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11 Glove Assets Investment Limited, and Truly Great Global Limited

12
13 **IN THE UNITED STATES BANKRUPTCY COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **LOS ANGELES DIVISION**
16

17 In re:
18 ZETTA JET USA, LTD., a California corporation,
19 Debtor.

Lead Case No.: 2:17-bk-21386-SK
Chapter 7
Jointly Administered With:
Case No.: 2:17-bk-21386-SK

Adv. Proc. No. 2:19-AP-01383-SK

**DEFENDANTS UNIVERSAL LEADER
INVESTMENT LIMITED, GLOVE
ASSETS INVESTMENT LIMITED, AND
TRULY GREAT GLOBAL LIMITED'S
MOTION FOR ATTORNEYS' FEES**

24 In re:
25 ZETTA JET PTE, LTD., a Singaporean corporation,
26 Debtor.

Hearing:
Date: September 29, 2021
Time: 9:00 a.m.
Place: Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

1 JONATHAN D. KING, solely in his capacity as
2 Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta

3 Jet PTE, Ltd.

4 Plaintiff,

5 v.

6 YUNTIAN 3 LEASING CO. DESIGNATED
7 ACTIVITY CO. F/K/A YUNTIAN 3 LEASING CO.
8 LTD., ET AL.

9 Defendants

10
11 **TO THE HONORABLE SANDRA R. KLEIN, UNITED STATES BANKRUPTCY**
12 **JUDGE, AND TO PLAINTIFF’S COUNSEL:**

13 **PLEASE TAKE NOTICE** that this Motion (as defined below) is brought under Federal Rule
14 of Civil Procedure 54(d)(2), as made applicable by Federal Rule of Bankruptcy Procedure
15 7054(b)(2)(A), and Local Bankruptcy Rule 7054-1(g). The Motion is based on the accompanying
16 Memorandum of Points and Authorities, the Declaration of Brian K. Condon (the “Condon
17 Declaration”), the docket and records in this adversary proceeding and in the above-captioned
18 Chapter 7 cases, and such other evidence and argument as may properly come before the Court at any
19 hearing.

20 **PLEASE TAKE FURTHER NOTICE** that Defendants Universal Leader Investment
21 Limited (“UL”), Glove Assets Investment Limited (“Glove”), and Truly Great Global Limited
22 (“Truly Great”) (collectively, the “UL Defendants”), hereby move (by this “Motion”) for an award of
23 their attorneys’ fees in their favor and against Jonathan D. King in his capacity as the Trustee on
24 behalf of debtors Zetta Jet PTE Ltd. (“Zetta PTE”), and Zetta Jet USA Inc. (“Zetta USA” and together
25 with Zetta PTE, the “Debtors”) in the above-captioned Chapter 7 cases. This Motion is made on the
26 grounds that the UL Defendants prevailed in full in the above-captioned adversary proceeding and, as
27 such, are entitled to an award of their attorneys’ fees under applicable Singapore, English, and Hong
28 Kong law governing their contractual relationships.

1 **PLEASE TAKE FURTHER NOTICE** that pursuant to LBR 9013-1(f), any written response
2 to the Motion shall be filed and served no later than 14 days before the hearing on this matter, subject
3 to further order of the Court. Pursuant to the Court’s self-calendaring rules, this matter is set for
4 hearing on September 29, 2021, at 9:00 a.m.

5 **WHEREFORE**, the UL Defendants respectfully request that the Court enter an order
6 awarding them their attorneys’ fees in the above-captioned adversary proceeding.

7

8 Dated: September 3, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

9

10

By: /s/ Brian K. Condon
Brian K. Condon (Bar No. 138776)
Oscar Ramallo (Bar No. 241487)
Attorneys for Attorneys for Defendants
Universal Leader Investment Limited and
Glove Assets Investment Limited

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The UL Defendants entered into a series of contracts with Zetta PTE in which the parties
4 agreed that Singapore, English, or Hong Kong law would govern. As the primary victims of Zetta
5 PTE’s alleged fraud, the UL Defendants lost tens-of-millions of dollars in those contractual
6 relationships. In this adversary proceeding, the Trustee asked the Court to impose tens-of-millions of
7 dollars more in losses on the UL Defendants and their director, Li Qi. The Trustee invoked the United
8 States Bankruptcy Code to avoid, reinterpret, and recharacterize the parties’ foreign contracts and
9 transactions undertaken pursuant to their terms. The UL Defendants and Li Qi prevailed by
10 establishing, *inter alia*, that the Trustee sought an improper extraterritorial application of the
11 Bankruptcy Code. Achieving this victory costs the UL Defendants nearly \$3,000,000 in attorneys’
12 fees and non-taxable costs. The UL Defendants respectfully request that the Court award them the
13 attorneys’ fees and non-taxable costs incurred in defending against the Trustee’s wholly unsuccessful
14 claims.

15 When the parties’ contract contains a choice of law clause selecting the laws of a particular
16 jurisdiction, a court must apply that jurisdiction’s laws related to attorney-fee shifting. *APL Co. Pte. v.*
17 *UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir. 2009) (holding that a contract clause stating “Singapore
18 law shall apply” required application of Singapore attorney-fee shifting law). Each of the jurisdictions
19 selected by the parties in the relevant contracts—Singapore, England, and Hong Kong—apply the
20 “English Rule,” under which “attorneys’ fees are generally awarded to the prevailing party.” *Id.*

21 A bankruptcy court must apply a contractually-selected English Rule, even if most or all of the
22 litigation was spent “litigating issues peculiar to federal bankruptcy law.” *Travelers Cas. & Sur. Co.*
23 *of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 452 (2007) (internal quotation omitted). “The character
24 of [a contractual] obligation to pay attorney’s fees presents no obstacle to enforcing it in bankruptcy.”
25 *Id.* at 453-54. When the parties litigate over whether a contract’s “enforceability was limited by
26 bankruptcy law,” courts will treat the litigation as “on the contract” for purposes of attorney-fee
27 shifting. *In re Penrod*, 802 F.3d 1084, 1088 (9th Cir. 2015). That is exactly the situation presented in
28 this case. The Trustee invoked the Bankruptcy Code in an effort to (1) avoid contractual obligations

1 and recover transfers made pursuant to those obligations; (2) recharacterize lease obligations as
2 secured financing; and (3) recharacterize contractual loan obligations as equity. The UL Defendants
3 prevailed by showing that the Bankruptcy Code provisions at issue were inapplicable to extraterritorial
4 contracts and, therefore, the contracts' enforceability was not limited by bankruptcy law. *In re Mac-*
5 *Go Corp.*, 541 B.R. 706, 715 (Bankr. N.D. Cal. 2015) (holding creditor's defeat of trustee's fraudulent
6 transfer claim was an action "on the contract" for attorneys' fees purposes). Because the UL
7 Defendants were successful in defending the extraterritorial contracts from the Trustee's attacks, they
8 are entitled to attorneys' fees under the English Rule.¹

9 When a party achieves an "excellent result," such as a complete victory, calculating the amount
10 of a reasonable award is straightforward: the prevailing party "should recover a fully compensatory
11 fee." *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001). Because the UL Defendants prevailed
12 in full, the UL Defendants respectfully request that the Court award them their reasonable attorneys'
13 fees and expenses.

14 FACTS

15 **A. The Complaint**

16 The Trustee filed the original Complaint on September 13, 2019. Dkt. 1. In the Complaint,
17 the Trustee sought relief against the UL Defendants with respect to three sets of contracts: (1) the
18 2015 Leases, (2) the Minsheng Transaction; and (3) the Confirmatory Deed of Loan. *See* Condon
19 Decl. Exs. A–E.²

20 The 2015 Leases. Pursuant to the 2015 Leases, Glove leased Plane 6 to Zetta PTE, and UL
21 leased Plane 7 to Zetta PTE. Dkt. 1 ¶¶ 82, 85. Section 34.1 of both of the 2015 Leases states that

22 ¹ The UL Defendants believe that the fees and expenses they are seeking are chapter 7
23 administrative expenses in the above-captioned chapter 7 cases. *See In re Good Taste, Inc.*, 317
24 B.R. 112, 120–21 (Bankr. D. Alaska 2004). To the extent the Court awards these fees and expenses,
25 the UL Defendants intend to separately file an application for allowance and payment of such
26 amounts as chapter 7 administrative expenses. However, the UL Defendants do not wish to
conflate the issue of an award of attorneys' fees with the separate issue of the priority of such fees.
Accordingly, this motion seeks only a determination that the UL Defendants are entitled to an
award of fees and expenses as required by Federal Rule of Civil Procedure 54(d), incorporated as
Fed. R. Bankr. P. 7054(b)(2).

27 ² The Court relied on these contracts pursuant to the incorporation by reference doctrine in its
28 memorandum decision dismissing the initial Complaint. Dkt. 174 at 7. The Court took judicial
notice of the previously filed contracts in its memorandum decision dismissing the Amended
Complaint. Dkt. 314-1 at 11. For the Court's convenience, the contracts are attached to the
Condon Declaration filed concurrently with this motion.

1 “This Lease shall be governed by and construed in accordance with the laws of Singapore.” Condon
2 Decl. Exs. A–B. The Complaint alleged that Zetta PTE made \$12 million in lease payments under
3 the 2015 Leases. *Id.* ¶ 88. The Complaint sought to avoid and recover these contractual payments
4 as fraudulent transfers (Count I) and/or preferences (Count IV) pursuant to Bankruptcy Code §§ 547
5 and 548.

6 The Minsheng Transaction. Pursuant to the Minsheng Transaction, UL and Glove sold
7 Planes 6 and 7 to Minsheng, a Chinese aircraft financing firm, which leased the planes back to Zetta
8 PTE. Dkt. 1 ¶ 104-105. Section 11.3(a) of both of the Sale and Leaseback agreements in the
9 Minsheng Transaction states that “this Agreement and any non-contractual obligations arising from
10 or in connection with it are governed by and shall be construed in accordance with English law.”
11 Condon Decl. Exs. C–D. Minsheng transferred \$55 million to UL’s bank account in partial
12 payment for the two planes. Dkt. 1 ¶ 101. The Trustee described Minsheng’s \$55 million payment
13 as a payment from Zetta PTE, implicitly taking the position that the applicable contracts should be
14 recharacterized or otherwise reinterpreted by the Court so that Zetta PTE was deemed the owner
15 rather than lessee of the planes. *Id.* The Trustee sought to avoid and recover these contractual
16 payments as fraudulent transfers (Count II) and/or preferences (Count V).

17 The Confirmatory Deed of Loan. The Confirmatory Deed of Loan was executed on or about
18 August 14, 2017. Dkt. 1 ¶ 311. The Confirmatory Deed of Loan’s recitals describe three loans
19 from UL to Zetta PTE between February 2016 and June 2017, and state that all the loans “shall be
20 governed by the terms and conditions set out in this Deed.” Condon Decl. Ex. E, Recital (D). The
21 Confirmatory Deed of Loan states that “This Deed shall be governed by and construed in
22 accordance with the laws of Hong Kong and the parties hereto agree to submit to the non-exclusive
23 jurisdiction of its courts.” Condon Decl. Ex. E. § 16. The Trustee sought to recharacterize \$15
24 million of loans provided for in and made pursuant to the Confirmatory Deed as equity under
25 Bankruptcy Code § 105. Dkt. ¶ 311. The Trustee also sought to avoid and recover certain
26 contractually-required loan payments as preferences under Bankruptcy Code § 547. *Id.* ¶ 259.

27 The Trustee alleged that Li Qi (the director of each of the UL Defendants) was personally
28 liable on all the claims against UL and Glove because he was allegedly acting as their alter ego

1 when they entered into the relevant contracts. Dkt. 1 ¶ 30. Thus, the claims against Li Qi were
2 entirely derivative of the claims asserted against UL and Glove. Finally, the Trustee alleged that
3 Truly Great violated the automatic stay as a result of an injunction issued by a court in Singapore in
4 a suit relating to the Singapore-law governed shareholders agreement for Zetta PTE. *Id.* ¶ 317. The
5 Trustee alleged that Li Qi caused the alleged violation, and thus the Trustee also brought a
6 derivative automatic stay claim against Li Qi personally. *Id.*

7 **B. The Dismissal of the Complaint Based on Extraterritoriality**

8 After the UL Defendants³ moved to dismiss all claims against them, the Court entered an
9 order on July 29, 2020, dismissing all claims against UL and Glove on the grounds that the claims
10 against them sought an improper extraterritorial application of the Bankruptcy Code. Dkt. 174.
11 The Court granted the Trustee leave to amend certain claims against UL and Glove. *Id.* at 46-48.
12 The Court denied the motion to dismiss as to the one claim asserted against Truly Great. *Id.* at 45-
13 46.

14 **C. The Amended Complaint**

15 The Trustee filed an Amended Complaint on March 29, 2021. Dkt. 232. In the Amended
16 Complaint, the Trustee sought to avoid the contractual obligations contained in the 2015 Leases and
17 the Minsheng Transaction. Count I alleged the obligations in the 2015 Lease “are domestic
18 obligations that the Trustee may avoid under 11 U.S.C. § 548(a)(1).” Dkt. 232 ¶ 451. Thus, the
19 Trustee alleged “the 2015 Plane 7 Finance Lease and the 2015 Plane 6 Finance Lease, and all of the
20 Debtors’ obligations arising thereunder, are avoidable.” *Id.* ¶ 447.

21 Count II similarly alleged that “the Trustee may also avoid the obligations arising out of
22 the Minsheng Refinancing (including those obligations incurred in the August 2016 Plane 6
23 Purchase Agreement, the August 2016 Plane 7 Purchase Agreement ...and [other agreements])
24 pursuant to 11 U.S.C. § 548(a)(1)(B)(i).” Dkt. 232 ¶ 465. Count VIII and IX asked the Court to
25 recharacterize Minsheng’s leases of Planes 6 and 7 to Zetta PTE into security agreements in which
26 Zetta PTE was the “actual economic owner” (rather than lessee) of the planes, and Minsheng
27 maintained only a security interest (rather than an ownership interest) in the planes. *Id.* ¶¶ 515, 522.

28 ³ At the time of the initial motion to dismiss, Li Qi had not been served and had not appeared in the
action.

1 Counts VIII and IX were ancillary to Count II in that the Trustee argued that Zetta PTE’s purported
2 ownership interest in the planes meant that *Minsheng*’s transfer of \$55 million to UL could be
3 considered “a transfer of Zetta PTE’s property.” *Id.* at 467.

4 Similar to the original Complaint, Count VI of the Amended Complaint once again sought to
5 recharacterize one of the loans reflected in the Confirmatory Deed of Loan as equity. Dkt. 232 ¶
6 502. Count VII once again alleged that Truly Great and Li Qi violated the automatic stay. Dkt. 232
7 ¶ 507.

8 **D. Dismissal of the Entire Action**

9 On August 17, 2021, the Court entered a memorandum decision dismissing all the claims
10 against UL and Glove with prejudice on the grounds that they involved an improper extraterritorial
11 application of the Bankruptcy Code. Dkt. 314-1 at 37. The Court dismissed the automatic stay
12 claim against Truly Great with prejudice because damages claims for violation of the automatic stay
13 are unavailable to corporate debtors or their trustees. *Id.* at 38. The Court dismissed the counts
14 against Li Qi with prejudice because they were “subsumed within the counts being dismissed”
15 against the UL Defendants. *Id.* at 41. The Court entered a final judgment based on its
16 memorandum decision on August 20, 2021. Dkt. 320.

17 The Trustee filed a notice of appeal of the Court’s final judgment on August 31, 2021. Dkt.
18 328.

19 **E. The UL Defendants’ Fees and Expenses**

20 As detailed in the Condon Declaration, the UL Defendants incurred \$2,939,371.23 in
21 attorneys’ fees in the adversary proceeding, \$84,164.84 in foreign law expert fees, and \$137,722.80
22 in Westlaw and Lexis costs. Condon Decl. ¶¶ 8, 10-11. The UL Defendants do not seek recovery
23 for time related to the main bankruptcy cases or otherwise not expended in connection with this
24 adversary proceeding. *Id.* ¶ 8. The UL Defendants have included a printout of all claimed time
25 entries, redacted for privilege, work product, and mediation confidentiality. Condon Decl. Ex. F.

26 **ARGUMENT**

27 **I. The UL Defendants Are Entitled To An Award of Their Attorneys’ Fees.**

28 Federal Rule of Civil Procedure 54(d) permits a party to make “[a] claim for attorney’s fees

1 and related nontaxable expenses ... by motion” after entry of judgment. Fed. R. Civ. P. 54(d).
2 Federal Rule of Civil Procedure 54(d) is incorporated, in relevant part, into adversary proceedings
3 by Federal Rule of Bankruptcy Procedure 7054(b)(2). Fed. R. Bankr. P. 7054(b)(2). Local
4 Bankruptcy Rule 7054-1(g) permits a party to file and serve a motion for attorneys’ fees within
5 fourteen days of entry of judgment. LBR 7054-1(g).

6 Federal Rule of Civil Procedure 54(d)(2) is the appropriate procedural vehicle for the UL
7 Defendants, as the prevailing party, to claim attorneys’ fees. *Ray Haluch Gravel Co. v. Cent.*
8 *Pension Fund of Int’l Union of Operating Engineers & Participating Emps.*, 571 U.S. 177, 188
9 (2014) (“Rule 54(d)(2) applies regardless of the statutory, contractual, or equitable basis of the
10 request for fees”) (internal quotation omitted). As discussed below, the UL Defendants are
11 entitled to attorneys’ fees pursuant to the 2015 Leases, the Minsheng Transaction, and the
12 Confirmatory Deed of Loan.

13 **A. A Prevailing Party is Entitled to Attorneys’ Fees Under Applicable Law.**

14 **1. The Contracts Require Application of the English Rule.**

15 The Ninth Circuit has repeatedly held that when a contract contains a general choice of law
16 provision selecting the law of a particular jurisdiction, a court must apply that jurisdiction’s law on
17 attorney-fee shifting. *APL Co. Pte. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir. 2009); *Flores v.*
18 *Am. Seafoods Co.*, 335 F.3d 904, 916 (9th Cir. 2003); *see also Boeing Co. v. KB Yuzhnoye*, No. CV-
19 13-00730-ABA-JWX, 2018 WL 735971, at *2 (C.D. Cal. Feb. 6, 2018); *Cap. Bank, PLC v. M/Y*
20 *Birgitta*, No. CV 08-5893 PSG SSX, 2010 WL 4241584, at *2 (C.D. Cal. Oct. 18, 2010) (awarding
21 attorneys’ fees where contracts stated they were “governed by and construed in accordance with
22 English law”).

23 In *APL*, for example, the applicable choice of law clause in the contract provided that
24 “[i]nsofar as anything has not been dealt with by the terms and conditions of the bill of lading,
25 Singapore law shall apply.” *APL Co.*, 582 F.3d at 950. “In the face of [the contract’s] silence as to
26 attorney’s fees,” the district court applied the “general American rule in admiralty cases” that each
27 side bears its own fees. *Id.* at 957. The Ninth Circuit reversed because, pursuant to the general choice
28 of law clause, “Singapore law [was] the parties’ choice of law as to attorneys’ fees.” *Id.* at 957-58.

1 Because “the common law of England is in force in Singapore,” and, “[u]nder the English rule,
2 attorneys’ fees are generally awarded to the prevailing party,” the Ninth Circuit remanded for an
3 award of attorneys’ fees. *Id.* at 957.

4 Similarly, in *Boeing*, the parties’ choice of law clause stated that the “formation, interpretation,
5 and performance of this Agreement shall be governed by and interpreted in accordance with the law of
6 the Kingdom of Sweden.” *Boeing Co.*, 2018 WL 735971, at *2. Following *APL*, the Court held that
7 this choice of law provision required application of Swedish law permitting the prevailing party to
8 recover attorneys’ fees. *Id.*

9 Here, the relevant contracts select the laws of Singapore (the 2015 Leases), England (the
10 Minsheng Transaction), and Hong Kong (the Confirmatory Deed of Loan). Condon Decl. Exs. A, B §
11 34.1; Exs. C, D § 11.3; Ex. E § 16. All three of these jurisdictions apply the English Rule under which
12 a prevailing party in a litigation is entitled to its attorneys’ fees. *Alyeska Pipeline Serv. Co. v.*
13 *Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (“[F]or centuries in England there has been statutory
14 authorization to award costs, including attorneys’ fees.”); *APL Co.*, 582 F.3d at 957 (holding
15 Singapore applies the English Rule); *Willcox v. Lloyds TSB Bank, plc*, No. CV 13-00508 ACK-RLP,
16 2016 WL 7238799, at *11 (D. Haw. Dec. 14, 2016) (“Hong Kong follows the ‘English Rule,’ which
17 provides that ‘the prevailing party is generally entitled to an attorney’s fees award.’”) (quoting *Alaska*
18 *Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 739 F.3d 960, 972 (9th Cir. 2013)); *Ho Wing On*
19 *Christopher v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ¶ 9 (holding estate in
20 Singapore liquidation proceedings must pay costs “like any other litigant”). Thus, the applicable
21 contracts require an award of attorneys’ fees to the prevailing parties.

22 2. The Parties’ Choice of Law Is Enforceable.

23 Under Restatement (Second) of Conflicts of Law § 187(2), a court will give effect to the
24 parties’ choice of law, unless “(a) the chosen state has no substantial relationship to the parties or
25 the transaction and there is no other reasonable basis for the parties’ choice” and “(b) application of
26 the law of the chosen state would be contrary to a fundamental policy of a state which has a
27 materially greater interest than the chosen state in the determination of the particular issue and
28 which, under the rule of § 188, would be the state of the applicable law in the absence of an

1 effective choice of law by the parties.” A choice of law provision “needs to satisfy only one of the
2 two alternative requirements under section 187(2)” to be effective. *Flores*, 335 F.3d at 918. Each
3 of the choice of law clauses here satisfies both alternative requirements.⁴

4 With respect to sub-paragraph (a) of § 187(2), Singapore has a substantial relationship to the
5 parties and transactions related to the 2015 Leases because, among other reasons, Zetta PTE is
6 incorporated and headquartered in Singapore, and many aspects of the transactions were negotiated
7 and carried out in Singapore. Dkt. 174 at 29-30. Hong Kong has a reasonable relationship to the
8 parties because the UL Defendants were both managed from Hong Kong. Dkt. 174 at 35; Dkt. 239-
9 1 ¶¶ 2, 4. And “there was a reasonable basis for the choice of English law because the parties to
10 the transactions are from all around the world,” including Singapore, the BVI, China, Canada, and
11 Ireland (Dkt. 174 at 29). *King v. Bombardier Aerospace Corp.*, Memorandum Decision on Motion
12 to Dismiss, 2:19-ap-01147-SK Dkt. No. 168-1, at 18 n.16 (Bkr. C.D. Cal. Oct. 15, 2020).

13 Even if the Trustee could establish the choice of law provisions are unenforceable under
14 subparagraph (a) (which he cannot), the provisions are still enforceable under subparagraph (b),
15 unless (1) absent the contractual choice of law provision, the laws of a jurisdiction following the
16 American Rule applied pursuant to Restatement (Second) of Conflicts of Laws § 188; (2) that
17 jurisdiction had a materially greater interest than the jurisdiction chosen by the parties; and (3) that
18 jurisdiction had “a fundamental policy of *prohibiting* prevailing parties ... from recovering their
19 attorneys’ fees.” *Boeing Co.*, 2018 WL 735971, at *4. Consistent with the Court’s ruling that the
20 relevant obligations were extraterritorial, there is no colorable argument that any American Rule
21 jurisdiction’s laws would apply to the relevant contracts absent a choice of law clause, much less
22 that an American Rule jurisdiction would have a materially greater interest than the jurisdiction
23 chosen by the parties. *See* Dkt. 174 at 30-35. Moreover, the United States does not have any
24 fundamental policy prohibiting fee-shifting in bankruptcy cases. To the contrary, the Supreme
25 Court has held that a rule prohibiting contractual fee shifting in bankruptcy cases “finds no support
26

27 ⁴ As this Court previously held, the Restatement’s analysis applies to the question of whether a
28 trustee is bound by a choice of law clause, even if the choice of law impacts creditors. *King v.*
Bombardier Aerospace Corp., Memorandum Decision on Motion to Dismiss, 2:19-ap-01147-SK
Dkt. No. 168-1, at 18 (Bkr. C.D. Cal. Oct. 15, 2020) (citing *In re Zukerkorn*, 585 B.R. 182, 194
(B.A.P. 9th Cir. 2012)).

1 in the Bankruptcy Code, either in § 502 or elsewhere.” *Travelers Cas. & Sur. Co. of Am. v. Pac.*
2 *Gas & Elec. Co.*, 549 U.S. 443, 452 (2007).

3 Because the parties’ relevant choice of law provisions are effective on multiple, independent
4 grounds in § 187(2), the Court must enforce the parties’ choices of law.

5 **B. Applicable Law Permits an Award of Contractual Attorneys’ Fees in Avoidance**
6 **Actions.**

7 Although the Ninth Circuit previously held that “‘attorney fees are not recoverable in
8 bankruptcy for litigating issues ‘peculiar to federal bankruptcy law,’” the Supreme Court in *Travelers*
9 rejected this line of Ninth Circuit cases as having no support in the Bankruptcy Code. *Travelers*, 549
10 U.S. at 451-52 (quoting *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991)). Under *Traveler’s*, “[t]he
11 character of [a contractual] obligation to pay attorney’s fees presents no obstacle to enforcing it in
12 bankruptcy.” *Travelers*, 549 U.S. at 453–54. Thus, after *Travelers*, a creditor who defeats a claim to
13 avoid a contractual obligation is entitled to recover contractual attorneys’ fees. *In re Mac-Go Corp.*,
14 No. 14-44181 CN, 2015 WL 1372717, at *4 (Bankr. N.D. Cal. Mar. 20, 2015) (“*Mac-Go I*”); *In re*
15 *Mac-Go Corp.*, 541 B.R. 706 (Bankr. N.D. Cal. 2015) (“*Mac-Go II*”).

16 For example, in *Mac-Go*, the trustee alleged that certain transfers to a creditor were avoidable
17 as fraudulent transfers under Bankruptcy Code §548. *Mac-Go I*, 2015 WL 137217, at *4. The
18 creditor defeated the fraudulent transfer claims on the grounds that the transfers were repayments on
19 an antecedent debt memorialized in a Loan Agreement and Note. *Id.*

20 Even though “[t]he Trustee’s fraudulent conveyance claims did not directly question the
21 validity of the Loan Agreement or Note,” the court held that the creditor’s defense of the fraudulent
22 conveyance claim “should qualify as the ‘enforcement’ of the Loan Agreement and Note,” entitling
23 the creditor to contractual attorneys’ fees under the Loan Agreement and Note. *In re Mac-Go I*, 2015
24 WL 1372717, at *4. And even though the adversary proceeding did not include breach of contract
25 claims or other claims to directly enforce the contract, the court concluded that, because the trustee’s
26 claims “were entirely premised on the existence of contractual payments,” the court must treat the
27 avoidance claims as claims “on the contract” for purposes of contractual fee-shifting. *Mac-Go II*, 541
28 B.R. at 715.

1 *In re Penrod*, 802 F.3d 1084, 1088 (9th Cir. 2015), is also instructive. There, the debtor owed
2 \$26,000 on a car loan secured by a car worth only \$16,000. The lender asserted in an objection to the
3 debtor’s Chapter 13 repayment plan that, pursuant to a certain provision of the Bankruptcy Code, the
4 lender held a secured interest worth \$26,000. *Id.* at 1086. The debtor prevailed in persuading the
5 bankruptcy court that the Bankruptcy Code should be interpreted to provide the lender a secured claim
6 of \$19,000 and an unsecured claim of \$7,000. *Id.* at 1087. However, the bankruptcy court refused to
7 award the debtor contractual attorneys’ fees reasoning “that a debtor prevails ‘on the contract’ only
8 when she prevails on an issue of state law or non-bankruptcy federal law.” *Id.* The Ninth Circuit
9 reversed. *Id.*

10 The Ninth Circuit explained that “[t]he bankruptcy court’s reasoning might have been valid
11 before the Supreme Court decided *Travelers*,” but after *Travelers*, nothing “categorically precludes an
12 award of attorney’s fees when a party successfully limits enforcement of a contract solely on the basis
13 of federal bankruptcy law.” *Id.* at 1089. “The sole issue in the ... litigation was whether ... the
14 contract should be enforced according to its terms, or whether its enforceability was limited by
15 bankruptcy law to exclude the negative-equity portion of the loan.” *Id.* at 1088. “By prevailing in that
16 litigation, [the debtor] obtained a ruling that precluded [the lender] from fully enforcing the terms of
17 the contract,” which was sufficient to establish that the Bankruptcy Code litigation was “on a contract”
18 for purposes of contractual fee-shifting, even though the litigation involved an objection to a Chapter
19 13 plan, rather than a direct action to enforce or nullify the contract. *Id.* The Ninth Circuit also
20 concluded that if the lender had prevailed in defeating the debtor’s bankruptcy law contentions, it too
21 “would have been entitled to recover attorney’s fees.” *Id.*

22 As in *Penrod*, the sole issue in the Trustee’s avoidance claims here was whether the 2015
23 Leases, the Minsheng Transaction, and the Confirmatory Deed of Loan’s enforceability were limited
24 by bankruptcy law, *i.e.* whether bankruptcy law permitted the Trustee to avoid obligations provided
25 for in the contracts, recover transfers made on account of those contractual obligations, and
26 recharacterize contractual obligations. The UL Defendants prevailed on those claims by successfully
27 arguing that foreign law, rather than the U.S. Bankruptcy Code, governed the transactions. Dkt. 314-1
28 at 24, 32-33. In making these arguments, The UL Defendants expressly relied, *inter alia*, on the

1 relevant contracts' choice of law clauses to demonstrate that the Bankruptcy Code was not applicable
2 to the transactions. Dkt. 174 at 35-36.

3 As noted above, each of the Trustee's claims against UL and Glove expressly asked the Court
4 to construe and recharacterize the contracts at issue. The 2015 Leases, on their faces, are leases of
5 airplanes, with UL or Glove acting as lessor and Zetta PTE acting as lessee. Condon Decl. Exs. A–B.
6 The Trustee, however, alleged that, although each lease “used the term ‘lease’ in its title, it was not a
7 ‘true’ or ‘operating’ lease under which a lessee and lessor agree for the lessee to rent an asset at a fair
8 monthly charge with the lessor retaining the residual ownership interest, and risks attendant to such
9 ownership interest, at the conclusion of the lease term.” Dkt. 232 ¶ 184; *see also id.* ¶ 206. This
10 attempted recharacterization of the contractual obligation was critical to the Trustee's bankruptcy
11 claims because they were premised on the (unsupported and conclusory) allegation that the “loans”
12 were “well above the fair market rate of interest” on a comparable “fair” loan. Dkt. 232 ¶ 197; *see*
13 *also id.* ¶ 217.

14 The Minsheng Transaction documents, on their face, resulted in sales of the planes from UL
15 and Glove to Minsheng and a leaseback to Zetta PTE. Condon Decl. Exs. C–D. The Trustee,
16 however, pleaded two counts seeking to recharacterize these documents as creating an ownership
17 interest in the planes in Zetta PTE and a security interest for Minsheng. Dkt. 232 ¶¶ 509-525. During
18 the litigation, the parties submitted dueling expert declarations from English lawyers on whether the
19 Minsheng Transaction documents could be recharacterized under applicable English contract law.
20 Dkt. 259-2, Dkt. 277-3.

21 Similarly, the Confirmatory Deed of Loan described the \$15 million loan as a “loan.” Condon
22 Decl. Ex. E. The Trustee, however, pleaded a claim to recharacterize that loan as equity. Dkt. 232 ¶
23 502.

24 When the Court dismissed the Trustee's bankruptcy claims on the grounds that the Bankruptcy
25 Code provisions that the Trustee invoked were inapplicable to the extraterritorial contracts, the effect
26 of the ruling was that the contracts' “enforceability was [not] limited by bankruptcy law.” *In re*
27 *Pendrod*, 802 F.3d at 1088. Because the Trustee's unsuccessful attacks on the contracts “were entirely
28 premised on the existence of contractual payments” and obligations, the court must treat them as

1 claims “on the contract” for purposes of contractual fee-shifting. *Mac-Go II*, 541 B.R. at 715.
2 Because each of these contracts selects the law of a jurisdiction that follows the English Rule on
3 attorneys’ fees, the UL Defendants are entitled to their attorneys’ fees as prevailing parties. *APL Co.*,
4 582 F.3d at 957-58.

5 **II. The Requested Fees Are Reasonable.**

6 In determining the proper amount of fees recoverable under the English Rule, federal courts
7 in the United States apply the lodestar methodology. *Willcox*, 2016 WL 7238799, at *12 (holding
8 court “will look to Ninth Circuit law as a guidepost for what constitutes a reasonable award” under
9 Hong Kong’s English rule); *Cap. Bank, PLC*, 2010 WL 4241584, at *2 (applying lodestar method
10 to contract under English law); *see also San Rafael Compania Naviera, S. A. v. Am. Smelting & Ref.*
11 *Co.*, 327 F.2d 581, 587 (9th Cir. 1964) (holding foreign law is “presumed to be the same as the law
12 of the forum”).

13 “The ‘lodestar’ is calculated by multiplying the number of hours the prevailing party
14 reasonably expended on the litigation by a reasonable hourly rate.” *Camacho v. Bridgeport Fin.,*
15 *Inc.*, 523 F.3d 973, 981 (9th Cir. 2008). “[T]he lodestar figure is presumptively a reasonable fee
16 award.”⁵ *Id.* As discussed below, the fees sought by the UL Defendants are reasonable under the
17 lodestar methodology.

18 **A. The Hourly Rates Are Reasonable.**

19 “[T]he established standard when determining a reasonable hourly rate is the rate prevailing
20 in the community for similar work performed by attorneys of comparable skill, experience, and
21 reputation.” *Camacho*, 523 F.3d at 979 (internal quotation omitted).

22 The hourly rates sought by the UL Defendants for this matter are between \$799.00 and
23 \$1,147.60 for partners and senior counsel; \$756.50 and \$969.00 for counsel; \$297.50 and \$790.50
24 for associates, and \$331.50 and \$391.00 for paralegals. Condon Decl. ¶ 9. These rates are well
25 within the range approved by courts in the community for comparable law firms, particularly in
26 matters in which tens-of-millions of dollars are at issue. Condon Decl. ¶ 9; *Doddie Alvarez Lapuz*

27 ⁵ A court may “in rare cases ... make upward or downward adjustments to the presumptively
28 reasonable lodestar.” *Camacho*, 523 F.3d at 982. The UL Defendants do not seek an upward
adjustment of the lodestar, and there is no colorable basis for a “rare” downward adjustment in this
case.

1 v. *Saul*, No. SACV 17-1496-KS, 2021 WL 3202462, at *3 (C.D. Cal. Apr. 27, 2021) (“[T]he
2 Central District of California has repeatedly found reasonable fees with effective hourly rates
3 exceeding \$1,000 per hour.”); *see also Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med.*
4 *Progress*, No. 16-CV-00236-WHO, 2020 WL 7626410, at *3 (N.D. Cal. Dec. 22, 2020) (finding
5 Arnold & Porter rates for partners, associates, and paralegals reasonable). They are also
6 comparable to the hourly rates this Court has approved for the Trustee’s counsel in this litigation.
7 Zetta USA Dkt. 1494-9 at 62; Zetta USA Dkt. 1601. Accordingly, the hourly rates sought by the
8 UL Defendants are reasonable.

9 **B. The Number of Hours Spent Is Reasonable.**

10 **1. The UL Defendants Seek Only Compensable Time.**

11 “The appropriate number of hours includes all time ‘reasonably expended in pursuit of the
12 ultimate result achieved, in the same manner that an attorney traditionally is compensated by a fee-
13 paying client for all time reasonably expended on a matter.’” *Yesipovich v. Colvin*, 166 F. Supp. 3d
14 1000, 1006 (N.D. Cal. 2015) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983)). Thus, it is
15 not appropriate to exclude an award for time spent on “issues of fact and law that ultimately did not
16 become litigated issues in the case or upon which [the party] ultimately did not prevail.” *Hensley*,
17 461 U.S. at 431. Likewise, a party “is entitled to all attorney’s fees reasonably expended in
18 pursuing [a successful] claim—even though she may have suffered some adverse rulings” along the
19 way. *Cabrales v. Cty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

20 Here, the UL Defendants achieved an unqualified victory on all claims against them, and are
21 therefore entitled to an award for all time reasonably spent in connection with the adversary
22 proceeding. While the UL Defendants presented additional grounds for dismissal beyond the
23 extraterritoriality ground ultimately relied upon by the Court, a successful party “should not have
24 his attorney’s fee reduced simply because the district court did not adopt each contention raised.”
25 *Cabrales*, 935 F.2d at 1052 (quoting *Hensley*, 461 U.S. at 440). Similarly, while the UL Defendants
26 suffered an interim loss on their initial motion to dismiss the automatic stay claim, having the court
27 “scalpel out attorney’s fees for every setback, no matter how temporary, regardless of its
28 relationship to the ultimate disposition of the case ... makes little sense.” *Cabrales*, 935 F.3d at

1 1053.

2 The UL Defendants are also entitled to attorneys' fees incurred litigating issues related to Li
3 Qi. Because the Trustee's claims against Li Qi were entirely subsumed within and derivative of the
4 claims against the UL Defendants, and because the Court dismissed Li Qi on the same grounds as it
5 dismissed the UL Defendants, nearly all of the time spent defending Li Qi would have been
6 incurred by the UL Defendants even if Li Qi had not been personally sued. *See* Dkt. 314-1 at 42.
7 Although Li Qi is not a party to the contracts on which the UL Defendants base their fee request,
8 the time spent on matters related exclusively to Li Qi is also recoverable because "if the non-
9 signatory party sues or is sued 'as if he were a party' to the contract containing the attorneys' fees
10 provision, the prevailing party may be entitled to an award of fees," even when he prevails by
11 establishing that he was not a party to the contract. *In re Crescent Assocs., LLC.*, No. 2:18-AP-
12 01310-WB, 2021 WL 1245913, at *4 (Bankr. C.D. Cal. Mar. 30, 2021) (citing *Reynolds Metals Co.*
13 *v. Alperson*, 25 Cal. 3d 124, 127 (1979) (holding attorneys' fees incurred to defeat alter ego claim
14 asserted against non-signatory were recoverable)).⁶

15 Finally, although the automatic stay claim does not arise directly out of the contracts that the
16 Trustee sought to avoid, the automatic stay claim is sufficiently related to the avoidance and
17 recovery claims to merit a fee award. Claims are "related" for purposes of attorneys' fees motions
18 when they "involve a common core of facts or will be based on related legal theories Thus, the
19 test is whether relief sought on the unsuccessful [or non-fee bearing] claim is intended to remedy a
20 course of conduct entirely distinct and separate from the course of conduct that gave rise to the
21 injury upon which the relief granted is premised." *Odima v. Westin Tucson Hotel*, 53 F.3d 1484,
22 1499 (9th Cir. 1995) (quoting *Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986)).
23 The Ninth Circuit does not require "commonality of both facts *and* law" to establish relatedness.
24 *Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003).

25 In this case, the avoidance and automatic stay claims relate to a single course of conduct in
26 that they all arise from the UL Defendants' business relationship to Zetta PTE. *Odima*, 53 F.3d at

27 ⁶ Because the UL Defendants are required by their Articles of Association to indemnify Li Qi for
28 claims arising out of his conduct as a director, the UL Defendants are appropriate movants with
standing to apply for an award of attorney's fees for time spent on issues related exclusively to Li
Qi.

1 1499 (holding claims were sufficiently related because they all related to plaintiff’s employment
2 relationship with defendant). The Court should accordingly award the UL Defendants all fees
3 “reasonably expended in pursuit of the ultimate result achieved,” which, in this case, was a
4 complete victory on all of the Trustee’s claims against them. *Hensley*, 461 U.S. at 424.

5 **2. The Number of Hours Spent is Reasonable.**

6 A prevailing party “is entitled to recover a reasonable attorney’s fee for every item of
7 service which, at the time rendered, would have been undertaken by a reasonable and prudent
8 lawyer to advance or protect his client’s interest.” *Moore v. James H. Matthews & Co.*, 682 F.2d
9 830, 839 (9th Cir. 1982) (internal quotation omitted). “By and large, the court should defer to the
10 winning lawyer’s professional judgment as to how much time he was required to spend on the case;
11 after all, he won, and might not have, had he been more of a slacker.” *Moreno v. City of*
12 *Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Furthermore, “[a] [party] cannot litigate
13 tenaciously and then be heard to complain about the time necessarily spent by [his adversary] in
14 response.” *Instrumentation Lab’y Co. v. Binder*, No. 11CV965 DMS (KSC), 2013 WL 12049072,
15 at *4 (S.D. Cal. Sept. 18, 2013).

16 Here, the Trustee was represented by able counsel who presented complex claims and
17 vigorously litigated the issues on behalf of their client. The initial Complaint was fifty-three pages
18 in length, not including appendixes, and sought to effectively unwind or recharacterize a complex
19 series of agreements entered into by the parties over the course of two years. Dkt. 1. The Trustee’s
20 opposition to the initial motion to dismiss cited more than one-hundred cases (Dkt. 55), and resulted
21 in the Court issuing a forty-eight page memorandum of decision (Dkt. 174).

22 The Trustee then filed an ninety-nine page long Amended Complaint, not including
23 appendixes. Dkt. 232. After the UL Defendants and Li Qi filed motions to dismiss, the Trustee
24 responded not only with two oppositions, but also a motion for jurisdictional discovery (Dkt. 255),
25 thirteen pages of objections to the UL Defendants’ request for judicial notice (Dkt. 260), a motion
26 to strike foreign law expert declarations (Dkt. 261), and a second motion to strike a foreign law
27 declaration in opposition to the jurisdictional discovery motion (Dkt. 290). The Court’s resulting
28 memorandum of decision was forty-two pages in length, despite it not needing to address the merits

1 of any of the three motions filed by the Trustee. Dkt. 314-1.

2 While the sums spent defeating the pleadings were significant, the money was well-spent.
3 The UL Defendants' early victory allowed the case to be resolved without any need of discovery.
4 In light of the sprawling allegations in the Complaint and Amended Complaint and the international
5 nature of the transactions and witnesses, discovery in this matter would likely have resulted in a
6 substantially larger expenditure than what was required to resolve this matter on the pleadings.
7 Given this "excellent result," the UL Defendants "should recover a fully compensatory fee" of
8 \$2,939,371.23. *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (internal quotation omitted).

9 **3. The UL Defendants Are Entitled to Non-Taxable Costs.**

10 Because the UL Defendants were successful on claims that provide for reasonable attorneys'
11 fees, they are also entitled to recover non-taxable costs that would customarily be charged to the
12 client. *Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010) ("[R]easonable
13 attorney's fees' include litigation expenses ... when it is the prevailing practice in a given
14 community' for lawyers to bill those costs separate from their hourly rates.") (internal quotation
15 omitted).

16 The UL Defendants seek two categories of non-taxable costs. First, the UL Defendants seek
17 \$84,164.84 foreign law expert fees for the expert declarations submitted in connection with their
18 successful motions to dismiss. Condon Decl. ¶ 10. Because "'expert witness fees' ... are not
19 witness fees as contemplated under 28 U.S.C. § 1821," these expenses "are recoverable as part of
20 the reasonable attorney's fees award." *Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994).

21 Second, the UL Defendants seek \$137,722.80 in legal research costs, such as Westlaw and
22 Lexis costs. Condon Decl. ¶ 11. Courts "routinely award[] the expense of electronic legal
23 research" as part of an attorneys' fee award. *Johnson v. Astrue*, No. C-07-2387 EMC, 2008 WL
24 3984599, at *3 (N.D. Cal. Aug. 27, 2008) (citing *Haroco, Inc. v. Am. Nat. Bank & Tr. Co. of*
25 *Chicago*, 38 F.3d 1429, 1440 (7th Cir. 1994) (holding "computer research costs are more akin to
26 awards under attorney's fees provisions than under costs. ... In fact such costs are indeed to be
27 considered attorney's fees") (internal quotation omitted)). The Court should accordingly award the
28 UL Defendants' these non-taxable costs as part of their award of attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court should award the UL Defendants \$2,939,371.23 in attorneys' fees and \$221,887.64 in non-taxable costs.

Dated: September 3, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Brian K. Condon
Brian K. Condon (Bar No. 138776)
Oscar Ramallo (Bar No. 241487)
Attorneys for Defendants
Universal Leader Investment Limited and
Glove Assets Investment Limited

US 170326458v9

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **DEFENDANTS UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED, AND TRULY GREAT GLOBAL LIMITED'S MOTION FOR ATTORNEYS' FEES** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) September 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) September 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) September 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

09/03/2021
Date

Vicky Apodaca
Printed Name

/s/ Vicky Apodaca
Signature

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

United States Trustee	ustpregion16.la.ecf@usdoj.gov
Minsheng Business Aviation Limited; Minsheng Financial Leasing Co., Ltd.; Yuntian 3 Leasing Company Designated Activity Company; Yuntian 4 Leasing Company Designated Activity Company	jmester@jonesday.com; dtmoss@jonesday.com;
Jonathan D. King as Chapter 7 Trustee	john.lyons@us.dlapiper.com
Export Development Canada	mjedelman@vedderprice.com; ahudson@vedderprice.com; solson@vedderprice.com

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11 *Attorneys for Defendants*
Universal Leader Investment Limited,
12 Glove Assets Investment Limited, and
Truly Great Global Limited
13

14 **IN THE UNITED STATES BANKRUPTCY COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **LOS ANGELES DIVISION**
17

18 In re:
19 ZETTA JET USA, LTD., a California
20 corporation,

21 Debtor.

Lead Case No.: 2:17-bk-21386-SK
Chapter 7
Jointly Administered With:
Case No.: 2:17-bk-21386-SK

Adv. Proc. No. 2:19-AP-01383-SK

**DECLARATION OF BRIAN K.
CONDON IN SUPPORT OF
DEFENDANTS UNIVERSAL
LEADER INVESTMENT LIMITED,
GLOVE ASSETS INVESTMENT
LIMITED, AND TRULY GREAT
GLOBAL LIMITED'S MOTION FOR
ATTORNEY'S FEES**

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In re:
ZETTA JET PTE, LTD., a Singaporean corporation,
Debtor.
JONATHAN D. KING, solely in his capacity as
Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta
Jet PTE, Ltd.
Plaintiff,
v.
YUNTIAN 3 LEASING CO. DESIGNATED
ACTIVITY CO. F/K/A YUNTIAN 3 LEASING
CO. LTD., ET AL.
Defendants

Hearing:
Date: September 29, 2021
Time: 9:00 a.m.
Place: Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

1 I, Brian K. Condon, declare:

2 1. I am an attorney licensed to practice law in the State of California and before this
3 Court. I am a senior counsel of Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”), counsel
4 of record for Defendants Universal Leader Investment Limited (“UL”), Glove Assets Investment
5 Limited (“Glove”), and Truly Great Global Limited (“TGG”) (collectively “UL Defendants”). I
6 have personal knowledge of the facts stated below based on my personal involvement in this
7 adversary proceeding and based upon my review of Arnold & Porter’s business records, and if
8 called as a witness I would competently testify to the following.

9 **The 2015 Leases**

10 2. Attached hereto as **Exhibit A** is a true and correct copy the Master Aircraft Finance
11 Lease Agreement relating to Bombardier Global Aircraft (Plane 6), dated December 29, 2015, by
12 and among Wells Fargo Bank Northwest, National Association (as Trustee), Zetta Jet PTE Ltd.,
13 and Glove.

14 3. Attached hereto as **Exhibit B** is a true and correct copy of the Master Aircraft
15 Finance Lease Agreement relating to Bombardier Global Aircraft (Plane 7), dated December 2015,
16 by and among Wells Fargo Bank Northwest, National Association (as Trustee), Zetta Jet PTE Ltd.,
17 and UL.

18 **The Minsheng Transaction**

19 4. Attached hereto as **Exhibit C** is a true and correct copy of the Sale and Leaseback
20 Purchase Agreement relating to Bombardier Global 6000 bearing manufacturer serial number 9688
21 (Plane 6), dated September 20, 2016, by and among Wells Fargo Bank, Northwest (as Trustee),
22 Glove, and TVPX ARS Inc. (as Trustee).

23 5. Attached hereto as **Exhibit D** is a true and correct copy of the Sale and Leaseback
24 Purchase Agreement relating to Bombardier Global 6000 bearing manufacturer serial number 9606
25 (Plane 7), dated September 20, 2016, by and among Wells Fargo Bank, Northwest (as Trustee),
26 UL, and TVPX ARS Inc. (as Trustee).

27 **The Confirmatory Deed of Loan**

28 6. Attached hereto as **Exhibit E** is a true and correct copy of the Confirmatory Deed of

1 Loan between Zetta Jet PTE Ltd. and UL.

2 **Attorneys' Fees And Expenses**

3 7. Attached hereto as **Exhibit F** is a printout of all Arnold & Porter time entries
4 incurred in connection with this adversary proceeding. All time and dollar amounts reflected in
5 Exhibit F were incurred by and actually billed to the UL Defendants. The narrative portion of the
6 time entries has been partially redacted to protect attorney-client privilege and work product
7 information, as well as mediation confidentiality.

8 8. To the extent individual time entries were for Arnold & Porter work in the main
9 bankruptcy proceeding or in adversary proceedings other than the Yuntian/UL proceeding, I have
10 excluded the time entries from Exhibit F in their entirety. To the extent an individual time entry
11 includes work related both to the Yuntian/UL adversary proceeding and either the main bankruptcy
12 proceeding or another adversary proceeding, I have excluded the estimated time attributable to the
13 latter (non-Yuntian/UL) activities. For each such time entry, Exhibit F indicates (1) in a separate
14 column, the number of hours excluded from the fee application, (2) the adjusted total number of
15 hours claimed, and (3) the adjusted dollar amount billed, for each such entry. The total adjusted
16 number of hours billed is 3,528. The total adjusted amount billed is \$2,939,371.23.

17 9. The range of hourly rates for Arnold & Porter timekeepers for this matter is as
18 follows:

- 19 • Partners and Senior Counsel¹ — \$799.00 - \$1,147.50
- 20 • Counsel² — \$756.50 - \$969.00
- 21 • Associates and International Legal Consultants³ — \$297.50 - \$790.50
- 22 • Paralegals⁴ — \$331.50 - \$391.00

23 Based on my more than thirty years of experience in the Los Angeles legal market, these rates fall
24

25 ¹ Christopher Allen, Stuart Axford, Michael Bernstein, Brian Condon, Benjamin Mintz, Anton
26 Ware, and Jeremy Willcocks.

27 ² Charles Malloy.

28 ³ Lucas Barrett, Tereza Gao, Zhouyi Ge, Gerardo Mijares-Shafai, Madelyn Nicolini, and Oscar Ramallo.

⁴ Kathryn DiGalbo, Rodney Ellis, Dennis Grinstead, and Lisa Mammone.

1 within the prevailing rate for attorneys and other professionals of comparable skill, experience, and
2 reputation.

3 10. As part of this litigation, the UL Defendants were required to retain counsel with
4 expertise in foreign law. The UL Defendants incurred \$84,164.84 in fees from experts in foreign
5 law in connection with motions filed in this proceeding. Attached hereto as **Exhibit G** is a
6 summary of expenses incurred for foreign law experts in connection with the foregoing work.

7 11. As part of this litigation, the UL Defendants also incurred necessary fees for
8 electronic research from Westlaw and Lexis during the time period of September 19, 2019 to July
9 8, 2021, in the total amount of \$137,722.80.

10 I declare under penalty of perjury under the laws of the United States that the foregoing is
11 true and correct.

12 Executed this 3rd day of September, 2021 in Los Angeles, California.

13
14 /s/ Brian K. Condon
15 Brian K. Condon

16
17
18 US 170350087v2

EXHIBIT A

DATED 29th DECEMBER 2015

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
(not in its individual capacity but solely as owner trustee,
except as otherwise expressly provided herein)
as Lessor

and

ZETTA JET PTE LTD
as Lessee

and

GLOVE ASSETS INVESTMENT LIMITED
as Beneficiary

MASTER AIRCRAFT FINANCE LEASE AGREEMENT
relating to
Bombardier Global 6000 Aircraft

SALEM IBRAHIM LLC, Singapore

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- EXHIBIT A: FORM OF LEASE SUPPLEMENT
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EXHIBIT J: FORM OF BROKER'S LETTER OF UNDERTAKING
- EXHIBIT K: [LEFT BLANK]
EXHIBIT L: FORM OF DE-REGISTRATION POWER OF ATTORNEY
EXHIBIT M: [LEFT BLANK]

This Master Aircraft Finance Lease Agreement is made this ~~21~~²² day of December 2015.

BETWEEN:

- (1) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as trustee, except as otherwise expressly provided herein, with its principal place of business at 299 South Main Street, 5th Floor, MAC: U1228-051, Salt Lake City, Utah, 84111 and its successors and assigns hereunder (in its capacity as trustee the "Lessor"; and in its individual capacity **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**); and
- (2) **ZETTA JET PTE LTD**, a company incorporated in Singapore with company number 201529010W and having its registered office at 700 West Camp Road, #04-10 JTC Aviation One, Singapore, 797649 (the "Lessee"); and
- (3) **GLOVE ASSETS INVESTMENT LIMITED**, company number 1881019 incorporated under the laws of the British Virgin Islands having its registered office at PO Box 957, Offshore Incorporations Centre, Road Town, Tortola, British Virgin Islands (the "Beneficiary").

WHEREAS:

- (A) The Lessee desires to lease from the Lessor and the Lessor is willing to lease to the Lessee the Aircraft described in Lease Supplement No. 1 upon and subject to the terms and conditions of this Lease; and
- (B) The Lessor and the Lessee wish to provide for the leasing of further Aircraft by the Lessor to the Lessee pursuant to one or more additional Lease Supplements upon and subject to the terms and conditions of this Lease.

NOW IT IS HEREBY AGREED as follows:

PART 1: INTERPRETATION

1. **DEFINITIONS AND CONSTRUCTION**

1.1 **Definitions**

In this Lease, except as otherwise provided or unless the context otherwise requires the following terms shall have the following meanings:

"Acceptance Certificate" means a certificate in the form of Exhibit D to be completed by the Lessee and the Lessor pursuant to clause 11.4;

"Affiliate" means, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under common control of such Person including any partnership of which such Person or any such other Person is a general partner or managing agent and any trust of which any Beneficiary is such Person or any such other Person;

"Aircraft" means each Airframe described in a Lease Supplement together with (a) the Engines and APU so described relating to that Airframe, whether or not installed on that Airframe, (b) any and all spare parts, ancillary equipment and devices furnished with that Airframe, those Engines and APU, (c) all Aircraft Documents relating to such Airframe, Engines, APU and parts, ancillary equipment and devices and (d) all substitutions, replacements and renewals of any and all thereof made pursuant to the terms of this Lease title to which is vested in the Lessor;

"Aircraft Documents" means all historical records relating to an Aircraft, and the operation, maintenance and modification thereof, including the items identified in Exhibit B and/or in the relevant Lease Supplement, together with all acquisition documents, manuals, data, overhaul records, original work sheets, life limited Parts tracing records, log books, serviceable Parts tags, Parts Manufacturing Approvals, modification records, inspection reports and other records required to be maintained by Lessee pursuant to the terms of this Lease;

"Aircraft Lease Agreement" means this agreement and has the same meaning as Master Aircraft Finance Lease Agreement;

"Airframe" means (a) each airframe described in a Lease Supplement in the Configuration so described, but not including any Engine or engine installed thereon and (b) any and all Parts so long as the same shall be incorporated or installed on or attached to such Airframe, or any and all Parts removed therefrom so long as title thereto shall remain vested in the Lessor after removal from such Airframe;

"Approved Insurance Broker" means FEIC (Asia) Ltd. or any reputable insurance broker, or reinsurance broker, of internationally recognized responsibility and standing in aircraft insurance or re-insurance, as the case may be, acceptable to the Lessor, such acceptance not to be unreasonably withheld;

"Approved Insurer" means an insurer selected by FEIC (Asia) Ltd. or a reputable insurer or reinsurer of internationally recognized responsibility and standing in aircraft insurances or re-insurances, as the case may be, acceptable to the Lessor, such acceptance not to be unreasonably withheld;

"APU" means, in relation to an Airframe, the auxiliary power unit described in the applicable Lease Supplement or any replacement therefor pursuant to clause 20, installed in the Airframe;

"Assignment" means an assignment by the Lessee in favour of the Lessor (including the acknowledgment and agreement relating thereto given by the Permitted Sublessee thereunder), substantially in the form of Exhibit M or such other form reasonably satisfactory to the Lessor;

"Lease Payment" in respect of an Aircraft shall have the meaning set forth in the applicable Lease Supplement;

"Lease Payment Date" means each date on which Lease Payment is to be paid in accordance with the applicable Lease Supplement;

"Beneficiary" means Glove Assets investment Limited;

"Business Day" means a day on which banking institutions in New York, New York, the United States of America and London, the United Kingdom are open for the transaction of business of a kind required by this Lease;

"Casualty Occurrence" means in relation to an Airframe or any Engine whether or not installed on the an Airframe (except for an Engine that has been replaced by a Replacement Engine) and such Parts as shall not from time to time be installed on or attached to the Airframe or any Engine:

- (i) an actual or constructive or compromised or agreed or arranged total loss thereof including any such total loss declared by the Approved Insurer following a requisition for hire; or
- (ii) requisition for title, forfeiture, condemnation, confiscation, appropriation or any compulsory acquisition whatsoever thereof by any Governmental Entity or by any Person having the authority of the same not being a requisition for hire; or
- (iii) the hi-jacking, theft or seizure of any or all of the Airframe, Engine or Parts which shall have resulted in the loss of possession thereof by the Lessee for sixty (60) consecutive days or, in any event, extending beyond the Term; or
- (iv) its destruction, damage beyond repair or being rendered permanently unfit for normal use for any reason whatsoever; or
- (v) the disappearance of the Aircraft or its not having been heard of for thirty (30) consecutive days or, in any event, extending beyond the Term;

"Casualty Value" means, in relation to an Aircraft, the value set forth in the applicable Lease Supplement;

"Claims" shall have the meaning ascribed thereto in clause 7.7;

"Closing Documents" means each of the documents listed in Exhibit G;

"Country of Organisation" means Singapore;

"Country of Registration" means, in relation to an Aircraft, the country identified as such in the applicable Lease Supplement;

"Deductible Amount" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Default" means an event or condition which is, or with the lapse of time, the giving of notice, the making of any determination or the fulfilment of any condition would constitute an Event of Default;

"Delivery" means the delivery of the Aircraft to and the acceptance of the Aircraft by the Lessee for the purposes of this Lease;

"Delivery Condition" means the condition of an Aircraft set out in Exhibit C or the relevant Lease Supplement, as the case may be;

"Delivery Date" means in relation to an Aircraft, the date on which Delivery of that Aircraft occurs;

"Delivery Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Dollars" and **"\$"** means the lawful currency of the United States of America from time to time;

"**Engine**" means each of the engines installed on or furnished with an Aircraft on the Delivery Date identified in the applicable Lease Supplement and any Replacement Engine therefor together in each case with any and all Parts incorporated or installed on or attached thereto or any and all Parts removed therefrom so long as title thereto remains vested in the Lessor after removal from such Engine Provided that at such time as a Replacement Engine shall be substituted for an Engine, such substituted Engine shall cease to be an Engine hereunder;

"**Engine Manufacturer**" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"**Estimated Delivery Date**" means the date specified in the applicable Lease Supplement which the parties anticipate will be the Delivery Date;

"**Event of Default**" means any event specified in clause 23;

"**FAA**" means the Federal Aviation Administration of the Department of Transportation and the National Transportation Safety Board of the United States Department of Transportation or any such body or bodies that shall replace the same from time to time;

"**Final Delivery Date**" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"**Financing**" means any financing arrangement to which the Lessor is a party secured by an interest in the Aircraft, any Engine, any Parts or this Lease;

"**Flight Hour**" means each hour or part thereof, measured to two decimal places, elapsing from the moment the wheels of the Aircraft first leave the ground on take-off to the moment when the wheels of the Aircraft first thereafter touch the ground on landing;

"**Force Majeure**" means acts of God or the public enemy, civil war, insurrection or riot, fire, flood, explosion, earthquake, accident, epidemic, quarantine restrictions, Law, governmental priority, allocation, regulation or order affecting materials, facilities or any part of the Aircraft, strike or labour dispute causing cessation, slowdown or interruption of work, or the inability after due and timely diligence to procure equipment, data and materials from suppliers or any other cause beyond the control of the Lessor including any failure by Bombardier to deliver the Aircraft in the Configuration to the Lessor by the Estimated Delivery Date;

"**GAA**" means the FAA so long as the Aircraft is registered in the United States of America and otherwise each governmental airworthiness or regulatory authority in the jurisdiction of such other Country of Registration having authority with respect to aircraft that is comparable to the authority of the FAA with respect to aircraft on the United States of America registry;

"**Governmental Entity**" means and includes (a) the GAA; (b) any national government, or political subdivision thereof or local jurisdiction therein; (c) any board, commission, department, division, organ, instrumentality, court, or agency of any entity described in (b) above, however constituted; and (d) any joint authority, association, organisation, or institution of which any entity described in (b) or (c) above is a member or to whose jurisdiction any such entity is subject or in whose activities any such entity is a participant but only (except for purposes of defining Law below) to the extent that any of the preceding have jurisdiction over the Aircraft or its operations;

"Indemnitee" means the Lessor, the Lessor's Aircraft Manager, the Beneficiary, their shareholders, partner unit holders and beneficiaries, any partner unit holders or beneficiaries of a successor or assignee of an Indemnitee, any Affiliate of an Indemnitee and any transferee of an Indemnitee with respect to any interest in the Aircraft, or any part thereof and their respective officers, directors, shareholders, agents, employees, attorneys and successors and assigns;

"Interest Rate" means 5.25% per annum;

"Law" means and includes (a) any statute, decree, constitution, regulation, order, judgment or other directive of any Governmental Entity; (b) any treaty, pact, compact or other agreement to which any Governmental Entity is a party; (c) any judicial or administrative interpretation or application of any Law described in (a) or (b) above; and (d) any amendment or revision of any Law described in (a), (b) or (c) above.

"Lease" in relation to an Aircraft, means this Aircraft Lease Agreement, together with, and as amended in relation to that Aircraft by, the applicable Lease Supplement and any and all amendments, revisions, supplements and modifications hereto and thereto;

"Lease Identification" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Lease Supplement" means a supplement to this Lease, in the form of Exhibit A or such other form as shall be agreed between the Lessor and the Lessee, entered into between the Lessor and the Lessee in relation to the leasing of a particular Aircraft by the Lessor to the Lessee on the terms of this Lease;

"Lessor's Aircraft Manager" means the person identified as such in the applicable Lease Supplement and its replacements in such function, designated by the Lessor from time to time;

"Lessor's Liens" means Liens arising as a result of (a) claims against the Lessor not related to the transactions contemplated by this Lease, (b) acts of the Lessor, the Beneficiary or the Lessor's Aircraft Manager not contemplated and expressly permitted under this Lease, (c) any Lien created by or pursuant to a Financing by the Lessor or the Beneficiary, (d) Taxes imposed against the Lessor that are not required to be indemnified against by the Lessee pursuant to clause 7.7 and (e) claims against the Lessor arising out of the voluntary transfer by the Lessor of all or any part of its interests in the Aircraft or this Lease, other than a transfer pursuant to clauses 22 or 24;

"Lien" means any mortgage, pledge, lien, charge, encumbrance, hypothecation, lease, statutory or other rights in rem, assignment or exercise of rights, security interest or claim, or other type of preferential arrangement, trust or title retention or any other encumbrance of any kind securing any obligation of any Person including any equivalent matter created or arising under the Laws of the Country of Organisation or Country of Registration or any subdivisions thereof;

"Maintenance Contractor" means any maintenance contractor duly certified by the GAA to maintain aircraft of the same type as the Aircraft and chosen by the Lessee and approved in writing by the Lessor, such approval not to be unreasonably withheld or delayed;

"Maintenance Programme" means a maintenance programme for the Aircraft complying with all requirements of the FAA and GAA (including those relating to

corrosion prevention and ageing aircraft) selected by the Lessee and approved in writing by the Lessor, such approval not to be unreasonably withheld or delayed;

"Manufacturer" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Master Aircraft Finance Lease Agreement" means Aircraft Lease Agreement;¹

"msn" means manufacturer's serial number;

"OEM" means original equipment manufacturer;

"Operative Documents" means this Lease and the other Operative Documents, if any, identified in the relevant Lease Supplement;

"Part 135" means part 135 of title 14 of the United States Code of Federal Regulations, as amended or modified from time to time;

"Parts" means all appliances, avionics, components, parts, instruments, appurtenances, accessories, furnishings, seats, galleys, galley equipment, serving equipment, lavatories, cargo handling equipment, safety equipment and other equipment of whatever nature (other than complete Engines or engines), which may now or from time to time be incorporated or installed or positioned in or on or attached to an Airframe or any Engine, or that remain the property of the Lessor pursuant to the terms of clause 18 despite removal therefrom **Provided that** at such time as a replacement Part shall be substituted for a Part in accordance with clause 18 hereof, the Part so replaced shall cease to be a Part hereunder;

"Payment Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Permitted Lien" means:

- (i) any Lessor's Lien;
- (ii) any Lien for Taxes whether or not yet assessed or yet due and payable or being contested in good faith;
- (iii) air navigation authority, airport, airport hangar keeper's, supplier's, repairer's, mechanic's, materialmen's, carrier's, employee's or other similar possessory liens arising in the ordinary course of the Lessee's business by statute or by operation of Law in respect of obligations not yet due or which are being contested in good faith;
- (iv) any Lien where the Lessee is unable to pay the monies to which such Lien relates because it is restrained from doing so by reason of exchange controls or other governmental regulation;
- (v) any Lien arising out of a judgment or award against the Lessee with respect to which an appeal is being presented in good faith and against which there shall have been secured a stay of execution pending such appeal;

¹ Used interchangeable with Aircraft Lease Agreement

(vi) the rights of others under any agreement for the leasing, exchange or hire of any engine or part intended for installation in or on the Airframe or an Engine where permitted by this Lease;

(vii) any Sublease;

"Permitted Sublessee" means such Person as may be approved in writing by the Lessor acting in its absolute discretion prior to the effectiveness of the relevant Sublease or to whom the Aircraft is chartered or wet leased pursuant to clause 14.1(1);

"Person" means and includes any individual person, corporation, partnership, business trust, firm, joint stock company, joint venture, trust, estate, unincorporated organisation, association, sovereign state or Governmental Entity;

"Redelivery Acceptance Certificate" means a certificate in the form of Exhibit E/2 to be completed by the Lessor pursuant to clause 13.7(2)(1);

"Related Lease" means any and all other leases of aircraft between the Lessor or any Affiliate of the Lessor, as lessor, and the Lessee or any Affiliate of Lessee, as lessee;

"Lease Payments" means the Lease Payment and the Supplemental Lease Payments;

"Replacement Engine" means an engine of the same manufacturer and model or of a comparable or an improved model and remaining useful life and otherwise of substantially equivalent value, utility, modification status and remaining useful life as that of the Engine for which it is substituted, suitable for installation and use on the Airframe without impairing the value or utility of the Airframe and compatible with the remaining installed Engine;

"Return Condition" means in respect of an Aircraft, such status and condition as shall comply with clause 13.2 and Exhibit E;

"Return Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Return Occasion" means the event that occurs when possession of the Aircraft is returned from the Lessee to the Lessor at the end of the Term or upon the Lessor taking possession of the Aircraft pursuant to clause 24;

"Service Bulletin" means a service bulletin issued by the Manufacturer, Engine Manufacturer or OEM in respect of the Aircraft;

"Sublease" means any aircraft sublease with a Permitted Sublessee entered into in accordance with clause 14.1(1)(d),(e) and any further subleasing of the Aircraft whether or not authorised by this Lease;

"Tax" and **"Taxes"** means any and all forms of taxation, levy, impost, duty, contribution, withholding or charge of whatever nature and by whatever name called whenever created or imposed and whether of The Netherlands or elsewhere and whether imposed by a local, municipal, governmental, state, federal or other body or authority and any amount deemed to be or treated as an amount of and any amount payable in advance of or creditable against any future payment of any of the same and any amounts in lieu thereof, together with any additions to tax, penalties, fines, charges or interest thereon and **"taxation"** shall be construed accordingly;

"**Tax Indemnitee**" means the Lessor, the Beneficiary and the Lessor's Aircraft Manager;

"**Term**" means the period of the leasing of the Aircraft to the Lessee specified in the applicable Lease Supplement;

"**Trust Agreement**" means the trust agreement identified in the applicable Lease Supplement;

1.2 Construction

In this Lease, except as otherwise provided or unless the context otherwise requires:

- (1) the **Exhibits and Annexes** to this Lease shall form an integral part hereof.
- (2) Reference herein to this Lease shall be deemed to include references to this Lease and its Exhibits and Annexes and the applicable Lease Supplement and its Exhibits and Annexes in relation to an Aircraft as the same may be amended or supplemented or replaced from time to time. The Lessor and the Lessee agree that if any of the Exhibits or Annexes have not been inserted into this Lease or all details thereof completed as of the date hereof, such Exhibit or Annexes shall be agreed or completed and inserted on or prior to the Delivery Date and shall thereupon be incorporated herein and shall form an integral part of this Lease. Such Exhibits and Annexes shall be attached to the originally executed counterparts of this Lease.
- (3) references within any documents to **appendices, schedules, paragraphs, clauses, exhibits or annexes** are references to appendices, schedules, paragraphs, clauses, exhibits or annexes in or to such document;
- (4) **headings, subheadings, paragraph and Part number descriptions and the table of contents** are solely for the convenience of reference and shall not affect the meaning, construction or affect of any provision thereof.
- (5) references to any **Person or party** shall include such Person or party, its successors and permitted assigns and transferees;
- (6) reference to any **agreement** means such agreement as amended, modified or supplemented from time to time in accordance with the provisions thereof;
- (7) references to "**including**" shall mean including without limiting the generality of any description preceding such term and the rule of *ejusdem generis* shall not be applicable to limit a general statement, followed by or referable to an enumeration of specific matters, to matters similar to those specifically mentioned;
- (8) the "**winding up**" or "**dissolution**" of a company or the appointment of an "**administrative receiver**", a "**liquidator**", a "**receiver**" or an "**administrator**" shall be construed so as to include any equivalent or analogous proceedings and any proceedings giving protection for any period against the claims of creditors under the Law of the jurisdiction in which such company is incorporated or any jurisdiction in which such company carries on business or owns assets;
- (9) references to any **statutory provision** shall include reference to that provision as it may be amended from time to time and to any like or similar provisions

replacing the same or which replacement provision addresses the same, the similar or analogous matter;

- (10) references to a "certified" copy shall be a reference to a copy certified by an officer of the Person required to produce the same or of that Person's Solicitor or Counsel as being a true copy; and
- (11) references to the "applicable Lease Supplement" shall mean the Lease Supplement relating to the particular Aircraft the subject matter of the particular provision or the Lease Supplement in which the Airframe, Engines and APU of such particular Aircraft are identified and "applicable Aircraft" shall be construed accordingly;
- (12) references to "indebtedness" shall be construed so as to include any obligation (whether incurred as principal or as surety) for the payment or repayment of money, whether present or future, actual or contingent;

Further:

- (13) where any matter requires the approval or consent of the Lessor or the Lessor's Aircraft Manager, such approval or consent shall be deemed not to have been given unless given in writing;
- (14) where any matter is required to be acceptable to the Lessor or the Lessor's Aircraft Manager, the same shall be deemed not to have been accepted unless such acceptance is communicated in writing;
- (15) the Lessor and the Lessor's Aircraft Manager may withhold its approval or consent to or acceptance of any matter in its absolute discretion; and
- (16) where any matter requires the consent, approval or acceptance of or waiver by or is at the request of or to be presented to the Lessor, such consent, approval, acceptance or waiver may be given by or shall also be at the request of or presented to the Lessor's Aircraft Manager on behalf of the Lessor.

PART 2: THE LEASE AND GENERAL PROVISIONS

2. LEASE AND CONDITIONS

2.1 The Lease

The Lessor hereby agrees to lease the Aircraft to the Lessee, and the Lessee hereby agrees to lease the Aircraft from the Lessor, on the terms of this Lease for the Term applicable thereto.

2.2 Conditions Precedent

- (1) The Lessor's obligations to lease any Aircraft to the Lessee shall be conditional upon:
 - (i) the absence of any Default existing (or circumstances which, if the lease of the Aircraft commenced, would give rise to a Default) on the Delivery Date;

- (ii) the non-occurrence of any Casualty Occurrence in respect of that Aircraft, its Airframe or Engines prior to the Delivery Date;
 - (iii) the certification by the FAA of the Aircraft as to type and airworthiness and the issuance by the FAA of a valid and effective certificate of airworthiness for operation of the Aircraft in the Country of Registration;
 - (iv) the Lessee having arranged for the delivery to the Lessor of each of the Closing Documents, each (other than the Closing Documents listed in paragraphs 5, 9 and 10 of Exhibit G which the Lessee shall arrange to have delivered to the Lessor within 10 Business Days of the Delivery Date) dated as of the Delivery Date (or such other date reasonably satisfactory to the Lessor) each of which shall be in form and substance reasonably satisfactory to the Lessor; and
 - (v) no change having occurred subsequent to the date of this Lease and prior to the Delivery Date in any applicable Law or in the interpretation thereof which in the Lessor's opinion would make it illegal for the Lessor and/or the Lessee and/or any Guarantor to perform any of their respective obligations under each of the Operative Documents.
- (2) The Lessee's obligation to lease the Aircraft hereunder shall be conditional upon the Aircraft generally meeting the Delivery Condition specified in relation thereto on Delivery in accordance with clause 11.
- (3) The conditions specified in paragraph clause 2.2(1) are inserted for the sole benefit of the Lessor and may be waived or deferred in whole or in part by the Lessor who may attach to such waiver or deferral such requirements and further or other conditions as the Lessor thinks fit. The Lessor shall be entitled to treat the failure of the Lessee to perform or satisfy any such deferred conditions as an Event of Default.

3. REPRESENTATIONS AND WARRANTIES

3.1 By the Lessee

The Lessee acknowledges that the Lessor and Beneficiary has entered into this Lease in full reliance upon the representation of the Lessee in the following terms and the Lessee now warrants to the Lessor that the following statements are, as of the date hereof and as of the times specified in this clause 3.1 will be true and accurate:

- (1) the Lessee is a corporation duly incorporated and validly existing in good standing under the Laws of the Country of Organisation and has the corporate power and authority to carry on its business as presently conducted and to perform its obligations under this Lease and the other Operative Documents;
- (2) this Lease has and the other Operative Documents have been duly authorised by all necessary corporate action on the part of the Lessee and does not require any approval of the shareholders of the Lessee (or if such approval is required, such approval has been obtained) and neither the execution and delivery hereof and thereof nor the consummation of the transactions contemplated hereby and thereby nor compliance by the Lessee with any of the terms and provisions hereof and thereof will contravene any Law applicable to the Lessee or result in any breach of, or constitute any default under, or result in the creation of any

Lien, charge or encumbrance upon any property of the Lessee under any creditor agreement or instrument, corporate charter or by-law or other agreement or instrument to which the Lessee is a party or by which the Lessee or its properties or assets are bound or affected;

- (3) the Lessee has received or will procure receipt by the Delivery Date, every consent, approval or authorisation of, and has given every notice to, each Governmental Entity having jurisdiction with respect to the execution, delivery or performance of this Lease and the other Operative Documents (including all monetary and other obligations hereunder) that is required for the Lessee to execute and deliver this Lease and the other Operative Documents and each such consent, approval or authorisation and notice is valid and effective and has not been revoked;
- (4) there are no suits or proceedings pending or, to the knowledge of the Lessee, threatened in any court or before any regulatory commission, board or other administrative Governmental Entity against or affecting the Lessee which will have a materially adverse effect on the current business or financial condition or the assets or operations of the Lessee;
- (5) no information supplied by the Lessee to the Lessor or the Lessor's Aircraft Manager in connection with any of the Operative Documents contains any untrue statement or omits to state any fact the omission of which makes the statements therein, in the light of the circumstances under which they were made, misleading, and all expressions of expectation, intention, belief and opinion contained therein were honestly made on reasonable grounds after due and careful enquiry by the Lessee;
- (6) the Lessee is not in default in the performance of any of its obligations for the payment of its indebtedness;
- (7) no event of default (by whatever name called) has occurred which constitutes, or which with the giving of notice and/or the lapse of time and/or relevant determination would result in any breach of or constitute any default under any agreement to which the Lessee is a party or by which any of its assets is bound or affected, being a breach or default which might have a material adverse effect on its financial condition, business, assets or operation or its ability to observe and perform its obligations under any of the Operative Documents to which it is a party;
- (8) there has been no material adverse change in the business of the Lessee since the date of its last published audited financial statements;
- (9) the Lessee may make the payments of Lease Payments (where the Beneficiary remains that named in the applicable Lease Supplement at the date of execution thereof), without the necessity of withholding therefrom any Tax imposed by any Governmental Entity in the Country of Organisation or the Country of Registration and neither the execution or delivery of this Lease nor the performance thereof will subject the Lessor or such Beneficiary to any Tax imposed by any Governmental Entity in the Country of Organisation or the Country of Registration;

3.2 By the Lessor

Lessor represents that:

- (1) Wells Fargo Bank Northwest, National Association is a national banking association duly organized and validly existing and in good standing under the laws of the United States, and has the power and authority to carry on its business as presently conducted and to perform its obligations as Lessor under this Lease and the other Operative Documents;
- (2) this Lease and the other Operative Documents have been duly authorized by all necessary action on the part of the Lessor and does not require any approval of the shareholders of the Lessor (or if such approval is required, such approval has been obtained) and neither the execution and delivery hereof and thereof nor the consummation of the transactions contemplated hereby and thereby nor compliance by the Lessor with any of the terms and provisions hereof and thereof will contravene any Utah State or United States federal banking law applicable to the Lessor or result in any breach of, or constitute any default under, or result in the creation of any Lien, charge or encumbrance upon any property of the Lessor under any creditor agreement or instrument, corporate charter or by-law or other agreement or instrument to which the Lessor is a party or by which the Lessor or its properties or assets are bound or affected; and
- (3) the Lessor has received by the Delivery Date, every consent, approval or authorization of, and has given every notice pursuant to Utah and United States federal banking law with respect to the execution, delivery or performance of this Lease and the other Operative Documents (including all monetary and other obligations hereunder) that is required for the Lessor to execute and deliver this Lease and the other Operative Documents and each such consent, approval or authorization and notice is valid and effective and has not been revoked.
- (4) the Lessor, as trustee, has the authority on behalf of the trust and the Beneficiary to enter into and be bound by this Lease and perform the Lessor's obligations hereunder;
- (5) the making and performance by the Lessor of this Lease have been duly authorized by all necessary action on the part of the Lessor and will not violate any provision of the federal banking or Utah law or the articles of association of Wells Fargo Bank Northwest, National Association;
- (6) this Lease has been duly entered into and delivered by the Lessor, and this Lease and each Operative Document does, and each Lease Supplement when executed and delivered hereunder will, constitute legal, valid and binding obligations of the Lessor, enforceable in accordance with their respective terms except as may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and, to the extent that certain remedies require or may require enforcement in equity, by such principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) as a court having jurisdiction may impose and by laws which may affect some of such remedies; and

- (7) the Lessor has, and on the Delivery Date will have, title to the Aircraft, with full power and authority to lease the Aircraft to the Lessee in accordance with the terms hereof.

3.3 Survival, Repetition and No Prejudice

- (1) The representations and warranties contained in clauses 3.1 and 3.2 shall survive the execution of this Lease and Delivery of each Aircraft.
- (2) The representations and warranties contained in clauses 3.1 and 3.2 shall be deemed to be repeated on and as of each Lease Payment Date and in respect of all paragraphs of clause 3.1 on each Delivery of an Aircraft under this Lease as if made with reference to the facts and circumstances existing on such Date and on such Delivery.
- (3) The rights of the Lessor in relation to any misrepresentation or breach of representation or warranty by the Lessee shall not be prejudiced by any investigation by or on behalf of the Lessor or the Lessor's Aircraft Manager into the affairs of the Lessee, by the performance of this Lease or by any other act or thing done or omitted to be done by the Lessor or the Lessor's Aircraft Manager which would, but for this clause 3.3 prejudice such rights.

PART 3: FINANCIAL AND COMMERCIAL PROVISIONS

4. LEASE PAYMENTS

The Lessee covenants and agrees to pay to the Lessor (or as the Lessor shall direct) in respect of each Aircraft the Lease Payments on each Lease Payment Date, the Lease Payment for that Aircraft.

5. COVENANTS OF THE LESSEE

5.1 The Lessee covenants and agrees that:

(1) Maintenance of Corporate Existence

Except as provided in paragraph (4) below, the Lessee will preserve and maintain its corporate existence and such of its rights, privileges, licences and franchises in any jurisdiction where failure to obtain such licensing or qualification would have a material adverse effect upon the Lessee or its ability to perform its obligations hereunder.

(2) Maintenance of Status

The Lessee is, and shall remain so long as it shall be the Lessee under this Lease, duly qualified to carry on its business as it is now conducted and to operate the Aircraft under applicable Law in accordance with the terms of this Lease.

(3) Payment of Taxes

The Lessee will pay or cause to be paid all Taxes and governmental charges or levies imposed upon it, or upon its income or profits, or upon any property belonging to it, prior to the date on which penalties attach thereto and prior to

the date on which any lawful claim, if not paid, would become a Lien upon any of the material property of the Lessee.

(4) Consolidation, Merger, Ownership, Etc

Without the prior written consent of the Lessor not to be unreasonably withheld or delayed, the Lessee shall not consolidate with, merge with any other Person or convey, transfer or lease substantially all of its business or assets to any other Person.

(5) Notice of Default

Within two (2) days after any responsible officer of the Lessee obtains or should upon the making of all reasonable enquiries have obtained knowledge of a Default hereunder, the Lessee shall notify the Lessor in writing of such Default.

(6) Governmental Consents

The Lessee undertakes to maintain in full force and effect all governmental consents, licenses, authorisations, approvals, declarations, filings and registrations required to be obtained or effected by it in connection with this Lease and every document or instrument contemplated hereby and to take all such additional action as may be proper or advisable in connection herewith or therewith. The Lessee further undertakes to obtain or effect any new or additional governmental consents, licenses, authorisations, approvals, declarations, filings or registrations as may become necessary for the performance of any of the terms and conditions of this Lease or any other document or instrument contemplated hereby.

(7) Suspension, Cessation, Etc

The Lessee shall not at any time during the Term (i) voluntarily suspend its operations or (ii) voluntarily or involuntarily permit to be revoked, cancelled or otherwise terminated prior to its normal expiry period any of the franchises, concessions, permits, rights or privileges required for the conduct of business and operation of the Aircraft by the Lessee or the Lessee's rights to free and continued use thereof to the extent the same may have a material adverse effect on the performance of its obligations hereunder.

6. PAYMENTS

6.1 Manner of Payment

Each instalment of Lease Payments and all other amounts payable by the Lessee under this Lease shall be paid in freely available same day funds on the due date by telegraphic transfer by noon (New York City time) to the relevant Payment Location therefor and with immediate notice advice to the Lessor's Aircraft Manager or in such other manner as the Lessor may designate from time to time by not less than three (3) Business Days' notice to the Lessee.

6.2 ABSENCE OF NEED FOR DEMAND

SAVE WHERE EXPRESSED TO BE PAYABLE ON DEMAND (WHERE PAYMENT SHALL BE MADE FORTHWITH ON DEMAND), ALL PAYMENTS TO BE MADE BY THE LESSEE PURSUANT TO THIS

LEASE SHALL BE MADE BY THE LESSEE WHETHER OR NOT DEMANDED BY THE PERSON TO WHOM SUCH PAYMENTS ARE TO BE MADE.

6.3 Non-Business Day: Date of Receipt

- (1) If any payment falls due under this Lease on a day which is not a Business Day, such payment shall be made on the next succeeding Business Day unless the next succeeding Business Day falls in the next calendar month in which event payment shall be made on the preceding Business Day.
- (2) All payments shall be considered to be made on the date on which they are received at the Payment Location in the manner provided in clause 6.1.

6.4 Currency of account

- (1) The Lessee acknowledges that the specification of Dollars in this Lease is of the essence and that Dollars shall be the currency of account in any and all events save where it is specifically provided in this Lease that the Lessee is obliged to pay or to reimburse any amount which is denominated in another currency, in which case, the Lessee shall pay or reimburse such amount in such other currency.

6.5 NET LEASE: PROHIBITION AGAINST SET OFF, COUNTERCLAIM, ETC

THIS LEASE IS A NET LEASE AND, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, THE LESSOR SHALL HAVE NO RESPONSIBILITY (OPERATIONALLY OR FINANCIALLY) IN RESPECT OF THE USE OR OPERATION OF THE AIRCRAFT. THE LESSEE'S OBLIGATION TO PAY ALL LEASE PAYMENTS AND ALL OTHER AMOUNTS DUE HEREUNDER AND TO PERFORM ALL THE TERMS HEREOF SHALL BE ABSOLUTE AND UNCONDITIONAL AND SHALL NOT BE AFFECTED OR REDUCED BY ANY CIRCUMSTANCES, INCLUDING (i) ANY SET-OFF, COUNTERCLAIM, RECOUPMENT, DEFENCE OR OTHER RIGHT WHICH THE LESSEE MAY HAVE AGAINST THE LESSOR OR ANY OTHER PERSON; (ii) ANY DEFECT IN THE TITLE, AIRWORTHINESS OR ELIGIBILITY FOR REGISTRATION UNDER APPLICABLE LAW, OR ANY CONDITION, DESIGN, OPERATION OR FITNESS FOR USE OF, OR ANY DAMAGE TO OR LOSS OR DESTRUCTION OF, THE AIRCRAFT, OR ANY INTERRUPTION OR CESSATION IN THE USE OR POSSESSION THEREOF BY THE LESSEE; (iii) SUBJECT TO CLAUSES 22.1 AND 22.(1), ANY CASUALTY OCCURRENCE; (iv) ANY LIENS WITH RESPECT TO THE AIRCRAFT; (v) THE INVALIDITY OR UNENFORCEABILITY OR LACK OF DUE AUTHORISATION OR OTHER INFIRMITY OF THIS LEASE OR ANY ABSENCE OF RIGHT, POWER OR AUTHORITY OF THE LESSOR OR THE LESSEE TO ENTER INTO THIS LEASE; (vi) ANY INSOLVENCY, BANKRUPTCY, REORGANISATION OR SIMILAR PROCEEDINGS BY OR AGAINST THE LESSOR OR THE LESSEE; (vii) ANY OTHER CIRCUMSTANCE OR HAPPENING OF ANY NATURE WHATSOEVER, SIMILAR TO ANY OF THE FOREGOING; OR (viii) ANY TAXES; IT BEING THE EXPRESS INTENTION OF THE LESSOR AND THE LESSEE THAT ALL LEASE PAYMENTS AND OTHER AMOUNTS PAYABLE HEREUNDER SHALL BE PAYABLE AND ALL OTHER TERMS HEREOF SHALL BE PERFORMED IN ALL EVENTS, UNLESS THE OBLIGATION TO PAY OR TO PERFORM THE SAME SHALL BE TERMINATED PURSUANT TO THE EXPRESS PROVISIONS OF THIS LEASE. EXCEPT AS PROVIDED IN THIS LEASE, EACH PAYMENT OF LEASE PAYMENTS OR ANY OTHER PAYMENT HEREUNDER MADE BY THE LESSEE TO THE LESSOR SHALL BE FINAL AND THE LESSEE WILL NOT SEEK TO RECOVER ANY PART OF SUCH PAYMENT FROM THE LESSOR FOR ANY REASON WHATSOEVER. THE LESSEE HEREBY WAIVES, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHTS WHICH IT MAY NOW HAVE OR WHICH AT ANY TIME HEREAFTER MAY BE CONFERRED UPON IT, BY LAW OR OTHERWISE, TO TERMINATE THIS LEASE OR ANY OBLIGATION IMPOSED UPON THE LESSEE HEREUNDER OR IN RELATION HERETO.

NOTHING IN THIS CLAUSE SHALL BE CONSTRUED TO LIMIT THE LESSEE'S RIGHTS AND REMEDIES (INCLUDING ANY RIGHTS IN RESPECT OF PAYMENTS OF LEASE PAYMENTS) IN THE EVENT OF ANY BREACH BY THE LESSOR OF ITS WARRANTY OF QUIET ENJOYMENT SET

FORTH IN CLAUSE 18 OR TO LIMIT THE LESSEE'S RIGHTS AND REMEDIES TO PURSUE IN A COURT OF LAW ANY CLAIM THAT IT MAY HAVE AGAINST THE LESSOR OR ANY OTHER PERSON.

6.6 Interest on Overdue amounts

In reliance on the prompt payment of each sum due hereunder, the Lessor has made or will or may make, certain financial commitments. If the Lessee fails to pay any such sum when due, the Lessor will suffer loss and damages, the exact nature and amount of which are difficult or impossible to ascertain in advance. To compensate the Lessor for such loss and damages, if the Lessee fails promptly to pay any sum when due, the Lessee shall pay interest on such unpaid sum at the Interest Rate as well after as before any judgment from the date when the unpaid sum fell due until the date of payment thereof. Such interest shall be payable by the Lessee to the Lessor on the Lessor's demand, shall be calculated on the basis of a year of 360 days and the actual number of days elapsed in the period during which the sum is outstanding and shall be compounded monthly during such period. The provisions of this clause shall be in addition and without prejudice to any other rights of the Lessor at law or hereunder in relation to the failure of the Lessee to make prompt payment of sums due hereunder.

6.7 Payments by the Lessor

Any obligations of the Lessor to make any payment or to release any money to the Lessee shall be conditional upon all amounts then due and payable by the Lessee to the Lessor and all obligations to be performed by the Lessee in favour of the Lessor under this or any Related Lease then having been paid and/or performed in full by the Lessee and the Lessor shall be entitled to set off and retain out of any sums otherwise due to the Lessee the amount of any indebtedness of the Lessee to the Lessor.

7. GENERAL TAX INDEMNITY

7.1 Payments to be Grossed-up

(1) Payments to be made gross

All payments to be made by the Lessee under this Lease shall be made free and clear of and without deduction or withholding for or on account of Tax.

(2) Gross payments prevented by law

Subject to the Proviso to clause 23.1:

(i) If the Lessee is required by any Law to make any deduction or withholding for or on account of Tax from any sum payable by it to or for the account of the Lessor, the sum payable by the Lessee in respect of which the relevant deduction, withholding or payment is required shall be increased to the extent necessary to ensure that, after the making of that deduction, withholding or payment, the Lessor receives on the due date and retains (free of any liability in respect of any such deduction, withholding or payment) a net sum equal to what it would have received had no such deduction, withholding or payment been so required or made.

(ii) If under any applicable Law the provisions of clause 7.1 (2)(i) cannot be complied with by the Lessee, the Lessee shall, on demand of the Lessor, indemnify the Lessor and keep the Lessor indemnified against all loss suffered by it in consequence of the inability of the Lessee to comply with clause 7.1 (1) and (2)(i) and the receipt by

the Lessor of a sum less than the full amount due from the Lessee under this Lease. Such loss shall be certified by the Lessor and shall take into account the cost to the Lessor of funding from whatever source it chooses and is available to it the amount of the deduction or withholding made by the Lessee from the payment in question for such period as the Lessor shall deem appropriate.

(3) Tax Credits

In the event that, following the making of any deduction, withholding or payment in respect of sums payable under this Lease and the payment by the Lessee of any increased amount in accordance with the provisions of clause 7.1 (2)(i), the Lessor receives or is granted a credit against, relief, remission for or repayment of any Tax payable by it, which credit, relief, remission or repayment is referable to that increased amount so paid, the Lessor shall, to the extent that it is satisfied that it can do so without prejudice to the retention of such credit, relief, remission or repayment, reimburse the Lessee with such amount as the Lessor shall certify to be the proportion of such credit, relief, remission or repayment as will leave the Lessor (after such reimbursement and taking into account the time when any Tax was payable and when any such credit, relief, remission or repayment was received) in no worse a position (after Taxation) than it would have been in had there been no such deduction or withholding from the said sums payable to the Lessor under this Lease.

(4) Mitigation

- (1) The Lessor shall, at the request of the Lessee, cooperate (at the expense of the Lessor) with the Lessee in the completion and filing of any claims that may properly be made by the Lessor pursuant to any relevant double taxation convention in order to mitigate any deduction or withholding required to be made as mentioned in clause 7.1 (2)(i).
- (2) If the Lessee gives any notification pursuant to clause 7.2 and the Lessee so requests, the Lessor and the Lessee shall consult with one another with a view to determining whether the leasing of the Aircraft to the Lessee might be restructured so as to mitigate the cost to the Lessee of complying with this clause **Provided that** (a) the Lessor shall not be obliged so to restructure the leasing of the Aircraft to the Lessee and (b) such consultation shall not affect the operation of this clause.

7.2 Notifications

If at any time the Lessee is required to make any deduction or withholding as mentioned in clause 7.1 (2)(i), or if thereafter there is any change in the rates at which or the manner in which such deductions or withholdings are calculated, the Lessee shall notify the Lessor and the Lessor's Aircraft Manager before or at the time of making the payment which is affected by such deduction, withholding or change.

7.3 Payment of Taxes Withheld

If the Lessee makes any payment under this Lease in respect of which it is required by Law to make any deduction or withholding for or on account of Tax, it shall pay the full amount to be deducted or withheld to the relevant Taxation or other authority within the time allowed for such payment under applicable Law and shall deliver to the Lessor promptly after receipt thereof an original receipt issued by such authority evidencing the payment to such authority of all amounts so required to be deducted or withheld from such payment.

7.4 INDEMNITY

THE LESSEE AGREES FOR THE BENEFIT OF EACH TAX INDEMNITEE TO PAY AND, ON WRITTEN DEMAND, TO INDEMNIFY AND HOLD EACH TAX INDEMNITEE HARMLESS FROM ALL LICENSE AND REGISTRATION FEES, DUTIES, IMPOSTS, DEDUCTIONS, CHARGES AND ALL TAXES, HOWSOEVER LEVIED OR IMPOSED, WHETHER LEVIED OR IMPOSED UPON OR ASSERTED AGAINST ANY TAX INDEMNITEE, THE AIRCRAFT, OR ANY PART THEREOF OR INTEREST THEREIN, OR OTHERWISE BY ANY GOVERNMENTAL ENTITY OR BY ANY INTERNATIONAL TAXING AUTHORITY UPON OR WITH RESPECT TO, OR ARISING OUT OF OR CONNECTED WITH, OR BASED UPON OR MEASURED:

- (1) against the Aircraft, or any part thereof, or interest therein;
- (2) against the exportation, importation, delivery, non-delivery (by reason of fault of the Lessee), warehousing, removal, leasing, exchange, acceptance, possession, repossession, recording, use, operation, settlement of any insurance or warranty claim, subleasing, rental, retirement, chartering, imposition of any Lien (other than Permitted Liens), abandonment, registration, installation, modification, repair, maintenance, replacement, transportation, storage, or return of the Aircraft or any part thereof or interest therein;
- (3) subject to the Proviso to clause 23.1, against the rentals, receipts or earnings arising from any one or more of the items or acts described in subclause (1) or (2) above; or
- (4) upon or with respect to this Lease, or any other document pertaining to or in connection with the transactions contemplated by this Lease;

and any out-of-pocket costs and expenses fairly attributable to any of the foregoing incurred by a Tax Indemnitee.

7.5 Exclusion

Except as provided in clause 7.6, there shall be excluded from the indemnity provided in clause 7.4:

- (1) Taxes to the extent imposed upon or measured solely by reference to the net income of the Tax Indemnitee which are imposed by any taxing authority in any jurisdiction in which the Tax Indemnitee is subject to Tax as a resident;
- (2) Taxes to the extent imposed or measured solely by reference to the failure or delay on the part of the Tax Indemnitee in the filing of any return of which it was aware;
- (3) items to the extent attributable to the negligence or willful misconduct of the Tax Indemnitee;
- (4) in respect of items to the extent that the same result solely from acts or events which occur prior to the Delivery Date or after the Aircraft has been redelivered to the Lessor in accordance with clause 13 and is no longer subject to this Lease; and/or
- (5) any amounts excluded by the Proviso to clause 23.1.

7.6 After Tax Basis of Payments

Notwithstanding anything in this clause to the contrary, the Lessee further agrees that, with respect to any payment or indemnity hereunder, such payment or indemnity shall include any amount necessary to hold the recipient of the payment or indemnity harmless on an after-tax basis from all Taxes required to be paid by such recipient with respect to such payment or indemnity, so that such recipient shall receive an amount which, net of any Taxes required to be paid or withheld by such recipient in respect of such amount, shall be equal to the amount of payment or indemnity otherwise required hereunder **Provided that** the provisions of Clause 8.1(1) and (2) shall apply *mutatis mutandis* to this Clause 7.6 as if set out here in full **and further that** the provisions of this subclause shall be subject to the Proviso to clause 23.1.

INDEMNITY

- 7.7 The Lessee agrees to indemnify, reimburse, hold harmless and defend each Indemnitee from and against any and all claims, damages, losses, liabilities, demands, suits, judgments, causes of action, legal proceedings, whether civil or criminal, penalties, fines and other actions, and any reasonable legal fees (on a full indemnity basis) and other reasonable costs and expenses in connection herewith, including any of the foregoing arising or imposed under the doctrine of absolute or strict liability but excluding those arising or imposed due to the fault of the Indemnitee and including any third party claims arising from or in any way connected with injury to or death of any Person or loss or damage to property (any and all of which are hereafter referred to as "Claims") which in any way may result from, pertain to or arise in any manner out of, or are in any manner related to (a) the Aircraft or this Lease, or the breach of any representation, warranty or covenant made by the Lessee hereunder or in any document delivered by the Lessee in connection herewith, or (b) the condition, ownership, manufacture, delivery, non-delivery (by reason of the fault of the Lessee), lease, acceptance, rejection of the Aircraft by the Lessee (save where the Aircraft does not generally satisfy the Delivery Condition), possession, return, purported disposition otherwise than by the Indemnitees, use, operation, maintenance, repair, alteration or control of the Aircraft in the air or on the ground during the Term, or (c) any defect in the Aircraft (whether or not discovered or discoverable by the Lessee or the Lessor) arising from the material or any articles used therein or from the design, testing, or use thereof or from any maintenance, service, repair, overhaul, or testing of the Aircraft, whether or not the Aircraft is in the possession of the Lessee, and regardless of where the Aircraft may then be located during the Term, or (d) any transaction, approval, or document contemplated by this Lease or given or entered into in connection herewith save to the extent that any of the above is due to any breach of this agreement by the Lessor or anything in relation to the Aircraft prior to the Delivery Date or after the Return Occasion or anything not attributable to or arising as a result of or in connection with any event, act or omission of the Lessee or any person operating the Aircraft on its behalf during the Term; **Provided, however, that** the Lessee shall be subrogated to all rights and remedies which any Indemnitee may have against the Manufacturer of the Aircraft and its subcontractors or any other person as to any such Claims, but only to the extent that the Lessee satisfies its indemnification obligation to such Indemnitee hereunder with respect to such Claims.
- (1) The Lessee hereby waives, and releases each Indemnitee from, any Claims (whether existing now or hereafter arising) for or on account of or arising or in any ways connected with injury to or death of personnel of the Lessee or loss or damage to property of the Lessee or the loss of use of any property which may result from or arise in any manner out of or in relation to the ownership, leasing, condition, use or operation of the Aircraft, in the air or on the ground, or which may be caused by any defect in the Aircraft, from the material or any article

used therein or from the design or testing thereof, or use thereof, or from any maintenance, service, repair overhaul or testing of the Aircraft regardless of when such defect may be discovered, whether or not the Aircraft is at the time in the possession of the Lessee, and regardless of the location of the Aircraft at any such time.

7.8 DISCLAIMER OF CONSEQUENTIAL DAMAGES

NO PARTY SHALL BE ENTITLED TO RECOVER, AND HEREBY DISCLAIMS AND WAIVES ANY RIGHT THAT IT MAY OTHERWISE HAVE TO RECOVER, CONSEQUENTIAL DAMAGES OR ANY LOSS OF BARGAIN AS A RESULT OF ANY BREACH OR ALLEGED BREACH BY THE OTHER PARTY OF ANY OF THE AGREEMENTS, REPRESENTATIONS OR WARRANTIES OF SUCH OTHER PARTY CONTAINED IN THIS LEASE.

7.9 The indemnities and disclaimers contained in this clause 7 shall continue in full force and effect notwithstanding the expiration or other termination of this Lease and are expressly made for the benefit of and shall be enforceable by each Indemnitee. Notwithstanding the foregoing, the Lessee shall not be liable to make any payments by way of indemnity in respect of any Claims against an Indemnitee:

- (1) to the extent attributable to negligence or willful misconduct of such Indemnitee; or
- (2) to the extent that the same result solely from acts or events which occur prior to the Delivery Date or after the Aircraft has been redelivered to the Lessor in accordance with clause 15 hereof and is no longer subject to this Lease.

8. LIENS AND CHARGES

8.1 THE LESSEE SHALL NOT DIRECTLY OR INDIRECTLY CREATE, INCUR, ASSUME OR SUFFER TO EXIST ANY LIEN ON OR WITH RESPECT TO THE AIRCRAFT, ANY ENGINE OR ANY PART, TITLE THERETO OR ANY INTEREST THEREIN, OTHER THAN PERMITTED LIENS. THE LESSEE SHALL PROMPTLY, AT ITS OWN EXPENSE, DULY DISCHARGE ANY LIEN, OTHER THAN LESSOR'S LIENS, IF THE SAME SHALL ARISE AT ANY TIME WITH RESPECT TO THE AIRCRAFT, ANY ENGINE OR ANY PART.

8.2 The Lessee shall, as the same fall due for payment, unless the same are being contested in good faith and in respect of which the Lessee or any Permitted Sublessee has adequate financial resources to discharge, pay and discharge, or procure the payment and discharge of any and all charges, fees, taxes, imposts and levies of whatsoever nature which are incurred by the Lessee and/or any other operator of the Aircraft and/or which attach to the Aircraft in the course of the operation of the Aircraft or of any other aircraft under the management or control of the Lessee or such operator, including without limitation all charges of airport authorities (whether relating to landing fees, parking fees, handling charges or otherwise), all charges imposed by air navigation authorities and all charges of aviation authorities whether relating to navigation or otherwise and will on request by the Lessor or the Lessor's Aircraft Manager supply evidence of payment of any such charges.

8.3 The Lessee shall not do and shall procure that any Permitted Sublessee shall not do any act which could reasonably be expected to result in the Aircraft being arrested, confiscated, impounded, subject to penalty, forfeiture, detention or destruction or otherwise taken from the possession of the Lessee or any Permitted Sublessee (otherwise than in accordance with the terms of this Lease

or Sublease) and if any of the same occurs, the Lessee shall (i) give immediate notice thereof to the Lessor and (ii) promptly secure the release of the Aircraft from the same.

9. **PERFECTION OF TITLE AND FURTHER ASSURANCES**

- 9.1 Title to the Aircraft shall at all times remain vested in the Lessor. If at any time any filing or recording is reasonably necessary to protect the interest of the Lessor, the Lessee, at the Lessor's cost and expense, shall cause this Lease, and any and all additional instruments which shall be executed pursuant to the terms hereof or thereof (including those referred to in clause 2.2(4)(iv)) to be kept, filed and recorded and to be re-executed, refiled and re-recorded in the appropriate office or offices pursuant to applicable Laws, to perfect, protect and preserve the rights and interests of the Lessor in the Aircraft, including the right of the Lessor to repossess, and export from any country the Aircraft, the Engines and the Parts if the Lease has been declared, or is deemed by its terms to have been declared in default. At the reasonable request of the Lessor and at the Lessor's expense, the Lessee shall furnish to the Lessor an opinion of counsel or other evidence reasonably satisfactory to the Lessor of each such filing or refiling and recordation or re-recordation.
- 9.2 Without limiting the foregoing, the Lessee shall do or cause to be done, at the Lessor's cost and expense, request and direction, any and all acts and things which may be required to perfect and preserve the title and interest of the Lessor in the Aircraft within any jurisdiction in which Lessee or any Permitted Sublessee may operate the Aircraft, as the Lessor may reasonably request. The Lessee shall also do or cause to be done, at the Lessor's expense, request and direction, any and all acts and things which may be required under the terms of any other Law involving any jurisdiction in which the Lessee (or any Permitted Sublessee) may operate, or any and all acts and things which the Lessor may reasonably request, to perfect and preserve the Lessor's ownership rights regarding the Aircraft within any such jurisdiction.
- 9.3 The Lessee will promptly and duly execute and deliver to the Lessor such further documents and assurances and take such further actions and execute and deliver or procure the execution and delivery of all such documents as the Lessor may from time to time consider necessary and as are reasonable in order to carry out more effectively the intent and purpose of this Lease and to establish and protect the rights and remedies created or intended to be created in favour of the Lessor hereunder.

10. **TRANSACTION COSTS**

- (1) The Lessor and the Lessee shall each be responsible for its own costs and expenses incurred in connection with the preparation, negotiation and delivery of this Lease and any other documents or instruments delivered in connection herewith.
- (2) The Lessee agrees to pay on demand all out-of-pocket expenses of the Lessor, including legal fees and disbursements on a full indemnity basis in connection with the enforcement of this Lease and any other documents which may be delivered in connection herewith or therewith. In the event that the Lessor pays any of the amounts the Lessee is required to pay pursuant to this clause, the Lessee will upon receipt of notice from the Lessor specifying the amount paid

and furnishing appropriate invoices, statements or demands for such payment, reimburse the Lessor for such advances.

PART 4: DELIVERY AND REDELIVERY

11. INSPECTION, DELIVERY AND ACCEPTANCE

11.1 Inspection

On or before the Estimated Delivery Date therefor, the Lessee shall conduct a ground inspection of the Aircraft and the Aircraft Documents at the Delivery Location in order to verify that the Aircraft is in the Delivery Condition.

11.2 Delivery

- (1) It is anticipated that the Aircraft will become available for delivery on or about the Estimated Delivery Date at the Delivery Location.
- (2) The Lessor shall, promptly upon ascertaining the same, notify the Lessee of the actual date when it expects delivery of the Aircraft to take place if that date differs from the Estimated Delivery Date. Subject to the terms and conditions hereof, the Lessee agrees to accept the Aircraft on such date.
- (3) Where applicable, the Lessor shall provide to the Lessee the requisite export documentation with respect to the export of the Aircraft issued by the relevant Government Entity in which the Aircraft is registered immediately prior to Delivery and the Lessee shall provide the Lessor with all reasonable aid and assistance necessary in connection with the production thereof.

11.3 Deficiencies on Delivery

- (1) On or before the Delivery Date, the Lessee shall, at its sole cost and expense, conduct a "Final Inspection" of the Aircraft to verify that the Aircraft is generally in compliance with the Delivery Condition.

11.4 Acceptance of Aircraft

Subject to clause 11.3(1), the Lessee shall accept the Aircraft, to be leased hereunder, "AS IS", "WHERE IS" and SUBJECT TO EACH AND EVERY DISCLAIMER OF WARRANTY AND REPRESENTATION AS SET FORTH IN CLAUSE 12. Upon acceptance of the Aircraft, Lessee shall thereupon indicate and confirm its acceptance of the Aircraft by execution and delivery to Lessor of an Acceptance Certificate dated the Delivery Date, in the form set forth as Exhibit D.

11.5 Delay in Delivery

The Lessor shall have no responsibility or liability to the Lessee for any failure to deliver the Aircraft on the Estimated Delivery Date or thereafter due to any event of *Force Majeure*. Upon the occurrence of an event of *Force Majeure*, the Lessor shall promptly notify the Lessee of the circumstances thereof and shall use reasonable endeavours to avoid the consequences of such event. Save as is otherwise provided in this Lease, the Lessee shall not be entitled to refuse to accept delivery of the Aircraft when tendered by the Lessor or to cancel its obligation to take the Aircraft on lease from the Lessor as a consequence of any delay due to an event of *Force Majeure*. Provided that if as a result of an event of *Force Majeure*, the Aircraft shall not have

been delivered to and accepted by the Lessee prior to the Final Delivery Date, the Lessee shall be entitled, by notice not later than five (5) Business Days after the Final Delivery Date, to cancel its obligation to take the applicable Aircraft on lease from the Lessor. Upon the giving of such notice neither party shall have any further liability or obligation to the other in relation to the applicable Aircraft.

12. LESSOR WARRANTIES AND DISCLAIMER OF WARRANTIES

THE AIRCRAFT IS TO BE LEASED HEREUNDER "AS IS" AND "WHERE IS". EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE LESSOR HAS NOT AND SHALL NOT BE DEEMED TO HAVE MADE (WHETHER BY VIRTUE OF HAVING LEASED THE AIRCRAFT UNDER THIS LEASE, OR HAVING ACQUIRED THE AIRCRAFT, OR HAVING DONE OR FAILED TO DO ANY ACT, OR HAVING ACQUIRED OR FAILED TO ACQUIRE ANY STATUS UNDER OR IN RELATION TO THIS LEASE OR OTHERWISE), AND THE LESSOR HEREBY SPECIFICALLY DISCLAIMS, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE AIRWORTHINESS, LACK OF AIRWORTHINESS, LOAD CARRYING CAPABILITY, VALUE, DURABILITY, COMPLIANCE WITH SPECIFICATIONS, CONDITION, DESIGN, OPERATION, MERCHANTABILITY, FREEDOM FROM CLAIMS OR INFRINGEMENT OR THE LIKE, OR FITNESS FOR USE FOR A PARTICULAR PURPOSE OF THE AIRCRAFT OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE AIRCRAFT, THE ABSENCE THEREFROM OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE, OR AS TO ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED (INCLUDING ANY IMPLIED WARRANTY ARISING FROM A COURSE OF PERFORMANCE OR DEALING OR USAGE OF TRADE), WITH RESPECT TO THE AIRCRAFT; AND THE LESSEE HEREBY WAIVES, RELEASES, RENOUNCES AND DISCLAIMS EXPECTATION OF OR RELIANCE UPON ANY SUCH WARRANTY OR WARRANTIES; EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE LESSOR SHALL NOT HAVE ANY RESPONSIBILITY OR LIABILITY TO THE LESSEE OR ANY OTHER PERSON, WHETHER ARISING IN CONTRACT OR TORT OUT OF ANY NEGLIGENCE OR STRICT LIABILITY OF THE LESSOR OR OTHERWISE, FOR (I) ANY LIABILITY, LOSS OR DAMAGE CAUSED OR ALLEGED TO BE CAUSED DIRECTLY OR INDIRECTLY BY THE AIRCRAFT OR PART THEREOF OR BY AN INADEQUACY THEREOF OR DEFICIENCY OR DEFECT THEREIN OR BY ANY OTHER CIRCUMSTANCE IN CONNECTION THEREWITH, (II) THE USE, OPERATION OR PERFORMANCE OF THE AIRCRAFT OR ANY RISKS RELATING THERETO, (III) ANY INTERRUPTION OF SERVICE, LOSS OF BUSINESS OR ANTICIPATED PROFITS OR CONSEQUENTIAL DAMAGES OR (IV) THE DELIVERY, OPERATION, SERVICING, MAINTENANCE, REPAIR IMPROVEMENT OR REPLACEMENT OF THE AIRCRAFT. TO THE EXTENT PERMITTED BY APPLICABLE LAW, THE LESSEE WAIVES ANY AND ALL RIGHTS AND REMEDIES NOW OR HEREAFTER CONFERRED UPON THE LESSEE BY LAW OR OTHERWISE THAT MAY LIMIT OR MODIFY THE LESSOR'S RIGHTS OR INCREASE OR MODIFY THE LESSOR'S OBLIGATIONS AS DESCRIBED IN THIS LEASE. THE WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS CLAUSE 12 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, AND THE LESSOR AND/OR WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION SHALL NOT BE DEEMED TO HAVE MADE ANY OTHER REPRESENTATIONS OR WARRANTIES, EXCEPT AS OTHERWISE SET OUT IN THIS AGREEMENT.

13. RETURN OF THE AIRCRAFT

13.1 Return

- (1) On the expiration or earlier termination of the Term or at such other time as the Lessee shall be required to return the Aircraft to the Lessor pursuant to the terms hereof, the Lessee, at its own expense, shall return the Aircraft to the Lessor at the Return Location equipped with all required Parts and Engines (or Replacement Engines), duly installed thereon and with all Aircraft Documents

which shall be complete and up to date and in all cases in the Return Condition and acceptable to the Lessor, by delivering the same to the Lessor at such location.

- (2) UNTIL THE LESSEE SHALL HAVE COMPLIED IN FULL WITH ITS OBLIGATIONS UNDER THIS CLAUSE TO RETURN THE AIRCRAFT, THE LESSEE SHALL NOT BE ENTITLED TO CONTINUE TO USE THE AIRCRAFT BUT SHALL BE OBLIGATED TO CONTINUE TO PERFORM ITS OBLIGATIONS UNDER THIS LEASE, INCLUDING THE OBLIGATION TO PAY LEASE PAYMENTS AND MAINTAIN INSURANCE COVERAGES AS THOUGH THE TERM HAD BEEN EXTENDED.

13.2 Legal Status Upon Return

Immediately prior to the Return Occasion, the Lessee shall, at its cost, procure that:

- (1) the Aircraft, Engines and Parts shall be free and clear of all Liens, except Lessor's Liens;
- (2) the Aircraft is equipped and in full airworthy condition for operation according to Part 135 to allow the Aircraft to be operated for the commercial charter under applicable rules, regulations and ADs of the GAA, without waiver, restrictions or exceptions;
- (3) the Aircraft shall have a current full certificate of airworthiness issued by the GAA with no exceptions noted thereon;
- (4) the Aircraft shall be in full compliance with the ADs and mandatory regulations of the FAA requiring compliance by the later of the Return Occasion and the last to occur of 100 Flight Hours, 10 Cycles or one month after the Return Occasion;
- (5) the Aircraft is in full compliance with the Maintenance Programme and Service Bulletins of the Manufacturer, Engine Manufacturer and any Parts manufacturer;
- (6) the Aircraft shall be in a maintenance status consistent with the requirements of clauses 17 and 18.

13.3 Return of Engines

In the event that any Replacement Engine not owned by the Lessor is delivered installed on the returned Airframe as set forth in clause 13.1, the Lessee, concurrently with such delivery, will, at no cost to the Lessor, furnish, or cause to be furnished, to the Lessor a full warranty (as to title) bill of sale with respect to such Replacement Engine, in form and substance satisfactory to the Lessor (together with a legal opinion to the reasonable satisfaction of the Lessor to the effect that such full warranty bill of sale has been duly authorised and delivered and is enforceable in accordance with its terms and that such Replacement Engine is free and clear of Liens other than Lessor's Liens), against receipt from the Lessor of a bill of sale evidencing the transfer, on the same terms *mutatis mutandis* and in form and substance satisfactory to the Lessee (together with a legal opinion on the same terms), by the Lessor to the Lessee or its designee of all of the Lessor's right, title and interest in and to an Engine not installed on the Airframe at the time of the return of the Airframe. If any such bill of sale transferring title of an engine to the Lessor shall be executed by a Permitted Sublessee, the Lessee will guarantee to the Lessor the title warranty contained in such bill of sale. The Lessee shall also take (or cause any Permitted Sublessee to take) such other action as the Lessor may reasonably request in connection with such transfer of any such engine.

13.4 Service Bulletins and Modification Kits

On return of the Aircraft pursuant to this clause, the Lessee shall deliver to the Lessor, at no cost to the Lessor, all service bulletin and modification kits furnished without charge by a manufacturer for installation on the Aircraft which have not been so installed together with appropriate instructions for installation. In the event such uninstalled kits were purchased or manufactured by the Lessee, then the Lessor shall have a right to purchase such kits at the cost of the same to the Lessee for a period of one hundred eighty (180) days after return.

13.5 Condition of the Aircraft

Upon the Return Occasion, the Lessee shall, at its cost, procure that the Aircraft shall comply with all of the conditions set forth in Exhibit E.

13.6 Lessor's Final Inspection

Immediately prior to the Return Occasion, the Lessee shall make the Aircraft available to the Lessor at the Lessee's principal operating base for detailed inspection, at the Lessee's expense, in order to verify that the condition of the Aircraft complies with the requirements set forth above, which inspection shall include, all elements set forth in Exhibit E, it being agreed by the Lessor that, if possible and practicable to test the condition of the Aircraft as at the Return Occasion, such inspection, or part thereof, should take place during the final scheduled maintenance of the Aircraft prior to the Return Occasion (such inspection being the "Lessor's Final Inspection"). The Lessee shall provide the Lessor with at least thirty (30) days' prior written notice of the time and place of the Lessor's Final Inspection and such support and personnel to facilitate the Lessor's Final Inspection as the Lessor or the Lessor's Aircraft Manager shall reasonably request. The period allowed for the Lessor's Final Inspection shall have such duration as to permit the opening of any areas of the Aircraft which are required to be opened to verify satisfaction with the requirements of Exhibit E and shall continue on consecutive days until all activity required above to be conducted during the Lessor's Final Inspection has been concluded. All storage expenses attributable to any extension of the Term pursuant to the above shall be payable by the Lessor.

13.7 Functional Check Flight and Redelivery Certificates

- (1) Immediately following completion of the Lessor's Final Inspection and prior to the expiration of the Term a functional check flight shall be conducted for the Aircraft in accordance with the Manufacturer's standard procedures at the cost of the Lessee. The Lessor shall be entitled to appoint two (2) representatives to participate in such check flight as observers. Any deficiencies noted during such functional check flight shall be corrected at the Lessee's expense if the Aircraft is not covered by the manufacturers' warranty.
- (2) Upon completion of the Lessor's Final Inspection and the functional check flight of the Aircraft, the Lessor shall either:
 - (1) accept the return of the Aircraft and sign the Redelivery Acceptance Certificate and Aircraft Status Report attached thereto with any deficiencies noted thereon and deliver the same to the Lessee; or

- (2) if the Aircraft fails fully to conform to the Return Condition, complete an Aircraft Status Report in relation to the Aircraft as at the completion of the Lessor's Final Inspection and functional check flight listing any such non-conforming items thereon.

The provisions of this sub clause shall be without prejudice to the right or remedies of the Lessor or to the obligations of the Lessee under any other provision of this Lease.

- (3) THE LESSEE SHALL INDEMNIFY AND HOLD HARMLESS THE INDEMNITEES FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES AND LOSSES THAT ANY INDEMNITEE MAY SUFFER OR INCUR ARISING BY REASON OF DEATH OR INJURY TO ANY EMPLOYEE OR REPRESENTATIVE OF THE LESSOR OR THE LESSOR'S AIRCRAFT MANAGER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE SAID FUNCTIONAL CHECK FLIGHT OF THE AIRCRAFT. The Lessee shall further maintain adequate insurance coverage for such flight in accordance with the terms of this Lease and such additional insurance coverage as the Lessor may require.

13.8 Aircraft Documentation

- (1) In order to enable Lessor to prepare for the Lessor's Final Inspection of the Aircraft pursuant to clause 13.6, the Lessee agrees to make available to the Lessor at the Return Location not later than ten (10) days prior to the commencement of the Lessor's Final Inspection, the Aircraft Documents together with such other documentation regarding the condition, use, maintenance, operation and history of the Aircraft during the Lessee's possession of the Aircraft as the Lessor may reasonably request.
- (2) In the event of missing, incomplete or unacceptable (in the reasonable opinion of the Lessor's Aircraft Manager) documentation, the Lessee shall reaccomplish the tasks necessary to produce such documentation in accordance with a GAA approved maintenance programme (and any other applicable rules, regulations or directives of the GAA) satisfactory to the Lessor prior to the required return of the Aircraft hereunder.

13.9 Corrections and Subsequent Corrections

In the event that the Aircraft fails upon the Return Occasion fully to conform to any Return Condition, the Lessor may:

- (1) continue the obligations of the Lessee under this Lease in effect in the manner provided for in clause 13.1(2) until such condition or requirement is met; or
- (2) accept the return of the Aircraft and thereafter have any such non-conformance corrected or requirement met, at such time as the Lessor may deem appropriate at commercial rates then charged by the Person selected by the Lessor to perform such correction. Any direct expense incurred by the Lessor for such correction shall become Supplemental Lease Payments ("Supplemental Lease Payments") payable by the Lessee within five (5) Business Days following the submission of a written statement by the Lessor to the Lessee, identifying the items corrected and setting forth the expense of such correction. The Lessee's obligation to pay such Supplemental Lease Payments shall survive the termination of the Term.

13.10 Additional Maintenance, Repair or Overhaul

Upon the Return Occasion and upon written request of the Lessor, for a period of up to ninety (90) days, the Lessee shall store and insure the Aircraft as requested by the Lessor in the same manner and with the same care as used for similar aircraft and engines maintained by the Lessee, **Provided that** the Lessor shall reimburse the Lessee for its documented direct out-of-pocket costs, without mark-up, for such storage and insurance and shall not extend this Lease.

13.11 Fuel and Oil on Return

On the Return Occasion, the Lessee, at its expense, shall return the Aircraft with an amount of fuel and oil that equals or exceeds the amount of fuel and oil on the Aircraft at the Delivery Date.

13.12 Registration and Deregistration Costs

The Lessor shall be solely responsible for any and all costs, Taxes and dues relating to the registration, importation and exportation and de-registration of the Aircraft in, into and from the Country of Registration in connection with the Delivery of the Aircraft to the Lessee at the commencement of the Term and in connection with the redelivery of the Aircraft to the Lessor as required hereby, including the cost of obtaining any necessary Certificates of Airworthiness for Export in respect of the Aircraft.

PART 5: OPERATIONS AND MAINTENANCE

14. POSSESSION AND USE : SUBLEASING

14.1 Possession : Subleasing

(1) Leasing

The Lessee will not, without the prior written consent of the Lessor, assign, pledge or otherwise encumber this Lease or sublet, charter, wet lease or transfer possession or operational control of the Aircraft or install any Engine or any Part or permit any Engine or Part to be installed on any airframe other than the Airframe **Provided that** if (i) no Default shall have occurred and be continuing, (ii) the action to be taken shall not affect the registration of the Aircraft and (iii) all necessary approvals of each Governmental Entity having jurisdiction over the Aircraft, the Lessee, any Permitted Sublessee or other relevant Person have been obtained, the Lessee may:

(a) without the consent of the Lessor, exchange any Engine with another engine on an aircraft operated by the Lessee, any Affiliate of the Lessee or any Permitted Sublessee under a Sublease or pursuant to a Related Lease;

(b) without the consent of the Lessor, deliver possession of the Aircraft, Airframe or any Engine or any Part thereof to a Maintenance Contractor for testing or other similar purposes or to any organisation for service, repair, maintenance, testing or overhaul work on the Aircraft or for alterations or modifications in or additions to the Aircraft to the extent required or permitted by the terms hereof;

(c) place an Engine in an aircraft engine pool approved by the Lessor's Aircraft Manager;

(d) with the prior written consent of the Lessor, sublease the Aircraft to any Permitted Sublessee on the terms and conditions satisfactory to the Lessor in its absolute discretion, including those set forth in clause 14.1(1);

(e) enter into a charter or wet lease of the Aircraft for a period of no more than six months, under which no Person other than the Lessee has or is granted any legally enforceable possessory interest in the Aircraft and the Lessee retains operational control of the Aircraft at all times save that the Lessee may sublease the aircraft to Advanced Air Management, Inc. ("AAM") and operational control of the Aircraft may be given to AAM for the conduct of operations under Part 135 of the Aeronautics Regulations of Title 14 of the United States Code of Federal Regulation ("FAR Part 135").

(2) Limitations

With respect to any transfer or Sublease pursuant to clause 11.1(1)(d) and (e):

(1) the rights of any transferee or sublessee pursuant to a transfer or Sublease permitted by clause 16.1(1) shall be subject and subordinate to all the terms of this Lease and such transferee or sublessee shall so acknowledge in writing for the benefit of the Lessor;

(2) the Lessee shall remain primarily liable hereunder for the performance of all of the terms of this Lease to the same extent as if such transfer or Sublease had not occurred;

(3) no Sublease, charter, wet lease or other similar arrangement or other transfer pursuant to the terms of clause 16.1(1) shall in any way discharge or diminish any of the Lessee's obligations to the Lessor;

(4) the term of any transfer or any Sublease, charter, wet lease or other similar arrangement or other transfer shall not extend beyond the then existing Term and the terms and conditions of the same shall not be inconsistent with this Lease;

(5) any Permitted Sublessee shall have:

(1) made representations comparable to those of the Lessee set forth in clause 3.1 Provided that references therein to Country of Organisation shall refer to the country in which the Permitted Sublessee is organised, the Country of Registration shall refer to the Country in which the Permitted Sublessee's use of the Aircraft occurs, and references to the Lease shall refer to such Sublease; and

(2) agreed to operate the Aircraft in accordance with the terms hereof and in accordance with all insurance policies relating to the Aircraft and the terms of such Sublease (and any agreements entered into in connection therewith);

(6) any Sublease shall be substantially identical to this Lease, *mutatis mutandis*, and shall be subject to the prior written approval of the Lessor, acting in its absolute discretion;

- (7) the Lessee shall use reasonable efforts to provide the Lessor with as much prior written notice as is reasonably practicable of the Lessee's intent to enter into any Sublease; and
 - (8) the Lessor shall have received, prior to the commencement of any Sublease, an opinion of independent counsel (which counsel and opinion shall be reasonably satisfactory to the Lessor) qualified to practice law in the jurisdiction of the Permitted Sublessee's domicile in form, scope and substance reasonably satisfactory to the Lessor concluding, among other things, that the terms of such Sublease are legal, valid, binding and enforceable in such jurisdiction and addressing such other matters as Lessor may reasonably request;
- (3) Except as provided in this clause 16, the Lessee shall not assign any interest in this Lease or any of its rights hereunder or in any property leased hereunder, and any attempt to do so shall be void *ab initio*.

14.2 Lawful Insured Operations

- (1) The Lessee will, or will cause a Permitted Sublessee to, operate and use the Aircraft only in lawful commercial cargo operations by crews duly certified by the Country of Registration.
- (2) The Lessee will not maintain, use or operate the Aircraft, or permit the Aircraft to be maintained, used or operated in violation of any applicable Law of any Governmental Entity, or in violation of any airworthiness certificate, permit, license or registration issued by the GAA or contrary to the Manufacturer's or Engine Manufacturer's operating manuals or instructions or the Maintenance Programme for the Aircraft.
- (3) The Lessee shall not operate the Aircraft, or permit the Aircraft to be operated during the Term, unless (i) the Aircraft is covered by insurance as required by the provisions hereof, and (ii) such operation is in compliance with the terms of such insurance.
- (4) The Lessee shall not operate or locate the Aircraft or permit the Aircraft to be operated or located during the Term in any area excluded from coverage by any insurance policy issued pursuant to the requirements of this Lease and the Lessee solely shall bear any costs and expenses that may arise from any loss or damage (with respect to both the Aircraft and any affected third parties) that may occur during or in connection with operations of the Aircraft including those that are excluded from coverage by the insurance policies issued pursuant to the requirements of this Lease.
- (5) Neither the Lessee or any Permitted Sublessee shall at any time represent the Lessor, the Beneficiary or any Financing Party as carrying goods or passengers in the Aircraft or as being in any way connected or associated with the operation or carriage being undertaken by the Lessee or any Permitted Sublessee or as having any operational interest in or responsibility for the Aircraft.

14.3 Restrictions on Operation

The Lessee shall not operate or locate the Aircraft or permit the Aircraft to be operated or located:

- (1) in any country that is the subject of sanctions under the U.S. International Economic Emergency Powers Act or U.N. Security Council directives from time to time ; or
- (2) in any country restricted under the U.S. Trading with the Enemy Act and U.S. Export Administration Act except as may be permitted by operating in accordance with the conditions specified by the U.S. Export Administration Regulations, General License GATS (15CFR Part 771.19); or
- (3) to or within any country with which the United States of America does not maintain diplomatic relations; or
- (4) in or over any area which may expose the Lessor, the Beneficiary or any Financing Party to any penalty, fine, sanction or other liability, whether civil or criminal, under any applicable Law.

14.4 AOC

The Lessee or its Permitted Sublessee shall continue to hold an air carrier operating certificate applicable to aircraft of the same type as the Aircraft and for the purpose for which the Aircraft is permitted to be used hereunder issued by the Country of Registration or Organisation, as the case may be.

14.5 Registration

During the Term, the Lessee shall at its expense keep the Aircraft at all times registered under the applicable Laws of the Country of Registration in the name of the Lessee, as operator, with the interest of the Lessor as owner on the applicable register in the Country of Registration.

14.6 Insignia

- (1) Upon delivery of the Aircraft, the Lessee agrees to place the Lease Identification in the cockpit in a prominent location and to place the Lease Identification on the gearbox of each Engine. The Lessee agrees to make such changes to the Lease Identification as the Lessor may reasonably request from time to time.
- (2) The Lessee shall be permitted to paint the Aircraft in accordance with its own livery **Provided** that such livery shall be removed upon the Return Occasion in accordance with clause 13 and Exhibit E.

15. INFORMATION AND INSPECTION

15.1 Information

From and after the Delivery Date, the Lessee agrees to furnish the Lessor's Aircraft Manager with the following at the following times:

- (1) within 24 hours after the occurrence thereof, notice of any notices received from the GAA indicating an intent to commence any investigation of the Lessee or its operations or to impose any disciplinary action on the Lessee;
- (2) at least 30 days prior to any scheduled maintenance on the Aircraft, notice of such scheduled maintenance and the locations thereof and provide the Lessor or

the Lessor's Aircraft Manager a reasonable opportunity to have one or more technical representatives of the Lessor present during the performance thereof with full access to all related documentation.

- (3) within 24 hours of an accident/incident affecting or involving the Aircraft, a written accident/incident report relating thereto;
- (4) promptly upon demand for the same, such written reports concerning the operation of the Aircraft as may be necessary to permit Lessor, the Beneficiary and their respective shareholders and Affiliates to determine their respective tax liabilities;
- (5) promptly upon request for the same, such information regarding the present and anticipated location and regarding the condition of the Aircraft as the Lessor or the Lessor's Aircraft Manager may reasonably require; and
- (6) promptly upon demand for the same, copies of all reports submitted to the GAA relating to the use or operation of the Aircraft.

15.2 Inspection rights

- (1) At all reasonable times during the Term, which shall include normal business hours in the location where the Aircraft is physically located and in the location where the Aircraft Documents are kept, the Lessee shall (and shall cause any Permitted Sublessee to) allow the Lessor, the Lessor's Aircraft Manager, at their own risk, to conduct an on-board or visual walk-around inspection of the Aircraft and any Engine and to inspect the Aircraft Documents **Provided that** (i) any such inspection shall be subject to the safety, security and workplace rules applicable at the location where such inspection is conducted and any applicable governmental rules or regulations, and (ii) in the case of an inspection during a maintenance visit, (and, save following a Default, the Lessor shall seek to make or procure the making of such inspections during a maintenance visit of the Aircraft) such inspection shall not in any respect interfere with the normal conduct of such maintenance visit or extend the time required for such maintenance visit or, in any event, at any time interfere with the use or operation of the Airframe or any Engine or with the normal conduct of the Lessee's or a Permitted Sublessee's business.
- (2) The Lessor shall have no duty to make any such inspection and shall not incur any liability or obligation by reason of not making any such inspection. The Lessor's (or the Lessor's Aircraft Manager's) failure to object to any condition or procedure observed or observable in the course of an inspection hereunder shall not be deemed to waive or modify any of the terms of this Lease with respect to such condition or procedure.
- (3) The cost of such inspections shall be borne;
 - (1) prior to the occurrence of a Default, by the Lessee for the first such inspection in each period of twelve months and by the Lessor for any additional inspection that is made by it in any such period **Provided that** if on any such additional inspection the Lessee is found not to be in compliance with the requirements of this Part 5, the cost of such inspection shall be borne by the Lessee; and
 - (2) following the occurrence of a Default and so long as the same is continuing, by the Lessee.

- (4) The Lessee shall forthwith effect such repairs to the Aircraft as any inspection pursuant to this clause may show are required in order for the terms of this Lease to be complied with.

16. QUIET ENJOYMENT

The Lessor covenants that so long as an Event of Default shall not have occurred and is not continuing or has not been waived by the Lessor, the Lessee shall quietly enjoy, in accordance with the terms hereof, the Aircraft and all rents, revenues, profits and income thereof, without interference from the Lessor, or from any Person lawfully claiming by or through the Lessor.

17. MAINTENANCE

17.1 Maintenance Contractor and Programme

- (1) At least twenty (20) Business Days prior to the Estimated Delivery Date, the Lessee shall submit to the Lessor's Aircraft Manager (i) details of the proposed Maintenance Contractor and (ii) full details and a copy of the proposed Maintenance Programme for the Aircraft in each case for the approval of the Lessor, such approval not to be unreasonably withheld or delayed.
- (2) If at any time the Lessee wishes to change the Maintenance Contractor or amend the Maintenance Programme for the Aircraft, the Lessee shall submit details of the same to the Lessor's Aircraft Manager for the Lessor's approval at least twenty (20) Business Days prior to the proposed effective date of the relevant change or amendment, such approval not to be unreasonably withheld or delayed.
- (3) The Lessee shall promptly, at its cost, supply the Lessor's Aircraft Manager with a copy of all updates and amendments of the Maintenance Programme promulgated by the Manufacturer, Engine Manufacturer and/or any OEM.

17.2 Generally

The Lessee, at its own cost and expense, shall:

- (1) cause a Maintenance Contractor to perform all mandatory service, inspections, repairs, maintenance, modifications, amendments, alterations, overhaul and testing, (i) as may be required under GAA rules and regulations applicable to the Aircraft and in compliance with the Maintenance Programme, (ii) as may be included in any ADs, Service Bulletins requiring termination or compliance during the Term or by the later of the times mentioned in clause 13.2(4) in the same manner and with the same care as shall be the case with similar aircraft and engines of the same make and model as the Aircraft and Engines owned by or operated by or on behalf of the Lessee without discrimination and (iii) so as to keep the Aircraft in good operating and airworthy condition and appearance as when delivered to the Lessee subject to normal wear and tear associated with the operation and maintenance thereof in accordance herewith;
- (2) keep the Aircraft in such condition as is necessary to enable the airworthiness certification of the Aircraft to be maintained in good standing at all times under GAA regulations and any other applicable Law;

- (3) maintain on a current basis throughout the term of this Lease and in the English language and retain and safeguard the same, accurate, complete, and current all Aircraft Documents and all current and historical maintenance and overhaul records (including all documents required by the GAA or otherwise to trace all time or cycle controlled Parts to the most recent overhaul or birth), all current and historical modification, addition or alteration records, all log books, all manuals and revisions and updates thereto, all certification and inspection records (including without limitation all certifications and forms required by the GAA and otherwise and all reports, x-rays, video tapes, print-outs and other non destructive testing documents), and all other material required by, and in a manner acceptable to, the GAA any other Governmental Entity, the Maintenance Programme and this Lease; and
- (4) permit the Lessor or any authorised representative of the Lessor to examine such Aircraft Documents at any reasonable time;

or shall procure that the same is performed, kept, maintained or permitted by any Permitted Sublessee.

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17.3 Engines

- (1) In addition to its rights under clause 16, the Lessee and any Permitted Sublessee shall have the right at its option at any time, on at least twenty (20) Business Days' prior written notice to the Lessor (or, if such prior notice is impractical, in any case ~~Provided~~ that such notice is given immediately after such substitution), to substitute or procure the substitution of, and if a Casualty Occurrence shall have occurred with respect to an Engine, the Lessee shall, within thirty (30) days of the occurrence of such Casualty Occurrence substitute or procure the substitution for any such Engine, a Replacement Engine on the Airframe ~~Provided~~ that the Replacement Engine shall have a value and utility at least equal to the replaced Engine, assuming that such Engine was in the condition and repair required to be maintained by the terms of this Lease. In such event, immediately upon such substitution and without further act, (i) title to the Replacement Engine shall thereupon vest in the Lessor (subject only to Permitted Liens), (ii) the replaced Engine shall no longer be deemed an Engine hereunder and (iii) such Replacement Engine shall be deemed part of the Aircraft for all purposes hereof to the same extent as the Engine originally installed on or attached to such Aircraft.

- (2) The Lessee and any Permitted Sublessee shall be entitled, so long as no Default shall have occurred and be continuing to substitute, replace or renew any Engine or Part with a Replacement Engine or part which does not satisfy the requirements of clause 17.3(2) or clause 18 **Provided that:**
 - (1) there shall not have been available to the Lessee or the Permitted Sublessee, at the time and in the place that such substitute or replacement part was required to be installed on the Airframe or Engines a Replacement Engine or substitute or replacement part complying with such requirements; and
 - (2) it would have resulted in an unreasonable disruption of the operation of the Aircraft to have grounded the Aircraft until such time as a Replacement Engine or substitute or replacement part complying with such requirements became available for installation in or on the Aircraft; and
 - (3) as soon as practicable after installation of the same in or on the Airframe or Engine (which, in the case of an Engine, shall be no later than the next shop visit of the Engine) the Lessee or the Permitted Sublessee shall remove any such Replacement Engine or part not complying with such requirements and replace or substitute the same with a Replacement Engine or part complying with the same.
- (3) Subject to the foregoing:
 - (1) unless the subject of an engine pooling agreement approved by the Lessor or the Lessor's Aircraft Manager, any Engine removed from an Aircraft for scheduled or unscheduled maintenance must have such maintenance completed and be reinstalled on the Aircraft within sixty (60) days of removal, but in any event prior to the expiration or earlier termination of the Term; and
 - (2) unless clause 20 permits such Part to be permanently removed, the Lessee shall procure that if any Part is removed from the Aircraft, such Part or a replacement Part permitted under clause 18, shall be reinstalled within thirty-six (36) hours of such removal or prior to the earlier expiration or earlier termination of the Term.
- (4) At any time when an Engine is installed on an airframe or aircraft other than the Airframe or the Aircraft, the Lessee shall ensure and shall produce evidence to the Lessor that insurance cover is maintained in respect of such Engine in such form as the Lessor may reasonably require. For the avoidance of doubt, an Engine may only be so installed as permitted by clause 14.1(1)(a).

18. **REPLACEMENT OF PARTS: ALTERATIONS, MODIFICATIONS AND ADDITIONS**

18.1 **Replacement and Removal of Parts**

- (1) The Lessee, at its own cost and expense, shall promptly replace or procure the replacement of all Parts which, from time to time, may become worn out, lost, stolen, destroyed, seized, confiscated, damaged beyond repair or rendered unfit for use for any reason whatsoever.

- (2) In the ordinary course of maintenance, service, repair, overhaul or testing during the Term, the Lessee may at its own cost and expense cause to be removed or allow the removal of any Parts, whether or not worn out, destroyed, damaged beyond repair or rendered unfit for use, **Provided that the Lessee shall replace at its own cost and expense such Parts as promptly as practicable.**
- (3) All replacement Parts shall be free and clear of all Liens, shall be in at least the same modification status and Service Bulletin accomplishment status, shall be fully interchangeable as to form, fit and function, shall have been overhauled, repaired and inspected by an agency reasonably acceptable to the Manufacturer, the Engine Manufacturer and the GAA (as applicable) and shall be in as good operating condition as, and have a utility at least equal to and a value and remaining warranty reasonably approximating the Parts replaced (assuming such replaced parts were in the condition and repair in which they were required to be maintained by the terms hereof) and all historical records (dating back to the time of the manufacturer of such Part) relating to such Parts shall be provided and maintained by the Lessee.

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- (4) All Parts owned by the Lessor which are at any time removed from the Aircraft shall remain the property of the Lessor and subject to this Lease, no matter where located, until such time as such Parts shall be replaced by Parts which have been incorporated or installed in or attached to the Aircraft and which meet the requirements of replacement Parts specified in subclause (3). Immediately upon any replacement part becoming incorporated or installed in or attached to the Aircraft as above provided, (i) title to the removed part shall thereupon vest in the Lessee, free and clear of all rights of the Lessor and Lessor's Liens, (ii) title to such replacement part shall thereupon vest solely in the Lessor and (iii) such replacement part shall become subject to this Lease and be deemed a Part for all purposes hereof to the same extent as the Part which it has replaced.
- (5) Any Part removed from the Airframe or from any Engine as provided in this clause 20.1 may be subjected by the Lessee to normal pooling or interchange arrangements on terms reasonably satisfactory to the Lessor or the Lessor's Aircraft Manager **Provided that** the part replacing such removed Part shall be incorporated in or installed on or attached to such Airframe or Engine in accordance with clause 18.1(1) to (4) as promptly as practicable after the removal of such removed Part and in any event prior to the earlier of: (i) 36 hours after the removal the removed Part; and (ii) the expiration or earlier termination of the Term.

18.2 Alterations, Modifications and Additions

- (1) The Lessee, at its own expense, shall make or procure or allow the making of such alterations, modifications and additions to the Aircraft as may be required from time to time to meet the applicable standards of the GAA or to comply with any Law, rule, directive, bulletin, notice, regulation or order of any Governmental Entity or the manufacturer of the Aircraft, Engines or Parts.
- (2) The Lessee or any Permitted Sublessee, at its own expense, may from time to time make alterations and modification in and additions to the Aircraft **Provided that** no such alteration, modification or addition diminishes, in the Lessor's reasonable opinion, the remaining warranty, value, marketability or utility, or impairs the condition or airworthiness, of the Aircraft and that title to all Parts incorporated or installed in or attached or added to the Aircraft as a result of such alteration, modification or addition shall vest immediately in the Lessor and become subject to this Lease, without the necessity for any further act of transfer, document or notice.
- (3) In no event shall the Lessor bear any liability or cost for any alteration, modification or addition to, or for any grounding or suspension of operations or of the certification of, the Aircraft, or for any loss of revenue arising therefrom.
- (4) The Lessee or any Permitted Sublessee may, at its own cost and expense at any time during the Term, remove or cause to be removed any Part from the Airframe or an Engine if (i) such Part is in addition to, and not in replacement of or in substitution for, any Part originally incorporated or installed in or attach to such Airframe or Engine at the time of delivery thereof hereunder or any Part in replacement of, or in substitution for, any such original Part, and (ii) such Part can be removed from such Airframe or Engine without diminishing or impairing the value, condition, utility, marketability or airworthiness which such Airframe or Engine would have had at the time of removal had such alteration, modification or addition not been effected by the Lessee assuming the Aircraft was otherwise maintained in the condition required by this Lease. Upon the removal of any such Part, title thereto shall vest, without further act,

in the Lessee free and clear of all rights of the Lessor and such Part shall no longer be deemed a Part hereunder. Any Part not removed as above provided prior to the return of the Aircraft to the Lessor hereunder shall remain the property of the Lessor.

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20. MANUFACTURERS' WARRANTIES

- 20.1 So long as no Default has occurred and is continuing, the Lessor agrees to cause to be extended to the Lessee such rights as the Lessor may have under any warranty, express or implied, with respect to the Aircraft given by the Manufacturer, the Engine Manufacturer, the manufacturer of any Part to the extent that the same may be assigned or otherwise made available to the Lessee; **Provided, however, that upon an Event of Default, all such rights shall immediately revert to the Lessor to the exclusion of the Lessee including all claims thereunder whether or not perfected.**
- 20.2 The Lessee shall not do or omit to do anything (or permit or fail to prevent the doing or omission of anything) which, or the omission of which, prejudices any right which the Lessor may have against the Manufacturer, the Engine Manufacturer, or against the manufacturer or supplier of any part of the Aircraft or against any maintenance or repair facility in respect of the Aircraft or any part thereof.

PART 6: INSURANCES: CASUALTY OCCURRENCES

21. INSURANCE

21.1 Obligation to Insure

The Lessee shall through the intermediary of an Approved Insurance Broker cause there to be effected and maintained in full force and effect in respect of each Aircraft insurances with an Approved Insurance Broker covering the Indemnitees as their interests may appear, on a worldwide basis in accordance with prudent aviation practice for the operation of cargo aircraft against (i) loss or damage to such Aircraft and (ii) any liability for injury, damage or claims caused by or arising out of or in connection with the operation, storage, maintenance or use of such Aircraft (including injury to or death of passengers and damage to or destruction of public or private property). Each policy required to be taken out by this Schedule is herein called a "required policy".

21.2 Types of Insurance

The Lessee shall (without prejudice to the generality of clause 21.1 effect and maintain or cause there to be effected and maintained:

- (1) an All Risks Hull Insurance Policy on each Aircraft on an agreed value basis in an amount not less than its Casualty Value;
- (2) a War Risks Insurance Policy on each Aircraft covering all of those risks which are currently enumerated in Lloyds Form AVN 48B (War, Hi-jacking and Other Perils Exclusion paragraph (Aviation)) other than paragraph (b) thereof to the fullest extent possible and any additional risks which may hereafter be included therein or in any form succeeding to any of its functions on an agreed value basis in an amount not less than the Casualty Value Provided that, if the

Aircraft is not being operated for hire or reward at any time, the risks required to be covered under this paragraph shall be limited to those enumerated in Lloyds Form AVN48B, paragraphs (c), (e) and (g) only; and

- (3) Liability Insurance, being Aircraft Third Party Legal Liability, Passenger Legal Liability, Baggage Legal Liability Legal Liability (including war and allied perils to the fullest extent available) for a combined single limit of liability (bodily injury/property damage) of not less than \$350,000,000 any one accident or series of accidents.

21.3 Terms of Hull Insurance

- (1) The Lessee shall procure that each required policy specified in clauses 21.1 and 21.2 shall be endorsed to include paragraph 1 of Lloyds' Form AVN67B with the Lessor and the Financing Parties named as Contract Parties and:
 - (1) covers at least such risks as are customarily insured against in respect of aircraft of the same type as the Aircraft;
 - (2) provides that, subject to the terms of the Mortgage, any loss will be settled jointly with the Lessee and the Lessor and any claim which becomes payable on the basis of a Casualty Occurrence shall be paid in dollars to the Contract Parties in accordance with endorsement AVN67B it being agreed between the parties hereto that such payment shall be made to or to the order of the Financing Parties (or, if none, the Lessor) with any other claim being payable as may be necessary for the repair of the damage or replacement of the Engine or Part to which it relates; and
 - (3) has a deductible of no more than the lesser of (i) the Deductible Amount and (ii) the lowest deductible amount applying to any similar aircraft in the Lessee's fleet in respect of any one claim, payment of which shall in all cases be the responsibility of the Lessee and for which the Lessee shall indemnify and hold harmless the Lessor and the Financing Parties.
- (2) The Lessee shall procure that the insurance placement shall provide, in the form of Lloyds' AVS.103 that in the event of separate insurances being arranged to cover the "All Risk" hull insurance and the "War Risk" and related insurance, that the underwriters subscribing to such insurances agree to a 50/50 claims funding arrangement in the event of any dispute as to which insurance is applicable.

21.4 Terms of Liability Insurance

The Lessee shall procure that each insurance policy specified in clause 21.2(3) is endorsed to include paragraph 2 of Lloyds' Form AVN67B with the Indemnitees named as Contract Parties and covers at least such risks as are customarily insured against in respect of aircraft of the same type as the Aircraft;

21.5 Terms Applicable to all Insurances

- (1) The Lessee shall procure that each insurance policy specified in clause 21.2 shall be endorsed to include paragraph 3 of Lloyds Form AVN67B with, subject to clause 21.4, the Lessor and the Beneficiary named as Contract Parties in accordance with sound international practice (having regard to the type of aircraft or engines involved).

- (2) If any of the policies maintained by the Lessee to satisfy the requirements of this clause 21 contain annual or other periodic limits on the aggregate of claims allowable in respect of the Lessee's fleet of Aircraft:
 - (1) the remaining unused portion of each limit shall at all times be equal to the sum of (a) the amount of coverage required by this Lease in respect of the Aircraft, (b) the amount of coverage required by each other Related Lease and (c) in the case of insurance against loss or damage to the Aircraft, an amount equal to the product of 2 and the Insured value of such other of the aircraft in the Lessee's fleet with the highest insured value; and
 - (2) the Approved Insurance Broker shall undertake in the undertaking issued by it to advise the Lessor promptly upon the occurrence of a claim which would reduce the remaining used portion of such limit.

21.6 Renewal

The Lessee shall begin or shall or shall cause there to begin final negotiations for the renewal of each required policy in due time before its expiry. Confirmation of completion of renewal shall be provided by the Lessee to the Lessor and the Lessor's Aircraft Manager before such expiry.

21.7 Information etc

- (1) The Lessee shall furnish to the Lessor and the Lessor's Aircraft Manager:
 - (1) on the Delivery Date for each Aircraft and thereafter within seven (7) days after each renewal date of each policy a certificate or certificates (in the form, or substantially in the form, of Exhibit I) signed by the Approved Insurers or the Approved Insurance Broker providing evidence of insurance coverage pursuant to this Lease;
 - (2) on request, certified copies of all documents constituting, evidencing or regulating the terms of any required policy (or of relevant extracts therefrom);
 - (3) on request, evidence of payment by or at the direction of the Lessee of each sum payable under or in connection with any required policy; and
 - (4) on request, such evidence as the Lessor or the Lessor's Aircraft Manager may reasonably require of the Lessee's compliance with its obligations under this Lease.
- (2) The Lessee shall forthwith notify the Lessor of any event (including but not limited to a Casualty Occurrence) which will or may give rise to a claim under any required policy in excess of the Deductible Amount and shall not (without the prior written consent of the Lessor or the Lessor's Aircraft Manager) settle or permit the settlement of any claim arising under a required policy unless it arises under a direct damage policy and is for less than the Deductible Amount.
- (3) The Lessee shall, before the Delivery Date in respect of an Aircraft, at its own cost and expense, cause the Approved Insurance Broker or, if appropriate, the Approved Insurer to issue a written undertaking in favour of the Lessor and the

Financing Parties in respect of the Insurances in the form or substantially in the form of Exhibit J.

- (4) If at any time and from time to time, the Lessor shall identify a Financing Party to the Lessee, the Lessee shall cause to be delivered new insurance certificates and broker's undertakings to ensure that each such Financing Party is afforded the insurance coverage required under this Lease.

21.8 Negative Undertakings

- (1) The Lessee shall not knowingly do or omit to do or permit to be done or left undone anything whereby any required policy would or might reasonably be expected to be rendered in whole or in part invalid or unenforceable and, without prejudice to the foregoing, shall not operate or locate the Airframe or any Engine or suffer the Airframe or any Engine to be operated or located, (i) in any area or for carriage of any goods excluded from coverage by any insurance required by the terms of this clause, except in the case of requisition by any Governmental Entity where any Borrower obtains, or procures, an indemnity in lieu of such insurance from such Governmental Entity against the risks and in the amounts required by this clause in respect of such area or such carriage of any goods, or (ii) in any recognised or threatened area of hostilities unless fully covered by war risk insurance or unless the Airframe or Engine is operated or used under contract with any Governmental Entity under which contract such Governmental Entity assumes full liability for any damage, loss, destruction or failure to return possession of such Airframe or Engines at the end of the term of such contract and for injury to persons and damage to property of others, or (iii) in any place or in any manner or for any purpose inconsistent with the terms or outside the cover provided by any required policy.
- (2) The Lessee shall not knowingly effect or authorise the placement of insurance covering the same subject matter as that covered by the policies specified in clause 21.2(1) or (2) (except on a contingent or other secondary basis).

21.9 Failure to Insure

If the Lessee shall fail to maintain or cause there to be maintained insurance as herein provided, the Lessor may at its option, provide such insurance and in such event the Lessee shall, upon demand, reimburse the Lessor for the cost thereof. Notwithstanding such provision by the Lessor, the Lessor may in its absolute discretion require that the relevant Aircraft be grounded until the Lessee has arranged for the provision of insurance as herein provided. Such provision by the Lessor shall not affect the right of the Lessor to treat such failure by the Lessee as an Event of Default in respect of that Aircraft.

21.10 Review of Insurance Obligations

Without prejudice to the foregoing provisions of this clause, if at any time due to changes in aviation insurance market practice and custom, (i) the Lessee or any Permitted Sublessee is unable at any time to comply with its obligations under this clause, or (ii) the Lessor or the Lessor's Aircraft Manager is of the view, based on the advice of the insurance advisers of the Lessor (or the Lessor's Aircraft Manager) that the insurances required to be maintained pursuant to this clause afford less protection to the Indemnitees than is normally provided in relation to aircraft similar to the Aircraft in similar circumstances, the Lessee shall forthwith notify the Lessor (or, as the case may be, the Lessor (or the Lessor's Aircraft Manager) shall forthwith notify the Lessee) and as soon as practicable thereafter the Approved Insurance Broker and the insurance

advisers of the Lessor (or the Lessor's Aircraft Manager) shall meet in good faith to consider what (if any) changes might be made to the terms and conditions of the Insurances required hereunder in order to take account of the changes in aviation insurance market practice and custom. On the basis of the recommendations of the Approved Insurance Broker and such insurance advisers the Lessor's Aircraft Manager and the Lessee will meet as soon as practicable in order to negotiate in good faith with a view to reaching agreement on what (if any) amendments should be made to such provisions.

21.11 Application of Insurance Proceeds for a Casualty Occurrence

Subject to clause 21.13, insurance payments which arise from any policy of insurance carried by the Lessee or any Permitted Sublessee and received as the result of the occurrence of a Casualty Occurrence shall be applied as follows:

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- (1) if such payments are received with respect to a Casualty Occurrence relating to the Airframe and Engines or engines installed on the Airframe, so much of such payments as shall not exceed the amounts due under clause 24.1 shall be paid to the Lessor; and
- (2) if such payments are received with respect to a Casualty Occurrence relating to an Engine under circumstances contemplated by clause 22.2, such payment shall be adjusted with the Lessee (provided that the Lessee has not breached any warranty, declaration or condition contained in the applicable insurance policy) and paid over to the Lessee, **Provided that** the Lessee shall have fully performed or concurrently therewith, will fully perform the terms of clause 22.2.

21.12 Application of Insurance Proceeds for Other than a Casualty Occurrence

Insurance payments for any damage to the Airframe or any Engine not constituting a Casualty Occurrence, or to any Part, will be held by the Lessor until the Lessee furnishes the Lessor with satisfactory evidence that the repairs or replacement property the Lessee is required to perform or obtain in accordance with the terms of clause 17 have been made or obtained by the Lessee. Subject to clause 21.13 and upon receipt of such evidence of repair or replacement, the Lessor shall pay the Lessee the amount of the insurance payment received with respect to such loss.

21.13 Application on Default

Any amount referred to in clause 21.11(1) or (2) or clause 21.12 which is otherwise payable to the Lessee shall not be paid to the Lessee, or, if it has been previously paid to the Lessee and not yet applied by the Lessee as permitted or required hereunder, shall be repaid by the Lessee to the Lessor, if at the time of such payment, a Default or an Event of Default shall have occurred and be continuing. In either case, all such amounts shall be held by the Lessor as security for the obligations of the Lessee, or, at the option of the Lessor, applied by the Lessor toward payment of any of the Lessee's obligations at the time due hereunder.

22. CASUALTY OCCURRENCES

22.1 As soon as possible, but in no event later than twenty-four (24) hours after a Casualty Occurrence during the Term with respect to the Airframe and/or any Engine, the Lessee shall give the Lessor and the Lessor's Aircraft Manager written notice of such occurrence.

22.2 Casualty Occurrence with Respect to the Airframe

- (1) No later than seven (7) Business Days after receipt of insurance proceeds in respect of such Casualty Occurrence, the Lessee shall pay to Lessor the sum of (i) the Casualty Value of the Aircraft plus the amount of Lease Payments (other than Supplemental Lease Payments), if any, accrued up to the date of payment of such Casualty Value (on the basis of actual days elapsed and a 360-day year) for each day during the period commencing with, and including, the last preceding Lease Payment Date and extending to the date of payment of such Casualty Value and (ii) all Supplemental Lease Payments computed as of the date of payment **Provided that**, if the Casualty Value or any part thereof is received by the Lessor pursuant to the hull insurances in respect of the Aircraft:
 - (1) prior to the date that the Lessee is obliged to pay the above Casualty Value to the Lessor, the obligation of the Lessee to make payment under

this clause shall be reduced by the amount of the Casualty Value so received; or

- (2) after the date on which the Lessee has paid the Casualty Value to the Lessor, the Lessor shall reimburse the Lessee with the amount of the same following the discharge by the Lessee of its obligations in full to the Lessor under this clause;

Provided further that the provisions of the foregoing proviso shall be subject to clauses 6.7.

- (2) Upon such payment:
 - (1) the obligation of the Lessee to make further payments of Lease Payments (other than Supplemental Lease Payments) hereunder shall terminate;
 - (2) this Lease shall terminate with respect to the Aircraft;
 - (3) the Lessor will transfer to the Lessee, without recourse or warranty, all of the Lessor's right, title and interest, if any, in and to the Airframe and Engines (if any) suffering the Casualty Occurrence, as well as all of the Lessor's right, title and interest in and to any Engine constituting part of the Aircraft but not installed thereon at the time of the Casualty Occurrence; **Provided, however, that** there shall be excluded from such assignment any and all claims against any Persons which arose prior to the date of such assignment, including any and all claims against any Persons who may have been responsible, in whole or in part, for the events giving rise to such Casualty Occurrence, but such exclusion shall be limited to the portion of such claims which exceeds the amounts paid to Lessor in respect of such Casualty Occurrence by the Lessee or the insurers under any policy of insurance maintained by the Lessee pursuant to clause 21; and
 - (4) the Lessor shall, at the request and cost of the Lessee, take such reasonable further actions and execute such further documents and assurances as the Lessee may reasonably require in order to procure that the Lessee shall receive the proceeds of the hull insurances in respect of the Aircraft.

22.3 Casualty Occurrence with Respect to an Engine

Upon a Casualty Occurrence with respect to an Engine under circumstances in which there has not occurred a Casualty Occurrence with respect to the Airframe, the Lessee shall, within forty-five (45) days after such occurrence, convey to the Lessor, as replacement for the Engine suffering a Casualty Occurrence, title to a Replacement Engine. Each Replacement Engine shall be free of all Liens (except Lessor's Liens) and shall be in as good an operating condition and shall have a value and utility at least equal to, and shall have at least the number of cycles remaining on its life-limited parts as, the Engine being replaced, assuming the Engine being replaced was in the condition and repair required by the terms hereof immediately prior to the Casualty Occurrence, and shall be compatible with the remaining installed Engines. Upon full compliance by Lessee with the terms of this clause:

- (1) the Lessor will transfer to the Lessee title to the Engine which suffered the Casualty Occurrence; and

- (2) the provisions of clause 22.2 shall apply *mutatis mutandis* to the proceeds of the insurances relating to the Engine suffering the Casualty Occurrence as they apply to a Casualty Occurrence in respect of the Aircraft under such clause or, if the Lessor shall have received the proceeds of the insurances in relation to the Casualty Occurrence in respect of the Engine, pay to the Lessee the amount thereof.

Further, prior to or at the time of any transfer of the Engine the subject of the Casualty Occurrence, the Lessee, at its own expense, will promptly (i) furnish the Lessor with a full warranty bill of sale, in form and substance reasonably satisfactory to the Lessor, with respect to such Replacement Engine; (ii) cause a supplement hereto, in form and substance reasonably satisfactory to the Lessor, subjecting such Replacement Engine to this Lease, to be duly executed by the Lessee; (iii) furnish the Lessor with such evidence of title to such Replacement Engine and of compliance with the insurance provisions of clause 21 with respect to such Replacement Engine as the Lessor may reasonably request; (iv) furnish the Lessor with an opinion of the Lessee's counsel (which counsel shall be reasonably acceptable to the Lessor) to the reasonable satisfaction of the Lessor to the effect that title to such Replacement Engine has been duly conveyed to the Lessor, free and clear of all Liens, and that such Replacement Engine is duly leased hereunder; (v) furnish a certificate signed by a duly authorised financial officer or executive of the Lessee certifying that, upon completion of such replacement, no Default or Event of Default will exist and (vi) furnish the Lessor with such documents as the Lessor may reasonably request in connection with the completion of the transactions contemplated by this clause 22.2, in each case in form and substance reasonably satisfactory to the Lessor. Upon full compliance by the Lessee with the terms of this clause 22.2, the Lessor will transfer to the Lessee "AS IS", "WHERE IS" and without recourse or warranty, except as to the Lessor's title and the absence of Lessor's Liens, all of the right, title and interest in the Engine which suffered the Casualty Occurrence and which was originally leased to the Lessee. For all purposes hereof, each such Replacement Engine shall be deemed part of the property leased hereunder, shall be deemed an "Engine" as defined herein and shall be deemed part of the same Aircraft as was the Engine replaced thereof. No Casualty Occurrence covered by this clause 22.2 shall result in any reduction in Lease Payments.

22.4 Application of Proceeds and Payments

Any payments received at any time by the Lessor or by the Lessee from any insurer under any policy of insurance (other than liability insurance) or any other Person (other than an insurer under insurance maintained by the Lessor) shall be applied in the manner specified in the relevant provision of clause 21. Subject to clause 21.13, any payments received at any time by the Lessor or the Lessee from any Governmental Entity or other Person with respect to a Casualty Occurrence will be applied as follows:

- (1) subject to sub clause 21.5(2), so much of such payments as shall not exceed the sum of Lease Payments accrued but unpaid through the date of receipt of such payments plus the Casualty Value required to be paid by the Lessee pursuant to clause 22.2 shall be paid to the Lessor in reduction of the Lessee's obligation to pay such unpaid Lease Payments and Casualty Value if not already paid by the Lessee, or, if already paid by the Lessee shall be applied by the Lessor to reimburse the Lessee for its payment of such Casualty Value and the balance of such payment, if any, remaining thereafter (if such payment is received with respect to insurance other than liability insurance) shall be paid over to, or retained by, the Lessee, except to the extent any such amount is specifically allocable to an interest of the Lessor; or

- (2) if such payments are received as a result of a Casualty Occurrence with respect to an Engine which is being replaced pursuant to clause 22.3, unless a Default or Event of Default shall have occurred and be continuing, all such payments shall be paid over to, or retained by, the Lessee if the Lessee shall have fully performed or, concurrently therewith will fully perform, the terms of clause 22.3 with respect to the Casualty Occurrence for which such payments are made.

22.5 Requisition

- (1) If the Aircraft or any part thereof is requisitioned for hire during the Term by or under the order of any Government Entity, unless the Aircraft or the Airframe shall have suffered a Casualty Occurrence following such requisition and the Lessee shall have made payment of all sums due pursuant to clause 22.2, the leasing of the Aircraft to the Lessee under this Lease shall continue in full force and effect for the remainder of the Term and the Lessee shall, other than its obligation to pay Lease Payments which shall abate, remain fully responsible for the due compliance with all its obligations under this Lease save for obligations with which the Lessee is unable to comply by virtue of such requisition.
- (2) The Lessee shall as soon as practicable after the end of any requisition for hire, and whether that requisition shall end during or after the Term, cause the Aircraft or the relevant part thereof to be put into the condition required by this Lease.
- (3) The Lessee shall be entitled to receive any requisition hire or other compensation payable by the requisitioning authority as a result of a requisition for hire of the Aircraft or relevant part thereof and shall pay an amount equal to the abated Lease Payments.
- (4) If the Aircraft or the relevant part thereof is under requisition for hire at the end of the Term:
 - (1) the leasing of the Aircraft under this Lease shall nevertheless terminate at such end but without prejudice to the accrued rights of the parties and the Lessor shall be entitled to receive and retain any requisition hire or other compensation payable by the requisitioning authority in respect of the period after the end of the Term; and
 - (2) if the Lessee is prevented by reason of such requisition from redelivering the Aircraft or the relevant part thereof under clause 13, the Lessee's obligation to redeliver the Aircraft shall cease.

22.6 Application in Default

Any amount referred to in clause 21 or this clause which is otherwise payable to the Lessee shall not be paid to the Lessee, or, if it has been previously paid to the Lessee, and not yet applied by the Lessee as permitted or required hereunder, shall be delivered from the Lessee to the Lessor, if at the time of such payment a Default or an Event of Default shall have occurred and be continuing and all such amounts shall be held by the Lessor as security for the obligations of Lessee, or, at the option of the Lessor, applied by the Lessor toward payment of any of the Lessee's obligations at the time due hereunder.

PART 7: EVENTS OF DEFAULT AND REMEDIES

23. EVENTS OF DEFAULT

23.1 Any one or more of the following occurrences or events shall constitute an Event of Default:

- (1) The Lessee shall fail to make any payment of Lease Payments to the Lessor when due for ten (10) days, in full and in the manner and at the place required under this Lease;
- (2) The Lessee shall fail to obtain and maintain any insurance required under the provisions of clause 21 or shall operate the Aircraft outside of the scope of the insurance coverage maintained with respect to the Aircraft;
- (3) Any representation or warranty made by the Lessee herein or in any document or certificate furnished to the Lessor in connection with this Lease or pursuant thereto is incorrect or to the knowledge of Lessee becomes materially incorrect at any time thereafter in any material respect at the time made;
- (4) The Lessee shall fail timely to comply with its obligation under clause 11 to accept Delivery of the Aircraft;
- (5) The Lessee shall make or permit any unauthorised assignment or transfer of this Lease, or any interest therein, or of the right to possession of or operational control over the Aircraft, the Airframe, any Engine or any Part;
- (6) The Lessee shall fail to perform or observe any other covenant, condition or agreement to be performed or observed by it pursuant to this Lease and such failure shall continue for a period of ten (10) days after written notice thereof is given by the Lessor to the Lessee;
- (7) The occurrence of an Event of Default (as defined or by whatever name called therein) under any of the Related Leases or any Sublease save in the case of any charter or wet lease permitted under clause 14.1(e) where the Aircraft remains in the possession and operational control of the Lessee following such Event of Default;
- (8) The Lessee consents to the appointment of a receiver, administrative receiver, administrator, trustee or liquidator of itself or of a substantial part of its property, or the Lessee admits in writing its inability to pay its debts generally as they come due, or makes a general assignment for the benefit of creditors, or the Lessee files a voluntary petition in bankruptcy or a voluntary petition seeking reorganisation in a proceeding under any bankruptcy laws (as now or hereafter in effect), or an answer admitting the material allegations of a petition filed against the Lessee in any such proceeding, or the Lessee by voluntary petition, answer or consent seeks relief under the provisions of any bankruptcy or other similar law providing for the reorganisation or winding-up of corporations, or provides for an agreement, composition, extension or adjustment with its creditors;
- (9) An order, judgment or decree is entered by any court, with or without the consent of the Lessee, appointing a receiver, administrative receiver, administrator, trustee or liquidator for the Lessee or if all or any substantial part of its property, or all or any substantial part of the property of the Lessee is sequestered, and any such order, judgment or decree of appointment or

sequestration remains in effect, undismitted, unstayed or unvacated for a period of thirty (30) days after the date of entry thereof;

- (10) A petition against the Lessee in a proceeding under the bankruptcy, insolvency or other similar Laws (as now or hereafter in effect) is filed and is not withdrawn or dismissed within thirty (30) days thereafter, or if, under the provisions of any Law providing for reorganisation or winding-up of corporations which may apply to the Lessee, any court of competent jurisdiction assumes jurisdiction over, or custody or control of, the Lessee or of all or any substantial part of its property and such jurisdiction, custody or control remains in effect, unrelinquished, unstayed or untermiated for a period of thirty (30) days;
- (11) Attachments or other Liens shall be issued or entered against any substantial portion of the property of the Lessee and shall remain undischarged or unbonded for thirty (30) days except for security interests created in connection with monies borrowed or obligations agreed to by the Lessee in the ordinary course of its business;
- (12) The Lessee shall default in the payment of any obligation for the payment of borrowed money, for the deferred purchase price of property or for the payment for rent or hire under any lease of aircraft which has an aggregate principal amount of One Million Dollars (\$1,000,000) (or an equivalent amount in any currency other than Dollars) or more (determined in the case of borrowed money by the amount outstanding under the agreement pursuant to which such borrowed money was borrowed, in the case of a deferred purchase price by the remaining balance and in the case of a lease by the present discounted value of the remaining rent or hire payable thereunder (ignoring any fair market renewal) when the same becomes due if such non-payment results in the right of such holder to accelerate such indebtedness or any lessor shall have become entitled to require the payment of any termination, stipulated loss, liquidated damages or similar amount or to demand repossession of such property; or the Lessee shall default in the performance of any other term, agreement or condition contained in any material agreement or instrument under or by which any such obligation is created, evidenced or secured, if the effect of such default is to cause or allow such obligation to become due prior to its stated maturity;
- (13) The Lessee voluntarily suspends all or substantially all of its operations or the franchise, concessions, permits, licences, rights or privileges required for the conduct of the business and operations of the Lessee are revoked, cancelled or otherwise terminated;

(The remainder of this page left blank intentionally)

- (14) Any franchise, concession, permit, licence, consent, right, privilege or approval from any Governmental Entity necessary for the operation, maintenance, use, insurance or return of the Aircraft or for the payment of Lease Payments by the Lessee in Dollars as specified herein shall be suspended, terminated or cancelled, or the Lessee shall fail to obtain any such hereafter required for such operation, maintenance, use, insurance, return or payment;
 - (15) Any Person declares a moratorium in respect of the payment of any indebtedness or obligations of the Lessee or any Permitted Sublessee (other than a Permitted Sublessee to whom the Aircraft is on charter or wet lease pursuant to clause 14.1(1)(e);
 - (16) There is any material adverse change since the date hereof in the condition of the Lessee, financial or other, which may adversely affect the ability of the Lessee to perform its obligations hereunder;
 - (17) This Lease or any other of the Operative Documents ceases to be a legal, valid and binding obligation of the Lessee, in whole or in part, enforceable against the Lessee in accordance with its terms; or
 - (18) The Lessee (or any Permitted Sublessee) repudiates its obligations under this Lease or any party repudiates its obligations under any other of the Operative Documents;
- 23.2 The Lessee hereby acknowledges that the occurrence of any one of the foregoing Events of Default would represent a fundamental breach of a condition of this Lease in the performance of its obligations under this Lease which entitles the Lessor to exercise any or all remedies provided for in Clause 24 and/or at common law.
24. REMEDIES
- 24.1 Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, the Lessor may, at its option declare this Lease to be in default. Once this Lease has been declared to be in default, and at any time thereafter, the Lessor shall be entitled automatically, as of the day prior to such occurrence, to exercise any of the following remedies as the Lessor in its sole discretion shall elect, to the extent permitted by applicable law then in effect:
- (1) Require that the Lessee, and the Lessee shall upon the written request of the Lessor and at the Lessee's expense, immediately return the Aircraft to Lessor in the manner specified in such notice, in which event such return shall not be delayed for purposes of complying with the return conditions specified in clause 15 (none of which conditions shall be deemed to affect the Lessor's possession of the Aircraft) or be delayed for any other reason. In addition, the Lessor, at its option and to the extent permitted by applicable Law, may enter upon the premises where all or any part of the Aircraft is located and take immediate possession of and, at the Lessor's sole option, remove the same (and any engine which is not an Engine but which is installed on the Airframe, subject to the rights of the owner, lessor or secured party thereof) by summary proceedings or otherwise;
 - (2) Sell at private or public sale, as the Lessor may determine, or hold, use, operate or lease to others the Aircraft as the Lessor in its sole discretion may determine, all free and clear of any rights to the Lessee;

- (3) Proceed by appropriate court action or actions, either at law or in equity, to enforce the performance by the Lessee of the applicable covenants of this Lease and to recover damages for the breach thereof and/or for any loss suffered by the Lessor or the Beneficiary by reason of the return of the Aircraft to the Lessor otherwise than on the Anticipated Lease Termination Date and/or to rescind this Lease; and/or
- (4) Terminate this Lease by written notice (which notice shall be effective upon dispatch) and repossess the Aircraft.

24.2 [INTENTIONALLY LEFT BLANK]

24.3 In effecting any repossession of the Aircraft, the Lessor and its representatives and agents, to the extent permitted by Law, shall:

- (1) have the right to enter upon any premises which it reasonably believes the Aircraft, the Airframe, an Engine or Part to be located;
- (2) not be liable, in conversion or otherwise, for the taking of any personal property of the Lessee which is in or attached to the Aircraft, the Airframe, an Engine or Part which is repossessed; **Provided, however, that the Lessor shall return to the Lessee all personal property of the Lessee or its passengers or consignors which was on the Aircraft at the time the Lessor re-takes possession of the Aircraft;**
- (3) not be liable or responsible, in any manner, for any inadvertent damage or injury to any of the Lessee's property in repossessing and holding Aircraft, the Airframe, an Engine or Part, except for that caused by or in connection with the Lessor's gross negligence or willful misconduct;
- (4) have the right to maintain possession of and dispose of the Aircraft, the Airframe, an Engine or Part on any premises owned by the Lessee or under the Lessee's control; and
- (5) have the right to obtain a key to any premises at which the Aircraft, the Airframe, an Engine or Part, may be located from the landlord or owner thereof.

24.4 If required by the Lessor, the Lessee, at its sole expense, shall assemble and make the Aircraft, the Airframe, an Engine or Part available at a place designated by the Lessor in accordance with clause 13. The Lessee hereby agrees that, in the event of the return to or repossession by the Lessor of the Aircraft, the Airframe, an Engine or Part, any rights in any warranty (express or implied) heretofore assigned to the Lessee or otherwise held by the Lessee shall without further act, notice or writing be assigned or reassigned to the Lessor, if assignable. The Lessee shall be liable to the Lessor for all expenses, disbursements, costs and fees incurred (i) in repossessing, storing, preserving, shipping, maintaining, repairing and refurbishing the Aircraft, the Airframe, an Engine or Part to the condition required by clause 13 and (ii) in the event of a repossession of the Aircraft by the Lessor following an Event of Default, in preparing the Aircraft, the Airframe, an Engine or Part for sale or lease, advertising the sale or lease of the Aircraft, the Airframe, an Engine or Part and selling or re-leasing the Aircraft, the Airframe, an Engine or Part. The Lessor is hereby authorised and instructed, at its option, to make reasonable expenditures which the Lessor considers advisable to repair and restore the Aircraft, the Airframe, an Engine or Part to the condition required by clause 13, all at the Lessee's sole expense.

- 24.5 No remedy referred to in this clause 24 is intended to be exclusive, but, to the extent permissible hereunder or under applicable Law, each shall be cumulative and in addition to any other remedy referred to or otherwise available to the Lessor at Law or in equity; and the exercise or beginning of exercise by the Lessor of any one or more of such remedies shall not preclude the simultaneous or later exercise by the Lessor or any or all of such other remedies. No express or implied waiver by the Lessor of any Default or Event of Default shall in any way be, or be construed to be, a waiver of any subsequent Default or Event of Default.

PART 8: FINAL PROVISIONS

25. ALIENATION

25.1 By the Lessor

- (1) The Lessor shall have the right at its sole cost and expense to assign, novate, sell, transfer or encumber any interest of the Lessor in the Aircraft or this Lease and/or the proceeds hereof subject to the rights of the Lessee under the provisions of this Lease.
- (2) Should the Lessor merge or consolidate its business or undertaking or that part thereof of which the leasing of the Aircraft forms a part with any other Person, the rights and obligations of the Lessor hereunder shall, without further act be deemed transferred to and the obligations and liabilities of the Lessee hereunder shall be owed to such Person.
- (3) To give effect to or facilitate any such assignment, novation, sale, transfer or encumbrance, merger or consolidation, the Lessee agrees promptly to provide, at the Lessor's sole cost and expense and upon payment of the Lessee's reasonable costs and expenses, such agreements, consents, conveyances or documents as may be reasonably requested by the Lessor. in connection therewith. The agreements, covenants, obligations, and liabilities contained herein including all obligations to pay rent and indemnify each Indemnitee are made for the benefit of each Indemnitee and their respective successors and assigns.

Provided that, not as a condition precedent to the same but so as to qualify the future obligations of the Lessee, following any such assignment, novation, sale, transfer, encumbrance, merger or consolidation, the obligations of the Lessee hereunder shall not exceed or be of a different kind than those which they would have been had the same not taken place.

25.2 By the Lessee

The Lessee shall not assign, transfer or otherwise dispose of or create any Lien in or over its rights and/or obligations under this Lease without the prior consent of the Lessor.

26. SEVERABILITY

Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof; any such

prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. To the extent permitted by Law, the Lessee and/or Lessor hereby waives any provisions of Law which renders any provisions hereof prohibited or unenforceable in any respect.

27. NOTICES

27.1 All reports, notices, requests, demands or other communications to or upon the parties hereto under this Lease shall:

- (1) be in the English language and in writing;
- (2) be deemed to have been duly served on, given to or made in relation to a party if it is:
 - (1) left at the address of that party specified in clause 27.2 or at such other address as that party may notify to the other party from time to time; or
 - (2) posted by first class airmail postage prepaid in an envelope addressed to that party at that address; or
 - (3) sent by facsimile to the facsimile number of that party specified in clause 27.2 or to such other number as that party may notify the other party from time to time;
- (3) be signed on behalf of the party giving, serving or making the same by any attorney, director, secretary, partner, agent or other duly authorised representative of such party; and
- (4) be effective:
 - (1) in the case of a letter, when left at the address referred to above or three (3) days after being deposited in the post as above mentioned, as the case may be; or
 - (2) in the case of a facsimile transmission, when receipt is confirmed by return facsimile or by telephone or on actual receipt if not so confirmed.

27.2 For the purposes of this Lease, all reports, notices, requests, demands or other communications shall be given or made by being addressed as follows:

- (1) if to the Lessor to:

Wells Fargo Bank Northwest, National Association
299 South Main Street, 5th Floor
MAC: U1228-051
Salt Lake City, Utah, 84111
Attention: Corporate Trust Services
Fax: +1 801 246-7142
Email: ctsleasegroup@wellsfargo.com

- (2) if to the Lessee to:

Zetta Jet Pte Ltd

700 West Camp Road,
#04-10 JTC Aviation One,
Singapore, 797649
Attention: Mr. Geoffery Cassidy
Phone : +65 6483 8870
Email : gcassidy@zettajet.com

(3) if to the Beneficiary to:

Glove Assets Investment Limited
[REDACTED], Min Hang District, Shanghai, PRC 201107
Attention: Mr. Li Qi
Email: [REDACTED]

28. THE LESSOR'S RIGHT TO PERFORM FOR THE LESSEE

If the Lessee fails to make any payment required to be made by it hereunder or fails to perform or comply with any of the covenants, agreements or obligations contained herein, the Lessor shall have the right, but not the obligation, to make such payment or conform or comply with such agreement, covenant or obligation, and the amount of such payment and the amount of the reasonable expenses of the Lessor incurred in connection with such payment or the performance thereof or compliance therewith, together with interest thereon at the Interest Rate, shall be payable by the Lessee to the Lessor (as Supplemental Lease Payments) upon demand. The Lessor agrees to notify the Lessee in writing prior to making any payment under this clause 28, unless the Aircraft will be in danger of loss, sale, confiscation, forfeiture or seizure should such payment not be made. The taking of any such action by the Lessor shall not constitute a waiver or release of any obligation of the Lessee under the Lease, nor a waiver of any Event of Default which may arise out of the Lessee's non-performance of such obligation, nor an election or waiver by the Lessor of any remedy or right available to the Lessor under or in relation to this Lease.

29. COUNTERPARTS

This Lease may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

30. BROKERS

The Lessee hereby represents and warrants that it has not paid, agreed to pay or caused to be paid directly or indirectly in any form, any commission, percentage, contingent fee, brokerage or other similar payments of any kind, in connection with the establishment or operation of this Lease, to any employee of the Lessor or to any other Person except to Excluded Persons. For the purposes hereof, the term "Excluded Persons" shall mean (i) in the case of the Lessor, any of its officers, directors, employees, attorneys or the professional advisors, wherever located and (ii) in the case of the Lessee, any of its officers, directors, employees, attorneys or other professional advisors, wherever located.

31. [INTENTIONALLY LEFT BLANK]

32. ENTIRE AGREEMENT; MODIFICATION OR REVISION

This Lease is intended to be a complete and exclusive statement of the terms of the agreement of the parties hereto and this Lease supersedes any prior or contemporaneous agreements, whether oral or in writing in relation to the leasing of the Aircraft to the Lessee. Neither this Lease nor any term of this Lease may be modified or waived except by in writing signed by the parties.

33. CONFIDENTIALITY

Each of the Lessee and the Lessor agree to and shall keep confidential this Lease and the terms hereof, all Aircraft Documents and other data or materials relating to the Aircraft supplied to the Lessee by the Lessor, or at the request of the Lessor, hereunder and will not disclose, transfer or otherwise impart any such information to any other Person, except (i) as may be required by Law or pursuant to any litigation; (ii) to its Affiliates, permitted assignees, officers, executives, employees, or agents; (iii) to its financial, accounting or legal advisors who are under a duty to or agree to hold such information confidential; (iv) with respect to any information which is generally available to the public at the time of disclosure; and (v) the Lessor may disclose the terms of this Lease in connection with any Financing.

34. GOVERNING LAW: JURISDICTION

34.1 Singapore Law

This Lease shall be governed by and construed in accordance with the laws of Singapore.

34.2 Singapore Courts

Each of the parties irrevocably agrees for the exclusive benefit of the other that the courts of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with this Lease (respectively "Proceedings" and "Disputes") and, for such purposes, irrevocably submits to the non-exclusive jurisdiction of such courts.

34.3 Appropriate Forum

Each of the parties irrevocably waives any objection which it might now or hereafter have to the courts referred to in clause 34.2 being nominated as the forum to hear and determine any Proceedings and to settle any Dispute and agrees not to claim that any such court is not a convenient or appropriate forum.

34.4 [INTENTIONALLY LEFT BLANK]

34.5 Non-exclusive Submissions

The submission to the jurisdiction of the courts referred to in clause 34.2 shall not, and shall not be construed so as to, limit the right of either party to take proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not, if and to the extent permitted by applicable Law.

34.6 Consent to Enforcement

Each party consents generally in respect of any Proceedings to the giving of any relief or the issue of any process in connection with such Proceedings including the making, enforcement or execution against any property whatsoever, irrespective of its use or intended use, of any order or judgment which may be made or given in such Proceedings.

34.7 Waiver of Immunity

To the extent that any party may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid of execution before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed), that party hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the full extent permitted by the Laws of such jurisdiction.

35. TRUSTEE

(1) Except as expressly provided in this Lease, the Lessee acknowledges that this Lease is executed by Wells Fargo Bank Northwest, National Association, not in its individual capacity, but solely as Owner Trustee, except as otherwise expressly provided herein, under the Trust Agreement with the Beneficiary as grantor, in the exercise of the power and authority conferred and vested in it as such Trustee, that this Lease is intended to bind only the Trust Estate (as defined in the Trust Agreement) and that nothing herein contained shall be construed as creating any liability on Wells Fargo Bank Northwest, National Association, individually or personally, to perform any agreement herein, all such liability, if any, being expressly waived by Lessee and by each and every person now or hereafter claiming by, through or under the holder, except with respect to the gross negligence or willful misconduct of Wells Fargo Bank Northwest, National Association. In acting hereunder Wells Fargo Bank Northwest, National Association is entitled to rely upon any and all protections, limitations, and indemnities contained in the trust agreement.

(2) If Wells Fargo Bank Northwest, National Association shall cease to be a "citizen of the United States" within the meaning of 49 U.S.C. §40102 and the rules and regulations of the FAA thereunder, Wells Fargo Bank Northwest, National Association, in its individual capacity, agrees to give the Lessee and

rules and regulations of the FAA thereunder, Wells Fargo Bank Northwest, National Association, in its individual capacity, agrees to give the Lessee and the Beneficiary prompt notice thereof, upon an officer of Wells Fargo Bank Northwest, National Association becoming aware thereof, and agrees to cooperate with the efforts of Beneficiary promptly to replace it as trustee of the trust owning the Aircraft and as Lessor hereunder with a person who is such a "citizen of the United States".

36. TRUTH IN LEASING

- (1) THE LESSOR AND THE LESSEE AGREE THAT THE LESSEE SHALL BE SOLELY RESPONSIBLE FOR OPERATIONAL CONTROL OF THE AIRCRAFT UNDER THIS LEASE AND SO ACKNOWLEDGES BY ITS SIGNATURE THEREON. THE LESSEE HEREBY CERTIFIES THAT IT UNDERSTANDS ITS RESPONSIBILITIES FOR COMPLIANCE WITH APPLICABLE FEDERAL AVIATION REGULATIONS; PROVIDED HOWEVER, THAT THE LESSEE SHALL NOT BE DEEMED TO BE RESPONSIBLE FOR THE OPERATIONAL CONTROL OF THE AIRCRAFT FOR SO LONG AS THE AIRCRAFT IS IN THE POSSESSION OF ANY PERMITTED SUBLESSEE OF THE LESSEE UNDER A SUBLEASE PURSUANT TO WHICH SUCH PERMITTED SUBLESSEE ASSUMES OPERATIONAL CONTROL UNDER A SUBLEASE WHICH HAS A PROVISION COMPARABLE TO THE PROVISIONS OF THIS CLAUSE 38.
- (2) AN EXPLANATION OF FACTORS BEARING ON OPERATIONAL CONTROL OF THE AIRCRAFT AND PERTINENT FEDERAL AVIATION REGULATIONS CAN BE OBTAINED FROM THE FAA FLIGHTS STANDARDS DISTRICT OFFICE.

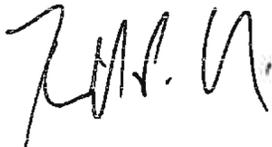
IN WITNESS whereof, the Lessor and the Lessee, each pursuant to due authority, have each caused this Aircraft Lease Agreement to be executed by their duly authorised officers on the day and year first above written.

LESSOR:

SIGNED by **Lane Molen**)
Assistant Vice President)
for and on behalf of)
WELLS FARGO BANK NORTHWEST,)
NATIONAL ASSOCIATION)
not in its individual capacity but solely)
as trustee, except as otherwise)
expressly provided herein])
in the presence of:)



Name: **Kenneth P. Childs**
Title: **Assistant Vice President**
Address: **Wells Fargo Bank Northwest, N.A.**
Occupation: **Corporate Trust Lease Group**
Executed at: **MAC U1228-051**
299 S. Main Street, 5th Floor
Salt Lake City, Utah 84111



LESSEE:

SIGNED by
Geoffrey Cassidy
for and on behalf of
ZETTA JET PTE LTD
in the presence of:

)
)
)
)
)



EXECUTIVE DIRECTOR

K
Name: KULVINDER KAUR
Title: ADVOCATE & SOLICITOR
Address: SINGAPORE
Occupation: **SALEM IBRAHIM LLC**
Executed at: Advocates & Solicitors | Notaries Public | Commissioners for Oaths
79 Robinson Road #16-08
CPF Building
Singapore 068897
Tel: 6226 1233 Fax: 6226 0888

BENEFICIARY:

SIGNED for and on behalf of
GLOVE ASSETS
INVESTMENT LIMITED
by Li Qi
in the presence of:

)
)
)
)
)
)

For and on behalf of
Glove Assets Investment Limited
[Handwritten Signature]
.....
Authorised Signature(s)



Name:
Title:
Address:
Occupation:
Executed at:

EXHIBIT A

FORM OF LEASE SUPPLEMENT

**[SEE SEPARATE DOCUMENT CALLED SUPPLEMENTAL NO 1 AIRCRAFT FINANCE LEASE
PURCHASE OPTION AGREEMENT TO BE ATTACHED HERE WHEN SETTLED]**

EXHIBIT B

DATED 31st **DECEMBER 2015**

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
(not in its individual capacity but solely as owner trustee,
except as otherwise expressly provided herein)
as Lessor

and

ZETTA JET PTE LTD
as Lessee

and

UNIVERSAL LEADER INVESTMENT LIMITED
as Beneficiary

MASTER AIRCRAFT FINANCE LEASE AGREEMENT
relating to
Bombardier Global 6000 Aircraft

SALEM IBRAHIM LLC, Singapore

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- EXHIBIT A: FORM OF LEASE SUPPLEMENT
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- EXHIBIT K: [LEFT BLANK]
EXHIBIT L: FORM OF DE-REGISTRATION POWER OF ATTORNEY
EXHIBIT M: [LEFT BLANK]

This Master Aircraft Finance Lease Agreement is made this [3rd] day of December 2015.

BETWEEN:

- (1) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as trustee, except as otherwise expressly provided herein, with its principal place of business at 299 South Main Street, 5th Floor, MAC: U1228-051, Salt Lake City, Utah, 84111 and its successors and assigns hereunder (in its capacity as trustee the "Lessor"; and in its individual capacity **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**); and
- (2) **ZETTA JET PTE LTD**, a company incorporated in Singapore with company number 20152901OW and having its registered office at 700 West Camp Road, #04-10 JTC Aviation One, Singapore, 797649 (the "Lessee"); and
- (3) **UNIVERSAL LEADER INVESTMENT LIMITED**, company number 1836404 incorporated under the laws of the British Virgin Islands having its registered office at Woodbourne Hall, Road Town, Tortola, British Virgin Islands (the "**Beneficiary**").

WHEREAS:

- (A) The parties have previously entered into a Aircraft Operating Lease Agreement dated 16th August 2015 ("Old Lease Agreement") in relation to the leasing arrangement of Aircraft (as described in Lease Supplement No.1). The Parties now wish to terminate the Old Lease Agreement and enter into this Aircraft Lease Agreement whereby the Lessee will accept lease from the Lessor and the Lessor will lease to the Lessee the Aircraft (as described in Lease Supplement No. 1) upon and subject to the terms and conditions of this Lease; and
- (B) The Lessor and the Lessee wish to provide for the leasing of further Aircraft by the Lessor to the Lessee pursuant to one or more additional Lease Supplements upon and subject to the terms and conditions of this Lease.

NOW IT IS HEREBY AGREED as follows:

PART 1: INTERPRETATION

1. **DEFINITIONS AND CONSTRUCTION**

1.1 **Definitions**

In this Lease, except as otherwise provided or unless the context otherwise requires the following terms shall have the following meanings:

"**Acceptance Certificate**" means a certificate in the form of Exhibit D to be completed by the Lessee and the Lessor pursuant to clause 11.4;

"**Affiliate**" means, with respect to any Person, any other Person directly or indirectly controlling, controlled by or under common control of such Person including any partnership of which such Person or any such other Person is a general partner or

managing agent and any trust of which any Beneficiary is such Person or any such other Person;

"Aircraft" means each Airframe described in a Lease Supplement together with (a) the Engines and APU so described relating to that Airframe, whether or not installed on that Airframe, (b) any and all spare parts, ancillary equipment and devices furnished with that Airframe, those Engines and APU, (c) all Aircraft Documents relating to such Airframe, Engines, APU and parts, ancillary equipment and devices and (d) all substitutions, replacements and renewals of any and all thereof made pursuant to the terms of this Lease title to which is vested in the Lessor;

"Aircraft Documents" means all historical records relating to an Aircraft, and the operation, maintenance and modification thereof, including the items identified in Exhibit B and/or in the relevant Lease Supplement, together with all acquisition documents, manuals, data, overhaul records, original work sheets, life limited Parts tracing records, log books, serviceable Parts tags, Parts Manufacturing Approvals, modification records, inspection reports and other records required to be maintained by Lessee pursuant to the terms of this Lease;

"Aircraft Lease Agreement" means this agreement and has the same meaning as Master Aircraft Finance Lease Agreement;

"Airframe" means (a) each airframe described in a Lease Supplement in the Configuration so described, but not including any Engine or engine installed thereon and (b) any and all Parts so long as the same shall be incorporated or installed on or attached to such Airframe, or any and all Parts removed therefrom so long as title thereto shall remain vested in the Lessor after removal from such Airframe;

"Approved Insurance Broker" means FEIC (Asia) Ltd. or any reputable insurance broker, or reinsurance broker, of internationally recognized responsibility and standing in aircraft insurance or re-insurance, as the case may be, acceptable to the Lessor, such acceptance not to be unreasonably withheld;

"Approved Insurer" means an insurer selected by FEIC (Asia) Ltd. or a reputable insurer or reinsurer of internationally recognized responsibility and standing in aircraft insurances or re-insurances, as the case may be, acceptable to the Lessor, such acceptance not to be unreasonably withheld;

"APU" means, in relation to an Airframe, the auxiliary power unit described in the applicable Lease Supplement or any replacement therefor pursuant to clause 20, installed in the Airframe;

"Assignment" means an assignment by the Lessee in favour of the Lessor (including the acknowledgment and agreement relating thereto given by the Permitted Sublessee thereunder), substantially in the form of Exhibit M or such other form reasonably satisfactory to the Lessor;

"Lease Payment" in respect of an Aircraft shall have the meaning set forth in the applicable Lease Supplement;

"Lease Payment Date" means each date on which Lease Payment is to be paid in accordance with the applicable Lease Supplement;

"Beneficiary" means Universal Leader Investment Limited;

"Business Day" means a day on which banking institutions in New York, New York, the United States of America and London, the United Kingdom are open for the transaction of business of a kind required by this Lease;

"Casualty Occurrence" means in relation to an Airframe or any Engine whether or not installed on the an Airframe (except for an Engine that has been replaced by a Replacement Engine) and such Parts as shall not from time to time be installed on or attached to the Airframe or any Engine:

- (i) an actual or constructive or compromised or agreed or arranged total loss thereof including any such total loss declared by the Approved Insurer following a requisition for hire; or
- (ii) requisition for title, forfeiture, condemnation, confiscation, appropriation or any compulsory acquisition whatsoever thereof by any Governmental Entity or by any Person having the authority of the same not being a requisition for hire; or
- (iii) the hi-jacking, theft or seizure of any or all of the Airframe, Engine or Parts which shall have resulted in the loss of possession thereof by the Lessee for sixty (60) consecutive days or, in any event, extending beyond the Term; or
- (iv) its destruction, damage beyond repair or being rendered permanently unfit for normal use for any reason whatsoever; or
- (v) the disappearance of the Aircraft or its not having been heard of for thirty (30) consecutive days or, in any event, extending beyond the Term;

"Casualty Value" means, in relation to an Aircraft, the value set forth in the applicable Lease Supplement;

"Claims" shall have the meaning ascribed thereto in clause 7.7;

"Closing Documents" means each of the documents listed in Exhibit G;

"Country of Organisation" means Singapore;

"Country of Registration" means, in relation to an Aircraft, the country identified as such in the applicable Lease Supplement;

"Deductible Amount" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Default" means an event or condition which is, or with the lapse of time, the giving of notice, the making of any determination or the fulfilment of any condition would constitute an Event of Default;

"Delivery" means the delivery of the Aircraft to and the acceptance of the Aircraft by the Lessee for the purposes of this Lease;

"Delivery Condition" means the condition of an Aircraft set out in Exhibit C or the relevant Lease Supplement, as the case may be;

"Delivery Date" means in relation to an Aircraft, the date on which Delivery of that Aircraft occurs;

"Delivery Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Dollars" and **"\$"** means the lawful currency of the United States of America from time to time;

"Engine" means each of the engines installed on or furnished with an Aircraft on the Delivery Date identified in the applicable Lease Supplement and any Replacement Engine therefor together in each case with any and all Parts incorporated or installed on or attached thereto or any and all Parts removed therefrom so long as title thereto remains vested in the Lessor after removal from such Engine **Provided that** at such time as a Replacement Engine shall be substituted for an Engine, such substituted Engine shall cease to be an Engine hereunder;

"Engine Manufacturer" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Estimated Delivery Date" means the date specified in the applicable Lease Supplement which the parties anticipate will be the Delivery Date;

"Event of Default" means any event specified in clause 23;

"FAA" means the Federal Aviation Administration of the Department of Transportation and the National Transportation Safety Board of the United States Department of Transportation or any such body or bodies that shall replace the same from time to time;

"Final Delivery Date" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Financing" means any financing arrangement to which the Lessor is a party secured by an interest in the Aircraft, any Engine, any Parts or this Lease;

"Flight Hour" means each hour or part thereof, measured to two decimal places, elapsing from the moment the wheels of the Aircraft first leave the ground on take-off to the moment when the wheels of the Aircraft first thereafter touch the ground on landing;

"Force Majeure" means acts of God or the public enemy, civil war, insurrection or riot, fire, flood, explosion, earthquake, accident, epidemic, quarantine restrictions, Law, governmental priority, allocation, regulation or order affecting materials, facilities or any part of the Aircraft, strike or labour dispute causing cessation, slowdown or interruption of work, or the inability after due and timely diligence to procure equipment, data and materials from suppliers or any other cause beyond the control of the Lessor including any failure by Bombardier to deliver the Aircraft in the Configuration to the Lessor by the Estimated Delivery Date;

"GAA" means the FAA so long as the Aircraft is registered in the United States of America and otherwise each governmental airworthiness or regulatory authority in the jurisdiction of such other Country of Registration having authority with respect to aircraft that is comparable to the authority of the FAA with respect to aircraft on the United States of America registry;

"Governmental Entity" means and includes (a) the GAA; (b) any national government, or political subdivision thereof or local jurisdiction therein; (c) any board, commission, department, division, organ, instrumentality, court, or agency of any entity

described in (b) above, however constituted; and (d) any joint authority, association, organisation, or institution of which any entity described in (b) or (c) above is a member or to whose jurisdiction any such entity is subject or in whose activities any such entity is a participant but only (except for purposes of defining Law below) to the extent that any of the preceding have jurisdiction over the Aircraft or its operations;

"Indemnitee" means the Lessor, the Lessor's Aircraft Manager, the Beneficiary, their shareholders, partner unit holders and beneficiaries, any partner unit holders or beneficiaries of a successor or assignee of an Indemnitee, any Affiliate of an Indemnitee and any transferee of an Indemnitee with respect to any interest in the Aircraft, or any part thereof and their respective officers, directors, shareholders, agents, employees, attorneys and successors and assigns;

"Interest Rate" means 5.25% per annum;

"Law" means and includes (a) any statute, decree, constitution, regulation, order, judgment or other directive of any Governmental Entity; (b) any treaty, pact, compact or other agreement to which any Governmental Entity is a party; (c) any judicial or administrative interpretation or application of any Law described in (a) or (b) above; and (d) any amendment or revision of any Law described in (a), (b) or (c) above.

"Lease" in relation to an Aircraft, means this Aircraft Lease Agreement, together with, and as amended in relation to that Aircraft by, the applicable Lease Supplement and any and all amendments, revisions, supplements and modifications hereto and thereto;

"Lease Identification" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Lease Supplement" means a supplement to this Lease, in the form of Exhibit A or such other form as shall be agreed between the Lessor and the Lessee, entered into between the Lessor and the Lessee in relation to the leasing of a particular Aircraft by the Lessor to the Lessee on the terms of this Lease;

"Lessor's Aircraft Manager" means the person identified as such in the applicable Lease Supplement and its replacements in such function, designated by the Lessor from time to time;

"Lessor's Liens" means Liens arising as a result of (a) claims against the Lessor not related to the transactions contemplated by this Lease, (b) acts of the Lessor, the Beneficiary or the Lessor's Aircraft Manager not contemplated and expressly permitted under this Lease, (c) any Lien created by or pursuant to a Financing by the Lessor or the Beneficiary, (d) Taxes imposed against the Lessor that are not required to be indemnified against by the Lessee pursuant to clause 7.7 and (e) claims against the Lessor arising out of the voluntary transfer by the Lessor of all or any part of its interests in the Aircraft or this Lease, other than a transfer pursuant to clauses 22 or 24;

"Lien" means any mortgage, pledge, lien, charge, encumbrance, hypothecation, lease, statutory or other rights in rem, assignment or exercise of rights, security interest or claim, or other type of preferential arrangement, trust or title retention or any other encumbrance of any kind securing any obligation of any Person including any equivalent matter created or arising under the Laws of the Country of Organisation or Country of Registration or any subdivisions thereof;

"Maintenance Contractor" means any maintenance contractor duly certified by the GAA to maintain aircraft of the same type as the Aircraft and chosen by the Lessee and approved in writing by the Lessor, such approval not to be unreasonably withheld or delayed;

"Maintenance Programme" means a maintenance programme for the Aircraft complying with all requirements of the FAA and GAA (including those relating to corrosion prevention and ageing aircraft) selected by the Lessee and approved in writing by the Lessor, such approval not to be unreasonably withheld or delayed;

"Manufacturer" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Master Aircraft Finance Lease Agreement" means Aircraft Lease Agreement;¹

"msn" means manufacturer's serial number;

"OEM" means original equipment manufacturer;

"Operative Documents" means this Lease and the other Operative Documents, if any, identified in the relevant Lease Supplement;

"Part 135" means part 135 of title 14 of the United States Code of Federal Regulations, as amended or modified from time to time;

"Parts" means all appliances, avionics, components, parts, instruments, appurtenances, accessories, furnishings, seats, galleys, galley equipment, serving equipment, lavatories, cargo handling equipment, safety equipment and other equipment of whatever nature (other than complete Engines or engines), which may now or from time to time be incorporated or installed or positioned in or on or attached to an Airframe or any Engine, or that remain the property of the Lessor pursuant to the terms of clause 18 despite removal therefrom **Provided that** at such time as a replacement Part shall be substituted for a Part in accordance with clause 18 hereof, the Part so replaced shall cease to be a Part hereunder;

"Payment Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Permitted Lien" means:

- (i) any Lessor's Lien;
- (ii) any Lien for Taxes whether or not yet assessed or yet due and payable or being contested in good faith;
- (iii) air navigation authority, airport, airport hangar keeper's, supplier's, repairer's, mechanic's, materialmen's, carrier's, employee's or other similar possessory liens arising in the ordinary course of the Lessee's business by statute or by operation of Law in respect of obligations not yet due or which are being contested in good faith;
- (iv) any Lien where the Lessee is unable to pay the monies to which such Lien relates because it is restrained from doing so by reason of exchange controls or other governmental regulation;

¹ Used interchangeable with Aircraft Lease Agreement

- (v) any Lien arising out of a judgment or award against the Lessee with respect to which an appeal is being presented in good faith and against which there shall have been secured a stay of execution pending such appeal;
- (vi) the rights of others under any agreement for the leasing, exchange or hire of any engine or part intended for installation in or on the Airframe or an Engine where permitted by this Lease;
- (vii) any Sublease;

"Permitted Sublessee" means such Person as may be approved in writing by the Lessor acting in its absolute discretion prior to the effectiveness of the relevant Sublease or to whom the Aircraft is chartered or wet leased pursuant to clause 14.1(1);

"Person" means and includes any individual person, corporation, partnership, business trust, firm, joint stock company, joint venture, trust, estate, unincorporated organisation, association, sovereign state or Governmental Entity;

"Redelivery Acceptance Certificate" means a certificate in the form of Exhibit E/2 to be completed by the Lessor pursuant to clause 13.7(2)(1);

"Related Lease" means any and all other leases of aircraft between the Lessor or any Affiliate of the Lessor, as lessor, and the Lessee or any Affiliate of Lessee, as lessee;

"Lease Payments" means the Lease Payment and the Supplemental Lease Payments;

"Replacement Engine" means an engine of the same manufacturer and model or of a comparable or an improved model and remaining useful life and otherwise of substantially equivalent value, utility, modification status and remaining useful life as that of the Engine for which it is substituted, suitable for installation and use on the Airframe without impairing the value or utility of the Airframe and compatible with the remaining installed Engine;

"Return Condition" means in respect of an Aircraft, such status and condition as shall comply with clause 13.2 and Exhibit E;

"Return Location" shall have the meaning ascribed thereto in the applicable Lease Supplement;

"Return Occasion" means the event that occurs when possession of the Aircraft is returned from the Lessee to the Lessor at the end of the Term or upon the Lessor taking possession of the Aircraft pursuant to clause 24;

"Service Bulletin" means a service bulletin issued by the Manufacturer, Engine Manufacturer or OEM in respect of the Aircraft;

"Sublease" means any aircraft sublease with a Permitted Sublessee entered into in accordance with clause 14.1(1)(d),(e) and any further subleasing of the Aircraft whether or not authorised by this Lease;

"Tax" and **"Taxes"** means any and all forms of taxation, levy, impost, duty, contribution, withholding or charge of whatever nature and by whatever name called whenever created or imposed and whether of The Netherlands or elsewhere and whether imposed by a local, municipal, governmental, state, federal or other body or authority and any amount deemed to be or treated as an amount of and any amount

payable in advance of or creditable against any future payment of any of the same and any amounts in lieu thereof, together with any additions to tax, penalties, fines, charges or interest thereon and "**taxation**" shall be construed accordingly;

"**Tax Indemnitee**" means the Lessor, the Beneficiary and the Lessor's Aircraft Manager;

"**Term**" means the period of the leasing of the Aircraft to the Lessee specified in the applicable Lease Supplement;

"**Trust Agreement**" means the trust agreement identified in the applicable Lease Supplement;

1.2 Construction

In this Lease, except as otherwise provided or unless the context otherwise requires:

- (1) the **Exhibits and Annexes** to this Lease shall form an integral part hereof.
- (2) Reference herein to this **Lease** shall be deemed to include references to this Lease and its Exhibits and Annexes and the applicable Lease Supplement and its Exhibits and Annexes in relation to an Aircraft as the same may be amended or supplemented or replaced from time to time. The Lessor and the Lessee agree that if any of the Exhibits or Annexes have not been inserted into this Lease or all details thereof completed as of the date hereof, such Exhibit or Annexes shall be agreed or completed and inserted on or prior to the Delivery Date and shall thereupon be incorporated herein and shall form an integral part of this Lease. Such Exhibits and Annexes shall be attached to the originally executed counterparts of this Lease.
- (3) references within any documents to **appendices, schedules, paragraphs, clauses, exhibits or annexes** are references to appendices, schedules, paragraphs, clauses, exhibits or annexes in or to such document;
- (4) **headings, subheadings, paragraph and Part number descriptions** and the **table of contents** are solely for the convenience of reference and shall not affect the meaning, construction or affect of any provision thereof.
- (5) references to any **Person** or **party** shall include such Person or party, its successors and permitted assigns and transferees;
- (6) reference to any **agreement** means such agreement as amended, modified or supplemented from time to time in accordance with the provisions thereof;
- (7) references to "**including**" shall mean including without limiting the generality of any description preceding such term and the rule of *ejusdem generis* shall not be applicable to limit a general statement, followed by or referable to an enumeration of specific matters, to matters similar to those specifically mentioned;
- (8) the "**winding up**" or "**dissolution**" of a company or the appointment of an "**administrative receiver**", a "**liquidator**", a "**receiver**" or an "**administrator**" shall be construed so as to include any equivalent or analogous proceedings and any proceedings giving protection for any period against the claims of creditors under the Law of the jurisdiction in which such company is incorporated or any jurisdiction in which such company carries on business or owns assets;

- (9) references to any **statutory provision** shall include reference to that provision as it may be amended from time to time and to any like or similar provisions replacing the same or which replacement provision addresses the same, the similar or analogous matter;
- (10) references to a "**certified**" copy shall be a reference to a copy certified by an officer of the Person required to produce the same or of that Person's Solicitor or Counsel as being a true copy; and
- (11) references to the "**applicable Lease Supplement**" shall mean the Lease Supplement relating to the particular Aircraft the subject matter of the particular provision or the Lease Supplement in which the Airframe, Engines and APU of such particular Aircraft are identified and "**applicable Aircraft**" shall be construed accordingly;
- (12) references to "**indebtedness**" shall be construed so as to include any obligation (whether incurred as principal or as surety) for the payment or repayment of money, whether present or future, actual or contingent;

Further:

- (13) where any matter requires the approval or consent of the Lessor or the Lessor's Aircraft Manager, such approval or consent shall be deemed not to have been given unless given in writing;
- (14) where any matter is required to be acceptable to the Lessor or the Lessor's Aircraft Manager, the same shall be deemed not to have been accepted unless such acceptance is communicated in writing;
- (15) the Lessor and the Lessor's Aircraft Manager may withhold its approval or consent to or acceptance of any matter in its absolute discretion; and
- (16) where any matter requires the consent, approval or acceptance of or waiver by or is at the request of or to be presented to the Lessor, such consent, approval, acceptance or waiver may be given by or shall also be at the request of or presented to the Lessor's Aircraft Manager on behalf of the Lessor.

PART 2: THE LEASE AND GENERAL PROVISIONS

2. LEASE AND CONDITIONS

2.1 The Lease

The Lessor hereby agrees to lease the Aircraft to the Lessee, and the Lessee hereby agrees to lease the Aircraft from the Lessor, on the terms of this Lease for the Term applicable thereto.

2.2 Conditions Precedent

- (1) The Lessor's obligations to lease any Aircraft to the Lessee shall be conditional upon:

- (i) the absence of any Default existing (or circumstances which, if the lease of the Aircraft commenced, would give rise to a Default) on the Delivery Date;
 - (ii) the non-occurrence of any Casualty Occurrence in respect of that Aircraft, its Airframe or Engines prior to the Delivery Date;
 - (iii) the certification by the FAA of the Aircraft as to type and airworthiness and the issuance by the FAA of a valid and effective certificate of airworthiness for operation of the Aircraft in the Country of Registration;
 - (iv) the Lessee having arranged for the delivery to the Lessor of each of the Closing Documents, each (other than the Closing Documents listed in paragraphs 5, 9 and 10 of Exhibit G which the Lessee shall arrange to have delivered to the Lessor within 10 Business Days of the Delivery Date) dated as of the Delivery Date (or such other date reasonably satisfactory to the Lessor) each of which shall be in form and substance reasonably satisfactory to the Lessor; and
 - (v) no change having occurred subsequent to the date of this Lease and prior to the Delivery Date in any applicable Law or in the interpretation thereof which in the Lessor's opinion would make it illegal for the Lessor and/or the Lessee and/or any Guarantor to perform any of their respective obligations under each of the Operative Documents.
- (2) The Lessee's obligation to lease the Aircraft hereunder shall be conditional upon the Aircraft generally meeting the Delivery Condition specified in relation thereto on Delivery in accordance with clause 11.
- (3) The conditions specified in paragraph clause 2.2(1) are inserted for the sole benefit of the Lessor and may be waived or deferred in whole or in part by the Lessor who may attach to such waiver or deferral such requirements and further or other conditions as the Lessor thinks fit. The Lessor shall be entitled to treat the failure of the Lessee to perform or satisfy any such deferred conditions as an Event of Default.

3. REPRESENTATIONS AND WARRANTIES

3.1 By the Lessee

The Lessee acknowledges that the Lessor and Beneficiary has entered into this Lease in full reliance upon the representation of the Lessee in the following terms and the Lessee now warrants to the Lessor that the following statements are, as of the date hereof and as of the times specified in this clause 3.1 will be true and accurate:

- (1) the Lessee is a corporation duly incorporated and validly existing in good standing under the Laws of the Country of Organisation and has the corporate power and authority to carry on its business as presently conducted and to perform its obligations under this Lease and the other Operative Documents;
- (2) this Lease has and the other Operative Documents have been duly authorised by all necessary corporate action on the part of the Lessee and does not require any approval of the shareholders of the Lessee (or if such approval is required, such approval has been obtained) and neither the execution and delivery hereof and

thereof nor the consummation of the transactions contemplated hereby and thereby nor compliance by the Lessee with any of the terms and provisions hereof and thereof will contravene any Law applicable to the Lessee or result in any breach of, or constitute any default under, or result in the creation of any Lien, charge or encumbrance upon any property of the Lessee under any creditor agreement or instrument, corporate charter or by-law or other agreement or instrument to which the Lessee is a party or by which the Lessee or its properties or assets are bound or affected;

- (3) the Lessee has received or will procure receipt by the Delivery Date, every consent, approval or authorisation of, and has given every notice to, each Governmental Entity having jurisdiction with respect to the execution, delivery or performance of this Lease and the other Operative Documents (including all monetary and other obligations hereunder) that is required for the Lessee to execute and deliver this Lease and the other Operative Documents and each such consent, approval or authorisation and notice is valid and effective and has not been revoked;
- (4) there are no suits or proceedings pending or, to the knowledge of the Lessee, threatened in any court or before any regulatory commission, board or other administrative Governmental Entity against or affecting the Lessee which will have a materially adverse effect on the current business or financial condition or the assets or operations of the Lessee;
- (5) no information supplied by the Lessee to the Lessor or the Lessor's Aircraft Manager in connection with any of the Operative Documents contains any untrue statement or omits to state any fact the omission of which makes the statements therein, in the light of the circumstances under which they were made, misleading, and all expressions of expectation, intention, belief and opinion contained therein were honestly made on reasonable grounds after due and careful enquiry by the Lessee;
- (6) the Lessee is not in default in the performance of any of its obligations for the payment of its indebtedness;
- (7) no event of default (by whatever name called) has occurred which constitutes, or which with the giving of notice and/or the lapse of time and/or relevant determination would result in any breach of or constitute any default under any agreement to which the Lessee is a party or by which any of its assets is bound or affected, being a breach or default which might have a material adverse effect on its financial condition, business, assets or operation or its ability to observe and perform its obligations under any of the Operative Documents to which it is a party;
- (8) there has been no material adverse change in the business of the Lessee since the date of its last published audited financial statements;
- (9) the Lessee may make the payments of Lease Payments (where the Beneficiary remains that named in the applicable Lease Supplement at the date of execution thereof), without the necessity of withholding therefrom any Tax imposed by any Governmental Entity in the Country of Organisation or the Country of Registration and neither the execution or delivery of this Lease nor the performance thereof will subject the Lessor or such Beneficiary to any Tax imposed by any Governmental Entity in the Country of Organisation or the Country of Registration;

3.2 By the Lessor

Lessor represents that:

- (1) Wells Fargo Bank Northwest, National Association is a national banking association duly organized and validly existing and in good standing under the laws of the United States, and has the power and authority to carry on its business as presently conducted and to perform its obligations as Lessor under this Lease and the other Operative Documents;
- (2) this Lease has and the other Operative Documents have been duly authorized by all necessary action on the part of the Lessor and does not require any approval of the shareholders of the Lessor (or if such approval is required, such approval has been obtained) and neither the execution and delivery hereof and thereof nor the consummation of the transactions contemplated hereby and thereby nor compliance by the Lessor with any of the terms and provisions hereof and thereof will contravene any Utah State or United States federal banking law applicable to the Lessor or result in any breach of, or constitute any default under, or result in the creation of any Lien, charge or encumbrance upon any property of the Lessor under any creditor agreement or instrument, corporate charter or by-law or other agreement or instrument to which the Lessor is a party or by which the Lessor or its properties or assets are bound or affected; and
- (3) the Lessor has received by the Delivery Date, every consent, approval or authorization of, and has given every notice pursuant to Utah and United States federal banking law with respect to the execution, delivery or performance of this Lease and the other Operative Documents (including all monetary and other obligations hereunder) that is required for the Lessor to execute and deliver this Lease and the other Operative Documents and each such consent, approval or authorization and notice is valid and effective and has not been revoked.
- (4) the Lessor, as trustee, has the authority on behalf of the trust and the Beneficiary to enter into and be bound by this Lease and perform the Lessor's obligations hereunder;
- (5) the making and performance by the Lessor of this Lease have been duly authorized by all necessary action on the part of the Lessor and will not violate any provision of the federal banking or Utah law or the articles of association of Wells Fargo Bank Northwest, National Association;
- (6) this Lease has been duly entered into and delivered by the Lessor, and this Lease and each Operative Document does, and each Lease Supplement when executed and delivered hereunder will, constitute legal, valid and binding obligations of the Lessor, enforceable in accordance with their respective terms **except** as may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and, to the extent that certain remedies require or may require enforcement in equity, by such principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) as a court

having jurisdiction may impose and by laws which may affect some of such remedies; and

- (7) the Lessor has, and on the Delivery Date will have, title to the Aircraft, with full power and authority to lease the Aircraft to the Lessee in accordance with the terms hereof.

3.3 Survival, Repetition and No Prejudice

- (1) The representations and warranties contained in clauses 3.1 and 3.2 shall survive the execution of this Lease and Delivery of each Aircraft.
- (2) The representations and warranties contained in clauses 3.1 and 3.2 shall be deemed to be repeated on and as of each Lease Payment Date and in respect of all paragraphs of clause 3.1 on each Delivery of an Aircraft under this Lease as if made with reference to the facts and circumstances existing on such Date and on such Delivery.
- (3) The rights of the Lessor in relation to any misrepresentation or breach of representation or warranty by the Lessee shall not be prejudiced by any investigation by or on behalf of the Lessor or the Lessor's Aircraft Manager into the affairs of the Lessee, by the performance of this Lease or by any other act or thing done or omitted to be done by the Lessor or the Lessor's Aircraft Manager which would, but for this clause 3.3 prejudice such rights.

PART 3: FINANCIAL AND COMMERCIAL PROVISIONS

4. LEASE PAYMENTS

The Lessee covenants and agrees to pay to the Lessor (or as the Lessor shall direct) in respect of each Aircraft the Lease Payments on each Lease Payment Date, the Lease Payment for that Aircraft.

5. COVENANTS OF THE LESSEE

5.1 The Lessee covenants and agrees that:

(1) Maintenance of Corporate Existence

Except as provided in paragraph (4) below, the Lessee will preserve and maintain its corporate existence and such of its rights, privileges, licences and franchises in any jurisdiction where failure to obtain such licensing or qualification would have a material adverse effect upon the Lessee or its ability to perform its obligations hereunder.

(2) Maintenance of Status

The Lessee is, and shall remain so long as it shall be the Lessee under this Lease, duly qualified to carry on its business as it is now conducted and to operate the Aircraft under applicable Law in accordance with the terms of this Lease.

(3) Payment of Taxes

The Lessee will pay or cause to be paid all Taxes and governmental charges or levies imposed upon it, or upon its income or profits, or upon any property belonging to it, prior to the date on which penalties attach thereto and prior to the date on which any lawful claim, if not paid, would become a Lien upon any of the material property of the Lessee.

(4) Consolidation, Merger, Ownership, Etc

Without the prior written consent of the Lessor not to be unreasonably withheld or delayed, the Lessee shall not consolidate with, merge with any other Person or convey, transfer or lease substantially all of its business or assets to any other Person.

(5) Notice of Default

Within two (2) days after any responsible officer of the Lessee obtains or should upon the making of all reasonable enquiries have obtained knowledge of a Default hereunder, the Lessee shall notify the Lessor in writing of such Default.

(6) Governmental Consents

The Lessee undertakes to maintain in full force and effect all governmental consents, licenses, authorisations, approvals, declarations, filings and registrations required to be obtained or effected by it in connection with this Lease and every document or instrument contemplated hereby and to take all such additional action as may be proper or advisable in connection herewith or therewith. The Lessee further undertakes to obtain or effect any new or additional governmental consents, licenses, authorisations, approvals, declarations, filings or registrations as may become necessary for the performance of any of the terms and conditions of this Lease or any other document or instrument contemplated hereby.

(7) Suspension, Cessation, Etc

The Lessee shall not at any time during the Term (i) voluntarily suspend its operations or (ii) voluntarily or involuntarily permit to be revoked, cancelled or otherwise terminated prior to its normal expiry period any of the franchises, concessions, permits, rights or privileges required for the conduct of business and operation of the Aircraft by the Lessee or the Lessee's rights to free and continued use thereof to the extent the same may have a material adverse effect on the performance of its obligations hereunder.

6. PAYMENTS

6.1 Manner of Payment

Each instalment of Lease Payments and all other amounts payable by the Lessee under this Lease shall be paid in freely available same day funds on the due date by telegraphic transfer by noon (New York City time) to the relevant Payment Location therefor and with immediate notice advice to the Lessor's Aircraft Manager or in such other manner as the Lessor may designate from time to time by not less than three (3) Business Days' notice to the Lessee.

6.2 ABSENCE OF NEED FOR DEMAND

SAVE WHERE EXPRESSED TO BE PAYABLE ON DEMAND (WHERE PAYMENT SHALL BE MADE FORTHWITH ON DEMAND), ALL PAYMENTS TO BE MADE BY THE LESSEE PURSUANT TO THIS LEASE SHALL BE MADE BY THE LESSEE WHETHER OR NOT DEMANDED BY THE PERSON TO WHOM SUCH PAYMENTS ARE TO BE MADE.

6.3 Non-Business Day: Date of Receipt

- (1) If any payment falls due under this Lease on a day which is not a Business Day, such payment shall be made on the next succeeding Business Day unless the next succeeding Business Day falls in the next calendar month in which event payment shall be made on the preceding Business Day.
- (2) All payments shall be considered to be made on the date on which they are received at the Payment Location in the manner provided in clause 6.1.

6.4 Currency of account

- (1) The Lessee acknowledges that the specification of Dollars in this Lease is of the essence and that Dollars shall be the currency of account in any and all events **save where** it is specifically provided in this Lease that the Lessee is obliged to pay or to reimburse any amount which is denominated in another currency, in which case, the Lessee shall pay or reimburse such amount in such other currency.

6.5 NET LEASE: PROHIBITION AGAINST SET OFF, COUNTERCLAIM, ETC

THIS LEASE IS A NET LEASE AND, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, THE LESSOR SHALL HAVE NO RESPONSIBILITY (OPERATIONALLY OR FINANCIALLY) IN RESPECT OF THE USE OR OPERATION OF THE AIRCRAFT. THE LESSEE'S OBLIGATION TO PAY ALL LEASE PAYMENTS AND ALL OTHER AMOUNTS DUE HEREUNDER AND TO PERFORM ALL THE TERMS HEREOF SHALL BE ABSOLUTE AND UNCONDITIONAL AND SHALL NOT BE AFFECTED OR REDUCED BY ANY CIRCUMSTANCES, INCLUDING (I) ANY SET-OFF, COUNTERCLAIM, RECOUPMENT, DEFENCE OR OTHER RIGHT WHICH THE LESSEE MAY HAVE AGAINST THE LESSOR OR ANY OTHER PERSON; (II) ANY DEFECT IN THE TITLE, AIRWORTHINESS OR ELIGIBILITY FOR REGISTRATION UNDER APPLICABLE LAW, OR ANY CONDITION, DESIGN, OPERATION OR FITNESS FOR USE OF, OR ANY DAMAGE TO OR LOSS OR DESTRUCTION OF, THE AIRCRAFT, OR ANY INTERRUPTION OR CESSATION IN THE USE OR POSSESSION THEREOF BY THE LESSEE; (III) SUBJECT TO CLAUSES 22.1 AND 22.(1), ANY CASUALTY OCCURRENCE; (IV) ANY LIENS WITH RESPECT TO THE AIRCRAFT; (V) THE INVALIDITY OR UNENFORCEABILITY OR LACK OF DUE AUTHORISATION OR OTHER INFIRMITY OF THIS LEASE OR ANY ABSENCE OF RIGHT, POWER OR AUTHORITY OF THE LESSOR OR THE LESSEE TO ENTER INTO THIS LEASE; (VI) ANY INSOLVENCY, BANKRUPTCY, REORGANISATION OR SIMILAR PROCEEDINGS BY OR AGAINST THE LESSOR OR THE LESSEE; (VII) ANY OTHER CIRCUMSTANCE OR HAPPENING OF ANY NATURE WHATSOEVER, SIMILAR TO ANY OF THE FOREGOING; OR (VIII) ANY TAXES; IT BEING THE EXPRESS INTENTION OF THE LESSOR AND THE LESSEE THAT ALL LEASE PAYMENTS AND OTHER AMOUNTS PAYABLE HEREUNDER SHALL BE PAYABLE AND ALL OTHER TERMS HEREOF SHALL BE PERFORMED IN ALL EVENTS, UNLESS THE OBLIGATION TO PAY OR TO PERFORM THE SAME SHALL BE TERMINATED PURSUANT TO THE EXPRESS PROVISIONS OF THIS LEASE. EXCEPT AS PROVIDED IN THIS LEASE, EACH PAYMENT OF LEASE PAYMENTS OR ANY OTHER PAYMENT HEREUNDER MADE BY THE LESSEE TO THE LESSOR SHALL BE FINAL AND THE LESSEE WILL NOT SEEK TO RECOVER ANY PART OF SUCH PAYMENT FROM THE LESSOR FOR ANY REASON WHATSOEVER. THE LESSEE HEREBY WAIVES, TO THE EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHTS WHICH IT MAY NOW HAVE OR WHICH AT ANY TIME HEREAFTER MAY BE CONFERRED UPON IT, BY LAW OR OTHERWISE, TO TERMINATE THIS LEASE OR ANY OBLIGATION IMPOSED UPON THE LESSEE HEREUNDER OR IN RELATION HERETO.

NOTHING IN THIS CLAUSE SHALL BE CONSTRUED TO LIMIT THE LESSEE'S RIGHTS AND REMEDIES (INCLUDING ANY RIGHTS IN RESPECT OF PAYMENTS OF LEASE PAYMENTS) IN THE EVENT OF ANY BREACH BY THE LESSOR OF ITS WARRANTY OF QUIET ENJOYMENT SET

FORTH IN CLAUSE 18 OR TO LIMIT THE LESSEE'S RIGHTS AND REMEDIES TO PURSUE IN A COURT OF LAW ANY CLAIM THAT IT MAY HAVE AGAINST THE LESSOR OR ANY OTHER PERSON.

6.6 Interest on Overdue amounts

In reliance on the prompt payment of each sum due hereunder, the Lessor has made or will or may make, certain financial commitments. If the Lessee fails to pay any such sum when due, the Lessor will suffer loss and damages, the exact nature and amount of which are difficult or impossible to ascertain in advance. To compensate the Lessor for such loss and damages, if the Lessee fails (promptly) to pay any sum when due, the Lessee shall pay interest on such unpaid sum at the Interest Rate (as well after as before any judgment) from the date when the unpaid sum fell due until the date of payment thereof. Such interest shall be payable by the Lessee to the Lessor on the Lessor's demand, shall be calculated on the basis of a year of 360 days and the actual number of days elapsed in the period during which the sum is outstanding and shall be compounded monthly during such period. The provisions of this clause shall be in addition and without prejudice to any other rights of the Lessor at law or hereunder in relation to the failure of the Lessee to make prompt payment of sums due hereunder.

6.7 Payments by the Lessor

Any obligations of the Lessor to make any payment or to release any money to the Lessee shall be conditional upon all amounts then due and payable by the Lessee to the Lessor and all obligations to be performed by the Lessee in favour of the Lessor under this or any Related Lease then having been paid and/or performed in full by the Lessee and the Lessor shall be entitled to set off and retain out of any sums otherwise due to the Lessee the amount of any indebtedness of the Lessee to the Lessor.

7. GENERAL TAX INDEMNITY

7.1 Payments to be Grossed-up

(1) Payments to be made gross

All payments to be made by the Lessee under this Lease shall be made free and clear of and without deduction or withholding for or on account of Tax.

(2) Gross payments prevented by law

Subject to the Proviso to clause 23.1:

(i) If the Lessee is required by any Law to make any deduction or withholding for or on account of Tax from any sum payable by it to or for the account of the Lessor, the sum payable by the Lessee in respect of which the relevant deduction, withholding or payment is required shall be increased to the extent necessary to ensure that, after the making of that deduction, withholding or payment, the Lessor receives on the due date and retains (free of any liability in respect of any such deduction, withholding or payment) a net sum equal to what it would have received had no such deduction, withholding or payment been so required or made.

(ii) If under any applicable Law the provisions of clause 7.1 (2)(i) cannot be complied with by the Lessee, the Lessee shall, on demand of the Lessor, indemnify the Lessor and keep the Lessor indemnified against all loss suffered by it in consequence of the inability of the Lessee to comply with clause 7.1 (1) and (2)(i) and the receipt by

the Lessor of a sum less than the full amount due from the Lessee under this Lease. Such loss shall be certified by the Lessor and shall take into account the cost to the Lessor of funding from whatever source it chooses and is available to it the amount of the deduction or withholding made by the Lessee from the payment in question for such period as the Lessor shall deem appropriate.

(3) Tax Credits

In the event that, following the making of any deduction, withholding or payment in respect of sums payable under this Lease and the payment by the Lessee of any increased amount in accordance with the provisions of clause 7.1 (2)(i), the Lessor receives or is granted a credit against, relief, remission or repayment of any Tax payable by it, which credit, relief, remission or repayment is referable to that increased amount so paid, the Lessor shall, to the extent that it is satisfied that it can do so without prejudice to the retention of such credit, relief, remission or repayment, reimburse the Lessee with such amount as the Lessor shall certify to be the proportion of such credit, relief, remission or repayment as will leave the Lessor (after such reimbursement and taking into account the time when any Tax was payable and when any such credit, relief, remission or repayment was received) in no worse a position (after Taxation) than it would have been in had there been no such deduction or withholding from the said sums payable to the Lessor under this Lease.

(4) Mitigation

- (1) The Lessor shall, at the request of the Lessee, cooperate (at the expense of the Lessor) with the Lessee in the completion and filing of any claims that may properly be made by the Lessor pursuant to any relevant double taxation convention in order to mitigate any deduction or withholding required to be made as mentioned in clause 7.1 (2)(i).
- (2) If the Lessee gives any notification pursuant to clause 7.2 and the Lessee so requests, the Lessor and the Lessee shall consult with one another with a view to determining whether the leasing of the Aircraft to the Lessee might be restructured so as to mitigate the cost to the Lessee of complying with this clause **Provided that** (a) the Lessor shall not be obliged so to restructure the leasing of the Aircraft to the Lessee and (b) such consultation shall not affect the operation of this clause.

7.2 Notifications

If at any time the Lessee is required to make any deduction or withholding as mentioned in clause 7.1 (2)(i), or if thereafter there is any change in the rates at which or the manner in which such deductions or withholdings are calculated, the Lessee shall notify the Lessor and the Lessor's Aircraft Manager before or at the time of making the payment which is affected by such deduction, withholding or change.

7.3 Payment of Taxes Withheld

If the Lessee makes any payment under this Lease in respect of which it is required by Law to make any deduction or withholding for or on account of Tax, it shall pay the full amount to be deducted or withheld to the relevant Taxation or other authority within the time allowed for such payment under applicable Law and shall deliver to the Lessor promptly after receipt thereof an original receipt issued by such authority evidencing the payment to such authority of all amounts so required to be deducted or withheld from such payment.

7.4 INDEMNITY

THE LESSEE AGREES FOR THE BENEFIT OF EACH TAX INDEMNITEE TO PAY AND, ON WRITTEN DEMAND, TO INDEMNIFY AND HOLD EACH TAX INDEMNITEE HARMLESS FROM ALL LICENSE AND REGISTRATION FEES, DUTIES, IMPOSTS, DEDUCTIONS, CHARGES AND ALL TAXES, HOWSOEVER LEVIED OR IMPOSED, WHETHER LEVIED OR IMPOSED UPON OR ASSERTED AGAINST ANY TAX INDEMNITEE, THE AIRCRAFT, OR ANY PART THEREOF OR INTEREST THEREIN, OR OTHERWISE BY ANY GOVERNMENTAL ENTITY OR BY ANY INTERNATIONAL TAXING AUTHORITY UPON OR WITH RESPECT TO, OR ARISING OUT OF OR CONNECTED WITH, OR BASED UPON OR MEASURED:

- (1) against the Aircraft, or any part thereof, or interest therein;
- (2) against the exportation, importation, delivery, non-delivery (by reason of fault of the Lessee), warehousing, removal, leasing, exchange, acceptance, possession, repossession, recording, use, operation, settlement of any insurance or warranty claim, subleasing, rental, retirement, chartering, imposition of any Lien (other than Permitted Liens), abandonment, registration, installation, modification, repair, maintenance, replacement, transportation, storage, or return of the Aircraft or any part thereof or interest therein;
- (3) subject to the Proviso to clause 23.1, against the rentals, receipts or earnings arising from any one or more of the items or acts described in subclause (1) or (2) above; or
- (4) upon or with respect to this Lease, or any other document pertaining to or in connection with the transactions contemplated by this Lease;

and any out-of-pocket costs and expenses fairly attributable to any of the foregoing incurred by a Tax Indemnatee.

7.5 Exclusion

Except as provided in clause 7.6, there shall be excluded from the indemnity provided in clause 7.4:

- (1) Taxes to the extent imposed upon or measured solely by reference to the net income of the Tax Indemnatee which are imposed by any taxing authority in any jurisdiction in which the Tax Indemnatee is subject to Tax as a resident;
- (2) Taxes to the extent imposed or measured solely by reference to the failure or delay on the part of the Tax Indemnatee in the filing of any return of which it was aware;
- (3) items to the extent attributable to the negligence or willful misconduct of the Tax Indemnatee;
- (4) in respect of items to the extent that the same result solely from acts or events which occur prior to the Delivery Date or after the Aircraft has been redelivered to the Lessor in accordance with clause 13 and is no longer subject to this Lease; and/or
- (5) any amounts excluded by the Proviso to clause 23.1.

7.6 After Tax Basis of Payments

Notwithstanding anything in this clause to the contrary, the Lessee further agrees that, with respect to any payment or indemnity hereunder, such payment or indemnity shall include any amount necessary to hold the recipient of the payment or indemnity harmless on an after-tax basis from all Taxes required to be paid by such recipient with respect to such payment or indemnity, so that such recipient shall receive an amount which, net of any Taxes required to be paid or withheld by such recipient in respect of such amount, shall be equal to the amount of payment or indemnity otherwise required hereunder **Provided that** the provisions of Clause 8.1(1) and (2) shall apply *mutatis mutandis* to this Clause 7.6 as if set out here in full **and further that** the provisions of this subclause shall be subject to the Proviso to clause 23.1.

INDEMNITY

7.7 The Lessee agrees to indemnify, reimburse, hold harmless and defend each Indemnitee from and against any and all claims, damages, losses, liabilities, demands, suits, judgments, causes of action, legal proceedings, whether civil or criminal, penalties, fines and other actions, and any reasonable legal fees (on a full indemnity basis) and other reasonable costs and expenses in connection herewith, including any of the foregoing arising or imposed under the doctrine of absolute or strict liability but excluding those arising or imposed due to the fault of the Indemnitee and including any third party claims arising from or in any way connected with injury to or death of any Person or loss or damage to property (any and all of which are hereafter referred to as "Claims") which in any way may result from, pertain to or arise in any manner out of, or are in any manner related to (a) the Aircraft or this Lease, or the breach of any representation, warranty or covenant made by the Lessee hereunder or in any document delivered by the Lessee in connection herewith, or (b) the condition, ownership, manufacture, delivery, non-delivery (by reason of the fault of the Lessee), lease, acceptance, rejection of the Aircraft by the Lessee (save where the Aircraft does not generally satisfy the Delivery Condition), possession, return, purported disposition otherwise than by the Indemnitees, use, operation, maintenance, repair, alteration or control of the Aircraft in the air or on the ground during the Term, or (c) any defect in the Aircraft (whether or not discovered or discoverable by the Lessee or the Lessor) arising from the material or any articles used therein or from the design, testing, or use thereof or from any maintenance, service, repair, overhaul, or testing of the Aircraft, whether or not the Aircraft is in the possession of the Lessee, and regardless of where the Aircraft may then be located during the Term, or (d) any transaction, approval, or document contemplated by this Lease or given or entered into in connection herewith save to the extent that any of the above is due to any breach of this agreement by the Lessor or anything in relation to the Aircraft prior to the Delivery Date or after the Return Occasion or anything not attributable to or arising as a result of or in connection with any event, act or omission of the Lessee or any person operating the Aircraft on its behalf during the Term; **Provided, however, that** the Lessee shall be subrogated to all rights and remedies which any Indemnitee may have against the Manufacturer of the Aircraft and its subcontractors or any other person as to any such Claims, but only to the extent that the Lessee satisfies its indemnification obligation to such Indemnitee hereunder with respect to such Claims.

- (1) The Lessee hereby waives, and releases each Indemnitee from, any Claims (whether existing now or hereafter arising) for or on account of or arising or in any ways connected with injury to or death of personnel of the Lessee or loss or damage to property of the Lessee or the loss of use of any property which may result from or arise in any manner out of or in relation to the ownership, leasing, condition, use or operation of the Aircraft, in the air or on the ground, or which may be caused by any defect in the Aircraft, from the material or any article

used therein or from the design or testing thereof, or use thereof, or from any maintenance, service, repair overhaul or testing of the Aircraft regardless of when such defect may be discovered, whether or not the Aircraft is at the time in the possession of the Lessee, and regardless of the location of the Aircraft at any such time.

7.8 DISCLAIMER OF CONSEQUENTIAL DAMAGES

NO PARTY SHALL BE ENTITLED TO RECOVER, AND HEREBY DISCLAIMS AND WAIVES ANY RIGHT THAT IT MAY OTHERWISE HAVE TO RECOVER, CONSEQUENTIAL DAMAGES OR ANY LOSS OF BARGAIN AS A RESULT OF ANY BREACH OR ALLEGED BREACH BY THE OTHER PARTY OF ANY OF THE AGREEMENTS, REPRESENTATIONS OR WARRANTIES OF SUCH OTHER PARTY CONTAINED IN THIS LEASE.

7.9 The indemnities and disclaimers contained in this clause 7 shall continue in full force and effect notwithstanding the expiration or other termination of this Lease and are expressly made for the benefit of and shall be enforceable by each Indemnitee. Notwithstanding the foregoing, the Lessee shall not be liable to make any payments by way of indemnity in respect of any Claims against an Indemnitee:

- (1) to the extent attributable to negligence or willful misconduct of such Indemnitee; or
- (2) to the extent that the same result solely from acts or events which occur prior to the Delivery Date or after the Aircraft has been redelivered to the Lessor in accordance with clause 15 hereof and is no longer subject to this Lease.

8. LIENS AND CHARGES

8.1 THE LESSEE SHALL NOT DIRECTLY OR INDIRECTLY CREATE, INCUR, ASSUME OR SUFFER TO EXIST ANY LIEN ON OR WITH RESPECT TO THE AIRCRAFT, ANY ENGINE OR ANY PART, TITLE THERETO OR ANY INTEREST THEREIN, OTHER THAN PERMITTED LIENS. THE LESSEE SHALL PROMPTLY, AT ITS OWN EXPENSE, DULY DISCHARGE ANY LIEN, OTHER THAN LESSOR'S LIENS, IF THE SAME SHALL ARISE AT ANY TIME WITH RESPECT TO THE AIRCRAFT, ANY ENGINE OR ANY PART.

8.2 The Lessee shall, as the same fall due for payment, unless the same are being contested in good faith and in respect of which the Lessee or any Permitted Sublessee has adequate financial resources to discharge, pay and discharge, or procure the payment and discharge of any and all charges, fees, taxes, imposts and levies of whatsoever nature which are incurred by the Lessee and/or any other operator of the Aircraft and/or which attach to the Aircraft in the course of the operation of the Aircraft or of any other aircraft under the management or control of the Lessee or such operator, including without limitation all charges of airport authorities (whether relating to landing fees, parking fees, handling charges or otherwise), all charges imposed by air navigation authorities and all charges of aviation authorities whether relating to navigation or otherwise and will on request by the Lessor or the Lessor's Aircraft Manager supply evidence of payment of any such charges.

8.3 The Lessee shall not do and shall procure that any Permitted Sublessee shall not do any act which could reasonably be expected to result in the Aircraft being arrested, confiscated, impounded, subject to penalty, forfeiture, detention or destruction or otherwise taken from the possession of the Lessee or any Permitted Sublessee (otherwise than in accordance with the terms of this Lease

or Sublease) and if any of the same occurs, the Lessee shall (i) give immediate notice thereof to the Lessor and (ii) promptly secure the release of the Aircraft from the same.

9. **PERFECTION OF TITLE AND FURTHER ASSURANCES**

- 9.1 Title to the Aircraft shall at all times remain vested in the Lessor. If at any time any filing or recording is reasonably necessary to protect the interest of the Lessor, the Lessee, at the Lessor's cost and expense, shall cause this Lease, and any and all additional instruments which shall be executed pursuant to the terms hereof or thereof (including those referred to in clause 2.2(4)(iv)) to be kept, filed and recorded and to be re-executed, refiled and re-recorded in the appropriate office or offices pursuant to applicable Laws, to perfect, protect and preserve the rights and interests of the Lessor in the Aircraft, including the right of the Lessor to repossess, and export from any country the Aircraft, the Engines and the Parts if the Lease has been declared, or is deemed by its terms to have been declared in default. At the reasonable request of the Lessor and at the Lessor's expense, the Lessee shall furnish to the Lessor an opinion of counsel or other evidence reasonably satisfactory to the Lessor of each such filing or refiling and recordation or re-recordation.
- 9.2 Without limiting the foregoing, the Lessee shall do or cause to be done, at the Lessor's cost and expense, request and direction, any and all acts and things which may be required to perfect and preserve the title and interest of the Lessor in the Aircraft within any jurisdiction in which Lessee or any Permitted Sublessee may operate the Aircraft, as the Lessor may reasonably request. The Lessee shall also do or cause to be done, at the Lessor's expense, request and direction, any and all acts and things which may be required under the terms of any other Law involving any jurisdiction in which the Lessee (or any Permitted Sublessee) may operate, or any and all acts and things which the Lessor may reasonably request, to perfect and preserve the Lessor's ownership rights regarding the Aircraft within any such jurisdiction.
- 9.3 The Lessee will promptly and duly execute and deliver to the Lessor such further documents and assurances and take such further actions and execute and deliver or procure the execution and delivery of all such documents as the Lessor may from time to time consider necessary and as are reasonable in order to carry out more effectively the intent and purpose of this Lease and to establish and protect the rights and remedies created or intended to be created in favour of the Lessor hereunder.

10. **TRANSACTION COSTS**

- (1) The Lessor and the Lessee shall each be responsible for its own costs and expenses incurred in connection with the preparation, negotiation and delivery of this Lease and any other documents or instruments delivered in connection herewith.
- (2) The Lessee agrees to pay on demand all out-of-pocket expenses of the Lessor, including legal fees and disbursements on a full indemnity basis in connection with the enforcement of this Lease and any other documents which may be delivered in connection herewith or therewith. In the event that the Lessor pays any of the amounts the Lessee is required to pay pursuant to this clause, the Lessee will upon receipt of notice from the Lessor specifying the amount paid

and furnishing appropriate invoices, statements or demands for such payment, reimburse the Lessor for such advances.

PART 4: DELIVERY AND REDELIVERY

11. INSPECTION, DELIVERY AND ACCEPTANCE

11.1 Inspection

On or before the Estimated Delivery Date therefor, the Lessee shall conduct a ground inspection of the Aircraft and the Aircraft Documents at the Delivery Location in order to verify that the Aircraft is in the Delivery Condition.

11.2 Delivery

- (1) It is anticipated that the Aircraft will become available for delivery on or about the Estimated Delivery Date at the Delivery Location.
- (2) The Lessor shall, promptly upon ascertaining the same, notify the Lessee of the actual date when it expects delivery of the Aircraft to take place if that date differs from the Estimated Delivery Date. Subject to the terms and conditions hereof, the Lessee agrees to accept the Aircraft on such date.
- (3) Where applicable, the Lessor shall provide to the Lessee the requisite export documentation with respect to the export of the Aircraft issued by the relevant Government Entity in which the Aircraft is registered immediately prior to Delivery and the Lessee shall provide the Lessor with all reasonable aid and assistance necessary in connection with the production thereof.

11.3 Deficiencies on Delivery

- (1) On or before the Delivery Date, the Lessee shall, at its sole cost and expense, conduct a "**Final Inspection**" of the Aircraft to verify that the Aircraft is generally in compliance with the Delivery Condition.

11.4 Acceptance of Aircraft

Subject to clause 11.3(1), the Lessee shall accept the Aircraft, to be leased hereunder, "AS IS", "WHERE IS" and SUBJECT TO EACH AND EVERY DISCLAIMER OF WARRANTY AND REPRESENTATION AS SET FORTH IN CLAUSE 12. Upon acceptance of the Aircraft, Lessee shall thereupon indicate and confirm its acceptance of the Aircraft by execution and delivery to Lessor of an Acceptance Certificate dated the Delivery Date, in the form set forth as Exhibit D.

11.5 Delay in Delivery

The Lessor shall have no responsibility or liability to the Lessee for any failure to deliver the Aircraft on the Estimated Delivery Date or thereafter due to any event of *Force Majeure*. Upon the occurrence of an event of *Force Majeure*, the Lessor shall promptly notify the Lessee of the circumstances thereof and shall use reasonable endeavours to avoid the consequences of such event. Save as is otherwise provided in this Lease, the Lessee shall not be entitled to refuse to accept delivery of the Aircraft when tendered by the Lessor or to cancel its obligation to take the Aircraft on lease from the Lessor as a consequence of any delay due to an event of *Force Majeure* **Provided that** if as a result of an event of *Force Majeure*, the Aircraft shall not have

been delivered to and accepted by the Lessee prior to the Final Delivery Date, the Lessee shall be entitled, by notice not later than five (5) Business Days after the Final Delivery Date, to cancel its obligation to take the applicable Aircraft on lease from the Lessor. Upon the giving of such notice neither party shall have any further liability or obligation to the other in relation to the applicable Aircraft.

12. **LESSOR WARRANTIES AND DISCLAIMER OF WARRANTIES**

THE AIRCRAFT IS TO BE LEASED HEREUNDER "AS IS" AND "WHERE IS". EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE LESSOR HAS NOT AND SHALL NOT BE DEEMED TO HAVE MADE (WHETHER BY VIRTUE OF HAVING LEASED THE AIRCRAFT UNDER THIS LEASE, OR HAVING ACQUIRED THE AIRCRAFT, OR HAVING DONE OR FAILED TO DO ANY ACT, OR HAVING ACQUIRED OR FAILED TO ACQUIRE ANY STATUS UNDER OR IN RELATION TO THIS LEASE OR OTHERWISE), AND THE LESSOR HEREBY SPECIFICALLY DISCLAIMS, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE AIRWORTHINESS, LACK OF AIRWORTHINESS, LOAD CARRYING CAPABILITY, VALUE, DURABILITY, COMPLIANCE WITH SPECIFICATIONS, CONDITION, DESIGN, OPERATION, MERCHANTABILITY, FREEDOM FROM CLAIMS OR INFRINGEMENT OR THE LIKE, OR FITNESS FOR USE FOR A PARTICULAR PURPOSE OF THE AIRCRAFT OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE AIRCRAFT, THE ABSENCE THEREFROM OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE, OR AS TO ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED (INCLUDING ANY IMPLIED WARRANTY ARISING FROM A COURSE OF PERFORMANCE OR DEALING OR USAGE OF TRADE), WITH RESPECT TO THE AIRCRAFT; AND THE LESSEE HEREBY WAIVES, RELEASES, RENOUNCES AND DISCLAIMS EXPECTATION OF OR RELIANCE UPON ANY SUCH WARRANTY OR WARRANTIES; EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE LESSOR SHALL NOT HAVE ANY RESPONSIBILITY OR LIABILITY TO THE LESSEE OR ANY OTHER PERSON, WHETHER ARISING IN CONTRACT OR TORT OUT OF ANY NEGLIGENCE OR STRICT LIABILITY OF THE LESSOR OR OTHERWISE, FOR (I) ANY LIABILITY, LOSS OR DAMAGE CAUSED OR ALLEGED TO BE CAUSED DIRECTLY OR INDIRECTLY BY THE AIRCRAFT OR PART THEREOF OR BY AN INADEQUACY THEREOF OR DEFICIENCY OR DEFECT THEREIN OR BY ANY OTHER CIRCUMSTANCE IN CONNECTION THEREWITH, (II) THE USE, OPERATION OR PERFORMANCE OF THE AIRCRAFT OR ANY RISKS RELATING THERETO, (III) ANY INTERRUPTION OF SERVICE, LOSS OF BUSINESS OR ANTICIPATED PROFITS OR CONSEQUENTIAL DAMAGES OR (IV) THE DELIVERY, OPERATION, SERVICING, MAINTENANCE, REPAIR IMPROVEMENT OR REPLACEMENT OF THE AIRCRAFT. TO THE EXTENT PERMITTED BY APPLICABLE LAW, THE LESSEE WAIVES ANY AND ALL RIGHTS AND REMEDIES NOW OR HEREAFTER CONFERRED UPON THE LESSEE BY LAW OR OTHERWISE THAT MAY LIMIT OR MODIFY THE LESSOR'S RIGHTS OR INCREASE OR MODIFY THE LESSOR'S OBLIGATIONS AS DESCRIBED IN THIS LEASE. THE WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS CLAUSE 12 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED, AND THE LESSOR AND/OR WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION SHALL NOT BE DEEMED TO HAVE MADE ANY OTHER REPRESENTATIONS OR WARRANTIES, EXCEPT AS OTHERWISE SET OUT IN THIS AGREEMENT.

13. **RETURN OF THE AIRCRAFT**

13.1 **Return**

- (1) On the expiration or earlier termination of the Term or at such other time as the Lessee shall be required to return the Aircraft to the Lessor pursuant to the terms hereof, the Lessee, at its own expense, shall return the Aircraft to the Lessor at the Return Location equipped with all required Parts and Engines (or Replacement Engines), duly installed thereon and with all Aircraft Documents

which shall be complete and up to date and in all cases in the Return Condition and acceptable to the Lessor, by delivering the same to the Lessor at such location.

- (2) UNTIL THE LESSEE SHALL HAVE COMPLIED IN FULL WITH ITS OBLIGATIONS UNDER THIS CLAUSE TO RETURN THE AIRCRAFT, THE LESSEE SHALL NOT BE ENTITLED TO CONTINUE TO USE THE AIRCRAFT BUT SHALL BE OBLIGATED TO CONTINUE TO PERFORM ITS OBLIGATIONS UNDER THIS LEASE, INCLUDING THE OBLIGATION TO PAY LEASE PAYMENTS AND MAINTAIN INSURANCE COVERAGES AS THOUGH THE TERM HAD BEEN EXTENDED.

13.2 Legal Status Upon Return

Immediately prior to the Return Occasion, the Lessee shall, at its cost, procure that:

- (1) the Aircraft, Engines and Parts shall be free and clear of all Liens, except Lessor's Liens;
- (2) the Aircraft is equipped and in full airworthy condition for operation according to Part 135 to allow the Aircraft to be operated for the commercial charter under applicable rules, regulations and ADs of the GAA, without waiver, restrictions or exceptions;
- (3) the Aircraft shall have a current full certificate of airworthiness issued by the GAA with no exceptions noted thereon;
- (4) the Aircraft shall be in full compliance with the ADs and mandatory regulations of the FAA requiring compliance by the later of the Return Occasion and the last to occur of 100 Flight Hours, 10 Cycles or one month after the Return Occasion;
- (5) the Aircraft is in full compliance with the Maintenance Programme and Service Bulletins of the Manufacturer, Engine Manufacturer and any Parts manufacturer;
- (6) the Aircraft shall be in a maintenance status consistent with the requirements of clauses 17 and 18.

13.3 Return of Engines

In the event that any Replacement Engine not owned by the Lessor is delivered installed on the returned Airframe as set forth in clause 13.1, the Lessee, concurrently with such delivery, will, at no cost to the Lessor, furnish, or cause to be furnished, to the Lessor a full warranty (as to title) bill of sale with respect to such Replacement Engine, in form and substance satisfactory to the Lessor (together with a legal opinion to the reasonable satisfaction of the Lessor to the effect that such full warranty bill of sale has been duly authorised and delivered and is enforceable in accordance with its terms and that such Replacement Engine is free and clear of Liens other than Lessor's Liens), against receipt from the Lessor of a bill of sale evidencing the transfer, on the same terms *mutatis mutandis* and in form and substance satisfactory to the Lessee (together with a legal opinion on the same terms), by the Lessor to the Lessee or its designee of all of the Lessor's right, title and interest in and to an Engine not installed on the Airframe at the time of the return of the Airframe. If any such bill of sale transferring title of an engine to the Lessor shall be executed by a Permitted Sublessee, the Lessee will guarantee to the Lessor the title warranty contained in such bill of sale. The Lessee shall also take (or cause any Permitted Sublessee to take) such other action as the Lessor may reasonably request in connection with such transfer of any such engine.

13.4 Service Bulletins and Modification Kits

On return of the Aircraft pursuant to this clause, the Lessee shall deliver to the Lessor, at no cost to the Lessor, all service bulletin and modification kits furnished without charge by a manufacturer for installation on the Aircraft which have not been so installed together with appropriate instructions for installation. In the event such uninstalled kits were purchased or manufactured by the Lessee, then the Lessor shall have a right to purchase such kits at the cost of the same to the Lessee for a period of one hundred eighty (180) days after return.

13.5 Condition of the Aircraft

Upon the Return Occasion, the Lessee shall, at its cost, procure that the Aircraft shall comply with all of the conditions set forth in Exhibit E.

13.6 Lessor's Final Inspection

Immediately prior to the Return Occasion, the Lessee shall make the Aircraft available to the Lessor at the Lessee's principal operating base for detailed inspection, at the Lessee's expense, in order to verify that the condition of the Aircraft complies with the requirements set forth above, which inspection shall include, all elements set forth in Exhibit E, it being agreed by the Lessor that, if possible and practicable to test the condition of the Aircraft as at the Return Occasion, such inspection, or part thereof, should take place during the final scheduled maintenance of the Aircraft prior to the Return Occasion (such inspection being the "**Lessor's Final Inspection**"). The Lessee shall provide the Lessor with at least thirty (30) days' prior written notice of the time and place of the Lessor's Final Inspection and such support and personnel to facilitate the Lessor's Final Inspection as the Lessor or the Lessor's Aircraft Manager shall reasonably request. The period allowed for the Lessor's Final Inspection shall have such duration as to permit the opening of any areas of the Aircraft which are required to be opened to verify satisfaction with the requirements of Exhibit E and shall continue on consecutive days until all activity required above to be conducted during the Lessor's Final Inspection has been concluded. All storage expenses attributable to any extension of the Term pursuant to the above shall be payable by the Lessor.

13.7 Functional Check Flight and Redelivery Certificates

- (1) Immediately following completion of the Lessor's Final Inspection and prior to the expiration of the Term a functional check flight shall be conducted for the Aircraft in accordance with the Manufacturer's standard procedures at the cost of the Lessee. The Lessor shall be entitled to appoint two (2) representatives to participate in such check flight as observers. Any deficiencies noted during such functional check flight shall be corrected at the Lessee's expense if the Aircraft is not covered by the manufacturers' warranty.
- (2) Upon completion of the Lessor's Final Inspection and the functional check flight of the Aircraft, the Lessor shall either:
 - (1) accept the return of the Aircraft and sign the Redelivery Acceptance Certificate and Aircraft Status Report attached thereto with any deficiencies noted thereon and deliver the same to the Lessee; or

- (2) if the Aircraft fails fully to conform to the Return Condition, complete an Aircraft Status Report in relation to the Aircraft as at the completion of the Lessor's Final Inspection and functional check flight listing any such non-conforming items thereon.

The provisions of this sub clause shall be without prejudice to the right or remedies of the Lessor or to the obligations of the Lessee under any other provision of this Lease.

- (3) THE LESSEE SHALL INDEMNIFY AND HOLD HARMLESS THE INDEMNITEES FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES AND LOSSES THAT ANY INDEMNITEE MAY SUFFER OR INCUR ARISING BY REASON OF DEATH OR INJURY TO ANY EMPLOYEE OR REPRESENTATIVE OF THE LESSOR OR THE LESSOR'S AIRCRAFT MANAGER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE SAID FUNCTIONAL CHECK FLIGHT OF THE AIRCRAFT. The Lessee shall further maintain adequate insurance coverage for such flight in accordance with the terms of this Lease and such additional insurance coverage as the Lessor may require.

13.8 Aircraft Documentation

- (1) In order to enable Lessor to prepare for the Lessor's Final Inspection of the Aircraft pursuant to clause 13.6, the Lessee agrees to make available to the Lessor at the Return Location not later than ten (10) days prior to the commencement of the Lessor's Final Inspection, the Aircraft Documents together with such other documentation regarding the condition, use, maintenance, operation and history of the Aircraft during the Lessee's possession of the Aircraft as the Lessor may reasonably request.
- (2) In the event of missing, incomplete or unacceptable (in the reasonable opinion of the Lessor's Aircraft Manager) documentation, the Lessee shall reaccomplish the tasks necessary to produce such documentation in accordance with a GAA approved maintenance programme (and any other applicable rules, regulations or directives of the GAA) satisfactory to the Lessor prior to the required return of the Aircraft hereunder.

13.9 Corrections and Subsequent Corrections

In the event that the Aircraft fails upon the Return Occasion fully to conform to any Return Condition, the Lessor may:

- (1) continue the obligations of the Lessee under this Lease in effect in the manner provided for in clause 13.1(2) until such condition or requirement is met; or
- (2) accept the return of the Aircraft and thereafter have any such non-conformance corrected or requirement met, at such time as the Lessor may deem appropriate at commercial rates then charged by the Person selected by the Lessor to perform such correction. Any direct expense incurred by the Lessor for such correction shall become Supplemental Lease Payments ("Supplemental Lease Payments") payable by the Lessee within five (5) Business Days following the submission of a written statement by the Lessor to the Lessee, identifying the items corrected and setting forth the expense of such correction. The Lessee's obligation to pay such Supplemental Lease Payments shall survive the termination of the Term.

13.10 Additional Maintenance, Repair or Overhaul

Upon the Return Occasion and upon written request of the Lessor, for a period of up to ninety (90) days, the Lessee shall store and insure the Aircraft as requested by the Lessor in the same manner and with the same care as used for similar aircraft and engines maintained by the Lessee, **Provided that** the Lessor shall reimburse the Lessee for its documented direct out-of-pocket costs, without mark-up, for such storage and insurance and shall not extend this Lease.

13.11 Fuel and Oil on Return

On the Return Occasion, the Lessee, at its expense, shall return the Aircraft with an amount of fuel and oil that equals or exceeds the amount of fuel and oil on the Aircraft at the Delivery Date.

13.12 Registration and Deregistration Costs

The Lessor shall be solely responsible for any and all costs, Taxes and dues relating to the registration, importation and exportation and de-registration of the Aircraft in, into and from the Country of Registration in connection with the Delivery of the Aircraft to the Lessee at the commencement of the Term and in connection with the redelivery of the Aircraft to the Lessor as required hereby, including the cost of obtaining any necessary Certificates of Airworthiness for Export in respect of the Aircraft.

PART 5: OPERATIONS AND MAINTENANCE

14. POSSESSION AND USE : SUBLEASING

14.1 Possession : Subleasing

(1) Leasing

The Lessee will not, without the prior written consent of the Lessor, assign, pledge or otherwise encumber this Lease or sublet, charter, wet lease or transfer possession or operational control of the Aircraft or install any Engine or any Part or permit any Engine or Part to be installed on any airframe other than the Airframe **Provided that** if (i) no Default shall have occurred and be continuing, (ii) the action to be taken shall not affect the registration of the Aircraft and (iii) all necessary approvals of each Governmental Entity having jurisdiction over the Aircraft, the Lessee, any Permitted Sublessee or other relevant Person have been obtained, the Lessee may:

(a) without the consent of the Lessor, exchange any Engine with another engine on an aircraft operated by the Lessee, any Affiliate of the Lessee or any Permitted Sublessee under a Sublease or pursuant to a Related Lease;

(b) without the consent of the Lessor, deliver possession of the Aircraft, Airframe or any Engine or any Part thereof to a Maintenance Contractor for testing or other similar purposes or to any organisation for service, repair, maintenance, testing or overhaul work on the Aircraft or for alterations or modifications in or additions to the Aircraft to the extent required or permitted by the terms hereof;

(c) place an Engine in an aircraft engine pool approved by the Lessor's Aircraft Manager;

(d) with the prior written consent of the Lessor, sublease the Aircraft to any Permitted Sublessee on the terms and conditions satisfactory to the Lessor in its absolute discretion, including those set forth in clause 14.1(1);

(e) enter into a charter or wet lease of the Aircraft for a period of no more than six months, under which no Person other than the Lessee has or is granted any legally enforceable possessory interest in the Aircraft and the Lessee retains operational control of the Aircraft at all times save that the Lessee may sublease the aircraft to Advanced Air Management, Inc. ("AAM") and operational control of the Aircraft may be given to AAM for the conduct of operations under Part 135 of the Aeronautics Regulations of Title 14 of the United States Code of Federal Regulation ("FAR Part 135").

(2) Limitations

With respect to any transfer or Sublease pursuant to clause 11.1(1)(d) and (e):

- (1) the rights of any transferee or sublessee pursuant to a transfer or Sublease permitted by clause 16.1(1) shall be subject and subordinate to all the terms of this Lease and such transferee or sublessee shall so acknowledge in writing for the benefit of the Lessor;
- (2) the Lessee shall remain primarily liable hereunder for the performance of all of the terms of this Lease to the same extent as if such transfer or Sublease had not occurred;
- (3) no Sublease, charter, wet lease or other similar arrangement or other transfer pursuant to the terms of clause 16.1(1) shall in any way discharge or diminish any of the Lessee's obligations to the Lessor;
- (4) the term of any transfer or any Sublease, charter, wet lease or other similar arrangement or other transfer shall not extend beyond the then existing Term and the terms and conditions of the same shall not be inconsistent with this Lease;
- (5) any Permitted Sublessee shall have:
 - (1) made representations comparable to those of the Lessee set forth in clause 3.1 **Provided that** references therein to Country of Organisation shall refer to the country in which the Permitted Sublessee is organised, the Country of Registration shall refer to the Country in which the Permitted Sublessee's use of the Aircraft occurs, and references to the Lease shall refer to such Sublease; and
 - (2) agreed to operate the Aircraft in accordance with the terms hereof and in accordance with all insurance policies relating to the Aircraft and the terms of such Sublease (and any agreements entered into in connection therewith);
- (6) any Sublease shall be substantially identical to this Lease, *mutatis mutandis*, and shall be subject to the prior written approval of the Lessor, acting in its absolute discretion;

- (7) the Lessee shall use reasonable efforts to provide the Lessor with as much prior written notice as is reasonably practicable of the Lessee's intent to enter into any Sublease; and
- (8) the Lessor shall have received, prior to the commencement of any Sublease, an opinion of independent counsel (which counsel and opinion shall be reasonably satisfactory to the Lessor) qualified to practice law in the jurisdiction of the Permitted Sublessee's domicile in form, scope and substance reasonably satisfactory to the Lessor concluding, among other things, that the terms of such Sublease are legal, valid, binding and enforceable in such jurisdiction and addressing such other matters as Lessor may reasonably request;
- (3) Except as provided in this clause 16, the Lessee shall not assign any interest in this Lease or any of its rights hereunder or in any property leased hereunder, and any attempt to do so shall be void *ab initio*.

14.2 Lawful Insured Operations

- (1) The Lessee will, or will cause a Permitted Sublessee to, operate and use the Aircraft only in lawful commercial cargo operations by crews duly certified by the Country of Registration.
- (2) The Lessee will not maintain, use or operate the Aircraft, or permit the Aircraft to be maintained, used or operated in violation of any applicable Law of any Governmental Entity, or in violation of any airworthiness certificate, permit, license or registration issued by the GAA or contrary to the Manufacturer's or Engine Manufacturer's operating manuals or instructions or the Maintenance Programme for the Aircraft.
- (3) The Lessee shall not operate the Aircraft, or permit the Aircraft to be operated during the Term, unless (i) the Aircraft is covered by insurance as required by the provisions hereof, and (ii) such operation is in compliance with the terms of such insurance.
- (4) The Lessee shall not operate or locate the Aircraft or permit the Aircraft to be operated or located during the Term in any area excluded from coverage by any insurance policy issued pursuant to the requirements of this Lease and the Lessee solely shall bear any costs and expenses that may arise from any loss or damage (with respect to both the Aircraft and any affected third parties) that may occur during or in connection with operations of the Aircraft including those that are excluded from coverage by the insurance policies issued pursuant to the requirements of this Lease.
- (5) Neither the Lessee or any Permitted Sublessee shall at any time represent the Lessor, the Beneficiary or any Financing Party as carrying goods or passengers in the Aircraft or as being in any way connected or associated with the operation or carriage being undertaken by the Lessee or any Permitted Sublessee or as having any operational interest in or responsibility for the Aircraft.

14.3 Restrictions on Operation

The Lessee shall not operate or locate the Aircraft or permit the Aircraft to be operated or located:

- (1) in any country that is the subject of sanctions under the U.S. International Economic Emergency Powers Act or U.N. Security Council directives from time to time ; or
- (2) in any country restricted under the U.S. Trading with the Enemy Act and U.S. Export Administration Act except as may be permitted by operating in accordance with the conditions specified by the U.S. Export Administration Regulations, General License GATS (15CFR Part 771.19); or
- (3) to or within any country with which the United States of America does not maintain diplomatic relations; or
- (4) in or over any area which may expose the Lessor, the Beneficiary or any Financing Party to any penalty, fine, sanction or other liability, whether civil or criminal, under any applicable Law.

14.4 AOC

The Lessee or its Permitted Sublessee shall continue to hold an air carrier operating certificate applicable to aircraft of the same type as the Aircraft and for the purpose for which the Aircraft is permitted to be used hereunder issued by the Country of Registration or Organisation, as the case may be.

14.5 Registration

During the Term, the Lessee shall at its expense keep the Aircraft at all times registered under the applicable Laws of the Country of Registration in the name of the Lessee, as operator, with the interest of the Lessor as owner on the applicable register in the Country of Registration.

14.6 Insignia

- (1) Upon delivery of the Aircraft, the Lessee agrees to place the Lease Identification in the cockpit in a prominent location and to place the Lease Identification on the gearbox of each Engine. The Lessee agrees to make such changes to the Lease Identification as the Lessor may reasonably request from time to time.
- (2) The Lessee shall be permitted to paint the Aircraft in accordance with its own livery **Provided that** such livery shall be removed upon the Return Occasion in accordance with clause 13 and Exhibit E.

15. INFORMATION AND INSPECTION

15.1 Information

From and after the Delivery Date, the Lessee agrees to furnish the Lessor's Aircraft Manager with the following at the following times:

- (1) within 24 hours after the occurrence thereof, notice of any notices received from the GAA indicating an intent to commence any investigation of the Lessee or its operations or to impose any disciplinary action on the Lessee;
- (2) at least 30 days prior to any scheduled maintenance on the Aircraft, notice of such scheduled maintenance and the locations thereof and provide the Lessor or

the Lessor's Aircraft Manager a reasonable opportunity to have one or more technical representatives of the Lessor present during the performance thereof with full access to all related documentation.

- (3) within 24 hours of an accident/incident affecting or involving the Aircraft, a written accident/incident report relating thereto;
- (4) promptly upon demand for the same, such written reports concerning the operation of the Aircraft as may be necessary to permit Lessor, the Beneficiary and their respective shareholders and Affiliates to determine their respective tax liabilities;
- (5) promptly upon request for the same, such information regarding the present and anticipated location and regarding the condition of the Aircraft as the Lessor or the Lessor's Aircraft Manager may reasonably require; and
- (6) promptly upon demand for the same, copies of all reports submitted to the GAA relating to the use or operation of the Aircraft.

15.2 Inspection rights

- (1) At all reasonable times during the Term, which shall include normal business hours in the location where the Aircraft is physically located and in the location where the Aircraft Documents are kept, the Lessee shall (and shall cause any Permitted Sublessee to) allow the Lessor, the Lessor's Aircraft Manager, at their own risk, to conduct an on-board or visual walk-around inspection of the Aircraft and any Engine and to inspect the Aircraft Documents **Provided that** (i) any such inspection shall be subject to the safety, security and workplace rules applicable at the location where such inspection is conducted and any applicable governmental rules or regulations, and (ii) in the case of an inspection during a maintenance visit, (and, save following a Default, the Lessor shall seek to make or procure the making of such inspections during a maintenance visit of the Aircraft) such inspection shall not in any respect interfere with the normal conduct of such maintenance visit or extend the time required for such maintenance visit or, in any event, at any time interfere with the use or operation of the Airframe or any Engine or with the normal conduct of the Lessee's or a Permitted Sublessee's business.
- (2) The Lessor shall have no duty to make any such inspection and shall not incur any liability or obligation by reason of not making any such inspection. The Lessor's (or the Lessor's Aircraft Manager's) failure to object to any condition or procedure observed or observable in the course of an inspection hereunder shall not be deemed to waive or modify any of the terms of this Lease with respect to such condition or procedure.
- (3) The cost of such inspections shall be borne;
 - (1) prior to the occurrence of a Default, by the Lessee for the first such inspection in each period of twelve months and by the Lessor for any additional inspection that is made by it in any such period **Provided that** if on any such additional inspection the Lessee is found not to be in compliance with the requirements of this Part 5, the cost of such inspection shall be borne by the Lessee; and
 - (2) following the occurrence of a Default and so long as the same is continuing, by the Lessee.

- (4) The Lessee shall forthwith effect such repairs to the Aircraft as any inspection pursuant to this clause may show are required in order for the terms of this Lease to be complied with.

16. QUIET ENJOYMENT

The Lessor covenants that so long as an Event of Default shall not have occurred and is not continuing or has not been waived by the Lessor, the Lessee shall quietly enjoy, in accordance with the terms hereof, the Aircraft and all rents, revenues, profits and income thereof, without interference from the Lessor, or from any Person lawfully claiming by or through the Lessor.

17. MAINTENANCE

17.1 Maintenance Contractor and Programme

- (1) At least twenty (20) Business Days prior to the Estimated Delivery Date, the Lessee shall submit to the Lessor's Aircraft Manager (i) details of the proposed Maintenance Contractor and (ii) full details and a copy of the proposed Maintenance Programme for the Aircraft in each case for the approval of the Lessor, such approval not to be unreasonably withheld or delayed.
- (2) If at any time the Lessee wishes to change the Maintenance Contractor or amend the Maintenance Programme for the Aircraft, the Lessee shall submit details of the same to the Lessor's Aircraft Manager for the Lessor's approval at least twenty (20) Business Days prior to the proposed effective date of the relevant change or amendment, such approval not to be unreasonably withheld or delayed.
- (3) The Lessee shall promptly, at its cost, supply the Lessor's Aircraft Manager with a copy of all updates and amendments of the Maintenance Programme promulgated by the Manufacturer, Engine Manufacturer and/or any OEM.

17.2 Generally

The Lessee, at its own cost and expense, shall:

- (1) cause a Maintenance Contractor to perform all mandatory service, inspections, repairs, maintenance, modifications, amendments, alterations, overhaul and testing, (i) as may be required under GAA rules and regulations applicable to the Aircraft and in compliance with the Maintenance Programme, (ii) as may be included in any ADs, Service Bulletins requiring termination or compliance during the Term or by the later of the times mentioned in clause 13.2(4) in the same manner and with the same care as shall be the case with similar aircraft and engines of the same make and model as the Aircraft and Engines owned by or operated by or on behalf of the Lessee without discrimination and (iii) so as to keep the Aircraft in good operating and airworthy condition and appearance as when delivered to the Lessee subject to normal wear and tear associated with the operation and maintenance thereof in accordance herewith;
- (2) keep the Aircraft in such condition as is necessary to enable the airworthiness certification of the Aircraft to be maintained in good standing at all times under GAA regulations and any other applicable Law;

- (3) maintain on a current basis throughout the term of this Lease and in the English language and retain and safeguard the same, accurate, complete, and current all Aircraft Documents and all current and historical maintenance and overhaul records (including all documents required by the GAA or otherwise to trace all time or cycle controlled Parts to the most recent overhaul or birth), all current and historical modification, addition or alteration records, all log books, all manuals and revisions and updates thereto, all certification and inspection records (including without limitation all certifications and forms required by the GAA and otherwise and all reports, x-rays, video tapes, print-outs and other non destructive testing documents), and all other material required by, and in a manner acceptable to, the GAA any other Governmental Entity, the Maintenance Programme and this Lease; and
- (4) permit the Lessor or any authorised representative of the Lessor to examine such Aircraft Documents at any reasonable time;

or shall procure that the same is performed, kept, maintained or permitted by any Permitted Sublessee.

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17.3 Engines

- (1) In addition to its rights under clause 16, the Lessee and any Permitted Sublessee shall have the right at its option at any time, on at least twenty (20) Business Days' prior written notice to the Lessor (or, if such prior notice is impractical, in any case **Provided that** such notice is given immediately after such substitution), to substitute or procure the substitution of, and if a Casualty Occurrence shall have occurred with respect to an Engine, the Lessee shall, within thirty (30) days of the occurrence of such Casualty Occurrence substitute or procure the substitution for any such Engine, a Replacement Engine on the Airframe **Provided that** the Replacement Engine shall have a value and utility at least equal to the replaced Engine, assuming that such Engine was in the condition and repair required to be maintained by the terms of this Lease. In such event, immediately upon such substitution and without further act, (i) title to the Replacement Engine shall thereupon vest in the Lessor (subject only to Permitted Liens), (ii) the replaced Engine shall no longer be deemed an Engine hereunder and (iii) such Replacement Engine shall be deemed part of the Aircraft for all purposes hereof to the same extent as the Engine originally installed on or attached to such Aircraft.

- (2) The Lessee and any Permitted Sublessee shall be entitled, so long as no Default shall have occurred and be continuing to substitute, replace or renew any Engine or Part with a Replacement Engine or part which does not satisfy the requirements of clause 17.3(2) or clause 18 **Provided that:**
 - (1) there shall not have been available to the Lessee or the Permitted Sublessee, at the time and in the place that such substitute or replacement part was required to be installed on the Airframe or Engines a Replacement Engine or substitute or replacement part complying with such requirements; and
 - (2) it would have resulted in an unreasonable disruption of the operation of the Aircraft to have grounded the Aircraft until such time as a Replacement Engine or substitute or replacement part complying with such requirements became available for installation in or on the Aircraft; and
 - (3) as soon as practicable after installation of the same in or on the Airframe or Engine (which, in the case of an Engine, shall be no later than the next shop visit of the Engine) the Lessee or the Permitted Sublessee shall remove any such Replacement Engine or part not complying with such requirements and replace or substitute the same with a Replacement Engine or part complying with the same.
- (3) Subject to the foregoing:
 - (1) unless the subject of an engine pooling agreement approved by the Lessor or the Lessor's Aircraft Manager, any Engine removed from an Aircraft for scheduled or unscheduled maintenance must have such maintenance completed and be reinstalled on the Aircraft within sixty (60) days of removal, but in any event prior to the expiration or earlier termination of the Term; and
 - (2) unless clause 20 permits such Part to be permanently removed, the Lessee shall procure that if any Part is removed from the Aircraft, such Part or a replacement Part permitted under clause 18, shall be reinstalled within thirty-six (36) hours of such removal or prior to the earlier expiration or earlier termination of the Term.
- (4) At any time when an Engine is installed on an airframe or aircraft other than the Airframe or the Aircraft, the Lessee shall ensure and shall produce evidence to the Lessor that insurance cover is maintained in respect of such Engine in such form as the Lessor may reasonably require. For the avoidance of doubt, an Engine may only be so installed as permitted by clause 14.1(1)(a).

18. **REPLACEMENT OF PARTS; ALTERATIONS, MODIFICATIONS AND ADDITIONS**

18.1 **Replacement and Removal of Parts**

- (1) The Lessee, at its own cost and expense, shall promptly replace or procure the replacement of all Parts which, from time to time, may become worn out, lost, stolen, destroyed, seized, confiscated, damaged beyond repair or rendered unfit for use for any reason whatsoever.

- (2) In the ordinary course of maintenance, service, repair, overhaul or testing during the Term, the Lessee may at its own cost and expense cause to be removed or allow the removal of any Parts, whether or not worn out, destroyed, damaged beyond repair or rendered unfit for use, **Provided that** the Lessee shall replace at its own cost and expense such Parts as promptly as practicable.
- (3) All replacement Parts shall be free and clear of all Liens, shall be in at least the same modification status and Service Bulletin accomplishment status, shall be fully interchangeable as to form, fit and function, shall have been overhauled, repaired and inspected by an agency reasonably acceptable to the Manufacturer, the Engine Manufacturer and the GAA (as applicable) and shall be in as good operating condition as, and have a utility at least equal to and a value and remaining warranty reasonably approximating the Parts replaced (assuming such replaced parts were in the condition and repair in which they were required to be maintained by the terms hereof) and all historical records (dating back to the time of the manufacturer of such Part) relating to such Parts shall be provided and maintained by the Lessee.

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- (4) All Parts owned by the Lessor which are at any time removed from the Aircraft shall remain the property of the Lessor and subject to this Lease, no matter where located, until such time as such Parts shall be replaced by Parts which have been incorporated or installed in or attached to the Aircraft and which meet the requirements of replacement Parts specified in subclause (3). Immediately upon any replacement part becoming incorporated or installed in or attached to the Aircraft as above provided, (i) title to the removed part shall thereupon vest in the Lessee, free and clear of all rights of the Lessor and Lessor's Liens, (ii) title to such replacement part shall thereupon vest solely in the Lessor and (iii) such replacement part shall become subject to this Lease and be deemed a Part for all purposes hereof to the same extent as the Part which it has replaced.
- (5) Any Part removed from the Airframe or from any Engine as provided in this clause 20.1 may be subjected by the Lessee to normal pooling or interchange arrangements on terms reasonably satisfactory to the Lessor or the Lessor's Aircraft Manager **Provided that** the part replacing such removed Part shall be incorporated in or installed on or attached to such Airframe or Engine in accordance with clause 18.1(1) to (4) as promptly as practicable after the removal of such removed Part and in any event prior to the earlier of: (i) 36 hours after the removal the removed Part; and (ii) the expiration or earlier termination of the Term.

18.2 Alterations, Modifications and Additions

- (1) The Lessee, at its own expense, shall make or procure or allow the making of such alterations, modifications and additions to the Aircraft as may be required from time to time to meet the applicable standards of the GAA or to comply with any Law, rule, directive, bulletin, notice, regulation or order of any Governmental Entity or the manufacturer of the Aircraft, Engines or Parts.
- (2) The Lessee or any Permitted Sublessee, at its own expense, may from time to time make alterations and modification in and additions to the Aircraft **Provided that** no such alteration, modification or addition diminishes, in the Lessor's reasonable opinion, the remaining warranty, value, marketability or utility, or impairs the condition or airworthiness, of the Aircraft and that title to all Parts incorporated or installed in or attached or added to the Aircraft as a result of such alteration, modification or addition shall vest immediately in the Lessor and become subject to this Lease, without the necessity for any further act of transfer, document or notice.
- (3) In no event shall the Lessor bear any liability or cost for any alteration, modification or addition to, or for any grounding or suspension of operations or of the certification of, the Aircraft, or for any loss of revenue arising therefrom.
- (4) The Lessee or any Permitted Sublessee may, at its own cost and expense at any time during the Term, remove or cause to be removed any Part from the Airframe or an Engine if (i) such Part is in addition to, and not in replacement of or in substitution for, any Part originally incorporated or installed in or attach to such Airframe or Engine at the time of delivery thereof hereunder or any Part in replacement of, or in substitution for, any such original Part, and (ii) such Part can be removed from such Airframe or Engine without diminishing or impairing the value, condition, utility, marketability or airworthiness which such Airframe or Engine would have had at the time of removal had such alteration, modification or addition not been effected by the Lessee assuming the Aircraft was otherwise maintained in the condition required by this Lease. Upon the removal of any such Part, title thereto shall vest, without further act,

in the Lessee free and clear of all rights of the Lessor and such Part shall no longer be deemed a Part hereunder. Any Part not removed as above provided prior to the return of the Aircraft to the Lessor hereunder shall remain the property of the Lessor.

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20. MANUFACTURERS' WARRANTIES

- 20.1 So long as no Default has occurred and is continuing, the Lessor agrees to cause to be extended to the Lessee such rights as the Lessor may have under any warranty, express or implied, with respect to the Aircraft given by the Manufacturer, the Engine Manufacturer, the manufacturer of any Part to the extent that the same may be assigned or otherwise made available to the Lessee; **Provided, however, that** upon an Event of Default, all such rights shall immediately revert to the Lessor to the exclusion of the Lessee including all claims thereunder whether or not perfected.
- 20.2 The Lessee shall not do or omit to do anything (or permit or fail to prevent the doing or omission of anything) which, or the omission of which, prejudices any right which the Lessor may have against the Manufacturer, the Engine Manufacturer, or against the manufacturer or supplier of any part of the Aircraft or against any maintenance or repair facility in respect of the Aircraft or any part thereof.

PART 6: INSURANCES: CASUALTY OCCURRENCES

21. INSURANCE

21.1 Obligation to Insure

The Lessee shall through the intermediary of an Approved Insurance Broker cause there to be effected and maintained in full force and effect in respect of each Aircraft insurances with an Approved Insurance Broker covering the Indemnitees as their interests may appear, on a worldwide basis in accordance with prudent aviation practice for the operation of cargo aircraft against (i) loss or damage to such Aircraft and (ii) any liability for injury, damage or claims caused by or arising out of or in connection with the operation, storage, maintenance or use of such Aircraft (including injury to or death of passengers and damage to or destruction of public or private property). Each policy required to be taken out by this Schedule is herein called a "required policy".

21.2 Types of Insurance

The Lessee shall (without prejudice to the generality of clause 21.1 effect and maintain or cause there to be effected and maintained:

- (1) an All Risks Hull Insurance Policy on each Aircraft on an agreed value basis in an amount not less than its Casualty Value;
- (2) a War Risks Insurance Policy on each Aircraft covering all of those risks which are currently enumerated in Lloyds Form AVN 48B (War, Hi-jacking and Other Perils Exclusion paragraph (Aviation)) other than paragraph (b) thereof to the fullest extent possible and any additional risks which may hereafter be included therein or in any form succeeding to any of its functions on an agreed value basis in an amount not less than the Casualty Value **Provided that**, if the

Aircraft is not being operated for hire or reward at any time, the risks required to be covered under this paragraph shall be limited to those enumerated in Lloyds Form AVN48B, paragraphs (c), (e) and (g) only; and

- (3) Liability Insurance, being Aircraft Third Party Legal Liability, Passenger Legal Liability, Baggage Legal Liability Legal Liability (including war and allied perils to the fullest extent available) for a combined single limit of liability (bodily injury/property damage) of not less than \$350,000,000 any one accident or series of accidents.

21.3 Terms of Hull Insurance

- (1) The Lessee shall procure that each required policy specified in clauses 21.1 and 21.2 shall be endorsed to include paragraph 1 of Lloyds' Form AVN67B with the Lessor and the Financing Parties named as Contract Parties and:
 - (1) covers at least such risks as are customarily insured against in respect of aircraft of the same type as the Aircraft;
 - (2) provides that, subject to the terms of the Mortgage, any loss will be settled jointly with the Lessee and the Lessor and any claim which becomes payable on the basis of a Casualty Occurrence shall be paid in dollars to the Contract Parties in accordance with endorsement AVN67B it being agreed between the parties hereto that such payment shall be made to or to the order of the Financing Parties (or, if none, the Lessor) with any other claim being payable as may be necessary for the repair of the damage or replacement of the Engine or Part to which it relates; and
 - (3) has a deductible of no more than the lesser of (i) the Deductible Amount and (ii) the lowest deductible amount applying to any similar aircraft in the Lessee's fleet in respect of any one claim, payment of which shall in all cases be the responsibility of the Lessee and for which the Lessee shall indemnify and hold harmless the Lessor and the Financing Parties.
- (2) The Lessee shall procure that the insurance placement shall provide, in the form of Lloyds' AVS.103 that in the event of separate insurances being arranged to cover the "All Risk" hull insurance and the "War Risk" and related insurance, that the underwriters subscribing to such insurances agree to a 50/50 claims funding arrangement in the event of any dispute as to which insurance is applicable.

21.4 Terms of Liability Insurance

The Lessee shall procure that each insurance policy specified in clause 21.2(3) is endorsed to include paragraph 2 of Lloyds' Form AVN67B with the Indemnitees named as Contract Parties and covers at least such risks as are customarily insured against in respect of aircraft of the same type as the Aircraft;

21.5 Terms Applicable to all Insurances

- (1) The Lessee shall procure that each insurance policy specified in clause 21.2 shall be endorsed to include paragraph 3 of Lloyds Form AVN67B with, subject to clause 21.4, the Lessor and the Beneficiary named as Contract Parties in accordance with sound international practice (having regard to the type of aircraft or engines involved).

- (2) If any of the policies maintained by the Lessee to satisfy the requirements of this clause 21 contain annual or other periodic limits on the aggregate of claims allowable in respect of the Lessee's fleet of Aircraft:
 - (1) the remaining unused portion of each limit shall at all times be equal to the sum of (a) the amount of coverage required by this Lease in respect of the Aircraft, (b) the amount of coverage required by each other Related Lease and (c) in the case of insurance against loss or damage to the Aircraft, an amount equal to the product of 2 and the Insured value of such other of the aircraft in the Lessee's fleet with the highest insured value; and
 - (2) the Approved Insurance Broker shall undertake in the undertaking issued by it to advise the Lessor promptly upon the occurrence of a claim which would reduce the remaining used portion of such limit.

21.6 Renewal

The Lessee shall begin or shall or shall cause there to begin final negotiations for the renewal of each required policy in due time before its expiry. Confirmation of completion of renewal shall be provided by the Lessee to the Lessor and the Lessor's Aircraft Manager before such expiry.

21.7 Information etc

- (1) The Lessee shall furnish to the Lessor and the Lessor's Aircraft Manager:
 - (1) on the Delivery Date for each Aircraft and thereafter within seven (7) days after each renewal date of each policy a certificate or certificates (in the form, or substantially in the form, of Exhibit I) signed by the Approved Insurers or the Approved Insurance Broker providing evidence of insurance coverage pursuant to this Lease;
 - (2) on request, certified copies of all documents constituting, evidencing or regulating the terms of any required policy (or of relevant extracts therefrom);
 - (3) on request, evidence of payment by or at the direction of the Lessee of each sum payable under or in connection with any required policy; and
 - (4) on request, such evidence as the Lessor or the Lessor's Aircraft Manager may reasonably require of the Lessee's compliance with its obligations under this Lease.
- (2) The Lessee shall forthwith notify the Lessor of any event (including but not limited to a Casualty Occurrence) which will or may give rise to a claim under any required policy in excess of the Deductible Amount and shall not (without the prior written consent of the Lessor or the Lessor's Aircraft Manager) settle or permit the settlement of any claim arising under a required policy unless it arises under a direct damage policy and is for less than the Deductible Amount.
- (3) The Lessee shall, before the Delivery Date in respect of an Aircraft, at its own cost and expense, cause the Approved Insurance Broker or, if appropriate, the Approved Insurer to issue a written undertaking in favour of the Lessor and the

Financing Parties in respect of the Insurances in the form or substantially in the form of Exhibit J.

- (4) If at any time and from time to time, the Lessor shall identify a Financing Party to the Lessee, the Lessee shall cause to be delivered new insurance certificates and broker's undertakings to ensure that each such Financing Party is afforded the insurance coverage required under this Lease.

21.8 Negative Undertakings

- (1) The Lessee shall not knowingly do or omit to do or permit to be done or left undone anything whereby any required policy would or might reasonably be expected to be rendered in whole or in part invalid or unenforceable and, without prejudice to the foregoing, shall not operate or locate the Airframe or any Engine or suffer the Airframe or any Engine to be operated or located, (i) in any area or for carriage of any goods excluded from coverage by any insurance required by the terms of this clause, except in the case of requisition by any Governmental Entity where any Borrower obtains, or procures, an indemnity in lieu of such insurance from such Governmental Entity against the risks and in the amounts required by this clause in respect of such area or such carriage of any goods, or (ii) in any recognised or threatened area of hostilities unless fully covered by war risk insurance or unless the Airframe or Engine is operated or used under contract with any Governmental Entity under which contract such Governmental Entity assumes full liability for any damage, loss, destruction or failure to return possession of such Airframe or Engines at the end of the term of such contract and for injury to persons and damage to property of others, or (iii) in any place or in any manner or for any purpose inconsistent with the terms or outside the cover provided by any required policy.
- (2) The Lessee shall not knowingly effect or authorise the placement of insurance covering the same subject matter as that covered by the policies specified in clause 21.2(1) or (2) (except on a contingent or other secondary basis).

21.9 Failure to Insure

If the Lessee shall fail to maintain or cause there to be maintained insurance as herein provided, the Lessor may at its option, provide such insurance and in such event the Lessee shall, upon demand, reimburse the Lessor for the cost thereof. Notwithstanding such provision by the Lessor, the Lessor may in its absolute discretion require that the relevant Aircraft be grounded until the Lessee has arranged for the provision of insurance as herein provided. Such provision by the Lessor shall not affect the right of the Lessor to treat such failure by the Lessee as an Event of Default in respect of that Aircraft.

21.10 Review of Insurance Obligations

Without prejudice to the foregoing provisions of this clause, if at any time due to changes in aviation insurance market practice and custom, (i) the Lessee or any Permitted Sublessee is unable at any time to comply with its obligations under this clause, or (ii) the Lessor or the Lessor's Aircraft Manager is of the view, based on the advice of the insurance advisers of the Lessor (or the Lessor's Aircraft Manager) that the insurances required to be maintained pursuant to this clause afford less protection to the Indemnitees than is normally provided in relation to aircraft similar to the Aircraft in similar circumstances, the Lessee shall forthwith notify the Lessor (or, as the case may be, the Lessor (or the Lessor's Aircraft Manager) shall forthwith notify the Lessee) and as soon as practicable thereafter the Approved Insurance Broker and the insurance

advisers of the Lessor (or the Lessor's Aircraft Manager) shall meet in good faith to consider what (if any) changes might be made to the terms and conditions of the Insurances required hereunder in order to take account of the changes in aviation insurance market practice and custom. On the basis of the recommendations of the Approved Insurance Broker and such insurance advisers the Lessor's Aircraft Manager and the Lessee will meet as soon as practicable in order to negotiate in good faith with a view to reaching agreement on what (if any) amendments should be made to such provisions.

21.11 Application of Insurance Proceeds for a Casualty Occurrence

Subject to clause 21.13, insurance payments which arise from any policy of insurance carried by the Lessee or any Permitted Sublessee and received as the result of the occurrence of a Casualty Occurrence shall be applied as follows:

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- (1) if such payments are received with respect to a Casualty Occurrence relating to the Airframe and Engines or engines installed on the Airframe, so much of such payments as shall not exceed the amounts due under clause 24.1 shall be paid to the Lessor; and
- (2) if such payments are received with respect to a Casualty Occurrence relating to an Engine under circumstances contemplated by clause 22.2, such payment shall be adjusted with the Lessee (provided that the Lessee has not breached any warranty, declaration or condition contained in the applicable insurance policy) and paid over to the Lessee, **Provided that** the Lessee shall have fully performed or concurrently therewith, will fully perform the terms of clause 22.2.

21.12 Application of Insurance Proceeds for Other than a Casualty Occurrence

Insurance payments for any damage to the Airframe or any Engine not constituting a Casualty Occurrence, or to any Part, will be held by the Lessor until the Lessee furnishes the Lessor with satisfactory evidence that the repairs or replacement property the Lessee is required to perform or obtain in accordance with the terms of clause 17 have been made or obtained by the Lessee. Subject to clause 21.13 and upon receipt of such evidence of repair or replacement, the Lessor shall pay the Lessee the amount of the insurance payment received with respect to such loss.

21.13 Application on Default

Any amount referred to in clause 21.11(1) or (2) or clause 21.12 which is otherwise payable to the Lessee shall not be paid to the Lessee, or, if it has been previously paid to the Lessee and not yet applied by the Lessee as permitted or required hereunder, shall be repaid by the Lessee to the Lessor, if at the time of such payment, a Default or an Event of Default shall have occurred and be continuing. In either case, all such amounts shall be held by the Lessor as security for the obligations of the Lessee, or, at the option of the Lessor, applied by the Lessor toward payment of any of the Lessee's obligations at the time due hereunder.

22. CASUALTY OCCURRENCES

22.1 As soon as possible, but in no event later than twenty-four (24) hours after a Casualty Occurrence during the Term with respect to the Airframe and/or any Engine, the Lessee shall give the Lessor and the Lessor's Aircraft Manager written notice of such occurrence.

22.2 Casualty Occurrence with Respect to the Airframe

- (1) No later than seven (7) Business Days after receipt of insurance proceeds in respect of such Casualty Occurrence, the Lessee shall pay to Lessor the sum of (i) the Casualty Value of the Aircraft plus the amount of Lease Payments (other than Supplemental Lease Payments), if any, accrued up to the date of payment of such Casualty Value (on the basis of actual days elapsed and a 360-day year) for each day during the period commencing with, and including, the last preceding Lease Payment Date and extending to the date of payment of such Casualty Value and (ii) all Supplemental Lease Payments computed as of the date of payment **Provided that**, if the Casualty Value or any part thereof is received by the Lessor pursuant to the hull insurances in respect of the Aircraft:
 - (1) prior to the date that the Lessee is obliged to pay the above Casualty Value to the Lessor, the obligation of the Lessee to make payment under

this clause shall be reduced by the amount of the Casualty Value so received; or

- (2) after the date on which the Lessee has paid the Casualty Value to the Lessor, the Lessor shall reimburse the Lessee with the amount of the same following the discharge by the Lessee of its obligations in full to the Lessor under this clause;

Provided further that the provisions of the foregoing proviso shall be subject to clauses 6.7.

- (2) Upon such payment:
 - (1) the obligation of the Lessee to make further payments of Lease Payments (other than Supplemental Lease Payments) hereunder shall terminate;
 - (2) this Lease shall terminate with respect to the Aircraft;
 - (3) the Lessor will transfer to the Lessee, without recourse or warranty, all of the Lessor's right, title and interest, if any, in and to the Airframe and Engines (if any) suffering the Casualty Occurrence, as well as all of the Lessor's right, title and interest in and to any Engine constituting part of the Aircraft but not installed thereon at the time of the Casualty Occurrence; **Provided, however, that** there shall be excluded from such assignment any and all claims against any Persons which arose prior to the date of such assignment, including any and all claims against any Persons who may have been responsible, in whole or in part, for the events giving rise to such Casualty Occurrence, but such exclusion shall be limited to the portion of such claims which exceeds the amounts paid to Lessor in respect of such Casualty Occurrence by the Lessee or the insurers under any policy of insurance maintained by the Lessee pursuant to clause 21; and
 - (4) the Lessor shall, at the request and cost of the Lessee, take such reasonable further actions and execute such further documents and assurances as the Lessee may reasonably require in order to procure that the Lessee shall receive the proceeds of the hull insurances in respect of the Aircraft.

22.3 Casualty Occurrence with Respect to an Engine

Upon a Casualty Occurrence with respect to an Engine under circumstances in which there has not occurred a Casualty Occurrence with respect to the Airframe, the Lessee shall, within forty-five (45) days after such occurrence, convey to the Lessor, as replacement for the Engine suffering a Casualty Occurrence, title to a Replacement Engine. Each Replacement Engine shall be free of all Liens (except Lessor's Liens) and shall be in as good an operating condition and shall have a value and utility at least equal to, and shall have at least the number of cycles remaining on its life-limited parts as, the Engine being replaced, assuming the Engine being replaced was in the condition and repair required by the terms hereof immediately prior to the Casualty Occurrence, and shall be compatible with the remaining installed Engines. Upon full compliance by Lessee with the terms of this clause:

- (1) the Lessor will transfer to the Lessee title to the Engine which suffered the Casualty Occurrence; and

- (2) the provisions of clause 22.2 shall apply *mutatis mutandis* to the proceeds of the insurances relating to the Engine suffering the Casualty Occurrence as they apply to a Casualty Occurrence in respect of the Aircraft under such clause or, if the Lessor shall have received the proceeds of the insurances in relation to the Casualty Occurrence in respect of the Engine, pay to the Lessee the amount thereof.

Further, prior to or at the time of any transfer of the Engine the subject of the Casualty Occurrence, the Lessee, at its own expense, will promptly (i) furnish the Lessor with a full warranty bill of sale, in form and substance reasonably satisfactory to the Lessor, with respect to such Replacement Engine; (ii) cause a supplement hereto, in form and substance reasonably satisfactory to the Lessor, subjecting such Replacement Engine to this Lease, to be duly executed by the Lessee; (iii) furnish the Lessor with such evidence of title to such Replacement Engine and of compliance with the insurance provisions of clause 21 with respect to such Replacement Engine as the Lessor may reasonably request; (iv) furnish the Lessor with an opinion of the Lessee's counsel (which counsel shall be reasonably acceptable to the Lessor) to the reasonable satisfaction of the Lessor to the effect that title to such Replacement Engine has been duly conveyed to the Lessor, free and clear of all Liens, and that such Replacement Engine is duly leased hereunder; (v) furnish a certificate signed by a duly authorised financial officer or executive of the Lessee certifying that, upon completion of such replacement, no Default or Event of Default will exist and (vi) furnish the Lessor with such documents as the Lessor may reasonably request in connection with the completion of the transactions contemplated by this clause 22.2, in each case in form and substance reasonably satisfactory to the Lessor. Upon full compliance by the Lessee with the terms of this clause 22.2, the Lessor will transfer to the Lessee "AS IS", "WHERE IS" and without recourse or warranty, except as to the Lessor's title and the absence of Lessor's Liens, all of the right, title and interest in the Engine which suffered the Casualty Occurrence and which was originally leased to the Lessee. For all purposes hereof, each such Replacement Engine shall be deemed part of the property leased hereunder, shall be deemed an "Engine" as defined herein and shall be deemed part of the same Aircraft as was the Engine replaced thereof. No Casualty Occurrence covered by this clause 22.2 shall result in any reduction in Lease Payments.

22.4 Application of Proceeds and Payments

Any payments received at any time by the Lessor or by the Lessee from any insurer under any policy of insurance (other than liability insurance) or any other Person (other than an insurer under insurance maintained by the Lessor) shall be applied in the manner specified in the relevant provision of clause 21. Subject to clause 21.13, any payments received at any time by the Lessor or the Lessee from any Governmental Entity or other Person with respect to a Casualty Occurrence will be applied as follows:

- (1) subject to sub clause 21.5(2), so much of such payments as shall not exceed the sum of Lease Payments accrued but unpaid through the date of receipt of such payments plus the Casualty Value required to be paid by the Lessee pursuant to clause 22.2 shall be paid to the Lessor in reduction of the Lessee's obligation to pay such unpaid Lease Payments and Casualty Value if not already paid by the Lessee, or, if already paid by the Lessee shall be applied by the Lessor to reimburse the Lessee for its payment of such Casualty Value and the balance of such payment, if any, remaining thereafter (if such payment is received with respect to insurance other than liability insurance) shall be paid over to, or retained by, the Lessee, except to the extent any such amount is specifically allocable to an interest of the Lessor; or

- (2) if such payments are received as a result of a Casualty Occurrence with respect to an Engine which is being replaced pursuant to clause 22.3, unless a Default or Event of Default shall have occurred and be continuing, all such payments shall be paid over to, or retained by, the Lessee if the Lessee shall have fully performed or, concurrently therewith will fully perform, the terms of clause 22.3 with respect to the Casualty Occurrence for which such payments are made.

22.5 Requisition

- (1) If the Aircraft or any part thereof is requisitioned for hire during the Term by or under the order of any Government Entity, unless the Aircraft or the Airframe shall have suffered a Casualty Occurrence following such requisition and the Lessee shall have made payment of all sums due pursuant to clause 22.2, the leasing of the Aircraft to the Lessee under this Lease shall continue in full force and effect for the remainder of the Term and the Lessee shall, other than its obligation to pay Lease Payments which shall abate, remain fully responsible for the due compliance with all its obligations under this Lease save for obligations with which the Lessee is unable to comply by virtue of such requisition.
- (2) The Lessee shall as soon as practicable after the end of any requisition for hire, and whether that requisition shall end during or after the Term, cause the Aircraft or the relevant part thereof to be put into the condition required by this Lease.
- (3) The Lessee shall be entitled to receive any requisition hire or other compensation payable by the requisitioning authority as a result of a requisition for hire of the Aircraft or relevant part thereof and shall pay an amount equal to the abated Lease Payments.
- (4) If the Aircraft or the relevant part thereof is under requisition for hire at the end of the Term:
 - (1) the leasing of the Aircraft under this Lease shall nevertheless terminate at such end but without prejudice to the accrued rights of the parties and the Lessor shall be entitled to receive and retain any requisition hire or other compensation payable by the requisitioning authority in respect of the period after the end of the Term; and
 - (2) if the Lessee is prevented by reason of such requisition from redelivering the Aircraft or the relevant part thereof under clause 13, the Lessee's obligation to redeliver the Aircraft shall cease.

22.6 Application in Default

Any amount referred to in clause 21 or this clause which is otherwise payable to the Lessee shall not be paid to the Lessee, or, if it has been previously paid to the Lessee, and not yet applied by the Lessee as permitted or required hereunder, shall be delivered from the Lessee to the Lessor, if at the time of such payment a Default or an Event of Default shall have occurred and be continuing and all such amounts shall be held by the Lessor as security for the obligations of Lessee, or, at the option of the Lessor, applied by the Lessor toward payment of any of the Lessee's obligations at the time due hereunder.

23. EVENTS OF DEFAULT

23.1 Any one or more of the following occurrences or events shall constitute an Event of Default:

- (1) The Lessee shall fail to make any payment of Lease Payments to the Lessor when due for ten (10) days, in full and in the manner and at the place required under this Lease;
- (2) The Lessee shall fail to obtain and maintain any insurance required under the provisions of clause 21 or shall operate the Aircraft outside of the scope of the insurance coverage maintained with respect to the Aircraft;
- (3) Any representation or warranty made by the Lessee herein or in any document or certificate furnished to the Lessor in connection with this Lease or pursuant thereto is incorrect or to the knowledge of Lessee becomes materially incorrect at any time thereafter in any material respect at the time made;
- (4) The Lessee shall fail timely to comply with its obligation under clause 11 to accept Delivery of the Aircraft;
- (5) The Lessee shall make or permit any unauthorised assignment or transfer of this Lease, or any interest therein, or of the right to possession of or operational control over the Aircraft, the Airframe, any Engine or any Part;
- (6) The Lessee shall fail to perform or observe any other covenant, condition or agreement to be performed or observed by it pursuant to this Lease and such failure shall continue for a period of ten (10) days after written notice thereof is given by the Lessor to the Lessee;
- (7) The occurrence of an Event of Default (as defined or by whatever name called therein) under any of the Related Leases or any Sublease save in the case of any charter or wet lease permitted under clause 14.1(e) where the Aircraft remains in the possession and operational control of the Lessee following such Event of Default;
- (8) The Lessee consents to the appointment of a receiver, administrative receiver, administrator, trustee or liquidator of itself or of a substantial part of its property, or the Lessee admits in writing its inability to pay its debts generally as they come due, or makes a general assignment for the benefit of creditors, or the Lessee files a voluntary petition in bankruptcy or a voluntary petition seeking reorganisation in a proceeding under any bankruptcy laws (as now or hereafter in effect), or an answer admitting the material allegations of a petition filed against the Lessee in any such proceeding, or the Lessee by voluntary petition, answer or consent seeks relief under the provisions of any bankruptcy or other similar law providing for the reorganisation or winding-up of corporations, or provides for an agreement, composition, extension or adjustment with its creditors;
- (9) An order, judgment or decree is entered by any court, with or without the consent of the Lessee, appointing a receiver, administrative receiver, administrator, trustee or liquidator for the Lessee or if all or any substantial part of its property, or all or any substantial part of the property of the Lessee is sequestered, and any such order, judgment or decree of appointment or

sequestration remains in effect, undismissed, unstayed or unvacated for a period of thirty (30) days after the date of entry thereof;

- (10) A petition against the Lessee in a proceeding under the bankruptcy, insolvency or other similar Laws (as now or hereafter in effect) is filed and is not withdrawn or dismissed within thirty (30) days thereafter, or if, under the provisions of any Law providing for reorganisation or winding-up of corporations which may apply to the Lessee, any court of competent jurisdiction assumes jurisdiction over, or custody or control of, the Lessee or of all or any substantial part of its property and such jurisdiction, custody or control remains in effect, unrelinquished, unstayed or unterminated for a period of thirty (30) days;
- (11) Attachments or other Liens shall be issued or entered against any substantial portion of the property of the Lessee and shall remain undischarged or unbonded for thirty (30) days except for security interests created in connection with monies borrowed or obligations agreed to by the Lessee in the ordinary course of its business;
- (12) The Lessee shall default in the payment of any obligation for the payment of borrowed money, for the deferred purchase price of property or for the payment for rent or hire under any lease of aircraft which has an aggregate principal amount of One Million Dollars (\$1,000,000) (or an equivalent amount in any currency other than Dollars) or more (determined in the case of borrowed money by the amount outstanding under the agreement pursuant to which such borrowed money was borrowed, in the case of a deferred purchase price by the remaining balance and in the case of a lease by the present discounted value of the remaining rent or hire payable thereunder (ignoring any fair market renewal) when the same becomes due if such non-payment results in the right of such holder to accelerate such indebtedness or any lessor shall have become entitled to require the payment of any termination, stipulated loss, liquidated damages or similar amount or to demand repossession of such property; or the Lessee shall default in the performance of any other term, agreement or condition contained in any material agreement or instrument under or by which any such obligation is created, evidenced or secured, if the effect of such default is to cause or allow such obligation to become due prior to its stated maturity;
- (13) The Lessee voluntarily suspends all or substantially all of its operations or the franchise, concessions, permits, licences, rights or privileges required for the conduct of the business and operations of the Lessee are revoked, cancelled or otherwise terminated;

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- (14) Any franchise, concession, permit, licence, consent, right, privilege or approval from any Governmental Entity necessary for the operation, maintenance, use, insurance or return of the Aircraft or for the payment of Lease Payments by the Lessee in Dollars as specified herein shall be suspended, terminated or cancelled, or the Lessee shall fail to obtain any such hereafter required for such operation, maintenance, use, insurance, return or payment;
 - (15) Any Person declares a moratorium in respect of the payment of any indebtedness or obligations of the Lessee or any Permitted Sublessee (other than a Permitted Sublessee to whom the Aircraft is on charter or wet lease pursuant to clause 14.1(1)(e));
 - (16) There is any material adverse change since the date hereof in the condition of the Lessee, financial or other, which may adversely affect the ability of the Lessee to perform its obligations hereunder;
 - (17) This Lease or any other of the Operative Documents ceases to be a legal, valid and binding obligation of the Lessee, in whole or in part, enforceable against the Lessee in accordance with its terms; or
 - (18) The Lessee (or any Permitted Sublessee) repudiates its obligations under this Lease or any party repudiates its obligations under any other of the Operative Documents;
- 23.2 The Lessee hereby acknowledges that the occurrence of any one of the foregoing Events of Default would represent a fundamental breach of a condition of this Lease in the performance of its obligations under this Lease which entitles the Lessor to exercise any or all remedies provided for in Clause 24 and/or at common law.

24. **REMEDIES**

- 24.1 Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, the Lessor may, at its option declare this Lease to be in default. Once this Lease has been declared to be in default, and at any time thereafter, the Lessor shall be entitled automatically, as of the day prior to such occurrence, to exercise any of the following remedies as the Lessor in its sole discretion shall elect, to the extent permitted by applicable law then in effect:
- (1) Require that the Lessee, and the Lessee shall upon the written request of the Lessor and at the Lessee's expense, immediately return the Aircraft to Lessor in the manner specified in such notice, in which event such return shall not be delayed for purposes of complying with the return conditions specified in clause 15 (none of which conditions shall be deemed to affect the Lessor's possession of the Aircraft) or be delayed for any other reason. In addition, the Lessor, at its option and to the extent permitted by applicable Law, may enter upon the premises where all or any part of the Aircraft is located and take immediate possession of and, at the Lessor's sole option, remove the same (and any engine which is not an Engine but which is installed on the Airframe, subject to the rights of the owner, lessor or secured party thereof) by summary proceedings or otherwise;
 - (2) Sell at private or public sale, as the Lessor may determine, or hold, use, operate or lease to others the Aircraft as the Lessor in its sole discretion may determine, all free and clear of any rights to the Lessee;

- (3) Proceed by appropriate court action or actions, either at law or in equity, to enforce the performance by the Lessee of the applicable covenants of this Lease and to recover damages for the breach thereof and/or for any loss suffered by the Lessor or the Beneficiary by reason of the return of the Aircraft to the Lessor otherwise than on the Anticipated Lease Termination Date and/or to rescind this Lease; and/or
- (4) Terminate this Lease by written notice (which notice shall be effective upon dispatch) and repossess the Aircraft.

24.2 [INTENTIONALLY LEFT BLANK]

24.3 In effecting any repossession of the Aircraft, the Lessor and its representatives and agents, to the extent permitted by Law, shall:

- (1) have the right to enter upon any premises which it reasonably believes the Aircraft, the Airframe, an Engine or Part to be located;
- (2) not be liable, in conversion or otherwise, for the taking of any personal property of the Lessee which is in or attached to the Aircraft, the Airframe, an Engine or Part which is repossessed; **Provided, however, that** the Lessor shall return to the Lessee all personal property of the Lessee or its passengers or consignors which was on the Aircraft at the time the Lessor re-takes possession of the Aircraft;
- (3) not be liable or responsible, in any manner, for any inadvertent damage or injury to any of the Lessee's property in repossessing and holding Aircraft, the Airframe, an Engine or Part, except for that caused by or in connection with the Lessor's gross negligence or willful misconduct;
- (4) have the right to maintain possession of and dispose of the Aircraft, the Airframe, an Engine or Part on any premises owned by the Lessee or under the Lessee's control; and
- (5) have the right to obtain a key to any premises at which the Aircraft, the Airframe, an Engine or Part, may be located from the landlord or owner thereof.

24.4 If required by the Lessor, the Lessee, at its sole expense, shall assemble and make the Aircraft, the Airframe, an Engine or Part available at a place designated by the Lessor in accordance with clause 13. The Lessee hereby agrees that, in the event of the return to or repossession by the Lessor of the Aircraft, the Airframe, an Engine or Part, any rights in any warranty (express or implied) heretofore assigned to the Lessee or otherwise held by the Lessee shall without further act, notice or writing be assigned or reassigned to the Lessor, if assignable. The Lessee shall be liable to the Lessor for all expenses, disbursements, costs and fees incurred (i) in repossessing, storing, preserving, shipping, maintaining, repairing and refurbishing the Aircraft, the Airframe, an Engine or Part to the condition required by clause 13 and (ii) in the event of a repossession of the Aircraft by the Lessor following an Event of Default, in preparing the Aircraft, the Airframe, an Engine or Part for sale or lease, advertising the sale or lease of the Aircraft, the Airframe, an Engine or Part and selling or re-leasing the Aircraft, the Airframe, an Engine or Part. The Lessor is hereby authorized and instructed, at its option, to make reasonable expenditures which the Lessor considers advisable to repair and restore the Aircraft, the Airframe, an Engine or Part to the condition required by clause 13, all at the Lessee's sole expense.

- 24.5 No remedy referred to in this clause 24 is intended to be exclusive, but, to the extent permissible hereunder or under applicable Law, each shall be cumulative and in addition to any other remedy referred to or otherwise available to the Lessor at Law or in equity; and the exercise or beginning of exercise by the Lessor of any one or more of such remedies shall not preclude the simultaneous or later exercise by the Lessor or any or all of such other remedies. No express or implied waiver by the Lessor of any Default or Event of Default shall in any way be, or be construed to be, a waiver of any subsequent Default or Event of Default.

PART 8: FINAL PROVISIONS

25. ALIENATION

25.1 By the Lessor

- (1) The Lessor shall have the right at its sole cost and expense to assign, novate, sell, transfer or encumber any interest of the Lessor in the Aircraft or this Lease and/or the proceeds hereof subject to the rights of the Lessee under the provisions of this Lease.
- (2) Should the Lessor merge or consolidate its business or undertaking or that part thereof of which the leasing of the Aircraft forms a part with any other Person, the rights and obligations of the Lessor hereunder shall, without further act be deemed transferred to and the obligations and liabilities of the Lessee hereunder shall be owed to such Person.
- (3) To give effect to or facilitate any such assignment, novation, sale, transfer or encumbrance, merger or consolidation, the Lessee agrees promptly to provide, at the Lessor's sole cost and expense and upon payment of the Lessee's reasonable costs and expenses, such agreements, consents, conveyances or documents as may be reasonably requested by the Lessor. in connection therewith. The agreements, covenants, obligations, and liabilities contained herein including all obligations to pay rent and indemnify each Indemnitee are made for the benefit of each Indemnitee and their respective successors and assigns.

Provided that, not as a condition precedent to the same but so as to qualify the future obligations of the Lessee, following any such assignment, novation, sale, transfer, encumbrance, merger or consolidation, the obligations of the Lessee hereunder shall not exceed or be of a different kind than those which they would have been had the same not taken place.

25.2 By the Lessee

The Lessee shall not assign, transfer or otherwise dispose of or create any Lien in or over its rights and/or obligations under this Lease without the prior consent of the Lessor.

26. SEVERABILITY

Any provision of this Lease which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof; any such

prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. To the extent permitted by Law, the Lessee and/or Lessor hereby waives any provisions of Law which renders any provisions hereof prohibited or unenforceable in any respect.

27. NOTICES

27.1 All reports, notices, requests, demands or other communications to or upon the parties hereto under this Lease shall:

- (1) be in the English language and in writing;
- (2) be deemed to have been duly served on, given to or made in relation to a party if it is:
 - (1) left at the address of that party specified in clause 27.2 or at such other address as that party may notify to the other party from time to time; or
 - (2) posted by first class airmail postage prepaid in an envelope addressed to that party at that address; or
 - (3) sent by facsimile to the facsimile number of that party specified in clause 27.2 or to such other number as that party may notify the other party from time to time;
- (3) be signed on behalf of the party giving, serving or making the same by any attorney, director, secretary, partner, agent or other duly authorised representative of such party; and
- (4) be effective:
 - (1) in the case of a letter, when left at the address referred to above or three (3) days after being deposited in the post as above mentioned, as the case may be; or
 - (2) in the case of a facsimile transmission, when receipt is confirmed by return facsimile or by telephone or on actual receipt if not so confirmed.

27.2 For the purposes of this Lease, all reports, notices, requests, demands or other communications shall be given or made by being addressed as follows:

- (1) if to the Lessor to:

Wells Fargo Bank Northwest, National Association
299 South Main Street, 5th Floor
MAC: U1228-051
Salt Lake City, Utah, 84111
Attention: Corporate Trust Services
Fax: +1 801 246-7142
Email: ctsleasegroup@wellsfargo.com

- (2) if to the Lessee to:

Zetta Jet Pte Ltd

700 West Camp Road,
#04-10 JTC Aviation One,
Singapore, 797649
Attention: Mr. Geoffery Cassidy
Phone : +65 6483 8870
Email : gcassidy@zettajet.com

(3) if to the Beneficiary to:

UNIVERSAL LEADER INVESTMENT LIMITED
[REDACTED] Min Hang District, Shanghai, PRC 201107
Attention: Mr. Li Qi
Email: [REDACTED]

28. **THE LESSOR'S RIGHT TO PERFORM FOR THE LESSEE**

If the Lessee fails to make any payment required to be made by it hereunder or fails to perform or comply with any of the covenants, agreements or obligations contained herein, the Lessor shall have the right, but not the obligation, to make such payment or conform or comply with such agreement, covenant or obligation, and the amount of such payment and the amount of the reasonable expenses of the Lessor incurred in connection with such payment or the performance thereof or compliance therewith, together with interest thereon at the Interest Rate, shall be payable by the Lessee to the Lessor (as Supplemental Lease Payments) upon demand. The Lessor agrees to notify the Lessee in writing prior to making any payment under this clause 28, unless the Aircraft will be in danger of loss, sale, confiscation, forfeiture or seizure should such payment not be made. The taking of any such action by the Lessor shall not constitute a waiver or release of any obligation of the Lessee under the Lease, nor a waiver of any Event of Default which may arise out of the Lessee's non-performance of such obligation, nor an election or waiver by the Lessor of any remedy or right available to the Lessor under or in relation to this Lease.

29. **COUNTERPARTS**

This Lease may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

30. **BROKERS**

The Lessee hereby represents and warrants that it has not paid, agreed to pay or caused to be paid directly or indirectly in any form, any commission, percentage, contingent fee, brokerage or other similar payments of any kind, in connection with the establishment or operation of this Lease, to any employee of the Lessor or to any other Person except to Excluded Persons. For the purposes hereof, the term "**Excluded Persons**" shall mean (i) in the case of the Lessor, any of its officers, directors, employees, attorneys or the professional advisors, wherever located and (ii) in the case of the Lessee, any of its officers, directors, employees, attorneys or other professional advisors, wherever located.

31. **INTENTIONALLY LEFT BLANK**

32. **ENTIRE AGREEMENT; MODIFICATION OR REVISION**

This Lease is intended to be a complete and exclusive statement of the terms of the agreement of the parties hereto and this Lease supersedes any prior or contemporaneous agreements, whether oral or in writing in relation to the leasing of the Aircraft to the Lessee. Neither this Lease nor any term of this Lease may be modified or waived except by in writing signed by the parties.

33. **CONFIDENTIALITY**

Each of the Lessee and the Lessor agree to and shall keep confidential this Lease and the terms hereof, all Aircraft Documents and other data or materials relating to the Aircraft supplied to the Lessee by the Lessor, or at the request of the Lessor, hereunder and will not disclose, transfer or otherwise impart any such information to any other Person, except (i) as may be required by Law or pursuant to any litigation; (ii) to its Affiliates, permitted assignees, officers, executives, employees, or agents; (iii) to its financial, accounting or legal advisors who are under a duty to or agree to hold such information confidential; (iv) with respect to any information which is generally available to the public at the time of disclosure; and (v) the Lessor may disclose the terms of this Lease in connection with any Financing.

34. **GOVERNING LAW: JURISDICTION**

34.1 **Singapore Law**

This Lease shall be governed by and construed in accordance with the laws of Singapore.

34.2 **Singapore Courts**

Each of the parties irrevocably agrees for the exclusive benefit of the other that the courts of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with this Lease (respectively "**Proceedings**" and "**Disputes**") and, for such purposes, irrevocably submits to the non-exclusive jurisdiction of such courts.

34.3 Appropriate Forum

Each of the parties irrevocably waives any objection which it might now or hereafter have to the courts referred to in clause 34.2 being nominated as the forum to hear and determine any Proceedings and to settle any Dispute and agrees not to claim that any such court is not a convenient or appropriate forum.

34.4 [INTENTIONALLY LEFT BLANK]

34.5 Non-exclusive Submissions

The submission to the jurisdiction of the courts referred to in clause 34.2 shall not, and shall not be construed so as to, limit the right of either party to take proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction, whether concurrently or not, if and to the extent permitted by applicable Law.

34.6 Consent to Enforcement

Each party consents generally in respect of any Proceedings to the giving of any relief or the issue of any process in connection with such Proceedings including the making, enforcement or execution against any property whatsoever, irrespective of its use or intended use, of any order or judgment which may be made or given in such Proceedings.

34.7 Waiver of Immunity

To the extent that any party may in any jurisdiction claim for itself or its assets immunity from suit, execution, attachment (whether in aid of execution before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to itself or its assets such immunity (whether or not claimed), that party hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the full extent permitted by the Laws of such jurisdiction.

35. TRUSTEE

(1) Except as expressly provided in this Lease, the Lessee acknowledges that this Lease is executed by Wells Fargo Bank Northwest, National Association, not in its individual capacity, but solely as (Owner) Trustee, except as otherwise expressly provided herein, under the Trust Agreement with the Beneficiary as grantor, in the exercise of the power and authority conferred and vested in it as such Trustee, that this Lease is intended to bind only the Trust Estate (as defined in the Trust Agreement) and that nothing herein contained shall be construed as creating any liability on Wells Fargo Bank Northwest, National Association, individually or personally, to perform any agreement herein, all such liability, if any, being expressly waived by Lessee and by each and every person now or hereafter claiming by, through or under the holder, except with respect to the gross negligence or willful misconduct of Wells Fargo Bank Northwest, National Association. In acting hereunder Wells Fargo Bank Northwest, National Association is entitled to rely upon any and all protections, limitations, and indemnities contained in the trust agreement;

(2) If Wells Fargo Bank Northwest, National Association shall cease to be a "citizen of the United States" within the meaning of 49 U.S.C. §40102 and the rules and regulations of the FAA thereunder, Wells Fargo Bank Northwest, National Association, in its individual capacity, agrees to give the Lessee and

the Beneficiary prompt notice thereof, upon an officer of Wells Fargo Bank Northwest, National Association becoming aware thereof, and agrees to cooperate with the efforts of Beneficiary promptly to replace it as trustee of the trust owning the Aircraft and as Lessor hereunder with a person who is such a "citizen of the United States".

36. TRUTH IN LEASING

- (1) THE LESSOR AND THE LESSEE AGREE THAT THE LESSEE SHALL BE SOLELY RESPONSIBLE FOR OPERATIONAL CONTROL OF THE AIRCRAFT UNDER THIS LEASE AND SO ACKNOWLEDGES BY ITS SIGNATURE THEREON. THE LESSEE HEREBY CERTIFIES THAT IT UNDERSTANDS ITS RESPONSIBILITIES FOR COMPLIANCE WITH APPLICABLE FEDERAL AVIATION REGULATIONS; **PROVIDED HOWEVER**, THAT THE LESSEE SHALL NOT BE DEEMED TO BE RESPONSIBLE FOR THE OPERATIONAL CONTROL OF THE AIRCRAFT FOR SO LONG AS THE AIRCRAFT IS IN THE POSSESSION OF ANY PERMITTED SUBLESSEE OF THE LESSEE UNDER A SUBLEASE PURSUANT TO WHICH SUCH PERMITTED SUBLESSEE ASSUMES OPERATIONAL CONTROL UNDER A SUBLEASE WHICH HAS A PROVISION COMPARABLE TO THE PROVISIONS OF THIS CLAUSE 38.
- (2) AN EXPLANATION OF FACTORS BEARING ON OPERATIONAL CONTROL OF THE AIRCRAFT AND PERTINENT FEDERAL AVIATION REGULATIONS CAN BE OBTAINED FROM THE FAA FLIGHTS STANDARDS DISTRICT OFFICE.

IN WITNESS whereof, the Lessor and the Lessee, each pursuant to due authority, have each caused this Aircraft Lease Agreement to be executed by their duly authorised officers on the day and year first above written.

LESSOR:

SIGNED by)
)
 for and on behalf of)
)
WELLS FARGO BANK NORTHWEST,)
NATIONAL ASSOCIATION)
 not in its individual capacity but solely)
 as trustee, except as otherwise)
 expressly provided herein])
 in the presence of:)



Lane Molen
Assistant Vice President



Joseph H. Pugsey,
Vice President

Name:
 Title:
 Address:
 Occupation:
 Executed at:

Wells Fargo Bank Northwest, N.A.
Corporate Trust Lease Group
MAC U1228-051
299 S. Main Street, 5th Floor
Salt Lake City, Utah 84111

LESSEE:

SIGNED by
Geoffery Cassidy
for and on behalf of
ZETTA JET PTE LTD
in the presence of:

)
)
)
)
)



Kulvinder Kaur
Name: KULVINDER KAUR
Title: ADVOCATE & SOLICITOR
Address: SINGAPORE
Occupation: **SALEM IBRAHIM LLC**
Executed at: Advocates & Solicitors | Notaries Public | Commissioners for Oaths
79 Robinson Road #16-06
CPF Building
Singapore 068897
Tel: 8226 1233 Fax: 6226 0888

BENEFICIARY:

For and on behalf of
Universal Leader Investment Limited

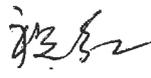
SIGNED for and on behalf of
UNIVERSAL LEADER
INVESTMENT LIMITED
by Li Qi

)
)
)
)
)
)



.....
Authorized Signatories

in the presence of:

Name:  Zhu Hong

Title:

Address: 179# Lane 333, Jiu Hui Road, Min Hang Dist., Shanghai, China 201107

Occupation:

Executed at: Shanghai

EXHIBIT A

FORM OF LEASE SUPPLEMENT

[SEE SEPARATE DOCUMENT CALLED SUPPLEMENTAL NO 1 AIRCRAFT FINANCE LEASE
PURCHASE OPTION AGREEMENT TO BE ATTACHED HERE WHEN SETTLED]

EXHIBIT B

PRINCIPAL AIRCRAFT DOCUMENTS

The manuals listed as "Technical Data and Services" in 14.4 of the Bombardier Global 6000 Schedule A, (document release date: 2013-09-03) as follows:

14.4. Technical Data and Services

The following documentation and technical publications, that are included in the Purchase Price of the aircraft, are provided to Buyer by Seller at Delivery Time:

Description	Quant	Maintenance Facilities Manual	1*
		Service Bulletins	1*
ity			
Flight Manuals		Description	Quantity
Airplane Flight Manual	1+1*	Other Manuals	
Flight Crew Operating Manual	1+1*	Rolls-Royce Service Bulletins	1**
Planning and Cruise Control Manual	1+1*	Rolls-Royce Time Limits Manual	1**
Quick Reference Handbook	1+1*	Rolls-Royce Power Plant Build-Up	1**
		The items identified with an asterisk (*) are delivered in format.CD-ROM format All others are delivered in hard copy. The items identified with double asterisks (**)	
		are provided to Buyer directly from Rolls-Royce in CD-ROM format following Buyer's completion of the warranty registration formalities with Rolls Royce. The item identified with three asterisks (***) has been superseded by SmartFix Plus	
Description	Quant	In addition, commencing at Delivery Time, Seller shall make available, from time to time, to Buyer at its last address provided by Buyer in writing to Seller, service bulletins and general information applicable to the aircraft, as well as any amendments to the documentation and technical publications referred to above (except for Engine Manuals and Completion Work Manuals) applicable to Buyer's aircraft, for a period of 10 years after delivery of the last BD700-1A10 or BD700-1A11 aircraft manufactured by Seller. Seller shall provide this service at no additional cost to Buyer for a period of 5 years from Delivery Time (except for Engines Manuals).	
ity		It is understood that the documentation and publications provided under this paragraph and any other software, data, drawings or information related to the aircraft, including any copies thereof, shall not be reproduced or disclosed without Seller's authorization and are proprietary to Seller and that all rights to patent, copyright, trademark, trade secret and other intellectual property rights therein belong to Seller. Buyer agrees not to modify, translate, reverse assemble, reverse engineer or decompile such documentation, publication, software, data, drawings or other information. Further, Buyer agrees to use such documentation, publications, software, data, drawings or other information solely to maintain, operate or repair the aircraft.	
Maintenance Manuals			
Aircraft Illustrated Parts Catalog	1*		
Aircraft Maintenance Manual (Part Two)	1*		
Component Maintenance Manual (Part One)	1		
Fault Isolation Manual	(***)		
Ground Handling & Service Information	1*		
Illustrated Tool & Equipment Manual	1*		
Maintenance Planning Document	1*		
Non-destructive Testing Manual	1*		
Standard Practices Manuals	1*		
Structural Repair Manual	1*		
System Description Section (AMM Part One)	1*		
System Schematic Manual	1*		
Time Limits and Maintenance Checks	1*		
Weight & Balance Manual	1+1*		
Wiring List Manual	1*		
Wiring Manual	1*		
Description	Quant		
ity			
Other Manuals			
Aircraft Recovery Manual	1*		
Airport Facilities Manual	1*		
Central aircraft Information Maintenance System (CAIMS)	1*		
Crash Crew Chart	1*		
Dispatch Deviation Guide	1*		
Ground Operation Checklist	1		

EXHIBIT C

DELIVERY CONDITION

1. The Aircraft will have a complete cleaning and be freshly painted.
2. The Aircraft will have installed the full complement of Engines and other equipment, parts and accessories, including emergency and loose equipment as is normally installed in aircraft such as the Aircraft.
3. The Aircraft shall have a standard Certificate of Airworthiness for use as a passenger corporate issued by the FAA.
4. All applicable ADs shall be current at Delivery.
5. Actions required under the corrosion prevention control programme pertaining to the Aircraft shall be current.

EXHIBIT D

FORM OF ACCEPTANCE CERTIFICATE
BOMBARDIER GLOBAL 6000 MSN [•]

To: Wells Fargo Bank Northwest, National Association
[]

Attention: Corporate Trust Department

Cc: []

Attention: []

This Acceptance Certificate

is delivered on the date set forth below by Zetta Jet Pte Ltd (the "Lessee") to Wells Fargo Bank Northwest, National Association (the "Lessor") with copy to the Lessor's Aircraft Manager, if applicable, pursuant to a Master Aircraft Finance Lease Agreement dated [] and a Lease Supplement No. [•] thereto dated [•] (together the "Lease") both between the Lessor and the Lessee. Terms used in this Certificate shall have the same meaning as in the Lease.

1. **Details of Acceptance**

The Lessee hereby indicates and confirms to the Lessor that the Lessee has at [•] hours, local time, on [•] [•] 201[•] at the Delivery Location accepted from the Lessor possession of:

one (1) Bombardier Global 6000 Airframe bearing msn [•]; together with its

two (2) [] engines bearing msns [•] (Position 1) and [•] (Position 2) and

[•] Auxiliary Power Unit msn [•]

all spare parts or ancillary equipment or devices furnished with that Airframe, those Engines and APU and

all Aircraft Documents relating to such Airframe, Engines, APU, ancillary equipment or devices

- (i) in an airworthy condition
- (ii) in the required Delivery Condition save as may be noted in Annex 3 hereto
- (iii) with a status as detailed in Annex 1 to this Certificate
- (iv) with the loose equipment listed in Annex 2 to this Certificate
- (v) with fuel on board as stated in Annex 1 to this Certificate and a full complement of oil and
- (v) in full compliance with the terms of the Lease.

2. **Confirmations**

The Lessee confirms that at the above mentioned time and on the above mentioned date (being the Delivery Date for the above Aircraft pursuant to the Lease):

- (i) the Lessee became obliged to pay to the Lessor the amounts provided for in the Lease in respect of the above mentioned Aircraft
- (ii) the Aircraft is insured in accordance with the terms of the Lease
- (iii) the Lessor has fully, duly and timely performed all of its obligations under the Lease
- (iv) the representations and warranties contained in clause 3.1 of the Lease are true and correct as at the date hereof
- (v) no Default or Event of Default has occurred and is continuing under the Lease or any Related Lease.

3.

IN WITNESS WHEREOF, the Lessee has caused this Acceptance Certificate to be executed on its behalf by its duly authorised officers or representatives pursuant to due corporate authority on this the Delivery Date.

SIGNED)
by)
for and on behalf of)
ZETTA JET PTE LTD)
in the presence of:)

ANNEX 1 TO THE ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

AIRCRAFT STATUS REPORT

AT DELIVERY

RELATING TO ONE BOMBARDIER GLOBAL 6000 AIRCRAFT MSN [•]

LESSEE: ZETTA JET PTE LTD
 OPERATOR: [•]

AIRCRAFT TYPE: BOMBARDIER GLOBAL 6000
 MSN: [•]
 REGISTRATION: [•]

AIRFRAME:

Total Flight Hours/Cycles:	[•]	Hrs	[•]
		Cycles	
Total Flight Hours/Cycles:	[•]	Hrs	[•]
		Cycles	

ENGINES:

		POSITION #1	
		POSITION #2	
ENGINE SERIAL NUMBER:	[•]		[•]
Total Block Hours:	[•]		[•]
Total Cycles:		[•]	[•]
Total Block Hours:	[•]		[•]
Total Cycles:		[•]	[•]
Engine time remaining to first limiting part:	[•]		[•]

LANDING GEAR

		NOSE	
		LEFT	MAIN
		RIGHT	MAIN
Total Flight Hours:	[•]		[•]
	[•]		
Total Cycles:		[•]	[•]
		[•]	
Total Flight Hours:	[•]		[•]
	[•]		
Total Cycles:		[•]	[•]
		[•]	
Time remaining to first limiting part:	[•]		[•]
	[•]		

AUXILIARY POWER UNIT

Total Block Hours: [•]
Total Cycles: [•]
Total Block Hours: [•]
Total Cycles: [•]
Time remaining
to first limiting part: [•]

FUEL ON BOARD: [•] US Gallons

ANNEX 2

ANNEX 2 TO THE ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

LOOSE EQUIPMENT LIST

[TO BE COMPLETED AT DELIVERY]

The loose equipment listed as “Annex B” of the Bombardier Global 6000 Schedule A-1, (document release date: 2013-09-27), which is as follows:

<i>Description</i>	<i>Quantity</i>	<i>Description</i>	<i>Quantity</i>
1. Cockpit Equipment:		c. Therapeutic mask with 12 ft oxygen hoses, a nebulizer, an adjustable flow meter and pouch	2
a. Noise cancelling headsets (crew)	3		
b. Flight Observer Seat sheepskin slipcover	1		
c. Sunshield Kit (two (2) pieces)	1		
d. Winglet viewing mirrors	2		
e. Sun Visors (factory installed)	2		
f. HUD combiner sun visor	1		
2. Cabin Equipment:			
a. Throw pillow	8		
b. Low cabinet cushion	1		
c. Seat belt extensions / demo units	4		
d. Divan sleeping belt	1*		
e. Lap tray with pouch	3		
f. Leveling self-inflating mattress for conference grouping (two (2) pieces)	1		
g. Cup holder inserts	a/r*		
h. Conference table extension with leather pouch	1		
i. Plug-in ashtray	1		
j. Cup holder plated sleeves	9		
3. CES Equipment:			
a. Stereo noise cancelling headsets with manufacturer supplied case	18		
b. 10.6” plug-in touchscreen LCD monitor with pouch	3		
c. Touchscreen WPCU	6		
4. Emergency Equipment:			
a. Passenger briefing card	25		
b. Oxygen demo unit	1		

5. Miscellaneous Equipment:

- a. Set of aircraft keys 6
 - b. Golf size umbrella 4
 - c. Coat hanger 18
 - d. Removable bulkhead pouch 1
 - e. Removable dirty dish bin for the galley 1
 - f. Sink cover 1
-

6. Maintenance Equipment:

- a. Throw rug for entry area 1
- b. Throw rug for crew area 1
- c. Throw rug for single seats grouping 3
- d. Maintenance runner for entry area 1
- e. Maintenance runner for passenger cabin 1
- f. Maintenance runner for aft lavatory 1
- g. Maintenance covers for all crew and passenger seats and divans a/r*
- h. Water filling station adapter hose with pouch 1
- i. Keyed locking fuel cap 3
- j. Towbar assembly 1
- k. Electric pump (115VAC/60Hz) for the manual fill of water tank with support plate, hose and pouch 1
- l. Cabin sliding door override handle. 1
- m. One (1) maintenance laptop and all accessories needed for aircraft maintenance tests 1
- n. Interior cleaning and grooming kit 1
- o. Touch-up kit for the following: 1
 - i. Wood finishes
 - ii. Interior finishes
 - iii. Exterior paints
- p. IPAD tablet (as specified in Schedule-A "SmartFix") c/w Otterbox case and latch. 1
- q. IPAD tablets (EFB) c/w Otterbox cases and latches. 2

* a/r = as required

ANNEX 3 TO THE ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

FORM OF ITEMISATION OF DEFICIENCIES

DEFICIENCIES

At Delivery, the following items were found not to satisfy the required Delivery Condition:

ITEM

	<u>AGREED</u>	
	<u>BY</u>	<u>LESSOR</u> ²
	<u>NOT</u>	
	<u>AGREED</u>	<u>BY</u>
	<u>LESSOR</u>	
1		
<hr/>		
<hr/>		
2		
<hr/>		
<hr/>		

ETC.

PROPOSED PROGRAMME FOR THE REMEDY OF THE DEFICIENCIES³

1	<hr/>
	<hr/>
2	<hr/>
	<hr/>

ETC.

SIGNED

for and on behalf of the Lessee:

by

NAME:

STATUS:

DATE:

²Initial against Deficiency as appropriate.

³Complete or annex further programme details.

SIGNED

for and on behalf of the Lessor

SUBJECT TO THE ITEMS MARKED ABOVE

AS NOT AGREED

by

NAME:

STATUS:

DATE:

EXHIBIT E

RETURN CONDITION AND LESSOR FINAL INSPECTION REQUIREMENTS

In addition to the requirements of clause 13, on the Return Occasion, the Lessee, at its own expense, shall return the Aircraft in compliance with all of the following provisions:

1. The Aircraft and Airframe

1.1 Emergency equipment will have a calendar life of a minimum of one month or 10 percent of its total life, whichever is the less remaining.

1.2 The Aircraft shall have properly installed the full complement of Engines (as used herein the term "Engines" includes engines for which title will be transferred to the Lessor pursuant to clause 19) and all other Parts, components, spare parts and ancillary equipment and devices, including emergency and loose equipment as is normally installed in such Aircraft, as when originally delivered to the Lessee or required to be installed as in accordance with this Lease, each such item properly functioning in accordance with its intended use and in accordance with the Maintenance Programme and the Manufacturer's maintenance manual.

1.3 The Aircraft, its Engines, Parts shall be in as good operating condition as when delivered to the Lessee hereunder.

1.4 Fuselage, windows and doors -

- (1) The fuselage shall be substantially free to the reasonable satisfaction of the Lessor's Aircraft Manager of dents and abrasions, scab patches and loose or pulled or missing rivets in accordance with the structural repair manual and all temporary fuselage skin repairs shall have been made permanent.
- (2) Windows shall be clean and shall be reasonably free of delamination, blemishes, crazing and shall be properly sealed.
- (3) Doors shall be free moving, correctly rigged and be fitted with serviceable seals.
- (4) The Aircraft shall have been maintained in accordance with an FAA approved corrosion control programme.
- (5) The Aircraft, except as otherwise provided in this Lease or as consented to by the Lessor, shall be in substantially the same configuration as at Delivery.
- (6) Neither the Aircraft nor any Engine shall have any open, deferred, continued, carry over or placarded log book items and all mandatory ADs, Service Bulletins and requiring compliance in accordance with clause 15.2(D) shall have been accomplished.
- (7) The Lessee's distinctive markings, such as name and logo, shall be removed from the Aircraft in accordance with standard industry practice.

1.5 Wings and Empennage -

- (1) All leading edges shall be free from damage.
- (2) All control surfaces shall be waxed and polished.

1.6 Interior - Main deck

- (1) Ceilings, sidewalls and bulkhead panels shall be clean and free of cracks and stains.
- (2) All seats shall be in good condition, clean and stain free and meet FAA fire resistance regulations, all lights shall be functional, floors shall be clean and gill liners and the smoke barrier curtain shall be free from holes, tears or distortions.
- (3) All signs and decals shall be clean and legible.

1.7 Landing Gear and Wheel Wells -

- (1) Shall be clean, free of leaks and repaired as necessary.
- (2) All decals shall be clean, secure and legible

2. Return of Engines

2.1 Each Engine shall:

- (1) be capable of being certificated, full-rated performance without limitations throughout the entire operating envelope as defined in the aircraft flight manual, performance compliance to be demonstrated at the time of the functional check flight and/or on-wing static inspection and testing of powerplants in accordance with the Engine maintenance manual at the Lessor's option;

3. Auxiliary Power Unit

The APU on the Return Occasion shall have just completed a power assurance run in accordance with the Maintenance Programme or manufacturer's maintenance manual and any defects discovered in such inspection which exceeds the in-service limits shall have been corrected at the Lessee's expense. The APU will be serviceable and in the same operational condition as at the Delivery Date with temperature and air outputs within the Manufacturer's limits at all operational settings.

4. Landing Gear

On the Return Occasion, each landing gear shall be in a serviceable and airworthy condition and each life limited part within each gear will have no time in excess of the time recorded on the applicable landing gear at the Delivery Date after having taken into account the maintenance item balances in respect thereof.

5. Maintenance Programme

The Lessee will provide the Lessor with a complete copy of Lessee's Maintenance Programme including work cards and a letter of authorization for the use of the Maintenance Programme.

EXHIBIT E/2

**FORM OF REDELIVERY ACCEPTANCE CERTIFICATE
BOMBARDIER GLOBAL 6000 MSN[•]**

To: Zetta Jet Pte Ltd (the "Lessee")
[]

Attention: []

This Redelivery Acceptance Certificate

is delivered on the date set forth below by Wells Fargo Bank Northwest, National Association (the "Lessor") pursuant to a Master Aircraft Lease Finance Agreement dated [] and a Lease Supplement No. [•] thereto dated [•] (together the "Lease") both between the Lessor and the Lessee. Terms used in this Certificate shall have the same meaning as in the Lease.

1. **Details of Acceptance of Redelivery**

The Lessor hereby indicates and confirms to the Lessee that the Lessor has at [•] hours, local time, on [•] [•] 201[•] at [•], being the agreed Return Location, accepted from the Lessee possession of:

one (1) Bombardier Global 6000 Airframe bearing msn [•]; together with its

two (2) [] engines bearing msns [•] (Position 1) and [•] (Position 2) and

[•] Auxiliary Power Unit msn [•]

all spare parts or ancillary equipment or devices furnished with that Airframe, those Engines and APU and

all Aircraft Documents relating to such Airframe, Engines, APU, ancillary equipment or devices

- (i) in an airworthy condition
- (ii) in the required Return Condition save as may be noted in Annex 3 hereto
- (iii) with a status as detailed in Annex 1 to this Certificate
- (iv) with the loose equipment listed in Annex 2 to this Certificate and
- (v) with fuel on board as stated in Annex 1 to this Certificate and a full compliment of oil

IN WITNESS WHEREOF, the Lessor has caused this Redelivery Acceptance Certificate to be executed on its behalf by its duly authorised officers or representatives pursuant to due corporate authority on this the Return Occasion.

SIGNED)
by)
for and on behalf of)
WELLS FARGO BANK NORTHWEST,)
NATIONAL ASSOCIATION)
in the presence of:)

ANNEX 1 TO THE REDELIVERY ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

AIRCRAFT STATUS REPORT

AT THE RETURN OCCASION
RELATING TO AIRCRAFT MSN [•]

OUTGOING LESSEE: ZETTA JET PTE LTD
 OUTGOING OPERATOR: [•]
 AIRCRAFT TYPE: BOMBARDIER GLOBAL 6000
 MSN: [•]
 REGISTRATION: [•]

AIRFRAME:

Total Flight Hours/Cycles: [•] Hrs [•] Cycles
 Total Flight Hours/Cycles: [•] Hrs [•] Cycles

ENGINES: POSITION #1 POSITION #2

ENGINE SERIAL NUMBER: [•] [•]
 Total Block Hours: [•] [•]
 Total Cycles: [•] [•]
 Total Block Hours: [•] [•]
 Total Cycles: [•] [•]
 Engine time remaining
 to first limiting part: [•] [•]

LANDING GEAR NOSE LEFT MAIN RIGHT MAIN

Total Flight Hours: [•] [•] [•]
 Total Cycles: [•] [•] [•]
 Total Flight Hours: [•] [•] [•]
 Total Cycles: [•] [•] [•]
 Time remaining
 to first limiting part: [•] [•] [•]

AUXILIARY POWER UNIT

Total Block Hours: [•]
 Total Cycles: [•]
 Total Block Hours: [•]
 Total Cycles: [•]
 Time remaining
 to first limiting part: [•]

FUEL ON BOARD: [•] US Gallons

ANNEX 2 TO THE REDELIVERY ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

LOOSE EQUIPMENT LIST

[TO BE COMPLETED ON THE RETURN OCCASION]

ANNEX 3 TO THE REDELIVERY ACCEPTANCE CERTIFICATE FOR AIRCRAFT MSN [•]

FORM OF ITEMISATION OF DEFICIENCIES

DEFICIENCIES

At the Return Occasion, the following items were found not to satisfy the required Return Condition:

<u>ITEM</u>	<u>AGREED BY LESSEE⁴</u>		<u>NOT</u>
	<u>AGREED</u>	<u>BY</u>	
	<u>LESSEE</u>		
1			
2			

ETC.

SIGNED
for and on behalf of the Lessor:
by
NAME:
STATUS:
DATE:

SIGNED
for and on behalf of the Lessee:
SUBJECT TO THE ITEMS MARKED ABOVE
AS NOT AGREED
by
NAME:
STATUS:
DATE:

⁴Initial against Deficiency as appropriate.

EXHIBIT F

FORM OF AIRCRAFT STATUS REPORT

(TO BE AGREED)

EXHIBIT G

LIST OF CLOSING DOCUMENTS

1. A copy of the Certificate of Incorporation and By-laws of Lessee or similar constitutional documents, certified by a duly authorised officer of the Lessee;
2. Copies of the resolutions of the Board of Directors and the Shareholders (if required) of Lessee approving and authorising the execution, delivery and performance of the Lease, the applicable Lease Supplement and any and all other documents required to be executed and delivered on its behalf, certified by a duly authorised officer of the Lessee and naming a person or persons authorised and appointed to execute and deliver each such document on behalf of the Lessee and give all notices and take all other action required of the Lessee thereunder;
3. A certificate of a duly authorised officer of the Lessee setting forth the names and signatures of the persons authorised and appointed to execute and deliver on behalf of the Lessee the documents referred to in paragraph 2 above and to take any action contemplated therein;
4. A deregistration power of attorney, if required, in the form of Exhibit L or such other form as the Lessor may reasonably request, duly signed by the Lessee and, if the Lessor shall so require, notarised and legalised so that the same may be registered in accordance with the law of the Country of Registration (at the cost of the Lessee) irrevocably empowering the Lessor or its assignee or delegate to release, terminate and void the Lessee's interest in the Aircraft leased hereunder, to deregister the Aircraft and the Lease and to export the Aircraft and to file, register or record such document with the GAA, and any other appropriate Governmental Entity, and otherwise to effect any of the rights and remedies contemplated by the Lease, together with the evidence of the due registration thereof if necessary;
5. A copy of the Certificate of Airworthiness of the Aircraft issued by the GAA, certified by a duly authorised officer of the Lessee;
6. A copy of the Certificate of Registration issued by the GAA relating to the Aircraft, certified by a duly authorised officer of the Lessee;
7. A copy of the Lessee's Air Transport Licence and Air Operator's Certificate in relation to the proposed operations of the Aircraft and to aircraft of the same type as the Aircraft issued by the GAA;
8. Written confirmation that the Lease Identification required to be affixed to the Airframe and Engines pursuant to clause 16.6 has been duly affixed;
9. A Certificate of Insurance dated the Delivery Date, signed by an Approved Insurance Broker or Approved Insurer, substantially in the form as set forth in Exhibit I;
10. A Letter of Undertaking, dated as of the Delivery Date, signed by an Approved Insurer or by an Approved Insurance Broker, substantially in the form of Exhibit J;
11. Such financial information and such other documents and evidence (if any) concerning the Lessee and affiliates, successors or assigns of the Lessee, as the Lessor or its counsel may be permitted to request under the Lease;

12. A legal opinion, in English, signed by such independent counsel for the Lessee as may be acceptable to the Lessor, dated the Delivery Date, substantially in the form set forth in Exhibit H;
13. An executed counterpart of each of the other Operative Documents duly executed by each of the parties thereto or a certified copy thereof;
14. The Acceptance Certificate for the Aircraft duly signed for and on behalf of the Lessee;
and
15. Such other documents or conditions as the Lessor may reasonably request in form and substance satisfactory to the Lessor.

EXHIBIT H

FORM OF OPINION OF THE LESSEE'S COUNSEL

[Letterhead of the Lessee's Counsel]

[Delivery Date]

[Beneficiary]

c/o [•]

[address]

[Lessor]

[address]

Aircraft Lease of Bombardier Global 6000 []
Aircraft Manufacturer's Serial No. [•]

Dear Sirs

We act as Legal Counsel for Zetta Jet Pte Ltd , a company organized under the laws of [] (the "Lessee"), and have reviewed (i) the Aircraft Lease Agreement dated [] between, (not in its individual capacity but solely as trustee) (the "Lessor") and the Lessee and Lease Supplement No. [•] thereto dated [•], between the Lessor and the Lessee (collectively, the "Lease"). Except as otherwise defined herein, capitalized terms used herein shall have the meanings set forth in the Lease.

You have requested us to render an opinion in connection with the transactions governed by the Lease. We have examined originals or copies, certified or otherwise identified to our satisfaction, of such documents, corporate records and other instruments as we have deemed necessary or advisable for the purpose of rendering this opinion. We have assumed the genuineness of all signatures and the authenticity of all documents submitted to us as originals and the conformity to original documents of all documents submitted to us as copies or facsimiles.

Based upon the foregoing, we are of the opinion that:

1. The Lessee is a company duly organized and validly existing in good standing under the laws of [] is duly qualified to hold property and to carry on its business as presently conducted under such laws and is duly qualified to carry on business in each jurisdiction in which it conducts business, has full power and authority to carry on its business as presently conducted, to hold and operate property under lease and to enter into and to perform its obligations under the Lease and each other document related thereto to which the Lessee is a party.
2. The execution, delivery and performance by the Lessee of the Lease have on the information provided to us by the Lessee, been duly authorized by all necessary corporate action on the part of the Lessee, do not require any approval of the shareholders of the Lessee or consent of any holder of any indebtedness or obligation of the Lessee, and the execution and delivery of the Lease, the consummation of the transactions contemplated therein, and compliance by the Lessee with the terms and provisions thereof, do not contravene any law applicable to the Lessee, or result in the breach of, or constitute any default under, or result in the creation of any Lien, charge or encumbrance upon any property of the Lessee under any credit agreement or

instrument, corporate charter or by law or other agreement to which the Lessee is a party or by which the Lessee or its properties or assets are bound or affected.

3. The Lessee confirms having received every consent, licence, approval or authorization of, and exemption by, and gave every notice to, each Governmental Entity having jurisdiction with respect to the execution, delivery and performance of the Lease (including all monetary and other obligations thereunder) that is required for the Lessee to execute and deliver the Lease and to perform the transactions contemplated thereby and each such consent, licence, approval, authorization and exemption is valid and effective and has not been revoked or rescinded.
4. The Lease has been duly executed and delivered by the Lessee and constitutes the legal, valid and binding agreement of the Lessee enforceable against the Lessee in accordance with its terms, except as enforcement thereof may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally, and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law) as a court having jurisdiction may impose.
5. There are no actions, suits or proceedings pending or, to our best knowledge after due inquiry, threatened against or affecting the Lessee in any court in Singapore or before any regulatory commission, arbitrator, board or other administrative Governmental Entity in Singapore which, if adversely determined to the Lessee, could have a material adverse affect on the current business under the Lease.
6. The Lessee by its principal, has declared to us that it is not in default under any indenture, mortgage, loan agreement or lease agreement of which we have knowledge and to which the Lessee is now a party or by which it is bound nor is the Lessee in default under any other agreement or instrument of a material nature of which we have knowledge and to which the Lessee is now a party or by which it is bound; nor to our knowledge is the Lessee in violation of any law, order, injunction, decree, rule or regulation applicable to the Lessee of any court or administrative body, which violation could materially and adversely affect the business, property or assets, operations or condition, financial or otherwise, of the Lessee, and no event has occurred and is continuing which, under the provisions of any such indenture, mortgage, loan agreement or lease agreement, with the lapse of time or the giving of notice, or both, would constitute a default thereunder.
7. There is no Tax (whether payable by withholding or deduction and including, without limitation, monetary transfer fees, or similar taxes and charges) (i) on or by virtue of the execution, delivery, performance or enforcement of the Lease, or any other document furnished or contemplated to be furnished thereunder, or (ii) to be deducted or withheld from any payment to be made by the Lessee pursuant to the Lease [or deal with exemptions].
8. The obligations of the Lessee under the Lease rank at least equally and ratably (*pari passu*) in all respects with all other unsecured obligations of the Lessee except for claims preferred by the laws of Singapore.
9. The Lessee is subject to private commercial laws and suit under the laws of [Singapore] and any other jurisdiction affecting the Lessee or the transaction contemplated by the Lease. The Lessee is not entitled to sovereign immunity under the laws of or any jurisdiction, and neither the Lessee nor any of its respective properties or assets have the right of immunity from suit or jurisdiction of any court or from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution or otherwise) on the ground of sovereign immunity in Singapore.

10. The choice of the law of Singapore to govern the Lease will be upheld as a valid choice of law in any action in the courts of Singapore. If any action in respect of the Lease were brought in a court of [], such court would apply the laws of Singapore in construing the rights and obligations of the parties under the Lease.
11. The consent of the Lessee to the jurisdiction of the courts of Singapore is valid and binding upon the Lessee and not subject to revocation. Any judgment or order given by an English court under the Lease may be enforced in [] by suit on the judgment and would be recognised and accepted by the courts of [] and would be enforceable by the courts of [] without re-trial or examination of the merits of the original action.
12. No stamp or registration or similar Taxes or charges are payable in [] in respect of the execution or performance of the Lease or the enforcement thereof in the courts of Singapore.
13. Except for compliance with the requirements set forth item 2 Exhibit G of the Lease to⁵ ensure the validity, effectiveness and enforceability of the Lease and the practical realization of the benefits and rights intended to be afforded thereby.

We do not purport to be experts on and do not purport to be familiar with or qualified to express legal opinions based on any law other than the laws of [] and, accordingly, express no legal opinion herein based upon any other laws.

This opinion shall be governed by the laws of [].

Yours very truly

[signature of Lessee's counsel]

EXHIBIT I

FORM OF CERTIFICATE OF INSURANCE

[Letterhead of Approved Insurance Broker]

[Delivery Date]

[Lessor]
[Address]

Attention: Corporate Trust Department

cc: [• name of Lessor's Aircraft Manager]
[• address]

Attention: [•]

Insurance Coverage for (Bombardier Global 6000) Aircraft under the Aircraft Lease Agreement dated () and Lease Supplement No. [•] dated [•] both between [not in its individual capacity but solely as trustee], (the "Lessor") and [] (the "Lessee") and [] (the "Beneficiary") (such Aircraft Lease Agreement and Lease Supplement being together the "Lease")

Gentlemen:

Certificate Number [•]

THIS IS TO CERTIFY that as Insurance Brokers we have placed Insurance in the name of [LESSEE] ZETTA JET PTE LTD (the 'Insured') covering their fleet of aircraft, including () aircraft registration [•] serial number [•] (the 'Aircraft'), against the following risks, up to the limits stated whilst operated by them anywhere in the world:

14. [Hull all risks of loss or damage for an Agreed Value of US\$50,000,000. The hull deductible is US\$1,000,000 in the aggregate over all aircraft insured under the policy and is also applicable in the event of total loss of the Aircraft.

This section of the policy is subject to the War, Hi-Jacking and Other Perils Exclusion Clause AVN.48B with paragraphs (c),(e) and (g) deleted subject to Extended Coverage Endorsement (Aircraft Hulls) AVN51 with US\$30,000,000 aggregate limit.

NOTE: This aggregate limit may be reduced or exhausted by virtue of any claim made under the aircraft hull or spare parts section of the policy.

15. Aircraft spare parts being the property of the Assured whilst in their care, custody or control or at the property of others, against all risks of loss or damage including transits by sea, road, rail or any other conveyance.

This section of the policy is subject to the War, Hi-Jacking and Other Perils Exclusion Clause AVN.48B with paragraphs (c), (e) and (g) deleted subject to Extended Coverage Endorsement (Aircraft Hulls) AVN51 with US\$30,000,000 aggregate limit.

NOTE: This aggregate limit may be reduced or exhausted by virtue of any claim made under the aircraft hull or aircraft spare parts section of the policy.

16. Aircraft Third Party and Passenger and Passengers Baggage/Personal Effects Legal Liability (for not exceeding fifteen non-revenue passengers) for a Combined Single Limit (Bodily Injury/Property Damage/Passenger Legal Liability) of US\$350,000,000 any one aircraft/occurrence whilst Aircraft are flying on test, demonstration, sales, acceptance, positioning and ferry flights and whilst on the ground.

This section of the policy is subject to the War, Hi-Jacking and Other Perils Exclusion Clause AVN.48B with all paragraphs except (b) deleted subject to Extended Coverage Endorsement (Aviation Liabilities) AVN 52C.]

It is further certified that the policy has been endorsed as follows:

[It is agreed that [•] has entered into a [Facility Agreement] dated [•] with [•] and as Owner Trustee has entered into an Aircraft Mortgage and Security Agreement dated [•] with [•] with respect to the Aircraft and in connection therewith underwriters agree to include Airline Finance/Lease Contract Endorsement AVN67B as follows:]

AIRLINE FINANCE/LEASE CONTRACT ENDORSEMENT

It is noted that the Contract Party(ies) have an interest in respect of the Equipment under the Contract(s). Accordingly, with respect to losses occurring during the period from the Effective Date until the expiry of the Insurance or until the expiry or agreed termination of the Contract(s) or until the obligations under the Contract(s) are terminated by any action of the Insured or the Contract Party(ies), whichever shall first occur, in respect of the said interest of the Contract Party(ies) and in consideration of the Additional Premium it is confirmed that the Insurance afforded by the Policy is in full force and effect and it is further agreed that the following provisions are specifically endorsed to the Policy:-

1. Under the Hull and Aircraft Spares Insurances
 - 1.1 In respect of any claim on Equipment that becomes payable on the basis of a Total Loss, settlement (net of any relevant Policy Deductible) shall be made to, or to the order of the Contract party(ies). In respect of any other claim, settlement (net of any relevant Policy Deductible) shall be made with such party(ies) as may be necessary to repair the Equipment unless otherwise agreed after consultation between the Insurers and the Insured and, where necessary under the terms of the Contract(s), the Contract Party(ies). Such payments shall only be made provided they are in compliance with all applicable laws and regulations.
 - 1.2 Insurers shall be entitled to the benefit of salvage in respect of any property for which a claims settlement has been made.
2. Under the Legal Liability Insurance
 - 2.1 Subject to the provisions of this Endorsement, the Insurance shall operate in all respects as if a separate Policy had been issued covering each party insured hereunder, but this provision shall not operate to include any claim howsoever arising in respect of loss or damage to the Equipment insured under the Hull or Spares Insurance of the Insured. Notwithstanding the foregoing the total liability of Insurers in respect of any and all Insureds shall not exceed the limits of liability stated in the Policy.
 - 2.2 The Insurance provided hereunder shall be primary and without the right of contribution from any other insurance which may be available to the Contract party(ies).

2.3 This Endorsement does not provide coverage for the Contract Party(ies) with respect to claims arising out of their legal liability as manufacturer, repairer, or servicing agent of the Equipment.

3. Under ALL Insurances

3.1 The Contract party(ies) are included as Additional Insured(s).

3.2 The cover afforded to each Contract Party by the Policy in accordance with this Endorsement shall not be invalidated by any act or omission (including misrepresentation and non-disclosure) of any other person or party which results in a breach of any term, condition or warranty of the Policy PROVIDED THAT the Contract Party so protected has not caused, contributed to or knowingly condoned the said act or omission.

3.3 The provisions of this Endorsement apply to the Contract Party(ies) solely in their capacity as financier(s)/lessor(s) in the identified Contract(s) and not in any other capacity. Knowledge that any Contract Party may have or acquire or actions that it may take or fail to take in that other capacity (pursuant to any other contract or otherwise) shall not be considered as invalidating the cover afforded by this Endorsement.

3.4 The Contract Party(ies) shall have no responsibility for premium and Insurers shall waive any right of set-off or counterclaim against the Contract Party(ies) except in respect of outstanding premium in respect of the Equipment.

3.5 Upon payment of any loss or claim to or on behalf of any Contract Party(ies), Insurers shall to the extent and in respect of such payment be thereupon subrogated to all legal and equitable rights of the Contract party). Insurers shall not exercise such rights without the consent of those indemnified, such consent not to be unreasonably withheld. At the expense of Insurers such Contract Party(ies) shall do all things reasonably necessary to assist the Insurers to exercise said rights.

3.6 Except in respect of any provision for Cancellation or Automatic Termination specified in the Policy or any endorsement thereof, cover provided by this Endorsement may only be cancelled or materially altered in a manner adverse to the Contract Party(ies) by the giving of not less than Thirty (30) days notice in writing to the Appointed Broker. Notice shall be deemed to commence from the date such notice is given by the Insurers. Such notice will NOT, however, be given at normal expiry date of the Policy or any endorsement.

EXCEPT AS SPECIFICALLY VARIED OR PROVIDED BY THE TERMS OF THIS ENDORSEMENT:-

1. THE CONTRACT PARTY(IES) ARE COVERED BY THE POLICY SUBJECT TO ALL TERMS, CONDITIONS, LIMITATIONS, WARRANTIES, EXCLUSIONS AND CANCELLATION PROVISIONS THEREOF.
2. THIS POLICY SHALL NOT BE VARIED BY ANY PROVISIONS CONTAINED IN THE CONTRACT(S) WHICH PURPORT TO SERVE AS AN ENDORSEMENT OR AMENDMENT TO THE POLICY.

SCHEDULE IDENTIFYING TERMS USED IN THIS ENDORSEMENT

1. Equipment : [] aircraft msn [•] registration [•].
2. Policy Deductible applicable to physical damage to the Equipment: [] in the aggregate over all aircraft insured under the Policy and is also applicable in the event of total loss of the Aircraft.
3. Contract Party(ies): (a)
[• name Beneficiary]
[• name Financing Parties]; and
(b) in addition, in respect of Legal Liability Insurances, the Indemnitees.
4. Contract(s): Aircraft Lease Agreement dated [•] and Lease Supplement No. [•] dated [•] both between the Lessor and the Lessee
[Facility Agreement] dated [•] between [•]
[Aircraft Mortgage and Security Agreement] [•] between [•]
[etc]
5. Effective Date: to be agreed by Insurers
6. Additional Premium:
7. Appointed Broker:

AVN.76B

Subject to the coverage, terms, conditions, limitations and exclusions of Policy number [•] which is due to remain in force until 12.01 a.m. Local Standard Time [•].

[• name of Approved Insurance Broker]

DIRECTOR

SEVERAL LIABILITY NOTICE - The subscribing insurer's obligations under policies to which they subscribe are several and not joint and are limited solely to the extent of their individual subscriptions. The subscribing insurers are not responsible for the subscription of any co-subscribing insurer who for any reason does not satisfy all or part of its obligations.

EXHIBIT J

FORM OF LETTER OF UNDERTAKING

[Letterhead of Approved Insurance Broker]

PLEASE READ CAREFULLY

Under the attached Certificate, Underwriters have agreed to give notice in certain circumstances. In order to ensure our ability, as the intermediary, to direct such notice to the relevant parties, we would request that you complete the schedule below and return it to [• name Approved Insurance Broker] at the address below, if possible by facsimile. (OUR FACSIMILE NUMBER IS [•]).

PLEASE NOTE: We would remind you that notices are effective from the time of issuance and failure to provide us with the above requested information will severely inhibit our ability to ensure that you are given prompt advice.

ASSURED:

ISSUED IN CONNECTION WITH: [] aircraft msn [•] registration [•]
CERTIFICATE REFERENCE: [•]

SCHEDULE OF PARTIES TO WHOM NOTICE IS TO BE GIVEN

COMPANY:
ADDRESS:

FACSIMILE NO:
ADDRESSEE:

COMPANY:
ADDRESS:
FACSIMILE NO:
ADDRESSEE:

[Date]

TO:

ATTN:

cc: [• name of Lessor's Aircraft Manager]
[• address]

Attn: [•]

Dear Sirs

AIRCRAFT TYPE: []
MSN [•] REGISTRATION [•]
LESSEE: ZETTA JET PTE LTD
OPERATOR: ADVANCED AIR MANAGEMENT, INC

We confirm that we have effected insurances for the account of the Operator covering aircraft owned or operated by them, including inter alia the above-mentioned Aircraft as set out in the attached Certificate of Insurance (Reference No. [•] dated [•]).

Pursuant to instructions received from the Operator and in consideration of your approving the arrangement of the Operators "Fleet Policy" (under which the above mentioned Aircraft are insured), through the intermediary of ourselves as Brokers in connection with the insurances covered by this letter, we undertake as follows, but only in so far as the same relate to your interest(s) in the above mentioned Aircraft:-

1. In relation to the Hull All Risks Insurance, to hold the benefit of those Insurances to your order in accordance with the Loss Payable provision incorporated in the Certificate of Insurance.
2. To advise you, promptly:-
 - 2.1 of the receipt by us of any notice of cancellation or material change in the Insurances
 - 2.2 if we cease to be Insurance Brokers to the Operator
 - 2.3 upon application from you, of the premium payment situation

The above undertakings are given subject to our continuing appointment for the time being as Insurance Brokers to the Operator and subject to all claims and return premiums being collected through Ourselves as brokers and subject to our lien, if any, on the policies referred to above for premiums due under such policies in respect of the Aircraft.

This letter shall be governed by Singapore Law.

Yours faithfully

[•]

DIRECTOR

EXHIBIT K

[Intentionally left Blank]

EXHIBIT L

Form of De-registration Power of Attorney

POWER OF ATTORNEY AND AUTHORITY

[LESSEE] a company incorporated under the laws of [] with number [] and whose registered office is at [] (the "Grantor")

HEREBY CONSTITUTES AND APPOINTS IRREVOCABLY AND BY WAY OF SECURITY:

(both a "Grantee") and any officer, representative or agent for the time being of or appointed by any Grantee (each and any of the same being the "Attorney") to be its true and lawful Attorney-in-Fact (with full power to appoint substitutes and to sub-delegate, including power to authorise the person so appointed or delegated to make further appointments or to delegate further) to do all or any of the following acts, matters and things as the Attorney shall, and in the manner that the Attorney shall, in its or his absolute and unfettered discretion deem necessary, advisable or desirable, namely:

1. to take possession of the Bombardier Global 6000 () freighter aircraft with manufacturer's serial number [•] and current (United States of America registration) [•] and its (two []) engines serial numbers [•] and [•] (the "Airframe" and the "Engines" respectively) and all manuals and technical records relating to the Airframe and the Engines and all parts thereof (together the "Aircraft" and in this Power of Attorney and Authority, where the context so permits, the term "Aircraft" shall include any part of the Aircraft);
2. to secure, park, move, fly, reposition, maintain, repair and insure the Aircraft and to complete or reconstruct its manuals and technical records and/or procure any of the same;
3. to operate, sell, charter or otherwise dispose of the Aircraft;
4. to effect the deregistration of the Aircraft from The Netherlands Register of Aircraft and/or any other aircraft registry on which the Aircraft may be registered from time to time;
5. to obtain from the Civil Aviation Authority of The Netherlands or any other authority having jurisdiction over the Aircraft from time to time a Certificate of Airworthiness for Export for the Aircraft;
6. to register and re-register the Aircraft at any time in any jurisdiction;
7. to pursue, agree, compromise or settle any proceedings, claims or liabilities in respect of or affecting the Aircraft;
8. to apply to any court, authority or person for any orders, consents or approvals in order to effect the foregoing;
9. to sign or execute and deliver all documents and to do all such acts and things as the Attorney shall in its or his absolute and unfettered discretion deem necessary, advisable or desirable for the purposes of effecting any of the above;

on behalf of, at the cost of, and whether in the name of the Grantor or otherwise;

AND HEREBY AUTHORISES, LICENCES AND INSTRUCTS

the Attorney to enter upon any land and/or premises owned by or under the control of the Grantor or to which the Grantor has or may secure access for any person for the purpose of effecting any of the above without liability for loss or damage;

AND REQUESTS

any person to whom the Attorney shall show or give a copy of this Power of Attorney and Authority to give to the Attorney such assistance in respect of the foregoing as the Attorney may reasonably request.

This Power of Attorney and Authority shall be conclusive and binding upon the Grantor and is irrevocable. No person or corporation having dealings with the Attorney under this Power of Attorney and Authority shall be under any obligation to make any enquiries as to whether the power to act hereunder has arisen and all acts hereunder shall be valid and binding upon the Grantor.

The Grantor irrevocably and unconditionally undertakes to indemnify the Attorney and his estates and its assets against all actions, proceedings, claims, costs, expenses and liabilities of every description arising from the exercise or the purported exercise in good faith of any of the powers conferred by this Power of Attorney and Authority.

This Power of Attorney and Authority shall be governed by and construed in accordance with the laws of England.

IN WITNESS whereof this Power of Attorney and Authority has been executed and delivered by the Grantor as a Deed this day of 201[•]

SIGNED and DELIVERED as a DEED

by Lessee

pursuant to a resolution of the Board of

Directors dated [] 201[•]

acting by two Directors or by a Director and its

Secretary

Director

Director/Secretary

EXHIBIT M

[intentionally left blank]

EXHIBIT C

EXECUTION VERSION

Dated 20 SEPTEMBER 2016

Wells Fargo Bank Northwest, National Association
(not in its individual capacity but solely as owner trustee
except as otherwise expressly provided herein)
(as Seller)

Glove Assets Investments Limited
(as Beneficial Owner)

Wells Fargo Bank Northwest, National Association
(not in its individual capacity but solely as owner trustee
(as Buyer)

TVPX ARS Inc.
(not in its individual capacity but solely as owner trustee)
(as Lessee)

**SALE AND LEASEBACK PURCHASE
AGREEMENT**

Relating to one (1) Bombardier Inc. BD-700-1A10 aircraft bearing manufacturer's serial number 9688 and US Registration No. N688ZJ equipped with two (2) Rolls-Royce Deutschland Ltd. & Co KG model BR700-710A2-20 engines bearing MSN 22502 (Left Hand No.1) and MSN 22503 (Right Hand No.2) in connection with a lease agreement dated the date hereof

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This Sale and Leaseback Purchase Agreement is made on 20 SEPTEMBER 2016

Between

- (1) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as owner trustee, except as otherwise expressly provided herein, with its principal place of business at 299 S Main St Fl 5, Salt Lake City, UT 84111-2689 United States of America and its successors and assigns hereunder (the "Seller");
- (2) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as owner trustee, except as otherwise expressly provided herein, with its principal place of business at 299 S Main St Fl 5, Salt Lake City, UT 84111-2689 United States of America and its successors and assigns hereunder (the "Buyer"); and
- (3) **GLOVE ASSETS INVESTMENT LIMITED**, a company incorporated under the laws of the British Virgin Islands with registered number 1881019 and whose registered office is at PO BOX 957, Offshore Incorporations Centre, Road Town, Tortola, British Virgin Islands (the "Beneficial Owner"); and
- (4) **TVPX ARS Inc.**, a corporation formed in accordance with the laws of the state of Wyoming, not in its individual capacity but solely as owner trustee (except as expressly set forth herein) and having its registered office at c/o Frontier Registered Agency Services LLC, 270 W. Pearl, Suite 103, Jackson, Wyoming, 83001, United States of America (the "Lessee"),

(individually referred to as a "Party" or collectively as the "Parties").

Whereas

The Buyer has agreed to lease the Aircraft to the Lessee and the Lessee has agreed to take the Aircraft on lease from the Buyer, in each case, on the terms and subject to the conditions of the Lease Agreement, for which purpose the Seller and Beneficial Owner have agreed to sell the Aircraft to the Buyer and the Buyer has agreed to purchase the Aircraft from the Seller and Beneficial Owner on the terms of this Agreement.

Now it is hereby agreed

1. Definitions and Interpretation

1.1 Definitions

In this Agreement unless the context otherwise requires or it is otherwise provided the following expressions shall have the following meanings and defined terms, unless otherwise defined in this Agreement, shall have the meaning given to such terms in the Lease Agreement:

"Address for Notices":

- (A) with respect to the Seller:

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
299 S Main St Fl 5,

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Salt Lake City,
UT 84111-2689
United States of America

Fax: 801-246-7142
Attention: Corporate Trust Lease Group
Email: ctsleasegroup@wellsfargo.com

(B) with respect to the Buyer:

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
299 S Main St Fl 5,
Salt Lake City,
UT 84111-2689
United States of America

Fax: 801-246-7142
Attention: Corporate Trust Lease Group
Email: ctsleasegroup@wellsfargo.com

with a copy to:

MINSHENG FINANCIAL LEASING CO., LIMITED
Room 308, Building No. 8, Beijing Friendship Hotel
No. 1 Zhongguancun Street
Haidian District, Beijing
China 100873

Fax: +86 10 5608 7511
Attention: Huang Chaorui
Email: huangchaorui@msfl.com.cn

(C) with respect to the Beneficial Owner:

GLOVE ASSETS INVESTMENT LIMITED
c/o Glove Assets Investment Limited


Min Hang District,
Shanghai, PRC 201107

Fax:
Attention: Mr. Li Qi
Email: 

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(D) with respect to the Lessee:

TVPX ARS Inc.

39 E. Eagle Ridge Drive, Suite 201
North Salt Lake, UT 84054
United States of America

Fax: +1 (801) 606 7640
Attention: David Wall
Email: dwall@tvpix.com

"Aircraft" means, as the context may require, the Airframe together with (a) the Engines, APU and Landing Gear, whether installed or not installed on the Aircraft, (b) all Parts or components thereof, (c) spare parts or ancillary equipment or devices furnished with the Airframe or the Engines under this Agreement, (d) all Aircraft Items and other property, tangible and intangible, which are delivered by Seller to Buyer hereunder and not otherwise described in the preceding portions of this definition, (e) all Aircraft Documents and all substitutions, replacements, amendments and renewals of any and all thereof,

"Aircraft Documents" means the original paper copies in original format (with additional photographic, digital, electronic or other medium if required by Seller) of (i) the manuals and records and all other documentation pertaining to the Airframe, Engines, APU, Landing Gear and Parts delivered with the Aircraft at Delivery as set out in Appendix C (*Aircraft Documents*).

"Aircraft Item" means the Aircraft, the Airframe, any of the Engines, any Landing Gear, any of the Parts, or the APU as the context may require.

"Airframe" means the Aircraft (except the Engines) as more specifically described in Schedule 1 (*Aircraft Specification*) together with the APU, all Landing Gear and any and all Parts which are from time to time incorporated or installed in or attached thereto or which have been removed therefrom.

"APU" means the auxiliary power unit installed in the Airframe at Delivery, together with any and all Parts which are from time to time incorporated in or attached to such auxiliary power unit and any and all Parts removed therefrom.

"Aviation Authority" means the governmental department, bureau, commission or agency in the State of Registration that under the Law of the applicable State of Registration that shall, from time to time, have control or supervision of civil aviation in that state or have jurisdiction over the registration, airworthiness, operation, or other matters relating to, the Aircraft.

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for general business in Dublin, London, New York, Singapore and Utah.

"Cape Town Convention" means the Convention on International Interests in Mobile Equipment (the "Convention") and the Protocol to the Convention on International Interests in

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Mobile Equipment on Matters Specific to Aircraft Equipment (the "Protocol"), both signed in Cape Town, South Africa on November 16, 2001 together with any protocols, regulations, rules, orders, agreements, instruments, amendments, supplements, revisions or otherwise that have or will be subsequently made in connection with the Convention and/or the Protocol by the "Supervisory Authority" (as defined in the Protocol), the "International Registry" or "Registrar" (as defined in the Convention) or an appropriate "Registry Authority" (as defined in the Protocol) or any other international or national body or authority, as applicable.

"**Certificate of Acceptance**" means a certificate of acceptance in respect of the Aircraft duly executed by the Buyer, such certificate to be substantially in the form of Appendix B.

"**Cut Off Date**" means 30 September 2016 or such later date as may be agreed between the Seller and the Buyer.

"**Delivery**" means the delivery of the Aircraft to and the acceptance of the Aircraft by the Buyer for the purposes of this Agreement.

"**Delivery Location**" means the location at which Delivery of the Aircraft shall take place, as shall be agreed between the Seller and the Buyer.

"**Encumbrance**" means any mortgage, charge, pledge, lien, debt, claim, liability, assignment, title retention, security interest or other encumbrance of any kind.

"**Engines**" means two (2) Rolls-Royce Deutschland Ltd & Co KG model BR700-710A2-20 engines delivered with the Aircraft as per Schedule 1 (*Aircraft Specification*), together with any and all Parts which are from time to time incorporated in or attached to any such engine and any and all Parts removed there from so long as title thereto remains vested in Seller at Delivery.

"**Escrow Agent**" means Insured Aircraft Title Service, Inc of P.O. BOX. 19527 OKLAHOMA CITY, OK. 73144, or such other escrow agent as the parties may mutually agree..

"**Escrow Agreement**" means the escrow agreement entered into on or about the date hereof between, amongst others, the Escrow Agent, the Seller, sLessor and Lessee regarding the appointment of the Escrow Agent in relation to this Agreement.

"**Escrow Agents Account**" means the account specified in writing by the Escrow Agent to the Buyer no later than five (5) Business Days prior to the proposed date of Delivery.

"**FAA**" means, as the context requires, the United States Federal Aviation Administration and/or the Administrator of the United States Federal Aviation Administration, or any Person, governmental department, bureau, commission or agency succeeding to the functions of either of the foregoing.

"**FAA Bill of Sale**" means an FAA bill of Sale (AC Form 8050-2) to be executed by or on behalf of the Seller in relation to the Aircraft.

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"**Governmental Authority**" means and include, as applicable, (i) the FAA and any other applicable Aviation Authority; (ii) any national government, or political subdivision thereof or local jurisdiction therein; (iii) any board, commission, department, division, organ, instrumentality, court, or agency of any entity described in (ii), however constituted; and (iv) any association, organization, or institution of which any entity described in (ii) or (iii) is a member or to whose jurisdiction any such entity is subject or in whose activities any such entity is a participant, but only to the extent that any of the preceding in clauses (i)-(iv) have jurisdiction over the Aircraft or its operations.

"**Law**" means and include (a) any statute, decree, constitution, regulation, rule, order, judgment, AD or other directive of any Governmental Authority; (b) any treaty, pact, compact or other agreement to which any Governmental Authority is a party; (c) any judicial or administrative interpretation or application of any Law described in (a) or (b); and (d) any amendment or revision of any Law described in (a), (b) or (c).

"**Landing Gear**" means the two (2) main and the one (1) nose landing gear installed on the Airframe at Delivery together with any and all Parts which are from time to time incorporated in or attached to any such landing gear and any and all Parts removed there from so long as title thereto remains vested in Seller at Delivery.

"**Lease Agreement**" means the aircraft lease agreement dated on or about the date hereof between the Buyer, as lessor, and the Lessee, as lessee, in respect of the Aircraft.

"**Part**" means any and all appliances, components, parts, instruments, appurtenances, accessories, furnishings, seats, and other equipment and additions of whatever nature (other than (i) the Engines, (ii) the APU, (iii) the Landing Gear (except for brakes) and (iv) temporary replacement parts installed pursuant to this Agreement) title to which is to pass to Buyer at Delivery, whether or not installed on the Aircraft.

"**Payment Instructions**" means the payment instructions to be given by the Seller to the Escrow Agent in relation to disbursement of the Purchase Consideration at Delivery, substantially in the form set out in Schedule 2 (*Payment Instructions*).

"**Person**" means an individual, general partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, limited liability company or limited partnership, Governmental Authority or other entity of whatever nature.

"**Process Agent**" means Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England or such other person and address in England as shall be notified by the Seller, Beneficial Owner and Lessee to the Buyer and as shall be consented to by the Buyer from time to time.

"**Purchase Consideration**" means an amount equal to US\$40,000,000 (forty million Dollars).

"**Seller's Invoice**" means an invoice from the Seller to the Buyer setting out the Purchase Consideration.

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"State of Registration" means the United States of America.

"United States Dollars", "US\$" or "USD", means the lawful currency of the United States of America from time to time.

"Warranty Bill of Sale" means a warranty bill of sale in respect of the Aircraft duly executed by the Seller, such warranty bill of sale to be substantially in the form of Appendix A.

1.2 Interpretation

In this Agreement, unless the context otherwise requires or it is otherwise provided:

- (a) words and phrases defined in the parties, recitals and Appendices to this Agreement shall, unless the context otherwise requires or it is otherwise provided, have the same meaning throughout this Agreement;
- (b) clause, schedule and appendix headings are for ease of reference only and shall not affect the interpretation of this Agreement;
- (c) references to clauses, paragraphs, sub-paragraphs, Appendices, Exhibits or Annexes shall be construed as references to clauses, paragraphs or sub-paragraphs of, and Appendices, Exhibits or Annexes to, this Agreement;
- (d) references to this Agreement or to any other document or any specified provision thereof shall be construed as references to this Agreement, that document or that provision as the same may have been, or may from time to time be, amended, supplemented or novated;
- (e) references to any statutory or other legislative provisions, or the rules and regulations thereunder, shall be construed as including any statutory or legislative modification or re-enactment or re-promulgation thereof, or any provision enacted or promulgated in substitution therefor;
- (f) any convention or protocol, includes any protocols, regulations, rules, orders, agreements, instruments, amendments, supplements, revisions or otherwise that may be made from time to time in connection with such convention or protocol;
- (g) references to any "party" shall include any successor in title to such party or any permitted assignee of such party and any company with which such party may amalgamate;
- (h) references to "including" shall mean including without limitation to the generality of any description preceding such term and the rule of ejusdem generis shall not be applicable to limit a general statement followed by or referable to an enumeration of specific matters to matters similar to those specifically mentioned;

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- (i) references to "indebtedness" shall include any obligation (whether present or future, actual or contingent, secured or unsecured, as principal or surety or otherwise) for the payment or repayment of money;
- (j) references to a "person" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust or partnership (whether or not having separate legal personality) of two or more of the foregoing;
- (k) a "law" or "regulation" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation;
- (l) references to taxes shall include any and all forms of taxation, levy, impost, duty, contribution, withholding or charge of whatever nature and by whatever name called, whenever created or imposed, whether imposed by a Governmental Authority, a local, municipal, federal or other body or authority under any jurisdiction and any amount deemed to be or treated as an amount of and any amount payable in advance of or creditable against any future payment of any of the same and any amounts in lieu thereof, together with any additions to tax, penalties, fines, charges or interest thereon and tax and taxation shall be construed accordingly; and
- (m) words importing the plural shall also include the singular and vice versa.

2. Sale and Purchase

- 2.1 The Seller and the Beneficial Owner agree to sell to the Buyer and the Buyer agrees to purchase from the Seller and Beneficial Owner both the legal and beneficial title to the Aircraft at the Delivery Location "as is, where is" for the Purchase Consideration in accordance with the terms and conditions of this Agreement. The Buyer's obligations under this Agreement (including its obligations to purchase the Aircraft, to pay the Purchase Consideration and to execute and deliver to the Seller the Certificate of Acceptance) shall be subject to the fulfilment of the conditions set out in clause 2 and schedule 3 of the Lease Agreement on or before the Delivery Date to the Buyer's satisfaction and receipt by the Buyer of the Seller's Invoice. In the event that Delivery does not occur on or before the Cut Off Date for whatever reason, this Agreement may be terminated by the Buyer giving notice to the Seller specifying the date for such termination.
- 2.2 The Beneficial Owner is a party to this Agreement as the beneficial owner of the Aircraft to agree, and hereby agrees subject to the terms of this Agreement, to transfer its beneficial interest in the Aircraft, free of all liens and encumbrances created by it, simultaneously with the transfer by the Seller of legal title to the Aircraft to the Buyer.
- 2.3 The Escrow Agent shall be appointed to perform the duties and obligations set out in this Agreement subject to the terms of the Escrow Agreement.

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3. **Conditions Precedent**

3.1 The Seller's obligation to sell the Aircraft to the Buyer under this Agreement is subject to the fulfilment prior to Delivery of the following conditions:

- (a) receipt by the Escrow Agent from the Buyer of:
 - (i) the Purchase Consideration;
 - (ii) the Acceptance Certificate duly executed by the Buyer (but undated);
- (b) that the representations given by the Buyer in clause 7(d) are true and accurate on the date of Delivery; and
- (c) that the Buyer has not failed to observe or perform any of its obligations under this Agreement.

3.2 The Buyer's obligation to purchase the Aircraft from the Seller under this Agreement is subject to fulfilment prior to Delivery of the following conditions:

- (a) receipt by the Escrow Agent from the Seller of:
 - (i) the Warranty Bill of Sale duly executed by the Seller (but undated);
 - (ii) the FAA Bill of Sale duly executed by the Seller (but undated);
 - (iii) the Payment Instructions duly executed by the Seller (but undated);
 - (iv) all necessary documents required by the FAA to transfer the registration of the Aircraft from the Seller to the Buyer;
 - (v) one hundred per cent (100%) of the fees of the Escrow Agent;
- (b) receipt by the Buyer of each of the Aircraft Documents (save for the Warranty Bill of Sale and the FAA Bill of Sale);
- (c) receipt by the Buyer of evidence of the establishment of the Seller as a transaction user entity with the International Registry, the appointment by the Seller of an approved administrator user and the designation of a professional user entity with the International Registry;
- (d) the Aircraft being tendered for Delivery by the Seller at the Delivery Location in the Delivery Condition on or prior to the Cut Off Date;
- (e) that the representations given by the Seller in clause 7(a) and the Lessee in clause 7(b) are true and accurate on the date of Delivery; and
- (f) that the Seller or the Lessee has not failed to observe or perform any of its obligations under this Agreement, the Lease Agreement or any Companion Lease.

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- 3.3 The conditions specified in Clause 3.1 are inserted for the sole benefit of the Seller and may be waived in writing in whole or in part, by the Seller without prejudicing the right of the Seller to receive fulfilment of those conditions, in whole or in part, at any time. If any of the conditions specified in Clause 3.1 remain outstanding on the Cut Off Date as a result solely of any action or inaction on the part of the Buyer and are not waived, the Seller shall be entitled at any time to terminate its obligation to sell the Aircraft to the Buyer by notice to the Buyer, whereupon neither party to this Agreement shall have any further obligation or liability under this Agreement.
- 3.4 The conditions specified in Clause 3.2 are inserted for the sole benefit of the Seller and may be waived in writing in whole or in part, by the Seller without prejudicing the right of the Seller to receive fulfilment of those conditions, in whole or in part, at any time. If any of the conditions specified in Clause 3.1 remain outstanding on the Cut Off Date as a result solely of any action or inaction on the part of the Buyer and are not waived, the Seller shall be entitled at any time to terminate its obligation to sell the Aircraft to the Buyer by notice to the Buyer, whereupon neither party to this Agreement shall have any further obligation or liability under this Agreement.
4. **Payment, Delivery and Acceptance**
- 4.1 The Seller shall pay one hundred per cent (100%) of the fees of the Escrow Agent for acting in such capacity with respect to this Agreement.
- 4.2 The Purchase Consideration is inclusive of any sales, turnover or value added tax or similar taxes that may from time to time be payable or chargeable on the provision or supply of the goods or services to which they relate and the Purchase Consideration shall be paid net of any deduction or withholding (whether in respect of set-off, counterclaim, duties, taxes, charges or otherwise howsoever) required by any applicable law.
- 4.3 The Purchase Consideration shall be paid in United States Dollars by wire transfer to the Escrow Agent's Account on or before the date of Delivery.
- 4.4 The Seller and the Lessee shall, jointly and severally, be responsible for and shall indemnify and keep the Buyer indemnified fully on demand from and against the payment of all taxes, duties, withholdings, deductions, fees and charges assessed by any national or local government or authority arising out of or in connection with this Agreement or the sale and purchase of the Aircraft under this Agreement or the ownership, import, export, possession, operation, use, maintenance, return, storage or resale of the Aircraft or any part of it on or after Delivery. The Parties shall co-operate with each other reasonably to ensure that the Delivery and transfer of title to the Aircraft will take place in a jurisdiction which will permit the Delivery and the transfer of title free of all such taxes, duties, withholdings, deductions, fees and charges.
- 4.5 Delivery may take place at any time from the date of this Agreement to the Cut Off Date (save that Delivery shall occur no later than 17:00 hrs. local time in the Delivery Location on the Cut Off Date).

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- 4.6 Subject to the fulfilment of all the conditions specified in Clause 3 (*Conditions Precedent*) (unless waived in accordance with clause 3.3 or 3.4), the Aircraft shall be tendered for Delivery by the Seller at the Delivery Location.
- 4.7 At Delivery, the Parties shall procure that the Escrow Agent (and the Escrow Agent shall) simultaneously:
- (a) date and deliver to the Buyer the Warranty Bill of Sale;
 - (b) date and deliver to the Seller the Acceptance Certificate;
 - (c) date the Payment Instructions and transfer the Purchase Consideration in accordance with the Payment Instructions;
 - (d) make or procure that all necessary filings for the transfer of registration of the Aircraft with the FAA from Seller to Buyer;
 - (e) date the FAA Bill of Sale and file or procure the filing of the FAA Bill of Sale with the FAA;
 - (f) register or procure the registration of the Warranty Bill of Sale with the International Registry as a contract of sale.

The Escrow Agent shall also: (A) circulate executed and dated copies of the Warranty Bill of Sale, FAA Bill of Sale and the Acceptance Certificate to both Parties by email in .PDF format; (B) provide the Seller and the Buyer with the wire instructions which reflect that the Purchase Consideration has been transferred in accordance with the Payment Instructions; and (C) dispatch the original executed and dated Warranty Bill of Sale and FAA Bill of Sale to the Buyer, and the original executed and dated Acceptance Certificate to the Seller, by international courier (with tracking details emailed to the intended recipient of the couriered package).

- 4.8 The parties hereby acknowledge that at the time of Delivery of the Aircraft by the Seller to the Buyer under this Agreement the leasing of the Aircraft from the Buyer to the Lessee pursuant to the Lease Agreement shall commence and no physical delivery in relation to the Aircraft or any part thereof is required pursuant to this Agreement.

5. Costs and Expenses

- 5.1 Any fees payable to any aviation authority in connection with the transfer of title to the Aircraft from the Seller to the Buyer shall be borne by the Seller.
- 5.2 All other costs and expenses (including legal fees) incurred by the Buyer in connection with the transaction contemplated hereby shall be borne by the Seller.

6. Assignment of Manufacturers' Warranties

With effect from Delivery, the Seller shall procure that Zetta Jet assigns to the Buyer absolutely all of Zetta Jet's rights, title and interest in and to all assignable warranties of

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manufacturers, suppliers and repairers that remain relating to the Aircraft (including, without limitation, in relation to its Airframe, Engines, APU, Landing Gear and Parts) and the Seller undertakes at the Seller's own cost to procure any consents and approvals for such assignments that may be necessary from such manufacturer, supplier or repairer. If any such warranties shall not be assignable or if consent to such assignment shall be refused, the Seller shall take or procure the taking at the Seller's own cost such action as the Buyer may reasonably request to enforce any such warranties.

7. **Representations and Warranties**

(a) The Seller represents and warrants to the Buyer that:

- (i) it is the sole and absolute legal owner of the Aircraft;
- (ii) at Delivery, the Seller will transfer the Aircraft to the Buyer with full title guarantee;
- (iii) the Aircraft is not the subject of any Encumbrances;
- (iv) the Aircraft has no damage history;
- (v) the Manuals and Technical Records have been maintained in accordance with the requirements of the Aviation Authority and/or by the FAA and will at Delivery properly record the complete and continuous maintenance condition of the Aircraft from the date of manufacture;
- (vi) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Seller and that this Agreement has been duly executed and delivered by the Seller.

(b) The Beneficial Owner represents and warrants to the Buyer that:

- (i) it is the sole and absolute beneficial owner of the Aircraft;
- (ii) the Aircraft is not the subject of any Encumbrances;
- (iii) the Aircraft has no damage history;
- (iv) the Manuals and Technical Records have been maintained in accordance with the requirements of the Aviation Authority and/or by the FAA and will at Delivery properly record the complete and continuous maintenance condition of the Aircraft from the date of manufacture;
- (v) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been

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duly authorised by all necessary corporate action of the Seller and that this Agreement has been duly executed and delivered by the Seller.

- (c) The Lessee represents and warrants to the Buyer that:
 - (i) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Lessee and that this Agreement has been duly executed and delivered by the Lessee; and
 - (ii) The Lessee represents and warrants to the Buyer that the Aircraft will be used for the international transport of passengers pursuant to and in accordance with the Lease Agreement and Sub-Lease (as defined in the Lease Agreement).
- (d) The Buyer represents and warrants to the Seller that it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Buyer and that this Agreement has been duly executed and delivered by the Buyer.

8. Cape Town Convention

- (a) The Parties acknowledge that the transaction contemplated by this Agreement is within the ambit of the Cape Town Convention.
- (b) The Seller will co-operate with the Buyer in order to register the Warranty Bill of Sale as a contract of sale with the International Registry at Delivery, as follows:
 - (i) Prior to Delivery, the Seller shall take any and all actions necessary to establish the Seller as a transaction user entity with the International Registry.
 - (ii) Prior to Delivery, the Seller shall appoint an approved administrator user and designate a professional user entity to initiate the registration of the Warranty Bill of Sale as a contract of sale with the International Registry at Delivery.

9. Assignments

No party shall be entitled to assign, novate, transfer or charge any of its rights under this Agreement without the prior written consent of the other parties, such consent not to be unreasonably withheld or delayed, save that the Seller and Lessee hereby acknowledge and consent to the Buyer assigning, novating, transferring or charging any of its rights under this Agreement to any Financier in relation to the financing or re-financing all or part of the Purchase Consideration.

EXECUTION VERSION

10. **Trustee**

Except as expressly provided in this agreement, the Buyer and the Lessee acknowledge that this Agreement is executed by Wells Fargo Bank Northwest, National Association, not in its individual capacity, but solely as owner trustee, except as otherwise expressly provided herein, under a trust agreement with the Beneficial Owner as grantor, in the exercise of the power and authority conferred and vested in it as such owner trustee, that this Agreement is intended to bind only a trust estate vested in the owner trustee in favour of the Beneficial Owner and that nothing herein contained shall be construed as creating any liability on Wells Fargo Bank Northwest, National Association, individually or personally, to perform any agreement herein, all such liability, if any, being expressly waived by Buyer and Lessee by each and every person now or hereafter claiming by, through or under the holder, except with respect to the gross negligence or wilful misconduct of Wells Fargo Bank Northwest, National Association.

11. **Further Provisions**

11.1 **English Language**

Each communication and document made or delivered by one party to another pursuant to this Agreement shall be in the English language or accompanied by a translation thereof into English certified (by an authorised person making or delivering the same) as being a true and accurate translation thereof. The English language version of any communication shall be the authoritative version.

11.2 **Notices**

All notices and communications under this Agreement shall be made in writing and in the English language and transmitted to a party at its Address for Notices, with copy as there provided, or to such other address, facsimile number or e-mail address as the intended recipient may have notified to the other Party (by not less than five (5) Business Days' notice). Notices hereunder shall not be effective unless given by personal delivery, post (return receipt requested), express courier (tracking receipt requested) or electronic communication (with confirmation report of complete transmission or no delivery failure message received as the case may be) to the relevant address. In the case of posting or courier service, any such notice shall be deemed duly served upon the second Business Day after its despatch, in the case of personal delivery on the Business Day immediately following the date of personal delivery and in the case of electronic communication on the date of transmission if no delivery failure message is received.

11.3 **Governing Law and Submission to Jurisdiction**

- (a) This Agreement and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with English law.
- (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly neither Party will argue to the contrary save that, as such agreement conferring jurisdiction is for the benefit of Buyer only, Buyer

EXECUTION VERSION

shall retain the right to bring proceedings against Seller and or Lessee in any court in another country.

- (c) Seller herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.
- (d) Beneficial Owner herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.
- (e) Lessee herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.

11.4 Entire Agreement

This Agreement constitutes the entire agreement between Buyer, Seller, Beneficial Owner and Lessee concerning the subject matter hereof and supersedes all preceding correspondence, agreements and stipulations whether oral or in writing between the Parties concerning the subject matter hereof.

11.5 Enforceability

If a provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, this will not affect the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement or the legality, validity or enforceability in any other jurisdiction of that or any other provision of this Agreement.

11.6 Amendment

Any term of this Agreement may be amended or waived only with the written consent of the Parties and any such amendment or waiver will be binding on the Parties.

11.7 No Waiver

No failure to exercise, nor any delay in exercising, on the part of any Party, any right or remedy under this Agreement shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise of any other right or remedy. The

EXECUTION VERSION

rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

11.8 Further Assurances

Seller, Beneficial Owner and Lessee shall, at their own expense, from time to time do and perform such other and further acts and execute and deliver any and all such further instruments as may be required by applicable Law or reasonably requested in writing by Buyer to establish, maintain and protect the rights and remedies of Buyer and to carry out and effect the intent and purposes of this Agreement.

11.9 Counterparts

This Agreement may be executed in two or more counterparts and by different parties hereto on separate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.10 Third Party Rights

A Person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 ("Third Parties Act") to enforce or to receive the benefit of any term of this Agreement.

IN WITNESS WHEREOF the duly authorised representative(s) of the parties hereto have signed this Agreement the date stated at the beginning of this Agreement.

THE SIGNATURES OF THE PARTIES APPEAR
ON THE LAST THREE PAGES OF THIS
AGREEMENT

EXECUTION VERSION

SCHEDULE 1
Aircraft Specification

A Bombardier Global 6000, BD-700-1A10 corporate aircraft airframe msn 9688 with its two Rolls-Royce Deutschland BR700-710A2-20 engines bearing MSNs 22502 and 22503 and the Honeywell auxiliary power unit ("APU") msn P-814.

EXECUTION VERSION

SCHEDULE 2
Form of Payment Instructions

To: Insured Aircraft Title Service, Inc.

Dated: [•]

Dear Sirs

Sale and Leaseback Purchase Agreement dated [•] 2016 in respect of one (1) Bombardier Global 6000 Aircraft with MSN 9688 and registration mark N688ZJ (the "SLB Purchase Agreement")

1. Capitalised terms used in these Payment Instructions but not otherwise defined shall have the same meanings as defined in the SLB Purchase Agreement.
2. The Seller hereby submits these payment instructions in accordance with the terms of the SLB Purchase Agreement that following receipt of the Purchase Consideration and confirmation from the Seller and Buyer that they wish to proceed with Delivery of the Aircraft the Seller hereby instructs you to apply such Purchase Consideration to the following accounts in the following amounts:
 - (a) US\$27,500,000.00 to be transferred to the account designated by the Beneficial Owner, in part satisfaction of the previous Financial Indebtedness in respect of the Aircraft, as follows:

Bank: HSBC Bank, New York, USA
(Field 56a) SWIFT code: MRMDUS33
Federal routing code: 021001088

For credit to: a/c no. [REDACTED]-9
(Field 57a) THE HONGKONG & SHANGHAI BANKING CORPORATION
LIMITED, HONG KONG PRIVATE BANKING DIVISION
BIC: HSBCHKHHPBD

In favour of: UNIVERSAL LEADER INVESTMENT LIMITED
(Field 59) A/C [REDACTED]-0002

With Message: Please send SWIFT MT103 to HSBCHKHHPBD with full payment details

- (b) [US\$6,205,120.00 to be transferred to the account of [Minsheng], in part satisfaction of certain fees to be paid to Lessor pursuant to the Lease Agreement, as follows:

[Details of Account]

- (c) US\$6,279,880 to be transferred to the account of Zetta Jet as follows:

Bank: Hong Kong and Shanghai Banking Corporation
Bank Address: 21 Collyer Quay, HSBC Building, Singapore 049320
Account Name: Zetta Jet Pte Ltd
Account No: [REDACTED] 81(USD)
Swift Code: HSBCSGSG

EXECUTION VERSION

- (d) US\$15,000.00 to be paid to the order of Insured Aircraft Title Service, Inc as agreed fees for escrow services
- 3. These Payment Instruction is irrevocable.
- 4. These Payment Instructions and any non-contractual obligations arising from or in connection with them are governed by and shall be construed in accordance with the laws of England.

Yours faithfully

SELLER

By: Wells Fargo Bank Northwest, National Association, not in its individual capacity but solely as owner trustee

Title: _____]

EXECUTION VERSION

APPENDIX A
Form of Warranty Bill of Sale

Warranty Bill of Sale

relating to one (1) Bombardier Inc. BD-700-1A10 aircraft with manufacturer's serial number 9688 and registration mark N888ZJ, its with two (2) Rolls-Royce Deutschland Ltd. & co KG model BR700-710A2-20 engines bearing MSN 22502 (Left Hand No. 1) and 22503 (Right Hand No. 2), its [Manufacturer and model] auxiliary power unit with MSN [*] and the equipment, systems, accessories and parts belonging to, installed in or appurtenant to such airframe, engines and auxiliary power unit and the documentation, certificates, licences, manuals, logbooks, records and data relating to such airframe, engines and auxiliary power unit (collectively, the Aircraft)

KNOW ALL MEN BY THESE PRESENTS:

This Warranty Bill of Sale is executed and delivered on and as of the date specified below by [*] (the Seller) to [*] (the Buyer) pursuant to an aircraft sale and leaseback purchase agreement dated [*] between the Seller, the Buyer, Glove Assets Investment Limited as beneficial owner and TVPX ARS Inc., not in its individual capacity but solely as owner trustee as lessee (the Agreement) relating to the Aircraft.

All words and phrases used in this Warranty Bill of Sale shall have the same meanings as in the Agreement.

For and in consideration of one (1) US Dollar (USD 1.00) and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller, with full title guarantee and as the sole and absolute legal, equitable and beneficial owner of the Aircraft did this [*] day of [*] 2016, grant, convey, transfer, bargain, sell, deliver and send over to Buyer and its successors and assigns all right, title, interest and benefit in and to the Aircraft free and clear of all Encumbrances of any kind in accordance with the terms of the Agreement.

The Seller hereby warrants to the Buyer and its successors and assigns that at the time of delivery of the Aircraft to the Buyer, the Seller was the lawful owner of the Aircraft with good and marketable title thereto. The Seller agrees with the Buyer and its successors and assigns that it will warrant and defend such title forever against all claims and demands whatsoever. The Seller further warrants that the Seller has good and lawful right to sell the Aircraft and that such title to the Aircraft is hereby vested in the Buyer free and clear of any Encumbrance of any kind.

In this Warranty Bill of Sale, **Encumbrance** means any encumbrance, right or interest of any person, whether by way of ownership, possession, enjoyment, security, contract, at law or otherwise, whatsoever, howsoever and whensoever created or arising, including any International Interest, mortgage, charge, pledge, hypothecation, assignment, statutory right in rem, title retention, lease, lien, attachment, levy, claim, right of detention or seizure or right of set-off and any filing, registration or recordation of any of the same.

This Warranty Bill of Sale and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with the laws of England.

IN WITNESS WHEREOF the Seller has executed and delivered this Warranty Bill of Sale as a deed by its duly authorised signatory as of this day of 2016

EXECUTION VERSION

THE SIGNATURE OF THE SELLER APPEARS
ON THE FOLLOWING PAGE

SELLER

SIGNED AND DELIVERED AS A DEED

BY

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, but solely as owner trustee:

By: _____

Name: _____

Title: _____

in the presence of

Signature of witness

Name of witness

Address of witness

Position

EXECUTION VERSION

APPENDIX B
Form of Certificate of Acceptance

Certificate of Acceptance

relating to one (1) Bombardier Inc. BD-700-1A10 aircraft with manufacturer's serial number 9688 and registration mark N588LQ, its with two (2) Rolls-Royce Deutschland Ltd. & co KG model BR700-710A2-20 engines bearing MSN 22502 (Left Hand No. 1) and 22503 (Right Hand No. 2), its [Manufacturer and model] auxiliary power unit with MSN [•] and the equipment, systems, accessories and parts belonging to, installed in or appurtenant to such airframe, engines and auxiliary power unit and the documentation, certificates, licences, manuals, logbooks, records and data relating to such airframe, engines and auxiliary power unit (collectively, the Aircraft)

This Certificate of Acceptance is executed and delivered on and as of the date specified below by [•] (the Buyer) to [•] (the Seller) pursuant to an aircraft sale and leaseback purchase agreement dated [•] between the Seller, the Buyer, Glove Assets Investment Limited as beneficial owner and TVPX ARS Inc., not in its individual capacity but solely as owner trustee as lessee (the Agreement) relating to the Aircraft.

All words and phrases used in this Certificate shall have the same meanings as in the Agreement.

The Buyer acknowledges that the Seller has delivered to it, and that it has received and accepted from the Seller, the Aircraft, pursuant to and in accordance with the provisions of the Agreement, on _____ 2016, at _____ hours UTC, at _____ airport.

This Certificate and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with the laws of England.

IN WITNESS WHEREOF the Buyer has executed and delivered this Certificate as a deed this _____ day of 2016

BUYER

SIGNED BY

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, but solely as owner trustee:

By: _____

Name: _____

Title: _____

EXECUTION VERSION

APPENDIX C
Aircraft Documents

1. Warranty Bill of Sale.
2. FAA Bill of Sale.
3. Certificate of Registration for the Aircraft issued by the Aviation Authority.
4. Certificate of Airworthiness for the Aircraft issued by the Aviation Authority (with no derogations).
5. A copy of the bill of sale pursuant to which the Seller took title to the Aircraft / Copies of the 'back to birth' bills of sale back to delivery of the Aircraft new from the manufacturer.
6. Evidence satisfactory to the Buyer that the Aircraft is free from any Encumbrances.
7. An invoice from the Seller to the Buyer detailing the Purchase Consideration for the Aircraft.

EXECUTION VERSION

SLBPA – MSN 9688 - Signature page 1

SELLER

SIGNED BY

J. Brent Allen)
)

for and on behalf of)

Wells Fargo Bank Northwest, National Association)

(not in its individual capacity but solely)

as owner trustee))

Position: Asst. Vice President

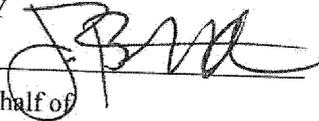
Name: J. Brent Allen

EXECUTION VERSION

SLBPA – MSN 9688 - Signature page 2

BUYER

SIGNED BY



for and on behalf of

Wells Fargo Bank Northwest, National Association

(not in its individual capacity but solely

as owner trustee)

Position: Asst. Vice President

Name: J. Brent Allen

EXECUTION VERSION

SLBPA – MSN 9688 - Signature page 3

BENEFICIAL OWNER

SIGNED BY

Li Qi

for and on behalf of

Glove Assets Investment Limited

For and on behalf of
Glove Assets Investment Limited


.....
Authorized Signature(s)

Position: Director

Name: Li Qi

in the presence of :-



LIN SIU LEUNG DAVID

Solicitor, Hong Kong SAR
C. P. Lin & Co.

SLBPA – MSN 9688 - Signature page 3

LESSEE

SIGNED BY


_____)

for and on behalf of)

TVPX ARS Inc., not in its individual capacity)

but solely as owner trustee)

Position: Senior Vice President

Name: David Wall

EXHIBIT D

EXECUTION VERSION

Dated 20 SEPTEMBER 2016

Wells Fargo Bank Northwest, National Association
(not in its individual capacity but solely as owner trustee
except as otherwise expressly provided herein)
(as Seller)

Universal Leader Investment Limited
(as Beneficial Owner)

Wells Fargo Bank Northwest, National Association
(not in its individual capacity but solely as owner trustee
(as Buyer)

TVPX ARS Inc.
(not in its individual capacity but solely as owner trustee)
(as Lessee)

**SALE AND LEASEBACK PURCHASE
AGREEMENT**

Relating to one (1) Bombardier Inc. BD-700-1A10 aircraft bearing manufacturer's serial number 9606 and US Registration No. N588LQ equipped with two (2) Rolls-Royce Deutschland Ltd. & Co KG model BR700-710A2-20 engines bearing MSN 22338 (Left Hand No.1) and MSN 22339 (Right Hand No.2) in connection with a lease agreement dated the date hereof

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EXECUTION VERSION

This Sale and Leaseback Purchase Agreement is made on 20 SEPTEMBER 2016

Between

- (1) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as owner trustee, except as otherwise expressly provided herein, with its principal place of business at 299 S Main St Fl 5, Salt Lake City, UT 84111-2689 United States of America and its successors and assigns hereunder (the "**Seller**");
- (2) **WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION**, not in its individual capacity but solely as owner trustee, except as otherwise expressly provided herein, with its principal place of business at 299 S Main St Fl 5, Salt Lake City, UT 84111-2689 United States of America and its successors and assigns hereunder (the "**Buyer**"); and
- (3) **UNIVERSAL LEADER INVESTMENT LIMITED**, a company incorporated under the laws of the British Virgin Islands with registered number 1836404 and whose registered office is at Woodbourne Hall, Road Town, Tortola, British Virgin Islands (the "**Beneficial Owner**"); and
- (4) **TVPX ARS Inc.**, a corporation formed in accordance with the laws of the state of Wyoming, not in its individual capacity but solely as owner trustee (except as expressly set forth herein) and having its registered office at c/o Frontier Registered Agency Services LLC, 270 W. Pearl, Suite 103, Jackson, Wyoming, 83001, United States of America (the "**Lessee**"),

(individually referred to as a "**Party**" or collectively as the "**Parties**").

Whereas

The Buyer has agreed to lease the Aircraft to the Lessee and the Lessee has agreed to take the Aircraft on lease from the Buyer, in each case, on the terms and subject to the conditions of the Lease Agreement, for which purpose the Seller and Beneficial Owner have agreed to sell the Aircraft to the Buyer and the Buyer has agreed to purchase the Aircraft from the Seller and Beneficial Owner on the terms of this Agreement.

Now it is hereby agreed

1. Definitions and Interpretation

1.1 Definitions

In this Agreement unless the context otherwise requires or it is otherwise provided the following expressions shall have the following meanings and defined terms, unless otherwise defined in this Agreement, shall have the meaning given to such terms in the Lease Agreement:

"Address for Notices":

- (A) with respect to the Seller:

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
299 S Main St Fl 5,

EXECUTION VERSION

Salt Lake City,
UT 84111-2689
United States of America

Fax: 801-246-7142
Attention: Corporate Trust Lease Group
Email: ctsleasegroup@wellsfargo.com

(B) with respect to the Buyer:

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION
299 S Main St Fl 5,
Salt Lake City,
UT 84111-2689
United States of America

Fax: 801-246-7142
Attention: Corporate Trust Lease Group
Email: ctsleasegroup@wellsfargo.com

with a copy to:

MINSHENG FINANCIAL LEASING CO., LIMITED
Room 308, Building No. 8, Beijing Friendship Hotel
No. 1 Zhongguancun Street
Haidian District, Beijing
China 100873

Fax: +86 10 5608 7511
Attention: Huang Chaorui
Email: huangchaorui@msfl.com.cn

(C) with respect to the Beneficial Owner:

UNIVERSAL LEADER INVESTMENT LIMITED
c/o Universal Leader Investment Limited

██████████
██████████
Min Hang District,
Shanghai, PRC 201107

Fax:
Attention: Mr. Li Qi
Email: ██████████

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(D) with respect to the Lessee:

TVPX ARS Inc.
39 E. Eagle Ridge Drive, Suite 201
North Salt Lake, UT 84054
United States of America

Fax: +1 (801) 606 7640
Attention: David Wall
Email: dwall@tvpix.com

"Aircraft" means, as the context may require, the Airframe together with (a) the Engines, APU and Landing Gear, whether installed or not installed on the Aircraft, (b) all Parts or components thereof, (c) spare parts or ancillary equipment or devices furnished with the Airframe or the Engines under this Agreement, (d) all Aircraft Items and other property, tangible and intangible, which are delivered by Seller to Buyer hereunder and not otherwise described in the preceding portions of this definition, (e) all Aircraft Documents and all substitutions, replacements, amendments and renewals of any and all thereof,

"Aircraft Documents" means the original paper copies in original format (with additional photographic, digital, electronic or other medium if required by Seller) of (i) the manuals and records and all other documentation pertaining to the Airframe, Engines, APU, Landing Gear and Parts delivered with the Aircraft at Delivery as set out in Appendix C (*Aircraft Documents*).

"Aircraft Item" means the Aircraft, the Airframe, any of the Engines, any Landing Gear, any of the Parts, or the APU as the context may require.

"Airframe" means the Aircraft (except the Engines) as more specifically described in Schedule 1 (*Aircraft Specification*) together with the APU, all Landing Gear and any and all Parts which are from time to time incorporated or installed in or attached thereto or which have been removed therefrom.

"APU" means the auxiliary power unit installed in the Airframe at Delivery, together with any and all Parts which are from time to time incorporated in or attached to such auxiliary power unit and any and all Parts removed therefrom.

"Aviation Authority" means the governmental department, bureau, commission or agency in the State of Registration that under the Law of the applicable State of Registration that shall, from time to time, have control or supervision of civil aviation in that state or have jurisdiction over the registration, airworthiness, operation, or other matters relating to, the Aircraft.

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for general business in Dublin, London, New York, Singapore and Utah.

"Cape Town Convention" means the Convention on International Interests in Mobile Equipment (the "Convention") and the Protocol to the Convention on International Interests in

EXECUTION VERSION

Mobile Equipment on Matters Specific to Aircraft Equipment (the "Protocol"), both signed in Cape Town, South Africa on November 16, 2001 together with any protocols, regulations, rules, orders, agreements, instruments, amendments, supplements, revisions or otherwise that have or will be subsequently made in connection with the Convention and/or the Protocol by the "Supervisory Authority" (as defined in the Protocol), the "International Registry" or "Registrar" (as defined in the Convention) or an appropriate "Registry Authority" (as defined in the Protocol) or any other international or national body or authority, as applicable.

"Certificate of Acceptance" means a certificate of acceptance in respect of the Aircraft duly executed by the Buyer, such certificate to be substantially in the form of Appendix B.

"Cut Off Date" means 30 September 2016 or such later date as may be agreed between the Seller and the Buyer.

"Delivery" means the delivery of the Aircraft to and the acceptance of the Aircraft by the Buyer for the purposes of this Agreement.

"Delivery Location" means the location at which Delivery of the Aircraft shall take place, as shall be agreed between the Seller and the Buyer.

"Encumbrance" means any mortgage, charge, pledge, lien, debt, claim, liability, assignment, title retention, security interest or other encumbrance of any kind.

"Engines" means two (2) Rolls-Royce Deutschland Ltd & Co KG model BR700-710A2-20 engines delivered with the Aircraft as per Schedule 1 (*Aircraft Specification*), together with any and all Parts which are from time to time incorporated in or attached to any such engine and any and all Parts removed there from so long as title thereto remains vested in Seller at Delivery.

"Escrow Agent" means Insured Aircraft Title Service, Inc of P.O. BOX. 19527 OKLAHOMA CITY, OK. 73144, or such other escrow agent as the parties may mutually agree..

"Escrow Agreement" means the escrow agreement entered into on or about the date hereof between, amongst others, the Escrow Agent, the Seller, the Beneficial Owner, Lessor and Lessee regarding the appointment of the Escrow Agent in relation to this Agreement.

"Escrow Agents Account" means the account specified in writing by the Escrow Agent to the Buyer no later than five (5) Business Days prior to the proposed date of Delivery.

"FAA" means, as the context requires, the United States Federal Aviation Administration and/or the Administrator of the United States Federal Aviation Administration, or any Person, governmental department, bureau, commission or agency succeeding to the functions of either of the foregoing.

"FAA Bill of Sale" means an FAA bill of Sale (AC Form 8050-2) to be executed by or on behalf of the Seller in relation to the Aircraft.

EXECUTION VERSION

"Governmental Authority" means and include, as applicable, (i) the FAA and any other applicable Aviation Authority; (ii) any national government, or political subdivision thereof or local jurisdiction therein; (iii) any board, commission, department, division, organ, instrumentality, court, or agency of any entity described in (ii), however constituted; and (iv) any association, organization, or institution of which any entity described in (ii) or (iii) is a member or to whose jurisdiction any such entity is subject or in whose activities any such entity is a participant, but only to the extent that any of the preceding in clauses (i)-(iv) have jurisdiction over the Aircraft or its operations.

"Law" means and include (a) any statute, decree, constitution, regulation, rule, order, judgment, AD or other directive of any Governmental Authority; (b) any treaty, pact, compact or other agreement to which any Governmental Authority is a party; (c) any judicial or administrative interpretation or application of any Law described in (a) or (b); and (d) any amendment or revision of any Law described in (a), (b) or (c).

"Landing Gear" means the two (2) main and the one (1) nose landing gear installed on the Airframe at Delivery together with any and all Parts which are from time to time incorporated in or attached to any such landing gear and any and all Parts removed there from so long as title thereto remains vested in Seller at Delivery.

"Lease Agreement" means the aircraft lease agreement dated on or about the date hereof between the Buyer, as lessor, and the Lessee, as lessee, in respect of the Aircraft.

"Part" means any and all appliances, components, parts, instruments, appurtenances, accessories, furnishings, seats, and other equipment and additions of whatever nature (other than (i) the Engines, (ii) the APU, (iii) the Landing Gear (except for brakes) and (iv) temporary replacement parts installed pursuant to this Agreement) title to which is to pass to Buyer at Delivery, whether or not installed on the Aircraft.

"Payment Instructions" means the payment instructions to be given by the Seller to the Escrow Agent in relation to disbursement of the Purchase Consideration at Delivery, substantially in the form set out in Schedule 2 (*Payment Instructions*).

"Person" means an individual, general partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, limited liability company or limited partnership, Governmental Authority or other entity of whatever nature.

"Process Agent" means Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England or such other person and address in England as shall be notified by the Seller, Beneficial Owner and Lessee to the Buyer and as shall be consented to by the Buyer from time to time.

"Purchase Consideration" means an amount equal to US\$40,000,000 (forty million Dollars).

"Seller's Invoice" means an invoice from the Seller to the Buyer setting out the Purchase Consideration.

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"State of Registration" means the United States of America.

"United States Dollars", "US\$" or "USD", means the lawful currency of the United States of America from time to time.

"Warranty Bill of Sale" means a warranty bill of sale in respect of the Aircraft duly executed by the Seller, such warranty bill of sale to be substantially in the form of Appendix A.

1.2 **Interpretation**

In this Agreement, unless the context otherwise requires or it is otherwise provided:

- (a) words and phrases defined in the parties, recitals and Appendices to this Agreement shall, unless the context otherwise requires or it is otherwise provided, have the same meaning throughout this Agreement;
- (b) clause, schedule and appendix headings are for ease of reference only and shall not affect the interpretation of this Agreement;
- (c) references to clauses, paragraphs, sub-paragraphs, Appendices, Exhibits or Annexes shall be construed as references to clauses, paragraphs or sub-paragraphs of, and Appendices, Exhibits or Annexes to, this Agreement;
- (d) references to this Agreement or to any other document or any specified provision thereof shall be construed as references to this Agreement, that document or that provision as the same may have been, or may from time to time be, amended, supplemented or novated;
- (e) references to any statutory or other legislative provisions, or the rules and regulations thereunder, shall be construed as including any statutory or legislative modification or re-enactment or re-promulgation thereof, or any provision enacted or promulgated in substitution therefor;
- (f) any convention or protocol, includes any protocols, regulations, rules, orders, agreements, instruments, amendments, supplements, revisions or otherwise that may be made from time to time in connection with such convention or protocol;
- (g) references to any "party" shall include any successor in title to such party or any permitted assignee of such party and any company with which such party may amalgamate;
- (h) references to "including" shall mean including without limitation to the generality of any description preceding such term and the rule of ejusdem generis shall not be applicable to limit a general statement followed by or referable to an enumeration of specific matters to matters similar to those specifically mentioned;

EXECUTION VERSION

- (i) references to "indebtedness" shall include any obligation (whether present or future, actual or contingent, secured or unsecured, as principal or surety or otherwise) for the payment or repayment of money;
- (j) references to a "person" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust or partnership (whether or not having separate legal personality) of two or more of the foregoing;
- (k) a "law" or "regulation" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation;
- (l) references to taxes shall include any and all forms of taxation, levy, impost, duty, contribution, withholding or charge of whatever nature and by whatever name called, whenever created or imposed, whether imposed by a Governmental Authority, a local, municipal, federal or other body or authority under any jurisdiction and any amount deemed to be or treated as an amount of and any amount payable in advance of or creditable against any future payment of any of the same and any amounts in lieu thereof, together with any additions to tax, penalties, fines, charges or interest thereon and tax and taxation shall be construed accordingly; and
- (m) words importing the plural shall also include the singular and vice versa.

2. Sale and Purchase

- 2.1 The Seller and the Beneficial Owner agree to sell to the Buyer and the Buyer agrees to purchase from the Seller and Beneficial Owner both the legal and beneficial title to the Aircraft at the Delivery Location "as is, where is" for the Purchase Consideration in accordance with the terms and conditions of this Agreement. The Buyer's obligations under this Agreement (including its obligations to purchase the Aircraft, to pay the Purchase Consideration and to execute and deliver to the Seller the Certificate of Acceptance) shall be subject to the fulfilment of the conditions set out in clause 2 and schedule 3 of the Lease Agreement on or before the Delivery Date to the Buyer's satisfaction and receipt by the Buyer of the Seller's Invoice. In the event that Delivery does not occur on or before the Cut Off Date for whatever reason, this Agreement may be terminated by the Buyer giving notice to the Seller specifying the date for such termination.
- 2.2 The Beneficial Owner is a party to this Agreement as the beneficial owner of the Aircraft to agree, and hereby agrees subject to the terms of this Agreement, to transfer its beneficial interest in the Aircraft, free of all liens and encumbrances created by it, simultaneously with the transfer by the Seller of legal title to the Aircraft to the Buyer.
- 2.3 The Escrow Agent shall be appointed to perform the duties and obligations set out in this Agreement subject to the terms of the Escrow Agreement.

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3. Conditions Precedent

3.1 The Seller's obligation to sell the Aircraft to the Buyer under this Agreement is subject to the fulfilment prior to Delivery of the following conditions:

- (a) receipt by the Escrow Agent from the Buyer of:
 - (i) the Purchase Consideration;
 - (ii) the Acceptance Certificate duly executed by the Buyer (but undated);
- (b) that the representations given by the Buyer in clause 7(d) are true and accurate on the date of Delivery; and
- (c) that the Buyer has not failed to observe or perform any of its obligations under this Agreement.

3.2 The Buyer's obligation to purchase the Aircraft from the Seller under this Agreement is subject to fulfilment prior to Delivery of the following conditions:

- (a) receipt by the Escrow Agent from the Seller of:
 - (i) the Warranty Bill of Sale duly executed by the Seller (but undated);
 - (ii) the FAA Bill of Sale duly executed by the Seller (but undated);
 - (iii) the Payment Instructions duly executed by the Seller (but undated);
 - (iv) all necessary documents required by the FAA to transfer the registration of the Aircraft from the Seller to the Buyer;
 - (v) one hundred per cent (100%) of the fees of the Escrow Agent;
- (b) receipt by the Buyer of each of the Aircraft Documents (save for the Warranty Bill of Sale and the FAA Bill of Sale);
- (c) receipt by the Buyer of evidence of the establishment of the Seller as a transaction user entity with the International Registry, the appointment by the Seller of an approved administrator user and the designation of a professional user entity with the International Registry;
- (d) the Aircraft being tendered for Delivery by the Seller at the Delivery Location in the Delivery Condition on or prior to the Cut Off Date;
- (e) that the representations given by the Seller in clause 7(a) and the Lessee in clause 7(b) are true and accurate on the date of Delivery; and
- (f) that the Seller or the Lessee has not failed to observe or perform any of its obligations under this Agreement, the Lease Agreement or any Companion Lease.

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- 3.3 The conditions specified in Clause 3.1 are inserted for the sole benefit of the Seller and may be waived in writing in whole or in part, by the Seller without prejudicing the right of the Seller to receive fulfilment of those conditions, in whole or in part, at any time. If any of the conditions specified in Clause 3.1 remain outstanding on the Cut Off Date as a result solely of any action or inaction on the part of the Buyer and are not waived, the Seller shall be entitled at any time to terminate its obligation to sell the Aircraft to the Buyer by notice to the Buyer, whereupon neither party to this Agreement shall have any further obligation or liability under this Agreement.
- 3.4 The conditions specified in Clause 3.2 are inserted for the sole benefit of the Seller and may be waived in writing in whole or in part, by the Seller without prejudicing the right of the Seller to receive fulfilment of those conditions, in whole or in part, at any time. If any of the conditions specified in Clause 3.1 remain outstanding on the Cut Off Date as a result solely of any action or inaction on the part of the Buyer and are not waived, the Seller shall be entitled at any time to terminate its obligation to sell the Aircraft to the Buyer by notice to the Buyer, whereupon neither party to this Agreement shall have any further obligation or liability under this Agreement.
4. **Payment, Delivery and Acceptance**
- 4.1 The Seller shall pay one hundred per cent (100%) of the fees of the Escrow Agent for acting in such capacity with respect to this Agreement.
- 4.2 The Purchase Consideration is inclusive of any sales, turnover or value added tax or similar taxes that may from time to time be payable or chargeable on the provision or supply of the goods or services to which they relate and the Purchase Consideration shall be paid net of any deduction or withholding (whether in respect of set-off, counterclaim, duties, taxes, charges or otherwise howsoever) required by any applicable law.
- 4.3 The Purchase Consideration shall be paid in United States Dollars by wire transfer to the Escrow Agent's Account on or before the date of Delivery.
- 4.4 The Seller and the Lessee shall, jointly and severally, be responsible for and shall indemnify and keep the Buyer indemnified fully on demand from and against the payment of all taxes, duties, withholdings, deductions, fees and charges assessed by any national or local government or authority arising out of or in connection with this Agreement or the sale and purchase of the Aircraft under this Agreement or the ownership, import, export, possession, operation, use, maintenance, return, storage or resale of the Aircraft or any part of it on or after Delivery. The Parties shall co-operate with each other reasonably to ensure that the Delivery and transfer of title to the Aircraft will take place in a jurisdiction which will permit the Delivery and the transfer of title free of all such taxes, duties, withholdings, deductions, fees and charges.
- 4.5 Delivery may take place at any time from the date of this Agreement to the Cut Off Date (save that Delivery shall occur no later than 17:00 hrs. local time in the Delivery Location on the Cut Off Date).

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- 4.6 Subject to the fulfilment of all the conditions specified in Clause 3 (*Conditions Precedent*) (unless waived in accordance with clause 3.3 or 3.4), the Aircraft shall be tendered for Delivery by the Seller at the Delivery Location.
- 4.7 At Delivery, the Parties shall procure that the Escrow Agent (and the Escrow Agent shall) simultaneously:
- (a) date and deliver to the Buyer the Warranty Bill of Sale;
 - (b) date and deliver to the Seller the Acceptance Certificate;
 - (c) date the Payment Instructions and transfer the Purchase Consideration in accordance with the Payment Instructions;
 - (d) make or procure that all necessary filings for the transfer of registration of the Aircraft with the FAA from Seller to Buyer;
 - (e) date the FAA Bill of Sale and file or procure the filing of the FAA Bill of Sale with the FAA;
 - (f) register or procure the registration of the Warranty Bill of Sale with the International Registry as a contract of sale.

The Escrow Agent shall also: (A) circulate executed and dated copies of the Warranty Bill of Sale, FAA Bill of Sale and the Acceptance Certificate to both Parties by email in .PDF format; (B) provide the Seller and the Buyer with the wire instructions which reflect that the Purchase Consideration has been transferred in accordance with the Payment Instructions; and (C) dispatch the original executed and dated Warranty Bill of Sale and FAA Bill of Sale to the Buyer, and the original executed and dated Acceptance Certificate to the Seller, by international courier (with tracking details emailed to the intended recipient of the couriered package).

- 4.8 The parties hereby acknowledge that at the time of Delivery of the Aircraft by the Seller to the Buyer under this Agreement the leasing of the Aircraft from the Buyer to the Lessee pursuant to the Lease Agreement shall commence and no physical delivery in relation to the Aircraft or any part thereof is required pursuant to this Agreement.

5. Costs and Expenses

- 5.1 Any fees payable to any aviation authority in connection with the transfer of title to the Aircraft from the Seller to the Buyer shall be borne by the Seller.
- 5.2 All other costs and expenses (including legal fees) incurred by the Buyer in connection with the transaction contemplated hereby shall be borne by the Seller.

6. Assignment of Manufacturers' Warranties

With effect from Delivery, the Seller shall procure that Zetta Jet assigns to the Buyer absolutely all of Zetta Jet's rights, title and interest in and to all assignable warranties of

EXECUTION VERSION

manufacturers, suppliers and repairers that remain relating to the Aircraft (including, without limitation, in relation to its Airframe, Engines, APU, Landing Gear and Parts) and the Seller undertakes at the Seller's own cost to procure any consents and approvals for such assignments that may be necessary from such manufacturer, supplier or repairer. If any such warranties shall not be assignable or if consent to such assignment shall be refused, the Seller shall take or procure the taking at the Seller's own cost such action as the Buyer may reasonably request to enforce any such warranties.

7. Representations and Warranties

- (a) The Seller represents and warrants to the Buyer that:
 - (i) it is the sole and absolute legal owner of the Aircraft;
 - (ii) at Delivery, the Seller will transfer the Aircraft to the Buyer with full title guarantee;
 - (iii) the Aircraft is not the subject of any Encumbrances;
 - (iv) the Aircraft has no damage history;
 - (v) the Manuals and Technical Records have been maintained in accordance with the requirements of the Aviation Authority and/or by the FAA and will at Delivery properly record the complete and continuous maintenance condition of the Aircraft from the date of manufacture;
 - (vi) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Seller and that this Agreement has been duly executed and delivered by the Seller.

- (b) The Beneficial Owner represents and warrants to the Buyer that:
 - (i) it is the sole and absolute beneficial owner of the Aircraft;
 - (ii) the Aircraft is not the subject of any Encumbrances;
 - (iii) the Aircraft has no damage history;
 - (iv) the Manuals and Technical Records have been maintained in accordance with the requirements of the Aviation Authority and/or by the FAA and will at Delivery properly record the complete and continuous maintenance condition of the Aircraft from the date of manufacture;
 - (v) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been

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duly authorised by all necessary corporate action of the Seller and that this Agreement has been duly executed and delivered by the Seller.

- (c) The Lessee represents and warrants to the Buyer that:
- (i) it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Lessee and that this Agreement has been duly executed and delivered by the Lessee; and
 - (ii) The Lessee represents and warrants to the Buyer that the Aircraft will be used for the international transport of passengers pursuant to and in accordance with the Lease Agreement and Sub-Lease (as defined in the Lease Agreement).
- (d) The Buyer represents and warrants to the Seller that it is duly incorporated and validly existing under the laws of the jurisdiction of its incorporation and has full power and authority to enter into and perform its obligations under this Agreement, that entry and performance has been duly authorised by all necessary corporate action of the Buyer and that this Agreement has been duly executed and delivered by the Buyer.

8. Cape Town Convention

- (a) The Parties acknowledge that the transaction contemplated by this Agreement is within the ambit of the Cape Town Convention.
- (b) The Seller will co-operate with the Buyer in order to register the Warranty Bill of Sale as a contract of sale with the International Registry at Delivery, as follows:
- (i) Prior to Delivery, the Seller shall take any and all actions necessary to establish the Seller as a transaction user entity with the International Registry.
 - (ii) Prior to Delivery, the Seller shall appoint an approved administrator user and designate a professional user entity to initiate the registration of the Warranty Bill of Sale as a contract of sale with the International Registry at Delivery.

9. Assignments

No party shall be entitled to assign, novate, transfer or charge any of its rights under this Agreement without the prior written consent of the other parties, such consent not to be unreasonably withheld or delayed, save that the Seller and Lessee hereby acknowledge and consent to the Buyer assigning, novating, transferring or charging any of its rights under this Agreement to any Financier in relation to the financing or re-financing all or part of the Purchase Consideration.

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10. **Trustee**

Except as expressly provided in this agreement, the Buyer and the Lessee acknowledge that this Agreement is executed by Wells Fargo Bank Northwest, National Association, not in its individual capacity, but solely as owner trustee, except as otherwise expressly provided herein, under a trust agreement with the Beneficial Owner as grantor, in the exercise of the power and authority conferred and vested in it as such owner trustee, that this Agreement is intended to bind only a trust estate vested in the owner trustee in favour of the Beneficial Owner and that nothing herein contained shall be construed as creating any liability on Wells Fargo Bank Northwest, National Association, individually or personally, to perform any agreement herein, all such liability, if any, being expressly waived by Buyer and Lessee by each and every person now or hereafter claiming by, through or under the holder, except with respect to the gross negligence or wilful misconduct of Wells Fargo Bank Northwest, National Association.

11. **Further Provisions**

11.1 **English Language**

Each communication and document made or delivered by one party to another pursuant to this Agreement shall be in the English language or accompanied by a translation thereof into English certified (by an authorised person making or delivering the same) as being a true and accurate translation thereof. The English language version of any communication shall be the authoritative version.

11.2 **Notices**

All notices and communications under this Agreement shall be made in writing and in the English language and transmitted to a party at its Address for Notices, with copy as there provided, or to such other address, facsimile number or e-mail address as the intended recipient may have notified to the other Party (by not less than five (5) Business Days' notice). Notices hereunder shall not be effective unless given by personal delivery, post (return receipt requested), express courier (tracking receipt requested) or electronic communication (with confirmation report of complete transmission or no delivery failure message received as the case may be) to the relevant address. In the case of posting or courier service, any such notice shall be deemed duly served upon the second Business Day after its despatch, in the case of personal delivery on the Business Day immediately following the date of personal delivery and in the case of electronic communication on the date of transmission if no delivery failure message is received.

11.3 **Governing Law and Submission to Jurisdiction**

- (a) This Agreement and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with English law.
- (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly neither Party will argue to the contrary save that, as such agreement conferring jurisdiction is for the benefit of Buyer only, Buyer

EXECUTION VERSION

shall retain the right to bring proceedings against Seller and or Lessee in any court in another country.

- (c) Seller herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.
- (d) Beneficial Owner herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.
- (e) Lessee herewith appoints Jacobs Allen Hammond Solicitors at 3 Fitzhardinge Street, Manchester Square, London W1H 6EF, England as its process agent for the service of any proceedings brought in the courts of England pursuant to this Agreement and will provide Buyer with a letter from such process agent confirming the appointment and agrees that failure by such agent to notify it of such service shall not adversely affect the validity of such service or any judgment based thereon.

11.4 Entire Agreement

This Agreement constitutes the entire agreement between Buyer, Seller, Beneficial Owner and Lessee concerning the subject matter hereof and supersedes all preceding correspondence, agreements and stipulations whether oral or in writing between the Parties concerning the subject matter hereof.

11.5 Enforceability

If a provision of this Agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, this will not affect the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement or the legality, validity or enforceability in any other jurisdiction of that or any other provision of this Agreement.

11.6 Amendment

Any term of this Agreement may be amended or waived only with the written consent of the Parties and any such amendment or waiver will be binding on the Parties.

11.7 No Waiver

No failure to exercise, nor any delay in exercising, on the part of any Party, any right or remedy under this Agreement shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise of any other right or remedy. The

EXECUTION VERSION

rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

11.8 Further Assurances

Seller, Beneficial Owner and Lessee shall, at their own expense, from time to time do and perform such other and further acts and execute and deliver any and all such further instruments as may be required by applicable Law or reasonably requested in writing by Buyer to establish, maintain and protect the rights and remedies of Buyer and to carry out and effect the intent and purposes of this Agreement.

11.9 Counterparts

This Agreement may be executed in two or more counterparts and by different parties hereto on separate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.10 Third Party Rights

A Person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 ("**Third Parties Act**") to enforce or to receive the benefit of any term of this Agreement.

IN WITNESS WHEREOF the duly authorised representative(s) of the parties hereto have signed this Agreement the date stated at the beginning of this Agreement.

THE SIGNATURES OF THE PARTIES APPEAR
ON THE LAST THREE PAGES OF THIS
AGREEMENT

EXECUTION VERSION

SCHEDULE 1
Aircraft Specification

A Bombardier Global 6000, BD-700-1A10, corporate aircraft airframe msn 9606 with its two Rolls-Royce Deutschland BR700-710A2-20 engines bearing MSNs 22338 and 22339 and the Honeywell auxiliary power unit ("APU") msn P7340.

EXECUTION VERSION

SCHEDULE 2
Form of Payment Instructions

To: Insured Aircraft Title Service, Inc.

Dated: [•]

Dear Sirs

Sale and Leaseback Purchase Agreement dated [•] 2016 in respect of one (1) Bombardier Global 6000 Aircraft with MSN 9606 and registration mark N533LQ (the "SLB Purchase Agreement")

1. Capitalised terms used in these Payment Instructions but not otherwise defined shall have the same meanings as defined in the SLB Purchase Agreement.
2. The Seller hereby submits these payment instructions in accordance with the terms of the SLB Purchase Agreement that following receipt of the Purchase Consideration and confirmation from the Seller and Buyer that they wish to proceed with Delivery of the Aircraft the Seller hereby instructs you to apply such Purchase Consideration to the following accounts in the following amounts:
 - (a) US\$27,500,000.00 to be transferred to the account designated by the Beneficial Owner, in part satisfaction of the previous Financial Indebtedness in respect of the Aircraft, as follows:

Bank: HSBC Bank, New York, USA
(Field 56a) SWIFT code: MRMDUS33
Federal routing code: 021001088

For credit to: a/c no. [REDACTED]-9
(Field 57a) THE HONGKONG & SHANGHAI BANKING CORPORATION
LIMITED, HONG KONG PRIVATE BANKING DIVISION
BIC: HSBCHKHHPBD

In favour of: UNIVERSAL LEADER INVESTMENT LIMITED
(Field 59) A/C [REDACTED]-0002

With Message: Please send SWIFT MT103 to HSBCHKHHPBD with full payment details

- (b) US\$6,279,880 to be transferred to the account of [Minsheng], in part satisfaction of certain fees to be paid to Lessor pursuant to the Lease Agreement, as follows:

[Details of Account]

- (c) US\$6,279,880 to be transferred to the account of Zetta Jet as follows:

Bank: Hong Kong and Shanghai Banking Corporation
Bank Address: 21 Collyer Quay, HSBC Building, Singapore 049320
Account Name: Zetta Jet Pte Ltd
Account No: 260-805700-181(USD)
Swift Code: HSBCSGSG

EXECUTION VERSION

- (d) US\$15,000.00 to be paid to the order of Insured Aircraft Title Service, Inc as agreed fees for escrow services

- 3. These Payment Instruction is irrevocable.

- 4. These Payment Instructions and any non-contractual obligations arising from or in connection with them are governed by and shall be construed in accordance with the laws of England.

Yours faithfully

SELLER

By: Wells Fargo Bank Northwest, National Association, not in its individual capacity but solely as owner trustee

Title: _____]

EXECUTION VERSION

APPENDIX A
Form of Warranty Bill of Sale

Warranty Bill of Sale

relating to one (1) Bombardier Inc. BD-700-1A10 aircraft with manufacturer's serial number 9606 and registration mark N588LQ, its with two (2) Rolls-Royce Deutschland Ltd. & co KG model BR700-710A2-20 engines bearing MSN 22338 (Left Hand No. 1) and 22339 (Right Hand No. 2), its [Manufacturer and model] auxiliary power unit with MSN [•] and the equipment, systems, accessories and parts belonging to, installed in or appurtenant to such airframe, engines and auxiliary power unit and the documentation, certificates, licences, manuals, logbooks, records and data relating to such airframe, engines and auxiliary power unit (collectively, the **Aircraft**)

KNOW ALL MEN BY THESE PRESENTS:

This Warranty Bill of Sale is executed and delivered on and as of the date specified below by [•] (the **Seller**) to [•] (the **Buyer**) pursuant to an aircraft sale and leaseback purchase agreement dated [•] between the Seller, the Buyer, Universal Leader Investment Limited as beneficial owner and TVPX ARS Inc., not in its individual capacity but solely as owner trustee as lessee (the **Agreement**) relating to the Aircraft.

All words and phrases used in this Warranty Bill of Sale shall have the same meanings as in the Agreement.

For and in consideration of one (1) US Dollar (USD 1.00) and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller, with full title guarantee and as the sole and absolute legal, equitable and beneficial owner of the Aircraft did this [•] day of [•] 2016, grant, convey, transfer, bargain, sell, deliver and send over to Buyer and its successors and assigns all right, title, interest and benefit in and to the Aircraft free and clear of all Encumbrances of any kind in accordance with the terms of the Agreement.

The Seller hereby warrants to the Buyer and its successors and assigns that at the time of delivery of the Aircraft to the Buyer, the Seller was the lawful owner of the Aircraft with good and marketable title thereto. The Seller agrees with the Buyer and its successors and assigns that it will warrant and defend such title forever against all claims and demands whatsoever. The Seller further warrants that the Seller has good and lawful right to sell the Aircraft and that such title to the Aircraft is hereby vested in the Buyer free and clear of any Encumbrance of any kind.

In this Warranty Bill of Sale, **Encumbrance** means any encumbrance, right or interest of any person, whether by way of ownership, possession, enjoyment, security, contract, at law or otherwise, whatsoever, howsoever and whensoever created or arising, including any International Interest, mortgage, charge, pledge, hypothecation, assignment, statutory right in rem, title retention, lease, lien, attachment, levy, claim, right of detention or seizure or right of set-off and any filing, registration or recordation of any of the same.

This Warranty Bill of Sale and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with the laws of England.

IN WITNESS WHEREOF the Seller has executed and delivered this Warranty Bill of Sale as a deed by its duly authorised signatory as of this day of 2016

EXECUTION VERSION

THE SIGNATURE OF THE SELLER APPEARS ON THE FOLLOWING PAGE

SELLER

SIGNED AND DELIVERED AS A DEED

BY

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, but solely as owner trustee:

By: _____

Name: _____

Title: _____

in the presence of

Signature of witness _____

Name of witness _____

Address of witness _____

Position _____

EXECUTION VERSION

APPENDIX B
Form of Certificate of Acceptance

Certificate of Acceptance

relating to one (1) Bombardier Inc. BD-700-1A10 aircraft with manufacturer's serial number 9606 and registration mark N588LQ, its with two (2) Rolls-Royce Deutschland Ltd. & co KG model BR700-710A2-20 engines bearing MSN 22338 (Left Hand No. 1) and 22339 (Right Hand No. 2), its [Manufacturer and model] auxiliary power unit with MSN [•] and the equipment, systems, accessories and parts belonging to, installed in or appurtenant to such airframe, engines and auxiliary power unit and the documentation, certificates, licences, manuals, logbooks, records and data relating to such airframe, engines and auxiliary power unit (collectively, the Aircraft)

This Certificate of Acceptance is executed and delivered on and as of the date specified below by [•] (the Buyer) to [•] (the Seller) pursuant to an aircraft sale and leaseback purchase agreement dated [•] between the Seller, the Buyer, Universal Leader Investment Limited as beneficial owner and TVPX ARS Inc., not in its individual capacity but solely as owner trustee as lessee (the Agreement) relating to the Aircraft.

All words and phrases used in this Certificate shall have the same meanings as in the Agreement.

The Buyer acknowledges that the Seller has delivered to it, and that it has received and accepted from the Seller, the Aircraft, pursuant to and in accordance with the provisions of the Agreement, on _____ 2016, at _____ hours UTC, at _____ airport.

This Certificate and any non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with the laws of England.

IN WITNESS WHEREOF the Buyer has executed and delivered this Certificate as a deed this ____ day of 2016

BUYER

SIGNED BY

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, but solely as owner trustee:

s

By: _____

Name: _____

Title: _____

EXECUTION VERSION

APPENDIX C
Aircraft Documents

1. Warranty Bill of Sale.
2. FAA Bill of Sale.
3. Certificate of Registration for the Aircraft issued by the Aviation Authority.
4. Certificate of Airworthiness for the Aircraft issued by the Aviation Authority (with no derogations).
5. A copy of the bill of sale pursuant to which the Seller took title to the Aircraft / Copies of the 'back to birth' bills of sale back to delivery of the Aircraft new from the manufacturer.
6. Evidence satisfactory to the Buyer that the Aircraft is free from any Encumbrances.
7. An invoice from the Seller to the Buyer detailing the Purchase Consideration for the Aircraft.

EXECUTION VERSION

SLBPA – MSN 9606 - Signature page 1

SELLER

SIGNED BY

_____)
_____)
for and on behalf of)

Wells Fargo Bank Northwest, National Association)

(not in its individual capacity but solely)

as owner trustee))

Position: Asst. Vice President

Name: J. Brent Allen

EXECUTION VERSION

SLBPA – MSN 9606 - Signature page 2

BUYER

SIGNED BY _____)
)
 for and on behalf of _____)
Wells Fargo Bank Northwest, National Association)
 (not in its individual capacity but solely)
 as owner trustee))

Position: Asst. Vice President

Name: J. Brent Allen

EXECUTION VERSION

SLBPA – MSN 9606 - Signature page 3

BENEFICIAL OWNER

SIGNED BY

Li Qi

for and on behalf of

Universal Leader Investment Limited

Position: Director

Name: Li Qi

in the presence of :-

For and on behalf of
Universal Leader Investment Limited



.....
Authorized Signatories



LIN SIU LEUNG DAVID

**Solicitor, Hong Kong SAR
C. P. Lin & Co.**

EXECUTION VERSION

SLBPA – MSN 9606 - Signature page 3

LESSEE

SIGNED BY



for and on behalf of

TVPX ARS Inc., not in its individual capacity

but solely as owner trustee

Position: Senior Vice President

Name: David Wall

EXHIBIT E

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DATED THE DAY OF 2017

ZETTA JET PTE LTD
(as Borrower)

and

UNIVERSAL LEADER INVESTMENT LIMITED
(as Lender)

CONFIRMATORY DEED OF LOAN

C. P. LYN & CO.

SOLICITORS

HONG KONG

Ref : DL821749kic

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This DEED is made is made on the day of 2017

BETWEEN :-

- (1) **ZETTA JET PTE. LTD**, a company incorporated under the laws of Singapore with company registration number 201529010W, and whose registered office is situated at 700 West Camp Road, #04-10 JTC Aviation One @ Seletar Aerospace Park, Singapore 797649 (the "**Company**"); and
- (2) **UNIVERSAL LEADER INVESTMENT LIMITED**, a company incorporated under the laws of the British Virgin Islands whose registered office is situate at Woodbourne Hall, Road Town, Tortola, British Virgin Islands (the "**Lender**").

(collectively, the "**Parties**" and individually, the "**Party**")

WHEREAS :-

- (A) The Lender has advanced to the Company a loan of US\$10,000,000 on 16 February 2016 at the interest rate of 10% per annum for general working capital purpose (the "**First Loan**").
- (B) The Lender has further advanced to the Company a loan of US\$10,000,000 on 19 July 2016 at the interest rate of 20% per annum for further general working capital purpose (the "**Second Loan**").
- (C) The Lender has further advanced to the Company a loan of US\$15,000,000 on 27 June 2017 for further general working capital purpose (the "**Third Loan**").
- (D) It is agreed by the Lender and the Company that the Loans (as defined below) shall be governed by the terms and conditions set out in this Deed.
- (E) The Company is currently arranging financing with a financial institution. Upon completion of such financing arrangement or any other financing arrangement, the Company has agreed to apply the money received from such financial arrangements to repay the Indebtedness (as defined below) upon the receipt of such money pursuant to Clause 14.3 below.

NOW IT IS HEREBY AGREED as follows :-

1. DEFINITIONS AND INTERPRETATION

1.1 In this Deed, unless otherwise expressed or required by context, the following words or expressions shall have the respective meanings set opposite thereto :-

"Business Day" a day (excluding Saturdays, Sundays and public holidays) on which banks both in Hong Kong and Singapore are open for business.

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- “Event of Default” any one of the events of default mentioned in clause 6.
- “Indebtedness” the Loans, the Interests and all moneys due or to become due from the Company to the Lender under this Deed.
- “the First Interest” the interest mentioned in clauses 4.1 and 4.4.
- “the Second Interest” the interest mentioned in clauses 4.2 and 4.5.
- “the Third Interest” the interest mentioned in clauses 4.3 and 4.6.
- “Interests” the First Interest, the Second Interest and the Third Interest.
- “Interest Payment Date” 16th day of March 2017 for the First and Second Loan and the 16th day of each succeeding month and 16th day of December 2017 for the Third Loan and the 16th day of each succeeding month Provided That if the 16th day of any month shall fall on a day which is not a Business Day, then “Interest Payment Date” for that month shall mean the first Business Day immediately following the 16th day of that month.
- “Repayment Date” each Instalment Date specified in Schedule 1 hereto Provided That if any Instalment Date shall fall on a day which is not a Business Day, then that “Repayment Date” shall mean the first Business Day immediately following that Instalment Date.
- “Last Repayment Date for First Loan and Second Loan” 16th September 2017.
- “Last Repayment Date for Third Loan” 16th June 2018.
- “Repayment Schedule” the repayment schedule stipulated in Schedule 1 herein.
- “Lender's Designated Bank Account” Account No. [REDACTED]0002 of “Universal Leader Inv Ltd” at The Hongkong & Shanghai Banking Corporation Limited, Hong Kong Private Banking Division with SWIFT Code of HSBCHKHHPBD.
- “the Loans” the aggregate principal amount of the First Loan, Second Loan and Third Loan.
- “First Remaining Loan” principal amount of the First Loan remaining unpaid (whether or not outstanding).
- “Second Remaining Loan” principal amount of the Second Loan remaining unpaid (whether or not outstanding).
- “Third Remaining Loan” principal amount of the Third Loan remaining unpaid

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(whether or not outstanding).

“US\$” or “cents” US Dollars and cents respectively.

- 1.2 The headings to the Clauses of this Deed are for ease of reference only and shall be ignored in interpreting this Deed.
- 1.3 References to Clauses, Schedules and Exhibits are references to Clauses, Schedules and Exhibits of or to this Deed.
- 1.4 Words and expressions in the singular include the plural and vice versa.
- 1.5 Reference to person include any public body and any body of persons, corporate or unincorporated.
- 1.6 Reference to Ordinances, statutes, legislation or enactments shall be construed as a reference to such Ordinances, statutes, legislation or enactments as may be amended or reenacted from time to time and for the time being in force.

2. THE LOANS

- 2.1 The Lender and the Company hereby agree that the Loans shall be governed by the terms and conditions contained in this Deed.

3. COMPANY’S COVENANT FOR REPAYMENT OF INDEBTEDNESS

- 3.1 The Company hereby covenants with the Lender that the Company will repay the Indebtedness in the manner and at the times as set out in Schedule 1 herein.

4. INTEREST

- 4.1 Subject to Clause 4.4, the Company shall pay monthly interest at the rate of 10% per annum to the Lender on or in respect of the First Remaining Loan until the First Loan has been repaid in full by the Company.
- 4.2 Subject to Clause 4.5, the Company shall pay monthly interest at the rate of 20% per annum to the Lender on or in respect of the Second Remaining Loan until the Second Loan has been repaid in full by the Company.
- 4.3 Subject to Clause 4.6, the Company shall pay monthly interest at the following rate to the Lender on or in respect of the Third Loan until the Third Loan has been repaid in full by the Company:
 - (a) from 27 June 2017 to 16 November 2017: nil interest; and
 - (b) from 17 November 2017: 10% per annum.
- 4.4 In the event that the Company shall fail to repay the First Loan and the First Interest in full on or before the Last Repayment Date for First Loan and Second Loan and the Lender, at its sole discretion, elects not to exercise its rights under clause 6 herein, the Company shall pay monthly interest on the First Remaining Loan and any outstanding First Interest at the rate as set out below until the First Loan and such outstanding First

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Interest have been repaid in full by the Company: -

Date	Interest Rate Per Annum
17 September 2017 – 16 March 2018	20%
17 March 2018 – 16 September 2018	30%
17 September 2018 – 16 March 2019	40%
17 March 2019 – 16 September 2019	50%
from (and including) 17 September 2019	60%

- 4.5 In the event that the Company shall fail to repay the Second Loan and the Second Interest in full on or before the Last Repayment Date for First Loan and Second Loan and the Lender, at its sole discretion, elects not to exercise its rights under clause 6 herein, the Company shall pay monthly interest on the Second Remaining Loan and any outstanding Second Interest at the rate as set out below until the Second Loan and such outstanding Second Interest have been repaid in full by the Company: -

Date	Interest Rate Per Annum
17 September 2017 – 16 March 2018	30%
17 March 2018 – 16 September 2018	40%
17 September 2018 – 16 March 2019	50%
from (and including) 17 March 2019	60%

- 4.6 In the event that the Company shall fail to repay the Third Loan and the Third Interest in full pursuant on or before the Last Repayment Date for Third Loan and the Lender, at its sole discretion, elects not to exercise its rights under clause 6 herein, the Company shall pay monthly interest on the Third Remaining Loan and any outstanding Third Interest at the rate as set out below until the Third Loan and such outstanding Third Interest has been repaid in full by the Company: -

Date	Interest Rate Per Annum
17 June 2018 – 16 December 2018	20%
17 December 2018 – 16 June 2019	30%
17 June 2019 – 16 December 2019	40%
17 December 2019 – 16 June 2020	50%
from (and including) 17 June 2020	60%

- 4.7 The Interests shall be paid on in arrears on each Interest Payment Date.

5. REPAYMENT

- 5.1 The Company shall :-

- (a) repay and pay the Indebtedness by delivering each payment to the Lender by remittance to the Lender's Designated Bank Account on each Repayment Date and (as the case may be) Interest Payment Date; and
- (b) repay each instalment of the Loans in the manner as stipulated in Schedule 1 hereto.

- 5.2 All sums payable by the Company hereunder shall be made without set-off, counterclaim, condition or qualification and free and clear of and without deduction for or on account of any tax, levy, impost, duty, charge, fee, deduction or withholding of whatever nature.

6. EVENT OF DEFAULT

6.1 Each of the following events shall be an Event of Default:-

6.1.1 the Company shall fail to pay or repay the Indebtedness or any part thereof as and when the same shall fall due.

6.1.2 any order shall be made by a competent court or other appropriate authority or any resolution shall be passed for liquidation, winding-up or dissolution or for the appointment of a liquidator, receiver, trustee or similar official of the Company or of all or a substantial part of its assets otherwise than for the purposes of amalgamation, merger or re-construction, the terms of which have previously been disclosed to and approved in writing by the Lender.

6.1.3 a distress or execution shall be levied or enforced upon or sued out against any of the Company's chattels, properties or assets and shall not be discharged or stayed or in good faith contested by action within 15 days thereafter.

6.1.4 The Company shall stop payment to creditors generally or shall be unable to pay its debts within the meaning of any applicable legislation relating to insolvency, bankruptcy, liquidation or winding-up, or shall cease or threaten to cease substantially to carry on business otherwise than for the purposes of amalgamation, merger or re-construction, the terms of which have previously been disclosed to and approved in writing by the Lender.

6.1.5 When the collective legal and beneficial shareholding of Asia Aviation Holding Pte. Limited, James Noel Halstead Seagram and Stephen Matthew Walter in the Company shall, for any reason whatsoever, fall below 25%.

6.2 In the event of the occurrence of an Event of Default the Lender may by notice in writing to the Company declare that the Indebtedness has become immediately due and payable and the Company shall forthwith comply with such notice.

7. WARRANTIES, REPRESENTATIONS AND UNDERTAKINGS

7.1 The Company hereby warrants and represents to the Lender that:

7.1.1 as at the date hereof, it can execute this Deed without the consent of any third party.

7.1.2 it will not reduce its issued share capital, share premium account or capital redemption service or any uncalled liability in respect thereof.

8. CONFIDENTIALITY

Other than such disclosure as may be required by law, regulation, the rules of any court, tribunal or agency of any competent jurisdiction, or any regulatory or governmental body (in which case the disclosing party will to the extent permissible consult with the other party as to the contents of such disclosure), none of the parties hereto shall make any announcement or release or disclose any information

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concerning this Deed or the transactions herein referred to or disclose the identity of the other parties (save disclosure to their respective professional advisers under a duty of confidentiality) without the written consent of the other parties.

9. ASSIGNMENT

This Deed shall be binding on and shall ensure for the benefits of the successors and assigns of the parties hereto but shall not be assigned by the Company without the prior written consent of the Lender.

10. NOTICES AND OTHER COMMUNICATION

10.1 Any communication to be given in connection with the matters contemplated by this Deed shall except where expressly provided otherwise be in writing and shall either be delivered by hand or email transmission. Delivery by courier shall be regarded as delivery by hand.

10.2 Such communication shall be sent to the address of the relevant party referred to in this Deed or the email address set out below or to such other address or email address as may previously have been communicated to the other party in accordance with this clause. Each communication shall be marked for the attention of the relevant person.

If to ZETTA JET PTE LTD:-

Address : 700 West Camp Road, #04-10 JTC Aviation One @ Seletar
Aerospace Park, Singapore 797649
Email : gcassidy@zettajet.com
Attn. : Geoffery Cassidy

If to UNIVERSAL LEADER INVESTMENT LIMITED:-

Address : [REDACTED] The Peak, Hong
Kong.
Email : [REDACTED]
Attn : Li Qi

10.3 A communication shall be deemed to have been served:-
10.3.1 if delivered by hand at the address referred to in clause 10.2, at the time of delivery; and
10.3.2 if sent by email to the email address referred to in clause 10.2, at the time of completion of transmission by the sender.

If a communication would otherwise be deemed to have been delivered outside of normal business hours (being 9:30 a.m. to 5:30 p.m. on a Business Day) under the preceding provisions of this clause, it shall be deemed to have been delivered at the opening of business on the next Business Day.

10.4 In proving service of the communication, it shall be sufficient to show that delivery by hand was made or that the email was dispatched.

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10.5 A party may notify the other party to this Deed of a change to its name, relevant person, address or email address for the purposes of clause 10.2 PROVIDED THAT such notification shall only be effective on :-

10.5.1 the date specified in the notification as the date on which the change is to take place; or

10.5.2 if no date is specified or the date specified is less than three clear Business Days after the date on which notice is deemed to have been served, the date falling three clear Business Days after notice of any such change is deemed to have been given.

11. COSTS AND EXPENSES

All the legal costs and expenses incurred in the negotiation, preparation and execution of this Deed shall be borne by the Company.

12. THIRD PARTIES' RIGHTS

12.1 It is hereby agreed and declared as follows :-

12.1.1 Any person who is not a party to the Deed ("Non-Party") :-

12.1.1.1 shall have no right under the Contracts (Rights of Third Parties) Ordinance (Cap.623) ("Cap.623") to enforce any provision in the Deed; and

12.1.1.2 shall enjoy no benefits, rights or remedies under Cap.623.

12.1.2 One or more of the parties to the Deed may rescind or vary the Deed (in the manner provided in the Deed) without any Non-Party's consent (save and except for such Non-Party's consent, if any, which is expressly required and specified in the Deed). Section 6(1) of Cap.623 shall not apply to in the Deed.

13. WAIVER

13.1 No waiver by either Party of any breach or non-fulfilment by the other Party of any provisions of this Deed will be deemed to be a waiver of any subsequent or other breach of that or any other provision.

13.2 No failure to exercise or delay by either Party in exercising any right or remedy under this Deed will constitute a waiver of the relevant provision of this Deed.

13.3 No single or partial exercise of any right or remedy under this Deed will preclude or restrict the further exercise of any such right or remedy.

13.4 The rights or remedies of either Party provided in this Deed are cumulative and not exclusive of any rights and remedies provided by law.

14. CONDITION PARAMOUNT

14.1 The Company acknowledges that the First Loan, the Second Loan and the Third Loan were advanced by the Lender to the Company as bridging finance only.

14.2 The Company is in the process of seeking financing from BNP Paribas or other banking or financial institution ("Financier(s)").

14.3 Notwithstanding anything to the contrary herein contained, the Indebtedness shall become forthwith repayable by the Company to the Lender upon the occurrence of any of the following events :-

(a) save in respect of any loan(s) or money(s) obtained to finance the Company's

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purchase of any aircraft(s), the Company succeeds in obtaining any loan(s) or money(s) from Financier(s) on or after the date hereof.

15. SEVERABILITY

If any provision of this Deed is not or ceases to be legal, valid, binding and enforceable under the laws of any jurisdiction, neither the legality, validity, binding effect or enforceability of the remaining provisions under that law nor the legality, validity, binding effect or enforceability of that provision under the law of any other jurisdiction shall be affected except where the remaining provisions (a) would operate as an undue hardship on either Party or (b) would constitute a substantial deviation from the general intent and purposes of the Parties as reflected in this Deed. In the event of either (a) or (b) above, the Parties shall use their reasonable efforts to negotiate a mutually satisfactory amendment to this Deed to circumvent such adverse construction.

16. GOVERNING LAW

This Deed shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereto agree to submit to the non-exclusive jurisdiction of its courts.

IN WITNESS whereof the parties hereto have executed this Deed the day and year first above written.

EXECUTED AS A DEED by
Geoffery Cassidy
for and on behalf of ZETTA JET
PTE. LTD, in the presence of :-

)
)
) 
) GEOFFERY CASSIDY
)



**IMAN IBRAHIM
ADVOCATE & SOLICITOR
SINGAPORE**

EXECUTED AS A DEED by
Li Qi
for and on behalf of UNIVERSAL LEADER
INVESTMENT LIMITED, in the presence of :-)

)
)
) 
)



**CHUNG KA IN JANET
Solicitor, Hong Kong SAR
C. P. Lin & Co.**

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SCHEDULE 1

Repayment Schedule of First Loan

<u>Instalment</u>	<u>Payment Date (full calendar month from start of operation)</u>	<u>Interest Amount (USD)</u>	<u>Instalment Amount (USD)</u>
1st	16th March 2017	83,333.33	-
2nd	16th April 2017	83,333.33	-
3rd	16th May 2017	83,333.33	-
4th	16th June 2017	83,333.33	-
5th	16th July 2017	83,333.33	-
6th	16th August 2017	83,333.33	-
last	16th September 2017	83,333.33	10,000,000.00
Total		10,583,333.31	

Repayment Schedule of Second Loan

<u>Instalment</u>	<u>Payment Date (full calendar month from start of operation)</u>	<u>Interest Amount (to be paid each month)(USD)</u>	<u>Interest Amount (to be paid on the Last Repayment Date for First Loan and Second Loan) (USD)</u>	<u>Instalment Amount (USD)</u>
1st	16th March 2017	83,333.33	-	-
2nd	16th April 2017	83,333.33	-	-
3rd	16th May 2017	83,333.33	-	-
4th	16th June 2017	83,333.33	-	-
5th	16th July 2017	83,333.33	-	-
6th	16th August 2017	83,333.33	-	-
last	16th September 2017	83,333.33	583,333.31	10,000,000.00
Total		11,166,666.62		

Repayment Schedule of Third Loan

<u>Instalment</u>	<u>Payment Date (full calendar month from start of operation)</u>	<u>Interest Amount (USD)</u>	<u>Instalment Amount (USD)</u>
1st	16th December 2017	125,000.00	-
2nd	16th January 2018	125,000.00	-
3rd	16th February 2018	125,000.00	-
4th	16th March 2018	125,000.00	-
5th	16th April 2018	125,000.00	-
6th	16th May 2018	125,000.00	-
last	16th June 2018	125,000.00	15,000,000.00
Total		15,875,000.00	

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EXHIBIT F

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
7/31/2019	Bernstein, Michael L.	Confer with G. Mijares-Shafai regarding potential Trustee claims [...]		0.4	\$430.20
8/1/2019	Malloy, Charles A.	Attention to M. Bernstein email regarding [...] Trustee claims; review file [...]		0.6	\$480.60
8/2/2019	Bernstein, Michael L.	Prepare for and participate in telephone conference regarding [...] potential Trustee litigation; various follow up.		1.4	\$1,505.70
8/30/2019	Condon, Brian K.	Conference call with M. Bernstein and team re Trustee's further request for settlement meeting re adversary claim.		0.5	\$423.00
8/30/2019	Mijares-Shafai, Gerardo	Review, analyze correspondence from Chapter 7 Trustee; telephone conference with A&P team re contemplated complaint by Trustee.		0.6	\$378.00
8/30/2019	Bernstein, Michael L.	Review correspondence from Trustee's counsel [...]; conference call with A&P team regarding anticipated suit [...]; draft email [...] regarding Lyons proposal; coordinate preparation for potential Trustee settlement meeting.		1.9	\$2,043.45
8/30/2019	Malloy, Charles A.	Telephone conference with Arnold & Porter attorneys to discuss Trustee tolling agreement proposal; review of emails from Trustee and draft email [...]		0.7	\$560.70
8/30/2019	Mintz, Benjamin	Emails and calls with M. Bernstein and B. Condon re tolling agreement, case strategy.		0.5	\$495.00
8/31/2019	Bernstein, Michael L.	Various calls and emails regarding anticipated Trustee litigation, Trustee's request for a tolling agreement and a settlement meeting, and related issues.		1.2	\$1,290.60
8/31/2019	Malloy, Charles A.	Email with M. Bernstein regarding draft email regarding tolling agreement.		0.2	\$160.20
8/31/2019	Mintz, Benjamin	Call with M. Bernstein re case strategy.		0.2	\$198.00
9/1/2019	Bernstein, Michael L.	Email with Trustee's counsel [...]	0.3	0.2	\$215.10
9/4/2019	Malloy, Charles A.	Review materials [...] in connection with potential meeting with Trustee [...]	0.6	0.6	\$480.60
9/4/2019	Condon, Brian K.	Review of recent adversary claims.		0.4	\$338.40
9/5/2019	Bernstein, Michael L.	Review summary of pending adversary proceedings filed by Trustee [...]	0.3	0.4	\$430.20
9/6/2019	Mijares-Shafai, Gerardo	Correspond with M. Bernstein re summary of adversary proceedings; draft same [...]	0.2	0.3	\$189.00
9/6/2019	Bernstein, Michael L.	Review docket regarding adversary proceedings filed by Chapter 7 Trustee; brief conference with G. Mijares-Shafai regarding same [...]	0.2	0.4	\$430.20
9/6/2019	Mintz, Benjamin	Telephone conference with M. Bernstein re pending actions.		0.1	\$99.00
9/7/2019	Bernstein, Michael L.	Email correspondence regarding potential Trustee meeting.		0.4	\$430.20
9/7/2019	Malloy, Charles A.	Attention to e-mails regarding Trustee request for conference.		0.2	\$160.20
9/9/2019	Bernstein, Michael L.	Call from [...]; confer with A&P attorneys re same; emails with Trustee's counsel; consider approach to Trustee re anticipated litigation; call with C. Malloy re aircraft transaction; notes re same [...]; review summary of adversary cases filed to date.		1.9	\$2,043.45
9/9/2019	Mijares-Shafai, Gerardo	Summarize adversary proceedings initiated in Chapter 11 cases.		2	\$1,260.00
9/9/2019	Malloy, Charles A.	Review background notes and circulate materials related to aircraft [...]; telephone conference with M. Bernstein regarding aircraft [...]		1.8	\$1,441.80
9/9/2019	Condon, Brian K.	Emails with M. Bernstein re call with Trustee's counsel; [...] review of aircraft transaction [...], and emails with C. Malloy re same.		0.8	\$676.80
9/10/2019	Mijares-Shafai, Gerardo	[...] Review, analyze motion to seal adversary complaints; correspond re same with M. Bernstein.	0.2	0.4	\$252.00

Date	TKPR Name	Narrative	Hours Educated	Adjusted Hours	Adjusted Balance
9/10/2019	Bernstein, Michael L.	[...] telephone conference with B. Condon; prepare for and participate in telephone conference with J. Lyons; email memorandum regarding same; [...]; confer with B. Mintz regarding bankruptcy litigation strategy; draft update [...]; telephone conference with B. Condon; review list of adversary proceedings filed to date; attention to Seagrim and Walter tolling agreement and approval motion; emails regarding same; attention to motion to file adversary complaint under seal and notice of emergency hearing thereon; emails regarding [...] seal motion [...]; various emails with A&P attorneys.		4.8	\$5,162.40
9/10/2019	Malloy, Charles A.	Review Trustee's motion to approve stipulation with Seagrim and Walter and Trustee's motion to file documents under seal; telephone conferences with M. Bernstein, B. Condon [...]; review of notes and materials related to aircraft transactions [...]		2.2	\$1,762.20
9/10/2019	Mintz, Benjamin	Emails re case developments, telephone conference with M. Bernstein.		0.3	\$297.00
9/10/2019	Condon, Brian K.	Conference call with J. Lyons and M. Bernstein re Trustee claims against UL/Glove, tolling, service, and confidentiality; prepare and email summary of call to team; [...] email with C. Malloy re case facts [...]; review Trustee complaint against Scout and other activities in adversary proceedings; [...] review tolling agreement between Trustee and Seagrim/Walter and email team re same; review Trustee's motion to file adversary complaint under seal, and email team [...]		4.5	\$3,807.00
9/11/2019	Malloy, Charles A.	Email correspondence regarding Trustee's proposed motions to approve tolling agreement with Walter and Seagrim and to approve filing complaints under seal; coordinate drafting of opposition to motion to approve tolling agreement; telephone conference and email with G. Mijares-Shafai regarding opposition to tolling agreement; review and revise opposition to tolling agreement; review and comment on opposition to motion to file complaints under seal; supervise filing of oppositions [...]		5.2	\$4,165.20
9/11/2019	Mijares-Shafai, Gerardo	Review, analyze correspondence between A&P team re response strategy to (i) Trustee's motion for relief to file complaints under seal and (ii) stipulation with Walter & Seagrim; draft limited objection and reservation of rights to stipulation; review, revise same with C. Malloy edits; review, analyze M. Bernstein comments to same; research case law [...]; research service requirements [...] for same; compile for filing [...]		5.1	\$3,213.00
9/11/2019	Mintz, Benjamin	Review motions re sealing, tolling, emails and calls re same.		0.6	\$594.00
9/11/2019	Bernstein, Michael L.	[...] Telephone conference with B. Condon; email exchange [...]; review Trustee's court filings; work on brief in opposition to motion to approve tolling agreement with Seagrim and Walter; work on brief in opposition to Trustee's seal/confidentiality motion; confer with A&P attorneys regarding same; advise regarding argument preparation for emergency court hearing.		4.4	\$4,732.20
9/11/2019	Condon, Brian K.	Multiple emails with team re objections to Trustee's emergency motion to seal and motion for approval of S&W tolling agreement; draft objection to emergency motion to seal, and research re same; emails to team re revisions and filing; review draft objections to motion for approval of tolling agreement.		3	\$2,538.00
9/12/2019	Mijares-Shafai, Gerardo	Review, analyze revise proposed order authorizing S&W stipulation from Chapter 7 Trustee; correspond with A&P team re [...] same; review, analyze correspondence re same and order authorizing motion to seal; telephone conference with Judge Klein's clerk re [...] order.		0.5	\$315.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
9/12/2019	Malloy, Charles A.	Telephone and email with M. Bernstein, B. Condon regarding hearing on Trustee's motions to approve tolling and sealing; attention to [...] proposed order on tolling agreement; telephone conference and emails with Trustee's counsel regarding revisions to proposed order.		2.3	\$1,842.30
9/12/2019	Bernstein, Michael L.	Call with B. Condon regarding hearing preparation; report from B. Condon regarding court hearing [...]; review order and discuss required corrections; confer with A&P team regarding strategy [...]; work on revisions to Trustee's proposed tolling order; various calls and emails regarding same; [...]		3.3	\$3,549.15
9/12/2019	Mintz, Benjamin	Emails re case developments, hearing orders, adversary proceeding, telephone conferences with M. Bernstein, C. Malloy, work on limited objections to sealing, tolling, review amended orders [...]		2.2	\$2,178.00
9/12/2019	Condon, Brian K.	Court appearance in US Bankruptcy Court for hearing on emergency motion to seal adversary complaints and re approval of tolling agreement; telephone calls and emails with M. Bernstein re same; telephone call with J. Lyons re revisions to tolling agreement order; telephone call and email with C. Malloy re same; telephone call and email to court staff re [...] order.		4.1	\$3,468.60
9/13/2019	Mijares-Shafai, Gerardo	Correspond with A&P team re transcript access and request from court.		0.3	\$189.00
9/13/2019	Bernstein, Michael L.	Review court filings and court's orders; review email correspondence; attention to procedural and substantive issues related to potential filing of redacted adversary complaint; various emails with A&P attorneys.		1.5	\$1,613.25
9/13/2019	Malloy, Charles A.	Attention to submitted order on tolling agreement; emails regarding September 12 hearing on Trustee motion to seal and motion to approve tolling agreement; attention to emails regarding notice of filing of complaints by Trustee.		1.2	\$961.20
9/13/2019	Condon, Brian K.	Draft summary of court hearing on Trustee's motions to seal and approve tolling agreement [...]; [...]; review of Yuntian/UL/Glove complaint; emails with M. Bernstein re same; review court's order on Trustee's motions.	0.5	1.8	\$1,522.80
9/14/2019	Bernstein, Michael L.	Emails with B. Condon regarding adversary complaint.		0.3	\$322.65
9/14/2019	Condon, Brian K.	Emails with M. Bernstein re aspects of adversary complaint.		0.2	\$169.20
9/15/2019	Bernstein, Michael L.	Email regarding adversary complaint.		0.2	\$215.10
9/16/2019	Mijares-Shafai, Gerardo	Coordinate [...] hearing transcript; telephone conference with EScribers re same; correspond with B. Condon re number of adversary cases and defendants; telephone conference with B. Condon re same; review, analyze B. Condon summary [...]; review, analyze court docket [...]		0.8	\$504.00
9/16/2019	Bernstein, Michael L.	Confer with B. Condon; review and comment on draft memorandum; address preliminary issues in connection with adversary complaint; follow-up regarding translation; begin review and analysis of adversary complaints; [...]		2	\$2,151.00
9/16/2019	Malloy, Charles A.	Attention to emails [...]; coordinate with B. Condon, G. Mijares-Shafai on initial review and analysis of Trustee complaint; review B. Condon draft email regarding complaint and case status.		1.1	\$881.10
9/16/2019	Condon, Brian K.	Telephone conference with M. Bernstein re analysis of adversary complaint; draft summary [...]; email with team re adversary claims generally; [...]; telephone call with G. Mijares-Shafai re strategy for analysis of complaint; further review of [...] creditor claims and basis for Trustee's claims [...], and emails with M. Bernstein [...]		4.4	\$3,722.40
9/17/2019	Mijares-Shafai, Gerardo	Correspond with A&P team re Sept. 12, 2019 hearing transcript.		0.1	\$63.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
9/17/2019	Malloy, Charles A.	Telephone conferences with M. Bernstein and B. Condon to discuss process for review of complaint and analysis of transactions and potential defenses; outline assignment for G. Mijares-Shafai regarding complaint.		1.2	\$961.20
9/17/2019	Bernstein, Michael L.	Review and analyze complaint; calls and emails regarding same; coordinate defense.		3.1	\$3,334.05
9/17/2019	Condon, Brian K.	Multiple emails [...] re [...] adversary claims [...]; [...]; conference with C. Malloy and M. Bernstein re [...] analysis of adversary complaint.		1.4	\$1,184.40
9/18/2019	Mijares-Shafai, Gerardo	Telephone conference with C. Malloy re review of Yuntian complaint; review, analyze claims and causes of action re same; telephone conference with C. Malloy re [...] details.		3	\$1,890.00
9/18/2019	Malloy, Charles A.	Telephone conference with G. Mijares-Shafai regarding review of Trustee's complaint, analysis of [...] complaint and analysis of potential defenses; confer with M. Bernstein regarding initial review of complaint and analysis of [...] transaction; [...]		1.4	\$1,121.40
9/18/2019	Bernstein, Michael L.	Emails with B. Condon regarding litigation strategy; emails and telephone conference with C. Malloy regarding same; [...]		0.7	\$752.85
9/18/2019	Condon, Brian K.	Emails [...] re defenses to Trustee's claims.		0.2	\$169.20
9/19/2019	Mijares-Shafai, Gerardo	[...] Review, analyze causes of action under and legal theories in response to [...] adversary complaint; telephone conference with C. Malloy re same; correspond with same[...]	2.2	4.6	\$2,898.00
9/19/2019	Malloy, Charles A.	Telephone conference with G. Mijares-Shafai regarding analysis of Trustee's complaint and [...] potential defenses or challenges to complaint; review draft summary of complaint [...]	0.3	0.8	\$640.80
9/19/2019	Mintz, Benjamin	Emails, calls re pending litigation [...]	0.2	0.3	\$297.00
9/20/2019	Malloy, Charles A.	Confer with G. Mijares-Shafai regarding [...] transactions in Trustee's complaint; begin review of Trustee's complaint.		0.7	\$560.70
9/20/2019	Bernstein, Michael L.	Attention to jurisdiction questions [...]; follow up regarding transaction analysis; various emails.		0.5	\$537.75
9/20/2019	Mintz, Benjamin	Review complaint, emails re jurisdiction issues.		1.3	\$1,287.00
9/21/2019	Bernstein, Michael L.	[...] Consider potential jurisdiction arguments [...]; emails with B. Condon and B. Mintz.		0.2	\$215.10
9/22/2019	Bernstein, Michael L.	Review [...] allegations in the complaint and respond to [...] questions; emails - B. Condon and B. Mintz.		0.4	\$430.20
9/22/2019	Mintz, Benjamin	Emails with M. Bernstein, B. Condon re jurisdiction issues.		0.2	\$198.00
9/23/2019	Mijares-Shafai, Gerardo	Review, analyze correspondence [...]; draft [...] flow chart; correspond with M. Bernstein [...]		0.8	\$504.00
9/23/2019	Mintz, Benjamin	Telephone conference with M. Bernstein and B. Condon re case strategy, jurisdiction issues.		0.8	\$792.00
9/23/2019	Bernstein, Michael L.	Prepare for and participate on call regarding [...] defenses and [...] dismissal; review and supplement research issues; [...] follow up regarding analysis of transaction [...] in complaint.		3	\$3,226.50
9/23/2019	Malloy, Charles A.	Review and comment on G. Mijares-Shafai draft summary of Trustee's complaint and analysis of potential defenses; telephone conference with G. Mijares-Shafai [...]; review complaint and background documents.		1.8	\$1,441.80
9/23/2019	Condon, Brian K.	Legal research re [...] jurisdiction [...]; conference with M. Bernstein and B. Mintz [...]; draft outline [...].		2.8	\$2,368.80
9/24/2019	Mijares-Shafai, Gerardo	Correspond with C. Malloy [and] [...] office conference with M. Bernstein re [...] Yuntian complaint analysis, and extraterritorial application [...]; confer with M. Bernstein re [...] jurisdiction [...]		1.1	\$693.00
9/24/2019	Bernstein, Michael L.	Meeting with G. Mijares-Shafai regarding analysis of adversary complaint; preliminary analysis of [...] dismissal; prepare for and participate in telephone conference regarding same; obtain precedent [...]; brief follow up conversation with G. Mijares-Shafai.		3.1	\$3,334.05
9/24/2019	Mintz, Benjamin	Jurisdiction issues, telephone conference with M. Bernstein.		0.7	\$693.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
9/24/2019	Malloy, Charles A.	Telephone conference with G. Mijares-Shafai regarding analysis of [...] Trustee's complaint.		0.4	\$320.40
9/24/2019	Condon, Brian K.	Revise outline of legal issues [...]		0.2	\$169.20
9/25/2019	Mijares-Shafai, Gerardo	Draft [...] diagram [...] as alleged in the adversary complaint; revise same with C. Malloy comments.		3.4	\$2,142.00
9/25/2019	Bernstein, Michael L.	Coordinate analysis of complaint, underlying transactions and potential defenses; attention to jurisdiction issues.		1	\$1,075.50
9/25/2019	Malloy, Charles A.	Review and edits to G. Mijares-Shafai's draft analysis of [...] Trustee's complaint; review background documents described in summary; telephone conference with G. Mijares-Shafai to discuss comments; review revised document.		1.4	\$1,121.40
9/25/2019	Condon, Brian K.	Review of [...] documents, email with team re same, and review transaction summary.		1.2	\$1,015.20
9/26/2019	Malloy, Charles A.	Telephone conference with M. Bernstein to review summary of Trustee's description [...] and to discuss case status and strategy; e-mail with B. Condon [...]		1.1	\$881.10
9/26/2019	Bernstein, Michael L.	Review as-alleged transaction analysis and discuss with C. Malloy; various emails.		1.2	\$1,290.60
9/26/2019	Condon, Brian K.	Review airplane transactions summary; email with C. Malloy re same; further review of [...] records.		1.2	\$1,015.20
9/27/2019	Mijares-Shafai, Gerardo	Revise Yuntian Complaint summary and analysis.		1.9	\$1,197.00
9/30/2019	Malloy, Charles A.	Attention to email from B. Condon [...]; attention to G. Mijares-Shafai's summary of complaint and analysis of defenses.		1	\$801.00
9/30/2019	Mijares-Shafai, Gerardo	Revise Yuntian complaint analysis.		3.5	\$2,205.00
9/30/2019	Condon, Brian K.	Review [...] aircraft transactions and emails to team re same.		0.4	\$338.40
10/1/2019	Bernstein, Michael L.	Communications with B. Condon [...]; various emails.		0.4	\$430.20
10/1/2019	Malloy, Charles A.	Review and comment on memorandum regarding Trustee complaint and analysis of responses and defenses.		1.8	\$1,441.80
10/1/2019	Condon, Brian K.	Telephone call [...] re [...] complaint [...]; telephone call to M. Bernstein re same; email with team re [...] documents.		0.8	\$676.80
10/2/2019	Malloy, Charles A.	Attention to summary [...]; e-mails regarding document management.		0.6	\$480.60
10/2/2019	Condon, Brian K.	Email with M. Bernstein re issues [...]		0.2	\$169.20
10/2/2019	Bernstein, Michael L.	Follow-up regarding complaint; review summary [...] and follow-up [...]		1	\$1,075.50
10/3/2019	Bernstein, Michael L.	Follow up regarding transactions summary and defense analysis.		0.6	\$645.30
10/3/2019	Mijares-Shafai, Gerardo	Revise Yuntian complaint summary and analysis.		2.3	\$1,449.00
10/3/2019	Malloy, Charles A.	Complete review of draft summary of Trustee complaint and analysis of potential defenses.		1.1	\$881.10
10/3/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; arrange for [...] organization [...]		0.2	\$69.30
10/4/2019	Malloy, Charles A.	Review revised summary of complaint and analysis of potential defenses from G. Mijares-Shafai, provide comments and circulate.		1.2	\$961.20
10/4/2019	Mijares-Shafai, Gerardo	Revise Yuntian complaint summary and analysis with C. Malloy comments.		0.4	\$252.00
10/7/2019	Bernstein, Michael L.	Initial review of detailed analysis of adversary complaint and potential defenses; notes re same; email - B. Condon; consider next steps.		1.9	\$2,043.45
10/8/2019	Mijares-Shafai, Gerardo	Review, summarize statement of adversary proceedings status filed by Chapter 7 Trustee.		0.2	\$126.00
10/8/2019	Malloy, Charles A.	Review e-mail regarding Chapter 7 Trustee adversary proceeding status report; telephone with G. Mijares-Shafai regarding [...] legal theories and defenses; attention to status of [...] adversary proceeding.		0.8	\$640.80
10/9/2019	Mijares-Shafai, Gerardo	Correspond with C. Malloy and research team re PACER updates in adversary proceeding.		0.2	\$126.00
10/9/2019	Malloy, Charles A.	Coordinate notices and case monitoring for Yuntian adversary.		0.5	\$400.50
10/10/2019	Mijares-Shafai, Gerardo	Review, analyze docket updates in Yuntian adversary proceeding.		0.2	\$126.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/10/2019	Bernstein, Michael L.	Review summary and analysis prepared by G. Mijares-Shafai regarding claims and defenses.		0.8	\$860.40
10/11/2019	Mijares-Shafai, Gerardo	Correspond with C. Malloy and M. Bernstein re summons response date; correspond with B. Condon re motion to dismiss.		0.2	\$126.00
10/11/2019	Ramallo, Oscar	Review analysis of Yuntian complaint.		0.8	\$622.80
10/11/2019	Malloy, Charles A.	Attention to service of process [...]; e-mails regarding [...] motion to dismiss complaint; review outline of possible defenses and bases for dismissal of Trustee complaint [...]		1.8	\$1,441.80
10/11/2019	Bernstein, Michael L.	Attention to service on BVI entities; emails re same; [...]; coordination litigation tasks.		1.3	\$1,398.15
10/11/2019	Condon, Brian K.	Telephone call and emails with M. Bernstein and C. Malloy re service of adversary complaint; [...]; email [...] re review of [...] service in BVI; legal research re potential challenges to complaint [...]		2.6	\$2,199.60
10/12/2019	Malloy, Charles A.	E-mails with G. Mijares-Shafai regarding agenda and coordination for call to discuss response and opposition to Trustee's complaint, service [...]		0.3	\$240.30
10/12/2019	Bernstein, Michael L.	Email correspondence with B. Condon.		0.2	\$215.10
10/13/2019	Bernstein, Michael L.	Coordinate work on motion to dismiss.		0.5	\$537.75
10/14/2019	Mijares-Shafai, Gerardo	Telephone conference with B. Condon and C. Malloy re outline for response to trustee [...] complaint; correspond [...] re California local bankruptcy rules.		0.8	\$504.00
10/14/2019	Ramallo, Oscar	Phone conference with team on potential motion to dismiss.		0.7	\$544.95
10/14/2019	Ramallo, Oscar	Review complaint; conduct legal research on [...] jurisdiction.		3.9	\$3,036.15
10/14/2019	Condon, Brian K.	Review outline of issues for motion to dismiss complaint; conference call with team re strategy for motion to dismiss claims [...]		1.2	\$1,015.20
10/14/2019	Malloy, Charles A.	Conference call with team to discuss service of process, jurisdiction [...]; attention to service [...]		1	\$801.00
10/14/2019	Bernstein, Michael L.	Coordinate work [...] to analyze defenses and consider [...] motion to dismiss; review docket; identify questions [...]		1.6	\$1,720.80
10/15/2019	Condon, Brian K.	Review service [...]; telephone call [...] re service issues [...]; telephone call with M. Bernstein re same and re motion to dismiss; [...]		2.4	\$2,030.40
10/15/2019	Malloy, Charles A.	Review [...] service issue; attention to outline of possible [...] motion to dismiss [...]		0.8	\$640.80
10/15/2019	Bernstein, Michael L.	Further review of claims and defenses analysis; confer with G. Mijares-Shafai regarding approach to motion to dismiss adversary complaint; emails with B. Condon; telephone conference with B. Condon regarding [...] service [...], [...] jurisdiction[...]; approach to motion to dismiss, and related issues; review bankruptcy court filings.		2.6	\$2,796.30
10/15/2019	Ramallo, Oscar	Research concerning extraterritoriality.		6.9	\$5,371.65
10/16/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search [...]		0.4	\$138.60
10/16/2019	Bernstein, Michael L.	Confer with B. Condon regarding [...] timing and procedural issues regarding answer deadline and Rule 26 disclosures.		1.1	\$1,183.05
10/16/2019	Ramallo, Oscar	Continue to research extraterritoriality.		7.2	\$5,605.20
10/16/2019	Condon, Brian K.	Email [...] re service and [...] records.		0.6	\$507.60
10/17/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search [...]		2.4	\$831.60
10/17/2019	Bernstein, Michael L.	Attention to defense strategy [...]; advice regarding bankruptcy law issues addressed by adversary complaint; call with B. Condon [...]; review materials in connection with adversary proceeding status conference and prepare for telephonic participation in same.		1.8	\$1,935.90
10/17/2019	Ramallo, Oscar	Continue to research extraterritoriality cases.		7.1	\$5,527.35

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/17/2019	Condon, Brian K.	Telephone call [...] re service of complaint [...] and defenses; conference with M. Bernstein re same and re potential responses to complaint; [...] research re jurisdictional issues for foreign transactions and personal jurisdiction; legal research re procedural issues for adversary proceedings, case management, and local rules; email with O. Ramallo re motion to dismiss.		3.5	\$2,961.00
10/18/2019	Ramallo, Oscar	Prepare for and participate in conference with B. Condon [...]		2	\$1,557.00
10/18/2019	Ramallo, Oscar	Work on research memorandum [...]		4.2	\$3,269.70
10/18/2019	Bernstein, Michael L.	Confer with B. Condon [...]re] jurisdictional defenses, document exchange requirements pursuant to [...] local rules, motion to dismiss timeline, upcoming status conference [...]		2.2	\$2,366.10
10/18/2019	Condon, Brian K.	Conference with M. Bernstein re motion to dismiss; [...]; conference with M. Donaldson re aircraft [...]; prepare factual background [...] and email[] summary of same to O. Ramallo.		3.7	\$3,130.20
10/19/2019	Bernstein, Michael L.	Review analysis of jurisdiction issues and evaluate [...]		0.9	\$967.95
10/19/2019	Ramallo, Oscar	Email regarding [...] extraterritoriality argument.		0.5	\$389.25
10/19/2019	Malloy, Charles A.	Review of e-mail correspondence with B. Condon and O. Ramallo regarding research [...]; e-mail with B. Condon regarding escrow agent Rule 2004 discovery.		0.6	\$480.60
10/19/2019	Condon, Brian K.	Emails with O. Ramallo re facts for [...] motion to dismiss; email with C. Malloy re discovery from escrow/title company.		0.3	\$253.80
10/21/2019	Mijares-Shafai, Gerardo	Telephone conference with M. Bernstein re affirmative defenses for motion to dismiss; correspond with B. Condon re same.		0.2	\$126.00
10/21/2019	Bernstein, Michael L.	Prepare for telephonic court hearing; emails with B. Condon regarding [...] strategy for [...] scheduling issues; brief conference with G. Mijares-Shafai; various emails regarding potential [...] defenses [...]; address Rule 2004 and related discovery questions; review summary analysis of [...] cases [...]		2.3	\$2,473.65
10/21/2019	Malloy, Charles A.	E-mails with B. Condon regarding [...] Rule 2004 discovery obtained by Trustee; review court docket, bankruptcy rules and secondary materials [...]; review e-mail from O. Ramallo regarding [...] research; e-mails with B. Condon regarding motion to dismiss outline.		2.2	\$1,762.20
10/21/2019	Ramallo, Oscar	Conduct legal research on personal jurisdiction issues.		3.2	\$2,491.20
10/21/2019	Condon, Brian K.	Multiple emails with M. Bernstein and team re claims and procedural strategy for motion to dismiss [...]; telephone call [...] re documents produced to Trustee.		2.2	\$1,861.20
10/22/2019	Mijares-Shafai, Gerardo	Correspond with APKS team re adversary proceeding procedures status conference.		0.2	\$126.00
10/22/2019	Malloy, Charles A.	Review complaint and attention to outline of potential motion to dismiss arguments in connection with avoidance claims and provide comments to G. Mijares-Shafai; e-mails regarding upcoming adversary proceeding status conference; attention to e-mail regarding initial conference in Yuntian adversary.		2.5	\$2,002.50
10/22/2019	Bernstein, Michael L.	Hearing preparation; address defense issues; confer with B. Condon [...]		2	\$2,151.00
10/22/2019	Ramallo, Oscar	Conduct legal research on [...] jurisdictional defense.		3.2	\$2,491.20
10/22/2019	Condon, Brian K.	Review letter and proposal from Trustee's counsel re status conference in adversary proceeding; conference with M. Bernstein re strategy.		0.8	\$676.80
10/23/2019	Mijares-Shafai, Gerardo	Review, analyze motion to dismiss issues list.		1.1	\$693.00
10/23/2019	Malloy, Charles A.	Review additions to outline of motion to dismiss points [...]; comment on revisions to outline and review of statutory and rule provisions in connection with same; e-mails with G. Mijares-Shafai regarding follow up on motion to dismiss; attention to B. Condon e-mail regarding information related to prepetition payments [...]; attention to notice of service of process filed with Bankruptcy Court.		2.4	\$1,922.40

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/23/2019	Bernstein, Michael L.	Telephone conference with B. Condon regarding [...]and] participate in Bankruptcy Court adversary proceeding status hearing; brief email report regarding same; telephone conference with B. Condon regarding meet and confer conference call with Trustee's counsel [...]; review summary research [...]; review notice from Trustee's counsel and email to litigation team regarding same.		2.8	\$3,011.40
10/23/2019	Ramallo, Oscar	Conduct legal research on [...] personal jurisdiction [...]		7.1	\$5,527.35
10/23/2019	Condon, Brian K.	Legal research re procedure for early meeting, case management and document exchanges; [...]; telephone call with M. Bernstein re same; telephone call with J. Torosian (Trustee counsel) and Jones Day (Minsheng) re date for status conference and early meeting issues; email with O. Ramallo re arguments for motion to dismiss [...]		3.8	\$3,214.80
10/24/2019	Mijares-Shafai, Gerardo	Confer with C. Malloy re motion to dismiss [...]		3.7	\$2,331.00
10/24/2019	Ramallo, Oscar	Review and analyze [...] jurisdiction defense; draft email memo [...]; conduct legal research [...] on personal jurisdiction.		3.5	\$2,724.75
10/24/2019	Malloy, Charles A.	E-mail with G. Mijares-Shafai regarding docket entry in Zetta Chapter 7 case; review of materials submitted by Trustee [...] and e-mails with B. Condon regarding same; review bankruptcy code provisions and relevant secondary sources [...] for motion to dismiss Trustee complaint.		1.8	\$1,441.80
10/24/2019	Bernstein, Michael L.	Attention to notice of service and request for status conference filed by Trustee's counsel [...]		0.5	\$537.75
10/25/2019	Mijares-Shafai, Gerardo	Research, summarize [...] motion to dismiss; correspond and telephone conference with C. Malloy re same.		4.1	\$2,583.00
10/25/2019	Ramallo, Oscar	Conduct legal research on jurisdictional arguments.		2.9	\$2,257.65
10/25/2019	Mintz, Benjamin	Review memo on automatic stay claims.		0.3	\$297.00
10/25/2019	Malloy, Charles A.	Review outline and provide comments to G. Mijares-Shafai on possible bases for motion to dismiss Trustee complaint; telephone conference with G. Mijares-Shafai regarding same.		2.2	\$1,762.20
10/28/2019	Mijares-Shafai, Gerardo	Review, revise C. Malloy comments to motion to dismiss outline; correspond with litigation team re same.		0.6	\$378.00
10/28/2019	Bernstein, Michael L.	Review motion to dismiss outline in preparation for call re same; telephone conference with B. Mintz regarding motion to dismiss issues; review materials in preparation for call regarding motion to dismiss.		2.1	\$2,258.55
10/28/2019	Mintz, Benjamin	Review complaint, consider defenses, review memo re same, telephone conference with M. Bernstein.		3	\$2,970.00
10/28/2019	Malloy, Charles A.	Further review of revised version of outline for motion to dismiss certain Trustee claims and provide comments to G. Mijares-Shafai; review and prepare for conference call with team to discuss.		0.8	\$640.80
10/29/2019	Bernstein, Michael L.	Call with B. Mintz; prepare for and participate in conference call regarding motion to dismiss arguments; follow up emails.		3.1	\$3,334.05
10/29/2019	Mijares-Shafai, Gerardo	Telephone conference with litigation team re outline to motion to dismiss.		2	\$1,260.00
10/29/2019	Malloy, Charles A.	Prepare for and participate in conference call to review outline [...]; review documents and follow up on questions [...]; attention to bankruptcy code provisions [...]		3.6	\$2,883.60
10/29/2019	Condon, Brian K.	Review outline of motion to dismiss complaint; conference call with M. Bernstein and team re strategy and legal issues for motion to dismiss, and re follow up issues.		2.4	\$2,030.40
10/29/2019	Mintz, Benjamin	Work on defense strategy; call with M. Bernstein, B. Condon, et al re same.		5.2	\$5,148.00
10/29/2019	Ramallo, Oscar	Telephone conference with litigation team concerning motion to dismiss arguments.		2	\$1,557.00
10/30/2019	Condon, Brian K.	Review complaint, schedules, contracts re [...] defenses; email with C. Malloy re same.		0.8	\$676.80

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/30/2019	Bernstein, Michael L.	Identify and analyze potential defenses to Trustee suit.		1.6	\$1,720.80
10/30/2019	Malloy, Charles A.	Email with B. Mintz [...] and respond to B. Condon email regarding [...] defense [...]		1.8	\$1,441.80
10/30/2019	Mintz, Benjamin	Litigation strategy; emails re same.		0.7	\$693.00
10/31/2019	Bernstein, Michael L.	Advise regarding litigation strategy in bankruptcy court proceeding.		1.8	\$1,935.90
10/31/2019	Malloy, Charles A.	E-mails with G. Mijares-Shafai regarding [...] aircraft transactions; review of lease documents.		0.6	\$480.60
10/31/2019	Mintz, Benjamin	Litigation strategy; emails re same.		0.3	\$297.00
10/31/2019	Mijares-Shafai, Gerardo	Review, analyze correspondence [...]		0.4	\$252.00
11/1/2019	Bernstein, Michael L.	Telephone conference regarding hearing date timing, potential extension of briefing schedule and related issues; consider strategy regarding same; emails with B. Condon, B Mintz.		0.6	\$645.30
11/4/2019	Bernstein, Michael L.	Email correspondence with B. Condon regarding hearing dates and call with Bankruptcy Court.		0.3	\$322.65
11/4/2019	Malloy, Charles A.	Attention to email from G. Mijares-Shafai transmitting draft summary of issues related to [...] transactions [...]		0.7	\$560.70
11/5/2019	Mijares-Shafai, Gerardo	Summarize issues and proposed research in connection with [...] agreements; review, analyze correspondence from B. Condon re motion to dismiss; telephone conference with C. Malloy re same; correspond with B. Condon re same.		1.5	\$945.00
11/5/2019	Condon, Brian K.	Review docket re adversary for status conference request; email with team re motion to dismiss; telephone call with court clerk re setting of hearing and briefing on motion to dismiss; email and call with M. Bernstein re same.		0.5	\$423.00
11/5/2019	Bernstein, Michael L.	Coordinate work on motion to dismiss adversary complaint; call with B. Condon regarding same.		1.5	\$1,613.25
11/5/2019	Malloy, Charles A.	Review current draft of outline for motion to dismiss avoidance claims in Trustee complaint; telephone conference with G. Mijares-Shafai to discuss same; e-mails with B. Condon and telephone conference with M. Bernstein regarding schedule.		1.1	\$881.10
11/6/2019	Malloy, Charles A.	E-mails with O. Ramallo and G. Mijares-Shafai regarding motion to dismiss and related work.		0.3	\$240.30
11/6/2019	Mijares-Shafai, Gerardo	Correspond [...] re [...] case law; correspond with C. Malloy re same.		0.2	\$126.00
11/6/2019	Bernstein, Michael L.	Confer with C. Malloy regarding motion to dismiss; coordinate with litigation team; consider and analyze [...] research issues regarding same.		1.3	\$1,398.15
11/7/2019	Mijares-Shafai, Gerardo	Telephone conference with C. Malloy and O. Ramallo re motion to dismiss strategy.		0.2	\$126.00
11/7/2019	Mintz, Benjamin	Emails, telephone conference with M. Bernstein re motion to dismiss issues.		0.5	\$495.00
11/7/2019	Bernstein, Michael L.	Call with B. Mintz regarding [...] briefing schedule issues; emails with B. Condon; coordinate regarding motion to dismiss.		1	\$1,075.50
11/7/2019	Malloy, Charles A.	Prepare for call with associates regarding motion to dismiss; telephone conference with G. Mijares Shafai and O. Ramallo regarding draft of motion to dismiss.		1	\$801.00
11/7/2019	Ramallo, Oscar	Team telephone conference on strategy for motion to dismiss.		0.5	\$389.25
11/7/2019	Condon, Brian K.	Emails with M. Bernstein and B. Mintz re strategy for motion to dismiss, jurisdiction [...]		0.4	\$338.40
11/8/2019	Bernstein, Michael L.	Coordinate work on motion to dismiss adversary complaint.		0.5	\$537.75
11/12/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss outline.		2.7	\$1,701.00
11/12/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search [...]		1.5	\$519.75
11/12/2019	Mintz, Benjamin	Review complaint and consider defenses and issues, call with B. Condon [...] re defenses, case strategy [...]		2.7	\$2,673.00
11/12/2019	Bernstein, Michael L.	Telephone conference with B. Condon regarding [...] intended motion to dismiss arguments; advise regarding approach to our motion to dismiss; various emails.		1.8	\$1,935.90

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
11/12/2019	Malloy, Charles A.	E-mails and prepare materials for conference call to discuss motion to dismiss Trustee complaint.		0.6	\$480.60
11/12/2019	Condon, Brian K.	Telephone conference with [...] B. Mintz re theories and strategy for motion to dismiss complaint, and potential defenses; follow up calls with M. Bernstein and B. Mintz re motion theories and preparation; telephone call and emails with K. DiGalbo re document search [...], and review documents re same ; [...]		3.5	\$2,961.00
11/13/2019	Mijares-Shafai, Gerardo	Telephone conference with B. Condon and B. Mintz re motion to dismiss arguments [...]; revise motion to dismiss outline; [...]; review, analyze [...] arguments in Jetcraft motion to dismiss.		3.3	\$2,079.00
11/13/2019	Bernstein, Michael L.	Review Jetcraft's motion to dismiss and consider arguments applicable to our case; emails regarding same; various communications with litigation team regarding motion to dismiss arguments, timing and related issues; [...]; brief conference with G. Mijares-Shafai.		2.5	\$2,688.75
11/13/2019	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; database search [...]		1	\$346.50
11/13/2019	Mintz, Benjamin	Internal call re motion to dismiss.		0.8	\$792.00
11/13/2019	Malloy, Charles A.	Strategy conference to discuss motion to dismiss Trustee complaint; follow up meeting with G. Mijares-Shafai to discuss legal research and arguments applicable to causes of action; [...]		3.3	\$2,643.30
11/13/2019	Ramallo, Oscar	Team conference call on motion to dismiss strategy; draft motion to dismiss.		6.9	\$5,371.65
11/13/2019	Condon, Brian K.	Conference call with G. Mijares-Shafai and team re status, strategy and legal issues for drafting motion to dismiss; review revised outline of same; [...]		2.2	\$1,861.20
11/14/2019	Mijares-Shafai, Gerardo	Research affirmative defenses to claims [...]; conference with C. Malloy re same and structure of motion to dismiss; correspond with O. Ramallo re section 362 [...]; draft motion to dismiss.		4.6	\$2,898.00
11/14/2019	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; retrieve and organize [...]; prepare index [...]		1.8	\$623.70
11/14/2019	Malloy, Charles A.	Office conference with G. Mijares-Shafai to work on motion to dismiss Trustee's complaint; legal research related to recharacterization and preference claims.		2.5	\$2,002.50
11/14/2019	Ramallo, Oscar	Draft motion to dismiss extraterritorial claims.		7.2	\$5,605.20
11/15/2019	Bernstein, Michael L.	Review Trustee's motion papers regarding expenditure of estate assets for litigation expenses and related matters.		0.5	\$537.75
11/15/2019	Mijares-Shafai, Gerardo	Research badges of fraud case law for motion to dismiss; draft motion to dismiss.		5.9	\$3,717.00
11/15/2019	Malloy, Charles A.	Review case law and research on issues for motion to dismiss Trustee complaint related to recharacterization and preference counts.		1.8	\$1,441.80
11/15/2019	Ramallo, Oscar	Draft motion to dismiss claims against UL and Glove.		3.2	\$2,491.20
11/15/2019	Condon, Brian K.	Conference with O. Ramallo re [...] jurisdiction motion [...]; [...]; emails with M. Bernstein re extension of time to respond in adversary case; telephone call [...] re extension request.		0.9	\$761.40
11/16/2019	Mijares-Shafai, Gerardo	Draft motion to dismiss.		1.1	\$693.00
11/17/2019	Mijares-Shafai, Gerardo	Draft motion to dismiss.		3.1	\$1,953.00
11/17/2019	Bernstein, Michael L.	Address issues in connection with preparation of motion to dismiss adversary complaint.		0.5	\$537.75
11/17/2019	Malloy, Charles A.	Receive and respond to e-mails regarding status of draft motion to dismiss.		0.4	\$320.40
11/17/2019	Ramallo, Oscar	Draft motion to dismiss on grounds of extraterritoriality.		7.9	\$6,150.15
11/17/2019	Condon, Brian K.	Review of transaction documents [...] for use in motion to dismiss.		0.5	\$423.00
11/18/2019	Bernstein, Michael L.	Various emails regarding motion to dismiss; email correspondence with Trustee's counsel and with A&P litigation team.		0.5	\$537.75
11/18/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search [...]		0.4	\$138.60

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
11/18/2019	Malloy, Charles A.	E-mails regarding [...] transaction documents; review legal research related to recharacterization and preference issues.		1.6	\$1,281.60
11/18/2019	Mijares-Shafai, Gerardo	Draft motion to dismiss.		4.1	\$2,583.00
11/18/2019	Barrett, Lucas B.	Review complaint; research applicable [...] requirements under the Bankruptcy Code.		2.1	\$945.00
11/18/2019	Condon, Brian K.	Emails with M. Bernstein re briefing schedule on motion to dismiss; email with B. Mintz re [...] defense.		0.2	\$169.20
11/19/2019	Malloy, Charles A.	Telephone conference with B. Mintz and M. Bernstein regarding [...] automatic stay cause of action; conference with G. Mijares-Shafai regarding status of draft and legal arguments [...]		1.2	\$961.20
11/19/2019	Bernstein, Michael L.	Attention to arguments for dismissal; confer with B. Mintz, C. Malloy regarding same; negotiate briefing schedule.		1.3	\$1,398.15
11/19/2019	Mijares-Shafai, Gerardo	Draft motion to dismiss; telephone conference with C. Malloy re same.		3.3	\$2,079.00
11/19/2019	Mintz, Benjamin	Research on motion to dismiss issues.		1.2	\$1,188.00
11/19/2019	Barrett, Lucas B.	Further research [...] requirements under the Bankruptcy Code; discuss [...] research with B. Mintz.		0.6	\$270.00
11/19/2019	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; document search [...]		0.2	\$69.30
11/20/2019	Mijares-Shafai, Gerardo	Draft motion to dismiss; review, summarize local rules for status conference and scheduling orders re adversary proceeding.		7.1	\$4,473.00
11/20/2019	Mintz, Benjamin	Telephone conference with M. Bernstein re stay issues, follow-up emails.		0.3	\$297.00
11/20/2019	Bernstein, Michael L.	Attention to various case administration issues, including confirmation of agreed briefing schedule, status conference and requirements in connection therewith.		0.9	\$967.95
11/20/2019	Malloy, Charles A.	Telephone conference with M. Bernstein regarding progress of draft motion to dismiss, scheduling, and related questions; attention to e-mail from G. Mijares-Shafai regarding bankruptcy court scheduling conference and status report rules.		0.8	\$640.80
11/20/2019	Condon, Brian K.	Review emails re briefing schedule; email with M. Bernstein re stipulation and order for briefing schedule; review court rules re status conference compliance and emails with team re [...] status conference.		2.2	\$1,861.20
11/21/2019	Mijares-Shafai, Gerardo	Research [...] defense.		0.1	\$63.00
11/21/2019	Bernstein, Michael L.	Confer with C. Malloy regarding motion to dismiss briefing, timing and related issues.		0.4	\$430.20
11/21/2019	Malloy, Charles A.	Begin review of draft motion to dismiss; telephone conference with M. Bernstein regarding status of draft.		1.2	\$961.20
11/22/2019	Malloy, Charles A.	Review e-mail from G. Mijares-Shafai regarding [...] automatic stay claim; telephone conference with G. Mijares-Shafai regarding draft motion to dismiss; review draft stipulation on scheduling.		1.6	\$1,281.60
11/22/2019	Ramallo, Oscar	Phone conference with B. Condon regarding stipulation on case calendar; review stipulation.		0.4	\$311.40
11/22/2019	Bernstein, Michael L.	Call with B. Condon regarding status conference, potential document exchange, joint status report requirements and related matters; prepare for and participate in telephone conference [...]; review and revise draft stipulation regarding briefing schedule and related matters; emails re same; advise regarding jurisdictional and related reservations of rights in connection with appearance and adversary proceeding; follow up regarding status of motion to dismiss.		2.3	\$2,473.65
11/22/2019	Mijares-Shafai, Gerardo	Correspond with C. Malloy re automatic stay section additions for motion to dismiss; review, research Singapore law re jurisdictional issues; telephone conference with C. Malloy re same.		2.6	\$1,638.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
11/22/2019	Condon, Brian K.	Telephone conference [...] re status conference proposed by Trustee, date, and compliance with disclosures; draft and circulate stipulation for briefing schedule on motion to dismiss; emails with J. Roselius (DLA) re status conference and stipulation; review of order denying Trustee request for status conference.		3.2	\$2,707.20
11/23/2019	Malloy, Charles A.	Review and revise draft motion to dismiss.		2.7	\$2,162.70
11/24/2019	Malloy, Charles A.	Review and revise draft motion to dismiss; transmit comments to G. Mijares-Shafai.		1.8	\$1,441.80
11/25/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss with C. Malloy comments; review same; office conference with C. Malloy re same and revisions to motion to dismiss; correspond with A&P and research team re complaint filed in Singapore [...]; correspond with O. Ramallo re request for judicial notice and incorporation by reference doctrine; review same.		2.1	\$1,323.00
11/25/2019	Malloy, Charles A.	Review comments on draft motion to dismiss; office conference with G. Mijares-Shafai regarding draft motion to dismiss; telephone conference with M. Bernstein and B. Condon to discuss joint statement and case strategy; review and comment on draft status report to court; review Minsheng and Trustee draft status reports; review Singapore injunction papers; review correspondence with counsel to Minsheng and Trustee regarding status report.		3.6	\$2,883.60
11/25/2019	Bernstein, Michael L.	Address joint status report required by bankruptcy court; coordinate with Jones Day re same; consider jurisdiction and consent issues in connection with joint status report; confer with B. Condon re litigation issues including initial disclosure requirement and strategy in connection therewith; revised draft joint status report; confer with C. Malloy re motion to dismiss briefing.		2.1	\$2,258.55
11/25/2019	DiGalbo, Kathryn A.	Legal Assistant services for G. Mijares-Shafai; arrange for research department to locate pleadings [...]		0.1	\$34.65
11/25/2019	Barrett, Lucas B.	Further research applicability of the Bankruptcy Code [...] provision.		0.3	\$135.00
11/25/2019	Mintz, Benjamin	Review [...] research, office conference with L. Barrett.		0.7	\$693.00
11/25/2019	Condon, Brian K.	Draft of additional defendant (UL, Glove, TGG) insert to Joint Status Report; multiple emails and telephone call with M. Bernstein re contents and revisions to same, and re submission to Bankruptcy Court authority; emails with DLA and Jones Day re briefing schedule stipulation, request for status conference, and joint report.		2.5	\$2,115.00
11/26/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; update key response and objection deadlines.		0.3	\$189.00
11/26/2019	Barrett, Lucas B.	Research [...] under the bankruptcy code and analyze related facts.		0.3	\$135.00
11/26/2019	Malloy, Charles A.	Telephone conferences and e-mails regarding joint status report to Bankruptcy Court; review and comment on draft status reports; revise status report per discussion with M. Bernstein and B. Condon; e-mails regarding conference [...]; attention to additional research issues for motion to dismiss Trustee complaint.		3.4	\$2,723.40
11/26/2019	Bernstein, Michael L.	Work on court-required position statement; numerous calls re same; negotiation call with DLA; several calls with Jones Day; conferences with C. Malloy, B. Condon; analysis of consent to final orders issue; address document exchange and disclosures issue [...].		4.8	\$5,162.40
11/26/2019	Mintz, Benjamin	Emails re status report, final order.		0.2	\$198.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
11/26/2019	Condon, Brian K.	Multiple reviews and revisions of Joint Status Report, Agreed Order for Status Conference, and Stipulation for briefing schedule; conference call with DLA (Trustee) and Jones Day, re meet and confer in connection with status conference, compliance with disclosure requirements for status conference, and other issues; multiple follow up calls and emails re all of the above; preparation of documents for filing; review court docket re status conference scheduling; telephone call with M. Bernstein re bankruptcy court jurisdiction.		4.4	\$3,722.40
11/27/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss.		3.2	\$2,016.00
11/27/2019	Malloy, Charles A.	Attention to e-mail correspondence regarding finalizing status report to court.		0.4	\$320.40
11/27/2019	Bernstein, Michael L.	Review Trustee's compilation of party status reports; various emails.		0.4	\$430.20
11/27/2019	Condon, Brian K.	Review of [...] documents for in connection with status conference.		1.2	\$1,015.20
11/29/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; research case law for same.		4.6	\$2,898.00
11/29/2019	Malloy, Charles A.	E-mails regarding status of draft motion to dismiss Trustee's complaint.		0.2	\$160.20
11/29/2019	Bernstein, Michael L.	Prepare for and participate in conference with B. Condon re case strategy.		0.5	\$537.75
11/30/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; correspond with C. Malloy re same; correspond with research team re case and docket updates.		3.3	\$2,079.00
12/1/2019	Malloy, Charles A.	Revise draft brief in support of motion to dismiss.		2.3	\$1,739.95
12/1/2019	Barrett, Lucas B.	Continue to research [...] under the bankruptcy code and analyze related facts.		0.7	\$297.50
12/2/2019	Mijares-Shafai, Gerardo	Review, analyze pleadings in connection with Singapore injunction; review, research precedent re incorporation by reference doctrine and request for judicial notice; telephone conference with C. Malloy re same; revise motion to dismiss.		1.9	\$1,130.50
12/2/2019	Malloy, Charles A.	Review and edit draft motion to dismiss; attention to orders entered setting status conference and approving stipulation.		4.1	\$3,101.65
12/2/2019	Bernstein, Michael L.	Attention to Jetcraft motion to dismiss to evaluate [...] arguments [...]; emails regarding same; confer with B. Condon; review Trustee's court filings re Minsheng.		1.8	\$1,828.35
12/2/2019	Condon, Brian K.	Review of Jetcraft motion to dismiss adversary complaint, and summarize arguments; emails with M. Bernstein re same; review Trustee's submission requesting status conference, and review docket; review of Trustee's claim of service on entities (Minsheng) in China and email re service procedure [...]; emails with Singapore counsel re bankruptcy law issues [...]		1.5	\$1,198.50
12/3/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; correspond with C. Malloy re alter ego theory and defense.		5	\$2,975.00
12/3/2019	Malloy, Charles A.	Prepare for and participate in conference call [...] to discuss motion to dismiss trustee's complaint; e-mails with O. Ramallo regarding extraterritoriality and jurisdiction arguments; call with O. Ramallo to discuss further arguments [...]; e-mails with G. Mijares-Shafai regarding alter ego claims; draft report on call [...]		3.5	\$2,647.75
12/3/2019	Ramallo, Oscar	Prepare for call [...] regarding extraterritoriality; [...] review Trustee filings [...]; draft revision to extraterritoriality.		3.1	\$2,279.28
12/3/2019	Barrett, Lucas B.	Continue to research relevant definitions [...]; draft email summarizing research.		1.7	\$722.50
12/3/2019	Bernstein, Michael L.	Coordinate regarding [...] call; attention to extraterritoriality arguments for motion to dismiss; review research regarding same; emails regarding issues for Singapore counsel.		1.8	\$1,828.35
12/3/2019	Condon, Brian K.	Further review of Trustee's adversary complaint against clients, and review background facts re airplane transactions in preparation for response and early meeting of counsel.		2.5	\$1,997.50
12/4/2019	Bernstein, Michael L.	Advice regarding motion to dismiss; various emails.		1.1	\$1,117.33
12/4/2019	Mijares-Shafai, Gerardo	Office conference with C. Malloy re revisions to motion to dismiss [...]; revise motion to dismiss.		7.5	\$4,462.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/4/2019	Malloy, Charles A.	Office conference with G. Mijares-Shafai regarding comments on motion to dismiss; e-mails with B. Condon regarding aircraft transaction documents [...]; e-mails with O. Ramallo regarding revisions [...]		2.3	\$1,739.95
12/4/2019	Condon, Brian K.	Review and analyze airplane contracts re extraterritoriality issue [...]; review of summary of [...] arguments from O. Ramallo; review of potential motion to dismiss arguments.		1.4	\$1,118.60
12/5/2019	Malloy, Charles A.	Revise motion to dismiss Trustee's complaint; conferences and e-mails with G. Mijares-Shafai and O. Ramallo regarding brief.		4.6	\$3,479.90
12/5/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; correspond with C. Malloy re same.		4.2	\$2,499.00
12/5/2019	Bernstein, Michael L.	Review recent 9th Circuit decision and consider potential use [...]; review draft [...] motion to dismiss brief; [...]		2.3	\$2,336.23
12/6/2019	Malloy, Charles A.	E-mail and telephone conference with G. Mijares-Shafai regarding Yuntian motion to dismiss; review draft summary of [...] and provide comments on same; attention to e-mails from M. Bernstein, B. Condon regarding issues raised [...]		2.9	\$2,193.85
12/6/2019	Mijares-Shafai, Gerardo	Review and summarize [...] motion to dismiss; correspond with M. Bernstein, B. Condon, O. Ramallo, and C. Malloy re same; conference with C. Malloy re same; revise motion to dismiss.		3.4	\$2,023.00
12/6/2019	Ramallo, Oscar	Email with team regarding Ponzi scheme issue in motion to dismiss.		0.2	\$147.05
12/6/2019	Bernstein, Michael L.	Attention to motion to dismiss; [...]; various emails.		2.4	\$2,437.80
12/6/2019	Mintz, Benjamin	Emails re motion to dismiss.		0.2	\$187.00
12/6/2019	Condon, Brian K.	Emails [...] re status conference issues and motion to dismiss; review and respond to email re briefing schedule; review of [...] draft motion to dismiss and G. Mijares-Shifai summary [...]; emails with M. Bernstein re motion and status conference; [...]		3	\$2,397.00
12/9/2019	Mijares-Shafai, Gerardo	Draft strategy considerations in connection with [...] motion to dismiss; review, analyze CAVIC docket for Trustee reply; review, analyze case law cited in Trustee reply to Jetcraft motion to dismiss; [...]	0.3	0.9	\$535.50
12/9/2019	Bernstein, Michael L.	[...] [A]ttention to motion to dismiss arguments; call with B. Condon regarding argument strategy.	0.8	1.7	\$1,726.78
12/9/2019	Mintz, Benjamin	Review [...] draft motions to dismiss.		2.3	\$2,150.50
12/9/2019	Ramallo, Oscar	Review Yuntian's motion to dismiss.		0.6	\$441.15
12/9/2019	Malloy, Charles A.	Telephone conference with M. Bernstein regarding motion to dismiss; e-mails regarding inclusion of [...] arguments; review correspondence from B. Condon regarding discussions [...]; review notices regarding Minsheng motion to dismiss and motion to approve compromise.		2.3	\$1,739.95
12/9/2019	Condon, Brian K.	Conference call [...] re preparation for status conference in adversary case, and re issues for motion to dismiss; prepare summary email to M. Bernstein re status conference and motion to dismiss issues; review Trustee's opposition to motion to dismiss in Jetcraft case and re arguments in CAVIC adversary case; emails with G. Mijares-Shifai re case status.		2.8	\$2,237.20
12/10/2019	Mijares-Shafai, Gerardo	Correspond with team re Yuntian's motion to dismiss; compile files of same; review and summarize key points [...]; research [...] case law; research retainment of investment by victim of alleged Ponzi scheme; correspond with O. Ramallo [...]		3.2	\$1,904.00
12/10/2019	Ramallo, Oscar	Draft fact section of motion to dismiss.		2.9	\$2,132.23
12/10/2019	Bernstein, Michael L.	Work on motion to dismiss and address various legal issues in connection therewith; prepare for Bankruptcy Court hearing and coordinate with co-defendants' counsel in connection therewith; address jurisdiction issues.		2.6	\$2,640.95

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/10/2019	Malloy, Charles A.	Read Minsheng motion to dismiss Trustee complaint; e-mails with G. Mijares-Shafai regarding motion to approve compromise; review article and e-mails to G. Mijares-Shafai regarding [...] motion to dismiss.		3	\$2,269.50
12/10/2019	Mintz, Benjamin	Emails, telephone conference with M. Bernstein, work on strategy for motion to dismiss and Trustee litigation.		1.5	\$1,402.50
12/10/2019	Condon, Brian K.	[...] review, edit and revision of draft motion to dismiss adversary complaint, emails with G. Mijares-Shifai and O. Ramallo with questions and issues regarding same; review emails from M. Bernstein and B. Mintz in preparation for status conference, and on issue of consent [...]; review of all documents in preparation for status conference in adversary case.		7.6	\$6,072.40
12/11/2019	Mijares-Shafai, Gerardo	Correspond with A&P team re ponzi scheme investor defense; research ponzi scheme investor exception; revise motion to dismiss with same.		2.6	\$1,547.00
12/11/2019	Ramallo, Oscar	Continue to draft fact section of motion to dismiss.		1.2	\$882.30
12/11/2019	Bernstein, Michael L.	Attention to motion to dismiss arguments; coordinate revisions to same; review Yuntian brief [...]; prepare for and participate telephonically in court hearing; confer and various emails with B. Condon.		2.5	\$2,539.38
12/11/2019	Mintz, Benjamin	Attention to complaint, motion to dismiss, emails re same, regarding motion to dismiss arguments, telephone conference with G. Mijares-Shafai.		2.5	\$2,337.50
12/11/2019	Malloy, Charles A.	Legal research and comments on draft motion to dismiss; e-mails and conference with G. Mijares-Shafai regarding further revisions to draft.		1.3	\$983.45
12/11/2019	Condon, Brian K.	Court appearance for status conference in adversary case before Judge Klein in Bankruptcy Court, and further review and preparation for same; meeting [...] re adversary litigation; telephone call and emails with M. Bernstein re status conference issues; review fact summary from O. Ramallo for motion to dismiss; further work on draft motion to dismiss, edit entire motion and research factual issues.		9.7	\$7,750.30
12/12/2019	Mijares-Shafai, Gerardo	Telephone conferences with M. Bernstein re B. Condon revisions to motion to dismiss; review same; correspond and office conference with C. Malloy re same; revise same; correspond with M. Bernstein re same.		3.5	\$2,082.50
12/12/2019	Barrett, Lucas B.	Draft email summarizing [...] research.		0.9	\$382.50
12/12/2019	Malloy, Charles A.	Attention to B. Condon's revisions to motion to dismiss; coordinate and confer with G. Mijares-Shafai and M. Bernstein on edits and further revisions in response to B. Condon comments; review revised motion from G. Mijares-Shafai and provide additional comments.		3.8	\$2,874.70
12/12/2019	Bernstein, Michael L.	Work on brief in support of motion to dismiss; coordinate revisions.		3	\$3,047.25
12/12/2019	Condon, Brian K.	Emails with team re status of motion to dismiss draft and certain legal issues.		0.3	\$239.70
12/13/2019	Barrett, Lucas B.	Research the legislative history [...]		1	\$425.00
12/13/2019	Ramallo, Oscar	Review revised motion to dismiss draft.		0.7	\$514.68
12/13/2019	Mijares-Shafai, Gerardo	Correspond with litigation team re [...] imputation issues; research same; conferences with M. Bernstein and B. Mintz re revisions to motion to dismiss.		5.1	\$3,034.50
12/13/2019	Bernstein, Michael L.	Work on brief in support of motion to dismiss adversary complaint; calls and emails regarding same.		7.4	\$7,516.55
12/13/2019	Malloy, Charles A.	E-mails regarding draft of motion to dismiss; coordinate with legal support for cite check; review draft text [...] for motion to dismiss; e-mail correspondence addressing questions and comments from M. Bernstein, B. Condon on draft motion.		2.2	\$1,664.30
12/13/2019	Mintz, Benjamin	Work on motion to dismiss, telephone conference with G. Mijares, review [...] Ponzi issues.		3.2	\$2,992.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/13/2019	Condon, Brian K.	Review of extraterritoriality and fact sections of brief; telephone call with M. Bernstein and email to team re strategy issues; work on [...] factual summary and revise introduction.		2.4	\$1,917.60
12/14/2019	Mijares-Shafai, Gerardo	Telephone conference with M. Bernstein, B. Condon, B. Mintz re revisions to motion to dismiss; review, revise same; correspond with C. Malloy re same.		2.9	\$1,725.50
12/14/2019	Mintz, Benjamin	Review and comment on motion to dismiss, call to discuss same.		5.7	\$5,329.50
12/14/2019	Bernstein, Michael L.	Work on motion to dismiss brief; call with litigation team regarding motion to dismiss brief revisions; follow up edits.		4.6	\$4,672.45
12/14/2019	Malloy, Charles A.	Review M. Bernstein's comments to motion to dismiss and prepare for call to review motion; conference call with team to review draft motion; revise and draft additional argument and legal discussion for motion to dismiss; telephone conference and e-mail with G. Mijares-Shafai regarding follow up.		5.8	\$4,387.70
12/14/2019	Ramallo, Oscar	Prepare for and participate in conference call with litigation team to revise motion to dismiss.		3.5	\$2,573.38
12/14/2019	Condon, Brian K.	Conference call with team re draft of brief, and strategy for editing, additional research, and fact issues; email to Singapore counsel re recharacterization claim; research [...].		4.2	\$3,355.80
12/15/2019	Mijares-Shafai, Gerardo	Revise motion to dismiss; compile [...] case law.		2.4	\$1,428.00
12/15/2019	Malloy, Charles A.	Draft additional argument and legal support for motion to dismiss; circulate summary of tasks and status for completion of motion to dismiss; review badges of fraud case law.		2.4	\$1,815.60
12/16/2019	Bernstein, Michael L.	Attention to recharacterization defense.		0.4	\$406.30
12/16/2019	Bernstein, Michael L.	Work on motion to dismiss brief; calls and emails regarding same.		5.3	\$5,383.48
12/16/2019	Mijares-Shafai, Gerardo	Review outstanding research and diligence inquiries for motion to dismiss; conference with M. Bernstein re same; research same; draft summaries of same for motion to dismiss; correspond with B. Condon, C. Malloy, and M. Bernstein re same.		6.8	\$4,046.00
12/16/2019	Ramallo, Oscar	Emails with team regarding source of [...] funds.		0.3	\$220.58
12/16/2019	Malloy, Charles A.	Review current draft of motion to dismiss and revise and circulate updated chart summarizing status of tasks and research; review e-mails from G. Mijares-Shafai, B. Condon, M. Bernstein on status of draft brief; add citation to brief regarding trustee prior admissions [...].		2.1	\$1,588.65
12/16/2019	Mintz, Benjamin	Calls with M. Bernstein, review and comment on motion to dismiss, emails re same.		4.3	\$4,020.50
12/16/2019	Condon, Brian K.	Multiple emails with team re analysis of issues for motion to dismiss; review comments of B. Mintz on brief; review and revise portions of brief.		4.4	\$3,515.60
12/17/2019	Mijares-Shafai, Gerardo	Research outstanding diligence inquiries for motion to dismiss; telephone conference with M. Bernstein and B. Condon re same.		3.4	\$2,023.00
12/17/2019	Bernstein, Michael L.	Work on brief in support of motion to dismiss; confer with litigators; [...]; follow up re HK and BVI law on recharacterization.		4.5	\$4,570.88
12/17/2019	Ramallo, Oscar	Conduct legal research on issues for motion to dismiss.		3.1	\$2,279.28
12/17/2019	Malloy, Charles A.	Update tracking of open research issues; review correspondence regarding recharacterization question; coordinate comparison of drafts of brief per B. Condon; various conferences with M. Bernstein and G. Mijares-Shafai regarding motion to dismiss.		2.8	\$2,118.20
12/17/2019	Mintz, Benjamin	Attention to motion to dismiss, emails re same.		1.4	\$1,309.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/17/2019	Condon, Brian K.	Review and incorporate comments [...] into brief on motion to dismiss; complete edit and revision of brief; email to team re open items needed for filing, additional research, and strategy issues; multiple emails with team re same; research manner of proof of foreign law and emails with team re same; email [...] re recharacterization under Singapore law; review order submitted by Trustee re status conference; review research from O. Ramallo re badges of fraud, and incorporate into brief.		8.5	\$6,791.50
12/18/2019	Mijares-Shafai, Gerardo	Research outstanding diligence for motion to dismiss; revise case and agreement citations; telephone conference with M. Bernstein re recharacterization; draft unpublished opinion declaration; research and summarize [...] analysis.		8.4	\$4,998.00
12/18/2019	Malloy, Charles A.	Telephone conference and office conferences with M. Bernstein to review edits to motion to dismiss; review of [...] agreements in connection with motion to dismiss; conference with G. Mijares-Shafai regarding [...] case law; review [...] case law and e-mails to O. Ramallo, G. Mijares-Shafai; review draft brief and edit citations to docket and incorporated documents; supervise additional edits to brief to add citations to case law; review amendments to section 547 and e-mail and telephone conference with B. Mintz.		6.4	\$4,841.60
12/18/2019	Mintz, Benjamin	Work on motion to dismiss, emails re same.		1.5	\$1,402.50
12/18/2019	Ramallo, Oscar	Draft B. Condon declaration; legal research regarding subsequent new value; legal research [...]; review and comment on draft of motion to dismiss.		3.2	\$2,352.80
12/18/2019	Bernstein, Michael L.	Work on brief in support of motion to dismiss adversary proceeding; calls and emails with litigation team regarding same; review recharacterization analysis under Hong Kong law; address Trustee's implicit recharacterization of aircraft lease transactions [...] for motion to dismiss.		6.8	\$6,907.10
12/18/2019	Grinstead, Dennis	Prepare unreported cases to attach to motion to dismiss.		1.2	\$448.80
12/18/2019	Condon, Brian K.	Further review and revisions to brief and supporting documents for motion to dismiss; review and respond to comments/questions from M. Bernstein on brief; multiple emails with M. Bernstein and team re legal, factual and strategy issues on brief; legal research re [...] defenses, and incorporate research from team to brief; review exhibits, and emails [...] ; further editing of entire brief [...].		5.5	\$4,394.50
12/19/2019	Malloy, Charles A.	Telephone conferences with M. Bernstein, B. Condon, G. Mijares-Shafai regarding revisions to motion to dismiss; review and revise sections of brief; attention to [...] case law and e-mails with G. Mijares-Shafai regarding same; further review and proofing of motion to dismiss and exhibits, including supervising citation and appendix references.		6.8	\$5,144.20
12/19/2019	Ramallo, Oscar	Revise declaration on motion to dismiss; review and comment on motion to dismiss; review [...] exhibits [...]; finalize declaration exhibits.		3.9	\$2,867.48
12/19/2019	Mijares-Shafai, Gerardo	Correspond with M. Bernstein and C. Malloy re motion to dismiss; review, revise [...] argument; revise motion to dismiss re Third Loan recharacterization matters; review, analyze motion to dismiss; finalize unpublished opinions pleading; correspond with team re same; draft and format table of contents; revise unpublished opinion supplement.		2.8	\$1,666.00
12/19/2019	Grinstead, Dennis	Check legal citations in motion to dismiss counts of Adversary Complaint.		4.5	\$1,683.00
12/19/2019	Bernstein, Michael L.	Work on brief in support of motion to dismiss; calls and emails regarding same.		5.8	\$5,891.35
12/19/2019	Mintz, Benjamin	Telephone conference M. Bernstein, review motion to dismiss.		1	\$935.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/19/2019	Condon, Brian K.	Review of evidence/agreements [...] supporting motion to dismiss; revise declaration re same; review and revise brief and address comments of M. Bernstein on brief; multiple emails with team re legal issues in brief; review research [...] re availability of recharacterization claims in bankruptcy proceedings; telephone call [...] re filing of exhibits [...]		5.2	\$4,154.80
12/20/2019	Mijares-Shafai, Gerardo	Review, confirm cite checks; review, analyze D. Grinstead comments; research [...] specific insolvent debtor; correspond with M. Bernstein and C. Malloy re same; correspond with filing team re unpublished opinions for motion to dismiss; review, analyze exhibits for same.		3	\$1,785.00
12/20/2019	Ramallo, Oscar	Revise motion to dismiss and related filings.		1.9	\$1,396.98
12/20/2019	Grinstead, Dennis	Prepare table of authorities for motion to dismiss causes of action; revise motion citations to conform to required format.		1.8	\$673.20
12/20/2019	Malloy, Charles A.	Review, revise and finalize motion to dismiss; coordinate exhibits and supporting declaration; e-mails regarding additional case law and telephone conference with G. Mijares-Shafai; review additional case law for brief; coordinate filing.		6.7	\$5,068.55
12/20/2019	Bernstein, Michael L.	Work on final revisions to brief in support of motion to dismiss; coordinate with litigation team regarding same.		4.1	\$4,164.58
12/20/2019	Condon, Brian K.	Further edits and final review of motion to dismiss, declaration, and exhibits for filing; multiple emails with team re research points and final edits to brief.		3	\$2,397.00
12/23/2019	Malloy, Charles A.	[...]; review documents from Singapore injunction proceeding.	0.9	1	\$756.50
1/3/2020	Bernstein, Michael L.	Review hearing notice; coordinate appearance at Bankruptcy Court hearing; communications with B. Condon regarding same; [...]	0.7	1.3	\$1,337.05
1/4/2020	Mijares-Shafai, Gerardo	Review, summarize docket; correspond with A&P team re same.		0.2	\$138.55
1/5/2020	Bernstein, Michael L.	Coordinate with B. Condon regarding upcoming continued status conference in adversary proceeding.		0.2	\$205.70
1/6/2020	Bernstein, Michael L.	Attention to court-ordered status conference; emails and call with B. Condon regarding same.		0.4	\$411.40
1/6/2020	Malloy, Charles A.	Attention to emails regarding tolling agreement between Trustee, Seagrim and Walter.		0.2	\$166.60
1/6/2020	Condon, Brian K.	Research and email to M. Bernstein re tolling agreement between Trustee and S&W; review docket for status hearing, and email with team re same.		0.4	\$351.90
1/7/2020	Mijares-Shafai, Gerardo	Correspond with A&P team re upcoming hearing dates.		0.1	\$69.28
1/7/2020	Malloy, Charles A.	Review B. Condon email regarding Bankruptcy Court status hearing; attention to filing by Trustee related to adversary case status reports.		0.4	\$333.20
1/7/2020	Bernstein, Michael L.	Confer with B. Condon regarding Bankruptcy Court status conference; address service of process issues and review legal analysis regarding same.		2.4	\$2,468.40
1/7/2020	Condon, Brian K.	Court appearance before Judge Klein on status conference re motions and related matters, scheduling, and briefing; telephone call and email to M. Bernstein and team re rulings and upcoming hearings.		2	\$1,759.50
1/8/2020	Bernstein, Michael L.	[...] identify legal and factual issues regarding adequacy of service and direct research and review of same; consider strategy [...]; various emails regarding same.		1.5	\$1,542.75
1/8/2020	Ramallo, Oscar	[...]; emails regarding procedures [...]; research regarding joining motions [...]		0.5	\$386.75
1/8/2020	Malloy, Charles A.	Attention to emails [...]; review federal rules research from O. Ramallo.		0.6	\$499.80
1/8/2020	Condon, Brian K.	Multiple emails with team [...], legal issues re proper service.		0.5	\$439.88
1/9/2020	Ramallo, Oscar	Conduct legal research concerning Hague service [...]; draft memo on research.		7.9	\$6,110.65
1/9/2020	Malloy, Charles A.	Attention to emails regarding service of process.		0.1	\$83.30

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/9/2020	Bernstein, Michael L.	Review and consider issues regarding Hague Convention Service [...]; emails regarding same.		1.8	\$1,851.30
1/10/2020	Bernstein, Michael L.	Review personal jurisdiction and service of process analysis [...]; various emails.		1	\$1,028.50
1/10/2020	Ramallo, Oscar	Legal research concerning service; draft memo concerning service; emails with team concerning [...] service.		4.9	\$3,790.15
1/10/2020	Condon, Brian K.	Review Hague Service Convention; outline service issues and emails with O. Ramallo and M. Bernstein re same.		0.4	\$351.90
1/13/2020	Ramallo, Oscar	Phone conference with M. Bernstein and B. Condon regarding strategy [...]; conduct legal research regarding personal jurisdiction.		2.5	\$1,933.75
1/13/2020	Malloy, Charles A.	Emails with B. Condon regarding [...] service; consideration of Trustee's alter ego theory.		0.4	\$333.20
1/13/2020	Bernstein, Michael L.	Further analysis of service of process issues; prepare for and participate in telephone conference with B. Condon and O. Ramallo regarding [...] strategy [...]		2.3	\$2,365.55
1/13/2020	Condon, Brian K.	Review email and research from O. Ramallo [...]; telephone conference with M. Bernstein and O. Ramallo re same and re personal jurisdiction [...]; review procedural strategy [...]; email with A. Ware re PRC law [...]; emails with D. Lin and J. Chung re [...] U.S. litigation.		3.2	\$2,815.20
1/14/2020	Mijares-Shafai, Gerardo	Telephone conference with C. Malloy re [...] considerations.		0.1	\$69.28
1/14/2020	Ramallo, Oscar	Conduct legal research on personal jurisdiction; draft email memo [...]; draft motion to dismiss claims against Mr. Li.		7	\$5,414.50
1/14/2020	Bernstein, Michael L.	Coordinate work on motion to dismiss claims against Mr. Li; confer with B. Condon regarding motion to dismiss arguments [...]; review research regarding same; various emails.		1.8	\$1,851.30
1/14/2020	Malloy, Charles A.	Email and telephone conference with G. Mijares-Shafai regarding [...]; voice messages and e-mail with B. Condon regarding motion to dismiss [...]; work on outline for motion.		1.2	\$999.60
1/14/2020	Condon, Brian K.	Review email from A. Ware and T. Gao re [...] service of process; email to C. Malloy re summary of [...] argument and issues; conference with M. Bernstein re strategy and procedure [...], and reply on pending motion to dismiss; review draft status conference order from Trustee; review issues for potential motion to dismiss [...], and emails with O. Ramallo re [...] strategy.		1.8	\$1,583.55
1/15/2020	Gao, Tereza S.	Communicate with A. Ware re service [...]; research on specific questions [...]		3	\$1,338.75
1/15/2020	Mijares-Shafai, Gerardo	Compile [...] research and case law; correspond with C. Malloy re same.		1.3	\$900.58
1/15/2020	Ramallo, Oscar	Draft motion to dismiss [...]; research regarding personal jurisdiction [...].		6.9	\$5,337.15
1/15/2020	Malloy, Charles A.	Review [...] materials from G. Mijares-Shafai; emails with B. Condon to coordinate drafting motion to dismiss [...]		1.4	\$1,166.20
1/15/2020	Ware, Anton A.	Supervise research re service of process [...]; prepare note to M. Bernstein re same.		1.4	\$1,166.20
1/15/2020	Bernstein, Michael L.	Attention to court filings; confer with B. Condon regarding case strategy; review revised scheduling order and emails regarding same.		0.9	\$925.65
1/15/2020	Condon, Brian K.	Conference and email with O. Ramallo re [...] legal issues re service [...]		0.3	\$263.93
1/16/2020	Malloy, Charles A.	Legal research [...] for motion to dismiss; [...]; review emails from O. Ramallo and B. Condon regarding motion to dismiss and related research; [...]	1	1.1	\$916.30
1/16/2020	Ramallo, Oscar	Conference with B. Condon regarding evidentiary issues [...]; legal research on personal jurisdiction [...]; draft motion to dismiss based on personal jurisdiction.		7.7	\$5,955.95
1/16/2020	Condon, Brian K.	Conference with O. Ramallo re motion to dismiss individual claims [...]; email with M. Bernstein re status of same; [...]; email with K. DiGalbo re corporate records.		1	\$879.75
1/17/2020	Bernstein, Michael L.	Review Trustee's court filings.		0.3	\$308.55
1/17/2020	Ramallo, Oscar	Continue to draft motion to dismiss based on service and lack of personal jurisdiction.		7.1	\$5,491.85
1/17/2020	Malloy, Charles A.	Legal research on [...] claim.		5.1	\$4,248.30

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/17/2020	Condon, Brian K.	Multiple emails with O. Ramallo and review of research on [...] personal jurisdiction and challenge to same.		0.6	\$527.85
1/20/2020	Bernstein, Michael L.	Follow up regarding motion to dismiss outline; [...]		0.3	\$308.55
1/21/2020	Ramallo, Oscar	Legal research regarding [...]; continue to draft motion to dismiss.		5.2	\$4,022.20
1/21/2020	Malloy, Charles A.	Legal research on [...] California and federal common law and regarding choice of law rules [...]; update working outline; emails with O. Ramallo and B. Condon [...]		5.3	\$4,414.90
1/21/2020	Bernstein, Michael L.	Coordinate regarding court hearing coverage; review research [...]; emails regarding same; coordinate preparation of outline of brief in support of [...] motion to dismiss; emails regarding same.		1.7	\$1,748.45
1/21/2020	Condon, Brian K.	Emails with team re [...] issues for jurisdictional motion and motion to dismiss individual claims; [...]	0.2	0.3	\$263.93
1/22/2020	Malloy, Charles A.	Continue legal research [...] and update working outline; coordinate regarding response to Trustee's opposition to motion to dismiss; [...]	1.6	3.2	\$2,665.60
1/22/2020	Bernstein, Michael L.	Review email memorandum [...]; emails regarding same; consider strategy for moving to dismiss [...] and discuss same with B. Condon; confer with B. Condon regarding approach and schedule for motion to dismiss claims against Mr. Li and reply brief in support of motion to dismiss entity defendants; follow-up emails with A&P litigation team; review [...]; review tentative ruling in Zetta Jet bankruptcy case and confer with A&P team regarding same.	0.6	2.3	\$2,365.55
1/22/2020	Condon, Brian K.	[...]; emails with team analyzing Trustee's opposition to motion to dismiss adversary claim; emails re service issues [...]; review summary email [...]	0.7	2.1	\$1,847.48
1/23/2020	Ramallo, Oscar	Continue to draft motion to dismiss for personal jurisdiction; research for personal jurisdiction; conference with B. Condon re strategy; draft email [...]		7.5	\$5,801.25
1/23/2020	Malloy, Charles A.	[...] draft outline for Li Qi motion to dismiss and review of relevant provisions of Trustee's complaint; further legal research for Li Qi motion to dismiss; review briefing schedule for pending motion to dismiss.	1	3.2	\$2,665.60
1/23/2020	Bernstein, Michael L.	Call and emails regarding [...] strategy; call with B. Mintz regarding Li motion to dismiss and entity reply brief; emails - B. Condon; [...]	0.5	1	\$1,028.50
1/23/2020	Mintz, Benjamin	Telephone conference with M. Bernstein re motion to dismiss, case status.		0.3	\$294.53
1/23/2020	Condon, Brian K.	Conference with O. Ramallo re legal arguments for [...] motion; research re Trustee's [...] proof of service; review and revise email [...] for motion to dismiss.		2.2	\$1,935.45
1/24/2020	Malloy, Charles A.	Review briefing and perform legal research on English law [...]; update outline [...]; attention to e-mails regarding notice of hearing on Trustee motion for discovery from escrow agent.		5.1	\$4,248.30
1/24/2020	Ramallo, Oscar	Continue to draft motion to dismiss; review documents [...]		3.9	\$3,016.65
1/24/2020	Bernstein, Michael L.	Review and revise draft memo [...]; attention to hearing notice; attention to escrow agent document production; review Bankruptcy Court filings.		0.9	\$925.65
1/24/2020	Condon, Brian K.	Further review of service and jurisdictional issues, telephone call with M. Bernstein re same, and review case law; email [...]; review docket entry re Trustee discovery from IATS (trust agent for plane transaction) and email team re same; email to K. DiGalbo re fact research [...]		1.4	\$1,231.65
1/27/2020	Condon, Brian K.	Review of draft brief [...], review of research issues, and conference with O. Ramallo re same; review of orders re Trustee's motion for document production by IATS (plane escrow) and emails with M. Bernstein and O. Ramallo re procedure for same.		1.7	\$1,495.58
1/27/2020	Mijares-Shafai, Gerardo	Review, analyze notice of withdrawal of IATS motion.		0.1	\$69.28
1/27/2020	Ramallo, Oscar	Email regarding discovery of documents produced by IATS.		0.6	\$464.10

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/27/2020	Malloy, Charles A.	Draft [...] legal argument sections related to motion to dismiss claims asserted against Mr. Li; review notice of withdrawal of motion by Trustee regarding escrow agent discovery and emails regarding same.		2.3	\$1,915.90
1/27/2020	Bernstein, Michael L.	Attention to discovery issues and review Bankruptcy Court filings regarding discovery issues between the Trustee and escrow agent; emails regarding same.		0.8	\$822.80
1/27/2020	Mintz, Benjamin	Review motion to dismiss, review Trustee response to Bombardier motion to dismiss.		3.2	\$3,141.60
1/28/2020	Bernstein, Michael L.	Address discovery issues; review summary of Trustee's opposition brief in Bombardier adversary proceeding [...]; emails regarding same.		0.8	\$822.80
1/28/2020	Malloy, Charles A.	Legal research on California, federal common law and BVI law [...]; summarize research for motion to dismiss outline.		2.8	\$2,332.40
1/28/2020	Condon, Brian K.	Emails with M. Bernstein and B. Mintz re strategy for discovery from Trustee, and review prior discovery efforts.		0.3	\$263.93
1/29/2020	Bernstein, Michael L.	Email correspondence regarding discovery strategy; review Bankruptcy Court filings.		0.7	\$719.95
1/29/2020	Malloy, Charles A.	Continue legal research on California, federal common law and BVI law [...] and related work on motion to dismiss outline; attention to email from Trustee counsel regarding scheduling and status in adversary proceedings; review proposed summary of status of adversary proceedings and emails with M. Bernstein and B. Condon.		3.1	\$2,582.30
1/29/2020	Mintz, Benjamin	Review Trustee briefs in other significant adversary proceedings, and consider arguments made therein.		3.5	\$3,436.13
1/30/2020	Mijares-Shafai, Gerardo	Correspond with research team re docket updates for key Zetta adversary proceedings; compile key dates in connection therewith.		0.5	\$346.38
1/30/2020	Malloy, Charles A.	Review Trustee's complaint and continue developing outline of [...] arguments; attention to filings by Bombardier; coordinate monitoring of related adversary cases with G. Mijares-Shafai.		3.4	\$2,832.20
1/30/2020	Bernstein, Michael L.	Review summary of court filings; review email exchange regarding Trustee's request to exceed page limitations; emails with B. Condon regarding same; review Trustee's litigation chart and co-defendants' comments re same; various emails.		0.9	\$925.65
1/30/2020	Condon, Brian K.	Review draft status update from Trustee; emails re Trustee request for leave to file combined opposition brief.		0.2	\$175.95
1/30/2020	Mintz, Benjamin	Review briefing.		2.3	\$2,258.03
1/31/2020	Mijares-Shafai, Gerardo	Review, analyze Jetcraft reply in support of motion to dismiss.		0.5	\$346.38
1/31/2020	Condon, Brian K.	Review status report filed by Trustee; review Trustee's opposition to motion to dismiss adversary claims.		1.2	\$1,055.70
1/31/2020	Malloy, Charles A.	Review Bombardier motion to dismiss reply; emails and coordination with G. Mijares-Shafai regarding tracking pleadings in related adversary cases; work on outline for [...] motion to dismiss; attention to filing of Trustee opposition to motion to dismiss.		3.7	\$3,082.10
1/31/2020	Bernstein, Michael L.	Emails regarding Trustee's court filings.		0.4	\$411.40
1/31/2020	Mintz, Benjamin	Review briefing preparing for Trustee response, review Trustee response.		3	\$2,945.25
1/31/2020	Ramallo, Oscar	Review opposition to motion to dismiss.		1.2	\$928.20
2/1/2020	Mijares-Shafai, Gerardo	Telephone conference with A&P attorneys re Trustee reply to motion to dismiss.		1.5	\$1,039.13
2/1/2020	Condon, Brian K.	Conference call with team re strategy for reply brief on motion to dismiss adversary claim, and further review of Trustee's opposition.		1.5	\$1,319.63
2/1/2020	Malloy, Charles A.	Review Trustee opposition to motion to dismiss; telephone conference with team to discuss Trustee opposition and approach to drafting reply.		3.3	\$2,748.90

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/1/2020	Mintz, Benjamin	Review Trustee's opposition brief to motion to dismiss, call re same with A&P attorneys.		3.5	\$3,436.13
2/1/2020	Ramallo, Oscar	Telephone conference regarding opposition to motion to dismiss.		1.8	\$1,392.30
2/1/2020	Bernstein, Michael L.	Preliminary review of Trustee's brief; emails - B. Mintz, C. Malloy regarding same.		0.8	\$822.80
2/2/2020	Bernstein, Michael L.	Address major issues in Trustee's opposition brief.		0.8	\$822.80
2/2/2020	Condon, Brian K.	Email to M. Bernstein re summary of reply brief strategy for motion to dismiss.		0.3	\$263.93
2/3/2020	Malloy, Charles A.	Draft outline and conduct legal research for reply to Trustee's objection to motion to dismiss.		4.5	\$3,748.50
2/3/2020	Mintz, Benjamin	Review Trustee opposition, research/consider defenses.		1.5	\$1,472.63
2/4/2020	Mintz, Benjamin	Review opposition brief, research re same, emails and telephone conferences with C. Malloy re same.		2	\$1,963.50
2/4/2020	Mijares-Shafai, Gerardo	Review, analyze outline for response to Trustee's reply to motion to dismiss; review Trustee reply.		0.3	\$207.83
2/4/2020	Malloy, Charles A.	Conduct legal research for reply to Trustee's objection to motion to dismiss; attention to local rules; update outline of brief; e-mails with B. Mintz and M. Bernstein regarding [...] argument; telephone conference with B. Mintz regarding [...] fraudulent intent.		6.1	\$5,081.30
2/4/2020	Bernstein, Michael L.	Coordinate preparation of reply brief; address [...] argument.		0.6	\$617.10
2/4/2020	Condon, Brian K.	[...]; review issue re [...] for reply brief, and multiple emails with team re same.		0.5	\$439.88
2/5/2020	Mijares-Shafai, Gerardo	Office conference with C. Malloy re research for reply to Trustee.		0.8	\$554.20
2/5/2020	Malloy, Charles A.	Conduct legal research for reply to Trustee's objection to motion to dismiss; conference with G. Mijares-Shafai to discuss outline of reply; review outline and circulate to B. Condon.		4.8	\$3,998.40
2/5/2020	Ramallo, Oscar	Outline of reply in support of motion to dismiss.		1.6	\$1,237.60
2/5/2020	Condon, Brian K.	Review outline of reply brief.		0.3	\$263.93
2/6/2020	Mijares-Shafai, Gerardo	Correspond with A&P team re motion to dismiss reply; telephone conference with A&P team re same; compile exhibits from B. Condon declaration to motion to dismiss.		1.2	\$831.30
2/6/2020	Bernstein, Michael L.	Review and analyze Trustee's opposition brief and compile notes regarding focus of reply arguments; review draft outline of reply brief and comments thereon; prepare for and participate in telephone conference regarding reply brief; follow-up call with B. Condon.		3.3	\$3,394.05
2/6/2020	Malloy, Charles A.	Legal research and drafting of reply to Trustee's opposition to motion to dismiss; conference call to discuss outline and approach to reply; review of relevant transaction documents for motion to dismiss reply; e-mail to B. Condon regarding case law and materials [...]		6.6	\$5,497.80
2/6/2020	Mintz, Benjamin	Review outline for response re motion to dismiss, note comments re same, call with B. Condon, M. Bernstein et al re response.		2.8	\$2,748.90
2/6/2020	Ramallo, Oscar	Draft reply in support of motion to dismiss.		4.9	\$3,790.15
2/6/2020	Condon, Brian K.	Review docket re changes to scheduled hearing dates; emails with team re status of reply draft.		0.2	\$175.95
2/7/2020	Malloy, Charles A.	E-mails with G. Mijares-Shafai regarding aircraft transaction documents.		0.3	\$249.90
2/7/2020	Ramallo, Oscar	Draft sections of reply in support of motion to dismiss.		2.9	\$2,243.15
2/7/2020	Bernstein, Michael L.	Coordinate preparation of reply brief in support of motion to dismiss entity defendants; address legal issues regarding recharacterization.		0.7	\$719.95
2/7/2020	Mintz, Benjamin	Telephone conference M. Bernstein, review Bombardier briefing.		1.5	\$1,472.63
2/9/2020	Malloy, Charles A.	Work on draft reply in support of motion to dismiss.		0.8	\$666.40
2/10/2020	Mijares-Shafai, Gerardo	Research, respond to Trustee's arguments on motion to dismiss.		2.2	\$1,524.05
2/10/2020	Ramallo, Oscar	Continue to draft reply to motion to dismiss.		6.9	\$5,337.15
2/10/2020	Mintz, Benjamin	Review Bombardier reply.		0.5	\$490.88

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/10/2020	Bernstein, Michael L.	Address legal issues in connection with reply brief in support of motion to dismiss; emails regarding same; correspondence regarding upcoming court hearings and coordinate participation in same.		0.8	\$822.80
2/10/2020	Malloy, Charles A.	Research and draft sections of reply to trustee's opposition to motion to dismiss; review adversary proceeding dockets regarding disposition of status conferences.		5.8	\$4,831.40
2/10/2020	Condon, Brian K.	Review docket re hearing dates and briefing schedules on all pending motions and status conferences; email team re same.		0.3	\$263.93
2/11/2020	Mijares-Shafai, Gerardo	Compile agreements/documents binder for C. Malloy; research, respond to Trustee response to motion to dismiss.		2.5	\$1,731.88
2/11/2020	Ramallo, Oscar	Continue to draft extraterritoriality reply.		8.9	\$6,884.15
2/11/2020	Bernstein, Michael L.	Coordinate preparation of reply brief in support of motion to dismiss; calls and emails regarding same; address selected legal issues.		1	\$1,028.50
2/11/2020	Malloy, Charles A.	Research and draft sections of reply to trustee's opposition to motion to dismiss; review aircraft financing transaction documents in connection with reply brief.		8.4	\$6,997.20
2/11/2020	Mintz, Benjamin	Emails re briefing issues, review Bombardier reply.		0.5	\$490.88
2/11/2020	Condon, Brian K.	Multiple emails with A&P team re status and strategy for reply brief; email [...]		0.6	\$527.85
2/12/2020	Mijares-Shafai, Gerardo	Research, respond to Trustee response to motion to dismiss; conference with M. Bernstein re Hong Kong recharacterization law.		5	\$3,463.75
2/12/2020	Mintz, Benjamin	Attention to reply briefing, emails re same.		0.7	\$687.23
2/12/2020	Bernstein, Michael L.	Calls and emails regarding legal arguments to make in reply brief in support of entities' motion to dismiss complaint; analyze legal issues and legal arguments in support of dismissal.		1.4	\$1,439.90
2/12/2020	Ramallo, Oscar	Review draft of motion to dismiss reply.		0.6	\$464.10
2/12/2020	Malloy, Charles A.	Review and revise sections of draft reply to motion to dismiss from G. Mijares-Shafai and O. Ramallo; incorporate various sections of draft and review and revise; additional legal research for reply; telephone calls and e-mails regarding Hong Kong recharacterization law; e-mails and telephone calls with G. Mijares-Shafai regarding [...] case law.		7.5	\$6,247.50
2/12/2020	Condon, Brian K.	Review draft sections of reply brief; emails and research re Hong Kong law [...]; draft insert for reply [...]; multiple emails with team re reply strategy; emails [...] re Hong Kong law research.		3.4	\$2,991.15
2/13/2020	Mijares-Shafai, Gerardo	Research, respond to Trustee response to motion to dismiss; telephone conference with C. Malloy re same; review, summarize [...] case.		2.3	\$1,593.33
2/13/2020	Bernstein, Michael L.	Coordinate work on reply brief in support of motion to dismiss claims against entity defendants; address recharacterization issue; telephone conference and emails with B. Mintz, B. Condon.		2.1	\$2,159.85
2/13/2020	Malloy, Charles A.	Revise and circulate draft reply brief; review case law regarding [...] foreign law; additional legal research; review additional legal research regarding [...] legal standard for [...] recharacterization.		6.2	\$5,164.60
2/13/2020	Mintz, Benjamin	Review issues re recharacterization for reply, emails re same, review and comment on reply.		4	\$3,927.00
2/13/2020	Condon, Brian K.	Work on reply brief [...] on recharacterization; telephone conference with M. Bernstein and C. Malloy, and review email from T. Gao re Hong Kong law issue; further review of draft reply brief.		2.9	\$2,551.28

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/14/2020	Gao, Tereza S.	Communicate with M. Bernstein, B. Condon and A. Ware re recharacterization [...] under Hong Kong law and next steps; conduct research; draft a summary of research and relevant analysis; communicate with [...]; strategize with M. Bernstein re [...] Hong Kong law.		9.8	\$4,373.25
2/14/2020	Mijares-Shafai, Gerardo	Telephone conference with C. Malloy re [...] research for reply to Trustee's response to Motion to Dismiss.		0.1	\$69.28
2/14/2020	Malloy, Charles A.	Telephone conference with counsel to Minsheng to discuss reply briefing; review additional case law and draft supplemental section for reply brief regarding recharacterization; attention to declarations regarding Singapore and Hong Kong law; telephone conference with G. Mijares-Shafai regarding drafting insert for reply brief.		5.1	\$4,248.30
2/14/2020	Mintz, Benjamin	Review and revise reply brief, emails re same, foreign declarations.		5.5	\$5,399.63
2/14/2020	Bernstein, Michael L.	Coordinate drafting of legal arguments in support of dismissal of claims against entity defendants; address Hong Kong and Singapore law issues; coordinate preparation of Hong Kong law declaration and [...]; various emails with Hong Kong counsel; confer with B. Mintz and B. Condon regarding recharacterization arguments; review documents regarding applicable law for lease recharacterization; coordinate outreach to Singapore counsel regarding [...]; prepare [...]; emails with A&P team re same; draft engagement letter for Hong Kong counsel; confer with C. Malloy regarding call with [...]; review summary of [...] call and consider additional arguments for motion to dismiss in light of same.		5.7	\$5,862.45
2/14/2020	Ware, Anton A.	Supervise research re Hong Kong [...] law issue.		0.5	\$416.50
2/14/2020	Condon, Brian K.	Further review and revise reply brief and address comments from team; review email [...] from T. Gao re Hong Kong law; conference call [...] for reply brief [...]		7	\$6,158.25
2/15/2020	Gao, Tereza S.	Communicate with M. Bernstein and B. Mintz re Hong Kong law declaration and engagement of H. Singh; engage with H. Singh for a declaration on Hong Kong law and [...]; discuss with H. Singh re [...]; revise [...]; communicate with M. Bernstein re [...]		4.3	\$1,918.88
2/15/2020	Bernstein, Michael L.	Work on Hong Kong and Singapore law [...]; calls and emails re same.		2.3	\$2,365.55
2/15/2020	Malloy, Charles A.	Attention to e-mails regarding declaration and materials from Singapore counsel and Hong Kong counsel; e-mails [...]; review legal research from G. Mijares-Shafai.		0.8	\$666.40
2/15/2020	Mintz, Benjamin	Emails re reply issues [...], call with M. Bernstein re same.		1.2	\$1,178.10
2/15/2020	Condon, Brian K.	Review and revise reply brief on motion to dismiss Trustee's complaint; review research on English law [...]; further legal research re case law on [...] fraudulent transfer.		3.2	\$2,815.20
2/15/2020	Mijares-Shafai, Gerardo	Research, summarize [...] precedent.		1.2	\$831.30
2/16/2020	Gao, Tereza S.	Review M. Bernstein's comments and conduct further research; communicate with H. Singh re [...]; strategize with H. Singh and M. Bernstein re [...]		3.7	\$1,651.13
2/16/2020	Malloy, Charles A.	Review comments and questions on reply brief and telephone conference with M. Bernstein, B. Mintz, B. Condon to discuss comments on reply brief.		1.2	\$999.60
2/16/2020	Mintz, Benjamin	Emails re reply issues, review briefing, review declarations, calls with M. Bernstein, B. Condon and C. Malloy re same.		2.7	\$2,650.73
2/16/2020	Condon, Brian K.	Further revisions to draft reply brief on motion to dismiss; review and respond to B. Mintz [...] comments on draft; review issue [...]; conference call with M. Bernstein and team re strategy [...]		9.5	\$8,357.63
2/16/2020	Mijares-Shafai, Gerardo	Telephone conference with A&P team re lease recharacterization issues.		1	\$692.75
2/16/2020	Bernstein, Michael L.	Identify legal issues in connection with preparation of reply brief in support of motion to dismiss claims against entity defendants; emails regarding Cavic briefs; [...]; prepare for and participate in call with A&P litigation team regarding reply brief.		2	\$2,057.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/17/2020	Gao, Tereza S.	Arrange H. Singh's execution of the declaration; [...]		0.9	\$401.63
2/17/2020	Mijares-Shafai, Gerardo	Review, research [...] precedent.		0.4	\$277.10
2/17/2020	Ramallo, Oscar	Review draft of motion to dismiss reply; comment on [...] section.		0.6	\$464.10
2/17/2020	Mintz, Benjamin	Emails re issues for briefing, attention to reply briefing.		1	\$981.75
2/17/2020	Condon, Brian K.	Further revision of draft reply brief, and additional legal research for same; emails to team re follow up research issues and Singapore declaration; review bankruptcy claims and other filings [...]		5.5	\$4,838.63
2/17/2020	Bernstein, Michael L.	Coordinate revisions to reply brief in support of motion to dismiss entity defendants; emails re legal citations; [...]; review statement [...]; emails re same.		2.1	\$2,159.85
2/17/2020	Malloy, Charles A.	Review e-mails [...]; e-mails with B. Condon and B. Mintz discussing [...] aircraft transactions.		1.1	\$916.30
2/18/2020	Bernstein, Michael L.	Work on reply brief in support of motion to dismiss; confer with C. Malloy, B. Condon regarding same; various emails.		7.7	\$7,919.45
2/18/2020	Mijares-Shafai, Gerardo	Research [...] precedent; correspond with C. Malloy re same.		1.9	\$1,316.23
2/18/2020	Malloy, Charles A.	Additional legal research to address issues identified by B. Condon for reply brief; draft inserts for reply brief summarizing additional research; telephone conference and e-mail with G. Mijares-Shafai regarding research [...]; conference with M. Bernstein in connection with draft reply; research various fact and legal issues in response to questions from M. Bernstein, B. Condon.		5.8	\$4,831.40
2/18/2020	Mintz, Benjamin	Work on reply briefing.		1	\$981.75
2/18/2020	Ramallo, Oscar	Review draft of motion to dismiss reply.		0.8	\$618.80
2/18/2020	Condon, Brian K.	Email Singapore counsel [...]; review Singapore legal authorities [...]; [...]; telephone conference [...]; revise reply brief and address B. Mintz comments.		3.4	\$2,991.15
2/19/2020	Malloy, Charles A.	Follow up with B. Condon, G. Mijares-Shafai on research to supplement reply; e-mails and review of docket related to Singapore injunction question.		1.1	\$916.30
2/19/2020	Mintz, Benjamin	Telephone conference with M. Bernstein, review reply, call with B. Condon and M. Bernstein.		4.3	\$4,221.53
2/19/2020	Bernstein, Michael L.	Work on reply brief; attention to Singapore declaration; calls and emails with B. Mintz, B. Condon.		3.7	\$3,805.45
2/19/2020	Condon, Brian K.	Review and revise full draft of reply brief on motion to dismiss; telephone conference with B. Mintz and M. Bernstein re arguments and revisions; work on legal inserts from C. Malloy; further emails [...]; telephone conference with M. Bernstein re same.		5.7	\$5,014.58
2/20/2020	Mijares-Shafai, Gerardo	Correspond with A&P team re inclusion of citations to complaints [...]		0.1	\$69.28
2/20/2020	Condon, Brian K.	Further review and revise reply brief on motion to dismiss; conference with M. Bernstein and B. Mintz [...]; conference with O. Ramallo re filing of reply.		2.4	\$2,111.40
2/20/2020	Bernstein, Michael L.	Work on reply brief in support of motion to dismiss entity defendants; confer with B. Mintz and B. Condon regarding same; [...]; [...]		5.2	\$5,348.20
2/20/2020	Grinstead, Dennis	Check legal citations in reply brief to motion to dismiss counts in adversary complaint.		6.6	\$2,580.60
2/20/2020	Mintz, Benjamin	Work on reply, review [...], emails [...], call with M. Bernstein and B. Condon.		2.8	\$2,748.90
2/20/2020	Malloy, Charles A.	Coordinate cite check on reply brief and office conference with D. Grinstead; attention to declarations in support of reply; e-mails with B. Condon regarding revisions to reply; [...]; [...]; review additional authority to be cited in brief.	0.5	4.3	\$3,581.90
2/21/2020	Condon, Brian K.	Final review and revision of reply brief on motion to dismiss; review and revise declaration, exhibits [...]; prepare reply and documents for filing; review of Jones Day/Minsheng reply brief on motion to dismiss.		4.5	\$3,958.88
2/21/2020	Ramallo, Oscar	Revise unpublished opinion filing; review and revise reply; revise declaration.		2.1	\$1,624.35

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/21/2020	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; prepare Appendix of Unpublished Opinions in support of Reply brief.		1.7	\$563.55
2/21/2020	Mintz, Benjamin	Review Yuntian reply, work on reply.		0.8	\$785.40
2/21/2020	Malloy, Charles A.	Final review and revisions to reply brief, proof citations; coordinate finalizing brief for filing.		5.1	\$4,248.30
2/21/2020	Bernstein, Michael L.	Attention to final revisions to reply brief in support of motion to dismiss.		0.5	\$514.25
2/24/2020	Ramallo, Oscar	Review Trustee motion for service; conference with B. Condon re motion for service; legal research on motion for service.		4.4	\$3,403.40
2/24/2020	Malloy, Charles A.	Attention to Trustee's motion for alternative service; emails with M. Bernstein regarding as-filed Yuntian and UL reply briefs.		1.2	\$999.60
2/24/2020	Bernstein, Michael L.	Review Trustee's substitute service motion and emails re same; confer with B. Mintz, B. Condon regarding motion to dismiss hearing and related issues; review co-defendants' reply brief on motion to dismiss; brief conference with B. Condon re same.		1.7	\$1,748.45
2/24/2020	Mintz, Benjamin	Follow up re reply.		0.2	\$196.35
2/24/2020	Condon, Brian K.	Review Trustee's motion for alternate service on Mr. Li, and declarations supporting service efforts; conference with O. Ramallo re research issues [...]; [...]; email to A. Ware re [...] service method [...].		2.6	\$2,287.35
2/25/2020	Malloy, Charles A.	Attention to local bankruptcy rule provisions regarding notice and objection deadlines related to Trustee motion for alternative service and emails with B. Condon; further review of Trustee's motion.		0.9	\$749.70
2/25/2020	Ramallo, Oscar	Phone conference [...]; conduct legal research on motion to serve.		7.8	\$6,033.30
2/25/2020	Bernstein, Michael L.	Review substitute service motion; [...]; consider response strategies; confer with A&P litigators re same; review preliminary research; follow up re scheduling and response deadline; consider approach for motion to dismiss hearing.		2.9	\$2,982.65
2/25/2020	Mintz, Benjamin	Review Trustee motion re service, telephone conference with M. Bernstein re same.		0.5	\$490.88
2/25/2020	Condon, Brian K.	Review email from A. Ware re Chinese law [...]; [...]		1	\$879.75
2/26/2020	Ware, Anton A.	Respond to queries [...] re Hague Convention service [...]		0.5	\$416.50
2/26/2020	Ramallo, Oscar	Email regarding [...] Hague service methods; telephone call [...] regarding Hague service; email regarding Hague service; legal research regarding Hague service.		1.2	\$928.20
2/26/2020	Condon, Brian K.	Review emails re strategies for opposing alternative service [...]; review docket re hearing on motion.		0.4	\$351.90
2/26/2020	Malloy, Charles A.	Review amended hearing notice filed by Trustee and e-mails with M. Bernstein, B. Condon; review local rules on objection deadlines and hearing notices and further emails.		0.9	\$749.70
2/26/2020	Bernstein, Michael L.	Attention to "alternative service" motion filed by Bankruptcy Trustee and bases for opposing same; review research regarding same.		2.5	\$2,571.25
2/27/2020	Bernstein, Michael L.	Review preliminary research regarding alternative service of process in connection with Trustee's Bankruptcy Court motion; emails with O. Ramallo and B. Condon regarding alternative service motion; [...]; follow-up call with O. Ramallo and B. Condon regarding strategy for opposition to alternative service motion.		1.4	\$1,439.90
2/27/2020	Malloy, Charles A.	Further review of court notices regarding Trustee's alternative service motion and objection deadline.		0.6	\$499.80
2/27/2020	Ramallo, Oscar	Legal research for Hague service; [...]; internal phone conference on service motion; draft service motion.		7.1	\$5,491.85
2/27/2020	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; prepare binder of briefs and declarations regarding Motion for Alternative service.		1	\$331.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/27/2020	Condon, Brian K.	Emails with M. Bernstein re objection to alternative service motion; telephone call with O. Ramallo re research for same; [...]		1	\$879.75
2/28/2020	Ramallo, Oscar	Continue to draft opposition to service motion.		8.2	\$6,342.70
2/28/2020	Bernstein, Michael L.	Attention to Trustee's adversary proceeding deadlines charts; email to Trustee's counsel regarding same; [...]		0.4	\$411.40
2/28/2020	Malloy, Charles A.	Review adversary proceeding status chart circulated by Trustee's counsel; emails with M. Bernstein, O. Ramallo regarding comments on chart; review as-filed version of Trustee's status chart.		0.8	\$666.40
3/2/2020	Malloy, Charles A.	Review Yuntian reply to opposition to motion to dismiss; [...]; e-mail with B. Condon regarding UL entities and Trustee's alternative service motion.	0.3	2.5	\$2,082.50
3/2/2020	Bernstein, Michael L.	Coordinate with non-US counsel; review bankruptcy case docket and docket from Trustee's other adversary proceedings.		0.5	\$514.25
3/3/2020	Bernstein, Michael L.	Attention to service objection; [...]		0.4	\$411.40
3/4/2020	Ramallo, Oscar	Continue to draft opposition to Trustee's alternative service motion.		7.6	\$5,878.60
3/4/2020	Malloy, Charles A.	[...] attention to filing of stipulation with EDC in Yuntian matter; further consideration of issues raised by Trustee's alternative service motion.	0.3	0.8	\$666.40
3/5/2020	Malloy, Charles A.	Review CAVIC motion to dismiss reply; [...] attention [...] to EDC extension in Yuntian case.	0.5	1.1	\$916.30
3/5/2020	Ramallo, Oscar	Draft opposition to Trustee's alternative service motion.		7.8	\$6,033.30
3/5/2020	Bernstein, Michael L.	Address issues in connection with opposition to motion for approval of substitute service; emails regarding same.		0.6	\$617.10
3/6/2020	Ramallo, Oscar	Continue to draft opposition to Trustee's motion regarding alternative service.		7.9	\$6,110.65
3/6/2020	Malloy, Charles A.	Review filings and email with B. Condon regarding possible discovery issues and review of Roselius declaration materials; attention to Roselius declaration.		1.8	\$1,499.40
3/6/2020	Bernstein, Michael L.	Email correspondence regarding objection to alternative service motion; review various court filings.		0.6	\$617.10
3/9/2020	Bernstein, Michael L.	Call with B. Condon; review Trustee's litigation schedule and email correspondence regarding same; begin review of objection to alternative service motion; call with A&P litigation partner [...]		2.1	\$2,159.85
3/9/2020	Malloy, Charles A.	[...]; review Trustee's proposed status update to be filed with court.	0.4	0.4	\$333.20
3/9/2020	Condon, Brian K.	Preparation for upcoming status conference, review reports and pending matters re same; review docket [...]	0.5	0.9	\$791.78
3/10/2020	Bernstein, Michael L.	Review and comment on draft brief in opposition to motion for substitute service on Mr. Li; telephone conference with B. Condon regarding same; various emails to B. Condon and O. Ramallo regarding legal issues and arguments.		3.7	\$3,805.45
3/10/2020	Condon, Brian K.	Telephone conference with M. Bernstein re strategy and revisions to opposition to Trustee's motion for alternative service; multiple emails with O. Ramallo re follow up questions on draft opposition; further email with M. Bernstein re [...] revised opposition.		2.5	\$2,199.38
3/11/2020	Bernstein, Michael L.	Call with B. Condon; participate by telephone in court hearing on contested motions to dismiss in Jetcraft and Cavic adversary cases, raising issues that overlap in our adversary proceeding, and participate in status conference in our adversary case; address issues in alternative service motion and emails with litigators regarding same.		5.8	\$5,965.30
3/11/2020	Malloy, Charles A.	Attention to e-mails regarding schedule for motions and objections in Zetta Jet case; review updated schedule for motion practice.		0.7	\$583.10

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
3/11/2020	Condon, Brian K.	Review materials in preparation for status conference; court appearance before Judge Klein for status conference on King v. Yuntian matter, and hearing/argument on motion to dismiss adversary claims in King v. Jetcraft case; conferences with M. Bernstein re [...] motion to dismiss in King v. Yuntian.		6.8	\$5,982.30
3/12/2020	Malloy, Charles A.	Review M. Bernstein summary of hearing [...]; obtain copies of tentative rulings on Jetcraft, Bombardier and FK motions; initial review of tentative and final rulings; attention to other filings in adversary cases.		2.1	\$1,749.30
3/12/2020	Condon, Brian K.	Initial review of Jetcraft rulings on motions to dismiss.		0.3	\$263.93
3/12/2020	Bernstein, Michael L.	Telephone conference with B. Mintz regarding court hearing on adversary proceeding motions to dismiss; email to B. Condon; begin review of court decisions.		1	\$1,028.50
3/12/2020	Mintz, Benjamin	Telephone conference with M. Bernstein re Cavic hearing, case strategy, review email re same.		0.3	\$294.53
3/13/2020	Condon, Brian K.	Conference with M. Bernstein re follow up on Jetcraft hearing and [...] motion to dismiss in Yuntian case; email with C. Malloy re same.		0.4	\$351.90
3/13/2020	Bernstein, Michael L.	Confer with B. Condon; emails: C Malloy, B Mintz.		0.7	\$719.95
3/13/2020	Malloy, Charles A.	E-mails with M. Bernstein and B. Condon regarding review of court's motion to dismiss rulings in related adversary proceedings; review dockets in other adversary proceedings and begin review of Jetcraft, Fasal-Karim and Bombardier rulings; attention to supplementing documents submitted by declaration.		1.7	\$1,416.10
3/16/2020	Bernstein, Michael L.	Review court filings by Trustee's counsel.		0.1	\$102.85
3/16/2020	Malloy, Charles A.	Review court rulings on Bombardier, Jetcraft and Fasal-Karim motions to dismiss; draft outline of summary memorandum; attention to notices filed on court docket.		6.5	\$5,414.50
3/17/2020	Malloy, Charles A.	Review court rulings and draft memorandum summarizing same.		7.2	\$5,997.60
3/17/2020	Bernstein, Michael L.	Review summary of court decisions in three adversary proceedings and consider potential impact on defense in Universal Leader/Yuntian adversary proceeding; follow up with B. Condon regarding pending issues.		1.4	\$1,439.90
3/17/2020	Condon, Brian K.	Review and revise opposition brief to Trustee's motion for alternate service.		2.6	\$2,287.35
3/18/2020	Malloy, Charles A.	Review EDC motion to dismiss; attention to request for judicial notice and supplementing declarations in connection with motion to dismiss; prepare list of documents for request for judicial notice; review pleadings and prepare schedule of citations to documents incorporated by reference; telephone conference with B. Condon regarding judicial notice and incorporation by reference issues; e-mails with B. Condon and M. Bernstein regarding same.		6.1	\$5,081.30
3/18/2020	Mintz, Benjamin	Review memo summarizing court decision in Cavic adversary.		0.4	\$392.70
3/18/2020	Condon, Brian K.	Further review and revise opposition to Trustee's motion for alternate service; review notes from O. Ramallo and M. Bernstein re revisions.		3.4	\$2,991.15
3/18/2020	Condon, Brian K.	Work on supplemental evidentiary submissions for motion to dismiss; conference call with team re strategy; review of memos from C. Malloy re [...]; draft memo re summary of issues and strategy; review [...]; review court ruling on Bombardier motion.		3.8	\$3,343.05
3/18/2020	Bernstein, Michael L.	Attention to summary of Bankruptcy Court rulings in Bombardier adversary case and consider rulings of relevance in the Yuntian/Universal adversary proceeding; formulate strategy [...] and coordinate with A&P team re same.		2.8	\$2,879.80
3/19/2020	Mintz, Benjamin	Telephone conference with M. Bernstein re supplemental submissions, call with B. Condon and M. Bernstein re same.		0.5	\$490.88

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
3/19/2020	Mijares-Shafai, Gerardo	Telephone conference with A&P team re filing of Request for Judicial Notice pleading and additional documents.		0.5	\$346.38
3/19/2020	Bernstein, Michael L.	Review memorandum and related materials from B. Condon and C. Malloy regarding Requests for Judicial Notice filing and supplemental declaration attaching relevant transaction documents; confer with B. Mintz regarding same; prepare for and participate in conference call [...]; various emails regarding same; [...]		2.4	\$2,468.40
3/19/2020	Malloy, Charles A.	E-mails with M. Bernstein, B. Condon regarding Request for Judicial Notice and incorporation by reference of documents for Motion to Dismiss; review previous draft Request for Judicial Notice and documents to be included in supplemental submission; call with team to discuss approach to Request for Judicial Notice and supplement to declaration.		3.6	\$2,998.80
3/19/2020	Condon, Brian K.	Telephone call with M. Bernstein and C. Malloy re supplemental filings on Motion to Dismiss; further revise opposition to Trustee's motion for alternate service; draft supplemental declaration and Request for Judicial Notice in support of pending motion to dismiss, per court's Bombardier ruling.		5.4	\$4,750.65
3/19/2020	Ramallo, Oscar	Telephone conference with team regarding motion to dismiss supplement.		0.8	\$618.80
3/19/2020	Ramallo, Oscar	Conduct legal research on Hague Convention for alternative service opposition.		2.1	\$1,624.35
3/20/2020	Bernstein, Michael L.	Attention to Request for Judicial Notice and supplemental documentation declaration; emails regarding same and coordination with Jones Day.		1.4	\$1,439.90
3/20/2020	Malloy, Charles A.	Work on proofing and finalizing draft request for judicial notice related to motion to dismiss; telephone conference with B. Condon [...]; e-mails regarding coordination with Yuntian on supplemental filings related to motions to dismiss; [...]	0.8	3.5	\$2,915.50
3/20/2020	Condon, Brian K.	Multiple calls and emails with Court Clerk and V. Apodaca re submission of replacement document for Dkt 45 (declaration supporting motion to dismiss); [...]; email with M. Bernstein re strategy for same.		1.6	\$1,407.60
3/20/2020	Ramallo, Oscar	Correspond regarding supplemental filing.		0.3	\$232.05
3/22/2020	Malloy, Charles A.	Review documents to be submitted with Condon supplemental declaration and e-mails to B. Condon, O. Ramallo regarding same.		1.2	\$999.60
3/22/2020	Ramallo, Oscar	Redact documents for motion to dismiss supplemental filing.		0.3	\$232.05
3/23/2020	Bernstein, Michael L.	Work on alternative service brief; emails regarding same; review and comment on draft Request for Judicial Notice; review supplemental Condon declaration; review Jones Day's Request for Judicial Notice for Yuntian; [...]	0.3	4.9	\$5,039.65
3/23/2020	Malloy, Charles A.	Revise and finalize Request for Judicial Notice and declaration materials for filing and delivery to court; coordinate filing, delivery of judge's copy, and service; draft and revise cover letter to court for judge's copy.		3.9	\$3,248.70
3/23/2020	Ramallo, Oscar	Revise opposition to alternate service motion.		2.2	\$1,701.70
3/23/2020	Condon, Brian K.	Emails with court clerk re submission of replacement filings for Dkt 45; review of replacement filing; review and finalize supplemental declaration and Request for Judicial Notice for Motion to Dismiss, and prepare for filing; review of exhibits to declaration; emails with team re opposition to motion for alternate service.		1.8	\$1,583.55
3/24/2020	Bernstein, Michael L.	Work on alternative service motion; call regarding same; review B. Mintz comments.		1.1	\$1,131.35
3/24/2020	Malloy, Charles A.	Emails with B. Condon; review additional materials filed by Yuntian, Element.		0.7	\$583.10
3/24/2020	Mintz, Benjamin	Review and comment on draft response to alternate service request.		1.5	\$1,472.63
3/24/2020	Ramallo, Oscar	Telephone conference with M. Bernstein and B. Condon regarding alternative service motion.		1	\$773.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
3/24/2020	Ramallo, Oscar	Revise alternate service opposition.		0.6	\$464.10
3/24/2020	Condon, Brian K.	Conference call with M. Bernstein and O. Ramallo re strategy and edits on brief re alternate service motion, and evidentiary issues; review draft Request for Judicial Notice.		1.1	\$967.73
3/25/2020	Mintz, Benjamin	Telephone conference regarding service motion, review edits to motion.		0.6	\$589.05
3/25/2020	Bernstein, Michael L.	Prepare for and participate in telephone conference regarding final revisions to brief in opposition to motion for alternative service.		0.8	\$822.80
3/25/2020	Ramallo, Oscar	Conference with team regarding opposition to alternate service motion.		0.6	\$464.10
3/25/2020	Ramallo, Oscar	Revise alternate service opposition.		0.5	\$386.75
3/25/2020	Condon, Brian K.	Follow up call with M. Bernstein and O. Ramallo re issues on opposition to alternate service motion; further revise draft opposition.		0.9	\$791.78
3/26/2020	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; retrieve exhibits to Request for Judicial Notice; cite check Opposition to Motion for Alternative Service.		2.5	\$828.75
3/26/2020	Ramallo, Oscar	Revise alternate service opposition.		0.9	\$696.15
3/27/2020	Bernstein, Michael L.	Address strategic issues regarding opposition to alternative service motion.		0.4	\$411.40
3/27/2020	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; prepare unpublished opinions index and assemble opinions in support of Opposition to Motion for Alternative service; cite-check opposition brief.		5.2	\$1,723.80
3/27/2020	Ramallo, Oscar	Revise alternative service opposition and Request for Judicial Notice.		2.1	\$1,624.35
3/27/2020	Condon, Brian K.	Review of exhibits for alternate service motion; emails with M. Bernstein and O. Ramallo re same.		0.5	\$439.88
3/29/2020	Bernstein, Michael L.	Review revised draft of brief in opposition to motion for alternative service; email comments re same.		0.6	\$617.10
3/29/2020	Condon, Brian K.	Review additional revisions to brief in opposition to motion for alternate service.		0.2	\$175.95
3/30/2020	Bernstein, Michael L.	[...] [I]dentify issues to raise in connection with finalizing our objection to the Trustee's alternative service motion; emails re same.		0.7	\$719.95
3/30/2020	Mintz, Benjamin	Attention to alternative service response and emails re same.		0.2	\$196.35
3/30/2020	Condon, Brian K.	Review [...] alternate service motion.		0.2	\$175.95
3/30/2020	Ramallo, Oscar	Review [...] and revise A&P's opposition.		1.5	\$1,160.25
3/31/2020	Malloy, Charles A.	Review draft status chart from Chapter 7 Trustee counsel and review of relevant local bankruptcy rules; e-mails with M. Bernstein, B. Condon regarding same; review as-filed version of chart.		0.8	\$666.40
3/31/2020	Condon, Brian K.	Review draft status report; email with J. Torosian re same; review additional cites for alternative service motion [...], and emails with team re same.		0.7	\$615.83
3/31/2020	Bernstein, Michael L.	[...] [C]oordinate finalizing our alternative service brief; review and comment on Trustee's draft litigation report to Bankruptcy Court.		1	\$1,028.50
4/1/2020	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; revise appendix of unpublished opinions in support of Opposition to Motion for Alternative Service.		1.5	\$497.25
4/1/2020	Mintz, Benjamin	Review Minsheng objection re service.		0.2	\$196.35
4/1/2020	Bernstein, Michael L.	Work on finalizing brief in opposition to Trustee's motion for alternative service and request for judicial notice; emails with O. Ramallo and B. Condon regarding same; review correspondence.		1.2	\$1,234.20
4/1/2020	Malloy, Charles A.	[...] [A]ttention to filings related to alternative service motion.	0.6	0.6	\$499.80
4/1/2020	Ramallo, Oscar	Finalize alternative service opposition for filing.		3.9	\$3,016.65

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
4/1/2020	Condon, Brian K.	Final review and preparation of alternative service opposition for filing; emails with team re same and re service; review opposition by Jones Day to alternative service motion.		0.5	\$439.88
4/2/2020	Bernstein, Michael L.	Review court filings; review California Supreme Court decision [...]; emails regarding same.		0.8	\$822.80
4/2/2020	Condon, Brian K.	Review amended proof of service for opposition filing.		0.1	\$87.98
4/2/2020	Condon, Brian K.	Review recent authority [...]		0.2	\$175.95
4/3/2020	Malloy, Charles A.	Review filed Yuntian and Universal oppositions to Trustee's alternative service motion.		2.1	\$1,749.30
4/3/2020	Bernstein, Michael L.	Review court filings.		0.4	\$411.40
4/6/2020	Malloy, Charles A.	Attention to court calendar and hearing schedule for Trustee's alternative service motion.		0.5	\$416.50
4/7/2020	Malloy, Charles A.	Review prior [...] research related to Trustee's complaint.		0.3	\$249.90
4/9/2020	Condon, Brian K.	Conference with M. Bernstein re case status.		0.1	\$87.98
4/9/2020	Malloy, Charles A.	Review notice of hearing filed by clerk and related e-mails.		0.2	\$166.60
4/9/2020	Bernstein, Michael L.	Confer with B. Condon regarding upcoming hearings and other matters in Trustee litigation.		0.4	\$411.40
4/9/2020	Ramallo, Oscar	Email regarding alternative service motion hearing.		0.1	\$77.35
4/14/2020	Malloy, Charles A.	Review outline of issues for Li Qi motion to dismiss [...] and perform legal research [...]		4.2	\$3,498.60
4/14/2020	Bernstein, Michael L.	Review status of pending adversary cases, and upcoming dates and deadlines.		0.3	\$308.55
4/15/2020	Malloy, Charles A.	Continue legal research on applicable choice of law provisions [...]		3.7	\$3,082.10
4/15/2020	Bernstein, Michael L.	Review Trustee's reply brief in support of alternative service; emails regarding same; [...]		0.9	\$925.65
4/15/2020	Ramallo, Oscar	Review Trustee's reply in support of motion for service.		0.5	\$386.75
4/15/2020	Condon, Brian K.	Review Trustee's reply brief on motion for alternative service, and review emails from O. Ramallo re analysis of same.		0.4	\$351.90
4/16/2020	Mintz, Benjamin	Review reply re alternate service.		0.2	\$196.35
4/16/2020	Bernstein, Michael L.	Analysis of Trustee's reply brief in support of his motion for alternative service, and detailed notes regarding responsive arguments and questions.		2	\$2,057.00
4/16/2020	Malloy, Charles A.	Review Trustee's reply to oppositions to motion to authorize alternative service and supporting materials.		1.8	\$1,499.40
4/20/2020	Bernstein, Michael L.	Correspondence with B. Condon [...]		0.3	\$308.55
4/20/2020	Malloy, Charles A.	Attention to filings related to extension of briefing schedule for Export Development Canada motion to dismiss opposition and reply.		0.4	\$333.20
4/21/2020	Malloy, Charles A.	[...] further review of outline for motion to dismiss [...]	0.8	0.6	\$499.80
4/21/2020	Condon, Brian K.	Review EDC motion to dismiss and briefing for overlapping and relevant law; email summary of same to M. Bernstein; [...]	1.5	1.6	\$1,407.60
4/29/2020	Malloy, Charles A.	Review Trustee's draft adversary proceeding status report.		0.1	\$83.30
4/29/2020	Bernstein, Michael L.	Review Trustee's periodic report; various emails.		0.4	\$411.40
5/5/2020	Malloy, Charles A.	Review Trustee's opposition to requests for judicial notice and e-mails regarding same.		0.7	\$583.10
5/5/2020	Bernstein, Michael L.	Review RJN from Trustee; emails re same; review Trustee's objection to RJNs we filed in support of motion to dismiss, and consider responsive arguments; emails with litigation team re same.		0.9	\$925.65
5/5/2020	Ramallo, Oscar	Phone conference with B. Condon regarding objection to request for judicial notice on motion to dismiss.		0.3	\$232.05
5/5/2020	Ramallo, Oscar	Draft reply to objections to request for judicial notice.		3.2	\$2,475.20
5/5/2020	Condon, Brian K.	Review of Trustee's objections to our request for judicial notice on motion to dismiss; review of RJN and explanations in motion and reply briefs; telephone call with O. Ramallo re response to objections and strategy; email to M. Bernstein re same.		1.2	\$1,055.70
5/6/2020	Bernstein, Michael L.	[...] review and revise draft response to Trustee's objection to request for judicial notice.	1	0.9	\$925.65

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
5/6/2020	Malloy, Charles A.	Attention to e-mails from B. Condon, M. Bernstein regarding Trustee opposition to request for judicial notice.		0.4	\$333.20
5/6/2020	Condon, Brian K.	Review and revise reply brief on request for judicial notice supporting motion to dismiss; emails with O. Ramallo and M. Bernstein re same.		1.2	\$1,055.70
5/7/2020	Malloy, Charles A.	Further attention to Trustee request for judicial notice filings.		0.4	\$333.20
5/11/2020	Bernstein, Michael L.	Emails regarding upcoming hearing on alternative service; review briefing to identify central issues for oral argument; [...]	0.2	0.5	\$514.25
5/12/2020	Bernstein, Michael L.	Prepare for and participate in telephone conference with B. Condon regarding argument on motion for alternative service; [...]		0.8	\$822.80
5/12/2020	Condon, Brian K.	Preparation for court hearing on Trustee's motion for alternative service, review all briefs and case law, and telephone conferences with M. Bernstein and O. Ramallo re same.		6.8	\$5,982.30
5/12/2020	Ramallo, Oscar	Confer with B. Condon in preparation for service motion hearing.		2.7	\$2,088.45
5/13/2020	Condon, Brian K.	Further review and preparation for court hearing on Trustee's alternative service motion; [...]; conference call with Judge Klein for hearing on motion for alternative service, and status conference; follow up call with M. Bernstein and O. Ramallo [...]		6.4	\$5,630.40
5/13/2020	Bernstein, Michael L.	Participate in Bankruptcy Court adversary proceeding status conference and oral argument on alternative service motion; follow-up discussions regarding same.		3.4	\$3,496.90
5/13/2020	Ramallo, Oscar	Call with team regarding motion for alternative service hearing.		0.5	\$386.75
5/14/2020	Bernstein, Michael L.	[...] email memorandum re service.	0.5	0.2	\$205.70
5/14/2020	Condon, Brian K.	Email [...]; email with M. Bernstein re same.		0.3	\$263.93
5/19/2020	Bernstein, Michael L.	Review proposed court order; emails regarding same; consider potential [...] motion and email - litigation team regarding same.		0.5	\$514.25
5/19/2020	Condon, Brian K.	Review proposed order on alternative service motion, and emails with Trustee's counsel re same.		0.2	\$175.95
5/24/2020	Ramallo, Oscar	Research [...] denial of motion to dismiss service.		0.9	\$696.15
5/24/2020	Condon, Brian K.	Telephone call with M. Bernstein re strategy on jurisdiction and service [...]	0.1	0.2	\$175.95
5/26/2020	Condon, Brian K.	Email from O. Ramallo re [...] alternate service [...]		0.4	\$351.90
5/26/2020	Ramallo, Oscar	Legal research regarding [...] service of process.		2.5	\$1,933.75
5/27/2020	Bernstein, Michael L.	[...] consider [...] service order [...]	0.2	0.2	\$205.70
5/27/2020	Condon, Brian K.	Review of research [...], and telephone conference with O. Ramallo analyzing same.		0.8	\$703.80
5/27/2020	Ramallo, Oscar	Further research on [...] personal jurisdiction [...]		0.6	\$464.10
5/28/2020	Malloy, Charles A.	Review Trustee's proposed adversary proceeding status update.		0.3	\$249.90
5/28/2020	Condon, Brian K.	Review of research [...], and email with O. Ramallo re same; review and revise reply brief on request for judicial notice for motion to dismiss, and emails with M. Bernstein re same; review status schedule from J. Torosian.		0.7	\$615.83
5/28/2020	Bernstein, Michael L.	Emails [...]; [...]	0.2	0.3	\$308.55
5/28/2020	Ramallo, Oscar	Legal research on [...] personal jurisdiction [...]		1.8	\$1,392.30
5/29/2020	Condon, Brian K.	Conference call [...]; revise and finalize reply brief on request for judicial notice for motion to dismiss, email with O. Ramallo, and file same.	0.3	1	\$879.75
5/29/2020	Malloy, Charles A.	Review notice of filing of status report by Trustee; attention to notice of filing response to request for judicial notice.		0.3	\$249.90
5/29/2020	Ramallo, Oscar	Review and finalize RJN reply filing.		0.5	\$386.75
5/29/2020	Bernstein, Michael L.	Review revised draft of reply to objection to request for judicial notice; draft revisions to same; confer with B. Condon regarding same; [...]	0.5	0.9	\$925.65

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/1/2020	Ramallo, Oscar	Provide case law to support motion to dismiss argument.		0.9	\$696.15
6/3/2020	Condon, Brian K.	Review court order regarding email service on Mr. Li; [...]		0.6	\$527.85
6/4/2020	Bernstein, Michael L.	[...] [R]eview service package and consider strategy [...]; various emails.	0.2	0.5	\$514.25
6/4/2020	Malloy, Charles A.	Attention to notice of service of complaint pursuant to court order; e-mails regarding Li motion to dismiss.		0.5	\$416.50
6/4/2020	Condon, Brian K.	Review emails re email service of complaint [...], review response date.		0.1	\$87.98
6/5/2020	Malloy, Charles A.	Review and revise draft outline for Li's motion to dismiss [...]		1.1	\$916.30
6/5/2020	Bernstein, Michael L.	Email communications with B. Condon; [...]	0.1	0.1	\$102.85
6/8/2020	Malloy, Charles A.	Review and revise [...] research outline and e-mail to B. Condon.		2.3	\$1,915.90
6/10/2020	Condon, Brian K.	Emails with M. Bernstein [...] re approach to extension for response to complaint for Li Qi [...]		0.2	\$175.95
6/10/2020	Bernstein, Michael L.	Emails re response timing and potential deferral stipulation; [...]; emails with B. Condon.		0.4	\$411.40
6/10/2020	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search for documents [...]		3	\$994.50
6/10/2020	Malloy, Charles A.	[...] [E]-mail correspondence regarding timing of Li response to Trustee's complaint.	0.4	0.3	\$249.90
6/12/2020	Condon, Brian K.	Telephone conference [...] [re] proposed scheduling of responses.		0.8	\$703.80
6/15/2020	Bernstein, Michael L.	Emails with B. Condon [...] regarding response deadline; [...]	0.3	0.3	\$308.55
6/15/2020	Condon, Brian K.	Emails with DLA and Jones Day re call re extension of time for responses to complaint.		0.2	\$175.95
6/16/2020	Condon, Brian K.	Telephone conference with J. Roselius (DLA) and Jones Day re responses to complaint by Li Qi and Minsheng, and extension of time to coordinate with hearing on motions to dismiss; follow up email re same.		0.7	\$615.83
6/17/2020	Condon, Brian K.	Draft stipulation for extension of date for response to adversary complaint.		0.8	\$703.80
6/18/2020	Condon, Brian K.	Email with M. Bernstein re terms of stipulation re extension of time for response to complaint.		0.1	\$87.98
6/20/2020	Condon, Brian K.	Email [...] re stipulation for extension on responses to complaint.		0.1	\$87.98
6/22/2020	Condon, Brian K.	Email to J. Roselius and J. Torosian re draft stipulation for extension of response date to complaint.		0.1	\$87.98
6/26/2020	Malloy, Charles A.	Attention to entry of stipulation and notice of service of summons.		0.3	\$249.90
6/26/2020	Condon, Brian K.	Prepare stipulation for extension of time to respond to complaint, proposed order, and notice of lodging for filing; review [...]		0.7	\$615.83
6/29/2020	Malloy, Charles A.	Review and respond to e-mails with B. Condon regarding motion to dismiss and status of research; review and circulate draft outline of [...] argument.		0.7	\$583.10
6/29/2020	Condon, Brian K.	Emails with M. Bernstein, O. Ramallo, C. Malloy re strategy and status of research and drafts of Li Qi motion to dismiss adversary complaint.		0.2	\$175.95
6/29/2020	Bernstein, Michael L.	Review schedule prepared by Trustee's counsel; follow-up with B. Condon regarding motion to dismiss claims against Mr. Li.		0.4	\$411.40
7/15/2020	Condon, Brian K.	Review of briefs and evidentiary materials for upcoming hearing on motions to dismiss adversary complaint.		2.2	\$1,935.45
7/15/2020	Bernstein, Michael L.	Review Trustee's court filings; review docket for July 22; Telephone conference with B. Condon regarding argument preparation.		0.5	\$514.25
7/16/2020	Bernstein, Michael L.	Emails with B. Condon regarding motion to dismiss.		0.1	\$102.85
7/17/2020	Condon, Brian K.	Review filings re EDC (Minsheng) related to pending motions to dismiss; telephone conference with M. Bernstein re hearing on motion to dismiss.		0.5	\$439.88
7/18/2020	Condon, Brian K.	Preparation for hearing on motion to dismiss Trustee's complaint, review of briefs and supporting materials.		4.9	\$4,310.78

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
7/19/2020	Condon, Brian K.	Further preparation for hearing on motion to dismiss Trustee's complaint; telephone call with M. Bernstein re hearing.		0.5	\$439.88
7/19/2020	Bernstein, Michael L.	Attention to preparation for hearing on motion to dismiss.		0.7	\$719.95
7/20/2020	Bernstein, Michael L.	Review bankruptcy case docket; confer with B. Condon regarding upcoming oral argument on motion to dismiss.		0.6	\$617.10
7/20/2020	Condon, Brian K.	Further preparation for hearing on motion to dismiss adversary proceeding; review attachments to motions and objections; review case law supporting brief and prepare outlines of argument points.		5.4	\$4,750.65
7/21/2020	Mintz, Benjamin	Telephone conference with M. Bernstein, emails re Judge's questions for tomorrow's hearing.		0.5	\$490.88
7/21/2020	Malloy, Charles A.	E-mails and review of Trustee's complaint in response to questions [...] for hearing on motion to dismiss.		0.6	\$499.80
7/21/2020	Bernstein, Michael L.	Review docket including notation regarding issues Judge Klein wishes to address at hearing on motion to dismiss; assist in preparation for oral argument on motion to dismiss; various emails regarding same.		2.4	\$2,468.40
7/21/2020	Ramallo, Oscar	Review motion to dismiss papers in preparation for call on motion to dismiss.		1.8	\$1,392.30
7/21/2020	Ramallo, Oscar	Phone call with Brian Condon in preparation for motion to dismiss hearing.		0.8	\$618.80
7/21/2020	Condon, Brian K.	Further preparation for hearing on motion to dismiss adversary complaint; review of briefs and case authorities; [...]; review court docket re calendar and tentative ruling/questions from judge for argument; telephone conference with O. Ramallo and email with M. Bernstein re argument on [...] issues raised by Judge Klein.		10.2	\$8,973.45
7/22/2020	Bernstein, Michael L.	Review materials; court hearing on motion to dismiss adversary case; emails - B. Condon [...]		2.6	\$2,674.10
7/22/2020	Condon, Brian K.	Further preparation for hearing on motion to dismiss adversary complaint, and preparation of outlines for responses to judge's questions; court appearance before Judge Klein for argument on motion to dismiss adversary proceeding and status conference.		7.5	\$6,598.13
7/23/2020	Mintz, Benjamin	Telephone conference with M. Bernstein re oral argument.		0.3	\$294.53
7/23/2020	Malloy, Charles A.	Attention to notices of continued hearing dates and summary from motion to dismiss hearing.		0.4	\$333.20
7/23/2020	Bernstein, Michael L.	Emails with client and B. Condon; follow-up regarding stipulation concerning extended time to respond to adversary complaint.		0.3	\$308.55
7/27/2020	Condon, Brian K.	Review of revised stipulation for response dates of Li Qi and Minsheng to complaint.		0.1	\$87.98
7/29/2020	Mintz, Benjamin	Start reviewing court decision on motion to dismiss.		0.6	\$589.05
7/29/2020	Condon, Brian K.	[...]; [R]eview Court's memorandum decision on motions to dismiss adversary complaint, and emails to team [...] summarizing ruling.	0.5	1.3	\$1,143.68
7/29/2020	Bernstein, Michael L.	Review summary of decision on motion to dismiss adversary complaint; various emails regarding same.		0.5	\$514.25
7/30/2020	Condon, Brian K.	Draft proposed order and notice of lodgment on motion to dismiss, per court's order, research re same, and emails with [...] A&P attorneys re potential response dates; [...]		1.4	\$1,231.65
7/30/2020	Mintz, Benjamin	Review decision on motion to dismiss.		0.6	\$589.05
7/30/2020	Ramallo, Oscar	Review court order granting motion to dismiss.		1.2	\$928.20
7/30/2020	Bernstein, Michael L.	Begin review of court decision; emails - B. Condon; call - B. Mintz.		0.8	\$822.80
7/31/2020	Condon, Brian K.	Emails [...] re proposed orders on motions to dismiss.		0.1	\$87.98
7/31/2020	Bernstein, Michael L.	Review and analyze written court opinion; attention to court order; [...]		0.7	\$719.95

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
8/3/2020	Ramallo, Oscar	Telephone conference [...] regarding orders on motion to dismiss and strategy for case schedule.		0.5	\$386.75
8/3/2020	Bernstein, Michael L.	Prepare for and participate in telephone conference [...] regarding order on motion to dismiss and related procedural and scheduling issues.		0.5	\$514.25
8/4/2020	Bernstein, Michael L.	Email correspondence with O. Ramallo regarding scheduling call [...]		0.2	\$205.70
8/4/2020	Ramallo, Oscar	Telephone conference [...] regarding scheduling in response to amended complaint.		0.2	\$154.70
8/4/2020	Ramallo, Oscar	Correspond with M. Bernstein regarding court order setting conference and proposed order.		0.3	\$232.05
8/5/2020	Bernstein, Michael L.	Prepare for and participate in telephone conference with Trustee's counsel regarding form of order granting motion to dismiss, scheduling of deadlines for potential amended complaint in response thereto; follow up with O. Ramallo; emails [...] to coordinate regarding forms of order, litigation schedule and related issues; review and revise draft of order; review and revise draft stipulation deferring time for Mr. Li to respond to adversary complaint; email correspondence with O. Ramallo regarding same; review Bankruptcy Court filings.		1.2	\$1,234.20
8/5/2020	Ramallo, Oscar	Telephone conference with Trustee's lawyers to discuss scheduling of response to complaint.		0.3	\$232.05
8/5/2020	Ramallo, Oscar	Finalize proposed order on motion to dismiss for filing.		0.5	\$386.75
8/5/2020	Ramallo, Oscar	Review and comment on proposed order re motion to dismiss.		0.3	\$232.05
8/6/2020	Condon, Brian K.	Review emails re stipulation for timing of amended complaint and responses to existing and amended complaint; review court order for status conference re same; email with O. Ramallo and M. Bernstein re existing deadlines, and review same.		0.5	\$439.88
8/6/2020	Bernstein, Michael L.	Review stipulation regarding filing deadlines.		0.6	\$617.10
8/6/2020	Ramallo, Oscar	Review and comment on stipulation regarding response to motion to dismiss.		0.6	\$464.10
8/7/2020	Ramallo, Oscar	Review and comment on edits to stipulation on response to discovery.		0.2	\$154.70
8/7/2020	Condon, Brian K.	Review and approve second stipulation for response of Li Qi to adversary complaint.		0.1	\$87.98
8/17/2020	Condon, Brian K.	Review existing stipulations and orders re responses to potential amended complaint from Trustee; review court calendar re status conference on Trustee's response to motion to dismiss, and email with M. Bernstein in preparation for conference.		0.5	\$439.88
8/17/2020	Bernstein, Michael L.	Email correspondence with B. Condon regarding status conference, litigation scheduling issues and related matters.		0.3	\$308.55
8/18/2020	Bernstein, Michael L.	Prepare for and participate in telephone conference with B. Condon regarding upcoming status conference in adversary proceeding.		0.4	\$411.40
8/18/2020	Condon, Brian K.	Telephone call with M. Bernstein re issues for status conference re adversary claim and [...]; [...]	0.2	0.2	\$175.95
8/19/2020	Malloy, Charles A.	E-mails with B. Condon and O. Ramallo regarding amended complaint and research.		0.2	\$166.60
8/19/2020	Condon, Brian K.	[...] [A]ttend court hearing re (1) status conference on adversary case [...]; email with M. Bernstein re outcome of status conference.	1.6	1.7	\$1,495.58
8/20/2020	Malloy, Charles A.	E-mails with B. Condon, O. Ramallo regarding response to amended Trustee complaint and research.		0.4	\$333.20
8/20/2020	Ramallo, Oscar	Correspond internally regarding strategy in response to amended complaint.		0.3	\$232.05
8/20/2020	Condon, Brian K.	Emails with O. Ramallo re strategies and arguments for motion to dismiss amended complaint, and jurisdictional arguments.		0.3	\$263.93
8/21/2020	Malloy, Charles A.	E-mails from O. Ramallo and B. Condon regarding bases for response to amended complaint; attention to lodgment of proposed scheduling order.		0.5	\$416.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
8/21/2020	Bernstein, Michael L.	Attention to litigation schedule; email correspondence regarding arguments in response to anticipated amended complaint, including potential [...] defenses and personal jurisdiction arguments.		0.6	\$617.10
8/21/2020	Condon, Brian K.	Review agreed scheduling order re amended complaint.		0.1	\$87.98
8/24/2020	Malloy, Charles A.	Review scheduling order as revised and entered by court.		0.3	\$249.90
8/28/2020	Condon, Brian K.	Review draft status chart for adversary proceedings; email J. Torosian re same.		0.1	\$87.98
8/28/2020	Bernstein, Michael L.	Review scheduling order; emails regarding same.		0.3	\$308.55
8/29/2020	Condon, Brian K.	Review [...] possible issues in amended complaint; review factual basis [...], and email summary to M. Bernstein and team re same.		1.2	\$1,055.70
9/3/2020	Condon, Brian K.	[...] [R]eview of legal issues for motion to dismiss complaint against Li Qi; telephone conferences with O. Ramallo re legal arguments and strategy for drafting; review and email [...]	0.3	1.4	\$1,231.65
9/3/2020	Ramallo, Oscar	Telephone conferences with B. Condon regarding Li Qi motion to dismiss strategy.		0.9	\$696.15
9/3/2020	Ramallo, Oscar	Conduct legal research regarding Li Qi motion to dismiss.		2.7	\$2,088.45
9/4/2020	Condon, Brian K.	Email with O. Ramallo re standard [...]		0.1	\$87.98
9/4/2020	Ramallo, Oscar	Conduct legal research on avoidance claims for Li Qi motion to dismiss.		0.4	\$309.40
9/8/2020	Ramallo, Oscar	Conduct legal research and draft motion to dismiss outline for Li Qi.		4.2	\$3,248.70
9/15/2020	Condon, Brian K.	[...] [R]eview outline of motion to dismiss claims against Li Qi, and email to M. Bernstein summarizing same.		0.8	\$703.80
9/15/2020	Bernstein, Michael L.	Direct research in anticipation of amended adversary complaints; emails with B. Condon; [...]	0.2	0.4	\$411.40
9/16/2020	Condon, Brian K.	Review status report filed by Trustee; [...]	0.1	0.1	\$87.98
9/23/2020	Malloy, Charles A.	Attention to notices of filings and status hearing.		0.3	\$249.90
9/23/2020	Condon, Brian K.	Review court calendar and hearing procedure for upcoming hearings, and email with M. Bernstein re same.		0.2	\$175.95
9/24/2020	Ramallo, Oscar	Research and draft Li Qi motion to dismiss.		6.9	\$5,337.15
9/25/2020	Ramallo, Oscar	Draft Li Qi motion to dismiss.		4.3	\$3,326.05
9/28/2020	Bernstein, Michael L.	Review Trustee's proposed scheduling update; review confidentiality stipulation and email - B. Condon regarding same.		0.3	\$308.55
9/28/2020	Malloy, Charles A.	Attention to B. Condon e-mail regarding proposed stipulation filed by Trustee related to filing confidential materials.		0.4	\$333.20
9/28/2020	Ramallo, Oscar	Draft motion to dismiss claims against Li Qi.		7.9	\$6,110.65
9/28/2020	Condon, Brian K.	Emails with M. Bernstein [...] re IATS (escrow) confidentiality stipulation re escrow documents; draft email to DLA re same; review of history [...] for preparation of motion to dismiss on automatic stay claim; emails with O. Ramallo and K. DiGalbo re same.		1.1	\$967.73
9/29/2020	Condon, Brian K.	Emails with O. Ramallo re draft of motion to dismiss on personal jurisdiction grounds, and arguments/strategy for same; email with M. Bernstein re same; telephone call [...]; emails with M. Bernstein re evaluation of same; draft email to J. Lyons re IATS documents; further emails [...] M. Bernstein re timing and strategy, in preparation for status conference; [...]; review of [...] motion to dismiss argument on automatic stay.	0.3	1.1	\$967.73
9/29/2020	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; search for [...]		0.7	\$232.05
9/29/2020	Ramallo, Oscar	Draft motion to dismiss claims against Li Qi for lack of personal jurisdiction.		7.2	\$5,569.20
9/29/2020	Malloy, Charles A.	Review Trustee's adversary proceeding status report; [...]	0.3	0.3	\$249.90
9/29/2020	Bernstein, Michael L.	[...] [R]eview and revise draft and note regarding IATS documents; attention to strategy.	0.6	0.5	\$514.25

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
9/30/2020	Malloy, Charles A.	Review B. Condon e-mail regarding status conference and [...].	0.2	0.2	\$166.60
9/30/2020	Condon, Brian K.	Review and preparation for status conference in adversary proceeding; court appearance (Zoom) for status conference and re filing of amended complaint by Trustee; further court appearance for hearing and argument on CAVIC/Bombardier motions to dismiss adversary claims; email to M. Bernstein and team re overlapping issues with Yuntian/UL case [...]		3.6	\$3,167.10
9/30/2020	Bernstein, Michael L.	Review summary of court hearings on motion to dismiss and consider relevance in adversary proceedings; follow-up regarding scheduling, legal research.		1.1	\$1,131.35
9/30/2020	Mintz, Benjamin	Review summary re Cavic argument.		0.2	\$196.35
10/1/2020	Ramallo, Oscar	Review and revise Li Qi motion to dismiss.		0.6	\$464.10
10/1/2020	Mintz, Benjamin	Emails re mediation proposal and strategy.		0.4	\$392.70
10/1/2020	Bernstein, Michael L.	Telephone conference with J. Lyons; follow up with A&P attorneys regarding potential mediation and related issues.		0.8	\$822.80
10/1/2020	Condon, Brian K.	Emails with M. Bernstein re potential mediation and call with J. Lyons re same; review and revise draft motion to dismiss claims against Li Qi, and email with O. Ramallo re same.		2	\$1,759.50
10/2/2020	Malloy, Charles A.	Review correspondence regarding mediation proposal.		0.4	\$333.20
10/2/2020	Bernstein, Michael L.	Telephone conference [...] regarding mediation and related issues; [...]; follow up with B. Condon regarding potential [...] issues.		1.1	\$1,131.35
10/2/2020	Ramallo, Oscar	Conduct legal research [...]		3.2	\$2,475.20
10/2/2020	Mintz, Benjamin	Telephone conference with M. Bernstein and B. Condon re mediation.		0.5	\$490.88
10/2/2020	Condon, Brian K.	Telephone call with M. Bernstein and B. Mintz re mediation strategy; [...]		0.9	\$791.78
10/3/2020	Bernstein, Michael L.	Emails regarding mediation and related issues.		0.3	\$308.55
10/3/2020	Condon, Brian K.	Email with M. Bernstein re mediation and potential strategy.		0.2	\$175.95
10/4/2020	Mintz, Benjamin	Call with M. Bernstein, B. Condon and O. Ramallo re mediation strategy.		1	\$981.75
10/4/2020	Bernstein, Michael L.	Prepare for and participate in conference call with A&P attorneys regarding mediation strategy and related issues; confer with B. Condon regarding amended complaint, case scheduling issues; [...]	0.4	0.8	\$822.80
10/4/2020	Ramallo, Oscar	Telephone conference with team to discuss mediation strategy [...]		1.2	\$928.20
10/4/2020	Condon, Brian K.	Telephone conference with M. Bernstein and team re mediation strategy and case status.		0.8	\$703.80
10/5/2020	Malloy, Charles A.	Attention to e-mails regarding mediation proposal.		0.2	\$166.60
10/5/2020	Mintz, Benjamin	Emails re mediation.		0.3	\$294.53
10/5/2020	Bernstein, Michael L.	[...] [E]mails with A&P attorneys; prepare for and participate in telephone conference with J. Lyons regarding mediation; [...] follow-up with A&P attorneys regarding mediation.		1.7	\$1,748.45
10/5/2020	Ramallo, Oscar	Conduct legal research [...]		0.9	\$696.15
10/5/2020	Condon, Brian K.	Legal research and email with O. Ramallo [...]		0.3	\$263.93
10/6/2020	Condon, Brian K.	Emails with M. Bernstein re stipulation for mediation and extension of schedule; review stipulation and email with DLA re same; emails with O. Ramallo re [...]		0.8	\$703.80
10/6/2020	Malloy, Charles A.	E-mails regarding Trustee's proposed stipulation and review of same; attention to e-mails regarding mediation proposal; review as-filed stipulation.		0.3	\$249.90
10/6/2020	Bernstein, Michael L.	Emails with Trustee's counsel and counsel for co-defendants; review and comment on draft extension stipulations; emails with A&P team regarding same, [...]; address case scheduling in light of proposed mediation.		1	\$1,028.50
10/6/2020	Ramallo, Oscar	Review draft stipulation regarding mediation.		0.1	\$77.35
10/6/2020	Ramallo, Oscar	Conduct legal research [...]		0.8	\$618.80
10/7/2020	Condon, Brian K.	Emails with O. Ramallo re [...]; emails with M. Bernstein re update on legal issues re same.		0.3	\$263.93

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/8/2020	Malloy, Charles A.	Attention to notice of entry of order extending deadlines for amended complaint and responses.		0.2	\$166.60
10/9/2020	Bernstein, Michael L.	Email [...] regarding mediation process issues; emails with A&P attorneys regarding same.		1.3	\$1,337.05
10/10/2020	Condon, Brian K.	Emails from M. Bernstein [...] re mediation planning.		0.2	\$175.95
10/12/2020	Bernstein, Michael L.	[...] [T]elephone conference with B. Condon regarding mediation; review materials in connection with upcoming court hearing.		1.3	\$1,337.05
10/12/2020	Condon, Brian K.	[...] [M]ultiple emails [...] re extending briefing schedule on motion to dismiss and amended complaint in light of mediation.	0.3	0.3	\$263.93
10/13/2020	Bernstein, Michael L.	Calls and emails regarding [...] mediator procedures; [...]; emails with Trustee's counsel and Jones Day.	1	1.1	\$1,131.35
10/13/2020	Condon, Brian K.	Review emails re [...] mediation; review email re proposed fee split for mediator's fees; emails with M. Bernstein and to D. Moss and J. Lyons re same; further review of docket and calendar in preparation for 10/14 [...] status conference in adversary case.	0.2	1	\$879.75
10/14/2020	Malloy, Charles A.	E-mails and telephone with M. Bernstein regarding [...] and mediation proposal; [...]; attention to follow up e-mails regarding mediation.	0.5	0.5	\$416.50
10/14/2020	Mintz, Benjamin	Emails re mediation [...]	0.1	0.2	\$196.35
10/14/2020	Bernstein, Michael L.	Prepare for and participate in Bankruptcy Court status conference in adversary proceeding; [...]; attention to mediation process and emails regarding same; emails with [...] and B. Condon regarding mediation issues.	1.7	1.7	\$1,748.45
10/14/2020	Condon, Brian K.	Email with M. Bernstein and B. Mintz re mediation [...]; attend court hearing before Judge Klein on (1) status conference in adversary case, and [...]; multiple emails from D. Moss, J. Lyons, K. Gross, and A. Troop re follow up on mediation scheduling and logistics following hearing.	0.7	1.5	\$1,319.63
10/15/2020	Bernstein, Michael L.	Emails with A&P bankruptcy and litigation attorneys regarding mediation issues; prepare for and participate in telephone conference with [...] regarding mediation; direct research [...]		1.3	\$1,337.05
10/15/2020	Ramallo, Oscar	Conduct legal research [...]		1.8	\$1,392.30
10/15/2020	Condon, Brian K.	Conference call [...] re mediation logistics [...]; follow up email and call with M. Bernstein re same; email with O. Ramallo re [...]		0.8	\$703.80
10/18/2020	Bernstein, Michael L.	[...] [F]ollow-up regarding mediation timing and logistics.	0.2	0.2	\$205.70
10/19/2020	Bernstein, Michael L.	Attention to mediation procedures; call [...]; emails with B. Condon; review and comment on draft mediation procedures order.		1.3	\$1,337.05
10/19/2020	Condon, Brian K.	Emails with M. Bernstein re mediation [...]; conference call with all counsel re mediator [...], and re draft amended complaints; review and revise mediation scheduling order, and further emails [...]		2.1	\$1,847.48
10/20/2020	Malloy, Charles A.	Review materials regarding court decision on Bombardier motion to dismiss.		0.5	\$416.50
10/20/2020	Ramallo, Oscar	Conduct legal research [...]		0.9	\$696.15
10/20/2020	Condon, Brian K.	Review and revise drafts of mediation order; circulate same [...]; multiple emails [...] re same; review draft order from CAVIC case.		1.2	\$1,055.70
10/21/2020	Bernstein, Michael L.	Numerous calls and emails regarding mediation process [...]		2.3	\$2,365.55
10/21/2020	Malloy, Charles A.	Attention to notice of filing of declaration and proposed order on mediation.		0.3	\$249.90
10/21/2020	Mintz, Benjamin	Telephone conference with M. Bernstein re mediation strategy, emails re same.		0.5	\$490.88
10/21/2020	Ramallo, Oscar	Conduct legal research [...]		4.2	\$3,248.70

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
10/21/2020	Condon, Brian K.	Telephone call and email [...] re mediation logistics and positions; conference call with J. Lyons re mediation scheduling, amended complaint, and request for documents; emails with M. Bernstein re same; review declaration from Judge Gross re disclosures, and emails with M. Bernstein re same; [...]		3.2	\$2,815.20
10/22/2020	Malloy, Charles A.	Review order entered by court regarding mediation process.		0.4	\$333.20
10/22/2020	Bernstein, Michael L.	Attention to mediation issues.		0.5	\$514.25
10/22/2020	Condon, Brian K.	Review email from Judge Gross [...]; multiple emails with M. Bernstein and B. Mintz re [...] same.		0.7	\$615.83
10/23/2020	Bernstein, Michael L.	Email correspondence re [...] mediator [...]		0.2	\$205.70
10/26/2020	Bernstein, Michael L.	Follow-up regarding mediation procedure issues.		0.1	\$102.85
10/27/2020	Bernstein, Michael L.	Attention to mediation process issues; preparation for call with proposed mediator; telephone conference with B. Condon.		0.9	\$925.65
10/27/2020	Condon, Brian K.	Review mediation order from Judge Klein, and revisions; emails with mediator K. Gross re scheduling and participants; telephone call and multiple emails [...] re mediation scheduling [...]		1.5	\$1,319.63
10/28/2020	Mintz, Benjamin	Emails re mediation, call re mediation with M. Bernstein.		0.3	\$294.53
10/28/2020	Bernstein, Michael L.	Prepare for and participate in conference call with Judge Gross regarding mediation; follow-up regarding mediation issues [...]; emails [...]		1.6	\$1,645.60
10/28/2020	Condon, Brian K.	Conference call with Judge Gross (mediator) re scheduling and briefing for mediation; follow up emails [...] re same; initial review [...]; prepare schedule for [...] mediation.		1.7	\$1,495.58
10/29/2020	Bernstein, Michael L.	Mediation scheduling and related process issues.		0.4	\$411.40
10/29/2020	Condon, Brian K.	Emails [...] re mediation scheduling; review [...]		1.2	\$1,055.70
10/30/2020	Condon, Brian K.	Further review [...]; email to and conference call with M. Bernstein and B. Mintz re [...] mediation; telephone conference with J. Lyons and D. Moss re mediation schedule, proposed amended complaint, and potential document exchange; email to M. Bernstein summarizing discussions.		3.2	\$2,815.20
10/30/2020	Mintz, Benjamin	Telephone conference with M. Bernstein and B. Condon re mediation, emails re same.		0.8	\$785.40
10/30/2020	Bernstein, Michael L.	Conference call with B. Condon and B. Mintz regarding [...] mediation; follow-up call with B. Condon; formulate strategy for mediation [...]; review summary memorandum following call with J. Lyons; emails with B. Condon.		1.6	\$1,645.60
11/2/2020	Malloy, Charles A.	Review Trustee's draft adversary proceeding status report.		0.4	\$333.20
11/2/2020	Bernstein, Michael L.	Review schedule charts; emails regarding mediation schedule and related issues.		0.4	\$411.40
11/2/2020	Condon, Brian K.	Review status/schedule chart from Trustee.		0.1	\$87.98
11/3/2020	Bernstein, Michael L.	Follow-up regarding mediation scheduling and procedural issues.		0.2	\$205.70
11/8/2020	Condon, Brian K.	Email with M. Bernstein regarding mediation schedule.		0.1	\$87.98
11/9/2020	Condon, Brian K.	Email with J. Lyons regarding mediation schedule.		0.1	\$87.98
11/10/2020	Mintz, Benjamin	Attention to mediation issues, emails and call regarding same.		0.3	\$294.53
11/10/2020	Bernstein, Michael L.	Emails with B. Condon regarding mediation strategy and timing; call with B. Mintz regarding same; follow-up emails.		0.7	\$719.95
11/10/2020	Condon, Brian K.	Telephone call and emails with J. Lyons and D. Moss regarding [...] mediation; emails with M. Bernstein regarding strategy [...]; further review [...]; review court order for mediation.		1.1	\$967.73
11/11/2020	Condon, Brian K.	Review research memo from O. Ramallo regarding [...], and multiple emails with O. Ramallo analyzing same.		1	\$879.75
11/11/2020	Ramallo, Oscar	Email with B. Condon regarding [...].		0.5	\$386.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
11/12/2020	Bernstein, Michael L.	Attention to mediation strategy [...]; emails regarding same.		0.9	\$925.65
11/12/2020	Ramallo, Oscar	Review emails and materials regarding proposal for mediation.		0.6	\$464.10
11/12/2020	Mintz, Benjamin	Emails regarding mediation strategy.		0.4	\$392.70
11/12/2020	Condon, Brian K.	Further emails with M. Bernstein and team regarding mediation [...]; draft email to J. Lyons regarding foregoing issues; review of draft stipulation from J. Lyons; prepare summary [...]		2.4	\$2,111.40
11/13/2020	Bernstein, Michael L.	Address mediation strategy, schedule, Lyons email [...]; [...]; call with A&P attorneys.		1	\$1,028.50
11/13/2020	Ramallo, Oscar	Telephone conference with team regarding mediation strategy.		0.9	\$696.15
11/13/2020	Mintz, Benjamin	Telephone conference and emails regarding mediation strategy.		0.8	\$785.40
11/13/2020	Condon, Brian K.	Telephone calls [...] regarding [...] mediation discussions with Trustee; conference call with M. Bernstein and team regarding mediation [...]; draft response to J. Lyons regarding mediation procedure and schedule.		2	\$1,759.50
11/15/2020	Bernstein, Michael L.	Emails regarding mediation.		0.3	\$308.55
11/15/2020	Condon, Brian K.	Emails with J. Lyons regarding mediation schedule and briefing.		0.2	\$175.95
11/16/2020	Mintz, Benjamin	Emails regarding mediation.		0.2	\$196.35
11/16/2020	Condon, Brian K.	Emails with D. Moss and J. Lyons regarding [...] claims.		0.2	\$175.95
11/19/2020	Bernstein, Michael L.	Attention to mediation issues.		0.2	\$205.70
11/19/2020	Mintz, Benjamin	Emails regarding mediation.		0.2	\$196.35
11/19/2020	Condon, Brian K.	Telephone call and emails [...] regarding status of mediation schedule [...]; email with M. Bernstein regarding same.		0.3	\$263.93
11/19/2020	Ramallo, Oscar	Correspond regarding potential mediation dates.		0.3	\$232.05
11/20/2020	Bernstein, Michael L.	Email correspondence with B. Condon regarding correction of dismissal order and related matters.		0.2	\$205.70
11/30/2020	Bernstein, Michael L.	Review draft schedule filing; emails regarding same and mediation issues.		0.6	\$617.10
11/30/2020	Condon, Brian K.	Review status chart from J. Torosian; telephone call [...]; emails with M. Bernstein and B. Mintz regarding mediation status; email with J. Torosian regarding edits to status chart; review [...] and email with M. Bernstein regarding same.		1.8	\$1,583.55
11/30/2020	Mintz, Benjamin	Emails regarding mediation.		0.2	\$196.35
12/1/2020	Malloy, Charles A.	Review Trustee's litigation status report.		0.3	\$249.90
12/3/2020	Condon, Brian K.	Emails with M. Bernstein and A. Ware [...]		0.2	\$175.95
12/4/2020	Bernstein, Michael L.	Attention to [...]; prepare for and participate in call with B. Condon and B. Mintz.		0.9	\$925.65
12/4/2020	Mintz, Benjamin	Telephone conference with M. Bernstein and B. Condon regarding [...]		0.3	\$294.53
12/4/2020	Condon, Brian K.	Telephone call with M. Bernstein and B. Mintz regarding [...]		1	\$879.75
12/8/2020	Mintz, Benjamin	Emails regarding [...], emails regarding amended complaint and [...]		1.5	\$1,472.63
12/8/2020	Ramallo, Oscar	Review and analyze draft amended complaint.		0.8	\$618.80
12/8/2020	Ware, Anton A.	Identify [...]		1	\$833.00
12/8/2020	Condon, Brian K.	Emails with M. Bernstein and draft email [...]; emails with team regarding Trustee's email to mediator on confidentiality [...]; email with [...]; review Trustee's draft amended complaint, and prepare summary of changes and email same to M. Bernstein and team.		2.5	\$2,199.38
12/9/2020	Mintz, Benjamin	Review amended complaint, emails regarding same [...]		2.5	\$2,454.38
12/9/2020	Bernstein, Michael L.	Review Trustee's materials; [...]; address mediation process issues; emails - B. Condon.		2.2	\$2,262.70
12/9/2020	Condon, Brian K.	Further review of draft amended complaint [...]; [...]; emails with team [...], and email with J. Lyons [...]; emails [...]		1.5	\$1,319.63
12/10/2020	Mintz, Benjamin	Emails regarding mediation, review of complaint, telephone conference with M. Bernstein, B. Condon and O. Ramallo.		1.6	\$1,570.80

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/10/2020	Bernstein, Michael L.	Review summary of amended complaint [...]; prepare for and participate in telephone conference regarding [...] mediation strategy; various emails.		2.1	\$2,159.85
12/10/2020	Ramallo, Oscar	Telephone conference with A&P team to discuss mediation strategy and legal issues.		1.2	\$928.20
12/10/2020	Ramallo, Oscar	Review and analyze amended complaint draft.		1.9	\$1,469.65
12/10/2020	Condon, Brian K.	Multiple emails with M. Bernstein and B. Mintz regarding mediation strategy and confidentiality [...]; email with J. Lyons regarding same; telephone conference with A&P team regarding mediation [...]; further analysis of draft amended complaint, and emails to A&P team [...]		2.6	\$2,287.35
12/11/2020	Condon, Brian K.	Further review of draft amended complaint; telephone conference [...] regarding [...] mediations, and regarding analysis of amended complaint; email with K. DiGalbo [...]		1.9	\$1,671.53
12/11/2020	Bernstein, Michael L.	Attention to amended complaint, mediation strategy.		0.5	\$514.25
12/11/2020	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search [...]		2	\$663.00
12/13/2020	Mintz, Benjamin	Emails regarding mediation [...]		0.2	\$196.35
12/13/2020	Bernstein, Michael L.	Emails regarding [...] mediation.		0.3	\$308.55
12/13/2020	Condon, Brian K.	Email to M. Bernstein and B. Mintz regarding [...] amended complaint [...]; draft email to J. Lyons regarding [...] mediation [...]		0.6	\$527.85
12/14/2020	Bernstein, Michael L.	Attention to mediation issues; amended complaint; review and revise draft memorandum; emails B. Condon.		1.1	\$1,131.35
12/14/2020	Mintz, Benjamin	Emails regarding mediation [...]		0.4	\$392.70
12/14/2020	Ramallo, Oscar	Conduct legal research [...]		3.2	\$2,475.20
12/14/2020	Condon, Brian K.	Review proposed amended complaint from Trustee [...]; [...]; [...]; work on [...] mediation brief; review issues [...], and email to C. Allen [...]		5.8	\$5,102.55
12/15/2020	Bernstein, Michael L.	Address mediation strategy issues; review summary of additional amendments [...]; email correspondence [...]		1.3	\$1,337.05
12/15/2020	Ramallo, Oscar	Draft email summarizing research [...]		1.1	\$850.85
12/15/2020	Condon, Brian K.	Emails with M. Bernstein and B. Mintz regarding [...], and emails regarding [...] amended complaint; revise and email J. Lyons [...]; multiple emails with O. Ramallo regarding analysis [...], and further research on same.		1.4	\$1,231.65
12/15/2020	Allen, Christopher L.	Attention to questions from B. Condon [...]		1.1	\$1,019.15
12/16/2020	Condon, Brian K.	Emails with [...]; review docket regarding claims register; email with M. Bernstein [...]		0.3	\$263.93
12/16/2020	Bernstein, Michael L.	Email correspondence regarding [...] mediation and related issues; [...]		0.5	\$514.25
12/16/2020	Mintz, Benjamin	Attention to complaint allegations and related emails.		0.8	\$785.40
12/17/2020	Bernstein, Michael L.	Email regarding [...] issues.		0.2	\$205.70
12/17/2020	Mintz, Benjamin	Emails regarding mediation.		0.3	\$294.53
12/17/2020	Condon, Brian K.	Emails with M. Bernstein and team [...]		0.2	\$175.95
12/18/2020	Bernstein, Michael L.	Email correspondence regarding amended complaint, [...]; mediation.		0.6	\$617.10
12/18/2020	Condon, Brian K.	Review transcript from motion to dismiss hearing, [...]; [...]; work on [...] mediation brief.		1.7	\$1,495.58
12/21/2020	Bernstein, Michael L.	Follow up with B. Condon regarding mediation briefing.		0.1	\$102.85
12/22/2020	Bernstein, Michael L.	Email correspondence regarding mediation brief and process; review recent case law summary.		1.2	\$1,234.20
12/22/2020	Condon, Brian K.	Review status of mediation scheduling, and email with J. Lyons regarding same; work on [...] mediation brief; email M. Bernstein regarding mediation [...]		1.6	\$1,407.60
12/23/2020	Condon, Brian K.	Email with J. Torosian regarding mediation schedule; review [...]; email with M. Bernstein regarding same.		0.7	\$615.83

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
12/23/2020	Bernstein, Michael L.	Attention to [...]; address timing and other mediation process issues.		0.8	\$822.80
12/27/2020	Condon, Brian K.	Work on outline of mediation brief [...]		0.6	\$527.85
12/28/2020	Bernstein, Michael L.	Attention to [...]		0.6	\$617.10
12/28/2020	Condon, Brian K.	Draft email to O. Ramallo regarding mediation brief issues and research for same, and follow-up emails regarding same; [...]		1.8	\$1,583.55
12/28/2020	Ramallo, Oscar	Conduct legal research [...]		4.1	\$3,171.35
12/29/2020	Bernstein, Michael L.	Attention to [...]; review Trustee's litigation schedule; emails with B. Condon.		0.5	\$514.25
12/29/2020	Condon, Brian K.	Review Trustee's amended complaint and [...], court order on motion, and related documents; draft email [...] summarizing case status and issues [...]; email with M. Bernstein regarding same; further email [...]; further email with O. Ramallo regarding [...] issues.		2.5	\$2,199.38
12/29/2020	Condon, Brian K.	Review Trustee's status report, and email J. Torosian regarding same.		0.1	\$87.98
12/30/2020	Malloy, Charles A.	Review Trustee's adversary proceeding status report.		0.2	\$166.60
12/30/2020	Condon, Brian K.	Emails with [...] A&P team regarding call on [...] issues.		0.1	\$87.98
12/31/2020	Bernstein, Michael L.	Review information [...]; emails regarding same; identify [...]		0.7	\$719.95
1/3/2021	Bernstein, Michael L.	Email correspondence regarding [...] mediation brief.		0.3	\$344.25
1/3/2021	Condon, Brian K.	Review research [...] for mediation brief [...]		0.6	\$581.40
1/4/2021	Bernstein, Michael L.	Email exchange with B. Condon regarding mediation brief; review [...] research from O. Ramallo; outline points for mediation brief; prepare for and participate in call with B. Condon regarding same.		2.2	\$2,524.50
1/4/2021	Ramallo, Oscar	Zoom conference with [...] team.		1.4	\$1,106.70
1/4/2021	Ramallo, Oscar	Phone call with B. Condon regarding mediation.		0.5	\$395.25
1/4/2021	Ramallo, Oscar	Conduct legal research [...]		2.5	\$1,976.25
1/4/2021	Condon, Brian K.	Work on mediation brief; multiple emails with M. Bernstein and O. Ramallo regarding legal issues [...]		3.4	\$3,294.60
1/5/2021	Malloy, Charles A.	Emails with B. Condon regarding Zetta PTE claim register; review claim register and further e-mails with B. Condon regarding same; attention to emails regarding amount of Zetta PTE claims.		1.2	\$1,162.80
1/5/2021	Mintz, Benjamin	Call with M. Bernstein regarding mediation, review [...], review email regarding mediation, emails regarding mediation strategy and statement.		2	\$2,295.00
1/5/2021	Ramallo, Oscar	Review [...] mediation [...]		0.7	\$553.35
1/5/2021	Bernstein, Michael L.	Review [...] mediation [...]; email correspondence regarding same; review summary [...] in connection with upcoming mediation; emails with B. Condon and B. Mintz regarding mediation brief; [...]; attention to legal arguments in connection with mediation brief; emails regarding same.		2.1	\$2,409.75
1/5/2021	Condon, Brian K.	Review and analyze creditor claims [...] and email to team [...]; review [...] and email team with summary of arguments; multiple emails with M. Bernstein and team regarding [...] mediation [...]		3.5	\$3,391.50
1/6/2021	Ramallo, Oscar	Email regarding questions [...]		0.2	\$158.10
1/6/2021	Condon, Brian K.	Work on draft of mediation brief; review amended complaint and notes regarding same; emails with O. Ramallo regarding specific issues; [...]; draft email/outline of issues [...] and emails with M. Bernstein, B. Mintz, O. Ramallo regarding comments on same.		2.5	\$2,422.50
1/6/2021	Mintz, Benjamin	Review [...] mediation [...], emails and follow up regarding same.		1.5	\$1,721.25
1/6/2021	Bernstein, Michael L.	Attention to [...] preparation of mediation brief; review [...] law [...]; emails regarding same; review [...] materials regarding [...] mediation statement.		1.7	\$1,950.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/7/2021	Mintz, Benjamin	Attention to [...] issues and emails regarding [...] mediation issues, review mediation statement section.		1.3	\$1,491.75
1/7/2021	Bernstein, Michael L.	Email correspondence [...]; draft section of mediation brief [...]; follow-up with [...]; various emails.		2.2	\$2,524.50
1/7/2021	Condon, Brian K.	Review [...] issues on Trustee's proposed claims; email with C. Malloy regarding facts for analysis [...]; work on draft of mediation brief [...]		3.2	\$3,100.80
1/7/2021	Malloy, Charles A.	Emails with B. Condon [...]; review [...]		0.8	\$775.20
1/8/2021	Mijares-Shafai, Gerardo	Review summary table [...]; communicate with C. Malloy regarding same.		0.2	\$150.45
1/8/2021	Mintz, Benjamin	Review emails [...], telephone conference with M. Bernstein regarding mediation and related issues.		1	\$1,147.50
1/8/2021	Malloy, Charles A.	Review transaction documents [...]; draft and send email memo to B. Condon regarding same.		3	\$2,907.00
1/8/2021	Condon, Brian K.	Review emails [...]; emails with A. Ware and T. Gao [...]; emails with C. Malloy regarding facts [...]; further work on draft mediation brief.		3.6	\$3,488.40
1/8/2021	Ramallo, Oscar	Draft sections of mediation brief [...]		0.8	\$632.40
1/8/2021	Ware, Anton A.	Respond to query [...]		0.1	\$84.58
1/8/2021	Bernstein, Michael L.	Various emails [...]; review [...] mediation [...] notes [...]; calls and emails with B. Mintz.		2.4	\$2,754.00
1/9/2021	Mijares-Shafai, Gerardo	Revise summary table [...]; communicate with C. Malloy regarding same.		0.6	\$451.35
1/9/2021	Condon, Brian K.	Further drafting of mediation brief, research [...], review transactions and record.		3.8	\$3,682.20
1/9/2021	Malloy, Charles A.	E-mails with G. Mijares-Shafai regarding [...] motion to dismiss; review schedule and B. Condon email [...]		0.5	\$484.50
1/9/2021	Ramallo, Oscar	Draft argument [...] for mediation brief.		0.2	\$158.10
1/10/2021	Condon, Brian K.	Further drafting of mediation brief, and review of record for same.		4.5	\$4,360.50
1/10/2021	Malloy, Charles A.	Update [...] analysis.		7	\$6,783.00
1/11/2021	Bernstein, Michael L.	Review questions [...] and information gathered by B. Condon in response; email correspondence regarding mediation.		0.9	\$1,032.75
1/11/2021	Malloy, Charles A.	Review [...] and revise [...] analysis.		1.5	\$1,453.50
1/11/2021	Mintz, Benjamin	Attention to mediation issues.		0.3	\$344.25
1/11/2021	Condon, Brian K.	Review and revise chart [...]; further drafting of mediation brief and research for same.		2.3	\$2,228.70
1/12/2021	Malloy, Charles A.	Analysis of claims [...], and follow-up questions from O. Ramallo, B. Condon regarding same.		1.2	\$1,162.80
1/12/2021	Mintz, Benjamin	Review overview of claims [...], emails regarding same.		1.5	\$1,721.25
1/12/2021	Condon, Brian K.	Emails from team regarding comments [...]; draft email [...]; prepare factual materials [...]; complete initial draft of mediation brief, further factual and legal research for same.		5.7	\$5,523.30
1/12/2021	Ramallo, Oscar	Review analysis of [...] law and draft email memo with questions [...]		0.8	\$632.40
1/12/2021	Bernstein, Michael L.	Attention to [...] law analysis and information requests [...]; various emails with A&P team.		1.1	\$1,262.25
1/13/2021	Condon, Brian K.	Review inserts from O. Ramallo on mediation brief; emails with M. Bernstein and B. Mintz regarding revisions to mediation brief; further review of draft.		1.7	\$1,647.30
1/13/2021	Malloy, Charles A.	Review [...] summary of legal issues; attention to emails regarding mediation statement.		1	\$969.00
1/13/2021	Bernstein, Michael L.	Work on mediation brief; emails regarding same.		4.9	\$5,622.75
1/13/2021	Ramallo, Oscar	Review and draft revisions to mediation brief; legal research [...] for mediation brief.		4.2	\$3,320.10
1/14/2021	Bernstein, Michael L.	Work on revisions and comments to mediation brief.		5.5	\$6,311.25
1/14/2021	Condon, Brian K.	Emails with [...] M. Bernstein regarding [...] mediation.		0.1	\$96.90
1/14/2021	Mintz, Benjamin	Review and comment on mediation brief.		1	\$1,147.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/15/2021	Condon, Brian K.	Conference call [...] regarding [...] mediation [...]; review further comments on mediation brief; conference call with A&P attorneys regarding [...] mediation brief, [...].		3.2	\$3,100.80
1/15/2021	Mintz, Benjamin	Review mediation statement, call with B. Condon, O. Ramallo and M. Bernstein regarding same.		4	\$4,590.00
1/15/2021	Ramallo, Oscar	Telephone conference with A&P team to discuss mediation brief and mediation issues.		1	\$790.50
1/15/2021	Ramallo, Oscar	Email regarding mediation brief.		0.1	\$79.05
1/15/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference [...] regarding [...] mediation; follow up emails regarding same; [...]; review B. Mintz's comments on mediation brief; prepare for and participate in telephone conference [...] regarding mediation strategy and comments on mediation brief.		3.9	\$4,475.25
1/17/2021	Condon, Brian K.	Review emails [...]; review record regarding mediation procedures and scheduling, and email to M. Bernstein with [...] summary of same; review comments on mediation brief.		1.4	\$1,356.60
1/17/2021	Malloy, Charles A.	Review [...] documents.		0.6	\$581.40
1/17/2021	Bernstein, Michael L.	Attention to mediation procedural issues.		0.3	\$344.25
1/18/2021	Bernstein, Michael L.	Address mediation issues.		0.3	\$344.25
1/18/2021	Ramallo, Oscar	Review analyses [...]; draft email memo [...]; draft potential argument [...]		3.2	\$2,529.60
1/19/2021	Mintz, Benjamin	Attention to [...] mediation statement.		1	\$1,147.50
1/19/2021	Bernstein, Michael L.	Email correspondence regarding mediation and mediation brief.		0.4	\$459.00
1/19/2021	Malloy, Charles A.	Attention to emails [...]		0.7	\$678.30
1/19/2021	Ramallo, Oscar	Conduct legal research [...]		1.9	\$1,501.95
1/19/2021	Condon, Brian K.	Further drafting of mediation brief [...] and revisions on earlier comments; emails with O. Ramallo [...]; email [...] regarding background documents; multiple emails with M. Bernstein regarding issues for mediation brief.		4.5	\$4,360.50
1/20/2021	Bernstein, Michael L.	Attention to mediation brief and related mediation issues.		0.6	\$688.50
1/20/2021	Mintz, Benjamin	Emails regarding mediation statement, review analysis[...], review and revise draft mediation statement.		2.8	\$3,213.00
1/20/2021	Malloy, Charles A.	Emails with B. Condon and review of additional information [...]		0.5	\$484.50
1/20/2021	Ramallo, Oscar	Draft [...] sections of mediation brief.		1.7	\$1,343.85
1/20/2021	Condon, Brian K.	Review [...] research [...]; draft portions of mediation brief [...]; review and incorporate comments on brief and emails with team regarding further issues; review email [...]		5.5	\$5,329.50
1/21/2021	Mintz, Benjamin	Review and comment on mediation brief.		2.4	\$2,754.00
1/21/2021	Bernstein, Michael L.	Work on mediation brief; emails regarding same.		4.5	\$5,163.75
1/21/2021	Condon, Brian K.	[...] [M]ultiple emails with team regarding comments and issues for mediation brief.		0.9	\$872.10
1/22/2021	Ramallo, Oscar	Telephone conference regarding mediation brief; review comments on brief.		2.2	\$1,739.10
1/22/2021	Ramallo, Oscar	Revise [...] section of mediation brief; review mediation brief.		1.5	\$1,185.75
1/22/2021	Mintz, Benjamin	Review mediation statement, call with M. Bernstein, B. Condon and O. Ramallo regarding same.		4.5	\$5,163.75
1/22/2021	Malloy, Charles A.	Attention to emails regarding mediation brief [...]		0.2	\$193.80
1/22/2021	Bernstein, Michael L.	Work on mediation brief; conference call regarding same; research [...]		5.7	\$6,540.75
1/22/2021	Condon, Brian K.	Review background [...]; conference call with M. Bernstein, B. Mintz, O. Ramallo regarding comments and additions to mediation brief; multiple revisions to mediation brief; [...]		7.7	\$7,461.30
1/23/2021	Ramallo, Oscar	Telephone conference to discuss mediation brief; review further draft of brief.		0.9	\$711.45
1/23/2021	Ramallo, Oscar	Review further draft of brief.		0.7	\$553.35
1/23/2021	Bernstein, Michael L.	Work on mediation brief; emails regarding same; call O. Ramallo and B. Condon.		1.7	\$1,950.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/23/2021	Condon, Brian K.	Further revisions and drafting of mediation brief; review and incorporate multiple revisions [...]		4.2	\$4,069.80
1/23/2021	Mintz, Benjamin	Emails regarding mediation statement.		0.5	\$573.75
1/24/2021	Bernstein, Michael L.	Address open issues in connection with mediation brief; emails regarding same.		1.3	\$1,491.75
1/24/2021	Mintz, Benjamin	Review of revised mediation brief and emails regarding same; review lease documents.		2	\$2,295.00
1/24/2021	Malloy, Charles A.	Review emails [...] on legal analysis [...]		0.4	\$387.60
1/24/2021	Condon, Brian K.	Further revisions to mediation brief, review and incorporate comments [...]; review of leases, and emails with B. Mintz regarding analysis [...]		3.5	\$3,391.50
1/25/2021	Bernstein, Michael L.	Work on mediation brief; review and comment on revised draft; prepare for and participate in telephone conference [...]; review and comment on draft memorandum to Judge Gross.		4.6	\$5,278.50
1/25/2021	Mintz, Benjamin	Review [...] analysis, [...], call with B. Condon and M. Bernstein regarding mediation statement, review revisions.		2.2	\$2,524.50
1/25/2021	Ramallo, Oscar	Telephone conference with team to discuss mediation brief.		1.5	\$1,185.75
1/25/2021	Ramallo, Oscar	Revise mediation brief; review and comment on [...] mediation brief.		1.2	\$948.60
1/25/2021	Condon, Brian K.	Further and final revisions to mediation brief [...] and further comments from team; preparation for submission to Judge Gross and email regarding same.		4.8	\$4,651.20
1/26/2021	Bernstein, Michael L.	Attention to mediation strategy and mediation preparation.		1	\$1,147.50
1/26/2021	Ramallo, Oscar	Email with B. Condon regarding personal jurisdiction motion; legal research [...].		0.8	\$632.40
1/26/2021	Condon, Brian K.	Review status of claims [...], and mediation schedule; email with M. Bernstein regarding same and [...] mediation; emails with O. Ramallo regarding arguments and strategy for personal jurisdiction motion; email with M. Nicolini regarding research issues [...]		1.2	\$1,162.80
1/27/2021	Condon, Brian K.	Conference call [...] regarding legal and factual arguments [...]; multiple emails from team regarding same.		1.2	\$1,162.80
1/27/2021	Mintz, Benjamin	Review case law for mediation, [...], telephone conference with M. Bernstein regarding same.		1.2	\$1,377.00
1/27/2021	Bernstein, Michael L.	Prepare for [...] mediation issues; notes regarding [...] primary arguments [...]; follow up with B. Condon regarding same; email [...]; coordinate preparation for mediation sessions with Judge Gross.		1.8	\$2,065.50
1/28/2021	Mintz, Benjamin	Emails regarding mediation preparation.		0.3	\$344.25
1/28/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference [...] regarding mediation; email exchange with B. Condon regarding mediation logistics; email correspondence from mediator.		2.4	\$2,754.00
1/28/2021	Condon, Brian K.	Emails with Judge Gross regarding mediation; review status chart from Trustee.		0.3	\$290.70
1/28/2021	Ramallo, Oscar	Email internally regarding status chart.		0.2	\$158.10
1/28/2021	Ramallo, Oscar	Review draft motion to dismiss [...]		0.6	\$474.30
1/29/2021	Condon, Brian K.	Telephone call with M. Bernstein and B. Mintz regarding mediation strategy; review Trustee's status report and email team regarding schedule for amended complaint and response; emails with Judge Gross regarding mediation.		1.2	\$1,162.80
1/29/2021	Mintz, Benjamin	Telephone conference with M. Bernstein, telephone conference with M. Bernstein and B. Condon, preparation for mediation, emails regarding same.		1.5	\$1,721.25
1/29/2021	Ramallo, Oscar	Telephone conference with B. Condon in preparation for mediation.		0.2	\$158.10
1/29/2021	Bernstein, Michael L.	Telephone calls and email correspondence regarding mediation; begin review of materials in preparation for mediation hearing.		1.7	\$1,950.75
1/30/2021	Condon, Brian K.	Prepare argument outline for mediation [...]		2.5	\$2,422.50
1/30/2021	Bernstein, Michael L.	Mediation preparation; email correspondence.		0.3	\$344.25

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
1/31/2021	Bernstein, Michael L.	Prepare for mediation.		1.5	\$1,721.25
1/31/2021	Mintz, Benjamin	Preparation for mediation, emails regarding same.		1.3	\$1,491.75
1/31/2021	Ramallo, Oscar	Legal research [...]; email internally [...] in preparation for mediation.		1.2	\$948.60
1/31/2021	Condon, Brian K.	Emails with M. Bernstein and B. Mintz [...]; review research and email with O. Ramallo [...]; prepare notes and outlines for mediation.		2.4	\$2,325.60
2/1/2021	Bernstein, Michael L.	Prepare for and participate in adversary proceeding mediation; brief post-mediation conversation and emails with A&P attorneys; telephone conference [...]; [...]; various emails with A&P team.		3.9	\$4,475.25
2/1/2021	Mintz, Benjamin	Prepare for mediation, mediation with Judge Gross, follow-up emails regarding same.		3.2	\$3,672.00
2/1/2021	Malloy, Charles A.	Review summary of mediation; review Trustee's adversary status report.		0.6	\$581.40
2/1/2021	Condon, Brian K.	Further preparation for mediation; prepare outline of issues [...]; participate in mediation before Judge Gross; emails with M. Bernstein [...]; email with O. Ramallo regarding mediation status; [...]; follow-up emails from M. Bernstein [...]		4.7	\$4,554.30
2/2/2021	Mintz, Benjamin	Follow up from mediation, status report.		0.3	\$344.25
2/2/2021	Bernstein, Michael L.	Call [...]; emails with A&P team; consider [...] mediation strategy and email correspondence regarding same; email [...]; review draft court-required status report; edits regarding same; emails with B. Condon regarding same.		1.3	\$1,491.75
2/2/2021	Condon, Brian K.	Emails with team regarding potential additional defenses [...]; review prior status conference report, prepare updates to same, draft new insert to report, and emails with team and DLA regarding same.		1.4	\$1,356.60
2/3/2021	Malloy, Charles A.	Review adversary proceeding joint status and scheduling report.		0.5	\$484.50
2/3/2021	Bernstein, Michael L.	Review revised draft court status report; correspondence regarding same.		0.3	\$344.25
2/3/2021	Condon, Brian K.	Review final status conference report, and emails regarding same for signature.		0.3	\$290.70
2/4/2021	Bernstein, Michael L.	Attention to Judge Gross's mediation follow-up; calls and emails regarding same.		0.6	\$688.50
2/4/2021	Mintz, Benjamin	Emails regarding mediation strategy.		0.3	\$344.25
2/4/2021	Condon, Brian K.	Emails with Judge Gross, and with M. Bernstein and B. Mintz [...]		0.3	\$290.70
2/5/2021	Mintz, Benjamin	Emails regarding mediation.		0.3	\$344.25
2/5/2021	Bernstein, Michael L.	Email correspondence regarding mediation follow-up.		0.2	\$229.50
2/5/2021	Malloy, Charles A.	E-mail with B. Condon regarding administrative claim [...]; review update regarding mediation [...]		0.4	\$387.60
2/8/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference with mediator Judge Gross; email correspondence with A&P attorneys regarding same; [...]		1.1	\$1,262.25
2/8/2021	Mintz, Benjamin	Mediation call with Judge Gross.		0.3	\$344.25
2/8/2021	Mintz, Benjamin	Emails regarding mediation.		0.2	\$229.50
2/8/2021	Condon, Brian K.	Conference call with Judge Gross and M. Bernstein, B. Mintz regarding mediation follow-up; emails with M. Bernstein regarding same.		0.6	\$581.40
2/9/2021	Bernstein, Michael L.	Email correspondence with A&P team regarding mediation and related issues; prepare for and participate in telephone conference with mediator Judge Gross; brief email summary to A&P team.		0.5	\$573.75
2/10/2021	Condon, Brian K.	Emails [...] regarding further mediation efforts.		0.1	\$96.90
2/10/2021	Bernstein, Michael L.	Attention to mediator follow-up; emails regarding same.		0.3	\$344.25
2/11/2021	Bernstein, Michael L.	Email exchange with mediator and follow-up correspondence with A&P attorneys.		0.2	\$229.50
2/11/2021	Condon, Brian K.	Emails with Judge Gross, M. Bernstein, D. Moss regarding mediation.		0.2	\$193.80
2/16/2021	Bernstein, Michael L.	Review mediator's report; email correspondence with A&P attorney; [...]		0.4	\$459.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/16/2021	Malloy, Charles A.	Review mediator's report and related emails.		0.2	\$193.80
2/16/2021	Condon, Brian K.	Preparation for status conference, review of joint report and docket; review mediator's report and calendar; email with M. Bernstein regarding briefing schedule.		0.8	\$775.20
2/17/2021	Mintz, Benjamin	Emails regarding status conference, call with B. Condon, M. Bernstein and O. Ramallo regarding same [...]		0.7	\$803.25
2/17/2021	Bernstein, Michael L.	Telephone conference with B. Condon regarding status hearing in Trustee's adversary proceeding [...] and related issues; follow-up emails; email [...] regarding claim-splitting, potential injunction and related issues.		1	\$1,147.50
2/17/2021	Ramallo, Oscar	Telephone conference with team regarding potential Singapore action.		0.7	\$553.35
2/17/2021	Ramallo, Oscar	Conduct legal research [...]		0.8	\$632.40
2/17/2021	Condon, Brian K.	Appear for status conference before Judge Klein; conference with M. Bernstein and team regarding issues at conference, and procedural issues for Trustee's potential suit in Singapore; legal research and email with O. Ramallo regarding same.		3	\$2,907.00
2/18/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference [...] regarding potential Singapore claims, claim-splitting and related legal and strategy issues; follow-up email correspondence with A&P attorneys.		1.2	\$1,377.00
2/18/2021	Malloy, Charles A.	Review B. Condon email regarding possible Singapore law claims and Trustee's amending complaint.		0.4	\$387.60
2/18/2021	Condon, Brian K.	Review law on [...] injunctions, and email with O. Ramallo regarding same; conference call with M. Bernstein [...] regarding strategy for U.S. and Singapore suits, and mediation; [...]		2.3	\$2,228.70
2/19/2021	Mintz, Benjamin	Calls and emails regarding follow-up from status conference and litigation status.		0.4	\$459.00
2/19/2021	Bernstein, Michael L.	Attention to strategy regarding potential Singapore claims; emails - B. Condon regarding same.		0.6	\$688.50
2/19/2021	Condon, Brian K.	[...] [E]mails with M. Bernstein regarding Singapore issues, procedures [...]; review draft status conference order from DLA.		1.1	\$1,065.90
2/20/2021	Bernstein, Michael L.	Email correspondence regarding Singapore claims.		0.2	\$229.50
2/22/2021	Condon, Brian K.	Review [...] analysis of Singapore law and procedure for response to Trustee's planned action; emails with M. Bernstein and B. Mintz [...]; draft email [...] regarding analysis, strategy for U.S. and Singapore, [...]; legal research regarding [...] claim splitting [...]; [...]	0.4	2.2	\$2,131.80
2/22/2021	Bernstein, Michael L.	Attention to Singapore claims; review Singapore counsel's advice and identify follow-up questions; email correspondence regarding same.		0.8	\$918.00
2/22/2021	Mintz, Benjamin	Attention to legal strategy regarding Singapore action, emails regarding same.		0.6	\$688.50
2/22/2021	Malloy, Charles A.	Review email from Singapore counsel and B. Condon response.		0.8	\$775.20
2/25/2021	Malloy, Charles A.	Review Trustee's adversary proceeding scheduling chart.		0.2	\$193.80
2/25/2021	Bernstein, Michael L.	Review status chart from Trustee's counsel; review summary of Singapore counsel's advice.		1.6	\$1,836.00
2/26/2021	Mintz, Benjamin	Emails regarding Singapore issues.		0.2	\$229.50
2/26/2021	Bernstein, Michael L.	Review court filings and email correspondence.		0.2	\$229.50
2/27/2021	Condon, Brian K.	Review [...] [Singapore counsel] responses on Singapore law and procedure for potential suit; follow up email with [Singapore counsel] [...]; emails with M. Bernstein and team regarding strategy for [...] U.S. and Singapore; review [...] documents [...]; legal research regarding standards for anti-suit injunction; draft outline regarding procedure [...] in U.S. and Singapore, and analyzing same.		4.8	\$4,651.20
2/27/2021	Malloy, Charles A.	Review Singapore counsel responses [...]		0.5	\$484.50
2/27/2021	Bernstein, Michael L.	Review Singapore counsel's [...] email correspondence [...].		0.6	\$688.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
2/27/2021	Mintz, Benjamin	Emails regarding Singapore issues and strategy.		0.5	\$573.75
2/28/2021	Malloy, Charles A.	Review B. Condon email to Singapore counsel regarding [...] timing [...]		0.2	\$193.80
2/28/2021	Bernstein, Michael L.	Review Singapore timeline email memorandum.		0.2	\$229.50
3/1/2021	Bernstein, Michael L.	Email correspondence regarding potential Singapore claims.		0.4	\$459.00
3/1/2021	Mintz, Benjamin	Attention to Singapore legal strategy, emails regarding same.		0.2	\$229.50
3/1/2021	Malloy, Charles A.	Review Trustee's as-filed adversary status report; review outline [...] provided by Singapore counsel.		0.3	\$290.70
3/2/2021	Bernstein, Michael L.	Email correspondence regarding Mediator Judge Gross invoice allocation [...]		0.3	\$344.25
3/2/2021	Condon, Brian K.	Review mediator's invoice; review agreement for sharing fees; email with M. Bernstein regarding same.		0.3	\$290.70
3/3/2021	Mintz, Benjamin	Review [...] emails regarding [...] Singapore strategy.	0.3	0.2	\$229.50
3/4/2021	Bernstein, Michael L.	Prepare for and participate in conference call with A&P attorneys regarding potential Singapore action [...]; various emails; [...]	0.4	0.3	\$344.25
3/4/2021	Mintz, Benjamin	Emails regarding Singapore strategy, [...], call with M. Bernstein, B. Condon and O. Ramallo regarding same.	0.4	0.4	\$459.00
3/4/2021	Mintz, Benjamin	Telephone conference with M. Bernstein, B. Condon regarding [...] claims splitting.		0.7	\$803.25
3/4/2021	Ramallo, Oscar	Telephone conference with team regarding strategy.		0.8	\$632.40
3/5/2021	Bernstein, Michael L.	Emails with B. Condon and litigation team.		0.3	\$344.25
3/6/2021	Mintz, Benjamin	Call with M. Bernstein, B. Condon and O. Ramallo regarding strategy [...]		1.1	\$1,262.25
3/6/2021	Bernstein, Michael L.	Prepare for and participate in call with A&P team regarding U.S. and Singapore strategy.		1.1	\$1,262.25
3/6/2021	Ramallo, Oscar	Telephone conference with team on US and Singapore strategy.		1	\$790.50
3/6/2021	Condon, Brian K.	Conference call with M. Bernstein and team regarding [...] U.S. and Singapore proceedings [...]		1.5	\$1,453.50
3/7/2021	Condon, Brian K.	Draft email [...] regarding [...] proceedings in U.S. and Singapore.		0.6	\$581.40
3/8/2021	Bernstein, Michael L.	Review and revise draft strategy email memorandum.		0.5	\$573.75
3/9/2021	Bernstein, Michael L.	Telephone conference with B. Condon; review and revise draft memorandum regarding [...] U.S. and Singapore litigation; various emails.		0.8	\$918.00
3/9/2021	Condon, Brian K.	[...]; [T]elephone conference with M. Bernstein regarding [...] regarding forum issues; confer with O. Ramallo and M. Nicolini regarding research issues for personal jurisdiction motion [...]; [...]	1.4	1.5	\$1,453.50
3/9/2021	Ramallo, Oscar	Telephone conference with team regarding U.S. and Singapore strategy.		1.3	\$1,027.65
3/9/2021	Ramallo, Oscar	Confer with B. Condon regarding Singapore/US strategy.		0.1	\$79.05
3/10/2021	Condon, Brian K.	[...]; [R]eview research on claim splitting [...]; [...]	1.4	1.4	\$1,356.60
3/10/2021	Nicolini, Madelyn	Research and draft email [re][...] standard for claim splitting [...], and [...] foreign anti-suit injunction.	2.5	5.1	\$2,384.25
3/10/2021	Bernstein, Michael L.	Attention to Singapore claims analysis [...][,] potential claim-splitting injunction; various emails.		1.5	\$1,721.25
3/11/2021	Nicolini, Madelyn	Research and draft email [...] [re] foreign anti-suit injunction and [...]; research alter ego liability [...].	2.7	5.5	\$2,571.25
3/12/2021	Nicolini, Madelyn	Research alter ego liability [...] and draft memo [...]		2.1	\$981.75
3/14/2021	Bernstein, Michael L.	Email correspondence with B. Condon.		0.1	\$114.75
3/14/2021	Nicolini, Madelyn	Research alter ego liability [...] and draft memo [...]		0.8	\$374.00
3/15/2021	Nicolini, Madelyn	Research and draft memo section regarding alter ego liability [...]; research and draft memorandum regarding [...] personal jurisdiction [...]		4.4	\$2,057.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
3/16/2021	Nicolini, Madelyn	[...]; [R]research and draft memo [...] regarding [...] personal jurisdiction [...].	2.8	2.8	\$1,309.00
3/17/2021	Nicolini, Madelyn	Revise sections of memo [...]; [...]; research and draft memo section regarding standard for personal jurisdiction [...]	3	4.1	\$1,916.75
3/17/2021	Condon, Brian K.	[...] [T]elephone call with [...], and email M. Bernstein and B. Mintz regarding same; email to [Singapore counsel] regarding [...] potential Singapore action; review [...] motion to dismiss [...] on lack of personal jurisdiction.	1.8	1.5	\$1,453.50
3/18/2021	Nicolini, Madelyn	Research and draft memorandum regarding standard for personal jurisdiction [...]		3.2	\$1,496.00
3/18/2021	Bernstein, Michael L.	Consider potential strategies [...] [re] claim splitting and multi-jurisdiction litigation.		0.7	\$803.25
3/19/2021	Nicolini, Madelyn	Research, draft, and edit memo section regarding personal jurisdiction [...]		4.8	\$2,244.00
3/19/2021	Condon, Brian K.	Review research on personal jurisdiction [...]		0.2	\$193.80
3/22/2021	Bernstein, Michael L.	Review Singapore [...]; emails regarding same.		0.4	\$459.00
3/22/2021	Mintz, Benjamin	Review email regarding Singapore legal issues.		0.1	\$114.75
3/22/2021	Malloy, Charles A.	Attention to B. Condon email regarding request from Singapore counsel [...]; review Zetta docket and pleadings [...]; follow-up email to B. Condon.		2.7	\$2,616.30
3/22/2021	Condon, Brian K.	Emails with [Singapore counsel] regarding background [...]; emails with C. Malloy regarding background materials [...]; [...]	1.8	0.8	\$775.20
3/23/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference with B. Condon regarding various issues in [...] and Trustee litigation.	0.7	0.6	\$688.50
3/23/2021	Condon, Brian K.	Email with D. Lin and J. Chung regarding HSBC correspondent banks; review [...]		0.2	\$193.80
3/24/2021	Condon, Brian K.	Emails with J. Chung regarding [...] HSBC; review same; [...], and email to team regarding same; telephone call with [...], and email to team regarding same.	0.6	1.2	\$1,162.80
3/24/2021	Bernstein, Michael L.	Email correspondence regarding [...]; emails regarding same; review advice from Singapore counsel; [...]; email correspondence with B. Condon.	0.7	1.5	\$1,721.25
3/24/2021	Malloy, Charles A.	Attention to [...]		0.3	\$290.70
3/25/2021	Bernstein, Michael L.	Attention to [...]; [...]; email correspondence regarding same; [...]	0.8	0.6	\$688.50
3/25/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; arrange for [...]		0.1	\$34.00
3/25/2021	Malloy, Charles A.	[...]; [R]eview B. Condon and B. Mintz emails regarding Trustee claims [...]; attention to communications regarding documents [...]	0.8	1.2	\$1,162.80
3/25/2021	Nicolini, Madelyn	Participate in call with B. Condon and O. Ramallo to discuss research [...]		1	\$467.50
3/25/2021	Ramallo, Oscar	Telephone call with M. Nicolini and B. Condon regarding strategy and upcoming motions.		1	\$790.50
3/25/2021	Ramallo, Oscar	Review research email memoranda on motion to dismiss issues.		0.9	\$711.45
3/25/2021	Condon, Brian K.	Email with B. Mintz regarding aircraft transactions; telephone conference with O. Ramallo and M. Nicolini regarding research issues and strategy [...]; review documents [...], and emails with K. DiGalbo regarding same; review mediator's invoice, allocate same, and emails with D. Moss and J. Lyons regarding same; [...]		3	\$2,907.00
3/26/2021	Bernstein, Michael L.	Attention to Singapore claims strategy.		0.3	\$344.25
3/29/2021	Condon, Brian K.	Review research for upcoming motions to dismiss and anti-suit injunction; email with P. Gibbs [...]; email with M. Bernstein regarding case status.		1.2	\$1,162.80
3/30/2021	Nicolini, Madelyn	Research and draft legal memo [...]; review section of amended complaint [...]		3.9	\$1,823.25
3/30/2021	Bernstein, Michael L.	Review amended adversary complaint; email correspondence regarding same; [...]	1.3	1.4	\$1,606.50
3/30/2021	Mintz, Benjamin	Emails regarding amended complaint and follow up.		0.3	\$344.25
3/30/2021	Malloy, Charles A.	Attention to emails regarding Trustee's amended complaint; preliminary review of amended complaint.		0.6	\$581.40

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
3/30/2021	Condon, Brian K.	Review amended complaint filed by Trustee; email team with brief summary; email [...]; telephone call with M. Bernstein regarding amended complaint [...]; [...]	3.5	2.6	\$2,519.40
3/31/2021	Condon, Brian K.	[...] telephone call with M. Bernstein and B. Mintz regarding [...]; review amended complaint, and emails with O. Ramallo regarding motion to dismiss; review research [...]; [...]	5.5	2.2	\$2,131.80
3/31/2021	Nicolini, Madelyn	Legal research; [...] review amended complaint for comparison [...]		2.1	\$981.75
3/31/2021	Bernstein, Michael L.	[...]; [A]ttention to strategy for U.S. and Singapore litigation; review and revise draft summary memorandum; email correspondence [...]; telephone conference and email correspondence regarding same.	2	1.1	\$1,262.25
3/31/2021	Mintz, Benjamin	Review amended complaint, call with Bernstein and Condon regarding hearing, strategy.		1	\$1,147.50
3/31/2021	Ramallo, Oscar	Review amended complaint for purposes of motion to dismiss.		0.7	\$553.35
3/31/2021	Malloy, Charles A.	Attention to emails [...]; attention to updated hearing notices on docket; review materials [...]		1.1	\$1,065.90
4/1/2021	Nicolini, Madelyn	Review [...] Amended Complaint [...]; compare [...] allegations [...].		4.2	\$1,963.50
4/1/2021	Bernstein, Michael L.	Review legal research; email correspondence regarding potential Singapore case; prepare for and participate in telephone conference [...].		2.3	\$2,639.25
4/1/2021	Malloy, Charles A.	Review Trustee's omnibus adversary status report.		0.4	\$387.60
4/1/2021	Condon, Brian K.	Telephone conference with [...]; preparation for same.		1.4	\$1,356.60
4/2/2021	Nicolini, Madelyn	Review counts included in Amended Complaint [...]; [...]; review exhibits attached to Amended Complaint; review current draft of Motion to Dismiss [...]		4.1	\$1,916.75
4/5/2021	Bernstein, Michael L.	[...] [A]ttention to strategy for personal jurisdiction motion and motion to dismiss amended adversary complaint.	0.5	0.6	\$688.50
4/5/2021	Ramallo, Oscar	Confer with Brian Condon regarding motions responsive to complaint.		1	\$790.50
4/5/2021	Condon, Brian K.	[...] [E]mail and call with J. Lyons regarding mediation invoice; conference with O. Ramallo regarding strategy and issues for motion to dismiss.	0.5	1.5	\$1,453.50
4/6/2021	Malloy, Charles A.	Review Trustee's amended complaint; telephone conference with B. Condon regarding outline and work on motions to dismiss [...]; further review of amended complaint and related materials.		2.5	\$2,422.50
4/6/2021	Bernstein, Michael L.	Review court order; follow-up regarding motion to dismiss issues.		0.8	\$918.00
4/6/2021	Ramallo, Oscar	Draft motion to dismiss.		1.2	\$948.60
4/6/2021	Condon, Brian K.	Review of amended complaint allegations [...], review prior motion, telephone call with C. Malloy regarding strategy for drafting and research, and review outline of motion.		1.6	\$1,550.40
4/7/2021	Nicolini, Madelyn	Review Courts Memorandum of Decision on Motion to Dismiss [...]; research caselaw [...] under Section 548 [...]		5.1	\$2,384.25
4/7/2021	Bernstein, Michael L.	Review amended adversary complaint and prior motion to dismiss decision; compile list of issues to address in motion to dismiss amended complaint.		1.6	\$1,836.00
4/7/2021	Malloy, Charles A.	Continue review of Trustee's amended complaint; review background materials from B. Condon for work on motions to dismiss amended complaint.		2.3	\$2,228.70
4/7/2021	Ramallo, Oscar	Draft motion to dismiss.		8.2	\$6,482.10
4/7/2021	Condon, Brian K.	Emails with O. Ramallo and M. Nicolini regarding extraterritoriality arguments for motion to dismiss.		0.3	\$290.70
4/8/2021	Nicolini, Madelyn	Research case law [...] under Section 548 of the Bankruptcy Code [...]; draft summary of cases and other authority found in research.		6.9	\$3,225.75
4/9/2021	Ramallo, Oscar	Review [...] research.		0.3	\$237.15
4/9/2021	Nicolini, Madelyn	Prepare legal memorandum regarding [...] avoidance action; review cases [...] to support argument in Motion to Dismiss [...].		4.1	\$1,916.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
4/9/2021	Malloy, Charles A.	Review Trustee's amended complaint in connection with motions to dismiss.		4.5	\$4,360.50
4/9/2021	Condon, Brian K.	Review research memos from M. Nicolini [...]; [...]	1.1	1.1	\$1,065.90
4/9/2021	Bernstein, Michael L.	Follow-up regarding allocation of mediator bills [...]		0.1	\$114.75
4/10/2021	Nicolini, Madelyn	Review cases [...] to support argument in Motion to Dismiss [...]; review and revise section of memorandum regarding same.		3.2	\$1,496.00
4/10/2021	Bernstein, Michael L.	Follow up regarding Mediator invoices [...]		0.1	\$114.75
4/10/2021	Malloy, Charles A.	Continue review of Trustee's amended complaint.		1	\$969.00
4/10/2021	Condon, Brian K.	Review further [...] research from M. Nicolini.		0.3	\$290.70
4/12/2021	Condon, Brian K.	Email to O. Ramallo and M. Nicolini regarding research and arguments [...]		0.2	\$193.80
4/12/2021	Malloy, Charles A.	Review Trustee's amended complaint; [...]; work on [...] motions to dismiss amended complaint.		4.4	\$4,263.60
4/12/2021	Nicolini, Madelyn	Research case law regarding application of Bankruptcy Code sections [...] in connection with motion to dismiss.		5.2	\$2,431.00
4/12/2021	Ramallo, Oscar	Draft motion to dismiss brief.		4.9	\$3,873.45
4/13/2021	Nicolini, Madelyn	Research case law on [...] Sections 502 and 550 of the Bankruptcy Code.		5.8	\$2,711.50
4/13/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; retrieve and organize [...] documents.		1	\$340.00
4/13/2021	Malloy, Charles A.	Review prior motion to dismiss briefing and outline arguments for motion to dismiss [...]; emails with B. Condon.		1.1	\$1,065.90
4/13/2021	Ramallo, Oscar	Draft motion to dismiss papers.		6.2	\$4,901.10
4/13/2021	Bernstein, Michael L.	Attention to motion to dismiss and personal jurisdiction motion arguments; email correspondence regarding same; attention to BVI declaration issues; [...]		1	\$1,147.50
4/13/2021	Condon, Brian K.	Review of Harney's research regarding [...], and conference call regarding expert declaration on same for motion to dismiss; emails with M. Bernstein and O. Ramallo regarding same; [...]		2.8	\$2,713.20
4/14/2021	Nicolini, Madelyn	Research [...] caselaw for standard [...] under Section 550(a) of the Bankruptcy Code; research [...] personal jurisdiction [...] in the forum.		7.9	\$3,693.25
4/14/2021	Malloy, Charles A.	Review amended complaint and exhibits; telephone conference with B. Condon regarding outline of arguments on motion to dismiss; continue work on arguments for motion to dismiss.		3.7	\$3,585.30
4/14/2021	Bernstein, Michael L.	Correspondence regarding BVI declaration.		0.2	\$229.50
4/14/2021	Ramallo, Oscar	Zoom call with BVI counsel [...]		1	\$790.50
4/14/2021	Ramallo, Oscar	Draft motion to dismiss.		3.2	\$2,529.60
4/14/2021	Condon, Brian K.	Review [...] records [...]; [...]; telephone conference with C. Malloy regarding strategy and drafting of motion to dismiss [...]; emails with O. Ramallo and M. Nicolini regarding research issues on jurisdiction.		3.7	\$3,585.30
4/15/2021	Nicolini, Madelyn	Research case law [...] for lack of personal jurisdiction.		6.1	\$2,851.75
4/15/2021	Bernstein, Michael L.	Email correspondence regarding motion to dismiss amended complaint and personal jurisdiction; review correspondence from [...]		0.4	\$459.00
4/15/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database searches [...]		1.2	\$408.00
4/15/2021	Ramallo, Oscar	Draft motion to dismiss claims against Mr. Li.		7.8	\$6,165.90
4/15/2021	Malloy, Charles A.	Review Trustee's amended complaint; emails with B. Condon regarding motion to dismiss; work on outline of motion to dismiss arguments.		3.6	\$3,488.40
4/15/2021	Condon, Brian K.	Emails [...] for jurisdictional motion [...]; emails with BVI counsel regarding declaration; review emails from O. Ramallo regarding arguments for motion.		1.8	\$1,744.20

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
4/16/2021	Nicolini, Madelyn	Research case law [...] for lack of personal jurisdiction; prepare summary of relevant case law.		6.1	\$2,851.75
4/16/2021	Condon, Brian K.	Review facts [...]; review outline of motion to dismiss, prior briefs, and conference with C. Malloy regarding strategy and drafting [...].		2.6	\$2,519.40
4/16/2021	Ramallo, Oscar	Draft motion to dismiss claims against Mr. Li.		5.2	\$4,110.60
4/16/2021	Malloy, Charles A.	Review prior briefing on motions to dismiss; further review of amended complaint and outlining motion to dismiss arguments; telephone conference with B. Condon to discuss motion to dismiss and other motion practice.		4.8	\$4,651.20
4/16/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; retrieval [and] [...] organize documents.		1.5	\$510.00
4/16/2021	Bernstein, Michael L.	Compile notes regarding issues to address in connection with adversary proceeding and motion to dismiss.		0.7	\$803.25
4/17/2021	Nicolini, Madelyn	Research alter ego case law to support motion to dismiss.		3.6	\$1,683.00
4/18/2021	Nicolini, Madelyn	Continued legal research to rebut Trustee's alter ego theory.		3.7	\$1,729.75
4/18/2021	Malloy, Charles A.	Research and draft motion to dismiss amended complaint.		2.5	\$2,422.50
4/19/2021	Nicolini, Madelyn	Research case law on [...] alter ego liability; research case law regarding [...] specific personal jurisdiction.		8.2	\$3,833.50
4/19/2021	Malloy, Charles A.	Review materials and work on draft motion to dismiss Trustee's amended complaint.		2.5	\$2,422.50
4/19/2021	Bernstein, Michael L.	Email correspondence regarding briefs in support of motion to dismiss and with respect to personal jurisdiction; address strategy issues regarding same.		0.6	\$688.50
4/19/2021	Condon, Brian K.	Work on draft motions to dismiss amended complaint; review facts [...]; telephone conference with O. Ramallo regarding strategy for motions and evidentiary submission; review research and prior briefing; email with BVI counsel [...]		3.2	\$3,100.80
4/19/2021	Ramallo, Oscar	Confer with Brian Condon regarding motions to dismiss.		1.9	\$1,501.95
4/19/2021	Ramallo, Oscar	Continue to draft motion to dismiss papers.		5.2	\$4,110.60
4/20/2021	Nicolini, Madelyn	Research case law regarding [...] specific personal jurisdiction.		5.3	\$2,477.75
4/20/2021	Malloy, Charles A.	Review research and prior briefing, Trustee's amended complaint; draft sections of motion to dismiss amended complaint.		5	\$4,845.00
4/20/2021	Bernstein, Michael L.	Email correspondence regarding [...] status, and briefing on motion to dismiss amended complaint and personal jurisdiction.		0.3	\$344.25
4/20/2021	Condon, Brian K.	Research regarding [...] choice of law analysis.		0.7	\$678.30
4/20/2021	Ramallo, Oscar	Continue to draft motion to dismiss.		7.2	\$5,691.60
4/21/2021	Nicolini, Madelyn	Research personal jurisdiction case law and draft summary [...]		3.8	\$1,776.50
4/21/2021	Condon, Brian K.	[...] Review outline of draft motion to dismiss; conference call with M. Bernstein, O. Ramallo and B. Mintz regarding strategy and arguments for motion to dismiss amended complaint [...]; work on draft motion to dismiss fraud claims.	0.5	2.9	\$2,810.10
4/21/2021	Mintz, Benjamin	Telephone call regarding motion to dismiss response.		0.8	\$918.00
4/21/2021	Bernstein, Michael L.	Prepare for and participate in conference call regarding strategy for motion to dismiss and personal jurisdiction motion; review [...] materials relevant to motion to dismiss arguments.		1.5	\$1,721.25
4/21/2021	Malloy, Charles A.	Draft [...] argument sections for motion to dismiss; review [...] documents cited in amended complaint.		4.2	\$4,069.80
4/21/2021	Ramallo, Oscar	Zoom conference with team regarding motion to dismiss.		1.7	\$1,343.85
4/21/2021	Ramallo, Oscar	Continue to draft motion to dismiss papers.		2.9	\$2,292.45
4/22/2021	Nicolini, Madelyn	Research case law regarding personal jurisdiction, alter ego, and section 550 issues in connection with motions to dismiss.		7.8	\$3,646.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
4/22/2021	Bernstein, Michael L.	Inquiry regarding status [...], other adversary proceedings; email correspondence from [...] counsel.		0.2	\$229.50
4/22/2021	Malloy, Charles A.	Draft and revise motion to dismiss amended complaint; emails and telephone conference with B. Condon; review [...] and continue drafting motion to dismiss.		4.7	\$4,554.30
4/22/2021	Condon, Brian K.	Draft and revise portions of UL defendants' motion to dismiss amended complaint; review prior briefing and research; telephone call with C. Malloy regarding briefing strategy.		3.6	\$3,488.40
4/22/2021	Ramallo, Oscar	Continue to draft motion to dismiss papers.		2.9	\$2,292.45
4/23/2021	Nicolini, Madelyn	Legal research regarding jurisdiction and substantive bankruptcy law issues to support motions to dismiss claims against Mr. Li and entity defendants.		10.8	\$5,049.00
4/23/2021	Condon, Brian K.	Draft and revise portions of UL entities' motion to dismiss amended complaint; review documents [...], and email same to O. Ramallo; review research points regarding same; telephone call with O. Ramallo regarding strategy for jurisdiction argument.		5.4	\$5,232.60
4/23/2021	Ramallo, Oscar	Telephone calls with B. Condon regarding personal jurisdiction [...].		1.5	\$1,185.75
4/23/2021	Ramallo, Oscar	Continue to draft motion to dismiss papers.		5.9	\$4,663.95
4/23/2021	Malloy, Charles A.	Legal research on [...] fraud standards; review amended complaint; draft and revise argument section for motion to dismiss regarding badges of fraud; emails with B. Condon.		5.6	\$5,426.40
4/24/2021	Condon, Brian K.	Emails with O. Ramallo regarding jurisdiction issues; email [...] regarding facts.		0.5	\$484.50
4/24/2021	Bernstein, Michael L.	Attention to questions in connection with personal jurisdiction motion.		0.2	\$229.50
4/24/2021	Malloy, Charles A.	Attention to emails from M. Nicolini, B. Condon regarding reasonably equivalent value research.		0.5	\$484.50
4/24/2021	Nicolini, Madelyn	Research case law [...] pursuant to Section 548 of the Bankruptcy Code.		1.4	\$654.50
4/25/2021	Condon, Brian K.	Further draft and revise UL entities' motion to dismiss amended complaint; review factual and litigation record; emails with C. Malloy regarding fraud claims.		9.3	\$9,011.70
4/25/2021	Malloy, Charles A.	Review case law and complaint; draft argument for motion to dismiss regarding fraudulent transfer and reasonably equivalent value.		2.5	\$2,422.50
4/26/2021	Nicolini, Madelyn	Review case law [...] related to personal jurisdiction.		2.9	\$1,355.75
4/26/2021	Condon, Brian K.	Further drafting and revision of UL entities motion to dismiss amended complaint; review facts, documents, prior pleadings, and research [...].	1.5	7.5	\$7,267.50
4/26/2021	Malloy, Charles A.	Attention to email from B. Condon regarding Trustee fraud allegations, review complaint and respond to B. Condon; emails with B. Condon and O. Ramallo regarding fraud allegations; review agreement attached to complaint and emails with O. Ramallo; review [...] documentation and further emails regarding same.		3.5	\$3,391.50
4/26/2021	DiGalbo, Kathryn A.	Legal Assistant services for O. Ramallo; document retrieval [...]		0.6	\$204.00
4/26/2021	Ramallo, Oscar	Continue to draft motion to dismiss Li Qi.		7	\$5,533.50
4/27/2021	Nicolini, Madelyn	Review case law [...] as related to personal jurisdiction; review and revise draft motion to dismiss.		2.6	\$1,215.50
4/27/2021	Bernstein, Michael L.	Review [...] case and consider applicability regarding personal jurisdiction and automatic stay issues; address questions regarding pending briefs; email correspondence regarding [mediation].		0.8	\$918.00
4/27/2021	Ramallo, Oscar	Continue to draft motion to dismiss Li Qi.		8.2	\$6,482.10
4/27/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; retrieve and organize [...] case filings.		0.5	\$170.00
4/27/2021	Malloy, Charles A.	Attention to emails regarding judicial notice question; attention to emails regarding draft motion to dismiss.		0.6	\$581.40

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
4/27/2021	Condon, Brian K.	Further draft and revise UL Defendants' motion to dismiss amended complaint; emails with M. Bernstein and O. Ramallo regarding various issues; email with J. Lyons regarding payment of mediator; [...]	0.3	5.4	\$5,232.60
4/27/2021	Mintz, Benjamin	Emails regarding motion to dismiss, review decision and legal analysis regarding same.		0.5	\$573.75
4/28/2021	Bernstein, Michael L.	Work on motion to dismiss brief.		5.8	\$6,655.50
4/28/2021	Malloy, Charles A.	Attention to B. Condon email regarding recharacterization arguments; attention to emails regarding draft motion to dismiss.		0.5	\$484.50
4/28/2021	Condon, Brian K.	Review bank documents regarding correspondent accounts, email with team regarding judicial notice.		0.3	\$290.70
4/28/2021	Nicolini, Madelyn	Research case law on judicial notice [...]		2.2	\$1,028.50
4/28/2021	Mintz, Benjamin	Review and comment on draft motion to dismiss.		3.3	\$3,786.75
4/29/2021	Bernstein, Michael L.	Review Trustee's [...] extraterritoriality arguments; email correspondence regarding same; follow up with B. Condon regarding personal jurisdiction motion.		0.6	\$688.50
4/29/2021	Nicolini, Madelyn	Research case law on judicial notice [...]		5.5	\$2,571.25
4/29/2021	Malloy, Charles A.	[...] Attention to comments on draft motion to dismiss.	0.7	0.8	\$775.20
4/29/2021	Condon, Brian K.	Initial review and revision of Li Qi motion to dismiss amended complaint, emails with O. Ramallo and M. Nicolini re HSBC documents regarding correspondent account.		3.3	\$3,197.70
4/29/2021	Mintz, Benjamin	[...] Review motion to dismiss briefing and prepare comments and revisions.	1.5	2.5	\$2,868.75
4/30/2021	Nicolini, Madelyn	Further research case law on judicial notice [...]		5	\$2,337.50
4/30/2021	Condon, Brian K.	Review judicial notice/incorporation by reference research [...]; email with C. Malloy regarding revisions to motion to dismiss; review and revise draft Li Qi motion to dismiss [...]; prepare comments to O. Ramallo regarding same; review [...] facts.		6.4	\$6,201.60
4/30/2021	Malloy, Charles A.	Review comments on draft motion to dismiss and draft responses and revisions.		1.5	\$1,453.50
5/1/2021	Condon, Brian K.	Further review and revise draft of Li Qi motion to dismiss [...] and review judicial notice research.		4.3	\$4,166.70
5/1/2021	Nicolini, Madelyn	Research case law on judicial notice [...]		1.5	\$701.25
5/1/2021	Ramallo, Oscar	Email regarding Li Qi motion to dismiss.		0.2	\$158.10
5/2/2021	Condon, Brian K.	Further revisions to draft of Li Qi motion to dismiss complaint; email with team regarding same.		1.5	\$1,453.50
5/3/2021	Nicolini, Madelyn	Review UL and Li Qi motions to dismiss for preparation of judicial notice requests, review and prepare exhibits for same.		3.6	\$1,683.00
5/3/2021	Mintz, Benjamin	Telephone call with M. Bernstein and B. Condon regarding motions to dismiss and case strategy, emails regarding same, review motions.		1.3	\$1,491.75
5/3/2021	Condon, Brian K.	Legal research regarding translated declaration requirements; call with certified translator [...]; drafting [...] declaration for motion to dismiss; telephone call with B. Mintz and M. Bernstein regarding status and arguments for UL and Li Qi motions to dismiss; review Trustee's status report.		6.4	\$6,201.60
5/3/2021	Malloy, Charles A.	Revise motion to dismiss pursuant to B. Mintz and M. Bernstein comments; draft email to B. Condon regarding comments to motion; attention to Trustee's draft status report and emails regarding briefing schedule.		1.8	\$1,744.20
5/3/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search and document retrieval.		0.4	\$136.00
5/3/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference with B. Condon and B. Mintz regarding pending briefs; review Trustee's proposed schedule comments regarding same; work on legal brief in support of Mr. Li's motion to dismiss on personal jurisdiction grounds.		7.3	\$8,376.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
5/3/2021	Ramallo, Oscar	Continue to draft and revise Li Qi motion to dismiss papers.		9.2	\$7,272.60
5/4/2021	Mintz, Benjamin	Review and comment on Li Qi personal jurisdiction motion to dismiss; review Ferrer witness statement, call with M. Bernstein and B. Condon regarding motion to dismiss.		6	\$6,885.00
5/4/2021	Bernstein, Michael L.	Work on legal briefs in support of motion to dismiss claims against entity defendants and Mr. Li, including personal jurisdiction objections; telephone conference with B. Condon and B. Mintz regarding same; work on revisions; review draft BVI declaration and email correspondence with A&P attorneys regarding same; follow up with [...]		4.9	\$5,622.75
5/4/2021	Malloy, Charles A.	Research regarding lease recharacterization elements; further review of aircraft lease documents; draft revisions to motion to dismiss [...] recharacterization arguments and email to B. Condon regarding same.		2.5	\$2,422.50
5/4/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; database search and retrieval of documents [...].		1.3	\$442.00
5/4/2021	Condon, Brian K.	Further draft [...] declaration in support of personal jurisdiction motion, and further revisions to motion; telephone call with O. Ramallo regarding evidentiary issues; telephone conference with M. Bernstein and B. Mintz regarding comments and arguments on UL defendants' motion to dismiss; further revisions to brief and legal research in response to comments.		10.2	\$9,883.80
5/4/2021	Ramallo, Oscar	Telephone call with B. Condon to discuss motion to dismiss.		1.1	\$869.55
5/4/2021	Ramallo, Oscar	Further draft and revise Li Qi personal jurisdiction motion papers.		8.9	\$7,035.45
5/5/2021	Bernstein, Michael L.	Work on motion to dismiss briefs and [...]; revise selected sections of brief; prepare for and participate in call with A&P litigation team regarding briefs; follow-up emails.		3.8	\$4,360.50
5/5/2021	Mintz, Benjamin	Work on motions to dismiss; call regarding same with B. Condon, M. Bernstein and O. Ramallo.		3.5	\$4,016.25
5/5/2021	Nicolini, Madelyn	Research case law on personal jurisdiction [...]		5	\$2,337.50
5/5/2021	Ramallo, Oscar	Further draft and revise Li Qi motion to dismiss; telephone call with team to discuss drafting issues and strategy.		5.9	\$4,663.95
5/5/2021	Condon, Brian K.	Further work on edits to UL Defendants' motion to dismiss; further drafting of [...] declaration [...]; emails [...] regarding declaration for motion; telephone conference with M. Bernstein, O. Ramallo regarding Li Qi motion to dismiss, facts [...], BVI law.		5.5	\$5,329.50
5/6/2021	Nicolini, Madelyn	Research case law on personal jurisdiction [...] and supplemental jurisdiction [...]; draft email summarizing same to O. Ramallo and B. Condon; prepare draft of request for judicial notice and prepare docketed materials for same.		7.9	\$3,693.25
5/6/2021	Ramallo, Oscar	Telephone conference with team regarding Ferrer declaration regarding BVI law on alter ego and revise [...]; revise Li Qi motion to dismiss.		7.9	\$6,244.95
5/6/2021	Mintz, Benjamin	Work on Li Qi and UL motions to dismiss and related emails, call with M. Bernstein and B. Condon.		3.2	\$3,672.00
5/6/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference regarding [...]; draft proposed revisions to same; work on personal jurisdiction brief [...]; telephone conference with B. Condon; various email correspondence with A&P litigation team; review and revise [...].		3.2	\$3,672.00
5/6/2021	Condon, Brian K.	Conference call with M. Bernstein and team regarding [...] Ferrer declaration; emails [...] for declaration; telephone call with M. Bernstein regarding same; further revision to UL defendants' motion to dismiss.		4.5	\$4,360.50
5/7/2021	Condon, Brian K.	Further revisions and editing of UL Defendants' motion to dismiss [...]; telephone call to court staff regarding hearing date and review local rules; telephone conference with M. Bernstein and team regarding Li Qi motion to dismiss and BVI law declaration [...]		9.2	\$8,914.80

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
5/7/2021	Nicolini, Madelyn	Draft Request for Judicial Notice; review UL Defendants Motion to Dismiss and pull dockets to include in Request for Judicial Notice.		8.4	\$3,927.00
5/7/2021	Ellis, Rodney	Assist with cite checking Defendant's Motion to Dismiss Amended Adversary Complaint.		9.3	\$3,280.58
5/7/2021	Mintz, Benjamin	Emails and calls with team regarding Ferrer declaration on BVI alter ego law.		0.7	\$803.25
5/7/2021	Ramallo, Oscar	Telephone call with team regarding Ferrer declaration on BVI law, and further revise Li Qi motion to dismiss on personal jurisdiction.		6.2	\$4,901.10
5/7/2021	Bernstein, Michael L.	Calls and emails with A&P litigation attorneys regarding BVI declaration; review and revise [...]; address choice of law issues; prepare for and participate in internal call regarding same.		2.4	\$2,754.00
5/8/2021	Condon, Brian K.	Review and revise Li Qi motion to dismiss, review all comments and changes [...]; telephone call and email with O. Ramallo regarding same; email with translator [...]		5.2	\$5,038.80
5/8/2021	Nicolini, Madelyn	Input cite check changes into UL Defendants Motion to Dismiss; review UL Defendants Motion to Dismiss and Li Qi Motion to Dismiss and pull dockets to include in Request for Judicial Notice.		6.7	\$3,132.25
5/8/2021	Ellis, Rodney	Assist with cite checking Zetta Jet - Li Qi's Motion to Dismiss Adversary Complaint.		8.8	\$3,104.20
5/8/2021	Bernstein, Michael L.	Email correspondence with BVI counsel.		0.2	\$229.50
5/8/2021	Ramallo, Oscar	Telephone call with B. Condon regarding UL and Li Qi motions, and further revise motion papers.		2.9	\$2,292.45
5/9/2021	Mintz, Benjamin	Emails regarding motions to dismiss, review case law regarding same.		0.3	\$344.25
5/9/2021	Nicolini, Madelyn	Revise legal citations in Li Qi Defendants Motion to Dismiss; review UL Defendants Motion to Dismiss and Li Qi Motion to Dismiss and pull dockets to include in Request for Judicial Notice; edit Request for Judicial Notice and accompanying chart of documents.		4.3	\$2,010.25
5/9/2021	Condon, Brian K.	Review and further revision of UL defendants motion to dismiss; review judicial notice document; further emails and revisions [...] and finalization of papers for filing.		5.5	\$5,329.50
5/9/2021	Ramallo, Oscar	Telephone call with B. Condon regarding motions; revise motion to dismiss papers.		2.9	\$2,292.45
5/10/2021	Bernstein, Michael L.	Review and final revisions to entity defendants' brief; work on [...]; email correspondence with BVI counsel and A&P litigation team; review proposed revisions to [...] declaration and email correspondence regarding same.		2	\$2,295.00
5/10/2021	Mintz, Benjamin	Work on final issues for motion to dismiss; emails regarding same.		0.8	\$918.00
5/10/2021	DiGalbo, Kathryn A.	Legal Assistant services for B. Condon; retrieve unpublished opinions cited in the two Motion to Dismiss briefs and prepare appendices regarding same.		4.5	\$1,530.00
5/10/2021	Nicolini, Madelyn	Further drafting of chart for Request for Judicial Notice documents and organize documents; final review of briefs for [...] request for judicial notice.		3.1	\$1,449.25
5/10/2021	Condon, Brian K.	Final review of UL defendants' and Li Qi defendants' motions to dismiss for filing; review and revise judicial notice request; review appendices; [...]; emails with translator [...]; assist with e-filing of motions; emails with team regarding filing status.		6.3	\$6,104.70
5/10/2021	Ramallo, Oscar	Telephone call with B. Condon regarding filings; finalize briefs for filing.		4.1	\$3,241.05
5/11/2021	Bernstein, Michael L.	Review scheduling order and email correspondence regarding same with A&P team; telephone conference with B. Condon regarding case strategy; various emails with A&P litigation team; consider approach to [...] exhibits [...]; preliminary review of Minsheng settlement agreement and emails with A&P team regarding same.		2.3	\$2,639.25
5/11/2021	Mintz, Benjamin	Emails regarding motion to dismiss and scheduling, case strategy.		0.8	\$918.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
5/11/2021	Condon, Brian K.	Multiple follow-up issues regarding filing of motions to dismiss; review revised proof of service; review briefing schedule order from court, and emails with team regarding same; review of Trustee's motion to approve settlement with Minsheng, and email team regarding summary of same.		2.3	\$2,228.70
5/12/2021	Nicolini, Madelyn	Research case law on [...] settlement order [...].		2.9	\$1,355.75
5/12/2021	Malloy, Charles A.	Attention to emails regarding terms of Trustee's settlement with Minsheng.		0.4	\$387.60
5/12/2021	Mintz, Benjamin	Emails with team regarding motion to dismiss strategy, call with M. Bernstein.		0.5	\$573.75
5/12/2021	Ramallo, Oscar	Emails with team regarding scheduling orders.		0.3	\$237.15
5/12/2021	Condon, Brian K.	Review court orders regarding briefing and regarding redlined/bookmarked amended complaint; review [...] Minsheng settlement [...]; review of exhibits and filing [...] rules.		1.2	\$1,162.80
5/12/2021	Bernstein, Michael L.	Review Minsheng settlement [...]; email - B. Condon; email correspondence regarding scheduling order and related matters; attention to exhibits to motion to dismiss [...]; email correspondence regarding [...] motion to dismiss; various emails with A&P litigation team.		1.9	\$2,180.25
5/13/2021	Bernstein, Michael L.	Telephone conference with B. Condon and email correspondence regarding mediator invoice; email correspondence regarding document and exhibit issues.		1.1	\$1,262.25
5/13/2021	Condon, Brian K.	Review local rules regarding exhibit filing, telephone call with court clerk regarding [...] exhibits, and email with M. Bernstein regarding same; review history of allocating mediator's invoice; emails with M. Bernstein regarding status; draft email to Judge Gross regarding allocation of invoice.		1.5	\$1,453.50
5/17/2021	Bernstein, Michael L.	Telephone conference with B. Condon regarding Bankruptcy Court status conference and judge's order regarding blacklined adversary complaint; review correspondence from Trustee; various emails.		0.4	\$459.00
5/17/2021	Malloy, Charles A.	Email with B. Condon regarding pending adversary proceedings; review filing in connection with adversary proceeding status conference.		0.4	\$387.60
5/17/2021	Condon, Brian K.	Telephone call with J. Roselius regarding court hearing on submission of redlined complaint; telephone call [...] regarding same; telephone call with M. Bernstein regarding same; review draft from J. Roselius and email regarding same.		0.8	\$775.20
5/18/2021	Malloy, Charles A.	Attention to B. Condon request regarding notices of filings.		0.4	\$387.60
5/18/2021	Condon, Brian K.	Review draft order from Trustee regarding extension to file redlined complaint.		0.3	\$290.70
5/18/2021	Bernstein, Michael L.	Follow-up regarding notice from Bankruptcy Court; email correspondence with B. Condon regarding same.		0.4	\$459.00
5/19/2021	Condon, Brian K.	Emails with [...] M. Bernstein regarding allocation of mediator's invoice; monitor and review submissions and court orders regarding redline, filing deadlines, and other case matters.		0.8	\$775.20
5/19/2021	Nicolini, Madelyn	Review Judge Klein's court calendar; [...] review docket entries in [...] Yuntian [...] adversary proceedings for upcoming hearing dates.	0.8	0.3	\$140.25
5/19/2021	Malloy, Charles A.	Emails with M. Nicolini regarding Zetta adversary proceedings; review docket materials for Zetta adversary proceedings.	0.5	0.2	\$193.80
5/20/2021	Nicolini, Madelyn	Review docket entries in [...] Yuntian [...] adversary proceedings for upcoming hearing dates; prepare case calendar for upcoming hearing dates and other relevant dates.	1.9	0.4	\$187.00
5/20/2021	Bernstein, Michael L.	Review docket materials regarding other adversary proceedings and consider potential impact in our case.		0.2	\$229.50
5/20/2021	Malloy, Charles A.	Review M. Nicolini email regarding case calendar and upcoming hearings.		0.2	\$193.80
5/21/2021	Bernstein, Michael L.	Email correspondence with B. Condon regarding approach to reply briefs on motions to dismiss.		0.2	\$229.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
5/24/2021	Bernstein, Michael L.	Email correspondence regarding preparation for reply briefs.		0.1	\$114.75
5/24/2021	Nicolini, Madelyn	Review docket entries and updates to determine hearing dates.		0.5	\$233.75
5/24/2021	Malloy, Charles A.	Review materials to prepare for call to coordinate on motion to dismiss.		0.6	\$581.40
5/25/2021	Bernstein, Michael L.	Coordination regarding reply briefing; brief conference with C. Malloy; review Trustee's blackline [...]	0.3	0.7	\$803.25
5/25/2021	Malloy, Charles A.	Telephone conference with B. Condon, M. Nicolini, O. Ramallo regarding motion to dismiss briefing; review motion to dismiss and attention to court decisions on choice of law from related adversary proceedings.		1.5	\$1,453.50
5/25/2021	Nicolini, Madelyn	Participate in call with B. Condon, O. Ramallo, and C. Malloy regarding planning for replies to Trustee opposition to motions to dismiss; review drafts of UL Defendants' Motion to Dismiss [...]; review Local Rules and Judge Klein's rules regarding replies; conduct preliminary research [...] under the Bankruptcy Code.		3.8	\$1,776.50
5/25/2021	Ramallo, Oscar	Telephone call regarding opposition and replies; research regarding [...] potential opposition.		1.2	\$948.60
5/26/2021	Malloy, Charles A.	Attention to filings in adversary proceedings; attention to Trustee's proposed status update and emails with M. Nicolini regarding same; attention to review of decisions and briefing for reply to opposition to motion to dismiss.		1.1	\$1,065.90
5/26/2021	Nicolini, Madelyn	[...] Review draft status report for adversary proceedings from U.S. Trustee [...] related to Yuntian case; review UL Defendant's Motion to Dismiss section [...].	0.6	1.1	\$514.25
5/26/2021	Bernstein, Michael L.	[...] Call with B. Condon regarding strategy for preparation of response briefs in support of motion to dismiss.	1.5	1	\$1,147.50
5/27/2021	Condon, Brian K.	Telephone call with M. Bernstein regarding strategy and arguments for reply briefing on UL and Li Qi motions to dismiss [...]	1.1	1.1	\$1,065.90
5/27/2021	Malloy, Charles A.	Emails with B. Condon regarding choice of law issues and prior bankruptcy court decisions in related adversary proceedings.		0.6	\$581.40
5/27/2021	Bernstein, Michael L.	Telephone conference with B. Condon regarding [...] and to coordinate preparation of reply briefs in support of motions to dismiss entity defendants and Mr Li; email and call with B. Mintz; follow-up email with B. Condon regarding additional legal arguments.	0.7	0.8	\$918.00
5/28/2021	Mintz, Benjamin	Attention to [...] pending motion to dismiss and research issues.	0.5	0.5	\$573.75
5/31/2021	Condon, Brian K.	Review motions to dismiss regarding strategy and organization of research for drafting of replies; email with team regarding same; review foreign law and choice of law issues, and email M. Bernstein regarding same; email H. Singh [...]; email [Singapore counsel] regarding Singapore law issues for reply brief; email P. Ferrer regarding [...]		2.8	\$2,713.20
5/31/2021	Condon, Brian K.	Conference call with O. Ramallo, C. Malloy and M. Nicolini regarding strategy and organization for reply briefs, potential issues, and research; brief review of Trustee's redlined complaint per court order.		1.3	\$1,259.70
5/31/2021	Malloy, Charles A.	Attention to B. Condon email regarding drafting reply to Trustee's opposition to motion to dismiss.		0.3	\$290.70
5/31/2021	Mintz, Benjamin	Emails regarding strategy for replies on motions to dismiss regarding choice of law issues.		0.2	\$229.50
5/31/2021	Bernstein, Michael L.	Review work plan for motion to dismiss reply briefs; focus on potential [...] issues to address; email correspondence regarding same.		0.5	\$573.75
6/1/2021	Bernstein, Michael L.	Review BVI counsel invoices and emails with B. Condon regarding same; review email correspondence [...]; [...] coordinate preparation of motion to dismiss reply briefs [...].	1.1	0.3	\$344.25
6/1/2021	Malloy, Charles A.	[...] Attention to materials for reply to Trustee's opposition to motion to dismiss [...]	0.8	0.4	\$387.60
6/1/2021	Nicolini, Madelyn	Research [...] remedy under the Bankruptcy Code.		0.7	\$327.25

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/1/2021	Mintz, Benjamin	[...] Attention to choice of law issues, case strategy including on motions to dismiss [...]	1	0.6	\$688.50
6/1/2021	Ramallo, Oscar	Telephone call with B. Condon regarding jurisdictional issues.		0.6	\$474.30
6/2/2021	Mintz, Benjamin	Emails regarding and attention to case strategy, [...], motions to dismiss, amended complaint.		0.2	
6/2/2021	Nicolini, Madelyn	Conduct research regarding [...] recharacterization claim.		3.1	\$1,449.25
6/2/2021	Ramallo, Oscar	Telephone call with B. Condon regarding motion papers.		0.9	\$711.45
6/3/2021	Nicolini, Madelyn	Review correspondence related to Trustee's opposition to motions to dismiss and other filings; review Trustee's opposition to motions to dismiss and other filings and note potential issues in preparation to draft replies; conduct research regarding [...] personal jurisdiction.		4.7	\$2,197.25
6/3/2021	Condon, Brian K.	[...] Initial review of Trustee's filings in oppositions to UL Defendants and Li Qi's motions to dismiss amended complaint; email with P. Ferrer regarding [...]; review motion for jurisdictional discovery, and review prior briefs regarding same; multiple emails with team regarding reply drafting.	3	1.5	\$1,453.50
6/3/2021	Bernstein, Michael L.	Read Trustee's brief in opposition to Mr. Li's motion to dismiss, brief in opposition to entity defendants' motion to dismiss, and ancillary Bankruptcy Court filings by Trustee; outline points for reply and issues for further inquiries and research; email correspondence regarding same; prepare for telephone conference with A&P litigation team regarding reply briefing.		3.1	\$3,557.25
6/3/2021	Malloy, Charles A.	Attention to emails regarding Trustee's jurisdictional discovery motion and review of same; emails regarding Trustee's opposition to motion to dismiss; review motions to dismiss.		4.1	\$3,972.90
6/3/2021	Mintz, Benjamin	Review opposition to Li Qi motion, emails regarding same and Trustee oppositions.		2.5	\$2,868.75
6/3/2021	Ramallo, Oscar	Draft UL Defendants' reply on extraterritorial issues.		9.9	\$7,825.95
6/4/2021	Nicolini, Madelyn	Telephone conference with M. Bernstein, B. Mintz, B. Condon, C. Malloy, and O. Ramallo regarding Trustee's opposition and replies; telephone conference with M. Bernstein and B. Mintz regarding [...] English law; review [...] English law sections of Motion to Dismiss and Trustee's Opposition; review Phelps Declaration; conduct research regarding [...] personal jurisdiction [...]		8.3	\$3,880.25
6/4/2021	Condon, Brian K.	Review Trustee's oppositions to motions to dismiss; notes and outline for preparation of replies; conference call with team regarding rebuttal arguments for reply, foreign law issues.		5.8	\$5,620.20
6/4/2021	Willcocks, Jeremy	Review email and documents received from M. Bernstein.		0.5	\$535.50
6/4/2021	Malloy, Charles A.	Review Trustee's objection to request for judicial notice and work on outline of response; review Trustee's opposition to motion to dismiss amended complaint; telephone conference with team to discuss reply to Trustee's opposition to motion to dismiss.		6.2	\$6,007.80
6/4/2021	Bernstein, Michael L.	[...] Prepare for and participate in call with A&P litigation team regarding reply briefs in support of motion to dismiss; draft English law recharacterization outline; call with M. Nicolini and B. Mintz regarding same; email correspondence with [...] regarding Trustee's declaration and potential rebuttal; review Trustee's arguments and declaration regarding same; email follow-up with B. Condon; review H. Singh declaration and Trustee's argument to strike same; email correspondence regarding same; various emails regarding litigation strategy.	1.5	3.6	\$4,131.00
6/4/2021	Mintz, Benjamin	Review opposition briefs, call with M. Bernstein, call with B. Condon, Bernstein et al. regarding opposition briefs, call with M. Bernstein and M. Nicolini regarding opposition briefs.		5.5	\$6,311.25
6/4/2021	Ramallo, Oscar	Draft UL Defendants' reply in support of motion to dismiss.		7.9	\$6,244.95

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/5/2021	Nicolini, Madelyn	Review Court's Memorandum of Decision in CAVIC [...]; review correspondence regarding English law [...]; review Phelps English law declaration [...]; review case law cited to in Trustee's opposition [...]; draft portion of reply brief [...]; correspond with M. Bernstein and B. Mintz regarding [...] argument; conduct research regarding [...] personal jurisdiction [...]		11.8	\$5,516.50
6/5/2021	Willcocks, Jeremy	Review documents received from US colleagues; read [...] decision; provide responses.		1.7	\$1,820.70
6/5/2021	Malloy, Charles A.	Work on draft reply to Trustee's opposition to motion to dismiss amended complaint; emails with M. Bernstein, B. Mintz regarding [...] English counsel; revise email to [...]; review schedule related to discovery and judicial notice motions and email regarding same.		4.2	\$4,069.80
6/5/2021	Mijares-Shafai, Gerardo	Communicate with B. Mintz regarding Trustee opposition to motion to dismiss and foreign declarants; review, analyze pleadings regarding same.		0.6	\$451.35
6/5/2021	Mintz, Benjamin	Attention to expert issues and response to opposition.		1.5	\$1,721.25
6/5/2021	Bernstein, Michael L.	Consideration of English recharacterization law in connection with revised motion to dismiss; review materials regarding same; email correspondence [...];[...]; attention to foreign law issues; email correspondence with A&P litigation team.	0.5	2.2	\$2,524.50
6/5/2021	Ramallo, Oscar	Continue to draft UL Defendant reply papers.		7.2	\$5,691.60
6/5/2021	Axford, Stuart	Review of background papers [...] in relation to English law [...]; internal emails in relation to [...] senior QC [...]; produce [...] instructions to counsel; internal emails [...].		6.6	\$7,012.50
6/5/2021	Willcocks, Jeremy	Further review of instructions to counsel; discuss same with S. Axford.		0.7	\$749.70
6/6/2021	Willcocks, Jeremy	Review correspondence and email to QC; correspondence with S. Axford.		0.9	\$963.90
6/6/2021	Malloy, Charles A.	Review Trustee's opposition to motion to dismiss, amended complaint; legal research for reply to Trustee's opposition; draft reply; attention to emails regarding English law declaration.		2.4	\$2,325.60
6/6/2021	Mijares-Shafai, Gerardo	Review, analyze Trustee's opposition to motion to dismiss and foreign declarants; communicate with O. Ramallo and B. Mintz regarding same.		1.8	\$1,354.05
6/6/2021	Mintz, Benjamin	Call with G. Mijares regarding expert declaration response, emails regarding expert issues and response to opposition.		1.2	\$1,377.00
6/6/2021	Condon, Brian K.	Legal research and drafting of reply brief on UL Defendants' motion to dismiss on actual fraud; revise extraterritoriality argument; emails with team regarding [...] law issues.		7.2	\$6,976.80
6/6/2021	Bernstein, Michael L.	Email correspondence regarding [...] English law; attention to preparation of reply briefs in support of motions to dismiss; email correspondence with A&P litigation team members regarding same.		1.1	\$1,262.25
6/6/2021	Nicolini, Madelyn	Draft portion of UL Defendants' Reply regarding choice of English law; conduct research regarding personal jurisdiction [...]		6.2	\$2,898.50
6/6/2021	Ramallo, Oscar	Draft Li Qi reply in support of motion to dismiss.		7.1	\$5,612.55
6/6/2021	Axford, Stuart	Revise instructions to [...] John Kimbell QC; send instructions to counsel [...]		2.4	\$2,550.00
6/7/2021	Nicolini, Madelyn	Review English case law cited in Opposition Declaration; conduct research regarding recharacterization of lease under English law; draft portion of UL Defendants' Reply regarding choice of English law; conduct research regarding personal jurisdiction [...]; review cases cited in Trustee's Opposition to Li Qi Motion to Dismiss.		9.6	\$4,488.00
6/7/2021	Mijares-Shafai, Gerardo	Review, analyze [...] from expert H. Singh.		0.4	\$300.90
6/7/2021	Bernstein, Michael L.	Work on [...], calls and emails regarding same; coordinate work on reply briefs and address legal and strategic issues in connection therewith.		5.8	\$6,655.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/7/2021	Condon, Brian K.	Further drafting of reply brief on UL Defendants' motion to dismiss; legal research regarding Hong Kong law, and emails with M. Bernstein regarding supplemental expert declaration; review request for judicial notice and outline response, draft email to M. Bernstein regarding same.		6.8	\$6,589.20
6/7/2021	Mintz, Benjamin	Attention to opposition, experts, call with M. Bernstein, review Singh declaration.		1.8	\$2,065.50
6/7/2021	Malloy, Charles A.	Research and draft reply to opposition to motion to dismiss regarding constructive fraudulent transfer claims; review email correspondence and draft and revise [...]; emails regarding status of reply to Trustee's opposition; telephone with M. Bernstein regarding Hong Kong law declaration and status of drafts; attention to emails regarding English law declaration; emails regarding response to opposition to judicial notice request.		9.2	\$8,914.80
6/7/2021	Gao, Tereza S.	Communicate with H. Singh regarding [...]; communicate with team regarding thoughts and next steps; provide [...] to H. Singh.		2.1	\$1,401.23
6/7/2021	Ramallo, Oscar	Continue to draft Li Qi reply.		9.2	\$7,272.60
6/7/2021	Willcocks, Jeremy	Review correspondence and discuss next steps with S. Axford.		1	\$1,071.00
6/7/2021	Axford, Stuart	Emails internally and with QC regarding [...].		1.8	\$1,912.50
6/8/2021	Mijares-Shafai, Gerardo	Review, analyze pleadings regarding Zetta declaration dispute; telephone conference with B. Mintz regarding Request for Judicial Notice work stream; draft reply to Trustee's motion to strike foreign expert declarations.		8	\$6,018.00
6/8/2021	Mintz, Benjamin	Attention to opposition pleadings, call regarding same with G. Mijares-Shafai, call with M. Bernstein, call with M. Bernstein, B. Condon and O. Ramallo regarding personal jurisdiction, emails regarding same.		2.6	\$2,983.50
6/8/2021	Malloy, Charles A.	Research and draft reply to opposition to motion to dismiss regarding constructive fraudulent transfer claim; review and revise recharacterization arguments; attention to emails [...]; attention to court order and emails regarding Trustee's jurisdictional discovery motion.		8.3	\$8,042.70
6/8/2021	Bernstein, Michael L.	Attention to foreign law arguments in connection with briefing of reply in support of motion to dismiss; email correspondence with [...]; review court order setting status conference on jurisdictional discovery; preparation for status conference argument on jurisdictional discovery; telephone conference with A&P attorneys regarding same; follow-up regarding China discovery issues; telephone conference with B. Mintz and email correspondence regarding requests for judicial notice and objections thereto.		4.8	\$5,508.00
6/8/2021	Nicolini, Madelyn	Draft and revise portion of UL Defendants' Reply regarding application of English law; review English law [...]; review Trustee's Objection to Request for Judicial Notice.		8.5	\$3,973.75
6/8/2021	Condon, Brian K.	Review Trustee's objections to request for judicial notice; draft outline of response strategy for same, and email team; review court order for status conference on Trustee's motion for jurisdictional discovery, prepare for status conference, and telephone call with M. Bernstein, B. Mintz regarding strategy for opposition and hearing; [...]	4.4	4.4	\$4,263.60
6/8/2021	Ramallo, Oscar	Telephone conference with team on reply briefing strategy; telephone call [...] regarding discovery procedures in China; further drafting of Li Qi motion reply.		2.4	\$1,897.20
6/8/2021	Ramallo, Oscar	Continue to draft Li Qi motion reply.		7.7	\$6,086.85
6/8/2021	Axford, Stuart	Call with John Kimbell QC to discuss [...]; emails with QC; Internal emails [...] on US law arising from [...]; emails back to QC [...]		3.4	\$3,612.50

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/9/2021	Nicolini, Madelyn	Draft and revise portion of UL Defendants Reply regarding application of English law; research timing [...] for jurisdictional discovery; review correspondence and docket regarding hearing and request for judicial notice.		7.3	\$3,412.75
6/9/2021	Gao, Tereza S.	Communicate with H. Singh regarding [...]; review and edit [...]; arrange H. Singh's signature.		1.9	\$1,267.78
6/9/2021	Mijares-Shafai, Gerardo	Review, analyze Request for Judicial notice pleadings and disputed issues; communicate with B. Mintz regarding same; draft reply to Trustee's objection to UL Defendants' request for judicial notice; research for same.		6.1	\$4,588.73
6/9/2021	Malloy, Charles A.	Draft and revise sections of reply to Trustee's opposition to motion to dismiss; further legal research for reply to Trustee's opposition to motion to dismiss; emails regarding English law expert declaration; attention to emails regarding status conference at court and scheduling of jurisdictional discovery motion and individual motion to dismiss.		7.2	\$6,976.80
6/9/2021	Mintz, Benjamin	Work on response to opposition including expert matters.		3.3	\$3,786.75
6/9/2021	Condon, Brian K.	Court appearance before Judge Klein on Trustee's motion for jurisdictional discovery; review [...] in preparation; multiple emails with team regarding hearing, motion schedule, and [...] issues; [...].	4	4.5	\$4,360.50
6/9/2021	Ramallo, Oscar	Telephone call with B. Condon regarding briefing.		0.5	\$395.25
6/9/2021	Ramallo, Oscar	Telephone conferences with B. Condon re reply briefing; [...]; research and draft opposition to Trustee's motion for jurisdictional discovery.		0.4	\$316.20
6/9/2021	Ramallo, Oscar	Attend hearing on motion for jurisdictional discovery.		1.5	\$1,185.75
6/9/2021	Ramallo, Oscar	Draft opposition to jurisdictional discovery motion.		7.6	\$6,007.80
6/9/2021	Bernstein, Michael L.	Review email summary of Judge Klein's ruling on discovery motion and follow-up email correspondence regarding same; attention to English law; email correspondence; review amended draft declaration and underlying case law [...]; work on revisions to [...]; confer with B. Mintz regarding same; email correspondence to [...]; follow up with Shanghai attorneys regarding discovery limitations under Chinese law in connection with response to jurisdictional discovery motion; email correspondence with A&P attorneys regarding request for judicial notice and objections thereto; coordinate reply in support of entity defendants' motion to dismiss; email correspondence regarding same.		4.9	\$5,622.75
6/9/2021	Axford, Stuart	Emails with QC; emails internally in relation to timing; review of article in relation to HK law analysis of same issue, and internal emails in response.		1.9	\$2,018.75
6/10/2021	Ware, Anton A.	Supervise research regarding Chinese law restrictions on U.S. discovery and email to M. Bernstein regarding same.		1.1	\$930.33
6/10/2021	Mijares-Shafai, Gerardo	Review, analyze Request for Judicial notice pleadings and disputed issues; communicate with B. Mintz regarding same; draft reply to Trustee objection to UL Defendants' request for judicial notice; research for same.		7.2	\$5,416.20
6/10/2021	Nicolini, Madelyn	Research timing to make a request for jurisdictional discovery; review correspondence and docket to update case calendar; conduct research regarding [...] declaratory relief; conduct research regarding jurisdictional discovery and new claims.		8.4	\$3,927.00
6/10/2021	Mintz, Benjamin	Prepare for call with English QC, call with English QC regarding [...], [...], attention to issues for response, calls with M. Bernstein and B. Condon.	0.9	1.9	\$2,180.25
6/10/2021	Malloy, Charles A.	Telephone conference with English law expert; provide pleadings [...]; review open research questions on draft reply; attention to communications regarding RJN reply.		2.5	\$2,422.50
6/10/2021	Bernstein, Michael L.	Work on dismissal motion reply briefs, discovery issues, foreign law issues, HK declaration, call with English QC and follow up; BVI issues; [...]; calls and email correspondence.	1	4	\$4,590.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/10/2021	Condon, Brian K.	Multiple emails and telephone conference with team regarding jurisdictional discovery motion and response to same; review emails with Shanghai office regarding discovery rules in China; review draft order on jurisdictional discovery motion and email J. Torosian regarding same; further drafting of UL Defendants' reply brief on motion to dismiss amended complaint.		5.8	\$5,620.20
6/10/2021	Ramallo, Oscar	Continue to draft opposition to jurisdictional discovery; review and comment on RJN reply.		9.2	\$7,272.60
6/10/2021	Axford, Stuart	Telephone consultation with John Kimbell QC; emails with QC prior to consultation.		1.5	\$1,593.75
6/10/2021	Ge, Zhouyi	Conduct legal research and draft response regarding restrictions under Chinese law on Chinese citizens giving depositions before U.S. courts.		2.8	\$833.00
6/11/2021	Condon, Brian K.	Telephone conference with P. Ferrer regarding [...]; [...]; further drafting of reply brief on UL Defendants' motion to dismiss; email to team regarding planning for reply filings.		5.2	\$5,038.80
6/11/2021	Nicolini, Madelyn	Conduct research regarding jurisdictional discovery [...]; conduct research regarding [...] deposition; review docket and update case calendar; review correspondence regarding filing schedules.		8.1	\$3,786.75
6/11/2021	Ramallo, Oscar	Conference (Zoom) with P. Ferrer re [...]; telephone call with G. Mijares-Shafai re reply on request for judicial notice; continue drafting opposition to motion for jurisdictional discovery.		0.5	\$395.25
6/11/2021	Ramallo, Oscar	Telephone call with G. Mijares regarding RJN reply.		0.3	\$237.15
6/11/2021	Ramallo, Oscar	Continue to draft opposition to motion for jurisdictional discovery.		7.7	\$6,086.85
6/11/2021	Mijares-Shafai, Gerardo	Review, analyze Request for Judicial notice pleadings and disputed issues; communicate with B. Mintz regarding same; draft reply to Trustee objection to UL Defendants' request for judicial notice; research for same; revise response to motion to strike foreign law declarations.		7	\$5,265.75
6/11/2021	Bernstein, Michael L.	Prepare for and participate in telephone conference with BVI counsel; work on reply papers in support of motions to dismiss and in opposition to Trustee's motion for jurisdictional discovery; calls and emails with A&P litigation team regarding same.		4.6	\$5,278.50
6/11/2021	Mintz, Benjamin	Further work on [...]; review draft opposition to motion to strike BVI law reports, and emails regarding same.		2	\$2,295.00
6/11/2021	Malloy, Charles A.	Attention to emails regarding declaration on Hong Kong law; emails regarding status of draft documents and filing deadlines.		0.8	\$775.20
6/11/2021	Gao, Tereza S.	Review correspondence and communicate with A. Ware regarding taking depositions in Hong Kong and related issues; supervise research regarding discovery proceedings in China.		0.8	\$533.80
6/11/2021	Ware, Anton A.	Supervise research on China/ Hong Kong law issues regarding taking of evidence and prepare email response to M. Bernstein regarding same.		1	\$845.75
6/11/2021	Ge, Zhouyi	Further legal research on follow-up issues regarding Chinese discovery procedures, and report regarding same to A. Ware.		1	\$297.50
6/12/2021	Nicolini, Madelyn	Conduct research regarding alter ego liability [...]		4.2	\$1,963.50
6/12/2021	Ramallo, Oscar	Continue to draft opposition to motion for jurisdictional discovery.		5.4	\$4,268.70
6/12/2021	Mintz, Benjamin	Attention to opposition pleadings and emails regarding same.		1	\$1,147.50
6/12/2021	Malloy, Charles A.	Attention to emails regarding responses on jurisdictional discovery questions; attention to email from B. Condon regarding comments on fraudulent transfer section of opposition; attention to additional legal research for fraudulent transfer question.		1	\$969.00
6/12/2021	Bernstein, Michael L.	Review responses on discovery issues; attention to motion to dismiss reply briefing.		0.7	\$803.25

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/12/2021	Condon, Brian K.	Work on edits to UL Defendants' reply on motion to dismiss; review comments from team; additional research regarding same; review English law and choice of law for reply on claims for recharacterization of 2016 leases; review issues for opposition to motion to jurisdictional discovery.		8.7	\$8,430.30
6/13/2021	Ramallo, Oscar	Telephone call with M. Bernstein regarding jurisdictional discovery brief.		0.1	\$79.05
6/13/2021	Nicolini, Madelyn	Conduct research regarding recharacterization [...]		1.3	\$607.75
6/13/2021	Bernstein, Michael L.	Work on jurisdictional briefing; email correspondence regarding same; coordinate preparation and review of all A&P briefing; begin work on revisions to entities' reply brief.		6.8	\$7,803.00
6/13/2021	Mintz, Benjamin	Review and revise reply regarding motion to dismiss, emails regarding same and related filings, telephone conference with M. Bernstein, review jurisdictional discovery response.		6	\$6,885.00
6/13/2021	Malloy, Charles A.	Emails regarding opposition to Trustee's request for judicial notice; attention to B. Condon email circulating draft of reply to opposition.		0.6	\$581.40
6/13/2021	Condon, Brian K.	Review draft opposition to [...] Trustee's motion for jurisdictional discovery; [...]; review and summarize draft supplemental declaration from P. Ferrer [...], and emails with team regarding same.	3.2	6.3	\$6,104.70
6/13/2021	Ramallo, Oscar	Further draft of reply regarding UL motion to dismiss, and opposition to motion for jurisdictional discovery.		5.2	\$4,110.60
6/14/2021	Mijares-Shafai, Gerardo	Review, analyze Trustee request for judicial notice; draft objection to same; research for same; correspond with A&P team regarding same.		4.5	\$3,385.13
6/14/2021	Malloy, Charles A.	Review draft reply to opposition to motion to dismiss; conduct additional legal research; review opposition to Trustee request for judicial notice; [...]	1.6	2.5	\$2,422.50
6/14/2021	Ellis, Rodney	Assist with cite checking Zetta Jet - Opposition of Non-Party Glove Assets Leave to Amend Adversary Complaint.		3.1	\$1,093.53
6/14/2021	Mintz, Benjamin	Review draft jurisdictional discovery opposition; telephone conferences with M. Bernstein, B. Condon and O. Ramallo regarding same.		5.5	\$6,311.25
6/14/2021	Bernstein, Michael L.	Work on reply brief in support of entity defendants' motion to dismiss; email correspondence and calls regarding same; review and revise [...]; telephone conference with A&P litigators regarding same; attention to English recharacterization law issues and arguments; telephone conference with A&P team regarding reply brief and ancillary filings; [...]; review status of all court filings in support of dismissal.	1	4.9	\$5,622.75
6/14/2021	Mammone, Lisa	Prepare Appendix of Unpublished Opinions Cited in Opposition of Non-Party Glove Assets Investment Limited to Trustee's Motion for Leave to Amend Adversary Complaint; Prepare Appendix of Unpublished Opinions Cited in Support of Li Qi's Opposition to Trustee's Motion for Jurisdictional Discovery.		3.2	\$1,088.00
6/14/2021	Nicolini, Madelyn	Research recharacterization claim [...]; research case law re [...] Ponzi scheme; revise choice of law section of UL Defendants' Reply; review and edit UL Defendants' Reply.		9	\$4,207.50
6/14/2021	Condon, Brian K.	Conference call with team regarding remaining issues on reply for UL Defendants' motion to dismiss; further draft and revise UL Defendants' reply [...]; complete edit of reply and address all comments; [...]; legal research and draft of request for judicial notice [...] for opposition to jurisdictional discovery motion.	2.3	8.9	\$8,624.10
6/14/2021	Ramallo, Oscar	Conference call with team re multiple opposition and reply filings, and further revise draft briefs.		1.5	\$1,185.75
6/14/2021	Ramallo, Oscar	Call to discuss motion filings.		1	\$790.50
6/14/2021	Ramallo, Oscar	Revise reply papers.		7.2	\$5,691.60

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/15/2021	Mijares-Shafai, Gerardo	Review, analyze revisions to reply to Trustee objection to request for judicial notice; revise same; review, analyze correspondence from A&P team regarding filings.		2.3	\$1,730.18
6/15/2021	Mintz, Benjamin	Review foreign law declarations; revise and comment on draft reply and opposition briefs; emails with team regarding same.		3.3	\$3,786.75
6/15/2021	Bernstein, Michael L.	Review and revise [...]; work on incorporating English law analysis into reply brief in support of entity defendants' motion to dismiss; [...]; review and make final revisions to brief in opposition to jurisdictional discovery; email - O. Ramallo regarding same; review final revisions [...]; coordinate finalizing all briefing in support of motion to dismiss; review and revise draft joint status report to Bankruptcy Court; email correspondence with O. Ramallo regarding same.	1.6	3.6	\$4,131.00
6/15/2021	Malloy, Charles A.	Review draft reply to opposition to motion to dismiss; review draft English law declaration; revise reply to incorporate English law declaration and circulate to M. Bernstein, B. Mintz; further emails regarding reply and declaration; emails regarding filing coordination; review and comment on Trustee's draft Rule 7016 status report; [...]	1	5.2	\$5,038.80
6/15/2021	Nicolini, Madelyn	Review and revise Li Qi reply to Motion for Jurisdictional Discovery; review and edit UL Defendants' Reply; review Kimbell QC declaration; collect foreign cases for inclusion in appendix of unpublished authorities.		12.3	\$5,750.25
6/15/2021	Mammone, Lisa	Prepare Appendix of Unpublished Opinions Cited in Support of Li Qi's Opposition to Trustee's Motion for Jurisdictional Discovery; Prepare Appendix of Unpublished Opinions Cited in Support of Li Qi's Request for Judicial Notice regarding Jurisdictional Discovery; prepare Index to Exhibits for Supplemental Ferrer Declaration.		4.8	\$1,632.00
6/15/2021	Ramallo, Oscar	Further review and revise motion to dismiss reply and jurisdictional discovery opposition briefs.		9.4	\$7,430.70
6/15/2021	Axford, Stuart	Review of and comments on QC's opinion; emails.		0.8	\$850.00
6/16/2021	Mijares-Shafai, Gerardo	Revise reply to Trustee objection to request for judicial notice; draft attorney declaration for same; research same.		3.2	\$2,407.20
6/16/2021	Nicolini, Madelyn	Final review and edit of UL Defendants' Reply; review UL Defendants' Reply to RJN Objection; perform various tasks related to filing including appendix and collecting authorities; [...]	2.2	6.9	\$3,225.75
6/16/2021	Bernstein, Michael L.	Final review of and revisions to brief in opposition to motion for jurisdictional discovery; final review of and revisions [...] in connection with recharacterization arguments; coordinate final review of reply brief in support of entity defendants' motion to dismiss; [...]; various emails with A&P litigation team.	0.8	3	\$3,442.50
6/16/2021	Mammone, Lisa	Prepare Appendix of Unpublished Authorities for UL Reply Brief re Motion to Dismiss; prepare Index to Exhibits for John Kimbell Opinion; prepare Appendix of Unpublished Authorities Cited in Reply of Defendants to Trustee's Limited Objection to Request for Judicial Notice In Support of Motion to Dismiss; telephone conference with attorneys regarding filing status.		13.7	\$4,658.00
6/16/2021	Mintz, Benjamin	Work on response briefing for motion to dismiss.		4	\$4,590.00
6/16/2021	Malloy, Charles A.	Assist with review and revisions to finalize reply to opposition to motion to dismiss; teleconference with O. Ramallo, M. Nicolini, L. Mammone regarding preparation and coordination for filing reply; [...]; attention to revisions to [...] and revise draft reply brief; attention to emails and draft of reply to objection to request for judicial notice; attention to notice and confirmation of filing of opposition to jurisdictional discovery; [...]	3.2	4	\$3,876.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/16/2021	Ramallo, Oscar	Telephone call with L. Mammone regarding expert declaration appendixes; Zoom call to coordinate filings; revise motion to dismiss reply papers.		0.7	\$553.35
6/16/2021	Ramallo, Oscar	Zoom call to coordinate filings.		0.4	\$316.20
6/16/2021	Ramallo, Oscar	Revise motion to dismiss reply papers.		9.2	\$7,272.60
6/17/2021	Mijares-Shafai, Gerardo	Review, analyze final form of pleadings filed regarding Request for Judicial Notice.		0.4	\$300.90
6/17/2021	Malloy, Charles A.	Attention to filing of reply to opposition to motion to dismiss and related documents; attention to emails regarding same; [...]	0.5	1	\$969.00
6/17/2021	Nicolini, Madelyn	Revise UL Defendants' Reply; review UL Defendants' Reply to RJN Objection; review filed materials.		5.2	\$2,431.00
6/17/2021	Bernstein, Michael L.	Work on finalizing Bankruptcy Court filings; calls and emails regarding same.		2	\$2,295.00
6/17/2021	Mintz, Benjamin	Work on reply regarding motion to dismiss, call with M. Bernstein, emails regarding same, call with M. Bernstein and O. Ramallo.		1	\$1,147.50
6/17/2021	Ramallo, Oscar	Telephone calls with V. Apodaca regarding filing.		0.6	\$474.30
6/17/2021	Ramallo, Oscar	Revise and finalize documents for filing.		3.9	\$3,082.95
6/18/2021	Mintz, Benjamin	Attention to supplemental authority, emails regarding opposition briefing.		0.6	\$688.50
6/18/2021	Bernstein, Michael L.	Work on notice of supplemental authority and memorandum of law in connection therewith; calls and emails with A&P attorneys regarding same; follow up regarding court filings in support of dismissal and related scheduling issues.		1.9	\$2,180.25
6/21/2021	Nicolini, Madelyn	Review Notice of Supplemental Authority; review [...]		0.7	\$327.25
6/21/2021	Mintz, Benjamin	Review supplemental authority, calls and emails regarding same and other filings, review submission.		3	\$3,442.50
6/21/2021	Condon, Brian K.	Review [...] decision on extraterritoriality; review draft notice of supplemental authority; telephone conference with team regarding strategy for same; telephone call with O. Ramallo regarding further edits and filing.		1.4	\$1,356.60
6/21/2021	Bernstein, Michael L.	Review and revise draft supplemental authority filing; telephone conference and email correspondence with A&P attorneys regarding same; review bankruptcy docket.		1.9	\$2,180.25
6/21/2021	Ramallo, Oscar	Telephone call with B. Condon and M. Bernstein re filings on UL motion to dismiss, opposition to jurisdictional discovery, and remaining filings.		0.7	\$553.35
6/21/2021	Ramallo, Oscar	Telephone call with B. Condon regarding filings.		0.2	\$158.10
6/21/2021	Ramallo, Oscar	Telephone call with M. Bernstein to discuss opposition.		0.3	\$237.15
6/22/2021	Mintz, Benjamin	Emails regarding opposition and strategy.		0.2	\$229.50
6/22/2021	Malloy, Charles A.	Review replies and oppositions filed in connection with Trustee's adversary proceeding; [...]	1	1	\$969.00
6/22/2021	Ramallo, Oscar	Telephone call with B. Condon regarding jurisdictional motion; revise opposition to motion to strike.		0.8	\$632.40
6/22/2021	Ramallo, Oscar	Revise opposition to motion to strike.		7.2	\$5,691.60
6/22/2021	Bernstein, Michael L.	Review motion to strike foreign law declarations and outline response thereto; email correspondence regarding litigation strategy; attention to supplemental authority filing; review Trustee's reply brief in support of jurisdictional discovery; communications with A&P attorneys regarding same.		2.4	\$2,754.00
6/23/2021	Nicolini, Madelyn	Review recent filings regarding Objection and Motion to Strike Supplemental Declaration, Reply to Opposition of Glove Assets, and Reply in Support of Motion for Jurisdictional Discovery; update case calendar regarding same.		0.8	\$374.00

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/23/2021	Bernstein, Michael L.	Review and analyze multiple briefs filed by Trustee; compile notes regarding points for response and for oral argument; telephone conference with B. Condon regarding same; email correspondence with O. Ramallo, B. Condon.		3.1	\$3,557.25
6/23/2021	Mintz, Benjamin	Attention to opposition and Trustee briefing, emails regarding same.		1	\$1,147.50
6/23/2021	Malloy, Charles A.	Attention to hearing notices, objections, and motions filed by Trustee and review same; review as-filed objection to motion to strike; [....]; review Trustee requests for judicial notice.	0.9	2.6	\$2,519.40
6/23/2021	Ramallo, Oscar	Review Trustee's reply brief; draft opposition to motion strike.		3.2	\$2,529.60
6/23/2021	Condon, Brian K.	Telephone call with M. Bernstein regarding pending matters; telephone call with O. Ramallo regarding response to Trustee's motion to strike declarations, and review draft response; review of new filings by Trustee on pending motions; [....]	0.5	2.4	\$2,325.60
6/24/2021	Nicolini, Madelyn	Review cases cited in Trustee's Objection and Motion to Strike Declaration and Supplemental Declaration.		3.9	\$1,823.25
6/24/2021	Malloy, Charles A.	Attention to emails from B. Condon, M. Bernstein, O. Ramallo regarding Trustee filings; [....]	1.8	1.7	\$1,647.30
6/24/2021	Bernstein, Michael L.	Attention to expert declaration objections and related issues; email correspondence regarding same; review Trustee's court filings; [....]	0.3	0.8	\$918.00
6/24/2021	Ramallo, Oscar	Draft opposition to motion strike papers.		7.9	\$6,244.95
6/24/2021	Condon, Brian K.	Emails with team regarding motion status, review schedule chart from Trustee.		0.4	\$387.60
6/25/2021	Nicolini, Madelyn	Review cases cited in Trustee's Objection and Motion to Strike Declaration and Supplemental Declaration.		2	\$935.00
6/25/2021	Mintz, Benjamin	Call with B. Condon, M. Bernstein and O. Ramallo regarding case strategy, upcoming hearing, attention to opposition, emails regarding same.		1.5	\$1,721.25
6/25/2021	Bernstein, Michael L.	Email correspondence with A&P litigation team; telephone conference with A&P litigation and bankruptcy team regarding pending briefs and strategy in advance of June 30 court hearing; review court order accelerating hearing on Trustee's motion for jurisdictional discovery; email correspondence regarding approach to June 30 hearing and related issues.		1.6	\$1,836.00
6/25/2021	Ramallo, Oscar	Telephone call with B. Condon regarding filings.		0.3	\$237.15
6/25/2021	Ramallo, Oscar	Telephone calls with B. Condon regarding motion Trustee's filings and response to same.		1.3	\$1,027.65
6/25/2021	Ramallo, Oscar	Team call to discuss filings.		1.1	\$869.55
6/25/2021	Ramallo, Oscar	Draft opposition to motion to strike papers.		2.2	\$1,739.10
6/25/2021	Condon, Brian K.	Review and revise response to Trustee's motion to strike foreign law declarations; review court order advancing hearing on jurisdictional motion; review choice of law issues in briefing; review objection to request for judicial notice; telephone call with team regarding pending motions and hearing.		5.6	\$5,426.40
6/26/2021	Mintz, Benjamin	Attention to opposition filings, emails regarding same.		0.8	\$918.00
6/26/2021	Bernstein, Michael L.	Review and revise draft brief in response to Trustee's motions to strike declarations of H. Singh and P. Ferrer; email correspondence regarding same with O. Ramallo and B. Condon.		2.3	\$2,639.25
6/26/2021	Condon, Brian K.	Email to M. Bernstein regarding objection to Trustee's status chart; telephone call and email with O. Ramallo regarding court filings in light of hearing date advancement; review and revise response to Trustee's motion to strike Ferrer and Singh declarations, and objection to Trustee's foreign law declarations.		1.5	\$1,453.50
6/26/2021	Ramallo, Oscar	Email regarding opposition motion to strike; email regarding preparation for jurisdictional discovery motion.		1.2	\$948.60
6/27/2021	Mintz, Benjamin	Attention to opposition filings, emails regarding same.		0.3	\$344.25

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
6/27/2021	Bernstein, Michael L.	Work on objection to Trustee's foreign law declarations; email correspondence with O. Ramallo and B. Condon regarding same.		1.2	\$1,377.00
6/27/2021	Condon, Brian K.	Preparation for court hearing on [...] motion for jurisdictional discovery; revise and finalize response to motion to strike Ferrer and Singh declarations on foreign law; email with J. Torosian regarding objection to status chart.	0.4	0.9	\$872.10
6/27/2021	Mammone, Lisa	Prepare Appendix of Unpublished Opinions Cited in Li Qi's and UL Defendants' Response to Objection and Motion to Strike Declaration of Peter Ferrer in Support of Li Qi's Motion to Dismiss and Declaration of Harprabdeep Singh in Support of UL Defendants' Motion to Dismiss.		4.4	\$1,496.00
6/27/2021	Ramallo, Oscar	Revise opposition to motion to strike and objection papers; review draft appendix.		1.5	\$1,185.75
6/27/2021	Malloy, Charles A.	Review M. Nicolini email and attached case calendar; review motions filed by Trustee regarding expert declarations.		0.5	\$484.50
6/28/2021	Nicolini, Madelyn	Review omnibus status report for adversary proceedings filed by Trustee and update internal case calendar to reflect omnibus status report; review UL Defendants' Response and Motion to Strike Expert Declarations.		1.9	\$888.25
6/28/2021	Bernstein, Michael L.	[...] Review as-filed briefs regarding foreign law declarations and related issues; emails - B. Condon.	0.5	0.5	\$573.75
6/28/2021	Mintz, Benjamin	Review opposition filings.		0.3	\$344.25
6/28/2021	Ramallo, Oscar	Telephone call with B. Condon regarding hearing on jurisdictional discovery motion.		0.7	\$553.35
6/28/2021	Ramallo, Oscar	Legal research regarding alter ego and personal jurisdiction.		0.4	\$316.20
6/28/2021	Malloy, Charles A.	[...] Review case status reports filed by Trustee; email with M. Nicolini regarding case calendar; emails regarding status conference and review of agenda.	2	1.5	\$1,453.50
6/28/2021	Condon, Brian K.	Review briefs on jurisdictional discovery motion and draft of reply brief on personal jurisdiction motion, in preparation for court hearing; review court's calendar and hearing schedule.		4	\$3,876.00
6/29/2021	Bernstein, Michael L.	Telephone conference with B. Condon regarding preparation for oral argument on jurisdictional discovery [...]; review court docket for June 30 court hearing; [...]	1	0.4	\$459.00
6/29/2021	Condon, Brian K.	Preparation for hearings on [...] motion for jurisdictional discovery; prepare outlines; review briefs and case law; emails with O. Ramallo regarding same; telephone conference with M. Bernstein regarding hearing strategy.	4	3.5	\$3,391.50
6/29/2021	Ramallo, Oscar	Legal research re choice of law issues.		3.2	\$2,529.60
6/30/2021	Bernstein, Michael L.	Prepare for and participate in contested court hearings.	3	2.9	\$3,327.75
6/30/2021	Mintz, Benjamin	Emails regarding pending hearing.		0.3	\$344.25
6/30/2021	Condon, Brian K.	Further preparation for court hearing on [...] motion for jurisdictional discovery; attend court hearing for status conferences [...] and jurisdictional discovery motions, emails with M. Bernstein and O. Ramallo regarding strategy.	6	3.6	\$3,488.40
6/30/2021	Ramallo, Oscar	Attend hearing on various motions; draft reply in support of Li Qi motion to dismiss.		7.9	\$6,244.95
7/1/2021	Bernstein, Michael L.	Call with B. Mintz regarding court hearings; email correspondence with B. Condon.		0.4	\$459.00
7/1/2021	Malloy, Charles A.	Attention to notices of hearing filed by court; attention to follow-up from June 30 hearing.		0.7	\$678.30
7/1/2021	Condon, Brian K.	Draft order and notice of lodgment for resetting of hearing on Li Qi motion to dismiss.		0.4	\$387.60
7/1/2021	Ramallo, Oscar	Draft Li Qi reply brief.		6.9	\$5,454.45
7/2/2021	Nicolini, Madelyn	Review recent docket entries; update internal case calendar reflecting recent orders entered by the court.		0.9	\$420.75

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
7/2/2021	Malloy, Charles A.	Review updated case calendar and emails from M. Nicolini, B. Condon, and M. Bernstein regarding schedule, hearing dates, and filing deadlines; review hearing notices and scheduling orders docketed by court.		0.9	\$872.10
7/2/2021	Bernstein, Michael L.	Review Bankruptcy Court filings; email correspondence with B. Condon; review updated case calendar.		0.5	\$573.75
7/2/2021	Condon, Brian K.	Revise proposed order on resetting of motion to dismiss and prepare for lodging; review calendar for all cases and email with team regarding status of hearings; work on reply brief on Li Qi motion to dismiss [...], email with O. Ramallo regarding [...] brief.		3.1	\$3,003.90
7/3/2021	Condon, Brian K.	Research and draft sections of reply brief on Li Qi motion to dismiss [...]; emails with O. Ramallo regarding same.		5.7	\$5,523.30
7/4/2021	Ramallo, Oscar	Continue to draft Li Qi reply brief.		2.2	\$1,739.10
7/5/2021	Condon, Brian K.	Further research and drafting [...] reply brief on Li Qi motion to dismiss; telephone call with O. Ramallo [...]; review and revise [...] reply brief, and email to M. Bernstein regarding same.		7.7	\$7,461.30
7/5/2021	Ramallo, Oscar	Telephone call with B. Condon regarding reply brief.		0.8	\$632.40
7/6/2021	Bernstein, Michael L.	Work on Li Qi personal jurisdiction reply brief; email correspondence regarding same.		4.7	\$5,393.25
7/6/2021	Mintz, Benjamin	Review response regarding Li Qi motion to dismiss.		3.5	\$4,016.25
7/6/2021	Ramallo, Oscar	Revise reply brief on Li Qi motion to dismiss.		3.9	\$3,082.95
7/7/2021	Bernstein, Michael L.	Prepare for and participate in conference call regarding reply brief in support of personal jurisdiction dismissal motion.		1.1	\$1,262.25
7/7/2021	Mintz, Benjamin	Telephone conference with M. Bernstein, call with B. Condon, O. Ramallo and M. Bernstein regarding [...] personal jurisdiction motion.		0.9	\$1,032.75
7/7/2021	Condon, Brian K.	Review edits and comments to reply brief on Li Qi motion to dismiss; conference call with team regarding [...] reply brief, and follow up call with O. Ramallo regarding same; draft edits to reply brief and circulate same; [...]	0.3	3.8	\$3,682.20
7/7/2021	Mammone, Lisa	Emails with B. Condon; prepare Appendix of Unpublished Opinions Cited in Defendant Li Qi's Reply in Support of Motion to Dismiss Counts I, II, VII, VIII, and IX of Amended Adversary Complaint.		4.5	\$1,530.00
7/7/2021	Nicolini, Madelyn	Review cases cited in Trustee's replies [...]		3.5	\$1,636.25
7/8/2021	Bernstein, Michael L.	Email regarding reply brief.		0.1	\$114.75
7/8/2021	Mintz, Benjamin	Review edits to reply for LiQi personal jurisdiction motion [...]		0.3	\$344.25
7/8/2021	Nicolini, Madelyn	Further review and analysis of cases cited in Trustee's replies [...]		4	\$1,870.00
7/8/2021	Mammone, Lisa	Emails with B. Condon; prepare Appendix of Unpublished Opinions Cited in Defendant Li Qi's Reply in Support of Motion to Dismiss Counts I, II, VII, VIII, and IX of Amended Adversary Complaint.		3.8	\$1,292.00
7/8/2021	Ellis, Rodney	General assistance with cite checking Li Qi's Reply Motion to Dismiss Adversary Complaint.		7.4	\$2,610.35
7/8/2021	Ramallo, Oscar	Email regarding choice of law oral argument; review and revise memo regarding Li Qi personal jurisdiction motion.		0.6	\$474.30
7/8/2021	Condon, Brian K.	Further review and revise reply brief on Li Qi motion to dismiss; [...]; emails with O. Ramallo regarding [...] hearing.		4.5	\$4,360.50
7/9/2021	Bernstein, Michael L.	Call with B. Condon, B. Mintz; review as-filed reply brief regarding personal jurisdiction; email - B. Condon regarding oral argument.		0.5	\$573.75
7/9/2021	Condon, Brian K.	Final review and revision of reply brief on Li Qi motion to dismiss, for filing; email with O. Ramallo regarding same.		2.2	\$2,131.80

Date	TKPR Name	Narrative	Hours Reduced	Adjusted Hours	Adjusted Balance
7/12/2021	Bernstein, Michael L.	Review court filings; review summary of July 14 court hearing agenda and preparation for hearing.		0.6	\$688.50
7/12/2021	Condon, Brian K.	Review all matters on calendar for July 14, and email to M. Bernstein regarding summary of matters to be heard.		0.8	\$775.20
7/15/2021	Bernstein, Michael L.	Litigation update memorandum, address issues [...]		0.2	\$229.50
7/15/2021	Condon, Brian K.	Revise email [...]		0.1	\$96.90
7/16/2021	Bernstein, Michael L.	Review various court filings; email correspondence - B. Condon, B. Mintz.		0.4	\$459.00
7/16/2021	Nicolini, Madelyn	Review updates to court docket to update internal case calendar.		0.5	\$233.75
7/21/2021	Bernstein, Michael L.	Follow up regarding payment of mediator expenses [...]		0.1	\$114.75
7/21/2021	Mintz, Benjamin	Emails regarding [...] action.		0.2	\$229.50
7/21/2021	Condon, Brian K.	Email [...] regarding potential [...] case issues; email to M. Bernstein [...]		0.3	\$290.70
7/22/2021	Bernstein, Michael L.	Email correspondence with B. Condon regarding various litigation issues.		0.2	\$229.50
7/22/2021	Condon, Brian K.	Review mediator's invoice and allocation emails; draft email to Judge Gross's firm regarding payment; email to DLA and Jones Day regarding payment of allocated amounts.		0.7	\$678.30
7/23/2021	Nicolini, Madelyn	Review docket and update internal case calendar.		0.3	\$140.25
7/26/2021	Nicolini, Madelyn	Further review docket updates and scheduling orders; circulate updated case calendar.		0.2	\$93.50
7/27/2021	Bernstein, Michael L.	Review Bankruptcy Court filings.		0.2	\$229.50
7/28/2021	Bernstein, Michael L.	Review Bankruptcy Court filings.		0.3	\$344.25
7/29/2021	Bernstein, Michael L.	Email correspondence with B. Condon regarding preparation for upcoming court hearings.		0.2	\$229.50
7/30/2021	Bernstein, Michael L.	Review entity and Li motion to dismiss briefing and compile notes for oral argument.		2.7	\$3,098.25
				3528	\$2,939,371.23

EXHIBIT G

Date	Cost Desc	To Bill Amt	Narrative
2/28/2020	Outside Counsel Fees	\$7,106.80	VENDOR: Brar Harprabdeep Singh INVOICE#: 21720 DATE: 2/17/2020 Providing a declaration on Hong Kong law
6/15/2021	Outside Counsel Fees	\$5,900.00	VENDOR: Brar Harprabdeep Singh INVOICE#: 06112021 DATE: 6/11/2021 Providing a supplemental declaration on Hong Kong law
3/4/2020	Outside Counsel Fees	\$8,719.31	VENDOR: Wong Partnership/Daniel Chan INVOICE #2040578 Advising on Singapore Bankruptcy Law Question relating to HC/B 179.2019*
5/28/2021	Outside Counsel Fees	\$17,352.23	VENDOR: Harneys Westwood & Riegels LP/Peter Ferrer INVOICE #1393312 Relating to Expert Witness Evidence
5/28/2021	Outside Counsel Fees	\$1,786.95	VENDOR: Harneys Westwood & Riegels LP/Peter Ferrer INVOICE #1393313 Relating to Expert Witness Evidence
6/25/2021	Outside Counsel Fees	\$11,390.50	VENDOR: Harneys Westwood & Riegels LP/Peter Ferrer INVOICE #1394454 Relating to Expert Witness Evidence
8/7/2021	Outside Counsel Fees	\$31,909.05	VENDOR: Quadrant Chambers/John Kimbell QC INVOICE/CASE 125928 Considering and Advising in Writing UK law**
		\$84,164.84	
			* Converted from S\$12,072.75
			** Converted from £23,000.00

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **DECLARATION OF BRIAN K. CONDON IN SUPPORT OF DEFENDANTS UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED, AND TRULY GREAT GLOBAL LIMITED'S MOTION FOR ATTORNEY'S FEES** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) September 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On (*date*) September 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) September 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

09/03/2021
Date

Vicky Apodaca
Printed Name

/s/ Vicky Apodaca
Signature

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

United States Trustee	ustpregion16.la.ecf@usdoj.gov
Minsheng Business Aviation Limited; Minsheng Financial Leasing Co., Ltd.; Yuntian 3 Leasing Company Designated Activity Company; Yuntian 4 Leasing Company Designated Activity Company	jmaster@jonesday.com; dtmoss@jonesday.com;
Jonathan D. King as Chapter 7 Trustee	john.lyons@us.dlapiper.com
Export Development Canada	mjedelman@vedderprice.com; ahudson@vedderprice.com; solson@vedderprice.com

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10 *Attorneys for Defendants*
Universal Leader Investment Limited,
11 Glove Assets Investment Limited, and
Truly Great Global Limited,
12

13 **IN THE UNITED STATES BANKRUPTCY COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **LOS ANGELES DIVISION**
16

17 In re:
18 ZETTA JET USA, LTD., a California corporation,
19 Debtor.

Lead Case No.: 2:17-bk-21386-SK
Chapter 7
Jointly Administered With:
Case No.: 2:17-bk-21386-SK

Adv. Proc. No. 2:19-AP-01383-SK

**APPENDIX OF UNPUBLISHED
OPINIONS CITED IN DEFENDANTS
UNIVERSAL LEADER INVESTMENT
LIMITED, GLOVE ASSETS
INVESTMENT LIMITED AND TRULY
GREAT GLOBAL LIMITED'S MOTION
FOR ATTORNEY'S FEES**

25 In re:
26 ZETTA JET PTE, LTD., a Singaporean corporation,
27 Debtor.

Hearing:
Date: September 29, 2021
Time: 9:00 am

1 JONATHAN D. KING, solely in his capacity as
2 Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Jet
PTE, Ltd.

Place: Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

3 Plaintiff,

4 v.

5 YUNTIAN 3 LEASING CO. DESIGNATED
6 ACTIVITY CO. F/K/A YUNTIAN 3 LEASING CO.
LTD., ET AL.

7 Defendants
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1 In accordance with Local Bankruptcy Rule 9013-2(b) (4), Defendants Universal Leader
2 Investment Limited, Glove Assets Investment Limited, and Truly Great Global Limited hereby submit
3 copies of unpublished judicial opinions cited in their Motion for Attorney’s Fees. The unpublished
4 judicial opinions cited in the Motion are attached hereto as follows:

- 5 1. Exhibit A: *Boeing Co. v. KB Yuzhnoye*, No. CV-13-00730-ABA-JWX, 2018 WL 735971
6 (C.D. Cal. Feb. 6, 2018)
- 7 2. Exhibit B: *Cap. Bank, PLC v. M/Y Birgitta*, No. CV 08-5893 PSG SSX, 2010 WL 4241584
8 (C.D. Cal. Oct. 18, 2010)
- 9 3. Exhibit C: *Doddie Alvarez Lapuz v. Saul*, No. SACV 17-1496-KS, 2021 WL 3202462 (C.D.
10 Cal. Apr. 27, 2021)
- 11 4. Exhibit D: *Ho Wing On Christopher v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R)
12 817
- 13 5. Exhibit E: *In re Crescent Assocs., LLC.*, No. 2:18-AP-01310-WB, 2021 WL 1245913 (Bankr.
14 C.D. Cal. Mar. 30, 2021)
- 15 6. Exhibit F: *In re Mac-Go Corp.*, No. 14-44181 CN, 2015 WL 1372717 (Bankr. N.D. Cal. Mar.
16 20, 2015)
- 17 7. Exhibit G: *Instrumentation Lab’y Co. v. Binder*, No. 11CV965 DMS (KSC), 2013 WL
18 12049072 (S.D. Cal. Sept. 18, 2013)
- 19 8. Exhibit H: *Johnson v. Astrue*, No. C-07-2387 EMC, 2008 WL 3984599 (N.D. Cal. Aug. 27,
20 2008)
- 21 9. Exhibit I: *King v. Bombardier Aerospace Corp.*, Memorandum Decision on Motion to
Dismiss, 2:19-ap-01147-SK Dkt. No. 168-1 (Bkr. C.D. Cal. Oct. 15, 2020)
- 22 10. Exhibit J: *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-CV-
00236-WHO, 2020 WL 7626410 (N.D. Cal. Dec. 22, 2020)
- 23 11. Exhibit K: *Willcox v. Lloyds TSB Bank, plc*, No. CV 13-00508 ACK-RLP, 2016 WL 7238799
24 (D. Haw. Dec. 14, 2016)

25 Dated: September 3, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

26 By: /s/ Brian K. Condon
27 Brian K. Condon (Bar No. 138776)
28 Oscar Ramallo (Bar No. 241487)
Attorneys for Defendants
Universal Leader Investment Limited, Glove
Assets Investment Limited, and Truly Great
Global Limited

EXHIBIT A

Boeing Company v. KB Yuzhnoye

United States District Court, C.D. California. | February 6, 2018 | Not Reported in Fed. Supp. | 2018 WL 735971

Document Details

standard Citation: Boeing Co. v. KB Yuzhnoye, No. CV1300730ABAJWX, 2018 WL 735971 (C.D. Cal. Feb. 6, 2018)
All Citations: Not Reported in Fed. Supp., 2018 WL 735971

Search Details

Jurisdiction: California

Delivery Details

Date: September 3, 2021 at 11:17 AM
Delivered By: Kathryn DiGalbo
Client ID: 1100836.00002

Outline

[Attorneys and Law Firms \(p.1\)](#)
[ORDER DENYING YUZHNOYE'S MOTION TO ALTER JUDGMENT \(DKT. NO. 989\) AND BOEING'S MOTION TO REGISTER THE JUDGMENT \(DKT. NO. 971\), AND GRANTING IN PART BOEING'S MOTION FOR COSTS AND ATTORNEYS' FEES \(DKT. NO. 966\) \(p.1\)](#)
[All Citations \(p.5\)](#)

2018 WL 735971

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

The BOEING COMPANY and Boeing
Commercial Space Company, Plaintiffs,
v.
KB YUZHNOYE and PO Yuzhnoye
Mashinostroitelny Zavod, Defendants.

Case No. CV 13-00730-AB (AJWx)

|
Signed 02/06/2018

Attorneys and Law Firms

Alec Solotorovsky, Christopher J. Esbrook, Michael D. Slade,
Kirkland and Ellis LLP, Chicago, IL, Michael E. Baumann,
Sasha Kingston Danna, Xanath Owens, Kirkland & Ellis LLP,
Los Angeles, CA, for Plaintiffs.

ORDER DENYING YUZHNOYE'S MOTION TO ALTER JUDGMENT (DKT. NO. 989) AND BOEING'S MOTION TO REGISTER THE JUDGMENT (DKT. NO. 971), AND GRANTING IN PART BOEING'S MOTION FOR COSTS AND ATTORNEYS' FEES (DKT. NO. 966)

HONORABLE [ANDRÉ BIROTTE JR.](#), UNITED STATES
DISTRICT JUDGE

*1 Pending before the Court are Plaintiffs The Boeing
Company and Boeing Commercial Space Company's
(collectively "Boeing") Motion for Costs and Attorneys'
Fees, Dkt. No. 966, Motion to Register the Judgment, Dkt.
No. 971, and Defendants KB Yuzhnoye and PO Yuzhnoye
Mashinostroitelny Zavod's (collectively "Yuzhnoye") Motion
to Alter or Amend the Judgment Pursuant to [Federal Rule of
Civil Procedure 59\(e\)](#), Dkt. Nos. 989, 993.

I. BACKGROUND

The Court assumes the parties are familiar with the
background of this case and summarizes the facts only as
necessary to understand the pending motions. The facts are
drawn from the Court's prior orders and are not disputed
for the purposes of these motions. Dkt. Nos. 650, 962.
Sea Launch Co. LLC ("Sea Launch") was a joint venture

between Boeing, Old Kvaerner Invest AS ("Kvaerner"),
S.P. Korolev Rocket and Space Corporation, Energia D/B/A
Rocket and Space Corporation Energia After S.P. ("Energia"),
and Yuzhnoye, a Ukrainian government entity, to launch
commercial satellites into space from a sea-based platform.
Following Sea Launch's bankruptcy, disputes among the four
entities and their affiliates resulted in litigation, including the
instant lawsuit. This lawsuit was brought by Boeing against
Energia and Yuzhnoye for the breach of two agreements, the
Creation Agreement, Compl. Ex. 1, Dkt. No. 1–2, and the
Guaranty and Security Agreement, Compl. Exs. 2, 3. Dkt.
No. 1–3, 4. The Creation Agreement created Sea Launch and
obligated each party to pay the debts of Sea Launch according
to its ownership stake. During its operations Sea Launch
discovered it needed additional funding and sought loans
from private banks. Sea Launch obtained loans from private
banks, but the banks required that Boeing and Kvaerner
guarantee the loans. Boeing and Kvaerner agreed to do so
after Energia and Yuzhnoye signed the Guaranty and Security
Agreements. Sea Launch later went into bankruptcy and
defaulted on the loans, which were then repaid by Boeing
pursuant to its guarantees.

Boeing initially attempted to recover the amounts it was owed
from Energia and Yuzhnoye (collectively "Defendants")
through arbitration in Sweden pursuant to the arbitration
provision in the Creation Agreement. After that arbitration
was dismissed for lack of jurisdiction Boeing filed this
case against Energia and Yuzhnoye seeking repayment
under the Creation Agreement and the Guaranty and
Security Agreement. *See* Compl. The parties engaged in
substantial motion practice in this Court which resulted in
the Court granting summary judgment to Boeing on its
breach of contract claims against Energia and Yuzhnoye,
Order Granting Pls.' Mot. for Summary J., Dkt. No. 750, a
bench trial finding Energia's subsidiaries were liable as alter
ego corporations, Court's Findings of Fact and Conclusions
of Law, Dkt. Nos. 961, 962, and the Judgment detailing
how much Energia and Yuzhnoye each owe for violating
their guarantees under both the Creation Agreement and the
Guaranty and Security Agreement, Judgment, Dkt. No. 960.
After the briefing was completed on these motions Boeing
settled with Energia, leaving Yuzhnoye as the only remaining
defendant. Dkt. No. 1059.

II. DISCUSSION

*2 Before the Court are three motions, Boeing's Motion
for Costs and Attorneys' Fees, Boeing's Motion to Register
the Judgment, and Yuzhnoye's Joinder in Energia's Motion to

Alter or Amend the Judgment. The Court will address each motion in turn.

A. Boeing's Motion for Costs and Attorneys' Fees

Boeing filed a Motion for Costs and Attorneys' Fees in its breach of contract case against Energia and Yuzhnoye. Pls.' Mot. for Attorneys' Fees, Dkt. Nos. 966, 967, 976 (collectively "Fees Motion"). Energia opposed, Dkt. No. 986 ("Fees Opposition"), Yuzhnoye joined in opposition, Dkt. No. 987, and Boeing replied, Dkt. Nos. 1000, 1001 ("Fees Reply").

Boeing asserted that it was entitled to \$9,686,251.06 in attorneys' fees for Defendants' breach of the Guaranty and Security Agreement, and the Creation Agreement. The Guaranty and Security Agreement has a choice of law provision which states that it is governed by English law and also contains an express attorneys' fees clause. Compl. Ex. 2, at 2. The Creation Agreement contains a choice of law provision which states that the "formation, interpretation, and performance of this Agreement shall be governed by and interpreted in accordance with the law of the Kingdom of Sweden." See Compl. Ex. 1, Article 13. The Creation Agreement does not contain an express attorneys' fees clause, but the Swedish Code of Judicial Procedure does require the losing party to pay the reasonable costs and attorneys' fees of the prevailing party. RÄTTÅNGANGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE] 18:1, 8 (Swed.) ("Swedish Code of Judicial Procedure").

Defendants concede that Boeing is entitled to attorneys' fees under the Guaranty and Security Agreement, and that Boeing's request is reasonable, but argue that Boeing is not entitled to fees for their breach of the Creation Agreement because: (1) Sweden's provision for attorneys' fees is procedural and should not be applied by this Court, (2) it would be unfair to apply Sweden's laws on attorneys' fees given the differences in litigation between Sweden and the United States, and (3) Boeing did not comply with the relevant Swedish procedures for requesting attorneys' fees. Fees Opp'n at 1.

1. Legal Standard

Federal Rule of Civil Procedure 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must

be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. Proc. 54(d)(2). The motion must be made within fourteen days after the entry of judgment. *Id.*

2. Swedish Law Governs Boeing's Request for Attorneys' Fees

This case is in federal court based on federal question jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). While for a diversity case this Court would apply California's choice of law rules, for a case arising under the FSIA this Court must apply the choice of law rules of federal common law. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). The Court of Appeals for the Ninth Circuit follows the Restatement (Second) of Conflict of Laws (1971) ("Restatement") to the extent it concludes that the Restatement is persuasive. *In re Sterba*, 852 F.3d 1175, 1179 (9th Cir. 2017), *petition for cert. filed* (U.S. Sept. 15, 2017) (No. 17-423). Federal common law will therefore determine whether this Court must apply Sweden's provisions on attorneys' fees. *Schoenberg*, 930 F.2d at 782–783.

*3 The Ninth Circuit's rulings in *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 916 (9th Cir. 2003) ("Flores"), and *APL Co. Pte. v. UK Aerosols Ltd.*, 582 F.3d 947, 951 (9th Cir. 2009) ("APL"), are instructive. In both *Flores* and *APL* the Ninth Circuit reversed the district court and instead applied the attorneys' fees rule of the jurisdiction chosen by the parties in their contract. Importantly, the Ninth Circuit never considered whether the chosen rule is substantive, procedural, mandatory, or optional. Such questions may be relevant in other circumstances. *E.g.*, *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 974 (9th Cir. 2013) (applying Alaska's general attorneys' fees provision in a diversity case after determining it is procedural for choice of law purposes). However, if the dispute arises out of a contract with a valid choice of law provision then such distinctions are irrelevant to determining what law the Court will apply. *Chuidian v. Philippine Nat. Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("[Restatement] Section 187 sets out the rule when the parties to a contract have designated the law to govern their relationship.").¹

¹ Restatement § 187 states:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Flores concerned an employment contract that contained an express choice of law provision selecting federal maritime law. 335 F.3d at 916. Federal maritime law does not generally provide for attorneys' fees in maritime employment contracts. However, the district court sitting in Washington applied that state's rule providing for attorneys' fees in employment contracts because the state had a strong public interest in providing for attorneys' fees in employment disputes. *Id.* at 917. Reversing the district court, the Ninth Circuit began its analysis with Restatement § 187. *Id.* at 917–18. The Ninth Circuit found that § 187(2) applied instead of § 187(1) because the contract's choice of law provision did not specifically speak to attorneys' fees. *Id.* The Ninth Circuit held that § 187(2)(a) was satisfied because the United States had a substantial relationship to the subject matter, and § 187(2)(b) was satisfied because there was no evidence that Washington's interest was materially greater than that of the United States. *Id.* Because federal common law provided no reason to disturb the parties' choice of federal maritime law, and because federal maritime law did not provide for attorneys' fees for the prevailing party, the Ninth Circuit reversed the district court's grant of attorneys' fees.

Similarly, in *APL* the Ninth Circuit had to determine whether a bill of lading that incorporated Singaporean law for issues not otherwise “dealt with” allowed for attorneys' fees under Singaporean law when the substantive law governing the dispute was provided by a federal statute. *APL*, 582 F.3d

at 956–58. The district court held that the plaintiff was not entitled to attorneys' fees because federal law governed the substantive dispute and did not provide for attorneys' fees under the general American rule. *Id.* at 957. Finding that the issue of attorneys' fees was not specifically addressed in the bill of lading or the substantive federal law, the Ninth Circuit reversed the district court and applied Singapore's provision on attorneys' fees because the parties had agreed that issues not otherwise dealt with would be governed by Singaporean law. *Id.* Because Singaporean law generally followed the English rule and provided fees for the prevailing party, it was therefore an error for the district court to apply the general American rule merely because a federal statute provided the substantive law. *Id.*

*4 Following *Flores* and *APL*, the Court must apply Sweden's provision on attorneys' fees unless both of the factors in Restatement § 187(2) are met. *Flores*, 335 F.3d at 918 (“To be effective, ASC's choice of federal maritime law needs to satisfy only one of the two alternative requirements under section 187(2)”). The Court finds that neither factor in Restatement § 187(2) is met in this case. The choice of Swedish law was reasonable under Restatement § 187(2)(a) because the Creation Agreement also contained a provision for arbitration in Sweden. Compl. Ex. 1, Article 13. In addition, the Court cannot say that the choice of Swedish law was unreasonable for a contract involving entities from the United States, Norway, Ukraine, and Russia. The parties' choice of law is particularly reasonable because the parties reasonably anticipated that they would need waivers of sovereign immunity because at least one defendant is owned by a foreign government. Restatement § 187(2)(b) is similarly not implicated in this case because the Court is not aware of any jurisdiction relevant to this case that has a fundamental policy of *prohibiting* prevailing parties in a breach of contract dispute from recovering their attorneys' fees.

In conclusion, federal common law requires the Court to enforce the parties' choice of Swedish law to govern their dispute, including its provisions on attorneys' fees.

3. Reasonableness of Boeing's Fee Request Under Swedish Law

The Court finds that the total amount of fees requested is reasonable under Swedish law. The Swedish Code of Judicial Procedure provides that “[c]ompensation for litigation costs shall fully cover the costs of preparation for trial and

presentation of the action including fees for representation and counsel, to the extent that the costs were reasonably incurred to safeguard the party's interests.” Swedish Code of Judicial Procedure 18:8. Defendants argued that the Court should deny the Fees Motion because of differences in litigation between the United States and Sweden, and because Boeing failed to comply with the timing requirements for requesting attorneys' fees under the Swedish Code of Judicial Procedure.

Defendants' Swedish law expert Maria Tufvesson Shuck argued that differences in discovery, pleading, and the rates attorneys charge make it unreasonable to apply Sweden's provisions for attorneys' fees in this case. Shuck Decl. ¶¶ 12–14, Dkt. No. 986-1. However, Defendants have provided no evidence that these differences were relevant to the fees actually incurred, or that the total amount of fees would have been smaller had this case been litigated in Sweden. Shuck also noted in general terms that attorneys' fees awarded by Swedish courts tend to be moderate when compared to U.S. cases, and that she was not aware of any Swedish court case where a party was awarded attorneys' fees of this magnitude. Shuck Decl. ¶ 19. This leads to her conclusion that a Swedish court would be reluctant to grant this request. *Id.* However, her evidence is less useful because she only speaks in general terms, does not appear to have actually examined the details of the fee request, nor does she actually conclude whether or not the fee request is reasonable. In addition, her points on Swedish law were persuasively refuted by Boeing's Swedish law expert Fredrik Forssman. He stated that while Sweden does not have the same manner of discovery known to U.S. practitioners, the Swedish Code of Judicial Procedure does permit the Court to issue evidentiary orders to opposing or third parties to produce evidence which can be quite large. Forssman Decl. ¶ 12, Dkt. No. 1001. He specifically noted that in a case such as this evidentiary requests would be filed and granted and would lead to “a great deal of documentary evidence provided to either side....” *Id.* He also stated in his declaration that “in comprehensive and complex cases with substantial monetary claims, it is not in any respect unusual that attorneys' fees amount to several million USD.” *Id.* ¶ 13. Forssman also disagreed with Shuck's assertion that Swedish Courts often reject or adjust requests for attorneys' fees. *Id.* ¶ 14. He stated that to his knowledge a Swedish court has never rejected a prevailing party's request for attorneys' fees, and that even in the rare cases that a Swedish court would adjust the amount granted, it would only be for a specific reason outlined in the Swedish Code of Judicial Procedure. *Id.* Boeing pointed out that Defendants were awarded over

\$1.5 million in attorneys' fees under the same provision of the Swedish Code of Judicial Procedure for the parties' Swedish arbitration that had one short hearing and did not lead to a verdict. Fees Reply at 7. Based on the parties own history in Sweden, the more specific and detailed nature of Forssman's declaration, and the extensive litigation costs specifically because of Defendants' actions, the Court finds that the request for \$9,686,251.06 is reasonable and in line with what a Swedish court would grant in this case.

*5 The only ground identified by Defendants to deny the fee request in Swedish law is that Boeing did not comply with the timing requirements under the Swedish Code of Judicial Procedures. Fees Opp'n at 1. Swedish law requires that a request for attorneys' fees be presented before the termination of the lawsuit. Shuck Decl. ¶ 16 (citing Swedish Code of Judicial Procedure 18:14). By contrast, [Rule 54](#) requires a party to file a motion seeking attorneys' fees within 14 days of the judgment. The Court is uncertain how the timing requirement of the Swedish Code of Judicial Procedure would apply to the current procedural posture of this case, but it is irrelevant because the procedures for requesting attorneys' fees in a Swedish court are not applicable to the Fees Motion. Even in a diversity case where the district court applies the fee-shifting laws of the state where it is located, “the procedure for requesting an award of attorney fees is governed by federal law.” [Carnes v. Zamani](#), 488 F.3d 1057, 1059 (9th Cir. 2007). This rule must apply equally to federal question cases, particularly when there is a Federal Rule of Civil Procedure that is directly on point. It also comports with how the Restatement applies procedural rules. Restatement § 122 (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”). Boeing's failure to follow the timing requirements of the Swedish Code of Judicial Procedure that contradict the Federal Rules of Civil Procedure is thus irrelevant.

Although not addressed by any party, subsequent to the filing of the Fees Motion Energia settled with Boeing, leaving Yuzhnoye as the only remaining defendant. Boeing must therefore submit additional briefing and/or documentation to clarify what portion of the \$9,686,251.06 it seeks solely from Yuzhnoye.

B. Boeing's Motion to Register the Judgment

Boeing asks the Court for permission to register the judgment under 28 U.S.C. § 1963. Pls.' Mot. to Register the J., Dkt. No. 971. Energia opposed, Dkt. No. 984, Yuzhnoye joined in opposition, Dkt. No. 985, and Boeing replied, Dkt. No. 1002. 28 U.S.C. § 1963 permits a party to register a judgment when it has become final or “when ordered by the court that entered the judgment for good cause shown.” “Good cause” is not a term defined by statute, and the Ninth Circuit has observed that “there is no Ninth Circuit law defining ‘good cause.’” *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001). While Boeing did identify assets of Energia in this district, it conceded that it has “not yet located any assets of Yuzhnoye in California.” McKeever Decl. ¶¶ 2–4, Dkt. No. 972. In this Motion Boeing has not identified any facts or reasons related to Yuzhnoye that would constitute good cause to register the judgment.

Boeing's Motion to Register the Judgment is therefore **DENIED**.

C. Yuzhnoye's Motion to Amend or Alter the Judgment

Energia filed a motion to alter or amend the judgment under Rule 59. Defs.' Mot. to Alter or Amend the J. Pursuant to Federal Rule of Civil Procedure 59(e), Dkt. Nos. 989, 999 (“Motion to Amend”). Boeing opposed the motion, Dkt. Nos. 1010, 1011, and Energia replied, Dkt. Nos. 1012, 1025. Energia filed two requests for judicial notice.² Dkt. Nos. 990, 1013. Yuzhnoye joined Energia's motion, Dkt. No. 993, reply, Dkt. No. 1016, and requests for judicial notice, Dkt. Nos. 994, 1017.

² Defendants' Requests for Judicial Notice are **GRANTED**.

Briefly, Energia brought the Motion Amend because it believed that the Court's summary judgment opinion ignored the impact of Kvaerner, a former party to this litigation, and its separate settlements with both Energia and Boeing. Energia argued that the amount it owed to Boeing must be reduced by the amount that Kvaerner paid Boeing, because that payment was made on behalf of Energia. See Dkt. No. 989–1.

Regardless of whether or not Energia is correct, is has since settled with Boeing and is no longer a party in this case. The Court also found Energia and Yuzhnoye were separately liable for specific amounts. Amending the Court's previous judgment to reduce the liability of Energia will therefore not impact the liability of Yuzhnoye. This is further shown in the motion itself which specifically cites paragraph 1-a of the Court's Judgment, a paragraph which expressly applies to Energia and not Yuzhnoye. Mot. to Amend at 3 (citing Dkt. No. 960 at ¶ 1-a). A motion to alter or amend a judgment under Rule 59 is properly denied when its resolution could not impact the rights or liabilities of any party. Cf. *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987) (noting that a court should deny a motion under Rule 59 unless the new evidence was “of such magnitude that production of it earlier would have been likely to change the disposition of the case.”). Yuzhnoye has not provided any argument for how it could benefit from this Motion.

*6 Because the motion will not impact Yuzhnoye, its Motion to Amend is **DENIED**.

III. CONCLUSION

The Fees Motion is **GRANTED** as to the applicability of Swedish law, Boeing's entitlement to fees under Swedish law, and that the total amount requested of \$9,686,251.06 was reasonable under Swedish law. Boeing may submit additional briefing and/or documentation within two weeks from the receipt of this order delineating what portion of the \$9,686,251.06 it still seeks from Yuzhnoye. Yuzhnoye will then have two weeks to file any opposition.

Boeing's motion to register the judgment is **DENIED**.

Yuzhnoye's motion to amend or alter the judgment is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 735971

EXHIBIT B

Capital Bank, PLC v. M/Y Birgitta

United States District Court, C.D. California. | October 18, 2010 | Not Reported in F.Supp.2d | 2010
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[All Citations](#) (p.7)

2010 WL 4241584

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.

CAPITAL BANK, PLC

v.

The M/Y BIRGITTA, et al.

No. CV 08-5893 PSG (SSx).

|

Oct. 18, 2010.

Attorneys and Law Firms

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Proceedings: (In Chambers) Order Awarding Attorneys' Fees and Related Expenses

The Honorable [PHILIP S. GUTIERREZ](#), District Judge.

*1 Wendy K. Hernandez, Deputy Clerk.

Before the Court is Plaintiff Capital Bank, PLC's Motion to Prove Up Attorney's Fees and Other Related Expenses. The Court finds the matter appropriate for decision without oral argument. See [Fed.R.Civ.P. 78](#); L.R. 7-15. Having considered the papers submitted in support of Plaintiff's motion, the Court GRANTS the motion.

I. Background

The in rem Defendant in this case, M/Y Birgitta ("Defendant" or "vessel") has been the subject of litigation in this Court for well over four years. In July 2005, Plaintiff Capital Bank, PLC ("Plaintiff" or the "Bank") issued a six million dollar loan to Juanita Group, Ltd. ("Juanita") for the purchase of the vessel, secured by a first preferred statutory ship mortgage. Before doing so, Juanita and the Bank executed both a Marine Mortgage and a Marine Loan Agreement in the principal amount of six million dollars plus interest, payable in 120 monthly payments. Both contain a list of defaulting events,

any one of which would trigger immediate repayment of the loan. Included in the list of defaulting events is failure to make a payment within 14 days of its due date and any material change in ownership or control of Juanita.

On July 26, 2010, this Court granted summary judgment in favor of the Bank because there was no factual dispute that "(1) Juanita failed to make *any* payments after the vessel was arrested and (2) Juanita underwent a material change in ownership after the arrest." See Dkt. # 201 (emphasis in original) (Minute Order granting summary judgment). All that remains is Plaintiff's Motion to Prove Up Attorney's Fees and Other Related Expenses now pending before the Court. Plaintiff's motion is unopposed.

II. Legal Standard

For a district court sitting in admiralty, the "American" rule provides that "absent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees." [APL Co. Pte. Ltd. v. UK Aerosols Ltd.](#), 582 F.3d 947, 957 (9th Cir.2009). "Where the parties specify in their contractual agreement which law will apply," however, "admiralty courts will generally give effect to that choice." *Id.* In contrast to the "American" rule, the "English" rule generally allows the recovery of attorneys' fees and costs by the prevailing party. See [Alyeska Pipeline Serv. Co. v. Wilderness Soc'y](#) 421 U.S. 240, 247, 95, S.Ct. 1612, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Moreover, where an attorneys' fees provision is included in a valid contract, a district court has discretion not to award the fees, but only where an award would be "inequitable and unreasonable." [DeBlasio Constr. Co. v. Mountain States Constr. Co.](#), 588 F.2d 259, 263 (9th Cir.1978); see also [McDonald's Corp. v. Watson](#), 69 F.3d 36, 45 (5th Cir.1995) (holding that a district court "abuses its discretion if it awards contractually-authorized attorney's fees under circumstances that make the award inequitable or unreasonable or fails to award such fees in a situation where inequity will not result"). If a court determines that a fee award is in order, the court must calculate the proper amount of the award to ensure that it is reasonable. See [Hensley v. Eckerhart](#), 461 U.S. 424, 433-34, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

III. Discussion

*2 Plaintiff seeks recovery of \$4,069,569.10 in attorneys' fees and other related expenses. The "English" rule and the loan agreements provide independent grounds for Plaintiff's

request for attorneys' fees, and the loan agreement provides for recovery of the other expenses incurred by Plaintiff.

A. Attorneys' Fees

1. Plaintiff's Entitlement to an Award of Attorneys' Fees

Clause 12.8 of the Marine Loan Agreement provides that “[t]his agreement shall be governed by and construed in accordance with English Law,” and clause 14(m) of the Marine Mortgage similarly states that “[t]his Mortgage shall be governed by and construed in accordance with English Law.” *See Compl.*, Exs. A-B. As English law controls, the “English” rule for attorneys' fees applies and the Bank is entitled to attorneys' fees as a prevailing party. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 247. In addition, Plaintiff is contractually entitled to attorneys' fees. Clause 12.1 of the Marine Loan Agreement provides that the borrower “shall, from time to time on [Bank's] demand reimburse [Bank] for all costs and expenses (including legal fees) reasonably incurred ... in connection with the preservation and/or enforcement of any of [Bank's] rights under this Agreement or as a consequence of any default by [borrower].” *Compl.*, Ex. A. Clause 14(g) of the Marine Mortgage likewise provides that borrower “shall repay to us on demand all expenses, fees, legal or other charges whatsoever incurred by [Bank] in applying for or enforcing payment of any sums payable by [borrower] ... or in preparing to recover or recovering possession of the Vessel from [borrower] or from any other person (including any payment made by [Bank] in discharge or satisfaction of any lien or alleged lien on the Vessel).” It is clear that reasonable attorneys' fees are owed under both the “English” rule and the relevant provisions of the mortgage agreements.

2. Plaintiff's Request for Attorneys' Fees

The customary method of determining reasonable attorneys' fees is known as the “lodestar” method. *See Morales v.*

City of San Rafael, 96 F.3d 359, 363 (9th Cir.1996). The “lodestar” method involves “multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate.” *Id.* The resulting “lodestar” figure is presumptively reasonable. *See id.* at 364, n. 8. The reasonableness of the time expended and the hourly rate charged can be determined by considering the following factors: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the necessary skill required; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys on the case; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir.1975). The court need only consider those factors that are relevant to the case. *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069, 1073 (9th Cir.1983). A court may reduce the hours claimed where the documentation is inadequate or the time was not “reasonably expended,” such as where the record reflects duplicative efforts or excessive staffing. *See Sorensen v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001). In such a case, the court must provide a clear explanation for any reduction. *See id.*

*3 Plaintiff requests \$963,647.50 in attorneys' fees. In support of its motion, Plaintiff provides billing statements from May 2006 through July 2010, which itemize the number of hours spent by each attorney on the matter and the attorney's hourly rate for each month of litigation. Because the litigation lasted for over four years, the attorneys' rate per hour increased at semi-regular intervals, which is reflected on each month's billing statements. The Court has reviewed the monthly billing statements and calculates the lodestar as follows:

Name	Rate Per Hour	Hours	Total
Frank C. Brucculeri	\$215.00	204.6	\$43,989.00
	\$265.00	798.5	\$211,602.50
	\$300.00	785.7	\$235,710.00
Bradley M. Rose	\$250.00	66.4	\$16,600.00

	\$300.00	323.8	\$97,140.00
Gerald L. Gorman	\$215.00	46	\$9,890.00
	\$265.00	247.5	\$65,587.50
Daniel F. Berberich	\$235.00	969.2	\$227,762.00
Lauren F. Griffo	\$95.00	0.7	\$66.50
	\$110.00	1.7	\$187.00
Aksana Moshav	\$165.00	13.7	\$2,260.50
	\$200.00	1	\$200.00
Michelle E. Ceja	\$165.00	3	\$495.00
	\$190.00	41.2	\$7,828.00
Sherilyn A. Winford	\$110.00	13.6	\$1,496.00
	\$125.00	18.2	\$2,275.00
Jamie A. Moran	\$200.00	5.3	\$1,060.00
Lisa G. Taylor	\$250.00	59.2	\$14,800.00
Andre M. Picciurro	\$235.00	27	\$6,345.00
William D. Carey	\$235.00	78.1	\$18,353.50
Total			\$963,647.50

Though the total amount of attorneys' fees is large, the Court finds that they are generally reasonable for the reasons that follow.

a. *The Time and Labor Involved*

This litigation started in 2006, had two lives with three different judges, and continues to the present. On February 27, 2006, the Bank filed the first iteration of the case in this Court. See *Capital Bank Plc. v. The M/Y Brigitta* ("Case 1"), No. CV 06-2740 PSG (SSx), Dkt. # 1. Almost two years later, the parties voluntarily dismissed the case without prejudice to promote settlement. See *id.*, Dkt. # 76 (Stipulation for voluntary dismissal on January 10, 2008). Settlement turned out to be too lofty a goal, and the case was refiled with this Court in September of 2008. See *Capital Bank PLC v. The M/Y Brigitta* ("Case 2"), No. CV 08-5893 PSG (SSx), Dkt. # 1. Both cases featured hotly contested motions including jurisdictional motions involving complex questions of English maritime law, see *Case 1*, Dkt.13-32; *Case 2*, Dkt.47-54, 59-79, motions to dismiss and vacate the arrest of the vessel, *Case 2*, Dkt.92-99, a motion for the sale of the vessel, see *id.*, Dkt.122, 125-26, 166-69, a motion for summary judgment against specially appearing party Cover Drive, see *id.*, Dkt.155-60, a motion for evidentiary sanctions, see *id.*, Dkt.124, 165, and, among others, the dispositive motion for summary judgment against the vessel, see *id.*, Dkt. # 132. Moreover, there were 23 depositions, 18 of which were noticed by the Defendants, see *Brucculeri Decl.* ¶ 10, and the case came so close to going to trial that the parties filed pre-trial documents as required by the Court, see *id.*, Dkt.136-38, 164. Plainly, a case filed twice, involving over 280 pleadings and numerous quarrels over obscure English maritime-mortgage law required a significant amount of time and labor on the part of the attorneys involved.

b. *The Novelty and Difficulty of the Questions Presented and the Skill Required to Litigate the Case*

*4 The M/Y Brigitta litigation involved extremely difficult questions of English law, which required the Plaintiffs to retain two English law experts. See *Brucculeri Decl.* ¶ 11. For example, in the Motion to Dismiss for Lack of Subject Matter Jurisdiction, the parties had to brief the question of whether the Bank's mortgage on the vessel was valid. See Dkt. # 47. The mortgage could be valid only if it was met the requirements of the Ship Mortgage Act, 46 U.S.C. § 31321, which recognizes a foreign mortgage only if the mortgage is valid under the laws of the country where it was executed. See Dkt. # 117 (Minute Order denying Defendants' Motion to

Dismiss for Lack of Subject Matter Jurisdiction). In addition, specially appearing Cover Drive made a claim to the vessel and the Bank had to show that it had a superior interest as determined by English mortgage law. See Dkt. # 196 (Minute Order granting Plaintiff's Motion for Summary Judgment against Cover Drive). The issues were novel and difficult, requiring significant attention by the attorneys and experts involved. See *id.* n. 1 (explaining the qualifications of one of the experts retained by Plaintiffs, Mr. Michael Joseph McParland).

c. *The Customary Fee and the Experience, Reputation, and Ability of the Attorneys*

In determining whether an hourly rate is reasonable, courts consider the experience, skill, and reputation of the attorney requesting fees, as well as whether the hourly rate reflects the prevailing market rates in the community. *Webb v. Ada County*, 285 F.3d 829, 840 n. 6 (9th Cir.2002); see also *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir.1992). Frank Brucculeri is a partner at Kaye, Rose & Partners, licensed to practice law in California since 1988, and rated "AV" by Martindale Hubbell. *Brucculeri Decl.* ¶ 7. Bradley Rose is a founding partner of Kaye, Rose & Partners, licensed to practice law in California since 1987, and rated "AV" by Martindale Hubbell. *Id.* ¶ 6. Together, Mr. Rose and Mr. Brucculeri have conducted over 35 maritime trials. *Id.* ¶ 7. Daniel Berberich is an associate at Kaye, Rose & Partners, licensed to practice in California since 2001, and has specialized in civil and maritime litigation since becoming a member of the bar. *Id.* ¶ 8. Although the rates charged by the firm increased as litigation progressed, partners never charged more than \$300.00 per hour and the main associate on the case, Mr. Berberich, never charged more than \$235.00 per hour. Based on the amount charged by Defendants' counsel-\$450 per hour-and an examination of cases where similar fees were held to be reasonable, the Court finds that the rates charged by Plaintiff's attorneys are within the customary fee range considered to be reasonable. See e.g., *Schultz v. Ichimoto*, No. CV 08-526 OWW (SMSx), 2010 WL 3504781, at *6-7 (E.D.Cal. Sept.7, 2010) (finding that rates of \$300 per hour were reasonable and customary based on other cases where \$315 and \$350 per hour were reasonable and customary); *Armada Bulk Carriers v. ConocoPhillips*, 505 F.Supp.2d 621, 624 (N.D.Cal.2007) (finding that a rate of \$325 per hour was a customary and reasonable rate for an attorney in California with 23 years of litigation and trial experience).

d. *Time Limitations Imposed by the Client or the Circumstances*

*5 Though not determinative, several occurrences over the course of this case required Plaintiff's attorneys to act with a certain degree haste not necessarily present in other cases. For example, when the vessel arrived in California waters, the attorneys had to move to arrest it before it could leave the jurisdiction. *See Brucculeri Decl.* ¶ 12. In addition, Defendants brought an *ex parte* application to stay the case because Juanita filed for liquidation in the British Virgin Islands, requiring the attorneys for the Bank to file an opposition in one business day addressing maritime law, bankruptcy law and the laws of the British Virgin Islands. *Id.*

e. *The Amount Involved and the Results Obtained*

The original mortgage on the vessel was for \$6,000,000. *See* Dkt. # 206, ¶ 7 (Final Judgment). Juanita made ten monthly payments of \$62,908.56 each, leaving an unpaid principal balance of \$5,370,914.40. *Id.* Moreover, late charges and interest accrued on the mortgage add up to \$2,601,835.35. Together, the Bank is entitled to \$7,972,749.75 based on Juanita's default on the loan. While the attorneys' fees look high upon initial examination, the Court finds that it is reasonable for a Plaintiff to spend just over one-tenth of the amount of the final judgment to litigate the case.

f. *Departures from the Requested Amount*

The Court, however, has concerns with some entries submitted for reimbursement. From August 2009 through October 2009, Plaintiff's attorneys billed over 400 hours, for a total amount of \$105,130.00 in fees. *See Brucculeri Decl.* (billing entries dated 8/31/09, 9/30/09, and 10/31/09). The entries do not specifically address what the hours were billed for, and the Court is unable to find any correlation between the billing entries and the Court's docket that would warrant such high fees. For example, from August 2009 through October 2009, Plaintiff filed an opposition to the motion to dismiss for lack of subject matter jurisdiction, participated in a status conference, and objected to a status report. *See* Dkt.92-112. To put it in perspective, Plaintiff billed 293.6 hours in April and May of 2010, presumably to prepare for May's *ex parte* application for sale of the vessel, motion for sanctions, motion for summary judgment and motion in limine. *See* Dkt.122-33. Without additional information from Plaintiff, it is impossible to determine whether the 400 hours billed from August 2009 through October 2009 were reasonable and necessary. As

a result, the Court reduces that time by half and subtracts \$52,565.00 from the total amount of attorneys' fees requested.

Based on the complexity of the case, the total time it has consumed, the rates charged, the hours billed, and the results obtained, the Court finds that Plaintiff is entitled to an award of attorneys' fees in the amount of \$911,082.50.

B. *Other Related Expenses*

In addition to attorneys' fees, the Marine Loan Agreement and the Marine Mortgage also allow Plaintiff to recover reasonable costs incurred in the litigation. *See* Dkt. # 206, ¶ 8 (Final Judgment); *see also Compl.*, Exs. A-B (Clause 12.1 of the Marine Loan Agreement provides that the borrower "shall, from time to time on [Bank's] demand reimburse [Bank] for all costs and expenses (including legal fees) reasonably incurred ... in connection with the preservation and/or enforcement of any of [Bank's] rights under this Agreement or as a consequence of any default by [borrower].") Clause 14(g) of the Marine Mortgage provides that borrower "shall repay to us on demand all expenses, fees, legal or other charges whatsoever incurred by [Bank] in applying for or enforcing payment of any sums payable by [borrower] ... or in preparing to recover or recovering possession of the Vessel from [borrower] or from any other person."). Plaintiff requests that the Court award (1) accrued interest and late penalties, (2) insurance expenses, (3) expert witness fees, and (4) expenses for mediation, travel and private investigation.

1. *Interest Accrued and Penalties Assessed*

*6 On August 6, 2010, the Court entered final judgment in this case and expressly stated that the Bank is entitled to recover interest and late charges on the principal amount of the loan pursuant to the mortgage agreements and English law. *See* Dkt. # 206, ¶ 8 (Final Judgment). The terms of the agreements set the annual interest rate on the principal amount of the loan at 1.75 percent above the "U.S. Base Rate." *Ratcliffe Decl.* ¶ 6. After subtracting the 10 payments made by Juanita, the interest accrued between July 9, 2005 and October 3, 2010 is \$1,533,223.43. *See id.* In addition, Plaintiff is entitled to late charges which accrue annually as interest set at 5 percent above the "U.S. Base Rate." *See* Dkt. # 206, ¶ 8 (Final Judgment); *Ratcliffe Decl.* ¶ 6. That penalty started accruing in April of 2006-after Juanita's last payment-and amounts to \$1,068,611.92. *Ratcliffe Decl.* ¶ 6. The total of interest and penalties, therefore, is \$2,601,835.35.

2. Insurance Expenses

Under the terms of the agreements, the vessel was to be continuously covered by an insurance policy. *See Compl.*, Ex. B (Marine Mortgage § 8(a)). According to the Bank, insurance on the vessel lapsed on April 20, 2006, requiring the Bank to provide insurance at its own expense. *See Mot.* 13:9-14. In the present motion, the Bank calculates the cost of providing insurance from the April 20, 2006 lapse until now to be \$359,844.33. *See Ratcliffe Decl.* ¶ 7. However, in the July 2010 Minute Order granting summary judgment in favor of the Bank, the Court expressly stated that there was a material factual dispute about whether the vessel was insured at the time of its arrest through part of 2007. *See Dkt. # 201* at 9. It would be unreasonable for this Court to reimburse costs needlessly expended, and the Court cannot determine the insurance expenses necessarily incurred. Presumably, the Bank is entitled to costs related to insurance premiums for the 2007-2008, 2008-2009, and 2009-2010 policies. Until the Bank provides additional information about those specific policies, the Court declines to award costs for insurance premiums.

3. Expert Witness Fees

The Bank retained two expert witnesses on English law, Mr. Michael McParland and Mr. Nicolas Craig. *See Brucculeri Decl.* ¶ 10. As discussed above, the issues presented in this case were complex and it was reasonable for the Bank to incur costs for the expert witnesses' services. Moreover, courts regularly award expert witness fees where the parties' contract provides for the recovery of costs. *See Armada Bulk Carriers*, 505 F.Supp.2d at 624 (awarding experts' fees where the contract stated: “[T]he prevailing party shall recover all costs and expenses incurred in the exercise of any remedies under the contract.”). Like the provision in *Armada Bulk Carriers*, the costs provisions here allow for reimbursement for “all costs and expenses ... reasonably incurred ... in connection with the preservation and/or enforcement of any of [the Bank's] rights under this Agreement or as a consequence of any default by [borrower].” *See Compl.*, Ex. A (Marine Loan Agreement, § 14(g)). Mr. McParland and Mr. Craig were paid \$96,327.95 in fees, an amount the Court finds reasonable

- | | |
|---------------------|----------------|
| a. Attorneys' Fees: | \$911,082.50 |
| b. Other Expenses: | \$2,746,077.27 |

The total amount awarded is \$3,657,159.77. Plaintiff is ordered to provide supplemental briefing on the insurance

given the complexity and duration of this case. *See Brucculeri Decl.* ¶ 10.

4. Expenses for Mediation, Travel and Private Investigation

*7 Finally, the Bank seeks an award of expenses for mediation, travel, and private investigation as costs covered in the agreements. First, the parties participated in two days of mediation after dismissing the first case and before filing the complaint in the second. *See Brucculeri Decl.* ¶ 15. The cost for the mediation session was \$6,650.00, as reflected by the mediation service's invoice. *Id.* Second, the Bank's attorneys were “required to travel abroad on two separate occasions” in order to depose witnesses, and were required to travel to Aspen, Colorado in order to depose the former director of Juanita. *See id.* ¶ 16. While the amount requested looks high, \$32,439.59, there is no indication that it is unreasonable such that it should not be awarded under the parties' contract. *See id.* Last, the “Bank incurred costs in connection with private investigation in order to locate the Vessel, which was ultimately found [and arrested] in Marina Del Rey, California.” *Id.* ¶ 17. The Bank also incurred private investigation costs to locate the former director of Juanita and serve him with a subpoena. *Id.* A total of \$8,824.38 was paid for those private investigative services, an amount the Court considers reasonable. As a result, the Bank is entitled to recover \$47,913.97 in expenses for mediation, travel and private investigation.

All costs discussed above were incurred by the Bank in this litigation and are recoverable under the parties' contract. However, the Court cannot determine a reasonable amount of costs associated with insurance premiums and thus declines to award any costs for insurance until detailed coverage statements are provided by the Bank. In sum, Plaintiff is awarded \$2,746,077.27 in expenses.

IV. Conclusion

Based on the foregoing, Plaintiff is entitled to an award for attorneys' fees and other expenses in the following amounts:

premiums paid on the vessel by **November 8, 2010** if it seeks recovery of those costs.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4241584

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EXHIBIT C

Doddie Alvarez Lapuz v. Saul

United States District Court, C.D. California. | April 27, 2021 | Slip Copy | 2021 WL 3202462

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Outline

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**ORDER RE:
MOTION FOR
ATTORNEY FEES
PURSUANT TO
42 U.S.C. § 406(b)**
(p.1)
[All Citations](#) (p.3)

2021 WL 3202462

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

DODDIE ALVAREZ LAPUZ, Plaintiff,

v.

Andrew M. SAUL, Commissioner
of Social Security,¹ Defendant.

¹ The Court previously ordered that the caption be amended to substitute Andrew M. Saul for Nancy A. Berryhill as the defendant in this action.

No. SACV 17-1496-KS

|
Signed 04/27/2021

Attorneys and Law Firms

Shanny J. Lee, Young Bin Yim, Charles E. Binder and Harry J. Binder LLP, New York, NY, for Plaintiff.

Assistant US Attorney LA-SSA, Tina R. Saladino, SAUSA-Office of US Attorney Social Security Administration, San Francisco, CA, Assistant US Attorney SA-CV, AUSA-Office of US Attorney, Santa Ana, CA, for Defendant.

ORDER RE: MOTION FOR ATTORNEY FEES PURSUANT TO 42 U.S.C. § 406(b)

KAREN L. STEVENSON, UNITED STATES
MAGISTRATE JUDGE

*¹ On August 17, 2020, Plaintiff, through counsel, filed a Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b) (“2020 Motion”). (Dkt. No. 24.) Plaintiff subsequently requested a stay of the 2020 Motion, which the Court granted. (Dkt. Nos. 29, 30.) On March 16, 2021, Plaintiff’s counsel filed a new Motion for Attorney Fees (the “2021 Motion”). (Dkt. No. 41.) Plaintiff’s counsel also filed a Memorandum in Support of the 2021 Motion (“Memo.”) and a declaration by Plaintiff’s counsel, Young Yim (“Yim Decl.”). (Dkt. Nos. 42, 43.) Additionally, on March 19, 2021, Plaintiff’s counsel filed a motion to lift the stay and withdraw the 2020 Motion. (Dkt. No. 46.) On March 22, 2021, the Court granted the motion, lifted the stay, and ordered the 2020 Motion withdrawn. (Dkt. No. 47.) On March 23, 2021, Defendant filed a response

(“Response”). (Dkt. No. 48.) For the reasons stated below, the 2021 Motion is GRANTED.

BACKGROUND

Plaintiff’s counsel represented Plaintiff before the United States District Court pursuant to a contingency fee agreement (“Agreement”) dated August 21, 2017, which provides for counsel to receive “twenty-five percent (25%) of the past due benefits,” if the matter is successfully prosecuted following judicial review. (Yim Decl., Ex. A [Dkt. No. 43-1 at 2].) On November 28, 2018, the Court issued a Memorandum Opinion and Order reversing the decision of the Administrative Law Judge and remanding the matter to the Commissioner for further proceedings; and entered judgment. (Dkt. No. 20, 21.) The Commissioner subsequently awarded Plaintiff \$119,895.00. (See Yim Decl., Ex. C [Dkt. No. 43-1 at 12].) Additionally, in accordance with a stipulation of the parties and related court order filed on January 31, 2019, Plaintiff’s counsel was awarded the sum of \$4,878.95 in attorney fees pursuant to the Equal Access to Justice Act (“EAJA”). (Dkt. No. 23.)

APPLICABLE LAW

Section 406(b) of Title 42 provides:

Whenever a court renders a judgment favorable to a claimant ... who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled.... In case of any such judgment, no other fee may be payable ... for such representation except as provided in this paragraph.

42 U.S.C. § 406(b)(1)(A).²

² For representation of a benefits claimant at the administrative level, an attorney may file a fee

petition or fee agreement. 42 U.S.C. § 406(a). In the event of a determination favorable to the claimant, the Commissioner “shall ... fix ... a reasonable fee” for the attorney’s services. 42 U.S.C. § 406(a)(1).

In *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court made clear that “the primacy of lawful attorney-client fee agreements” must be respected. *Id.* at 793. Thus, the Court must “approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness.” *Id.* at 808. The Supreme Court held that Section 406(b):

*2 does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases. Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due benefits. Within the 25 percent boundary, ... the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.

Id. at 807 (citations omitted).

In *Crawford v. Astrue*, 586 F.3d 1142 (9th Cir. 2009), the Ninth Circuit examined the various factors a district court may consider when conducting a “reasonableness analysis” of an attorney’s fee request. *Id.* at 1153. The Ninth Circuit recognized that:

[a]lthough *Gisbrecht* did not provide a definitive list of factors that should be considered in determining whether a fee is reasonable or how those factors should be weighed, the Court directed the lower courts to consider “the character of the representation and the results the representative achieved.” ... The court may properly reduce the fee for substandard performance, delay, or benefits that are not in proportion to the time spent on the case....

Id. at 1151 (citations omitted). *Crawford* states that a court may “consider the lodestar calculation, but only as an aid in assessing the reasonableness of the fee.”³ *Id.* at 1148 (citing *Gisbrecht*, 535 U.S. at 808). Applying these factors, the Ninth Circuit has found reasonable fees with effective hourly rates of \$519, \$875, and \$902. *Crawford*, 586 F.3d at 1153 (Clifton, J., concurring in part and dissenting in part).

3 Under the “lodestar” method, attorney fees are calculated by multiplying the number of hours reasonably expended in representing a client by a reasonable hourly fee. See *Gisbrecht*, 535 U.S. at 797-98 (discussing application of the “lodestar” method in the Ninth Circuit). The “lodestar” may be adjusted upward or downward to account for a variety of factors. See *id.* at 798-99. Courts in this and other circuits look to the following factors to determine whether the lodestar should be adjusted: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. In *Crawford*, the Ninth Circuit expressed concern that the lodestar method “under-compensates attorneys for the risk they assume in representing SSDI claimants and ordinarily produces remarkably smaller fees than would be produced by starting with the contingent fee agreement.” *Crawford*, 586 F.3d at 1149.

When a district court determines that a fee request is unreasonable, it must provide a “concise but clear explanation of its reasons.” *Crawford*, 586 F.3d at 1152 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). In particular, the Court must consider the complexity and risk involved in the case at issue before deciding that a particularly substantial fee award constitutes an unreasonable “windfall.” See *id.* at 1152-53.

DISCUSSION

*3 In testing the reasonableness of fees yielded by contingency fee agreements within the statute's 25 percent ceiling, *Gisbrecht* provided some guidance by identifying the following examples of factors or circumstances that may warrant a reduction: (1) the result achieved; (2) "substandard" representation by counsel; (3) delay by counsel (justifying a reduction to prevent counsel from profiting from the accumulation of benefits while the case is pending due to any foot-dragging); (4) "if the benefits are large in comparison to the amount of time counsel spent on the case," thereby resulting in a windfall; and (5) counsel's record of the hours spent representing the claimant and counsel's normal hourly billing rate for non-contingency work. *Id.* at 808; *see also Ellick v. Barnhart*, 445 F. Supp. 2d 1166, 1168-72 (C.D. Cal. 2006) (providing a thorough analysis of post-*Gisbrecht* case law and factors considered by various courts).

As prescribed by *Gisbrecht* and *Crawford*, the Court here begins with the executed contingency fee agreement between Plaintiff and his counsel. (*See* Yim Decl., Ex. A.) Plaintiff agreed that counsel shall receive "twenty-five percent (25%) of the past due benefits" if the matter was successfully prosecuted following judicial review. (*Id.*) As discussed above, according to the parties, the Commissioner subsequently awarded Plaintiff \$119,895.00 in past-due benefits. (*See* Yim Decl., Ex. C.) Plaintiff's counsel now seeks attorney's fees in the amount of \$29,973.75 for his work related to Plaintiff's case, with a credit to Plaintiff for the EAJA fees previously paid in the amount of \$4,878.95; this constitutes exactly 25% of Plaintiff's past-due benefits, the precise amount to which he is entitled under the fee agreement. (*See* 2021 Motion at 1; Memo. at 1-2.)

The Court finds no evidence of delay or substandard representation. Plaintiff's counsel pursued this matter efficiently and successfully. Counsel assumed the risk of nonpayment inherent in a contingency agreement. Accordingly, the only question is whether the fees sought

are unreasonable because they would result in a windfall to Plaintiff's counsel – that is, whether they are large in comparison to the amount of time counsel spent on the case. (*See* Memo. at 5-10; *see also* Yim Decl., Ex. B [Dkt No. 43-1 at 9].) Plaintiff's counsel's billing records show that counsel expended 27.30 hours on litigating this case in federal court. (Yim Decl., Ex. B.) This award amounts to an hourly rate of \$1,097.94 ($\$29,973.75 \div 27.3 = \$1,097.94$). The Ninth Circuit has found reasonable fees with effective hourly rates exceeding \$900, and the Central District of California has repeatedly found reasonable fees with effective hourly rates exceeding \$1,000 per hour. *See, e.g., Crawford*, 586 F.3d at 1153; *Radford v. Berryhill*, No. EDCV 15-1723-KK, 2017 WL 4279217, at *3 (C.D. Cal. Sept. 26, 2017) (approving fees amounting to \$1,197.92 per hour of attorney time); *Palos v. Colvin*, No. CV 15-4261-DTB, 2016 WL 5110243, at *2 (C.D. Cal. Sept. 20, 2016) (approving fees amounting to \$1,546.39 per hour of attorney time); *Daniel v. Astrue*, No. EDCV 04-1188-MAN, 2009 WL 1941632, at *2-*3 (C.D. Cal. July 2, 2009) (approving fees amounting to \$1,491.25 per hour of attorney time). When considered in this context, counsel's fee request is reasonable and would not result in a windfall to Plaintiff's counsel.

CONCLUSION

For the reasons set forth above, Plaintiff's counsel's request for an award of fees is GRANTED. Section 406(b) fees are allowed in the total amount of \$29,973.75 and are to be paid out of the amount withheld by the Commissioner from Plaintiff's benefits. In view of the previous award of EAJA fees to counsel in the amount of \$4,878.95, counsel is ordered to refund that amount to Plaintiff. The balance of the withheld funds shall be paid to Plaintiff.

*4 IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 3202462

EXHIBIT D

Ho Wing On Christopher and others
v
ECRC Land Pte Ltd (in liquidation)

[2006] SGCA 25

Court of Appeal — Civil Appeal No 139 of 2005

Chan Sek Keong CJ, Andrew Phang Boon Leong JA and Judith Prakash J

22 May; 16 August 2006

Insolvency Law — Winding up — Liquidators unsuccessfully bringing action in company's name — Company ordered to pay opposing party's costs — Company having insufficient assets to satisfy costs order because of liquidators' breach of estate costs rule — Scope of personal liability of liquidators for unpaid costs — Scope of court's power to exempt liquidators from liability for unpaid costs — Sections 283(3), 323(1), 328(1) Companies Act (Cap 50, 1994 Rev Ed)

Facts

The liquidators of the respondent company (“ECRC”) commenced a suit against the appellants in ECRC’s name, seeking the repayment of moneys that had allegedly been wrongfully paid out. ECRC’s claim was eventually dismissed both at first instance and on appeal, and it was accordingly ordered to pay the appellants’ legal costs.

The appellants then commenced the present proceedings to recover their unpaid legal costs from ECRC’s liquidators personally. ECRC had been unable to pay the appellants’ legal costs because its liquidators had used its moneys to satisfy its own legal costs before the appellants’. Most of these payments had been made before ECRC’s claim against the appellants was first dismissed by the High Court; only the final two payments had been made whilst ECRC’s appeal against the dismissal of its claim was pending.

The appellants alleged that the liquidators had breached a rule of corporate insolvency called the estate costs rule by paying ECRC’s solicitors before the appellants. Therefore, it was only fair that the liquidators be held personally liable for any resultant shortfall in ECRC’s assets. The judge in the High Court dismissed the appellants’ application to hold the liquidators personally liable. The appellants then brought the present appeal against this decision.

Held, allowing the appeal with costs:

(1) The estate costs rule supplemented the position under the Companies Act (Cap 50, 1994 Rev Ed) (“the CA”) by clarifying the relative priority between the various types of liquidation expenses *inter se*. In particular, the rule stated that a successful litigant against a company in liquidation was entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator: at [9].

(2) When considering the circumstances in which a liquidator should be made personally liable for a defendant’s costs, a distinction had to be drawn between: (a) the adjudicatory jurisdiction of the court hearing the litigation to

order costs against a non-party; and (b) the supervisory jurisdiction of the court over liquidators. The present case concerned the court's supervisory jurisdiction over a liquidator's decision to make payments in breach of the estate costs rule. It therefore concerned a liquidator's liability for a successful defendant's litigation expenses *qua* a debt of the company. Cases which dealt with a liquidator's liability for an opposing litigant's expenses *qua* costs had no bearing on this issue: at [44] to [46], [51], [54].

(3) A liquidator's duty to recover the company's assets was no excuse for him to pay the company's solicitors in breach of the estate costs rule. This duty was subject to the overriding question of whether the company's existing assets were sufficient to enable him to do so. If a liquidator believed that the company had a viable cause of action against someone, but the company's assets appeared to be insufficient to sustain both the company's legal fees and the opposing party's costs, the proper course of action was for the liquidator to seek an indemnity from the creditors for the costs of the litigation. He could not unilaterally ignore the estate costs rule and deplete the company's available resources: at [59], [66] to [68].

(4) The imposition of personal liability on liquidators in such situations would not contravene the principle that an impecunious claimant must not be denied access to the courts. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs had to be struck differently depending on the type of claimant involved. In this respect, there was a real and tangible justification for deterring insolvent companies from commencing litigation without any real possibility of satisfying a successful defendant's costs: at [70], [71] and [75].

(5) An order of security for costs was not a sufficient alternative to imposing personal liability upon liquidators. Such an order was a provisional remedy, and would not provide adequate protection against the possibility that an insolvent plaintiff company would be unable to satisfy the defendant's costs if it lost the action. In addition, it would be unfair to make defendants bear the burden of applying for security. A defendant would not know whether the company had sufficient assets to pay his costs, but the liquidator would or should know since he was the person with full knowledge of the company's financial condition: at [73], [76], [79] and [80].

(6) The liquidators in the present case would be held personally liable for the appellants' unpaid costs. The liquidators had breached the estate costs rule by making the relevant payments to ECRC's solicitors in priority to the appellants. If the liquidators were not held personally liable, this would lead to the wholly inequitable result of making the appellants bear the burden of sustaining the company's litigation for the creditors' benefit: at [18], [30], [42] and [81].

(7) Section 283(3) of the CA conferred the court with a discretionary power to override the application of the estate costs rule in appropriate circumstances. This discretion would be exercised sparingly in exceptional situations. On the present facts, there were no extenuating circumstances calling for an exercise of the court's discretion to relieve the liquidators from liability for the appellants' unpaid costs: at [85], [89] and [90].

[Observation: As a cautionary note to insolvency practitioners, it had to be pointed out that the rationale for imposing personal liability on the present facts applied equally to situations where a liquidator commenced proceedings though the company was completely insolvent and had no prospects of satisfying any costs order made against it. While the position on this issue was not entirely settled, a liquidator would be well-advised to obtain an indemnity from the creditors in such a situation: at [69].]

Case(s) referred to

Abraham v Thompson [1997] 4 All ER 362 (refd)
Beni-Felkai Mining Company, Limited, Re [1934] Ch 406 (folld)
Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd [2003] 2 SLR(R) 571; [2003] 2 SLR 571 (folld)
Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd [1999] 3 SLR(R) 907; [2000] 1 SLR 137 (folld)
Cowell v Taylor (1885) 31 Ch D 34 (refd)
Deputy Commissioner of Taxation v Tideturn Pty Ltd (2001) 37 ACSR 152 (folld)
Dominion of Canada Plumbago Company, In re (1884) 27 Ch D 33 (folld)
Dronfield Silkstone Coal Company (No 2), In re (1883) 23 Ch D 511 (refd)
Eastglen Ltd (in liquidation) v Grafton [1996] 2 BCLC 279 (refd)
Hamilton v Al Fayed (No 2) [2003] QB 1175 (refd)
Home Investment Society, In re (1880) 14 Ch D 167 (folld)
Hytec Electronics Pty Ltd v Mead (2004) 185 FLR 76 (distd)
Knight v FP Special Assets Limited (1992) 174 CLR 178 (folld)
Linda Marie Ltd, Re [1989] BCLC 46 (refd)
London Metallurgical Company, In re [1895] 1 Ch 758 (refd)
Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613 (not folld)
Pacific Coast Syndicate, Limited, In re [1913] 2 Ch 26 (folld)
Pearson v Naydler [1977] 1 WLR 899 (refd)
Peng Ann Realty Pte Ltd v Liu Cho Chit [1992] 3 SLR(R) 178; [1993] 1 SLR 630 (refd)
Project Construction & Development Pty Ltd v Ellison [2002] NSWSC 372 (refd)
R Bolton and Company, In re [1895] 1 Ch 333 (refd)
Staffordshire Gas and Coke Company, In re [1893] 3 Ch 523 (refd)
Trent and Humber Ship-Building Company, In re (1869) LR 8 Eq 94 (refd)
Wenborn & Co, In re [1905] 1 Ch 413 (refd)
Wilson Lovatt & Sons Ltd, In re [1977] 1 All ER 274 (refd)

Legislation referred to

Companies Act (Cap 50, 1994 Rev Ed) ss 283(3), 323(1), 328(1) (consd);
 ss 313(2), 315, 323(2), 328(1)(a), 388(1)
 Companies (Winding up) Rules (Cap 50, R 1, 1990 Rev Ed) r 173
 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59 r 2(2)
 Corporations Act 2001 (Aust) s 536(1)(b)
 Insolvency Act 1986 (c 45) (UK) s 202

*Francis Xavier and Lai Yew Fei (Rajah & Tann) for the appellants;
Oommen Mathew (Haq & Selvam) for the respondent.*

[Editorial note: The decision from which this appeal arose is reported at [2006] 2 SLR(R) 103.]

16 August 2006

Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

1 This was an appeal against the High Court decision in Summons in Chambers No 600611 of 2004 (“the application”). The judge dismissed the ten appellants’ application for an order that the liquidators of the respondent company, ECRC Land Pte Ltd (“ECRC”), be held personally liable for the appellants’ unpaid costs in successfully defending an action brought against them by ECRC.

Background facts

2 ECRC was placed in compulsory liquidation in 1999, with Chee Yoh Chuang and Lim Lee Meng appointed as liquidators (collectively referred to as “the liquidators”). The present appeal concerns the liquidators’ liability for costs incurred by the appellants in defending Suit No 1210 of 2001 (“the main suit”) and the appeal therefrom in Civil Appeal No 117 of 2003 (“the main appeal”). The essential facts are not in dispute, and are as follows.

3 The main suit and the main appeal were proceedings the liquidators commenced in ECRC’s name, seeking to recover moneys from the appellants based on allegations of fraud, breach of fiduciary duty, constructive trust and conspiracy to injure ECRC. In the course of the proceedings, ECRC provided a total of \$105,000 as security for costs, of which \$60,000 was security for the appellants’ costs in the main suit and \$45,000 for their costs in the main appeal. Before the main suit was decided, the appellants had applied for additional security of \$250,000 (“the first security application”), but the application had been opposed by ECRC. The assistant registrar (“the AR”) dismissed the first security application, relying on the principle that where a defendant’s alleged misconduct is the purported cause of a plaintiff company’s impecuniosity, the court may refuse to award security for costs if the provision of security would stultify the claim: *Peng Ann Realty Pte Ltd v Liu Cho Chit* [1992] 3 SLR(R) 178 (“*Peng Ann*”) at [15]. As there was no evidence of a third party providing funds to finance the litigation, the AR found that ECRC would have difficulty continuing with the action if the order of security was made.

4 ECRC’s claims against the appellants were largely unsuccessful, and costs were ordered in favour of the appellants in both the main suit and main appeal. After the main appeal was dismissed, the appellants filed Summons in Chamber No 600479 of 2004, asking that their costs in the

main suit and main appeal be paid in priority to all other claims against ECRC. The judge ordered that subject to the liquidators' costs of getting in, maintaining and realising ECRC's assets ("the realisation costs"), ECRC should pay the appellants' costs in the main suit and main appeal in priority to all other claims and expenses, *including the liquidators' remuneration and ECRC's legal costs for the same*.

5 After setting off the amounts provided as security for costs and other relevant deductions, ECRC found itself owing the appellants \$208,179.32 ("the shortfall"). The present proceedings were commenced to recover the shortfall from the liquidators.

6 At present, ECRC has only a balance of \$18,105.76 in its bank account. The shortfall has arisen because the liquidators paid themselves \$108,754.04 as remuneration and paid ECRC's lawyers, who were initially M/s Arthur Loke Bernard Rada & Lee (since dissolved) and subsequently M/s Arthur Loke & Partners (collectively referred to as "ALP"), an even more sizable amount of \$409,829.64 as ECRC's legal fees for the main suit and main appeal. The payments to ALP were made on various occasions after the main suit was commenced. The final two payments (totalling \$26,391.85) were made in February and March 2004, whilst the main appeal was pending and *after* Tay J had ordered that ECRC pay 80% of the appellants' costs in the main suit. Before these two payments were made, the appellants had written to the liquidators twice (in December 2003 and January 2004), asking that they pay the appellants' costs in the main suit *in priority to all other claims*. It would appear that the liquidators had decided to ignore the appellants' letters. Furthermore, all the sums paid to ALP were not taxed. This was in breach of r 173 of the Companies (Winding up) Rules (Cap 50, R 1, 1990 Rev Ed) ("the CWU Rules"), which provides, *inter alia*, that "[n]o payment in respect of bills of costs, charges or expenses of solicitors ... shall be allowed out of the assets of the company without proof that the same have been duly taxed".

7 As a result of ECRC's inability to pay the shortfall, the appellants filed the application, seeking two main orders:

- (a) that the liquidators pay the appellants the balance of \$18,105.76 currently standing to ECRC's credit as well as all sums previously paid to themselves as payment of the shortfall and the costs of the application; and
- (b) that the liquidators be held personally liable for the costs of the application and any part of the shortfall outstanding after payment is made under prayer (a) ("the outstanding shortfall").

Proceedings in the High Court

8 In the High Court, the appellants relied on a rule of priority known as the estate costs rule to support their application for relief under both

prayers (a) and (b). The judge granted prayer (a), but dismissed prayer (b). The exact quantum that the liquidators were liable to repay under prayer (a) would depend on how much of what they had paid themselves represented the realisation costs (see [4] above). This appeal concerns the judge's refusal to grant prayer (b). The issue under prayer (a), *ie*, whether the liquidators should be made to disgorge their remuneration, is not in contention before us.

9 The estate costs rule is a recognised common law rule of priority in the liquidation of companies. It was established in the 19th century by cases such as *In re Home Investment Society* (1880) 14 Ch D 167 ("*Home Investment*"), and has since been followed by courts in Singapore and other common law jurisdictions. The estate costs rule supplements s 328(1)(a) of the Companies Act (Cap 50, 1994 Rev Ed) ("CA"), which provides that "the costs and expenses of the winding up" including the remuneration of the liquidator shall be paid in priority to all other unsecured debts. Whilst legislation has provided that liquidation expenses take first priority over *other categories* of unsecured claims, the estate costs rule clarifies the *relative* priority between the various types of liquidation expenses *inter se*. In particular, the rule states that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator: see *eg*, *In re Pacific Coast Syndicate, Limited* [1913] 2 Ch 26 ("*Pacific Coast*") at 28; *In re London Metallurgical Company* [1895] 1 Ch 758 at 764 ("*LMC*"). As stated in *In re Trent and Humber Ship-Building Company* (1869) LR 8 Eq 94 ("*Trent and Humber*") at 97, the rationale for the estate costs rule lies in the fact that:

[A] company in winding up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly, or defended fruitlessly, then *the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent.* [emphasis added]

10 The appellants' case before the judge was fairly simple. It rested on the proposition that the liquidators had wrongfully caused the outstanding shortfall and therefore should have to remedy it. According to the appellants, the liquidators would have had sufficient assets in hand to pay the appellants' costs but for their breach of the estate costs rule by paying ALP's legal fees first. Thus, it was only fair that the liquidators should personally make good the resultant deficiency in the company's assets. If the liquidators were not made liable, future liquidators would be given the "green light" to flout the estate costs rule with impunity.

11 The judge refused to hold the liquidators personally liable for the outstanding shortfall, and found the appellants' proposition to be "as disingenuous ... as it was novel": *Ho Wing On Christopher v ECRC Land Pte*

Ltd [2006] 2 SLR(R) 103 (“GD”) at [21]. He affirmed the position by the English Court of Appeal in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 (“*Metalloy*”), and held that a liquidator who was a non-party to an action would only be held personally liable for costs in exceptional circumstances where impropriety on his part was proved: GD at [19] and [46].

12 The judge accepted counsel for ECRC’s submission that the court should exercise considerable caution before ordering costs personally against liquidators. In his view (GD at [47]):

... There were powerful policy considerations in this regard, in particular, that office holders such as the liquidators should not be unduly restricted or held back in the honest and proper performance of their duties for fear of incurring personal liability for costs simply because they acted for an insolvent company with insufficient assets to pay the costs of a winning party. *Otherwise, the very purpose of the liquidator’s role in realising as much of the company’s assets as was possible would be subverted.* I concurred with Millett LJ’s astute observation in *Metalloy* that *a liquidator was under no obligation to a defendant to protect his interest by ensuring that he had sufficient funds in hand to pay the defendant’s costs as well as his own if the proceedings failed.* [emphasis added]

13 For all these reasons, the judge held that a breach of the estate costs rule, in itself, could not warrant the imposition of personal liability upon the liquidators: GD at [21] and [49]. According to the judge, the *only* costs consequences to be borne by a liquidator who unsuccessfully commenced an action for the company was that the payment of the liquidator’s expenses and remuneration would enjoy lesser priority than the payment of the winning party’s costs: GD at [44].

14 In reaching this conclusion, the judge considered a number of authorities which he held were either inapplicable or distinguishable: see, eg, GD at [35] and [39]. As we will be re-examining a number of these cases in our judgment, it would be apposite to mention them at this juncture by way of introduction. In our view, the key cases which merit this court’s reconsideration are: (a) *Pacific Coast* ([9] *supra*); (b) *Hypec Electronics Pty Ltd v Mead* (2004) 185 FLR 76 (“*Hypec*”); (c) *In re Dominion of Canada Plumbago Company* (1884) 27 Ch D 33 (“*Dominion of Canada*”); and (d) *Deputy Commissioner of Taxation v Tideturn Pty Ltd* (2001) 37 ACSR 152 (“*Tideturn*”).

The appeal

15 The sole issue in this appeal is whether the liquidators should have to make good the outstanding shortfall because they breached the estate costs rule. Counsel for the appellants, Mr Xavier, made four main submissions in support of their appeal:

(a) Where the liquidator of an insolvent company commences litigation with insufficient funds, he takes the risk of being made personally liable for the unpaid costs of the successful defendant if he also breaches the estate costs rule: *Pacific Coast* ([9] *supra*). If the law were otherwise, the estate costs rule would, for all effects and purposes, be nullified.

(b) It would not be inequitable to hold a liquidator who breaches the estate costs rule personally liable. Liquidators can easily “insure” themselves against that risk by getting a suitable indemnity from the creditors.

(c) In contrast, litigants such as the appellants have no means of protecting themselves against a company’s insolvency, except by obtaining an order of security for costs. An order for security is however an inadequate remedy for a liquidator’s breach of the priority rule(s). This is amply demonstrated by the present facts since the liquidators denied the appellants of this remedy by resisting the first security application.

(d) There is no principle which limits a liquidator’s personal liability to instances where he has conducted *the litigation* improperly.

16 Mr Xavier also made the following subsidiary submissions regarding the *timing* of the liquidators’ payments to ALP:

(a) The liquidators should be made personally liable for all sums paid to ALP, *regardless of when those payments were made*. The liquidators have been made to disgorge *all* their remuneration, including the sums paid before the main suit was decided and the adverse costs order made against ECRC. There is no basis for making a distinction between amounts paid in breach of the estate costs rule to: (i) a liquidator as his fees; and (ii) a third party.

(b) In any event, the liquidators paid out approximately \$26,000 to ALP *after* the verdict in the main suit was delivered. Those sums are clearly sums for which the liquidators should be personally liable.

17 In response, Mr Mathew, counsel for ECRC, advanced the following arguments:

(a) The issue of costs is a matter entirely at the discretion of the court, and this court should therefore only interfere with the judge’s decision if it was manifestly wrong or exercised on wrong principles.

(b) There is no authority which has held that a liquidator should be held personally liable for breaching the estate costs rule. When considering a liquidator’s personal liability for costs, a distinction must be drawn between situations where the litigation is commenced in the *company’s* name, and where it is brought in the *liquidator’s* own

name. The English and Australian authorities adopt the position that a liquidator who commences litigation *in the company's name* can only be made personally liable if he has been guilty of some impropriety or unreasonableness *in the conduct of the litigation*.

(c) Imposing personal liability upon the liquidators here would deter future liquidators from carrying out their duty to recover all the company's assets. It is impractical to expect liquidators to get an indemnity from creditors because creditors are rarely willing to fund litigation out of their own pockets.

(d) An order of security for costs is a *sufficient and adequate* safeguard against a liquidator's potential breach of the estate costs rule. There is therefore no reason to additionally visit personal liability upon the liquidators in question.

The basis for imposing liability on the liquidators

18 Before proceeding to assess the merits of the parties' respective arguments, it would be appropriate to first delineate the *exact* scope of the issue which falls for our determination. In the present proceedings, it is undisputed that the liquidators breached the estate costs rule by making the relevant payments to themselves and to ALP in priority to the appellants. Counsel for ECRC accepts that the estate costs rule applies to company liquidations in Singapore. That being the case, authorities cited by the appellants such as *Home Investment* ([9] *supra*), *In re Wenborn & Co* [1905] 1 Ch 413 ("*Wenborn*") and *Trent and Humber* ([9] *supra*), which merely affirm the content of the estate costs rule, are of limited assistance to us.

19 In their written submissions, the appellants contend that the judge failed to appreciate the true basis upon which they had sought to hold the liquidators personally liable. According to them, the judge was under the erroneous impression that they were seeking to make the liquidators liable *over and above* the amounts paid in breach of the estate costs rule. In the judge's view, "the application of the estate costs rule was not in issue in the present proceedings *since the liquidators had already been ordered to make good those payments made in breach of the estate costs rule*" [emphasis added]: GD ([11] *supra*) at [30]. As a result, he perceived the issue as being "whether... [a] liquidator could be made to bear any shortfall in costs personally, *despite having returned moneys paid in breach of the estate costs rule*" [emphasis added]: GD at [25]. Notably, ECRC does not dispute that the judge erred in finding that the liquidators had fully repaid the moneys taken from ECRC, and relies instead on the proposition that there is no basis for requiring a liquidator to make good his breach of the estate costs rule.

20 In considering the basis upon which the appellants seek to make the liquidators personally liable, it is crucial to distinguish between two sets of

breaches of the estate costs rule: (a) the liquidators' use of ECRC's funds to pay *their own* remuneration; and (b) their use of ECRC's funds to pay ALP. The judge's other order that the liquidators disgorge the sums paid to *themselves* only makes good the liquidators' *former* breach of the estate costs rule in paying their own remuneration before the appellants' costs. The effects of the liquidators' *latter* breach by paying ALP have not been mitigated or remedied in any way. That being the case, the judge erred in so far as he held that the liquidators had already *fully* remedied their breaches of the estate costs rule. It is the linchpin of the appellants' case that the liquidators have done *nothing* to remedy their wrongful payments to ALP.

21 The judge's misconception that the liquidators had *completely* "made good" their breach led to a misapprehension of the basis upon which the appellants seek to render the liquidators personally liable. Contrary to the judge's view, the appellants do not seek to render the liquidators personally liable "simply because" they have breached the estate costs rule: GD at [49]. The liquidators' supposed liability in fact rests on two *cumulative* grounds: (a) their breach of the estate costs rule by paying ALP; *and* (b) their failure to remedy the deficiency in ECRC's assets caused by this breach. The issue presently before us is therefore *not* whether the liquidators should be made liable *even after they have remedied their breach*, but instead whether they should be held personally liable for the outstanding shortfall *which has resulted from their breach of the estate costs rule*.

Competing considerations for and against personal liability

22 The issue in this appeal, as presently framed (see [21] above), can be approached on two varying levels of specificity. *On a more generic level*, there is the more abstract question of whether, *as a matter of general principle*, a liquidator who breaches the estate costs rule should be made to remedy the consequences of his breach. *On a more specific level*, there is also the issue of whether it would be justifiable to impose personal liability upon the liquidators given the *particular* circumstances attending *their* breach of the estate costs rule. Each of these questions attracts a host of divergent legal and policy concerns, which must be addressed before this court can reach a decision in these proceedings.

23 Turning first to the *general* question of how the courts should approach a breach of the estate costs rule, one starts with the concern, which the judge highlighted in his judgment, that the imposition of personal liability for breaching the estate costs rule will deter future liquidators from commencing actions to recover companies' assets. According to the judge, there is an element of public interest involved in allowing liquidators to perform their duties without the fear of personal liability: GD ([11] *supra*) at [47]. In addition, the *separate legal personality* of a company also suggests that a liquidator who sues in the name of the company is technically a non-party to the suit and, as such, should only be

ordered to pay the opposing party's costs in *exceptional circumstances: Metalloy* ([11] *supra*) at 1620–1621. These considerations converge to support the proposition that a liquidator should not be liable for the legal costs of a successful defendant unless he has acted with impropriety.

24 These considerations must, however, be balanced against the need to uphold the efficacy of the estate costs rule, which would be rendered illusory if errant liquidators who breach it are not taken to task. Further, the law should refrain from placing too much emphasis on the consideration that a liquidator suing in the name of an insolvent company is a non-party. In our view, this is only a technical consideration. The strict adherence to the principle of the separate corporate personality of an insolvent company during a winding up is not necessarily in the public interest if it allows liquidators to hide behind an invisible shield to launch unmeritorious claims against defendants who ultimately emerge victorious but end up being the poorer for it. In any case, if the element of impropriety is a condition precedent to imposing personal liability on a liquidator, a breach of the estate costs rule would surely be such a form of impropriety. Ignorance of the rule would not make the breach any less improper.

25 The *specific factual matrix* in the present case also gives rise to the additional question of how a liquidator should *balance* the competing interests of the company and a defendant to an action brought in the company's name. In the present case, the breaches of the estate costs rule arose because the liquidators paid *ECRC's legal costs* in the main suit and the main appeal in priority to the appellants' legal costs. Most of these payments to *ECRC's* solicitors, ALP, took place whilst the main suit was *still ongoing* and *before* the costs order against *ECRC* had been made. The liquidators' infringements of the estate costs rule were therefore a *direct consequence* of having to finance the suit from which the company's subsequent liability in costs to the appellants arose. As a result, the question of whether the liquidators should be held personally liable raises an inherent tension between the interest in maximising the recovery of an insolvent company's assets and the need to protect the interests of a successful defendant to an action brought by such a company.

26 In this regard, a number of cases appear to suggest that a liquidator's duty to recover the company's assets takes precedence over a defendant's interests. According to Millett LJ in *Metalloy* ([11] *supra*) at 1620, the liquidator of an insolvent company is under no duty to ensure that the company's assets would be sufficient to satisfy *both the company's as well as a successful defendant's legal costs*. In addition, as he subsequently held in another case, "[i]t is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it": *Abraham v Thompson* [1997] 4 All ER 362 at 377.

27 However, whilst there may be compelling reasons to facilitate a liquidator's recovery of corporate assets, equally, it may be said that a successful defendant has a right to be paid his legal costs. The need to protect a defendant against an unsatisfied costs order may be said to be *a fortiori* where the plaintiff is a company that is *already* in insolvent liquidation. Such a company is in effect little more than an empty shell. The emphasis placed on a liquidator's duty to recover the company's assets must also be reconciled with s 323(1) of the CA, which provides that a liquidator shall not be liable to incur any expense if the company does not have sufficient assets. Cases such as *Metalloy* therefore need to be re-evaluated to ensure that the credence accorded to the realisation of an insolvent company's assets is reconcilable with the general purport of the corporate insolvency regime.

28 These divergent considerations must be reconciled before this court can decide whether the liquidators should be held liable for the appellants' unpaid costs. The resolution of these competing factors will require an assessment of the policy concerns underpinning each of them in order to determine which of them are consonant with the statutory framework of our CA.

Personal liability for infringing the estate costs rule

29 To support the imposition of personal liability upon liquidators who breach the estate costs rule, the appellants cited a plethora of authority, including some cases where the liquidator was made liable for costs incurred in litigation that was commenced *in his own name*. These cases are inapplicable since the issue presently in contention concerns a liquidator's potential liability for the costs of proceedings brought *in the company's name*. Where a liquidator brings an action *in his own name*, he is himself a party to the proceedings and therefore "litigates at his own risk": *In re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 285. That being the case, he will be held liable for the opposing party's costs even if the company's assets are inadequate to provide a complete indemnity: *In re Staffordshire Gas and Coke Company* [1893] 3 Ch 523 at 526. In contrast, where litigation is commenced *in the company's name*, the liquidator is a non-party, and an order of costs against him *would not follow as a matter of course*: *Project Construction & Development Pty Ltd v Ellison* [2002] NSWSC 372. But, as we will observe later, a liquidator's status as a non-party will not always be sufficient reason to shield him from personal liability, especially when he has other means at his behest to protect himself against an order for costs.

30 In our view, case law clearly requires a liquidator who makes payments in breach of the estate costs rule to remedy his breach. *Pacific Coast* ([9] *supra*) is direct authority for this proposition. In that case, the company in question went into voluntary liquidation. Following that, the liquidator of the company commenced an action against B Ltd in the

company's name. Judgment was entered for B Ltd with costs, which were taxed at £300. At the date of the judgment, the company still had assets amounting to about £500. However, the liquidator subsequently paid out £375 in legal fees to the solicitors who represented the company in the action, and made a few other disbursements. This left him with a balance of approximately £86, which he paid to B Ltd. B Ltd then applied for an order that the liquidator of the company pay the remainder of its unpaid costs of about £214. Neville J ordered the liquidator to pay B Ltd its outstanding costs and held (at 28–29):

Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants [B Ltd]. I hold, therefore, that he must pay the applicants their taxed costs of the action, and he may repay himself out of any further assets that may come to his hands.

31 In its written submissions, ECRC contends that *Pacific Coast* merely emphasises the application of the estate costs rule, and is not authority for the proposition that a liquidator will be ordered to personally repay any sums paid out in breach of the estate costs rule. It submits that the *ratio* of the case was simply that where judgment with costs is ordered against a company in liquidation, the party entitled to costs is entitled to payment *before* the liquidator's costs are paid, regardless of whether the order is merely for costs, or for costs to be paid out of the company's assets. In his judgment, the judge concurred with ECRC on this point, and held that the issue of whether a liquidator could be made to personally bear any shortfall in costs did not arise for determination in *Pacific Coast*: GD ([11] *supra*) at [23]–[25].

32 With respect, both the judge and ECRC erred in their reading of *Pacific Coast*. Neville J's order (see [30] above) was clearly an order that entailed personal liability on the part of the liquidator in question. The company had no assets at the time the order was made. The ruling that the liquidator could subsequently avail himself of any additional assets coming into the company's hands did not immunise him from having to personally make good B Ltd's costs first. As a result of Neville J's order, it was the liquidator, and not B Ltd, who had to bear the risk of the company not having sufficient assets to pay *both* B Ltd and the company's solicitors.

33 During the hearing, counsel for ECRC additionally referred us to a passage in the Australian case of *Hypac* ([14] *supra*), which he contended supported his position. There, Campbell J stated (at 102):

I am not aware of any case where a court has ordered a liquidator, in the exercise of its supervisory jurisdiction over liquidators, to pay the costs which have been ordered against the company as a result of litigation which was instigated and carried through by the liquidator.

Counsel further pointed out that Campbell J had referred to *Pacific Coast* ([9] *supra*) in his judgment and submitted that that was conclusive evidence that *Pacific Coast* did not decide that personal liability could be imposed on liquidators who breach the estate costs rule. This argument is devoid of substance. In our view, counsel misunderstood the purport of the passage above. The interpretation placed on Campbell J's *dictum* must be tempered by the fact that his attention in *Hypac* was directed towards a *completely different aspect* of the court's supervisory jurisdiction over liquidators. *Pacific Coast* and the estate costs rule were in fact only referred to *en passant* (at 103) as *another* distinct example of how the court's supervisory jurisdiction might be exercised. We will return to this point later in this judgment (see [51]–[53] below).

34 When confronted with the actual terms of the order in *Pacific Coast*, counsel for ECRC conceded that Neville J's order did in fact result in the liquidator having to assume *personal liability* for the deficit caused by his breach of the estate costs rule. However, he then contended that the decision in *Pacific Coast* had been made erroneously, contrary to the decision in *In re R Bolton and Company* [1895] 1 Ch 333 ("*Re Bolton*"). In *Re Bolton*, a contributory brought an action *against the liquidator of a company*, seeking to have its name removed from the list of contributories. The claim succeeded on appeal, and the liquidator was ordered to pay the costs of the appeal and of the application out of the company's assets. The contributory sought to vary that order by directing the liquidator to personally pay its costs. The Court of Appeal rejected the contributory's attempt to hold the liquidator personally liable, holding that since the application had been taken out by the contributory against the liquidator and not *vice versa*, the contributory's costs would be paid out of the company's assets: *Re Bolton* at 334. Counsel for ECRC placed particular reliance on Lindley LJ's statement that "an order ought [not] to be made against the liquidator personally ... unless the liquidator *has done something to make himself personally liable for the costs*" [emphasis added]: *Re Bolton* at 334.

35 In our opinion, *Re Bolton* does not assist ECRC. First, the case concerned litigation in which the *liquidator* of the company was the *defendant*, and is clearly distinguishable from the case before us where the *company* itself is the *plaintiff*. Second, Lindley LJ's statement of principle left unanswered the critical question of when a liquidator "has done something" to make himself personally liable. In our view, even if we were to apply Lindley LJ's statement of principle to the liquidators' conduct in the present case, the answer to this question has been provided by *Pacific Coast*, which illustrates that a liquidator does "something" to make himself liable when he breaches the estate costs rule.

Personal liability for breaching other priority rules

36 There are other authorities that in principle support the ruling in *Pacific Coast* ([9] *supra*). These are cases where liquidators have been held personally liable for breaches of *other* kinds of priority rules. In *Tideturn* ([14] *supra*), the Deputy Commissioner of Taxation sought to hold a liquidator personally liable for his failure to ensure the retention of moneys to pay group tax. The taxes were post-liquidation debts payable in priority to other creditors' claims. The Commissioner made no allegations of dishonesty, but instead contended that the liquidator's negligence in failing to ensure that all priority debts were paid proportionately sufficed to render him liable. The court held that the liquidator, in failing to follow the priority rules, was in breach of duty and was personally liable to pay the unpaid group tax as a condition to his release as a liquidator: *Tideturn* at 156.

37 *Tideturn* clearly supports the proposition that a liquidator who breaches a priority rule should be held personally liable. With respect, the judge erred in holding that *Tideturn* was "unhelpful" to the appellants' case: GD ([11] *supra*) at [32]. In the judge's own words:

... There, upon the application of the Deputy Commissioner of Taxation, a liquidator was held personally responsible for his failure to retain moneys for tax purposes, and was made to cough up the moneys he had failed to hold back. ... [emphasis added]

The analogy between *Tideturn* and the present case, where the appellants seek to hold the liquidators liable for *failing to withhold the company's assets* to pay their legal costs, is undeniable. The judge's rejection of *Tideturn* stemmed from his misapprehension that the appellants sought to hold the liquidators liable *simply because* they had failed in legal proceedings commenced on behalf of an insolvent estate: GD at [32].

38 ECRC sought to distinguish *Tideturn* on the ground that it concerned a breach of a *statutory* priority rule whereas the estate costs rule is a *common law* rule. According to counsel for ECRC, it would be inequitable to hold insolvency practitioners liable for breaches of *common law* priority rules since they would not be aware of such rules. We find this submission to be wholly misconceived. Ignorance of the law is no excuse, even in civil matters. There is, or should be, no difference in principle between a statutory rule and a common law rule.

39 A liquidator's personal liability for breaches of *common law* priority rules was also upheld in *Dominion of Canada* ([14] *supra*). In that case, the liquidator's solicitor, Beall, sought an order that the company be ordered to pay his legal fees. The liquidator had earlier paid a successful litigant against the company, Kirby, his costs in the relevant action. The company was insolvent, and had insufficient assets to discharge *both* Kirby's and Beall's claims. Beall argued that the liquidator had breached a common law priority rule, established in the case of *In re Dronfield Silkstone Coal*

Company (No 2) (1883) 23 Ch D 511, which required that the general costs of winding up be paid *pari passu* with the costs of internal litigation.

40 Pearson J's *dictum* in *Dominion of Canada* supports a finding of personal liability against a liquidator who applies the company's moneys in breach of *common law* priority rules. According to Pearson J (at 36):

If ... the liquidator were wrong in paying Mr Kirby, and if Mr Kirby ought to have been paid *pari passu* with the general costs of the liquidation, then *the liquidator ought to have, and must be deemed to have, a larger sum in his hands than he has accounted for.* [emphasis added]

Though the court ultimately found that the liquidator had been correct in paying Kirby in priority to Beall, the passage quoted above clearly suggests that if the liquidator had been in breach of a common law priority rule, he would have been held personally liable for the company's inability to pay Beall because of his wrongful prior payment to Kirby.

41 The judge failed to consider this aspect of Pearson J's judgment when he held that *Dominion of Canada* "merely affirmed the estate costs rule or showed how the rule was to be applied, *viz*, a liquidator having to subordinate the payment of his costs to the payment of the winning party's costs": GD ([11] *supra*) at [31]. The decision in *Dominion of Canada* did not stop at merely affirming the efficacy of the estate costs rule, but went on to stipulate the *consequences* that would follow from a breach thereof.

42 In our view, *Tideturn* and *Dominion of Canada* reinforce the correctness of the decision in *Pacific Coast*. These cases confirm that the imposition of personal liability for a breach of the estate costs rule is just a manifestation of the *general* approach towards breaches of priority rules in corporate liquidation.

The requirement of "impropriety" – adjudicatory versus supervisory jurisdiction

43 To support its argument that there is no general principle requiring a liquidator to be held personally liable for breaching the estate costs rule, ECRC additionally submits that established jurisprudence states that where a liquidator commences an action in the company's name, the court can *only* order the liquidator to pay costs where there has been *impropriety in his conduct of the action*. As authority for its proposition, ECRC cites the English Court of Appeal decision in *Metalloy* ([11] *supra*). This submission was accepted by the judge in the court below: GD ([11] *supra*) at [19].

44 The appellants' contention on this point is that the judge erred in accepting ECRC's submission. Counsel submitted that the impropriety of a liquidator's conduct in the litigation is not the *only* instance when a liquidator may be visited with personal liability for a defendant's costs. When considering the circumstances in which a liquidator should be made

personally liable for costs, a distinction must be drawn between: (a) the *adjudicatory* jurisdiction of the court *hearing the litigation* to order costs against a non-party; and (b) the *supervisory* jurisdiction of the court over liquidators. In the former, the court would be more concerned with the reasonableness and propriety of the liquidator's conduct of *the litigation*. No issue concerning the breach of priority rules would arise. Conversely, in the latter situation, it would not be necessary in all cases to show misconduct by the liquidator in his conduct of the litigation. According to the appellants, *Metalloy* was concerned with the court's *adjudicatory* jurisdiction to order costs against non-parties, and is not authority for the scope of the court's *supervisory* jurisdiction to order a liquidator to personally pay a defendant's costs.

45 In our view, the distinction which counsel for the appellants has drawn between the court's supervisory and adjudicatory jurisdictions is well-founded. The court's power to order costs against a non-party under O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is *ancillary* to its jurisdiction to adjudicate the merits of the case. Such an order is a "*consequential order that follows the principal decision reached by the court with regard to the issues of the case*" [emphasis added]: *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 at [26]. As such, an order of costs made in exercise of this power would be *inextricably linked* with the main proceedings as a result of which the costs were incurred. Hence, when deciding whether to order costs against a non-party, the court would naturally be concerned with factors relating to the proceedings, and nothing else. As stated by Lindsay J in *Eastglen Ltd (in liquidation) v Grafton* [1996] 2 BCLC 279 at 289:

[T]he bona fides of the proceedings and of the non-party's support for them are an important feature of the ... discretion [to order costs against a non-party].

46 In contrast, the court's *supervisory* jurisdiction over liquidators is significantly broader and extends beyond the purview of the liquidator's conduct of the litigation in question. Section 313(2) of the CA provides that the court "shall take cognizance of the conduct of liquidators", and allows the court, *inter alia*, to inquire into any complaint made by a creditor regarding the liquidator's performance of his duties or observance of the prescribed requirements, and to "take such action as it thinks fit". In addition, s 315 of the CA allows any person aggrieved by *any act* of the liquidator to apply to court, and confers the court in question with the power to reverse or modify the act complained of and make such order "as it thinks just". These provisions confer a *broad* power on the courts to supervise *all* aspects of a liquidator's conduct of the winding up to ensure that his conduct accords with the statutory regime of liquidation dictated by the CA. Hence, the court would be justified, in exercising its supervisory jurisdiction under the CA, to order a liquidator to pay a defendant's costs

even if he had conducted the proceedings properly, provided that there was some *other* aspect of his conduct that rendered such an order equitable.

47 In the present case, the appellants' application to render the liquidators personally liable is one which was made pursuant to this court's *supervisory*, and not adjudicatory, jurisdiction. The court's jurisdiction to order costs under O 59 of the Rules was already spent by the time the application was made. The application was made *after* costs orders in the main suit and in the main appeal had *already been made against ECRC*. Therefore, what is currently sought is an exercise of the court's *supervisory* jurisdiction over the liquidators under the CA to render them liable for failing to accord the appellant's *established* entitlement to costs with the requisite priority.

48 It follows from this conclusion that ECRC's reliance on *Metalloy* ([11] *supra*) is misplaced. In *Metalloy*, the liquidator of a company had commenced an action in the company's name. The defendants successfully obtained an order of security for costs, which the company failed to satisfy. As a result, the action against the defendants was dismissed. The defendants then sought an order that the liquidator be made personally liable for the defendants' costs in the action. In our view, the English Court of Appeal was, in that case, dealing with the issue of whether the court should exercise *its adjudicatory jurisdiction to order costs against a non-party*. This is evident from the following passage in Waller LJ's judgment (at 1618):

I think ... that there is jurisdiction to order a liquidator *as a non-party* to pay the costs personally; but it will only be in exceptional cases that the jurisdiction will be exercised, and impropriety will be a necessary ingredient, particularly having regard to the fact that the normal remedy of obtaining an order for security for costs is available; the caution necessary *in all cases where an attempt is being made to render a non-party liable for costs* will be the greater in the case of a liquidator having regard to the public policy considerations. [emphasis added]

49 If ECRC's interpretation of *Metalloy* were correct, we would have to reconcile it with *Pacific Coast* ([9] *supra*), which clearly establishes that a liquidator can be made liable for costs even if his conduct *of the litigation* was not improper. In our view however, *Metalloy* and *Pacific Coast* are nothing more than *discrete examples* of how liquidators may find themselves being made personally liable for costs, and are not in conflict with each other.

Scope of court's supervisory jurisdiction over liquidators

50 Our findings as regards *Metalloy* do not completely dispose of ECRC's submissions on this point. ECRC's reliance on the requirement of impropriety *concerning the litigation* rests additionally on another authority, which cannot be similarly disposed of by relying on the distinction between the court's adjudicatory and supervisory jurisdictions.

ECRC submits that even if this court is not minded to accept *Metalloy* as authority for the proposition which ECRC advances, we should in any event accept the principle adopted by the New South Wales Supreme Court in *Hypoc* ([14] *supra*). In that case, the liquidator of a company was made personally liable for a defendant's costs because it was found that he had acted unreasonably in causing the company to commence the litigation. Campbell J held that the court would *only* exercise its *supervisory* jurisdiction over liquidators and hold a liquidator personally liable for a defendant's costs *if the liquidator had acted improperly in causing the defendant to incur the costs in question*. ECRC places particular reliance on the following statement from Campbell J's judgment (at 102):

I cannot identify any principle on which the Court would, in exercise of its supervisory jurisdiction, order a liquidator to pay costs of litigation brought by a company in liquidation when those costs are properly incurred, in the Beddoe sense [ie, reasonably and honestly]. [emphasis added]

According to ECRC, Campbell J's statement supports the conclusion that even the court's *supervisory* jurisdiction over liquidators is limited to instances where the liquidator had acted with some unreasonableness *in the conduct of the litigation*.

51 To our minds, though *Hypoc* was a case involving the court's supervisory, and not adjudicatory, jurisdiction, one must always ask the additional question: *Which act* of the liquidator was the court seeking to "supervise"? In *Hypoc*, the issue was whether a liquidator should be made personally liable for litigation costs that were *unreasonably incurred* which, as a result, were not payable out of the company's assets under the Australian Corporations Act 2001. The case therefore involved the court's supervisory jurisdiction over the liquidator's decision *to commence and conduct litigation in the company's name*. One should not treat Campbell J's *dictum* as excluding the court's supervisory jurisdiction over *other acts* of liquidators which may similarly render them personally liable for the costs of an action. In the present case, this court is being asked to exercise its supervisory jurisdiction over a different kind of conduct from that in *Hypoc*, *ie*, a liquidator's decision *to make payments in breach of the estate costs rule*. For this reason, the decision in *Hypoc* is not relevant to the exercise of our supervisory jurisdiction over this matter.

52 It is evident from *Hypoc* itself that Campbell J did not intend the *sole* criterion of a liquidator's personal liability for costs to be that of whether the costs in question were "properly incurred". Immediately after the passage which ECRC has cited (see [33] above), Campbell J went on to observe (at 102):

As well as this inherent jurisdiction, s 536 of the Corporations Act confers power on the Court with administrative control of the liquidation, in appropriate cases, *to order that a liquidator should*

personally pay the amount which the company has been ordered to pay under a costs order. However, that power is dependent upon whether any of the circumstances identified in s 536 have arisen. *That, in turn, depends on questions of whether the liquidator has performed his or her duties.* [emphasis added]

53 Section 536(1)(b) of the Australian Corporations Act 2001 provides that:

[W]here a complaint is made to the Court ... by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties, the Court ... may inquire into the matter and ... take such action as it thinks fit.

This provision is, in effect, no different from s 313(2) of our CA, which states that:

[T]he Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties ... or if any complaint is made to the Court by any creditor ... in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

Accordingly, even in *Hypex* itself, Campbell J recognised that the court's supervisory jurisdiction over liquidators could extend to ordering a liquidator who has breached his duties (in our case, the estate costs rule) to pay costs, even if he is beyond reproach *vis-à-vis* the conduct of the litigation itself.

54 In the ultimate analysis, *Metalloy* and *Hypex* were really cases which dealt with a liquidator's liability for an opposing litigant's expenses *qua* costs. The courts' focus in these cases was accordingly directed to the liquidator's conduct in the litigation as a result of which these costs had been incurred. These cases have no bearing on the present case, which concerns a liquidator's liability for a successful defendant's litigation expenses *qua* a debt of the company. The issue which is presently before us is not whether the liquidators acted reasonably in causing the appellants to incur the costs in question (under the *Hypex* test) or whether the liquidators acted with impropriety in the conduct of the main suit and the main appeal (under the *Metalloy* test), but whether ECRC's debt to the appellants (for their costs in the main suit and the main appeal) has been accorded the proper treatment by the liquidators. On the authority of cases such as *Pacific Coast* ([9] *supra*), *Tideturn* ([14] *supra*) and *Dominion of Canada* ([14] *supra*), we find that an order of personal liability *should* be made against a liquidator if he has failed to accord a costs order against the company with the requisite degree of priority required under the estate costs rule.

Competing interests in collection of corporate assets

55 Our enquiry thus far has led us to the conclusion that imposing personal liability for infringing the estate costs rule would accord with established principle and authority. However, an additional issue that needs to be addressed is whether the imposition of personal liability *on the present facts* would breach any broader principle of corporate insolvency law.

56 As we mentioned earlier, the moneys paid out in breach of the estate costs rule were applied towards satisfying ECRC's own legal costs for the main suit and main appeal. At the time when most of these payments were made, it was still a distinct possibility that ECRC might win the main suit and avoid any liability in costs to the appellants. To our minds, the issue is really as follows: When a company in liquidation commences an action with limited funds, is the liquidator entitled to use the funds available to sustain the litigation and risk irreparably prejudicing the defendant in the event that the company loses the action and a costs order against the company is made?

57 Based on our analysis above, where a liquidator has sufficient assets in his hands to fully discharge the defendant's legal costs, the estate costs rule clearly prohibits a liquidator from jeopardising a defendant's interest in this manner and requires the liquidator to preserve the company's assets to ensure that the company will be able to meet any costs order made against it. It may be argued that such a ruling could deter or impede insolvent companies from commencing litigation to recover their assets. In situations where a company's assets are inadequate to meet *both* its legal fees and the opposing litigant's costs, liquidators would, on pain of personal liability, have to preserve the company's assets unless and until the entire action is determined and the issue of entitlement to costs is decided. In these circumstances, a liquidator might be hard pressed to find continuing legal representation for the company. Few lawyers would be willing to hold their legal fees in abeyance or to agree to defer receiving payment thereof until: (a) the opposing litigant's potential entitlement to costs is resolved; and (b) if a costs order against the company is indeed made, the opposing litigant's costs are fully paid.

58 In our view, there are two possible considerations which might weigh against inhibiting corporate litigation in this manner. First, a liquidator has a *duty* to recover assets belonging to the company, and therefore should be allowed to take all necessary measures to do so. Second, this would create a *de facto* requirement that creditors should provide liquidators of insolvent companies with the requisite indemnities before commencing litigation. The difficulty in obtaining such indemnities would consequently prevent genuine claims from being ventilated. However, for the reasons that follow, it is our view that neither of these concerns is sufficiently important to overrule a strict application of the estate costs rule.

A liquidator's duty to recover the company's assets

59 In situations where a company would not be able to pay *both* the defendant's and its own legal costs, a liquidator's duty to adhere to the estate costs rule and his duty to recover assets rightfully belonging to the company may seem to pull him in opposing directions. In our view, this conflict is apparent rather than real. Whilst a liquidator has a duty to recover the company's assets, this duty is not absolute and is subject to the overriding question of whether the company's existing assets are sufficient to enable him to do so.

60 Section 323(1) of the CA, which applies to every mode of winding up, provides that:

Unless expressly directed to do so by the Official Receiver, a liquidator *shall not be liable to incur any expense* in relation to the winding up of a company unless there are sufficient available assets. [emphasis added]

Accordingly, if a company does not have sufficient resources, the liquidator need not commence any action on the company's behalf unless so directed by the Official Receiver. Similarly, if no lawyer will act for the company unless his legal fees are paid upfront and as the case proceeds, but the liquidator is unsure whether the company's existing assets would be sufficient to meet *both* the opposing litigant's potential costs and the company's own legal fees, the liquidator would be completely justified on the authority of s 323(1) in refraining from commencing the litigation.

61 In advocating the need to give credence to a liquidator's duty to get in assets, counsel for ECRC has placed much emphasis on the following passage from Millett LJ's judgment in *Metalloy* ([11] *supra*). Millett LJ held (at 1620) that:

Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. If he does so in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. If he brings proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail. [emphasis added]

62 This passage suggests that in situations such as the present, where the company's assets are inadequate to meet both the defendant's and its own legal costs, a liquidator should give precedence to his duty to recover the company's assets and may legitimately disregard any potential prejudice to the defendant if the claim should fail. However, we would point out that the Singapore position on liquidators' duties to recover corporate assets differs from the English position. Section 323(1) of our CA (see [60] above) appears to be absent from the Insolvency Act 1986 (c 45) (UK). Section 202

of the UK Insolvency Act allows the liquidator of a company to apply for an early dissolution of the company on the ground that the company's realisable assets are insufficient to cover the expenses of winding up. However, under s 202(4), the liquidator is only discharged from performing his duties *after* he gives the company's creditors and contributories notice of his intention to make such an application. These two sections, read together, suggest that the *default* position under the UK Act is that unless and until proceedings to obtain a dissolution order are commenced, a liquidator remains subject to the full extent of his statutory duties, regardless of whether the company has sufficient assets for him to do so. In contrast, s 323(1) of our CA *prima facie* allows a liquidator to abstain from taking *any* action where the company's assets are insufficient.

63 Millett LJ's *dictum* in *Metalloy* (see [61] above) is therefore inapplicable locally. A liquidator's duty to get in corporate assets is no excuse for him to pay the company's solicitors in breach of the estate costs rule. In light of s 323(1), a liquidator does not need to single-mindedly pursue the recovery of the company's assets. Where the company has insufficient assets, he may have to exercise prudence to hold in abeyance his duty to recover the company's assets. The estate costs rule therefore assumes primary importance. In our view, a Singapore liquidator *does* have a positive duty to avoid subjecting a defendant to the unfairness of an unsatisfied costs order.

The requirement of obtaining an indemnity

64 The practical effect of holding the liquidators personally liable would be to require liquidators to obtain an indemnity from the creditors if they wish to bring an action but the company has limited assets. In the future, when liquidators are faced with a situation where the company's existing assets are not sufficient to fund the legal costs of an unsuccessful suit, they should look to the creditors to fund the litigation. If no indemnity is forthcoming, they would have to decide whether to commence litigation for fear of being held personally liable for breaching the estate costs rule. In some cases, this might result in meritorious claims having to be abandoned. However, in our view, this is a justifiable consequence of the creditors' refusal to provide an indemnity.

65 During the hearing, counsel for ECRC stressed that this *de facto* requirement of obtaining an indemnity would make it arduous for liquidators to sue since creditors are often reluctant to provide any form of indemnity. With respect, we do not consider that the difficulty of obtaining an indemnity is a relevant factor that should affect the outcome of the present appeal. The following passage from Vaughan Williams J's decision in *LMC* ([9] *supra*) unequivocally rejects any suggestion that the difficulty in obtaining an indemnity should be a reason not to enforce the estate costs rule. According to Williams J (at 768):

It is said that if liquidators were bound at once to pay the costs of successful litigants, winding-up would soon come to an end. But that is not so. *If necessary, creditors in liquidations, as in bankruptcy, must provide an indemnity fund.* If the result of the rule of practice I am laying down is that, where liquidators now start proceedings knowing there is no estate on which the adverse litigant can come, creditors should find that liquidators will not go on without an indemnity fund, so much the better. *I am not to be deterred from laying down the rule because it is suggested that, where there is a doubt as to the sufficiency of the assets, liquidators will be deterred from commencing proceedings because those who have present claims may swallow up the assets.* [emphasis added]

66 The creation of a *de facto* requirement that liquidators seek an indemnity would not lead to any unjust consequences. Under sub-s (2) to s 323 of the CA, which section is titled “Expenses of winding up where assets insufficient”, if the Official Receiver directs a liquidator to incur an expense, he may order that the liquidator be indemnified by *the contributory or the creditor who requested that that particular expense be incurred*. The Official Receiver will, perforce, order an indemnity if the company has insufficient assets to pay for the expense in question. In our view, s 323(2) is reflective of a broader underlying principle which should determine whether a liquidator should initiate an action on the company’s behalf. The principle may be stated as follows: Where a company is insolvent and the liquidator has insufficient resources at his disposal to take a particular course of action, *the individual who reaps the fruit of that action should be the one to shoulder the risk of taking it.*

67 When a liquidator commences an action in the company’s name to recover its assets, the potential beneficiaries are the company’s creditors. It is the creditors who stand to gain the most if the company’s assets are increased because their claims against the company will have a greater chance of being satisfied. In the passage from *Metalloy* cited at [61] above, Millett LJ expressed the view that where an insolvent company commences litigation, *“the company is the real plaintiff”* [emphasis added]. With respect, we disagree with this statement. Where a company has already entered into liquidation, the “real plaintiff[s]” are *the creditors*, and not the company. When winding up commences, the company ceases to be a going concern with distinct interests of its own and is, in effect, little more than a projection of its creditors’ composite interests. The continued existence of the company following the commencement of liquidation is solely to ensure that the company’s affairs are satisfactorily terminated and any outstanding claims against the company are resolved. The fruits of any successful litigation would accrue primarily for the creditors’ benefit and be used to satisfy the company’s outstanding debts owed to them.

68 Hence, if a liquidator believes that the company has a viable cause of action against someone, but the company’s assets appear to be insufficient

to sustain *both* the company's legal fees and the opposing party's costs, the proper course of action is for the liquidator to seek an indemnity from the creditors for the costs of the litigation. Since the creditors are the ultimate beneficiaries of any asset-swelling activities, it is only fair that they should shoulder the risk of litigating to increase the company's assets. If the creditors decide against incurring litigation expenses in the hope of recovering more assets, the liquidator can either shoulder this burden himself, or refrain from bringing proceedings. His status as a liquidator does not entitle him to disregard a successful defendant's right to legal costs by unilaterally ignoring the estate costs rule and depleting the company's available resources.

69 As a cautionary note to insolvency practitioners, we should point out that given our statutory framework (see [60] above), this rationale for imposing personal liability should apply *equally* to situations where a liquidator commences proceedings though the company's coffers are *completely empty* and it has no assets to satisfy *either its own or the defendant's legal costs*. It may be necessary in future to revisit the English position in *Metalloy* ([11] *supra*) that a liquidator is not liable to pay costs personally in such situations unless he has acted improperly in commencing the suit in the name of the company. It may well be that where, as here, the law allows a liquidator to desist from taking action if the company does not have any or sufficient assets to meet the full costs of the litigation, and where, as here, he is entitled to an indemnity from the creditors in performing his duty to augment the pool of assets for their benefit, a liquidator who proceeds to commence litigation without an adequate indemnity will be liable personally for the unsatisfied costs of a successful defendant. In deciding to proceed without an indemnity covering potential liability for the defendant's costs, the liquidator would in effect be making *the defendants* bear the part of the risk of litigating, albeit for *the creditors'* benefit. Such a result would not be fair and a liquidator who chooses to sue knowing that the company will be unable to satisfy any costs order made against it should be held personally liable for a successful defendant's costs.

70 In reaching this conclusion, we are mindful of the over-arching principle that an impecunious claimant must not be denied access to the courts, even if this would result in injustice to a successful defendant who may be unable to recover his legal costs: *Hamilton v Al Fayed (No 2)* [2003] QB 1175 ("*Al Fayed*") at 1200, *per* Chadwick LJ. However, we do not feel that imposing personal liability on liquidators in the situations outlined above would contravene this principle. As explained above, where a company in liquidation commences litigation, the "real plaintiff[s]" are the creditors. If the creditors *themselves* decide against commencing litigation, it cannot be gainsaid that they have been denied access to the courts. It has

always been an individual's prerogative to decide how and *whether* he wishes to enforce his legal rights.

71 In addition, we feel that the courts' approach to the principle expressed in *Al Fayed* must be sufficiently nuanced to discern between *different categories of impecunious claimants*. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs needs to be struck *differently* depending on the type of claimant involved. The distinction that needs to be drawn between differing categories of claimants is illustrated by the principles governing security for costs. Whilst it is trite law that poverty is no bar to a litigant who is a *natural person* (*Cowell v Taylor* (1885) 31 Ch D 34 at 38), s 388(1) of the CA subjects all *companies* to the potential liability to furnish security for costs where "there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". As Megarry VC stated in *Pearson v Naydler* [1977] 1 WLR 899 at 905, the rationale for this distinction between natural persons and companies is as follows:

A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and section 447 [the equivalent of our s 388] provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. [emphasis added]

72 In our view, the law on security for costs is express recognition that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts. This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company.

The sufficiency of security for costs

73 The availability of an order of security for costs against an impecunious company gives rise to the additional question of whether such an order provides a sufficient alternative to imposing personal liability upon liquidators. A number of decisions suggest that the availability of an order for security for costs provides sufficient protection for would-be defendants since public policy does not *per se* prohibit an insolvent company from commencing litigation. In *Metalloy* ([11] *supra*), Millett LJ aligned himself with this view, saying (at 1619):

It is not an abuse of process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid. If the plaintiff is an individual, the defendant's only recourse is to threaten the plaintiff with bankruptcy. If the plaintiff is a limited company, the defendant may apply for security for costs and have the proceedings dismissed if the plaintiff fails to provide whatever security is ordered. [emphasis added]

74 Similarly, in *Knight v FP Special Assets Limited* (1992) 174 CLR 178 (“*Knight*”), two of the five judges in the High Court of Australia expressed views similar to those of Millett LJ. In that case, the issue was whether the court should order costs against a receiver *qua* non-party to the litigation. According to McHugh J (at 217):

As a matter of policy, provision for security for costs is a better remedy for protecting persons involved in litigation with insolvent companies than ordering a receiver to pay the costs of litigation after verdict. Public policy does not preclude an insolvent company from bringing or defending an action. Where it does so, the ordinary remedy is to stay the action until security for costs is provided. [emphasis added]

Dawson J agreed, and held (at 204) that an order of security for costs should ordinarily be the appropriate remedy where a receiver conducts litigation through a company that will be unable to pay the defendant's costs if the defendant is successful in the litigation.

75 Contrary to what these *dicta* suggest, for the reasons discussed above (at [66]–[72]), there is a real and tangible justification for deterring insolvent companies from commencing litigation without any real possibility of satisfying a successful defendant's costs. In addition, we are unable to align ourselves with the view that security for costs provides adequate protection for successful defendants who face the risk of bearing their own costs. McHugh and Dawson JJ's views in *Knight* should be contrasted with the joint judgment of the majority judges, Mason CJ and Deane J (at 190–191), with whom Gaudron J agreed:

No doubt [an order for security for costs] is an appropriate remedy in many cases but there are limitations attaching to the availability of security for costs. These limitations are such that security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party. ... The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that the costs are escalating so as to render the amount of security previously awarded insufficient. [emphasis added]

76 We agree with the majority judgment in *Knight* on this issue. First, an order for security is a *provisional* remedy provided at a preliminary stage of

the proceedings where the merits of the litigation have not been decided upon. Thus, the court hearing a security application would invariably take a conservative approach in order to balance the interests of all the parties. For instance, the court may refuse to order security if the defendant's conduct is *prima facie* the cause of the company's insolvency: *Peng Ann* ([3] *supra*) at [15].

77 Secondly, as was the situation here, where the defendant (here the appellants) applies for security but is *successfully* opposed by the liquidator, it cannot lie in the liquidator's mouth to subsequently contend that an order granting security for costs is an appropriate remedy when it is contradicted by the outcome of his own conduct.

78 Thirdly, a defendant cannot be expected, as ECRC has argued, to repeatedly apply for security for costs when more costs accrue as the litigation proceeds. As Mason CJ and Deane J pointed out in *Knight*, it is simply not practical for defendants to *continually* apply for security for costs at *every* stage in the litigation against the company.

79 Fourthly, it is unfair to make defendants bear the burden of applying for security. The liquidator is the person with full knowledge of the company's financial condition, and is therefore in the best position to know whether an indemnity from the creditors is needed. A defendant would not know whether the company has sufficient assets to pay his costs, but the liquidator would or should know. The onus should therefore fall on a liquidator to seek an indemnity from the creditors where necessary. It would place an overly onerous burden on defendants if they have to determine from time to time in the course of litigation whether the company is able to pay their costs if they succeed in their defence.

80 For these reasons, we disagree with the strong judicial statements by Millett LJ in *Metalloy* (see [73] above) and by the minority judges in *Knight* (see [74] above) that security for costs furnishes adequate protection against the possibility that an insolvent plaintiff company may be unable to satisfy the defendant's costs if it loses the action. None of the statements considered the availability of an indemnity from the creditors as an appropriate, and indeed the most equitable, means of balancing a liquidator's duties with a defendant's interests. In our view, this is the *best* form of protection for a liquidator when discharging his duty to recover the assets of the company for the benefit of the creditors.

The liquidators' liability for the outstanding shortfall

81 For the reasons considered above, we hold that the liquidators in the present case should be held personally liable for the secondary insolvency resulting from their breach of the estate costs rule. If this court were to refuse to hold the liquidators personally liable in the present case, it would lead to the wholly inequitable result of making the successful defendants, *ie*,

the appellants, bear the burden of sustaining the company's litigation for the creditors' benefit. When the liquidators decided to pay ALP for their legal fees in the main suit and main appeal, they knew or ought to have known that ECRC's remaining assets would not be sufficient to meet the defendants' costs if they lost the case. As was correctly held in *In re Beni-Felkai Mining Company, Limited* [1934] Ch 406 ("*Beni-Felkai*") at 422, the liquidator is the "person who can see what the position is" and has the means to ascertain the company's financial position at any time. Yet, the liquidators decided to proceed without an indemnity and exposed the appellants' to the risk of getting a Pyrrhic victory. It is therefore eminently reasonable that the liquidators, and not the appellants, should bear the consequences of deciding to proceed with the litigation despite the company's limited resources. As this court held in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 at [46]:

The rationale for the Estate Costs Rule is that where an action is taken by a liquidator for the benefit of the insolvent estate, it is only fair that the defendant's costs should rank in priority over the liquidator's expenses and remuneration and the claims of the unsecured creditors in general. *The liquidator should take the risk for his own actions: see In re Home Investment Society* (1880) 14 Ch D 167 at 169 to 170. [emphasis added]

82 Notably, in *Wenborn* ([18] *supra*), Buckley J held (at 417):

When the voluntary liquidator, or the liquidator in a compulsory winding up, comes to the Court for leave to bring or defend an action by or against the company, and obtains this leave, *the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or adopt or defend.* [emphasis added]

83 Even though leave of court is no longer needed for a liquidator to commence litigation in the company's name, the principle in *Wenborn* still applies with equal force. When a liquidator commences an action on behalf of the company, he "pledges the assets of the company for the costs of the action" – in particular the defendant's costs, which would be entitled to first priority if the company is unsuccessful. The liquidator therefore cannot use these assets to pay claims of a lower priority before the outcome of the litigation is determined.

84 As Mr Xavier has highlighted, the liquidators have been ordered to disgorge all the sums that they had paid themselves as remuneration, even those paid *before* the main suit was commenced. Just as a liquidator should not pay *himself* until he is sure that the company will have sufficient assets to satisfy any potential claims of a higher priority under the estate costs rule, similarly, he should not pay *the company's legal fees* until he is sure of the same. If he is unsure, he should seek an indemnity from the creditors to meet any demand for legal fees by the company's lawyers.

The court's discretion to exempt liquidators from liability for costs

85 Section 283(3) of the CA confers the court with a discretionary power to override the application of the estate costs rule in appropriate circumstances. The section provides that where a company's assets are insufficient to satisfy its liabilities, *the court* may stipulate the order of priority in which "the costs, charges and expenses incurred in the winding up" should be paid. The court's power under s 283(3) allows it to retroactively reverse the order of priorities between liquidation expenses *inter se*, thereby absolving a liquidator, who is otherwise in breach of the common law priority rules, of personal liability. This discretion to reverse the erstwhile order of priorities will only be exercised in *exceptional* situations: *Re Linda Marie Ltd* [1989] BCLC 46.

86 The ambit of the court's power under s 283(3) is exemplified by the case of *Beni-Felkai* ([81] *supra*). In that case, the liquidator paid himself without first making provision for the other liquidation creditors. In doing so, he breached a general principle of corporate insolvency which dictates that the whole of the liquidation expenses are to be paid before a liquidator's remuneration: *Beni-Felkai* at 422. Notwithstanding this, Maugham J declared that the liquidator was entitled to retain the remuneration he had already paid himself. Maugham J held that the discretion under the UK equivalent of our s 283(3) should be exercised to reverse the order of priorities since the liquidator had taken his remuneration at a time when the company was deemed to be completely solvent and "*he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding up*" [emphasis added]: *Beni-Felkai* at 422.

87 Similarly, where a liquidator pays the company's legal costs in the course of a trial, leaving the company with insufficient assets to satisfy a subsequent costs order made against it, the court might, in a sufficiently deserving case, be minded to exercise its discretion under s 283(3) to exempt the liquidator from liability for his breach of the estate costs rule. For instance, a liquidator might have paid the company's legal fees without first obtaining a creditors' indemnity because he was of the *reasonable, albeit erroneous*, view that the company's remaining assets would be sufficient to discharge any costs order made against it. We should, however, reiterate that the discretion under s 283(3) is one that will be exercised sparingly. If a liquidator turns a blind eye to the limited nature of the company's assets, and recklessly decides to proceed without an indemnity from the creditors, the court would undoubtedly uphold the general rules of priority and hold such a liquidator personally liable.

88 On the present facts, there is nothing to suggest that there were any unexpected or exceptional circumstances, such as in *Beni-Felkai*, which justified the liquidators' decision to pay ALP in priority to the appellants. In their affidavits, the liquidators never suggested that there was cause for

them to believe, when they paid ALP, that there would nevertheless be sufficient funds to satisfy the appellants' costs. ECRC appears to accept that the liquidators will be liable once the appellants' general propositions are accepted, and has not called for this court to exercise its discretion under s 283(3) of the CA.

89 In addition to the absence of any extenuating circumstances to mitigate the liquidators' breach of the estate costs rule, their ignorance or denial, as the case may be, of this rule was made even less defensible by the fact that ALP's fees were paid without taxation, contrary to r 173 of the CWU Rules. Hence, not only did the liquidators prejudice the appellants' potential claims by first paying ALP, they compounded their breach by failing to ensure that the fees ALP claimed were not inflated. Given ECRC's precarious financial situation, the liquidators should have been especially careful to preserve its existing assets.

Conclusion

90 In the ultimate analysis, this court has been asked to strike a balance between: (a) the interests in facilitating liquidators' duties to recover insolvent companies' assets for the benefit of their creditors; and (b) the need to protect defendants from having to shoulder the legal costs of defending unmeritorious suits. In our opinion, the estate costs rule encapsulates the appropriate balance that should be struck between these two opposing tensions. One must always have regard to the fact that liquidators are in a far more advantageous position than defendants to suits commenced in the company's name. A liquidator is in the best position to know whether he will be able to comply with the estate costs rule. With this knowledge, he can then decide whether to limit his potential liability for the defendant's legal costs by availing himself of the other means at his disposal, such as by obtaining an indemnity from creditors. In the present case, there are no extenuating circumstances calling for an exercise of the court's discretion to relieve the liquidators from liability for the appellants' unpaid costs. The liquidators created the present state of affairs for which they must now be held accountable.

91 We expect that after our decision in this case, liquidators will be more mindful to protect themselves from potential liability for legal costs when discharging their duties for the benefit of creditors. Liquidators should at all times uphold the existing legal regime affecting corporate insolvency, which includes the estate costs rule. Future liquidators who wish to commence litigation on the company's behalf may want to consider the following points before deciding whether to proceed:

- (a) As a matter of general principle, a liquidator who breaches the estate costs rule will be held personally liable for any shortfall in the company's assets which results from his breach. An order of personal liability will usually follow from such a breach *regardless* of whether it

is the liquidator himself or a third party who receives the money in breach of the rule.

(b) In the absence of extenuating circumstances, the courts will hold a liquidator liable for breaching the estate costs rule *even if* the company's moneys were used to pay the company's own costs of sustaining the litigation. Where a liquidator has insufficient assets at his disposal to satisfy *both* the company's legal costs of maintaining the litigation *as well as* any potential costs order made against the company, a liquidator would be well-advised to obtain an indemnity from the creditors. If such an indemnity is not forthcoming, a liquidator should only proceed with the litigation if he is prepared to be held personally liable for a successful defendant's costs in the event that he is found in breach of the estate costs rule.

(c) By way of analogy with the principle in (b), if a company is completely insolvent and therefore has *no prospects of satisfying any costs order made against it*, it would be advisable for a liquidator to refrain from commencing proceedings unless he has managed to obtain a creditors' indemnity. Whilst the position on this issue is not entirely settled, a liquidator who omits to do so in a future case may well be held personally liable for the defendant's costs if the company's claim is unmeritorious.

(d) In appropriate cases, the courts might exercise its power under s 283(3) of the CA to exempt a liquidator from personal liability for breaching the estate costs rule. In deciding whether to reverse the erstwhile rules of priority, the court will consider whether *the liquidator* in question is able to show that the company's inability to satisfy the opposing litigant's costs did not result from his disregard of that other party's interests.

92 For these reasons, the appeal against the judge's decision is allowed with costs. We find that the liquidators are liable to compensate the appellants for the outstanding shortfall, which will be payable following the determination of the quantum of the realisation costs.

Reported by Harikumar Sukumar Pillay.

EXHIBIT E

In re Crescent Associates, LLC.

United States Bankruptcy Court, C.D. California, Los Angeles Division. | March 30, 2021 | Slip Copy |
2021 WL 1245913

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Outline

[MEMORANDUM OF
DECISION](#) (p.1)
[All Citations](#) (p.5)

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NOT FOR PUBLICATION

United States Bankruptcy Court, C.D. California,
Los Angeles Division.

IN RE: [CRESCENT ASSOCIATES, LLC.](#), Debtor(s).

[Crescent Associates, LLC.](#), Plaintiff(s),

v.

Eyal Ben Dror, Defendant(s).

Case No.: 2:18-bk-20654-WB

|

Adv No: 2:18-ap-01310-WB

|

Signed March 30, 2021

|

Date: January 26, 2021, Time: 2:00
PM, Courtroom: 1375 (via Zoomgov)

MEMORANDUM OF DECISION

[Julia W. Brand](#), United States Bankruptcy Judge

*1 This matter is before the Court for ruling on the Trial Brief and Motion for Damages and Attorney Fees (“Motion for Damages”) [Docket No. 63] filed by the plaintiff, Crescent Associates LLC. Oral argument on the Motion for Damages was heard on October 20, 2020 and January 26, 2021. Based on the pleadings, record, and oral argument of the parties, and for the reasons that follow, the Court finds that the plaintiff is entitled to its attorneys’ fees under [Civil Code section 1717](#)¹ in the amount of \$98,369.00 as the prevailing party with respect to this adversary proceeding.

¹ All references to Civil Code refer to the California Civil Code.

I. FACTS

On October 4, 2018, debtor and plaintiff, Crescent Associates LLC (“Plaintiff”), filed a Notice of Removal of Action styled *Crescent Associates LLC v. Eyal Ben Dror, et al.* (the “Complaint”) from the Los Angeles County Superior Court to the bankruptcy court. The Complaint alleged claims for declaratory relief and damages for slander of title and

for cancellation of instrument. Plaintiff alleged that it was the record title holder of two parcels of real property (the “Multiview Properties”) as a result of a foreclosure sale on May 14, 2018. Prior to the foreclosure sale, ADY Property, LLC and MJK 18 LLC owned the Multiview Properties.

Approximately four years earlier, on September 8, 2014, Joe Klein and his business entity, MJK 18 LLC, entered into an agreement with Eyal Ben Dror (“Dror” or “Defendant”) entitled Statement of Understanding and Investment Agreement (the “Klein Agreement”). In summary, the Klein Agreement provided the terms for the parties’ acquisition of unrelated real property on Beverly Glen Drive (the “Beverly Glen Property”). Defendant was to advance all funds, and any additional costs, for the purchase of the Beverly Glen Property with Defendant and Klein each holding a 50% interest. In turn, Klein and MJK 18 agreed to guarantee Defendant’s investment and provided, as security for the guarantee, junior deeds of trust on the Multiview Properties (the “Dror Deeds of Trust”). The Klein Agreement provided that in the event Klein was unable to provide his required funds, Klein would withdraw his ownership in the Beverly Glen Property or quitclaim his interest to Defendant. In the event of withdrawal of Klein’s shares, Dror agreed not to seek any recovery on the Klein guarantee. Because Klein was unable to fulfill his obligations under the Klein Agreement, Defendant sued, and obtained judgment against Klein, granting Dror sole ownership of the Beverly Glen Property pursuant to the Klein Agreement. However, Dror did not release the Dror Deeds of Trust and subsequently filed a claim in Plaintiff’s bankruptcy case.

In the Complaint, Plaintiff sought declaratory relief that the obligations secured by the Dror Deeds of Trust have been satisfied and that the guarantees were extinguished by the entry of judgment in favor of Dror and the transfer of title to the Beverly Glen Property to Dror. Plaintiff sought cancellation of the Dror Deeds of Trust and sought damages for slander of title (the “Slander of Title Claim”) based on Dror’s refusal to remove the Dror Deeds of Trust from and after July 26, 2018 as demanded by Plaintiff. Plaintiff sought punitive damages in connection with the Slander of Title Claim.

*2 On January 30, 2019, Plaintiff filed its motion for partial summary judgment. On February 11, 2019, Defendant filed his motion for summary judgment. The Court held a hearing on the motions on February 26, 2019 and issued an oral ruling and findings of fact and conclusions of law on April

9, 2019. The Court entered orders granting Plaintiff's motion and denying Dror's motion on May 17, 2019 (see Docket Nos. 43, and 44). In granting Plaintiff's Motion for Summary Judgment in part, the Court determined that in electing to take title to the Beverly Glen Property, Defendant no longer had the right to "seek any recovery on any guarantees" provided in the Klein Agreement, which "guarantees" were secured by the Dror Deeds of Trust at issue here. By enforcing paragraph 25 of the Klein Agreement, the guarantee obligations were extinguished and the obligations under the Dror Deeds of Trust were extinguished. The Court ordered the Dror Deeds of Trust cancelled and of no further force and effect and held that, as a result, Dror had no claim against the estate. The issue of damages remained open as well as Plaintiff's right to attorneys' fees.

The Court scheduled a trial for July 28, 2020 to determine damages and attorneys' fees. This hearing was continued to address the form of the trial and to allow Dror the opportunity to obtain counsel. At the continued status conference, Dror appeared without counsel. The parties agreed on the record that the matter would be submitted on written evidence and argument (the "Trial by Motion"). The Court set a briefing schedule and scheduled a hearing for October 20, 2020.

Plaintiff timely filed its Motion for Damages, the Declaration of Steven Morris in Support of Motion for Damages and Attorney Fees (see Docket No. 64), the Declaration of Edward Friedman in Support of Motion for Damages and Attorney Fees (see Docket No. 65) and the Declaration of Robert Yaspan in Support of Motion for Damages and Attorney Fees (see Docket No. 66). Dror did not file any opposition and did not appear at the hearing on October 20, 2020. The Court heard oral argument from Plaintiff's counsel, Steven A. Morris ("Morris"), and took the matter under submission.

On November 18, 2020, Defendant filed a Stipulation re Continuance of Hearing on Motion for Damages ("Stipulation"). See Docket No. 68. Pursuant to the Stipulation, the parties agreed to continue the deadline for Defendant to file an opposition to the Motion For Damages and to continue the hearing on the Motion For Damages. The Stipulation was signed by Defendant on October 5, 2020 and by Morris, on behalf of Plaintiff, on October 8, 2020. Morris failed to mention the Stipulation at the hearing on October 20, 2020.

Approving the Stipulation, the Court set a continued hearing on the Motion for Damages for January 12, 2021 at 2:00

p.m. On December 30, 2020, Defendant filed an Opposition to Trial Brief and Motion for Attorneys Fees ("Opposition") (see Docket No. 71), the Declaration of Michael P. Rubin in Support of Eyal Ben Dror's Opposition (see Docket No. 72), and the Declaration of Eyal Ben Dror in support of Opposition (see Docket No. 73). The Court entered an order accepting the Defendant's late-filed Opposition and declarations for consideration, set a reply deadline and continued the hearing to January 26, 2021. See Docket No. 74.

II. DISCUSSION

In the Motion for Damages, Plaintiff argues that as the prevailing party in the adversary proceeding it is entitled to attorneys' fees and costs under [Civil Code § 717](#) from July 11, 2018, the date of entry of judgment in the state court litigation (the "State Court Judgment"), through confirmation of the plan in the underlying bankruptcy case. Plaintiff seeks additional damages pursuant to [Civil Code § 2941\(d\)](#) and punitive damages under Plaintiff's Slander of Title Claim.

Plaintiff asserts the following attorneys' fees and costs were incurred:

- 1) Bankruptcy counsel's fees in the amount of \$178,804.94 (see Docket No. 66, Declaration of Robert Yaspan);
- 2) Special counsel's fees in the amount of \$98,369 (see Docket No. 64, Declaration of Steven Morris); and
- 3) United States Trustee's ("U.S. Trustee") fees in the amount of \$27,324.34 (see Docket No. 65, Declaration of Edward Friedman).

*3 In total, Plaintiff seeks actual damages of attorneys' fees and costs of \$304,498.28 pursuant to the Klein Agreement and [Civil Code § 1717](#) and as damages, and punitive damages of \$76,124.57.

A. Award of Fees under [Civil Code § 1717](#)

Plaintiff argues it is entitled to attorneys' fees and costs under [§ 1717](#) as the prevailing party in this adversary proceeding based on the attorneys' fees provision in the Klein Agreement. Section 14 of that agreement provides that the prevailing party in any dispute arising from or relating to the Klein Agreement shall be awarded costs and attorneys' fees. Plaintiff contends that while it is not a party to the original contract, established

case law indicates that in certain circumstances such as this, that distinction is without a difference.

Defendant argues that Plaintiff is not entitled to attorneys' fees because it is not a party to the Klein Agreement, § 1717 is not applicable because the attorneys' fees provision is not unilateral and Plaintiff is not a third party beneficiary to the agreement nor a successor to the agreement.

Section 1717 provides that in any action on a contract, where a contractual provision provides a right to attorneys' fees recovery to one party or to the prevailing party, the prevailing party is entitled to reasonable attorneys' fees, whether it is the party specified in the contract or not.² Cal. Civ. Code § 1717(a).

² Section 1717(a) states that: “[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.” Cal. Civ. Code § 1717(a).

In *Santisas v. Goodin*, the California Supreme Court made clear that § 1717 does not just apply to contracts with one-sided provisions but that it applies to “contracts containing reciprocal ... attorney fee provisions ... authorizing recovery of attorney fees by a ‘prevailing party.’” *Santisas v. Goodin*, 17 Cal.4th 599, 614–16 (1998). Section 1717, which was enacted to ban unfair one-sided fee provisions, has been expanded over time to cover reciprocal fee agreements as well. For example, the rules in § 1717 regarding the identification of a “prevailing party”—including the rule that there is no prevailing party in an action that is voluntarily dismissed or that is settled—apply to all actions “on a contract” in which parties seek to recover attorneys' fees. *Id.* at 616-17. Section 1717, thus, allows recovery of attorneys' fees by whichever contracting party prevails in a contract enforcement action, whether the prevailing party is the party specified in the contract or not. *Id.* at 611. Section 1717 applies, however, only to actions that contain at least one contract claim. *Id.* at 615 (citation omitted). The action must be “on the contract” and the party must prevail “on the contract.” Thus, any contractual attorney fee provision must be interpreted in light of Civil Code § 1717. *Khan v. Shim*,

7 Cal.App.5th 49, 55 (2016). Contrary to Dror's assertion, § 1717 does apply to the Klein Agreement and its provision providing attorneys' fees to the prevailing party.

*4 Next, the Court must determine whether Plaintiff, as a non-signatory party to the Klein Agreement, may recover attorneys' fees under the contract and § 1717. Generally, absent contractual language providing otherwise, a contract providing for attorneys' fees to be awarded to a contracting party does not typically apply to a non-signatory party. *See Cargill, Inc. v. Souza*, 201 Cal.App.4th 962, 966, 968–69 (2011). However, a non-signatory party may be entitled to contractual attorneys' fees for litigation in which “the non-signatory party “stands in the shoes of a party to the contract.”” *Id.* at 966 (citation omitted). That is, if the non-signatory party sues or is sued “as if he were a party” to the contract containing the attorneys' fees provision, the prevailing party may be entitled to an award of fees. *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 127–28 (1979) (non-signatory party who was sued as alter ego of signatory party entitled to contractual attorneys' fees); *Cargill*, 201 Cal.App.4th at 966–70 (third party beneficiary of contracting party entitled to attorneys' fees); *Exarhos v. Exarhos*, 159 Cal.App.4th 898, 900, 903–8 (2008) (non-signatory party who sued as deceased contracting party's successor in interest required to pay contractual attorneys' fees); *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, 96 Cal.App.4th 598, 601, 608 (2002) (non-signatory party who brought action based on assignment of contract rights from signatory party required to pay contractual attorneys' fees).

Here Plaintiff, as purchaser of the Multiview Properties at a foreclosure sale, stood in the shoes of Klein and was required to litigate with Defendant to enforce the terms of the Klein Agreement in order to obtain removal of the Dror Deeds of Trust. Section 14 of the Klein Agreement provides that the prevailing party in any dispute arising from or relating to the Klein Agreement shall be awarded costs and attorneys' fees. Thus, Plaintiff as successor to the prior owners of the Multiview Properties may recover reasonable attorneys' fees incurred in an action on the contract.

Plaintiff seeks attorneys' fees under the Klein Agreement for the successful prosecution of the adversary proceeding, the conduct and confirmation of a plan of reorganization and for the U.S. Trustee fees paid in the bankruptcy case. There is no dispute that the adversary proceeding is an action on the contract. The Complaint sought a declaration regarding the Klein Agreement and cancellation of the Dror Deeds of

Trust pursuant to the terms of the Klein Agreement. The same cannot be said for the pursuit of the bankruptcy case and the concomitant payment of U.S. Trustee fees. Plaintiff seeks the fees of its chapter 11 bankruptcy's general counsel, Robert Yaspan ("Yaspan"), in the amount of \$178,804.94, and quarterly fees charged by the U.S. Trustee, among other costs, in the amount of \$27,324.34.³ Plaintiff maintains that the only reason the bankruptcy was filed was to enable Plaintiff to sell the Multiview Properties, free and clear of the Dror Deeds of Trust. Further, Plaintiff contends that its other option, remaining in state court, presented significant delays inherent within that judicial system. Plaintiff asserts that but for the Dror Deeds of Trust, Plaintiff had no other reason to file bankruptcy as it was not insolvent and there was sufficient equity to pay all debts, including Defendant's, had he prevailed.

³ The Declaration of Robert Yaspan (see Docket No. 66) provides a breakdown of fees and costs incurred by Plaintiff for bankruptcy services for the period of September 11, 2018 through July 31, 2020 in the following general categories of: case administration, fee applications, motions, chapter 11 plan, Defendant related issues, sale of real property and costs.

Plaintiff has not demonstrated that the bankruptcy case was an action on the contract. In *Bos v. Board of Trustees*, 818 F.3d 486 (9th Cir. 2016), the Ninth Circuit explained that where the contract is collateral to the dispute, it is not an action on the contract and attorneys' fees cannot be awarded under § 1717. It is not an action on a contract if the action does not litigate the validity of the contract or consider state law governing the contract. The Court is unpersuaded by Plaintiff's contention that the bankruptcy case was an action on the contract. Plaintiff's assertion that it had no other recourse but to file bankruptcy in order to clear title and sell the Multiview Properties does not make the case an action on the contract. Filing bankruptcy was merely one of Plaintiff's options. Plaintiff could have settled or resolved its dispute in state court and brought the matter to a conclusion there. But, as asserted by Plaintiff, under these circumstances it chose to seek what in its view was a more expeditious route via the bankruptcy courts.

*⁵ Moreover, Plaintiff addressed issues related to confirmation of the plan of reorganization that were unrelated to the Dror Deeds of Trust, including the claims asserted by EPCO Consultants, Inc. The Court cannot find that pursuit of

the bankruptcy case through confirmation was an action on the contract. Accordingly, the Court denies Plaintiff's claim to recover its chapter 11 bankruptcy's general counsel's fees and costs and the quarterly fees imposed by the U.S. Trustee under the Klein Agreement and § 1717.

Plaintiff is entitled to its reasonable attorneys' fees and costs as the prevailing party in the adversary proceeding. Plaintiff seeks attorneys' fees and costs of its special counsel, Morris, in the amount of \$98,369.00. Morris was principally responsible for the litigation against Defendant in this adversary proceeding. Morris and his firms' services commenced from the date the judgment was entered in the *Klein v. Dror* state court action on July 11, 2018 (the date Defendant should have reconveyed the Dror Deeds of Trust) until title on the Multiview Properties was cleared. See Declaration of Steven Morris, Docket No. 64. Morris attests that the work included: (1) in-depth legal research concerning the sale of real property subject to the Multiview Deeds of Trust; (2) basic discovery (including a document demand and deposition of Defendant); (3) preparation of the Motion for Partial Summary Judgment; and (4) opposing Defendant's Motion for Summary Judgment. The Court grants Morris' fees in the amount of \$98,369.00 under § 1717 and finds that they are reasonable and necessary costs incurred with respect to the action on the contract.

B. Civil Code § 2941(d)

Plaintiff also seeks an award of attorneys' fees under Civil Code § 2941(d). Plaintiff did not assert a claim for recovery of fees under § 2941(d) in the Complaint, raising this claim for the first time in the Motion for Damages.⁴

⁴ Although Plaintiff did not allege a claim for damages under § 2941(d) in the Complaint, Fed.R.Bankr.P. 7015(b) allows the pleadings to be conformed to the evidence raised at trial "at any time." "[T]he lack of an amendment will not affect the judgment in any way." *Dunn v. Trans World Airlines*, 589 F.2d 408, 412-13 (9th Cir. 1978). "Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to the pleadings to conform to the proof should have been made, the Courts of Appeals will presume that it is so made to support the judgment." *Id.* quoting *Decker v. Korth*, 219 F.2d 732, 739 (10th Cir. 1955).

Section 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. Code § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property. Cal. Civ. Code § 2941(b)(1)(B)(ii).

Section 2941(d) provides that a violation of § 2941 makes the violator liable to the plaintiff for all damages sustained by reason of the violation, and additionally requires the violator to pay the plaintiff \$500.00 in statutory damages. Cal. Civ. § 2941(d). Section 2941(d) does not grant a statutory right to attorneys' fees for § 2941 litigation with the creditor. See *In re Luchini*, 511 B.R. 664, 677 (Bankr. E.D. Cal. 2014).

*6 Plaintiff asserts that Dror failed to reconvey the Dror Deeds of Trust by August 29, 2018 (the last day to do so following entry of the July 11, 2018 judgment in the state court action). Plaintiff's alleged damages from this violation are attorneys' fees incurred for the Dror litigation, the sale of the Multiview Properties through these bankruptcy proceedings and the attorneys' fees associated with the administration of this bankruptcy case. First, the Court will award attorneys' fees for the Dror litigation under the Klein Agreement. With respect to the attorneys' fees and U.S. Trustee fees incurred in connection with the bankruptcy case, Plaintiff has not demonstrated that these are damages that flow from the refusal to reconvey the Dror Deeds of Trust. This Court was required to make a determination as to the application of the reconveyance requirement in the Klein Agreement based on the ruling in the state court litigation. Further, as noted above, Plaintiff did not demonstrate that the bankruptcy case was necessary for it to enforce the Klein Agreement. Indeed, the adversary was filed originally in state court and removed to the bankruptcy court upon the filing of the chapter 11 case. The Court cannot find that all of the fees associated with the chapter 11 case were the result of the Dror litigation and his failure to release the Dror Deeds of Trust. As a result, no damages will be awarded. Finally, Plaintiff did not demand an award of the statutory damages of \$500.00.

C. Slander of Title

Slander of title is a "tortious injury to property resulting from unprivileged, false, malicious publication of disparaging statements regarding the title to property owned by plaintiff, to plaintiff's damage." *Southcott v. Pioneer Title Co.*, 203 Cal.App.2d 673, 676 (1962). " 'The recordation of an instrument facially valid but without underlying merit will give rise to an action for slander of title.' " *Nguyen v. Bank of Am. Nat. Ass'n*, 2011 WL 5574917 at *7 (N.D. Cal. Nov. 15, 2011), citing *Stamas v. County of Madera*, 2011 WL 2433633 at *14 (E.D. Cal. June 14, 2011).

Under California law, slander of title requires allegations that a person, without a privilege to do so, published a false statement that disparaged title to property and caused the property owner some special pecuniary loss or damage. *Sumner Hill Homeowners' Ass'n, Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1030 (2012), citing *Fearon v. Fodera*, 169 Cal. 370, 379–80 (1915). The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 84 (1997).

Plaintiff alleges in the Complaint that Defendant maintained and refused to reconvey the Dror Deeds of Trust on the Multiview Properties which Defendant had a legal duty to reconvey. The Complaint essentially alleges that the act of failing to reconvey the Dror Deeds of Trust constitutes a false representation and disparages, without authority, Plaintiff's title to the Multiview Properties. However, Plaintiff cites no authority for the proposition that Defendant's failure to remove a lien can form the basis for a slander of title claim; specifically, that such failure satisfies the publication requirement, and the Court has found none. Having failed to satisfactorily establish an essential element of its Slander of Title Claim, the Court declines to award actual or punitive damages.

III. CONCLUSION

Based on the foregoing, the Court awards Plaintiff attorneys' fees in the amount of \$98,369.00. A separate order consistent with this memorandum of decision will be entered.

All Citations

Slip Copy, 2021 WL 1245913

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EXHIBIT F



In re Mac-Go Corporation

United States Bankruptcy Court, N.D. California. | March 20, 2015 | Not Reported in B.R. Rptr. |
2015 WL 1372717

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MEMORANDUM DECISION RE: FEE CLAUSES (p.1)
[All Citations](#) (p.6)

2015 WL 1372717

Only the Westlaw citation is currently available.
United States Bankruptcy Court, N.D. California.

IN RE : MAC-GO CORPORATION, Debtor.

Case No. 14-44181 CN

Signed March 20, 2015

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MEMORANDUM DECISION RE: FEE CLAUSES

[Charles Novack](#), U.S. Bankruptcy Judge

*1 After numerous motions to dismiss, one summary judgment motion, and a day long trial, First National Bank (the “Bank”) now moves to recover some of the attorney’s fees and costs that it incurred in this adversary proceeding. While the Bank’s attorney’s fees are substantial, it has (for the moment) limited its request to \$62,480.41. The Bank contends that the attorney’s fee clauses in the Mac-Go loan documents entitle it to recover the fees and costs that it incurred in defending the Chapter 7 Trustee’s [Bankruptcy](#)

[Code §§ 547, 548](#) and [549](#) claims for relief arising from the MacGo loans.¹ The Trustee disagrees.

¹ The Trustee’s claims against the Bank are described at length in the memorandum decision granting the Bank’s summary judgment motion and the memorandum after trial. The court presumes that the parties are well versed in these facts, that they recognize that the loan in question was made directly by the Bank to Mac-Go, and that this memorandum does not refer to the personal Macchia loans which Mac-Go guaranteed. Accordingly, this memorandum will only address those facts necessary to make this decision coherent.

Procedurally, the Bank’s request raises further questions. After trial (and well after the claims bar date), the Bank filed a \$346,745.24 proof of claim, which included a secured claim for the \$62,480.41 in fees and costs at issue herein. The Bank alternatively argues that (1) regardless of its proof of claim, it is entitled to recover its attorney’s fees under *Travelers Cas. & Sur. Co. of Am. v. PG & E*, 549 U.S. 443 (U.S.2007) and its progeny, and (2) that it is over-secured and thus entitled to reasonable fees and costs under the Mac-Go loan documents pursuant to [Bankruptcy Code § 506\(b\)](#). The Trustee objected to the Bank’s proof of claim and filed an opposition to the Bank’s motion. The Trustee first contends that the fee clauses are limited in scope and that the Bank’s fees and costs are not covered by them under any circumstances. The Trustee alternatively argues that even if the fees and costs do fall within the fee clauses, the Bank is undersecured and that its request for fees and costs constitutes a time-barred unsecured claim. While the Trustee’s objection raises serious questions, most of his arguments will be resolved on another day. This decision only addresses whether the Bank’s requested fees (analyzed under [§ 506\(b\)](#) or the *Travelers* doctrine) fall within the fee clauses in the Mac-Go loan documents.

*2 In December 2009, Mac-Go borrowed \$250,000.00 from the Bank and secured the loan by providing the Bank with a perfected security interest encumbering all of its assets, including its inventory, chattel paper, accounts and equipment (the “Mac-Go Loan”). Mac-Go and the Bank signed three documents as part of the Mac-Go Loan: the Business Loan Agreement (the “Loan Agreement”), the Promissory Note (the “Note”) and the Commercial Security Agreement (the “Security Agreement”). Each contains an attorney’s fee clause.

a.) *Note*: Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's Attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law.

b.) *Loan Agreement*: Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's Attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower also shall pay all court costs and additional fees as may be directed by the court.

c.) *Commercial Security Agreement*: Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's Attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor shall also pay all court costs and additional fees as may be directed by the court.²

² 2 These fee clauses will collectively be referred to as the "Fee Clauses."

While the Fee Clauses are similar, they are not identical. Moreover, neither the Bank nor the Trustee convincingly argued which clause governs. The court believes that it should utilize all three clauses. First, the Note states that "in addition to the terms and conditions contained in the Note,

it is also subject to the terms and conditions contained in that certain Business Loan Agreement." Since the Trustee sought to avoid payments made under the Note, the court should at the very least rely on these two clauses. Second, the Trustee conceded summary judgment on his preference claims because the Bank was over-secured (at least when these pre-petition payments were made). This court therefore should also examine the clause in the Security Agreement.

This court looks to California law to determine the scope of the Fee Clauses. [Bankruptcy Code § 506\(b\)](#) allows over-secured creditors to recover "reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." California is the governing law in the Note, Loan Agreement, and Security Agreement. [Travelers Cas. & Sur. Co. of Am. v. PG & E, 549 U.S. 443 \(U.S.2007\)](#), which upended long-standing Ninth Circuit law precluding the award of post-petition attorney's fees in bankruptcy litigation, also requires that this court apply California law. In *Travelers*, the Supreme Court affirmed the general presumption that "claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." The Court concluded that "[t]he character of [a contractual] obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy." *Id.* at 454 (citations omitted). *See also, In re SNTL Corp.*, 380 B.R. 204, 221 (9th Cir. B.A.P. 2007) *aff'd*, 571 F.3d 826 (9th Cir. 2009) ("[W]e hold that attorney's fees arising out of a prepetition contract but incurred postpetition fall within the Bankruptcy Code's broad definition of claim ...").

*3 The Bank contends that [Cal. Civ.Code § 1717](#) and [Cal.Code of Civ. Procedure § 1021](#) allow it to recover fees under the Fee Clauses. [Section 1717](#) states, in relevant part:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract ... then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs....

Section 1717 only applies in contract actions. *Santisas v. Goodin*, 17 Cal.4th 599, 615 (1998). As a result § 1717 may not be applicable herein, as it is unclear whether §§ 547, 548, and 549 claims for relief are “action[s] on a contract ... [to] enforce that contract.” The court need not, however resolve this issue, since the Bank is the explicit beneficiary of the Fee Clauses and need not rely on § 1717. See *MRW, Inc. v. Big-O Tires, LLC*, 684 F.Supp.2d 1197, 1202–1203 (E.D.Cal. 2010) (when a unilateral fee-shifting provision is drafted in favor of the party relying on such provision, the party seeking fees need not rely on section 1717(a) 's “enforced bilateralism”).

Instead, the Bank may rely on Cal.Code of Civ. Procedure § 1021, which allows a party to recover attorney's fees in actions other than breach of contract complaints. Section 1021 provides in relevant part that “[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.” Thus, under § 1021, parties may contract for the recovery of attorney's fees regardless of whether such litigation is premised on contract claims, tort claims, statutory claims, or otherwise, so long as the fee clause is sufficiently broad to encompass such claims. “[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.” *Xuereb* 3, Cal.App. 4th at 1341; *Excess Electronix v. Heger Realty Corp.*, 64 Cal.App. 4th 698, 706 (1998). Examples of such broadly worded language include clauses that allowed fees: “arising out of the execution of the agreement” (*Santisas*, 17 Cal. 4th at 607); “relating to the contract” (*Moallem v. Coldwell Banker Com. Group, Inc.* 25 Cal.App.4th 1827, 1831 (1994)); “to which this Agreement gives rise” (*Xuereb*, 3 Cal.App.4th at 1342); incurred in “any dispute under the agreement” (*Thompson v. Miller*, 112 Cal.App.4th 327, 333 (2003)); incurred in “any dispute” (*Maynard v. BTI Group, Inc.*, 216 Cal. App. 4th 984, 993 (2013)); incurred pursuant to a “civil action instituted in connection with this Agreement” (*Cruz v. Ayromloo*, 155 Cal.App. 4th 1270, 1277 (2007)).

This court cannot look past the express terms of the Fee Clauses (Cal. Civ.Code § 1639) if their language is “clear and explicit, and does not involve an absurdity” Cal. Civ.Code § 1638. The Fee Clauses will be construed “in their ordinary and popular sense, rather than according to their strict legal meaning” unless the parties use language in a “technical

sense” or usage indicates the language is to be given “special meaning.” See *Santisas* 17 Cal.4th at 608 (“[I]f the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning.”).

*4 The Bank incurred its fees defending against §§ 547, 548 and 549 claims for relief. Since the elements of these claims differ, the court must separately analyze whether the Bank may recover the fees incurred in defending them.

The Fraudulent Conveyance Claims

The Bank contends that the fee clause in the Loan Agreement unambiguously authorizes it to recover its fees, since it encompasses all fees for “bankruptcy proceedings.” The Bank gives this clause too broad a swath, and ignores the preceding sentences that fundamentally limit its scope. While the fee clause does allow for fees incurred in bankruptcy proceedings, such proceedings must have been “incurred in connection with the enforcement of this [Loan] Agreement.” The question thus becomes whether defending against the Trustee's fraudulent conveyance claims required the Bank to “enforce” the Loan Agreement.

In his third amended complaint, the Trustee alleged that twenty-two transfers made by MacGo between February 8, 2010 and January 6, 2012 were fraudulent transfers under Bankruptcy Code § 548(a)(1)(B). This code section provides in pertinent part:

“The trustee may avoid any transfer ... of an interest of the debtor in property ... that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(B)(I) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

The Bank obtained summary judgment on these claims because it demonstrated, not surprisingly, that MacGo received “reasonably equivalent” value in exchange for these transfers. *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP)*, 408 B.R. 318, 341 (Bankr.N.D.Cal. 2009). Section 548(d)(2)(A) defines “value” as the “satisfaction or securing of a present or antecedent debt of the debtor.” The twenty-two transfers were, in fact, MacGo

payments on the Mac-Go Loan. “To the extent a transfer constitutes repayment of the debtor’s antecedent or present debt, the transfer is not constructively fraudulent.” *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int’l, Inc.)*, 714 F.3d 1141, 1145–1146 (9th Cir. 2013).

The Trustee’s fraudulent conveyance claims did not directly question the validity of the Loan Agreement or Note. In fact, the Trustee appeared to be ignorant of the existence of the Mac-Go Loan and believed that the transfers had been made entirely for the Macchias’ benefit. The Bank’s defense against these claims, however, was premised on the validity of the Loan Agreement and Note. It successfully argued that the Note and Loan Agreement were valid, enforceable agreements that required Mac-Go to make the twenty-two payments in question.³ Utilizing the Note and Loan Agreement in order to retain these payments is the functional equivalent of relying on these documents to pursue a collection action. Both should qualify as the “enforcement” of the Loan Agreement and Note.

³ That’s why the Trustee conceded summary judgment on his fraudulent conveyance claims.

*5 There is California case law, however, that holds to the contrary. For example, in *Excess Electronixx v. Heger Realty Corp.*, 64 Cal.App. 4th 698 (1998), the court of appeal examined whether a real estate broker sued on several tort claims could rely on an attorney’s fee clause in a lease to recover its fees. In *Excess*, the plaintiff asserted tort claims against a real estate broker which had negotiated its lease. The parties settled the case, and the broker sought to recover its attorney’s fees under a lease provision that read that “[i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party ... or Broker ... shall be entitled to reasonable attorney’s fees.” The broker argued that because its defense required that it assert an “as is” clause in the lease, it effectively enforced the lease. While the court of appeal agreed that asserting the defense may have had the effect of “enforcing the terms of the lease,” it refused to award fees because the real estate broker had not asserted any affirmative claims and thus had not “brought” an action or proceeding. *Excess Electronixx*, 64 Cal.App. 4th at 712.

In *Gil v. Mansano*, 121 Cal.App. 4th 739 (2004), the court also narrowly interpreted an attorney’s fees clause in a release and rejected the defendant’s fee motion. Here, two real

estate investors were parties to a purchase agreement and a related release. When one investor asserted a fraud claim against the other, the defendant successfully relied on the release language, and thereafter filed a motion to recover his attorney’s fees. The release’s fee clause provided that “[i]n the event action is brought to enforce the terms of this [Release], the prevailing party shall be paid his reasonable attorney fees and costs incurred therein.” The court of appeal reversed the trial court’s award of attorney’s fees. It determined that where “a defense to a tort action based on a provision of the contract may have the effect of enforcing the provisions of the contract .. [t]he assertion of a defense does not constitute the bringing of an action to accomplish that goal.” *Gil*, 121 Cal.App. 4th at 744. Simply, the court held that the phrase “brings an action to enforce the contract” was “quite narrow.” *Id.*

While the *Excess* and *Gil* decisions are distinguishable by reason that the Loan Agreement is not limited to parties who “bring” an action, these cases also clash with California Supreme Court caselaw (and intermediate appellate decisions) which reject the proposition that California courts should narrowly interpret fee clauses. The California Supreme Court has held that fee provisions are subject to “the ordinary rules of contract interpretation.” *Santisas*, 17 Cal.4th at 608 (emphasis added). See also *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 231 Cal.App. 4th 805, 818, n.7 (2014). In addition, other California courts have expressly rejected *Excess* and *Gil* and hold that a defendant may recover attorney’s fees under the terms of a contract which formed its defense. For example, in *Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal.App. 4th 263 (2013), Windsor contended that it held prescriptive easement rights which allowed it to use certain roads on Shadow’s property. It then sued Shadow to enforce these rights. Shadow prevailed in the litigation, and it sought attorney’s fees under a fee clause in the easement document that authorized the prevailing party to recover fees “[i]n any action or proceeding to enforce or interpret the provisions of this agreement.” The trial court denied the request for attorney’s fees but the court of appeal reversed. It reasoned that an “an action in which a party seeks to enforce or interpret a contract in connection with ... a defense alleged in an answer will constitute an action to ‘enforce or interpret’ the contract.” *Id.* at 275.⁴

⁴ The *Windsor* court expressly acknowledged its conflict with the *Excess* and *Gil* decisions. *Id.* at 275.

In *Finalco, Inc. v. Roosevelt*, 235 Cal.App.3d 1301 (1991), the court similarly determined that using a contract provision as a defense to tort litigation is akin to enforcing the contract's terms. There, a lender sued a borrower to collect on its promissory note. The borrower cross-claimed, asserting fraud and misrepresentation claims, along with numerous violations of federal and state securities laws. The trial court dismissed the borrower's claims and awarded the lender its attorney's fees in defending against the cross-claims based on a fee clause that required the borrower "to pay all costs of collection ... including, without limitation, all attorney's fees and expenses and court costs." The court of appeal upheld the fee award and held that the lender's defense was "inextricably intertwined" with its collection efforts and that it had to defend against borrower's fraud claims in order to collect on the note. *Id.* at 1308. "[A] borrower's obligation to pay attorneys' fees incurred in the collection of [a] note includes attorneys' fees incurred in defending against a challenge to the underlying validity of the obligation." *Id.* See also *Siligo v. Castellucci*, 21 Cal. App. 4th 873 (1994); *MRW, Inc. v. Big-O Tires, LLC*, 684 F.Supp.2d 1197 (E.D.Cal. 2010); *Wagner v. Benson*, 101 Cal.App.3d 27, 37 (1980); and *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 231 Cal.App. 4th 805 (2014).

*6 This court agrees with *Windsor Pacific* and also believes that it must follow California Supreme Court caselaw and apply "ordinary" rules of interpretation when analyzing a fee clause.⁵ The Loan Agreement's fee clause is not limited to the party who "brings" an action. As such, it must also apply to the party who successfully defends an action by raising the enforceable terms of the litigants' binding contract. This is an ordinary and common sense interpretation of the Loan Agreement's fee clause. Accordingly, the Bank is entitled to recover the (reasonable) fees and costs that it incurred defending against the fraudulent conveyance claims for relief.

⁵ When interpreting California law, this court is bound by California Supreme Court precedent. *See. Pacific Nat'l Bank v. Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). In the absence of a controlling decision from the California Supreme Court, "a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other

jurisdictions, statutes, treatises, and statements as guidance." *Id.* at 1239.

The Preference Claims

The Bank is also entitled to recover the fees in incurred in defending against the Trustee's preference claims for relief. [Bankruptcy Code § 547\(b\)](#) authorizes the Trustee to avoid transfers of "an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; ... and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

The Bank successfully argued that it was fully secured when it received the payments in question, and that the Trustee therefore could not establish that the Bank received more than it would have in a hypothetical Chapter 7 case. *See, e.g., Batlan v. Transamerica Commer. Fin. Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 971 (9th Cir. 2001). This argument required the Bank to establish that it had (at the relevant times) a perfected security interest in Mac-Go collateral, the value of which was equal to or exceeded the amount due under the Mac-Go Loan. The Trustee conceded these points when he dismissed his preference claims. The question here is whether the Bank's efforts constituted the "enforcement" of the Security Agreement.

Enforcement of a security agreement extends beyond the simple foreclosure of collateral. Secured creditors frequently use security agreements to establish their priority to receive payments when a third party (such as a receiver or trustee) liquidates its collateral. This issue is regularly litigated in bankruptcy cases, as the Bankruptcy Code has established a firm framework regarding how Chapter 11 debtors and Chapter 7 trustees recover and distribute property of the bankruptcy estate. With rare exception, a Chapter 7 trustee cannot disburse to unsecured creditors the proceeds of collateral subject to a perfected security agreement without first fully satisfying the secured creditor. Similarly, a Chapter 7 trustee cannot avoid and recover payments made to a fully secured creditor on a preference theory. The secured creditor, by dint of its secured claim, has a right to retain the allegedly preferential payments. This argument is premised, however, on the secured creditor establishing the bonafides of

its secured claim. This is exactly what the Bank did to prevail on the preference claims. *Windsor Pacific, FinalCo, Siligo*, and *MRW* are equally applicable in the preference context, and the Bank therefore can recover the (reasonable) fees and costs that it incurred in defending against the preference claims.⁶

⁶ This court's research unearthed *Williams v. Official Unsecured Creditors' Comm. (In re Connolly)*, 238 B.R. 475 (9th Cir. B.A.P. 1999), where the BAP held that a secured creditor could not recover the fees that he incurred in prevailing against the plaintiff's preference claim for relief. There, the successful creditor sought fees under the fee clause in its security agreement which authorized fees to "the prevailing party only in connection with the enforcement or interpretation of the security agreement." Unlike this case, the plaintiff Creditors' Committee sought to avoid the security agreement itself as a preferential transfer. As a result, the BAP held that the litigation addressed the "ownership of the security interest in the promissory note, not the enforcement or the interpretation of the security agreement itself." *Id.* at 479. *Connolly* therefore is distinguishable, as the secured creditor was forced to defend the creation of the security agreement itself.

The Post-Petition Claims

*7 Similarly, the Bank can also recover the fees that it incurred in successfully litigating the Trustee's § 549 claims. A trustee may avoid a transfer under *Bankruptcy Code* § 549(a) "(1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by this court." A Trustee may not, however, recover post-petition payments made to a fully secured creditor. See *Weiss v. People Sav. Bank (In re Three Partners)*, 199 B.R. 230, 237 (Bankr.D.Mass. 1995). The purpose of § 549 "is to ensure that similarly situated pre-petition creditors are treated even-handedly." *Dave Noake, Inc. v. Harold's Garage, Inc. (In re Dave Noake, Inc.)*, 45 B.R. 555, 557 (Bankr.D.Vt. 1984). If a creditor is fully secured, postpetition payments on such debt does not effect other creditors and the estate derives no benefit from avoiding such payments. *Dave Noake, Inc.*, 45 B.R.at 557.

Thus, for all the same reasons, the Bank can recover the fees that it incurred in defending against the Trustee's § 549 claims for relief. The Bank's defense was premised on the Loan Agreement and Security Agreement, which constituted the enforcement of these documents.

All Citations

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EXHIBIT G

Instrumentation Laboratory Co. v. Binder

United States District Court, S.D. California. | September 18, 2013 | Not Reported in Fed. Supp. |
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Outline

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2013 WL 12049072

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

INSTRUMENTATION LABORATORY CO., Plaintiff,

v.

Walter BINDER (Individually and as Trustee
of the 1998 Binder Family Living Trust
Dated June 1, 1998) et al., Defendants.

Case No. 11cv965 DMS (KSC)

|
Signed 09/18/2013

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

HON. [DANA M. SABRAW](#), United States District Judge

*1 Plaintiff Instrumentation Laboratory Co. (“ILC”) filed this action alleging Defendants' breach of indemnity contract. Judgment in ILC's favor was entered on April 26, 2013. Pending before the Court is ILC's motion for attorneys' fees and related expenses pursuant to [Federal Rule of Civil Procedure 54\(d\)](#), requesting approximately \$5.4 million in attorneys' fees and costs incurred from 2008 through June 2013, any further attorneys' fees and costs incurred in this action, including on appeal, and more than \$420,000 in prejudgment interest on the award. Defendants filed an opposition¹ and ILC replied. Following briefing on Defendants' motion to alter or amend judgment, ILC filed a supplemental declaration with a supplemental request for fees and costs incurred in June 2013. Defendants objected to the supplemental request and ILC responded. Defendants' objection is overruled. ILC's motion is granted to the extent \$4,420,982.90 is awarded for attorneys' fees and costs.

¹ Defendants' evidentiary objections, included in the opposition briefing, are overruled.

Background

This action arises from a Stock Purchase Agreement (“SPA”) whereby Werfen Life Group, S.A. (“Werfen”) acquired all shares of Inova Diagnostics, Inc. (“Inova”) from Defendants. Defendants are Inova founders and the family trusts created by them to hold Inova shares. In connection with the closing, Werfen assigned to ILC all rights it acquired under the SPA, and Inova became ILC's wholly-owned subsidiary. The SPA included a number of representations and warranties, including representations regarding the absence of litigation threats against Inova, and an indemnity clause, in case any representations or warranties proved to be inaccurate. Less than two weeks after the sale closed, Inova's key supplier sued Inova for patent infringement in Germany. Shortly thereafter, the same supplier and another licensee of the same technology issued cease and desist letters threatening patent infringement litigation against Inova in the United States. Inova defended the patent infringement action in Germany and filed a lawsuit in California seeking a declaration that the patent was invalid and not infringed. Both patent actions were settled.

From the inception of the patent litigation, ILC sought indemnity under the SPA from Defendants. Faced with Defendants' refusal, Plaintiff filed this action on May 4, 2011, seeking indemnification for expenses incurred in the underlying patent litigation. After two sets of cross-motions for summary judgment, a judgment in ILC's favor was entered on April 26, 2013, awarding ILC approximately \$5.3 million for the underlying patent litigation expenses and settlement, the right to receive reimbursement for any future settlement payments up to a total of \$5.25 million, and approximately \$1.9 million in prejudgment interest. Pursuant to Section 6.1 of the SPA, ILC now seeks an award of attorneys' fees and costs incurred in prosecuting this action.

Attorneys' Fees

In a diversity case such as this, “the law of the state in which the district court sits determines whether a party is entitled to attorney fees, and the procedure for requesting an award of attorney fees is governed by federal law.” [Carnes v. Zamani](#), 488 F.3d 1057, 1059 (9th Cir. 2007). Accordingly, [Rule 54\(d\)](#) governs the procedure. As noted in the March 28,

2013 Order, because ILC prevailed on its indemnity claim, it is also entitled to recover the attorneys' fees and costs incurred in enforcing the indemnity provision. (Docket no. 104 (Order Denying Defendants' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment ("March 28, 2013 Order") at 32.) Under these circumstances, [California Civil Code Section 1717](#) governs the substance of ILC's request. See [Baldwin Builders v. Coast Plastering Corp.](#), 125 Cal. App. 4th 1339 (2005). ILC's motion is supported by declarations describing attorney work and costs, together with supporting documentation, including numerous itemized invoices. ILC seeks \$131,488.98 for fees billed by attorneys at Fried Frank (Peterson Decl. at 3-4 & n. 2), and \$4,595,596.95² for attorney and paralegal fees billed by Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), for a total of \$4,727,085.93 in fees.

2 The amount of Milbank's fees is calculated as follows: the \$4,463,601.53 total of all invoices through April 2013 (Pl.'s App. 1) is reduced by \$133,918.62 for Fried Frank invoices (*id.*) and \$229,477.86 for Milbank's in-house costs (Pl.'s App. 5), for a total of \$4,100,205.05 for fees incurred through April 2013. Added to this sum is \$235,673.15 for May 2013 fees (Marks Reply Decl. Ex. B) and \$259,718.75 for June 2013 fees (Marks Supp. Decl. Ex. A).

*2 State substantive law determines the amount of recoverable attorneys' fees. [Mangold v. Cal. Pub. Util. Comm'n](#), 67 F.3d 1470, 1478 (9th Cir. 1995). The parties agree that [PLCM Group v. Drexler](#), 22 Cal.4th 1084 (2000), governs the determination of recoverable fees. (Pl.'s Mem. of P.&A. at 7; Opp'n at 2.) The fee award is based on the "lodestar," *i.e.*, the number of hours reasonably expended multiplied by the reasonable hourly rate.... The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." [PLCM Group](#), 22 Cal.4th at 1095. The burden to show the requested fees are reasonable is on the requesting party. [Ajaxo Inc. v. E*Trade Group, Inc.](#), 135 Cal. App. 4th 21, 65 (2005).

To calculate the lodestar, the Court must determine the reasonable hourly rate. [PLCM Group](#), 22 Cal.4th at 1095. Milbank billed approximately 7,527.8³ hours from March 2011 through June 2013 to enforce the indemnity provision. The primary partner on the case, Jerry Marks, billed over 80%

of all partner time and approximately 16% of all attorney time on the case; he has over 25 years of experience in business litigation and corporate matters, including investigations. His hourly rate over the life of the case ranged from \$995 to \$1,160 per hour. The other two partners on the case were Timothy Peterson, with over 25 years of corporate transaction experience, and Robert Liubicic, with 13 years of complex business litigation experience. Mr. Peterson, located at Milbank's London office, was Werfen's lead counsel in the Inova stock acquisition. He participated in the litigation by providing familiarity with the underlying Inova acquisition, and billed at a rate of \$950 to \$1,030 per hour. Mr. Liubicic was involved mainly to assist with expert discovery and summary judgment briefing. His hourly rate was \$900. The primary associate on the case was Elizabeth Koenig. Her work represented almost 70% of all associate time on the case and approximately one third of all time billed. She has seven years of complex business litigation experience, and billed at a rate of \$650 to \$740 per hour. The other associates on the case were James Whooley, Ashlee Lin and Miguel Ruiz, all of whom work in the complex business litigation area. Mr. Whooley, a ninth-year associate, billed at a rate of \$735 to \$780 per hour; Mr. Ruiz, a seventh-year associate, billed at a rate of \$650 per hour; and Ms. Lin, a third-year associate, billed at a rate of \$345 to \$570 per hour. In addition, Milbank employed three paralegals, who collectively billed approximately 33% of the time logged to this case and billed at an hourly rate ranging from \$210 to \$310. (Marks Decl. at 18-20 & Pl.'s App. 4.)

3 The number of Milbank's hours is calculated by adding 6,762.55 for total hours through April 2013 (Pl.'s App. 4), 372 hours billed in May 2013 (Marks Reply Decl. Ex. B), and 393.25 hours billed in June 2013 (Marks Supp. Decl. Ex. A).

The reasonable hourly rate to calculate the lodestar is the rate "prevailing in the community for similar work." [PLCM Group](#), 22 Cal.4th at 1095. The parties disagree whether the pertinent community is San Diego, where the case is pending, or Los Angeles, where ILC's attorneys are located. ILC points to [PLCM](#), where the court noted the fees awarded were at "the prevailing market rate ... where counsel is located." [PLCM](#), 22 Cal.4th at 1096. However, the issue presented here was not presented in [PLCM](#), and the court did not address it. In [Ketchum v. Moses](#), the standard for the applicable rate was refined and articulated as "the general local hourly rate for a fee-bearing case." 24 Cal.4th 1122, 1138 (2001) (emphasis added). In subsequent California Court of Appeal decisions, this standard has been interpreted as referring to the local

community of the court rather than the local community of out-of-town counsel. *Nichols v. City of Taft*, 155 Cal.App.4th 1233, 1242-43 (2007); *Rey v. Madera Unif. Sch. Dist.*, 203 Cal. App. 4th 1223, 1241 (2012); *Ctr for Biological Diversity v. County of San Bernardino*, 188 Cal. App. 4th 603, 617-19 (2010).

*3 A higher rate of non-local attorneys may be found reasonable if the requesting party shows that hiring local counsel was impracticable. *Nichols*, 155 Cal. App. 4th at 1244. Milbank was retained in this case because Mr. Peterson, formerly with Fried Frank, was lead counsel for Werfen in the underlying acquisition of Inova. (Peterson Decl. at 2.) He was subsequently involved in Fried Frank's efforts to negotiate a settlement of ILC's indemnity claim prior to filing this action. (*Id.* at 2-3.) When Mr. Peterson left Fried Frank for Milbank, ILC retained Milbank for further representation on the indemnity issue because of Mr. Peterson's prior experience with the case, which enabled Milbank to efficiently gain an understanding of the underlying transaction, including the terms of the SPA and the due diligence process, both of which were critical to the liability stage of the case. (Marks Reply Decl. at 14-15; Peterson Reply Decl. at 2-3.) In addition, ILC retained Milbank and Mr. Marks because of Milbank's litigation reputation and Mr. Marks' good reputation in the legal community, strong background with mergers and acquisitions litigation, and experience in San Diego courts. (Peterson Reply Decl. at 3.) The burden of showing that retaining counsel local to the court was impracticable is not onerous. *Ctr for Biological Diversity*, 188 Cal. App. 4th at 618. ILC has presented "sufficient and competent evidence that [it] acted in good faith and hiring qualified counsel in the [San Diego] area would be impracticable," as it would serve to increase the number of hours necessary for adequate representation. *Id.* at 618-19. The Court shall therefore apply the prevailing rates in the local community of ILC's counsel as the appropriate benchmark.⁴

⁴ Defendants' Exhibits 2, 3 & 5 are reports of attorneys' fees charged by law firms with offices in San Diego. Accordingly, these exhibits are not helpful in arriving at a reasonable rate in this case.

As the relevant reference point for reasonable hourly rates, ILC offers (a) the rates the Court approved in the March 28 Order for Irell & Manella to indemnify ILC for the patent litigation fees; and (b) the Thomson Reuters Public Rates report for 2012 and 2013 for the one hundred largest national law firms (Marks Decl. Ex. G). Neither reference point is

relevant in this case. This is not a patent case, although patent litigation formed a part of relevant facts. Because Irell & Manella's rates were charged for patent litigation, they are not relevant.⁵ For the most part, the Public Rates Report includes the rates charged nation-wide, while the relevant reference points are the rates charged in the attorneys' local community. However, the report includes a few references to the rates charged by California attorneys and paralegals who represent clients in California's Central and Northern Districts.⁶ The rates charged by Milbank substantially exceed those rates.

⁵ Defendants' Exhibit 7 includes only intellectual property practice fees for 2010, and is therefore not relevant for the same reason.

⁶ The report does not disclose the law firms' locations within California.

To find an appropriate reference point, the Court looks to the CEB and TyMetrix Real Rate Report of 2012 attorneys' fee rates in Los Angeles for partners and associates in the comparable areas of practice.⁷ (Defs' Ex. 6.) The rates are presented by quartile. Based on Milbank's high national ranking (*see* Pl.'s Ex. F), the Court applies rates in the highest quartile. The nature of this case spans two practice areas covered in the report – "non-insurance company litigation" and "corporate and general." (*Id.* at 59-63 (description of categories).) Given Mr. Marks' background in representing corporations, directors, and officers in investigations and mergers and acquisition litigation, in addition to contract disputes and complex business litigation (Marks Decl. at 18-19), the higher partner fee in the area of corporate work is warranted, as the factual background of the case called for experience in this area. Accordingly, the reasonable rate for Mr. Marks is \$842. (Defs' Ex. 6 at 38.) On the other hand, Mr. Liubicic and all associates practice in the complex business litigation area. (Marks Decl. at 19-20.) Generally, the nature of this case was breach of contract with a complex factual background. Accordingly, the more appropriate reference point for Mr. Liubicic and the associates is for work in non-insurance company litigation. The third quartile hourly rate is \$725 for partners and \$475 for associates, which the Court finds to be reasonable for this case. (Defs' Ex. 6 at 50.) The foregoing rates, including the reasonable rate for Mr. Marks, are comparable to the rates in the Public Rates Report of the top one hundred nationally ranked firms for the fees charged by attorneys located in California representing clients in California courts in 2012 and 2013. (Marks Decl. Ex. G.)

7 No comparable report was provided for 2011 and 2013 rates. The report of 2012 rates is adequate, however, as approximately 76% of Milbank's fees and approximately 78% of the hours charged in this case were charged in 2012, while approximately 8% of the fees and hours were charged in 2011, and 16% of the fees and 14% of the hours were charged in 2013.

*4 With respect to Mr. Peterson, who charged a total of 35.75 hours to the case, the Court finds the rates charged to be reasonable. Mr. Peterson is located in London. Neither side has presented any information for prevailing rates in London. Given that the client was informed about his rates in advance and paid them (Peterson Reply Decl. at 3), the Court finds the rates as charged to be reasonable. *See Cintas Corp. v. Perry*, 517 F.3d 459, 469 (7th Cir. 2008).

Finally, in a general manner Defendants appear to object to awarding any "staff fees." (Opp'n at 16.) Their reference to "legal assistant" and "case manager," and the general argument that only "legal work" is compensable (*id.* at 16-17), suggest they object to awarding any fees for the work performed by Jennifer Gibbs, Ricky Windom and Bryan Loper, who provided various types of support to the case. Ms. Gibbs is a certified paralegal in civil litigation with over 20 years of experience, Mr. Windom has a J.D. from Ohio State University, and Mr. Loper has 20 years of experience as a litigation paralegal. (Marks Decl. at 20.) Their work was primarily related to document discovery and coordinating voluminous court filings. (*Id.* at 8, 10 & 20.)

Under California law, paralegal fees may be recovered as attorneys' fees. *Gorman v. Tessajara Dev. Corp.*, 178 Cal. App. 4th 44, 92 (2009); *Guinn v. Dotson*, 23 Cal. App. 4th 262, 268-69 (1994). *See also Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571 (2008) (under the Equal Access to Justice Act, the prevailing party entitled to reasonable attorneys' fees may also recover paralegal fees at prevailing market rates). Whether paralegal fees are recoverable depends on the prevailing practice in the relevant community. *See Guinn*, 23 Cal. App. 4th at 269-70. The fees are recoverable where the prevailing practice is to bill separately for paralegal services at a reasonable market rate. *Id.* Moreover, where, as here, "a contract provides for payment of costs and attorney fees, a court may allow as attorney fees any expenses ordinarily billed to a client which are not included in the overhead component of the attorney's hourly rate." *Id.* at 268.

Milbank's practice was to separately charge for paralegal services on an hourly basis. (*See* Pl.'s Ex. A.) This is consistent with the Court's understanding of the prevailing practice in the legal community. Accordingly, Defendants' argument that no paralegal fees may be awarded is rejected.

Defendants do not object to the hourly rates charged by Milbank's paralegals. The Court notes that the rates charged are consistent with paralegal rates reflected in the Public Rates Report for the fees charged by attorneys located in California representing clients in California courts in 2012 and 2013. (*see* Marks Decl. Ex. G.) The rates are therefore reasonable.

To arrive at the lodestar, the Court must also determine a reasonable amount of hours. *PLCM Group*, 22 Cal.4th at 1095. ILC seeks payment for 7,527.8 hours billed by Milbank attorneys and paralegals on this case. Defendants dispute the reasonableness of Milbank's time.

As an initial matter, the Court notes that the high number of hours Milbank attorneys worked on this case is not surprising, given the complex factual background, which involved an investigation into the due diligence performed in the underlying acquisition of Inova's stock, and a damages analysis that involved evaluation of international patent litigation and a license agreement. In addition, the action was defended with extreme vigor, and nearly every factual and legal issue was aggressively disputed. To the extent the number of hours Milbank's attorneys worked on the case was needed to meet Defendants' efforts, this is not a reason to find the hours unreasonable. "A defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 114 (2009) (internal quotation marks and citations omitted).

*5 Defendants assert that attorney time spent on discovery was excessive and/or duplicative. Milbank attorneys billed 871.5 hours for written discovery and document production (72.25 hours by Mr. Marks, 589.5 hours by Ms. Koenig, and 209.75 hours by Ms. Lin) and 781.75 hours for fact witness depositions not including Mr. Guerrero (335.5 hours by Mr. Marks, 426.5 hours by Ms. Koenig, and 19.75 hours by Ms. Lin). (Defs' Ex. 23 at 232 & 239.) Defendants neither point to any particular billing that was excessive or duplicative, nor explain why the time was excessive or duplicative. The case included 62 requests for production, 47 interrogatories and 17 requests for admissions propounded by Defendants, as well as 20 fact witness depositions, which were evenly

divided between ILC and Defendants. In addition to the large number of witnesses and Defendants' discovery requests, the case was document-intensive, because it included due diligence documents from Inova's acquisition and the files in the underlying patent litigation, among other things, resulting in over 250,000 pages of documents produced by ILC to Defendants.⁸ (Marks Decl. at 7; Tyrell Decl. at 5-9.) Moreover, the work was appropriately staffed with as much work delegated to associates and paralegals as possible.⁹ (Marks Decl. at 7-11& 15-16.) The Court finds the number of hours worked on fact discovery reasonable.

⁸ Because Inova was acquired by ILC, the majority of the transaction-related documents were out of Defendants' possession. It was therefore incumbent on ILC to produce them. (Tyrell Decl. at 4 & 5.) Due to the highly contentious nature of the case, it is understandable why ILC did not accept Defendants' offer to let them sort through Inova's computer records. (*See id.* at 5-6.) Furthermore, Defendants complain about delay in producing some of the documents to them. (*Id.* at 7-9.) As they do not show that the delay resulted in any increase in the number of hours spent by Milbank on the document production, this is irrelevant to determining the reasonable number of hours.

⁹ Overall, partners billed approximately 19% of all hours on the case, associates billed approximately 48%, and paralegals billed approximately 33%.

Defendants next contend that attorneys' fees charged for expert discovery were excessive because two attorneys worked together on preparing for depositions of three experts — Messrs. Smegal, Weinstein and Daly. According to Defendants, Mr. Liubicic and Ms. Lin worked 24 and 13 hours, respectively, in preparing for Mr. Smegal's deposition; they worked 20 and 15 hours, respectively, in preparing Mr. Weinstein for deposition; and they worked 12 and 9 hours, respectively, in preparing Mr. Daly for deposition. (Defs' Memo. of P.&A. at 14-15.) Given the document-intensive nature of the case, and the breadth of issues raised by the case, the Court does not find it excessive that associates sometimes assisted in expert preparations, especially when, as here, the amount of hours expended was modest. The suggestion that the fees incurred in preparing Mr. Weinstein for deposition were excessive because the deposition did not take place after Defendants withdrew their subpoena (*see* Marks Reply Decl. at 7) is rejected.

Defendants also challenge the number of attorney hours expended on preparing expert reports. ILC retained three experts who issued reports of their opinions, as well as reports in rebuttal to Defendants' four experts. (Marks Decl. at 11 & Marks Reply Decl. at 6-7.) According to Defendants, Messrs. Marks and Liubicic and Ms. Koenig collectively spent 107 hours working on expert reports. (Opp'n at 15.) Considering that a least six expert reports exist, the Court does not find the amount of time excessive or duplicative.

Furthermore, Defendants assert that attorney time billed on two sets of cross-motions for summary judgment was excessive and duplicative. The first set of cross-motions involved approximately 2,500 pages of filings, and the second set involved approximately 4,000 pages, including voluminous exhibits, declarations, and evidentiary objections. In their briefing, Defendants vigorously defended this action, raising every conceivable legal and factual issue and objecting to nearly every piece of evidence submitted by ILC. According to Defendants, Milbank attorneys billed approximately 737 hours drafting their summary judgment motion, responding to Defendants' motion and replying to Defendants' opposition. (Opp'n at 13-14.) With respect to the second set of cross-motions, ILC's attorneys billed 414 hours. (*Id.* at 14.) Although the number of hours billed is high and at times as many as five attorneys worked on the same filing, the Court finds the time billed reasonable, considering that (a) the briefing on the first set of cross-motions occurred simultaneously with fact and expert discovery, (*see* Marks Decl. at 10 & 12), (b) in the context of concurrent cross-motions the time schedule for filing of responsive papers was very compressed, (c) a large number of legal and factual issues were raised, and (d) the filings themselves were extremely voluminous.

*6 Defendants also object to the time billed for discovery related to Mr. Guerrero. In its opposition to Defendants' first set of cross-motions for summary judgment, ILC filed Mr. Guerrero's declaration. Mr. Guerrero had not previously been disclosed as a potential witness. Accordingly, Defendants were given an opportunity to depose him and seek a related production of documents. (Docket no. 73 (Order (1) Denying Defs' Mot. for Summ. J.; (2) Granting in Part and Denying in Part Pl.'s Mot. for Summ. J.; and (3) Denying Defs' Mot. for Partial Summ. J.) at 6 & 14.) Defendants argue that they should not have to pay any of ILC's attorneys' fees incurred for this discovery, claiming that such fees were incurred as a result of the untimely disclosure. (Opp'n at

15-16.) Defendants have presented no reason to conclude that the same fees would not have been incurred had the discovery been taken in the normal schedule. Accordingly, their argument is rejected.

Next, Defendants contend that the time billed to file the instant motion and respond to Defendants' opposition and to oppose Defendants' motion to amend judgment "is excessive and should be reduced." (Opp'n at 16; *see also* Obj. to Supp. Marks Decl.) General assertions such as this, "unaccompanied by any citation to the record or any explanation of which fees were unreasonable or duplicative" provides no basis to deny a properly supported request. *See Tuchscher Development Enters, Inc. v. San Diego Unif. Port Dist.*, 106 Cal. App. 4th 1219, 1248 (2003).

Based on the foregoing, Milbank's fees shall be based on the actual number of hours billed and the hourly rates as adjusted above. Based on the September 5, 2013 Marks declaration, the total reduction is \$1,010,920.65.¹⁰ Accordingly, the lodestar for Milbank's fees is \$3,584,676.30.¹¹

¹⁰ This amount consists of adjustments of \$311,564.40 for Mr. Marks' fees, \$42,437.50 for Mr. Liubicic's fees, \$556,523.75 for Ms. Koenig's fees, \$58,185 for Mr. Wholley's fees, \$30,353.75 for Ms. Lin's fees, and \$11,856.25 for Mr. Ruiz' fees. The calculation of each of the foregoing is included in the Appendix at the end of this order.

¹¹ The request for \$4,595,596.95 less \$1,010,920.65.

Finally, ILC seeks reimbursement for \$131,488.98 for the fees billed by attorneys at Fried Frank's London office.¹² (Peterson Decl. at 3-4 & n. 2). Fried Frank's London office employed two partners and three associates on the case, who billed 260.9 hours on the attempts to enforce the indemnity clause without litigation, and whose average billing rate was \$637.61 per hour. (*Id.* at 4-5 & Pl.'s Ex. B.) The request is supported by a detailed declaration describing the work and supporting documentation, which demonstrate that the requested fee is reasonable. Defendants' entire opposition to this request is that Fried Frank invoices warrant close scrutiny because they may overlap with the underlying patent litigation and contain duplication due to Mr. Peterson's transition to Milbank. (Opp'n at 11 n.10.) A similar argument that billings require "careful review" by the court was rejected in *Tuchscher Development* for failure to support the bare assertion with any explanation of which fees were

unreasonable or duplicative, or citation to the relevant record. 106 Cal. App. 3d at 1248. Defendants' argument is therefore rejected. The Court finds the lodestar for Fried Frank fees is \$131,488.98.

¹² The client is located in Europe. (Peterson Decl. at 5.)

After calculating the lodestar, the court considers whether the total award so calculated is reasonable. *PLCM Group*, 22 Cal.4th at 1095-96. In adjusting the lodestar, the court may consider: "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." *Id.* at 1096 (internal quotation marks and citation omitted). Under the circumstances of this case, the lodestar award is reasonable without further adjustment, in light of the highly disputed nature of this litigation, complexity of the evidence, and success. The attorneys' fee award is therefore \$3,716,165.27.¹³

¹³ \$3,584,676.30 for Milbank's fees and \$131,488.98 for Fried Frank's fees.

Costs

*7 In addition to attorneys' fees, ILC also seeks reimbursement of its costs. Rule 54(d) contains two separate provisions for costs. To request taxable costs, the prevailing party must file a bill of costs with the clerk. Civ. Local Rule 54.1(a). Taxable costs are taxed by the clerk rather than the court. Fed. R. Civ. Proc. 54(d)(1); Civ. Local Rule 54.1. The categories of taxable costs are circumscribed by 28 U.S.C. Section 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *see also* Civ. Loc. Rule 54.1. For example, some of ILC's costs which fall in this category are \$350 for the court filing fee and \$2,067.25 for service of process. (Pl's App. 5.) *See* 28 U.S.C. § 1920(1) & Civ. Loc. Rule 54.1(b).

ILC has not filed a bill of costs and has not obtained prior leave of Court to forego the procedure set forth in Rule 54(d)(1) and Civil Local Rule 54.1(a).¹⁴ Defendants object to ILC's request for taxable costs solely on this basis and do not claim to be prejudiced. Although Defendants are correct that ILC should have timely filed a bill of costs with the Clerk, ILC's request is granted notwithstanding failure to follow proper procedure. Had ILC filed a bill of costs, its taxable costs would be awarded. *See* Civ. Loc. Rule 54.1(a). ILC

could have sought and obtained leave of Court to include taxable costs in its motion for attorneys' fees. (See [Fed. R. Civ. Proc. 54\(d\)\(1\)](#)). Furthermore, because the SPA provides for recovery of all reasonable litigation expenses, the Court will not deny ILC's request based solely on a point of procedure that does not prejudice Defendants in any way. See *Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co.*, 47 Cal. App. 4th 464, 491-92 (1996). ILC's request for taxable costs is therefore granted.

¹⁴ Instead, ILC offered to file a Bill of Costs if the Court held ILC could not recover taxable costs by a [Rule 54\(d\)\(2\)](#) motion. (Mem. of P.&A. at 18 n.16.) The Court does not approve this procedure, as [Rule 54\(d\)\(1\)](#) contemplates seeking leave of Court before filing a [Rule 54\(d\)\(2\)](#) motion.

ILC also requests non-taxable costs. The total amount of ILC's request for costs is \$704,817.63.¹⁵ In contrast to taxable costs, nontaxable costs are recoverable on a motion to the court under [Rule 54\(d\)\(2\)](#) along with attorney's fees. [Fed. R. Civ. Proc. 54\(d\)\(2\)](#) ("claim for attorney's fees and related nontaxable expenses"). Federal law provides the procedure for recovery of nontaxable costs and California law determines whether they are recoverable. See *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1281-82 (9th Cir. 1999). ILC's request for nontaxable costs includes supporting documentation. (Marks Decl. at 22-26; Peterson Decl. at 5 & Pl.'s Exs B-E.)

¹⁵ This amount is comprised of \$229, 477.86 for Milbank in-house costs through April 2013 (Pl.'s App. 5), \$5,005.26 for Milbank May 2013 in-house costs (Marks Reply Decl. Ex. B), \$12,562.08 for Milbank June 2013 in-house costs (Marks Suppl. Decl. Ex. A), \$2,429.65 for Fried Frank in-house costs (Peterson Decl. at 5), \$420,284.08 for expert fees (Pl.'s App. 2), and \$35,058.70 for document processing vendors. (Pl.'s App. 3).

Defendants' challenge to the nontaxable costs is not based on [California Code of Civil Procedure 1033.5](#). Because the SPA provides for a broader recovery than allowed by [Section 1033.5](#). (SPA ¶¶ 6.1 & 6.5(d)), the Court's review is not limited by [section 1033.5](#). See *Arntz Contracting*, 47 Cal. App. 4th at 491-92 ("While it is reasonable to interpret general contractual cost provision by reference to an established statutory definition of costs," where sophisticated parties freely choose to provide "a broader standard authorizing

recovery of reasonable litigation charges and expenses," that standard may be enforced.).

*8 Defendants object to the expert fees charged by Gilbert Matthews and Michelle Patterson of Sutter Securities, who prepared a report regarding due diligence in the Inova acquisition. Mr. Matthews also gave deposition testimony regarding the report. ILC seeks reimbursement of \$102,141.81 for the fees paid Sutter Securities for these services. (See Pl.'s App. 2.)¹⁶ Defendants' main complaint is that Mr. Matthews and Ms. Patterson attended a conference in London and continued on to family vacations in England while they were writing the report, suggesting "run-amok billing." (Opp'n at 20.) According to Mr. Matthews' deposition testimony, he and Ms. Patterson worked long hours during their respective family vacations to prepare the report, foregoing spending time with their families. (Defs' Ex. 19.) Defendants' suggestion that the experts billed for time when they were not working is contradicted by the evidence. (*Id.*) Their argument to reduce the fees charged by Sutter Securities as unreasonable is therefore rejected.

¹⁶ ILC paid \$50,097.04 less than the amount billed by Sutter Securities. (*Cf.* Pl.'s Ex. C at 338-341.)

Defendants argue that expenses for travel are recoverable only if the party made a good faith attempt, but was unable to locate a competent local attorney to take the case. Based on the broad wording of the SPA, and the discussion about local counsel in the context of hourly rates, this argument is rejected. ILC requests \$18,549.39 mostly for travel between Los Angeles and San Diego to attend depositions and court hearings. Upon review of the supporting documentation together with the testimony about the timing, staffing, and location of depositions, the Court finds the travel charges reasonable. (See Pl.'s Ex. Eat 436-38; Marks Decl. at 23; *see also id.* at 9-11, 13, 15-16.)

Defendants object to ILC's \$86,714.48 request for Lexis, Westlaw, Pacer and other computerized research. (*Cf.* Pl.'s App. 5 & Pl.'s Ex. E at 491-504.) Defendants note that not all courts award computerized legal research costs; however, in this case, the broad wording of the SPA allows for any type of reasonable expense. Furthermore, given the large number of disputed legal and factual issues in this case, and upon review of the itemized legal research entries, the requested amount is reasonable.

Finally. Defendants object to a \$1,758.18 charge for word processing. (See Pl.'s App. 5.) The word processing charges appear reasonable given the large volume of filings in this case. Because it appears these charges were passed on to the client (cf. Pl.'s Ex. E at 553-54 & Pl.'s Ex. A), and based on the broad wording of the SPA, ILC's request for this item is granted.

Prejudgment Interest

Finally, ILC requests \$421,906.24 in prejudgment interest on the award of attorneys' fees and costs. In diversity cases, state law applies to the issues whether prejudgment interest should be awarded and the rate of interest. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 961 (9th Cir. 2008); *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1107-08 (9th Cir. 1998). California Civil Code Section 3287(a) provides for prejudgment interest when a person "is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day" Such prejudgment interest is therefore calculated on the amount recovered as damages, and "is an element of compensatory damages, not a court cost." *Bodell Constr. Co. v. Trustees of the Cal. State University*, 62 Cal. App. 4th 1508, 1526 (1998). Recovery of prejudgment interest on attorneys' fees and costs

therefore depends on whether ILC's recovery is an element of compensatory damages. As stated in the March 28 Order, because the attorneys' fee clause in the SPA contemplates an action to enforce the indemnity obligation, such fees and costs are not damages, but are recoverable as prevailing party fees. (March 28, 2013 Order at 33, citing *Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339 (2005).) See also *Berkla v. Corel Corp.*, 302 F.3d 909, 919 (9th Cir. 2002) (applying Cal. law). ILC's request for prejudgment interest on its award of attorneys' fees and costs is therefore denied.

Conclusion

*9 For the foregoing reasons, ILC's motion is granted to the extent of \$3,716,165.27 for attorneys' fees and \$704,817.63 for costs. The motion is denied in all other respects. The request for any future attorneys' fees and costs incurred in this action, including on appeal, is denied without prejudice.

IT IS SO ORDERED.

APPENDIX

Milbank Hourly Rate Adjustments

Jerry Marks			Robert Liubicic				
Rate	Hours	Total	Rate	Hours	Total		
2011	\$995	67.50	\$67,162.50	2011	0.00	0.00	
2012	1,100	971.30	1,068,430.00	2012	\$900	220.50	\$198,450.00
2013	1,100	159.25	184,730.00	2013	1,000	14.00	14,000.00
Total		1,198.05	\$1,320,322.50	Total		234.50	\$212,450.00
Adj. Rate	\$842	1,198.05	\$1,008,758.10	Adj. Rate	\$725	234.50	\$170,012.50
Decrease			\$311,564.40	Decrease			\$42,437.50
Elizabeth Koenig			James Whooley				
Rate	Hours	Total	Rate	Hours	Total		
2011	\$650	291.25	\$189,312.50	2011	0.00	0.00	
2012	695	1,986.00	1,380,270.00	2012	\$735	305.50	\$114,542.50

2013	740	259.00	191,660.00	2013	780	291.00	226,980.00
Total		2,536.25	\$1,761,242.50	Total		596.50	\$341,522.50
Adj. Rate		\$475	2,536.25	Adj. Rate		\$475	596.50
Decrease		\$556,523.75		Decrease		\$58,185.00	

Ashlee Lin				Miguel Ruiz			
	Rate	Hours	Total		Rate	Hours	Total
2011	\$460	118.00	\$54,280.00	2011	\$650	67.75	\$44,037.50
2012	570	269.25	153,472.50	2012		0.00	0.00
2013	645	38.50	24,832.50	2013		0.00	0.00
Total		425.75	\$232,585.00	Total		67.75	\$44,037.50
Adj. Rate		\$475	425.75	Adj. Rate		\$475	67.75
Decrease		\$30,353.75		Decrease		\$11,856.25	

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EXHIBIT H

Johnson v. Astrue

United States District Court, N.D. California. | August 27, 2008 | Not Reported in F.Supp.2d | 2008
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Outline

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2008 WL 3984599

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

Robin A. JOHNSON, Plaintiff,

v.

Michael J. ASTRUE, Defendant.

No. C-07-2387 EMC.

|
Docket No. 18.

|
Aug. 27, 2008.

Attorneys and Law Firms

[Barbara Marie Rizzo](#), Attorney at Law, Moss Beach, CA, for Plaintiff.

[Odell Grooms](#), Jacqueline A. Forslund, Social Security Administration, [Katherine R. Loo](#), U.S. Attorney Office, San Francisco, CA, for Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES, COSTS, AND EXPENSES

[EDWARD M. CHEN](#), United States Magistrate Judge.

*1 Previously, the Court issued an order granting in part Plaintiff's motion to remand for further administrative proceedings. *See* Docket No. 15 (order, filed on 4/25/2008). Now pending is Plaintiff's motion for attorney's fees, costs, and expenses. Having reviewed the parties' briefs and accompanying submissions, the Court hereby **GRANTS** Plaintiff's motion.¹

¹ The Court issues this order based on the parties' written submissions. Neither party asked for a hearing on the motion, and the Court also concluded that no hearing was necessary.

I. DISCUSSION

A. Attorney's Fees

The Equal Access to Justice Act ("EAJA") provides that,

[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Under the statute,

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (I) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$ 125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

Id. § 2412(d)(2)(A).

Here, the Commissioner does not dispute that Plaintiff is entitled to some attorney's fees under the EAJA. Rather, the Commissioner's sole dispute is that the fees requested by Plaintiff are not reasonable. More specifically, the Commissioner contends that Plaintiff should be compensated for only 35 hours of attorney time, not 47 hours.² See Opp'n at 1. The Commissioner does not object to the hourly rate requested by Plaintiff (*i.e.*, \$166.46 per hour).

² Six of the 47 hours were related to the currently pending fee and cost motion. See Rizzo Decl., Ex. A.

The Court finds that the Commissioner's position is not persuasive. Neither of his main arguments is convincing. First, while the instant case was not overly complex and fairly routine, the Commissioner's own authority indicates that an award of 47 hours would not be out of line-particularly where, as here, some of the 47 hours were related to the currently pending fee and cost motion. See *Harden v. Commissioner*, 497 F.Supp.2d 1214, 1215-16 (D.Or.2007) (noting, that absent unusual circumstances or complexity, 20-40 hours is a reasonable amount of time to spend on a social security case; ultimately awarding fees for 40 hours of time); *Patterson v. Apfel*, 99 F.Supp.2d 1212, 1215 n. 2 (C.D.Cal.2000) (citing cases in which as many as 41-46.5 hours of time were compensated); see also *Hardy v. Callahan*, No. 9:96-CV-257, 1997 U.S. Dist. LEXIS 12161, at *27-29, 1997 WL 470355 & n. 10 (E.D.Tex.1997) (awarding fees for 46.5 hours, including 6.5 hours for fee petition; noting that "the typical EAJA application in social security cases claims between thirty and forty hours," and concluding that "this appears to be an appropriate average" for "relatively non-complex" social security cases).

*2 Second, the Commissioner's contention that Plaintiff's counsel should not have billed multiple times for legal research given her experience-*i.e.*, the research was not necessary or redundant-is unconvincing. The time entries that the Commissioner cites show that legal research was conducted in conjunction with the drafting of a brief (*e.g.*, opening motion for summary judgment, reply brief, fee and cost motion). The fact that some research is required is not remarkable and the total hours spent per entry appears reasonable.

The Court therefore awards Plaintiff the full fee award requested, based on 47 hours. In addition, the Court awards

Plaintiff an additional fee based on the time spent by counsel to review and prepare a reply to the Commissioner's opposition to the fee motion. Plaintiff's attorney spent 10 hours on these tasks. The Court concludes that this was a reasonable amount of time. Notably, the Commissioner did not file any brief contesting the reasonableness of this time.

To summarize, the Court awards Plaintiff a total of \$9,488.22 in attorney's fees, representing 57 hours at a rate of \$166.46.

B. Costs
Under the EAJA,

[e]xcept as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title [28 U.S.C. § 1920], but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C. § 2412(a)(1).

In its opposition, the Commissioner does not dispute that Plaintiff is entitled to costs. Instead, the Commissioner's only argument is that any award of costs pursuant to § 1920 should be paid, not by his own agency, but rather by the Treasury Department. See 28 U.S.C. § 2412(c)(1) ("Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title [28 U.S.C. §§ 2414] and shall be in addition to any relief provided in the judgment."); *id.* § 2414 ("Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the

Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury.”).

The Court agrees with the Commissioner that the only items that qualify as costs under § 1920 are the filing fee (\$350) and the copying costs (\$37).³ See Rizzo Decl., Ex. B. However, the Court does not agree that Plaintiff must seek these costs from the Treasury Department directly. While the Commissioner may be right that costs ultimately come out of the Treasury Department's pocket, the Court is not aware of any requirement that, in litigation such as this, Plaintiff seek the costs from the Treasury Department instead of the Commissioner. Both the Commissioner and the Treasury Department are part of the United States government. Costs are normally assessed against the party who loses. The Court therefore orders that costs in the amount of \$387 be paid by the Commissioner.

³ In the opening brief, Plaintiff asked for copying costs in the amount of \$35.40. In the reply brief, Plaintiff asked for an additional \$1.60 for copying costs.

C. Expenses

*3 As noted above, the EAJA authorizes the award of not only reasonable attorney's fees but also reasonable expenses. See 28 U.S.C. § 2412(d)(1)(A). The Commissioner challenges only one type of expense sought by Plaintiff-*i.e.*, the expense of electronic legal research. According to the Commissioner, the expense of electronic legal research is an overhead expense which is generally not reimbursable. The Commissioner also argues that “allowing a reimbursement for counsel's time performing legal research as well as the computer charges [would] be duplicative.” Opp'n at 6.

The Court does not agree. Other courts have routinely awarded the expense of electronic legal research pursuant to the EAJA. See, e.g., *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir.1988) (“[W]e reject the government's argument that telephone, reasonable travel, postage, and computerized research expenses are not compensable under the EAJA.”); *Washington Dep't of Wildlife v. Stubblefield*, 739 F.Supp. 1428, 1433 (W.D.Wash.1989) (“The expense of computerized legal research is ... recoverable.”). And notably, the very

authority cited by the Commissioner indicates that it would not be duplicative if an attorney were to charge both for her time spent on legal research as well as the computer fee itself. See *Haroco v. American Nat'l Bank & Trust of Chicago*, 38 F.3d 1429, 1440-41 (7th Cir.2004) (stating that “computer research costs ‘are more akin to awards under attorney's fees provisions than under costs’ and that “such costs are indeed to be considered attorney's fees”; then stating that “[t]he added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching” such that “we see no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee”); see also *In re Media Vision Tech. Secs. Litig.*, 913 F.Supp. 1362, 1371 (N.D.Cal.1995) (stating that “Lexis is an essential tool of a modern efficient office” and, “[a]s such, it saves lawyers' time by increasing the efficacy of legal research”) (internal quotation marks omitted).

Accordingly, the Court awards all of Plaintiff's expenses, including that for electronic legal research, in the amount of \$533.83.⁴

⁴ In the opening brief, Plaintiff asked for expenses in the amount of \$449.23. In the reply brief, Plaintiff asked for an additional \$84.60 for expenses.

II. CONCLUSION

For the foregoing reasons, the Court grants Plaintiff's motion and awards \$9,488.22 in attorney's fees, \$387 in costs, and \$533.83 in expenses. Pursuant to Plaintiff's request, the attorney's fees shall be paid directly to his attorney. See Johnson Decl. ¶¶ 3-4.

This order disposes of Docket No. 18.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3984599, 134 Soc.Sec.Rep.Serv. 4

EXHIBIT I

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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
Zetta Jet USA, Inc.

Debtor(s).

Jonathan D. King

Plaintiff(s),

v.
Bombardier Aerospace Corporation,
CAVIC Aviation Leasing (Ireland) 22 Co.
Designated Activity Company

Defendant(s).

CHAPTER 7
Case No.: 2:17-bk-21386-SK
Adv. No.: 2:19-ap-01147-SK

**REDACTED COURT'S MEMORANDUM OF
DECISION ON "MOTION TO DISMISS
COUNTS I, III, IV, V, VI, AND VII OF THE
TRUSTEE'S ADVERSARY COMPLAINT,"
DOCKET #59, FILED BY CAVIC AVIATION
LEASING (IRELAND) 22 CO. DESIGNATED
ACTIVITY COMPANY**

Date: 9/30/2020
Time: 9:00 a.m.
Courtroom: 1575

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On 9/30/20 at 9:00 a.m., the Court heard the “Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustee’s Adversary Complaint” (Motion), Docket #59, filed by CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company (CAVIC). Appearances were as noted on the record. All parties were given an opportunity to be heard. At the conclusion of the 9/30/20 hearing, the Court took the Motion under submission.

On 10/7/20, the Court issued a Memorandum of Decision regarding the Motion. Docket #157. On 10/10/20, Bombardier Aerospace Corporation and CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company filed a “Joint Unopposed Emergency Motion to Remove Memorandum Decisions and Substitute Them with the Attached Redacted Memorandum Decisions” (Redaction Motion). Docket #161. On 10/13/20, the Court entered an order granting the Redaction Motion. Docket #163. A copy of the Court’s Memorandum of Decision, which was redacted per Docket #163, is attached hereto.

Date: October 15, 2020


Sandra R. Klein
United States Bankruptcy Judge

Before the Court is a “Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustee’s Adversary Complaint” (Motion) filed by CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company (CAVIC). AP Docket #59.¹ On 2/14/20, Jonathan D. King (King), in his capacity as chapter 7 trustee (Trustee) of Zetta Jet USA, Inc. (Zetta USA) and Zetta Jet PTE, Ltd. (Zetta Singapore, and together with Zetta USA, the Debtors), filed an “Opposition to CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company’s . . . Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustee’s Adversary Complaint” (Opposition). AP Docket #75. On 2/28/20, CAVIC filed a “Reply in Further Support of Their Motion to Dismiss Counts I, III, IV-VII of the Trustee’s Adversary Complaint” (Reply). AP Docket #82.

On 9/30/20, the Court held a hearing on the Motion, during which counsel for the Trustee and CAVIC appeared and were given an opportunity to be heard. At the conclusion of the hearing, the Court took the Motion under submission. Based on the argument in the pleadings and argument of counsel during the hearing, and for the reasons stated in the analysis below, the Court rules as follows: Counts I, III, IV, V, VI, and VII are dismissed with leave to amend. This memorandum constitutes the Court’s findings of fact and conclusions of law regarding the legal sufficiency of the counts at issue in the Motion.

I. Facts

a. Bankruptcy Cases

On 9/15/17 (Petition Date), Zetta USA and Zetta Singapore filed chapter 11 petitions (collectively, Cases). Zetta USA Docket #1; Zetta Singapore Docket #1. King was appointed as the chapter 11 trustee, and after the Cases were converted, he was appointed as the chapter 7 trustee. Zetta USA Docket #s 159, 452, 458.

b. Adversary Proceeding

On 5/21/19, the Trustee filed an adversary complaint (Complaint) against CAVIC and Bombardier Aerospace Corporation (Bombardier), which alleges that the Debtors, CAVIC, and Bombardier were parties to a series of complex leveraged lease financing transactions involving four Bombardier Global 6000 Aircraft (Four Aircraft).² AP Docket #1. According to the Complaint, CAVIC financed the Four Aircraft and the parties intended that the Debtors would pay the financed amount, plus interest, over time under disguised financing arrangements. AP Docket #1.

¹ All references to “Zetta USA Docket” are to the docket in In re Zetta Jet USA, Inc., 17-bk-21386-SK. All references to “Zetta Singapore Docket” are to the docket in In re Zetta Jet PTE Ltd., 17-bk-21387-SK. All references to “AP Docket” are to the docket in Jonathan D. King v. CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company et al., 19-ap-01147-SK (AP).

² The Four Aircraft are Bombardier Global 6000 aircraft with manufacturer serial numbers ending in: 1) 9764 (Aircraft 9764); 2) 9740 (Aircraft 9740); 3) 9716 (Aircraft 9716); and 4) 9788 (Aircraft 9788). Complaint ¶ 1; Ex. I.

The Complaint contains the following counts against the following parties that are at issue in the Motion:

- 1) Declaratory Judgment that the Financed Leases³ Are Financings and Not True Leases, against CAVIC (Count I);
- 2) Declaratory Judgment that CAVIC’s Security Interest in the Refund⁴ Is Not Perfected, against CAVIC (Count III);
- 3) The Unperfected Security Interest in the Refund Must Be Avoided and Preserved for the Benefit of the Debtors’ Estate, under 11 U.S.C. § 544(a)(1), against CAVIC (Count IV);
- 4) The Right to the Refund Is Recoverable for the Benefit of the Estate, under 11 U.S.C. § 550(a), against CAVIC (Count V);
- 5) The Refund Is Property of the Estate, under 11 U.S.C. § 542(a), against Bombardier (Count VI); and
- 6) Avoidance and Recovery of Preferential Transfers, under 11 U.S.C. §§ 547 and 550, against CAVIC (Count VII).

Complaint ¶¶ 123-33, 140-70.

II. Legal Standards

a. Motions to Dismiss Generally

Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP or Rules) applies in adversary proceedings and provides that a party may assert the defense of “failure to state a claim upon which relief can be granted.” Fed. R. Bankr. P. 7012(b); In re Kvassay, 2014 WL 2446181, at *9 (B.A.P. 9th Cir. May 30, 2014). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the allegations in the complaint. Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Student Loan Mktg. Ass’n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998). “A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990)).

In resolving a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, and accept all well-pled factual allegations as true. Johnson, 534 F.3d at 1122; Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001). The Court, however, is not bound by conclusory statements, statements of law, and

³ The Complaint defines the: 1) “Delivered Financed Leases” as the lease financing transactions involving Aircraft 9764, 9716, and 9740; and 2) the “Undelivered Financed Lease” as the lease financing transaction that was intended to result in the manufacturing and delivery of Aircraft 9788. Complaint ¶ 2. The “Financed Leases” are defined as the “Delivered Financed Leases” and the “Undelivered Financed Lease.” Id.

⁴ The “Refund” is \$30 million (\$30 Million PDP or PDP) paid to Bombardier to manufacture Aircraft 9788 pursuant to the “Aircraft Purchase Agreement” (APA). Complaint ¶ 1, Ex. A.

unwarranted inferences cast as factual allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (citations omitted). A complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.” Id. at 562 (emphasis in original) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

In Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), the Supreme Court elaborated on the Twombly standard:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

The allegations of a complaint, along with other materials properly before the court on a motion to dismiss, can establish an absolute bar to recovery. See Weisbuch v. Cty. of L.A., 119 F.3d 778, 783 n.1 (9th Cir. 1997) (“If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.”). Generally, when ruling on a Rule 12(b)(6) motion to dismiss, courts cannot consider material outside the pleadings. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018); Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001). If matters outside of the pleadings are “presented to and not excluded by the court,” the motion to dismiss is converted to a motion for summary judgment under Rule 56 and all parties must be given a “reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). There are, however, two exceptions to this rule: 1) matters that the Court can take judicial notice of under Rule 201 of the Federal Rules of Evidence; and 2) the “incorporation-by-reference doctrine.” Khoja, 899 F.3d at 998. The incorporation-by reference doctrine treats certain documents as if they were “part of the complaint itself.” Id. at 1002.

The party seeking dismissal under Rule 12(b)(6) has the burden of proof. In re Reed, 532 B.R. 82, 88 (Bankr. N.D. Ill. 2015); In re Enron Corp., 316 B.R. 434, 449 (Bankr. S.D.N.Y. 2004).

III. Argument and Analysis

a. Count I

1. Motion

i. Recharacterization

CAVIC argues that the Trustee has the burden of proof regarding recharacterization. Motion at 17 (citing Hitchin Post Steak Co. v. General Electric Capital Corp. (In re HP Distribution, LLP), 436 B.R. 679, 682 (Bankr. D. Kan. 2010); In re Pillowtex, 349 F.3d 711, 716 (3d Cir. 2003)). It highlights that there is a rebuttable presumption that a transaction documented as a lease is a lease agreement rather than a security agreement, and the party seeking recharacterization has the burden of rebutting that presumption by proving the elements of Uniform Commercial Code (UCC) § 1-204(b)⁵ or establishing that the economic realities of the transaction created a security agreement. Id. (citing Mason v. Heller Fin. Leasing (In re JII Liquidating, Inc.), 341 B.R. 256, 259 (Bankr. N.D. Ill. 2006); Royal T Energy v. ENGS Com. Fin. Co. (In re Royal T Energy), 596 B.R. 525, 530 (Bankr. E.D. Tex. 2019)). According to CAVIC, California law applies UCC § 1-203, which enumerates six factors that do not create a security interest merely because of their presence. Id. at 18 (citing Cal. Com. Code § 1203; WorldCom Inc. v. Gen. Elec. Global Asset Mgmt. Servs. (In re WorldCom, Inc.), 339 B.R. 56, 71 (Bankr. S.D.N.Y. 2006)).

A. Aircraft 9788

CAVIC argues that Aircraft 9788's "lease" cannot be recharacterized because: 1) the aircraft was never delivered to the lessor; 2) the "Lease Term" did not begin until delivery of the aircraft, so "Zetta Jet" did not have a valid lease; and 3) a precondition to the "Lessor's" obligations to lease the aircraft to Zetta USA was delivery of the aircraft to the "Owner," ZJ6000-4 Statutory Trust. Motion at 18 (citing Complaint ¶¶ 2; Ex. M; Ex. V). CAVIC argues that the unsigned "Leasing proposals for 2 Bombardier's [sic] Global 6000 jets" dated 11/17/16 (Term Sheet), Ex. D, is irrelevant to Aircraft 9788 because there was no lease for that aircraft. Id. at 19. According to CAVIC, UCC § 1-203 and "applicable case law" provide for recharacterization only of a transaction in the form of a lease, and whether the "lease" for Aircraft 9788 is a true lease or a disguised financing is moot because without a valid agreement there is nothing to recharacterize. Id. at 18.

B. Aircraft 9716, 9740, and 9764

CAVIC asserts that the Complaint does not plead facts showing that the re-characterization claim regarding Aircraft 9716, 9740, and 9764 is plausible because the Trustee provides no information regarding the Financed Leases for those aircraft. Motion at 19. According to CAVIC, the Complaint includes the Term Sheet between AVIC International Leasing Co. Ltd. (AVIC) and Zetta Singapore to support its

⁵ CAVIC cites UCC § 1-204(b), which addresses "value" and does not contain a subsection (b).

recharacterization claims, and the Complaint indicates that the Term Sheet applies “*only to the financing arrangements for Aircraft 9764 and 9788.*” *Id.* (emphasis in original) (citing Complaint ¶ 70). CAVIC contends that the Term Sheet provides no support for recharacterizing *any* leases for Aircraft 9716 and 9740, which were executed on 5/24/16 and 9/16/16, respectively. *Id.* (emphasis in original).

CAVIC argues that the Term Sheet does not establish a plausible claim for recharacterization of Aircraft 9764’s lease because: 1) the Term Sheet is unsigned; 2) there are no allegations that the Term Sheet was negotiated for the benefit of CAVIC; 3) AVIC, which is a party to the Term Sheet, is not a party to the Complaint; 4) the Term Sheet is a non-binding letter of intent, which may or may not have been accepted, amended, or superseded and is irrelevant in light of integration clauses in later agreements; 5) the Term Sheet cannot substitute for “Aircraft 9764 Leasing Transaction documents”⁶ that are neither described nor identified; and 6) the Term Sheet is governed by English law, which does not permit recharacterization of agreements like the aircraft leases at issue here. *Id.* CAVIC asserts that without facts alleging *which* leasing transactions for Aircraft 9716, 9740, and 9764 the Complaint is seeking to recharacterize, Count I must be dismissed because it does not satisfy the Twombly and Iqbal requirements. *Id.* at 19-20 (emphasis in original).

ii. Applicable Law

CAVIC argues that the Complaint is premised on the false assumption that U.S. law regarding recharacterizing contracts will be applied to the “Aircraft Leases,”⁷ but all of the relevant documents—the “Aircraft Head Leases,”⁸ all of the “Aircraft Subleases,” and a majority of key agreements, including: 1) the “Facility Agreement for Pre-Delivery Payments . . .” (PDP Facility Agreement) between Export Development Canada (EDC) and CAVIC (Ex. F); 2) the “Facility Agreement in Respect of Two (2) Bombardier Inc. Model BD-700-1A10 Aircraft with Manufacturer’s Serial Numbers 9764 and 9788” (3/16/17 Facility Agreement) between EDC and ZJ6000-4 Statutory Trust and TVPX ARS Inc. (TVPX) (Ex. O); 3) the Sublease between TVPX and Zetta USA (Ex. M); 4) the “Deed of Guarantee and Indemnity” (Head Lease Guarantee) regarding Aircraft 9788 between ZJ6000-4 Statutory Trust and the Debtors (Ex. J); and 5) the “Deed of Guarantee and Indemnity” (FPA Guarantee) between CAVIC and the Debtors (Ex. L) regarding the “Forward Purchase Agreement” (FPA) for Aircraft 9764 and 9788 (Ex.

⁶ Neither the Complaint nor the Motion defines the “Aircraft 9764 Leasing Transaction,” or “Leasing Transactions.”

⁷ Neither the Complaint nor the Motion defines the “Aircraft Leases.”

⁸ The Complaint attaches: 1) an “Aircraft Lease Agreement” regarding Aircraft 9788 (Head Lease), Ex. I; and 2) an “Aircraft Sub-Lease Agreement” regarding Aircraft 9788 (Sublease), Ex. M. The Motion indicates that the “Head Leases” and “Sub-Leases” for Aircraft 9716, 9740, and 9764 are attached to the Proofs of Claims (POCs) filed by the ZJ6000-1 Statutory Trust (POC #163), ZJ6000-2 Statutory Trust (POC #164), and ZJ6000-3 Statutory Trust (POC #166). Motion at 11 n.2.

K)⁹—mandate that English law applies. Motion at 20-21 (citing LT Leasing, Inc. v. NHA Hamburger Assekuranz-Agentur GmbH, 2015 WL 1622846 (E.D. Cal. 2015); Hatfield v. Halifax PLC, 564 F.3d 1177, 1183 (C.D. Cal. 2009); Pannell Kerr Forster Intern. Ass’n Ltd. v. Quek, 5 Fed. Appx. 574 (9th Cir. 2001); Richards v. Lloyd’s of London, 135 F.3d 1289 (9th Cir. 1998)).

CAVIC claims that under English law, “there is no risk of recharacterization of an aircraft lease as a security agreement.” Id. at 21 (quoting Thomas A. Zimmer & Neil Poland, Aircraft Operating Leases – New York Law or English Law?, Aviation Finance and Leasing (<https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2018/08/afl2018aircraft-operating-leases.pdf>)). It contends that English and U.S. law diverge on whether an owner retains title and ownership in property that is the subject of a lease agreement. Id. (citing Gerard McCormack, Secured Credit Under English and American Law 52-53 (2004); HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681, 688 (D.N.J. 2010)). According to CAVIC, under English law, there is a clear, formalistic distinction between a sale and a hire purchase or lease: a hire purchase agreement is viewed as a “lease with an option to purchase provided at the end of the term of the lease, and unless the option is exercised, the lessor retains ownership of the goods.” Id. (citing HFGL Ltd., 700 F.Supp. at 688). CAVIC claims that the U.K.’s approach “sharply distinguishes the grant of security from the retention of title under conditional sale, hire-purchase and leasing agreements,” because “the buyer, hirer or lessee has merely a possessory interest, subject to which the seller, owner or lessor continues to enjoy absolute ownership by virtue of the agreement between the parties.” Id. (citing Goode, R. and Gullifer, L. (2017), Goode and Gullifer on Legal Problems of Credit and Security (6th Ed.), London, Sweet & Maxwell, at ¶ 1-04).

CAVIC asserts that under English law, a lessor retains ownership and a lease may not be recharacterized unless and until the lessee exercises a purchase option. Id. Applying English law to the “Aircraft Leases,” absolute ownership of each aircraft remained with the “Aircraft Trusts”¹⁰ until the purchase option was exercised, which never occurred, and Count I must be dismissed. Id. at 21-22. CAVIC claims that Zetta USA did not hold a valid lease to Aircraft 9788 because Bombardier never manufactured and delivered that aircraft to the owner, ZJ6000-4 Statutory Trust. Id. at 22. CAVIC concludes that for Aircraft 9788, there was no sublease that could be recharacterized as a disguised financing, and the Trustee’s claim under Count I collapses entirely. Id.

⁹ It is unclear which documents the Trustee wants to recharacterize in Count I, which seeks a declaratory judgment that the Financed Leases are actually financing agreements and not true leases. Complaint ¶ 133. In the Opposition, the Trustee does not allege that CAVIC incorrectly identifies the documents that he seeks to recharacterize.

¹⁰ The “Aircraft Trusts” are ZJ6000-1 Statutory Trust, ZJ 6000-2 Statutory Trust, ZJ6000-3 Statutory Trust, and ZJ6000-4 Statutory Trust. Motion at 13 n.4, 14; Complaint at ¶¶ 29, 32, 35, 38. According to the Complaint, each of these statutory trusts was a special purpose vehicle (SPV) established by CAVIC and all decisions regarding these trusts were under CAVIC’s control. Complaint ¶¶ 29, 32, 35, 38.

2. Opposition

i. Recharacterization

The Trustee argues that Count I states a claim for recharacterization. Opposition at 17. He argues that Bankruptcy Code § 365 does not define a “lease” but in In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988), the Ninth Circuit held that an agreement that otherwise qualified as a lease under California law based on “surface formalities” would be subject to recharacterization under § 365 as a disguised financing if the “economic realities so dictated.” Id. The Trustee highlights that in Moreggia, the lease required fixed monthly payments over 40 years, which would end when the underlying bond debt was repaid, and because the rent payments were calculated based on debt service, the payments did not relate to the value of the possessory right and no true landlord/tenant relationship was created. Id. The Trustee claims that the same is true here: the Complaint alleges that the “lease payments” were calculated based on CAVIC’s debt service obligations to EDC, and once all the payments were made, and the EDC debt was extinguished, the Debtors could buy the aircraft for █████ each. Id. at 17-18.

The Trustee contends that even if the Court applies California law, CAVIC will still not prevail.¹¹ Id. at 18. He argues that state law will be consulted to the extent that it uses factors to glean the economic substance of the transaction. Id. (citing United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 615 (7th Cir. 2005)). The Trustee contends that California’s version of UCC § 1-203, contained in Cal. Com. Code § 1203, sets forth a bright-line test, under which a transaction in the form of a lease *per se* creates a security interest if: 1) the consideration the lessee pays to the lessor for the right to possess and use the goods is an obligation for the term of the lease and is not subject to termination by the lessee; and 2) one of the following four factors is met: i) the original term of the lease is equal to or greater than the remaining economic life of the goods; ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods; iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or iv) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement. Id. (citing UCC § 1-203; Blackstone Equip. Fin., L.P. v. Bernhard, 2011 WL 13227750, at *2 (C.D. Cal. May 5, 2011); In re WorldCom, Inc., 339 B.R. 56, 65 (Bankr. S.D.N.Y. 2006)).

¹¹ The Trustee argues that courts uniformly agree that the economic substance of a transaction prevails over its form, but he acknowledges that courts disagree regarding whether state or federal law governs if a transaction is a “true lease” or a “disguised” financing. Id. at 18 n. 6 (citing In re PCH Assocs., 804 F.2d 193, 198-200 (2d Cir. 1983); Moreggia, 852 F.2d at 1182-84; United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 615 (7th Cir. 2005), cert. denied 126 S.Ct. 1465 (Mar. 6, 2006); In re Pillowtex, Inc., 349 F.3d 711, 716 (3d Cir. 2003); In re Continental Airlines, Inc., 932 F.2d 282 (3d Cir. 1991)).

According to the Trustee, Count I contains facts demonstrating that each element is met: 1) it alleges that Zetta Singapore's obligation to make payments is for the term of the Financed Leases and is not subject to termination by the Debtors; 2) it pleads that after all payments were made under the Financed Leases, the Debtors had the option to buy the aircraft for the nominal amount of [REDACTED]; and 3) the arrangement involving Aircraft 9788 was nearly identical to each of the Financed Leases for Aircraft 9764, 9740, and 9716. Id. at 18-19 (citing Complaint ¶¶ 74, 87, 90; Ex. I § 24.1). The Trustee concludes that each of the Financed Lease transactions is subject to recharacterization as security interests under UCC § 1-203(b)(4). Id. at 19.

The Trustee contends that even if an agreement is not a *per se* disguised financing, courts examine the "facts of each case," also known as utilizing the "economic realities test." Id. (citing UCC § 1-203(a); In re Pac. Exp., Inc., 780 F.2d 1482 (9th Cir. 1986)). The Trustee claims that when analyzing a transaction, most courts agree that a security interest is created when at the end of the lease term, the lessor retains no meaningful reversionary interest in the goods. Id. (citing WorldCom, 339 B.R. at 70-72; In re Phoenix Equip. Co., Inc., 2009 WL 3188684, at *10 (Bankr. D. Ari. Sept. 30, 2009)). The Trustee elaborates that ordinarily, a meaningful reversionary interest means that: 1) at the outset of the lease the parties expect the goods to retain some significant residual value at the end of the lease term; and 2) the lessor retains some entrepreneurial stake (either the possibility of gain or the risk of loss) in the value of the goods at the end of the lease term. Id. (citing In re Grubbs Const. Co., 319 B.R. 698, 711 (Bankr. M.D. Fla. 2005)). He argues that California courts focus on two aspects of a lease when evaluating whether there is a meaningful reversionary interest: 1) an option to purchase; and 2) a provision for the lessee's acquisition of equity in the goods. Id. at 19-20 (citing Addison v. Burnett, 41 Cal. App. 4th 1288, 1296 (1996)).

The Trustee asserts that Count I pleads facts showing that the "economic realities of the transactions indicate that the arrangements between the parties were not true leases, but rather disguised financings." Id. at 20 (citing Complaint ¶¶ 9, 88). The Trustee contends that CAVIC had no reversionary interest in the aircraft at the end of the lease term because of the [REDACTED] purchase option for the aircraft. Id. (citing Complaint ¶¶ 87, 90). The Trustee claims that CAVIC had no interest in owning the aircraft but only in receiving principal and interest payments from the Debtors. Id. (citing Complaint ¶¶ 130-31). According to the Trustee, CAVIC concedes that if he can show the elements of the UCC bright-line test or establish that the economic realities of the transaction created a security agreement, Count I states a claim. Id.

The Trustee argues that the Complaint clearly identifies the Financed Leases that should be recharacterized: the Delivered Financed Leases and the Undelivered Financed Lease. Id. (citing Complaint ¶ 2).

In response to CAVIC's argument that the transaction for Aircraft 9788 cannot be recharacterized because the aircraft was not manufactured and delivered, the Trustee highlights that UCC § 1-203 governs a "transaction in the form of a lease," which, according to the Trustee, "is precisely what this was." Id. The Trustee notes that

CAVIC provides no support for its argument that the Undelivered Financed Lease transaction cannot be recharacterized simply because the aircraft was not delivered. Id.

The Trustee indicates that a recharacterization finding will bolster the legal conclusion that the “Assignment of Rights Under the Aircraft Purchase Agreement . . .” (APA Assignment) (Ex. R) was a security assignment and not an absolute assignment. Id. at 20-21. He claims that the parties never intended CAVIC to own Aircraft 9788, but instead, they intended that the Debtors would own the plane subject to CAVIC’s rights as a lender under a disguised financing structure. Id. at 21.

Regarding the Term Sheet, the Trustee argues that CAVIC ignores “vast swathes” of the Complaint that sufficiently allege key portions of the Delivered Financed Leases, including incorporating by reference the detailed discussion of the Undelivered Financed Lease that was attached to the Complaint. Id. (citing Complaint ¶¶ 70-88, 90-91). The Trustee claims that he is not required to attach to the Complaint all of the master leases and subleases for the Delivered Financed Leases to meet Fed. R. Bankr. P. 7008’s requirements. Id. (citing U.S. ex rel. Chabot v. MLU Servs., Inc., 544 F.Supp.2d 1326, 1329 (M.D. Fla. 2008)).

The Trustee argues that CAVIC focuses on the Term Sheet instead of addressing the Complaint’s allegations, including: 1) the majority of the terms in the Term Sheet are identified in each relevant lease document attached to the Complaint, Complaint ¶¶ 71-73; and 2) after all lease payments were made, the Financed Leases contain the same purchase option, Complaint ¶¶ 71-73, 87, 90. Id. at 21-22. The Trustee contends that the Term Sheet, at a minimum, provides conclusive parol evidence that the parties intended the aircraft transactions to be disguised financings. Id. at 22. He asserts that CAVIC discounts the Term Sheet by focusing on the unsigned version attached to the Complaint. Id. But, the Trustee argues that the lack of signatures is irrelevant for purposes of a motion to dismiss because all factual allegations—including the provisions in the unsigned Term Sheet and those terms that are probative of the intent of the parties—are assumed to be true. Id.

Finally, the Trustee highlights that the Complaint indicates that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases for CAVIC. Id. (citing Complaint ¶¶ 26, 46). He notes that under the Head Lease and Sublease. Id. (citing Ex. I at § 30.1.4; Ex. M at § 27.1). The Trustee contends that CAVIC ignores the extensive analysis that shows the provisions of the Term Sheet are contained in the “transaction documents,”¹² and CAVIC’s argument is meritless that there are no allegations demonstrating that the Term Sheet was intended for its benefit. Id. (citing Complaint ¶¶ 71-73).

ii. Applicable Law

¹² Neither the Complaint nor the Opposition defines the “transaction documents.”

Aircraft 9716 and 9740.” Id. (emphasis in original). CAVIC claims that these are only a few of the many differences among the four Financed Leases, and without more specific pleading, Count I does not adequately describe the Financed Lease transactions the Trustee seeks to recharacterize and should be dismissed. Id.

CAVIC argues that Count I, which seeks relief no different than that requested in Count III regarding Aircraft 9788, is a request for an advisory opinion because an unenforceable and ineffective lease cannot be resurrected as an enforceable security interest. Id. (citing Peterson v. Hotel Emp. & Rest. Emp. Int’l Union Welfare Fund, 288 F. Supp. 2d 1145, 1150 (D. Nev. 2003); Suni-Citrus Prod. Co. v. Vincent, 170 F.2d 850, 853 (5th Cir. 1948)). CAVIC claims that the relevant instrument here—the Undelivered Financed Lease—will never become effective. Id. at 13.

ii. Applicable Law

CAVIC argues that English law requires dismissal of Count I, highlighting that in the Motion, it cited HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, 700 F. Supp. 2d 681, 688 (D.N.J. 2010), which examined the distinction between English and American law regarding ownership of property and equipment leases. Id. at 13. It argues that HFGL discusses at length the difference regarding a financed sale and a lease under English and U.S. law and the fact that, under English law, the lessor retains ownership of the property. Id. CAVIC contends that articles cited in HFGL and in the Motion show that English law does not permit recharacterization of leases, and the Trustee offers no authority to rebut this analysis. Id.

CAVIC asserts that the Trustee fails to acknowledge controlling Ninth Circuit precedent, which compels use of federal choice of law rules to determine whether to apply English law, as selected by the parties, and the Trustee erroneously treats Article 9 of the Cal. Com. Code as a choice of law provision. Id. CAVIC describes Eagle Enterprises as an out of circuit, inapposite case that is contrary to Ninth Circuit authority, which follows the Restatement (Second) of Conflict of Laws. Id. (citing In re Sterba, 852 F.3d 1175, 1179 (9th Cir. 2017)). According to CAVIC, a bankruptcy court applies federal common law choice-of-law rules to determine the enforceability of contractual choice-of-law provisions, even when resolution of the underlying dispute turns on state law. Id. (citing Mandalay Resort Grp. v. Miller, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003)).

CAVIC claims that when a dispute does not concern the formation of an agreement, the law chosen by the parties need not have any reasonable relationship to the place of creation or performance of the contract. Id. at 13-14 (citing In re CMR Mortg. Fund, LLC, 416 B.R. 720, 729 (Bankr. N.D. Cal. 2009)). CAVIC asserts that there is no dispute that the “Aircraft Leases”¹³ were binding, executed contracts, and the parties were sophisticated, well-represented entities who expressly contracted to have English law apply to the “Aircraft Leases” and many of the key “Financed Transaction

¹³ Neither the Complaint nor Reply defines the “Aircraft Leases.”

CAVIC argues that that English law applies because the parties selected English law to govern all of the “Aircraft Head Leases” and “Aircraft Subleases,” and a majority of key agreements. Motion at 20-21. The Trustee responds that California law applies based on Cal. Com. Code §§ 1301, 9301, 1201, and 1203 and In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998). Opposition at 24. CAVIC replies that Eagle Enterprises is contrary to the Restatement (Second)’s rule, that when a dispute does not concern the formation of the agreement, the law chosen by the parties need not have any reasonable relationship to the place of creation or performance of the contract. Reply at 13-14.

Here, it is undisputed that the parties selected English law to govern the Head Lease and Sublease regarding Aircraft 9788, as well as the PDP Facility Agreement, the 3/16/17 Facility Agreement, the Head Lease Guarantee, and the FPA Guarantee. Ex. F § 36, Ex. I § 32.1, Ex. J § 18, Ex. M § 29.1, Ex. O § 43. Further, the parties who executed the relevant documents were sophisticated and well-represented; there are no allegations that any party lacked the capacity to contract or that a binding contract was not formed. In re CMR Mortg. Fund, LLC, 416 B.R. 720, 729 (Bankr. N.D. Cal. 2009) (enforcing a New York choice of law clause where there were sophisticated and well-represented parties and no allegations that any party lacked capacity or that a binding contract was not formed). Because the making of these agreements is not in dispute, English law, which was agreed to by the parties, must be applied.

The Trustee’s reliance on In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998), to support his position that Cal. Com. Code §§ 1301, 9301, and 1203 displace extraterritorial choice of law clauses regarding recharacterization of a lease under UCC Article 9, is misplaced. Opposition at 23-24. In Eagle Enters., 223 B.R. at 292, the parties agreed that Pennsylvania choice of law rules governed, whereas here, the relevant documents in this case contain no indication of which choice of law rules govern, and the applicable choice of law rule is the Restatement (Second), which requires application of English law.

iii. Do Choice of Law Provisions Apply to the Trustee?

In the Motion, CAVIC does not address whether choice of law provisions apply to the Trustee. The Trustee argues that cases are “fairly uniform in holding that contractual choice of law provisions are not binding on third parties or otherwise capable of effecting the reclassification of security agreements into leases,” and he claims that he is a third party representative of all creditors, who has the power of a judgment lien creditor. Opposition at 24-25 (citing In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998); Carlson v. Tandy Comput. Leasing, 803 F.2d 391 (8th Cir. 1986); In re Morse Tool, Inc., 108 B.R. 384 (Bankr. D. Mass. 1989)).

CAVIC replies that the Trustee is not asserting a fraudulent conveyance or other claim that would belong to the creditors, but rather he seeks a declaration characterizing the nature of the parties’ agreement. Reply at 15. According to CAVIC, the court in In re

Zukerkorn, 484 B.R. 182 (9th Cir. 2012), held that contractual choice of law clauses apply in the latter circumstances, and creditors' interests are irrelevant. Id.

In Eagle Enterprises, the court highlighted that § 1105(a) of the Pennsylvania UCC allowed contracting parties to choose the law applicable to *their* relationship, and based on fundamental principles of contract law, that statute did not let contracting parties make choice of law decisions that affected the rights of third parties. In re Eagle Enters., Inc., 223 B.R. 290, 293 (Bankr. E.D. Pa. 1998) (emphasis in original). The court stated that the chapter 7 trustee stood in the role of a third party as a representative of all creditors and he was not bound by a German choice of law provision. Id. (citing 3 Collier on Bankruptcy ¶ 323.02[1] (15th ed. 1998)).

In Carlson v. Tandy Comput. Leasing, 803 F.2d 391 (8th Cir. 1986), Larry Gene Brock (Brock) executed an agreement to lease computer equipment from Tandy Computer Leasing (Tandy). Id. at 392. After Brock filed bankruptcy, Thomas Carlson (Carlson) was appointed as the trustee, and he filed an adversary proceeding seeking the computer equipment. Id. at 392-93. Tandy countered that the agreement was a lease and it had a right to repossess. Id. at 393. The bankruptcy court applied Missouri law and concluded that Tandy held an unperfected security interest in the computer equipment. Id. The district court reversed, concluding that the agreement provided that it would be governed by Texas law under which the agreement was a lease. Id. Brock appealed and the Eighth Circuit examined the Missouri choice of law rules contained in its UCC to determine the applicable law and noted that under Missouri law contracting parties may generally agree that the contract would be governed by the law of a particular state. Id. But, the court noted that the Missouri UCC had a policy of prohibiting choice of law agreements when the rights of third parties are at stake. Id. at 394. Because the dispute implicated the rights of third-party creditors, the Eighth Circuit concluded that Missouri law applied. Id. at 393.

In In re Morse Tool, Inc., 108 B.R. 384 (Bankr. D. Mass. 1989), Barclays Business Credit, Inc. (Barclays) and Morse Tool, Inc. (Morse Tool) entered into a "General Loan and Security Agreement," which contained a Connecticut choice of law clause. Id. at 386. After Morse Tool filed bankruptcy, David Ferrari (Ferrari) was appointed as trustee and he filed a complaint against Barclays to avoid transfers and obligations that were voidable under "applicable law." Id. at 384-85. Ferrari and Barclays filed cross-motions for summary judgment: Ferrari claimed that the "applicable law" was Massachusetts and Barclays claimed that it was Connecticut. Id.

The court applied the Restatement (Second) of Conflict of Laws choice of law analysis and determined that the Connecticut choice of law clause carried little weight in the context of the adversary proceeding because:

The parties to a contract can specify which forum's law will govern their contract, and courts often follow their choice because both parties to the contract, and therefore to the suit on the contract, have agreed upon the choice. But this is a fraudulent conveyance action, not a contract action.

And one of the parties to this suit—the Trustee, who stands in the shoes of the creditors—was not a party to the contract. The parties to a contractual conveyance cannot in their contract make a choice-of-law that binds creditors who allege that they were defrauded by the conveyance. The choice-of-law binds only parties to the contract, not the Trustee or the creditors.

Id. at 186.

In contrast to Eagle Enterprises, Carlson, and Morse Tool, in In re Zukerkorn, 484 B.R. 182 (B.A.P. 9th Cir. 2012), the Ninth Circuit Bankruptcy Appellate Panel (BAP) enforced a trust settlor’s choice of law provision against a bankruptcy trustee. Sally Zukerkorn (Sally) established a revocable trust (Trust), which contained a spendthrift provision¹⁵ and a Hawaii choice of law clause. Id. at 186. After Sally died, her son, Herbert Zukerkorn (Herbert) became the trustee. Id. When Herbert and his wife filed a chapter 7 bankruptcy petition in California, Linda Green (Green) was appointed as trustee. Id. Shortly thereafter, Green filed a motion to compel turnover of 25% of the distributions paid to Herbert under the Trust, contending that California law applied, and 25% of the distributions was property of the estate pursuant to Cal. Prob. Code § 15306.5. Id. at 186-87. Later, Green filed an amended motion, seeking turnover of: 1) the entire principal and all income from the Trust; and, alternatively, 2) Herbert’s postpetition income distributions. Id. at 187. On cross-motions for summary judgment, the bankruptcy court concluded that the Trust was governed by Sally’s choice of Hawaii law, and neither the principal nor interest paid or payable to Herbert under the Trust was property of the estate because the spendthrift provisions were enforceable under Hawaii law. Id.

Green appealed, claiming that the bankruptcy court erred in upholding Sally’s choice of Hawaii law. Id. at 187-88. The BAP noted that federal courts in the Ninth Circuit utilize the Restatement (Second) of Conflict of Laws for choice of law rules, and it applied Restatement § 187(2). Id. at 189-90. According to the BAP, “the Restatement reflects a strong policy favoring enforcement of choice of law provisions,” and Sally’s choice of Hawaii law would be upheld if Hawaii had a substantial relation to the Trust. Id. at 192. Because there was “little question” that Hawaii had a substantial relationship to the Trust—Sally was domiciled in Hawaii when she created it, her assets were in Hawaii, Herbert was domiciled in Hawaii and was a citizen there for more than 70 years, and the Trust was administered by a Hawaii corporate trustee—and a reasonable basis otherwise existed for the choice of law, the BAP held that Sally’s choice of Hawaii law would be enforced unless Green could establish that: 1) the chosen law was contrary to a fundamental policy of California; and 2) California had a materially greater interest in the determination of the particular issue. Id. Because Green was unable to establish

¹⁵ The spendthrift clause provided that: “No interest under this instrument shall be transferable or assignable by any beneficiary, or be subject during said beneficiary’s life to the claims of said beneficiary’s creditors.” Id.

either, the BAP agreed with the bankruptcy court that Sally’s choice of Hawaii law applied to the Trust. Id. at 194.

The Trustee’s argument, that he is not bound by the parties’ English choice of law provisions because he represents third-party creditors who did not agree to those provisions, Opposition at 24-25, is unpersuasive in light of Zukerkorn, where the BAP, applying the Restatement’s choice of law rules, enforced Sally’s choice of Hawaii law even though provisions in her Trust affected the rights of third party creditors represented by the chapter 7 trustee.¹⁶ Eagle Enterprises and Carlson are inapposite because they were decided under Pennsylvania and Missouri choice of law rules, respectively and Morse Tool is distinguishable because there, the court refused to enforce a choice of law clause in an allegedly fraudulent agreement, whereas here, there are no allegations of any fraudulent conduct.

iv. Recharacterization Requirements Under English Law

CAVIC argues that under English law, there is no risk of recharacterization of an aircraft lease as a security agreement. Motion at 21 (citations omitted). It argues that English law contains a “clear, formalistic distinction” between a sale and a hire purchase or lease. Id. The Trustee counters that even assuming English law applied, the Court should disregard CAVIC’s “caricature” of it as prohibiting recharacterization in all instances. Opposition 25. The Trustee asserts that CAVIC fails to cite any English or American case to support its assertion that there is no recharacterization risk under English law. Id. at 25 n.13. CAVIC replies that it cited HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681

¹⁶ The Court believes that Restatement § 187(1) applies, but even if the Court were to apply Restatement § 187(2) as the court did in Zukerkorn, the result would be the same. Restatement § 187(2) provides:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue

The § 187(2)(a) “reasonable basis” standard is a minimal standard and rarely, if ever, will parties choose a law without good reason. Zavec v. Yield Dynamics, Inc., 179 F. Appx. 116, 121-22 (3d Cir. 2006). Here, there was a reasonable basis for the choice of English law because the parties to the transactions are from all around the world. Complaint ¶¶ 22-30, 32-39. Further, international aircraft financing and leasing contracts are often governed by English law. Carlos Sierra, Ten Years of the Cape Town Convention and the Aircraft Protocol in Mexico, AIR & SPACE LAW. 11, 11 (2018) (indicating that international aircraft financing and leasing contracts are generally governed by New York or English law). And, the Trustee has not argued that application of English law would be contrary to any other state’s policy.

(D.N.J. 2010), which examined the distinction between English and U.S. law regarding ownership of property and equipment leases and demonstrates that English law does not permit recharacterization of leases. Reply at 13.

The laws of England and the United States “diverge on whether an owner retains title and ownership in property that is the subject of a hire purchase agreement.” HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681, 688 (D.N.J. 2010). Under English law, “there is a clear, formalistic distinction between a sale and a hire purchase or lease A hire purchase agreement is viewed as a ‘lease with an option to purchase provided at the end of the term of the lease.’” Id. (internal citations omitted); see also Hire Purchase, Black’s Law Dictionary (11th ed. 2019) (defining “hire purchase” as the British terminology for an “installment plan”). Unless the option is exercised, the lessor retains ownership of the goods. HFGL, 700 F.Supp.2d at 688. The English formal approach, “sharply distinguishes the grant of security from the retention of title under conditional sale, hire-purchase and leasing agreements, on the basis that the buyer, hirer or lessee has merely a possessory interest, subject to which the seller, owner or lessor continues to enjoy absolute ownership by virtue of the agreement between the parties.” Goode, R. and Gullifer, L. (2017), Goode and Gullifer on Legal Problems of Credit and Security (6th Ed.), London, Sweet & Maxwell, at ¶ 1-04. In contrast, the American “functional” approach to recharacterization under the UCC is to conduct a fact-intensive inquiry to determine whether an agreement in the form of a lease should properly be considered a security interest or installment contract. HFGL, 700 F.Supp.2d at 688.

In HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681 (D.N.J. 2010), cited by CAVIC and not addressed by the Trustee, HFGL Ltd. (HFGL) and CNH Capital Europe Ltd. (CNH) executed approximately 50 hire purchase agreements with Thornycroft 1862 Co. Ltd. and its affiliated companies (Thornycroft) that contained English choice of law provisions. Id. at 683-84. Thornycroft transported equipment from England to the United States, and Alex Lyon & Son Sales Managers & Auctioneers, Inc. (ALS) sold it at auction in the U.S. Id. at 684-85. After Thornycroft went into administration—the English law equivalent of bankruptcy—HFGL and CNH discovered that Thornycroft had smuggled the equipment and they filed suit against ALS for conversion and unjust enrichment. Id. at 682, 686. HFGL and CNH moved for summary judgment, arguing that under English law, they owned the equipment pursuant to the hire purchase agreements. Id. at 687. ALS challenged HFGL and CNH’s claim of ownership and asserted that the agreements should be interpreted under American law. Id.

The court noted that it was deciding a diversity case, and because New Jersey was the forum state, its choice of law rules governed and required the court to first determine whether there was a conflict between the potentially applicable laws. Id. The court determined that there was a true conflict between American and English law regarding whether an owner retains title and ownership of property that is the subject of a hire purchase agreement. Id. at 688. According to the court, English law formally distinguishes between a sale and a hire purchase, whereas American law conducts a

1. Motion

CAVIC argues that the Trustee fails to allege sufficient facts to show that he holds a plausible claim to the \$30 Million PDP under non-bankruptcy law. Motion at 22. According to CAVIC, for the Trustee to prevail on his 11 U.S.C. § 544(a) claim (Count IV), he must allege facts showing that: 1) Zetta Singapore had a legal or equitable interest in the \$30 Million PDP on the Petition Date, 9/15/17; and 2) a creditor holding a judgment lien under applicable state law would be able to attach the Debtors’ rights in and to the PDP. Id. at 24. CAVIC contends that the Complaint contains no such facts. Id.

CAVIC highlights that § 544(a) provides that a trustee may avoid “any transfer of *property of the debtor* . . . that is voidable by . . . a creditor that . . . obtains . . . a judicial lien on *all property on which a creditor on a simple contract could have obtained a judicial lien*, whether or not such a creditor exists.” Id. at 23 (emphasis added by CAVIC). CAVIC argues that a trustee’s rights in a debtor’s property during bankruptcy are no greater than the debtor’s rights outside of bankruptcy, and the estate does not possess anything more than the debtor did before filing bankruptcy. Id. at 22-23 (citing Mission Prod. Holdings Inc. v. Tempnology LLC (In re Tempnology), 139 S.Ct. 1652, 1663 (2019); Long Term Disability Plan Hoffman-La Roche, Inc. v. Hiler (In re Hiler), 99 B.R. 238, 244 (Bankr. D.N.J. 1989)). CAVIC asserts that whether a debtor has a legal or equitable interest in property so that it becomes “property of the estate” under § 541 is determined by applicable state law. Id. at 23-24 (citing Musso v. Ostashko, 468 F.3d 99, 105 (2d Cir. 2006); Robinson v. Howard Bank (In re Kors, Inc.), 819 F.2d 19, 22-23 (2d Cir. 1987); Ford v. Fed. Home Loan Mortg. Corp. (In re Bishop), 2009 WL 2231197, at *2 (Bankr. D.N.H. July 24, 2009)). CAVIC claims that if its alleged security interest under § 544(a)(1) were avoided, the Trustee would be in the position of an ideal lien creditor, armed with a judgment and with the power that state law confers on such a creditor. Id. at 23 (citing Musso, 468 F.3d at 104). CAVIC alleges that nothing in the Complaint “connects the dots” to show that a judicial lien creditor would have a plausible claim to assert a lien on the PDP because it never belonged to the Debtors. Id. at 22.

CAVIC characterizes the Trustee’s claim to the \$30 Million PDP as resting entirely on the theory that, on termination of the APA, the “Buyer” is entitled to a return of “all advanced payments” received by Bombardier for the undelivered Aircraft 9788. Id. at 24 (citing Complaint ¶ 4). CAVIC contends that it was assigned the APA on 3/31/17, Complaint ¶ 51, Ex. R, and as Buyer, it was a party to:

- 1) the PDP Facility Agreement, Complaint ¶ 48(a), Ex. F;
- 2) the “Security Agreement” with EDC (Security Agreement), and other “Aircraft 9788 Leasing Transaction Agreements,”¹⁸ Complaint ¶ 48(i), Ex. N;
- 3) the “Trust Agreement”, with TVPX (CAVIC-TVPX Trust Agreement), Complaint ¶ 48(c), Ex. H;
- 4) the Head Lease, Complaint ¶ 48(d), Ex. I;

¹⁸ Neither the Complaint nor the Motion defines the “Aircraft 9788 Leasing Transaction Agreements.”

CAVIC argues that even if the Trustee were to step into its shoes, his claim to the \$30 Million PDP is belied by the plain language of the Bombardier Consent, which provides that, in case of default by Bombardier “or for any other reason,” the \$30 Million PDP would be paid to EDC, not to the buyer under the APA—be it CAVIC or the Debtors. Id.

CAVIC claims that the APA Assignment and Bombardier Consent are governed by New York law, which requires contracts to be construed in accordance with the parties’ intent and is generally discerned from the four corners of a document itself. Id. (citing MHR Cap. Partners, 12 N.Y.3d 640, 645 (2009); Ellington v. EMI Music, Inc., 24 N.Y.3d 239, 244 (2014); Legum v. Russo, 133 A.D.3d 638, 640 (2015)). CAVIC notes that in the Bombardier Consent, EDC agreed that in exercising any rights under the APA, or in making any claim regarding the assigned rights, the APA’s terms and conditions would apply to and be binding on EDC to the same extent as if EDC had been the original “Buyer” thereunder. Id. at 26-27 (quoting Ex. T ¶ 7).

CAVIC emphasizes that Zetta Singapore did not sign the Bombardier Consent and acknowledges that the APA Assignment was an absolute assignment. Id. at 27. According to CAVIC, if the APA Assignment were anything *other than* an absolute assignment, Bombardier and EDC would have required Zetta Singapore to sign the Bombardier Consent given Zetta Singapore’s possible residual rights in and to the \$30 Million PDP. Id. (emphasis in original). CAVIC contends that Zetta Singapore’s approval was unnecessary because the terms of the APA Assignment and the Bombardier Consent were clear, as was the parties’ intent that EDC—not Zetta Singapore—would receive the \$30 Million PDP if Bombardier defaulted or “for any other reason.” Id. CAVIC concludes that although the APA indicated that the “Buyer” had a right to return of the \$30 Million PDP, that was superseded by the Bombardier Consent. Id. CAVIC argues that even if the Debtors could substitute themselves as a party to the Bombardier Consent, it would not change that the \$30 Million PDP was to be repaid to EDC. Id.

2. Opposition

The Trustee responds that the Complaint states a claim that the \$30 Million PDP is property of the estate. Opposition at 26. He asserts that the plain meaning of the APA and the APA Assignment indicate that the APA Assignment was not an absolute assignment, but rather a security assignment of Zetta Singapore’s right to the \$30 Million PDP. Id. The Trustee contends that neither CAVIC nor Bombardier challenge Count II, which seeks a declaration that the APA was terminated, nor do they contest that Bombardier received the \$30 Million PDP pursuant to the APA. Id. at 28. The Trustee notes that: 1) Count III seeks a declaratory judgment that CAVIC did not perfect its security interest, which CAVIC does not dispute; 2) Count IV seeks to avoid CAVIC’s unperfected security interest in the \$30 Million PDP under § 544 (and once CAVIC’s security interest is avoided, so too is everything that comes afterwards, including EDC’s perfected security interest in CAVIC’s avoided rights under the APA Assignment); 3)

Count V seeks to recover the \$30 Million PDP under § 550; and 4) Count VI seeks turnover of the \$30 Million PDP from Bombardier under § 542. Id. at 26.

The Trustee argues that under § 544(a)(1), he may avoid unperfected security interests in property of the estate. Id. at 27 (citing In re Pac. Exp., Inc., 780 F.2d 1482, 1485-86 (9th Cir. 1986); In re Bonner, 2014 WL 890477, at *4 (B.A.P. 9th Cir. Mar. 6, 2014); In re Peregrine Entm't, Ltd., 116 B.R. 194, 207 (C.D. Cal. 1990)). The Trustee highlights that § 541(a) describes property of the estate as “all legal or equitable interests of the debtor in property as of the commencement of the case . . . wherever located and by whomever held,” and the scope of § 541(a) is “broad and ubiquitous” and includes all proceeds or profits of or derived from property of the estate. Id. (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 204 n.9 (1983); In re Allegheny Label, Inc., 128 B.R. 947, 952 (Bankr. W.D. Pa. 1991); § 541(a)(6)).

The Trustee contends that a debtor’s contract right is property of the estate. Id. (citing In re Nat’l Envtl. Waste Corp., 191 B.R. 832, 834 (Bankr. C.D. Cal. 1996), subsequently aff’d, 129 F.3d 1052 (9th Cir. 1997)). He argues that the Complaint alleges that pursuant to the APA, Zetta Singapore was the “Buyer” and Bombardier was the “Seller.” Id. (citing Complaint ¶¶ 4, 41). He argues that under Article 9.2 of the APA, if the APA was terminated, Zetta Singapore was entitled to all advanced payments less liquidated damages: “If before Delivery Time: . . . (b) Buyer terminates this Agreement . . . then

Id. at 27-28 (citing Complaint ¶ 66, Ex. A). He claims that as the “Buyer” Zetta Singapore has a contractual right to the \$30 Million PDP, and the Complaint sufficiently pleads that the money is property of the estate. Id. at 28. The Trustee argues that the APA Assignment—a security assignment—does not alter this result because it is avoidable under § 544 for lack of perfection. Id.

The Trustee asserts that CAVIC completely disregards the Complaint, which plausibly alleges that the APA Assignment only resulted in CAVIC holding a security interest in the \$30 Million PDP, which it failed to perfect. Id. (citing Complaint ¶¶ 92-110, 143-44). The Trustee argues that an assignment may transfer a security interest rather than absolute ownership if the parties intended to create a security interest. Id. (citing In re Evergreen Valley Resort, Inc., 23 B.R. 659, 661 (Bankr. D. Me. 1982)). According to the Trustee, whether an assignment is absolute or a security transaction is left to the courts, and a document which on its face is seemingly an absolute assignment may still be treated as a security agreement in certain instances. Id. (citing Evergreen Valley, 23 B.R. at 661; In re Matter of Candy Lane Corp., 38 B.R. 571, 574-75 (Bankr. S.D.N.Y. 1984)). The Trustee claims that instead of looking at the language of the purported assignment, courts examine the nature of the transaction and analyze the parties’ intent. Id. (citing Evergreen Valley, 23 B.R. at 661; Candy Lane, 38 B.R. at 574-75). And, if an assignment’s language is ambiguous, courts have considered parol evidence to determine the nature and intent of the transaction. Id. at 28-29 (citing Candy Lane, 38 B.R. at 576; Evergreen Valley, 23 B.R. at 661).

The Trustee argues that the Complaint plausibly pleads that the parties intended the APA Assignment to be a security interest rather than an absolute assignment. Id. at 29. He acknowledges that the APA Assignment uses the term “absolute” assignment in Article 1, but he claims that its other provisions clearly indicate that it was not an absolute assignment of all rights and obligations. Id. The Trustee asserts that:

- 1) Zetta Singapore did not assign the APA itself, but only certain rights and obligations under the APA to CAVIC, and it was expressly subject to the assignment restrictions in Article 10.1 of the APA, Complaint ¶¶ 51, 94;
- 2) the Complaint alleges numerous additional facts to show that the parties intended the APA Assignment to act as security for the repayment of the \$30 Million PDP, and the APA Assignment is listed on the Term Sheet as one of the “securities” for the \$30 Million PDP, Complaint ¶¶ 92-97; and
- 3) Bombardier and the Debtors treated the APA as an executory contract in the Cases, and CAVIC’s POC indicated that its claim was secured, Complaint ¶¶ 96-97.

Id.

The Trustee argues that the following additional factors confirm the parties’ intent:

- 1) the assignment did not reduce Zetta Singapore’s obligations because it remained jointly and severally liable with CAVIC for the performance of all the APA obligations and CAVIC retained a right of deficiency, Complaint ¶¶ 98-99, 108;
- 2) the timing of the APA Assignment, within one day of the \$30 Million PDP, suggests that it was for security, Complaint ¶ 100;
- 3) the payments made on the Undelivered Financed Lease would be applied to reduce the amount of the PDP after it was rolled into the “Financed Amount,”²⁰ Complaint ¶¶ 101-04;
- 4) in the event of a loss of the aircraft, CAVIC was required to pay any amounts recovered in excess of the remaining amount due under the lease to Zetta Singapore, Complaint ¶¶ 105-06;
- 5) the parties intended that the APA Assignment would give CAVIC an extra source of payment for the loan, Complaint ¶ 107; and
- 6) TVPX, at the direction of the Debtors, had the right to pay off the debt in full, which would extinguish CAVIC’s rights to the assigned property, Complaint ¶ 109.

Id. at 29-30 (citing Levin v. City Trust Co., 482 F.2d 937, 938 (2d Cir. 1973); Evergreen Valley Resort, 23 B.R. at 662; Candy Lane, 38 B.R. at 576; In re Voboril, 568 B.R. 797, 799 (Bankr. E.D. Wis. 2017)).

The Trustee argues that rather than address any of these facts, CAVIC blithely states that his claim to the PDP rests entirely on the “theory” that, upon the APA’s termination,

²⁰ The “Financed Amount” was [REDACTED] of the “Undelivered Aircraft Price.” Compliant ¶ 72(f).

the “Buyer” was entitled to return of all “advanced payments” received by Bombardier. Id. at 30 (citing Motion at 24). He asserts that his claim is not based on “theory,” but instead on specific factual allegations and a plain reading of the APA and ancillary documents. Id.

The Trustee claims that none of the documents that CAVIC cites describe it as the “Buyer.” Id. (citing Motion at 24; Complaint Exs. F, H, I, K, N, T). According to the Trustee, the Bombardier Consent clearly defined and referred to Zetta Singapore as the “Buyer,” including a provision that enforcement of EDC’s rights would not trigger a change in control of “Buyer,” and CAVIC was defined as the “Assignor.” Id. at 30-31 (citing Ex. T at 1, 4, § 14). He claims that CAVIC cannot create alternative facts or draw alternative inferences, CAVIC’s factual allegations are irrelevant to the Motion, and the Court may not simply disbelieve his allegations in favor of its competing inferences. Id. at 31 (citing In re Know Weigh, 576 B.R. 189, 213 (Bankr. C.D. Cal. 2017); Zochlinski v. Regents of the Univ. of Cal., 578 F. App’x 636, 638 (9th Cir. 2014)).²¹ The Trustee highlights that Zetta Singapore was not a party to the Bombardier Consent and did not sign it. Id. at 11. He claims that the Bombardier Consent cannot be deemed to modify or amend the fully integrated APA, which requires that any amendment be contained in a writing signed by the *parties* to the APA. Id. (emphasis in original).

The Trustee contends that the Complaint adequately pleads that he is entitled to avoid CAVIC’s security interest in the \$30 Million PDP. Id. at 31. The Trustee highlights CAVIC’s arguments, that—1) the APA Assignment is not a lease that can be avoided as a disguised financing; 2) the Debtors were not parties to certain operative documents regarding Aircraft 9788; and 3) the Undelivered Financed Lease was a “busted deal” and no precedent exists to recharacterize it—and he argues that CAVIC conflates the recharacterization of the lease transaction with a finding that the APA Assignment was a security assignment subject to avoidance. Id. According to the Trustee, he is not asserting that the APA Assignment is a lease and the Court’s determination of whether the Undelivered Financed Lease constitutes, or could have constituted, a disguised financing is relevant, but not dispositive regarding whether the APA Assignment constitutes a security assignment. Id. at 31-32.

In response to CAVIC’s argument that the Complaint asserts no plausible state law claim to the \$30 Million PDP, the Trustee contends that this rehashes the arguments about whether the \$30 Million PDP is Zetta Singapore’s property. Id. at 32. The Trustee describes as “simply false” the allegation that when Zetta Singapore assigned the APA to CAVIC, CAVIC took on the obligation to pay for Aircraft 9788, and as a result, CAVIC and not the Debtors borrowed the money for the \$30 Million PDP. Id. The Trustee highlights that Zetta Singapore remained jointly and severally liable with

²¹ The Trustee describes CAVIC’s statement, that Zetta Singapore acknowledges that the APA Assignment was “an absolute assignment,” as “bizarre.” Id. at 31 n.16 (citing Motion at 27). According to the Trustee, the Complaint states repeatedly that the APA Assignment was not absolute. Id. (citing Complaint ¶¶ 7, 92, 110, 142). The Trustee also argues that if CAVIC is relying on language in ¶ 1, terminology can be disregarded if a court determines that the substance of the transaction indicates that it was an assignment for security. Id.

CAVIC for the performance of all of Zetta Singapore's obligations under the APA to the same extent as if the APA Assignment had not been executed. Id. (citing Ex. R). And, the Trustee notes that Zetta Singapore was on the hook directly to CAVIC for all funds advanced by CAVIC under the Head Lease Guarantee and the FPA Guarantee. Id. According to the Trustee, this demonstrates the parties' intent that the APA Assignment was security to ensure that Zetta Singapore repaid the PDP amount to CAVIC, which is exactly why the APA Assignment is listed as one of the "securities" on the Term Sheet. Id. (citing Complaint ¶¶ 92-93, 99, 108).

The Trustee challenges CAVIC's argument, that the plain language of the Bombardier Consent reflects Bombardier's and EDC's intent that the APA Assignment was an absolute assignment, because neither Bombardier nor EDC were parties to the APA Assignment, and their intent is irrelevant (if it could be determined on a motion to dismiss when a complaint pleads otherwise). Id. at 32 (citing Know Weigh, 586 B.R. at 213). The Trustee argues that nothing in the Bombardier Consent, or whatever intent implied between the parties to that document, affects Zetta Singapore and the fully integrated APA and APA Assignment. Id. at 32-33. He contends that it would be strange if the Court ignored all of the facts plead in the Complaint in favor of a document to which Zetta Singapore was not a party to infer Zetta Singapore's intent. Id. at 33 (citing Cutler v. Rancher Energy Corp., 2014 WL 12599602, at *1 (C.D. Cal. June 2, 2014)).

Finally, the Trustee asserts that he does not need to avoid the entire transaction or the Bombardier Consent to recover. Id. Rather, he claims that he has sufficiently pled that CAVIC has an unperfected security interest in the PDP, which he can avoid using his strong-arm powers under § 544(a)(1). Id. at 33 (citing Complaint ¶¶ 7-8, 148-49).

3. Reply

CAVIC replies that the \$30 Million PDP is not property of the estate. Reply at 15. It contends that assuming, *arguendo*, that a debtor's contract right is property of the estate, Zetta Singapore's right to the \$30 Million PDP is simply "too contingent in nature and speculative to create a present or future property interest." Id. (quoting Diamond v. Hogan Lovells US LLP, 2020 WL 717809, at *5 (D.C. Cir. Feb. 13, 2020)). CAVIC argues that viewing one document in isolation does not tell the whole story, and the Trustee "conveniently fails" to add crucial context to his argument regarding Article 9.2 of the APA. Id. at 15-16.

CAVIC contends that it received a \$30 million loan from EDC to fulfill its obligation to purchase Aircraft 9788 and those funds were paid to Bombardier on its, and not the Debtors', behalf. Id. at 16. CAVIC claims that assuming that the APA Assignment is avoided, the "contract right" that the Trustee alleges is property of the estate imposes significant obligations on CAVIC, not merely rights. Id.

CAVIC argues that without the APA Assignment, the Debtors would have merely held a contract "right" to arrange for financing and payment of the \$30 Million PDP to

agreed to perform all obligations under the APA “as if it were the original Buyer under the” APA. Id. (citing Ex. R). CAVIC asserts that at no time has it, as assignee, acted in any way other than as the absolute assignee and owner of the APA. Id. CAVIC argues that its POC has no relation to the APA Assignment and it was filed only as a prophylactic measure in response to the Trustee’s asserted ownership interest in the \$30 Million PDP. Id. at 18 n.4.

CAVIC contends that the documents attached to the Complaint belie the Trustee’s assertion that the parties intended the APA Assignment to be for security. Id. at 18. It highlights that before Zetta Singapore filed bankruptcy, there were six amendments to the APA (Exs. B, C, E, P, Q, U), with amendments one through five executed before the APA Assignment. Id. CAVIC stresses that in each of those five assignments, Bombardier and Zetta Singapore were the only signatories, but pursuant to the APA Assignment, CAVIC replaced Zetta Singapore as a party to the APA. Id. CAVIC notes that after the APA Assignment, Zetta Singapore lost its “party” status. Id. at 18-19. CAVIC highlights “Amendment No. 6” to the APA (Sixth Amendment) (Ex. U), and emphasizes that the first paragraph differs from the first paragraph of the five earlier amendments because Zetta Singapore is described as the “Original Buyer,” and it references two assignments: 1) the APA Assignment, which is described as an “assignment;” and 2) CAVIC’s assignment to EDC, which is described as a “security assignment.”²² Id. at 19. CAVIC asserts that all four parties were sophisticated and represented by knowledgeable and experienced counsel who distinguished between the description of these two assignments. Id.

CAVIC notes that the last page of the Sixth Amendment was executed by CAVIC and Bombardier as “parties,” with Zetta Singapore and EDC acknowledging and agreeing to its terms. Id. CAVIC claims that the Sixth Amendment was signed nearly three months after the 3/31/17 APA Assignment, which accurately described not only their intent, but also the structure of the transaction that the Trustee is trying to unwind. Id. at 19-20.

CAVIC argues that the Trustee has not alleged plausible facts that the APA Assignment was an assignment for security because it states clearly that it was an absolute assignment, and the Trustee ignores the integration clauses in the APA Assignment (Article 10) and the APA (Article 10.4) and New York law. Id. at 20. According to CAVIC, the Trustee’s only alleged ambiguity is his own incorrect interpretation of the meaning and use of APA Article 10.1, which is referenced in APA Assignment Article 4. Id. CAVIC notes that Bombardier and Zetta Singapore acknowledged and agreed in the

²² CAVIC indicates that the parties knew how to craft a limited assignment as distinguished from an absolute assignment of rights. Id. at 19 n.5 (citing Reply Ex. A). CAVIC claims that the Opposition invited it to attach portions of financed leases. Id. (citing Opposition at 21 n.9). The Opposition noted that CAVIC was free to attach relevant portions of the Financed Leases if it believed the terms of the agreements contradicted the Complaint’s allegations. Opposition at 21 n.9 (citing Kreipke v. Wayne State Univ., 807 F.3d 768, 774 (6th Cir. 2015)). The Court will not consider Reply Ex. A because it is not authenticated. Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (stating that documents must be authenticated before they can be admitted); Evans v. Bd. of Educ. Sw. City Sch. Dist., 2010 WL 1849273, at *3 (S.D. Ohio 2010) (indicating that unauthenticated documents are inadmissible under the Federal Rules of Evidence).

Assignment was consented to by Bombardier and TVPX. Id. CAVIC claims that all parties knew what a security assignment of a purchase agreement was and how it worked and the APA Assignment and the circumstances hardly “suggest” that it was for security. Id.

CAVIC focuses on the Trustee’s argument that later payments under the Undelivered Financed Lease would have applied to reduce its own loan from EDC. Id. at 22. CAVIC argues that this hypothetical does not somehow imply an intent that the APA Assignment was a security assignment. Id. CAVIC contends that the loan it received from EDC had nothing to do with Zetta Singapore. Id. at 22-23.

CAVIC addresses the Trustee’s argument that if, hypothetically, Aircraft 9788 had been delivered and there was an “event of loss,” CAVIC was required to pay any amounts received in excess of the amount due under the lease to Zetta Singapore. Id. at 23. CAVIC claims that that does not mean that the APA Assignment was a security assignment. Id.

In response to the Trustee’s argument that the APA Assignment was an extra source of payment for CAVIC’s exposure on its loan from EDC, CAVIC argues that if the aircraft had been delivered, it would have had to pay Bombardier and arrange to buy and sell Aircraft 9788 to another buyer or assign the APA to that buyer. Id. CAVIC argues, however, that it would not have been what could be described as a source of payment. Id.

CAVIC asserts that the Trustee relies on the FPA when arguing that TVPX, at the direction of the Debtors, had a right to pay off the debt, which would extinguish CAVIC’s rights to the assigned property. Id. CAVIC contends that the FPA does not state this. Id. Rather, according to CAVIC, the FPA is a “two way street” and meant to ensure that both CAVIC and TVPX and its guarantor Debtors would complete the lease transaction upon delivery. Id. at 23-24.

4. Analysis

Counts III, IV, V, and VI are inextricably intertwined. If the APA Assignment was for security and not absolute, then it would be avoidable as an unperfected security interest, and the \$30 Million PDP would be property of the estate. If, in contrast, the APA Assignment was absolute, then it did not need to be perfected, it is not avoidable, and the \$30 Million PDP would not be property of the estate. Whether Counts III, IV, V, and VI should be dismissed therefore turns on whether the assignment was absolute or for security.

i. Security v. Absolute Assignment in General

Title 11 U.S.C § 544(a) provides:

The trustee . . . as of the commencement of the case . . . may avoid any transfer of property of the debtor . . . that is voidable by . . . a creditor that . . . obtains . . . a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists.

If property of a debtor is assigned prepetition, that property will be property of the estate subject to avoidance under § 544 only if the assignment was intended to be a security transaction as opposed to an absolute transfer. In re Evergreen Valley Resort, Inc., 23 B.R. 659, 660-61 (Bankr. D. Maine 1982) (noting that funds could be used as cash collateral only if the estate had an interest in the funds, which would occur if an assignment was intended to be a security transaction as opposed to an absolute transfer).

“To decipher a security agreement from an absolute assignment is often a difficult task.” Matter of Candy Lane Corp., 38 B.R. 571, 575. No particular “phraseology” is required to effect an assignment or a security interest. Id. All that an assignment requires “is that the property must be sufficiently identifiable and there must be an intent to assign a present right in the subject matter of the assignment, divesting the assignor of all control over that which is assigned.” Id. A security interest, by contrast, is “an interest in personal property or fixtures which secures payment or performance of an obligation.” Id. Determining whether an agreement is an absolute assignment or a security interest is based on examining the relevant documents in the context of the surrounding transaction. Id. at 576. A document which is seemingly an absolute assignment on its face may be treated as a security agreement in certain instances, and the intent of the parties governs whether a particular document or transaction creates a security interest. Id. at 575-76. Ultimately, this is a factual decision left to the courts. In re Evergreen Valley Resort, Inc., 23 B.R. 659, 661 (Bankr. D. Maine 1982). The party challenging the assignment has the burden of proof and must show by “clear and convincing proof” that only a security interest was intended. Candy Lane, 38 B.R. at 577.

Courts have used a number of factors to determine whether an assignment is absolute or for security:

- 1) the plain language of the agreement;
- 2) the timing of the assignment and the loan;
- 3) whether payments received under the assignment would be applied to reduce the amount of the loan;
- 4) whether the assignment will be a source of payment if the loan is not paid;
- 5) whether any excess paid on the loan will be returned to the assignor;
- 6) whether the assignee retains a right to deficiency if the assignment does not satisfy the amount of debt owed;
- 7) whether the assignee’s rights in the assigned property would be extinguished if the assignor paid the debt from another source; and
- 8) whether, before the complaint was filed, the assignee filed proofs of claims or other documents asserting that it was a secured party.

held that the excess reserves were property of the estate and cash collateral, and it granted Evergreen's motion. Id.

In Matter of Candy Lane Corp., 38 B.R. 571 (Bankr. S.D.N.Y. 1984), Seymour Newman (Newman) and Raymond Ducorsky (Ducorsky), who were the principals of the Candy Lane Corporation (Candy Lane), owned real property in Hudson, New York, where they conducted manufacturing operations. Id. at 573. Candy Lane rented a building from Newman and Ducorsky and it owned the building's trade fixtures. Id. After a New York state court entered a condemnation order vesting title to the property in the Hudson Urban Renewal Agency (HURA), Shirley Leff (Leff) made four loans to Candy Lane totaling \$131,000 and Candy Lane gave Leff a \$131,000 note. Id. Shortly thereafter, Ducorsky, Newman, and Candy Lane executed a document that was facially an absolute assignment. Id. at 573, 576. The document indicated that they "jointly and severally, sold, assigned, transferred" to Leff their "right, title and interest in and to any award" up to \$131,000 plus interest that they received for the taking of the property (3/21/78 Assignment). Id. at 573. Approximately a week later, Nathaniel Rubin (Rubin), Ducorsky's, Newman's and Candy Lane's attorney, wrote to Leff indicating that he was enclosing the original \$131,000 note and assignment of rents executed by Newman and Ducorsky, "as collateral security for said note, together with the Assignment of Condemnation Award in Hudson, *as further security* for the payment of said note." Id. at 574 (emphasis in original).

Candy Lane then filed a chapter 11 bankruptcy petition, and Lawrence Sarf (Sarf) was appointed as the trustee. Id. at 573. Sometime later, a judgment was entered in the condemnation proceeding awarding Newman and Ducorsky \$79,535.25 for the taking of their real property, and Candy Lane \$780,079 for the taking of its trade fixtures. Id. Sarf placed the \$780,078 in an escrow account. Id. Leff asserted an interest in the \$780,078, claiming that she received an unqualified assignment and the funds were not part of Candy Lane's bankruptcy estate. Id. at 574. Sarf filed a complaint, seeking to set aside Leff's interest in the condemnation award because he asserted that the assignment was intended to create only a security interest, which was not perfected by filing a financing statement. Id. at 572. Id. Leff moved to dismiss the complaint or alternatively, for summary judgment and an order that Sarf pay her \$131,000 from the condemnation award. Id. at 574.

The court indicated that the 3/21/78 Assignment contained certain characteristics of an absolute assignment, including: 1) it identified the property and showed an intent to assign a present interest; 2) it was "absolute on its face;" and 3) Ducorsky claimed that Leff (his sister) was to be repaid from the condemnation award as a primary source, and only if those funds were insufficient, then she would be paid from secondary sources including Candy Lane's principals' personal guarantees. Id. at 576-77. But, the Court also noted that an issue remained whether Candy Lane divested itself of all control over the \$131,000 of condemnation proceeds, and the 3/21/78 Assignment could still be found to be a security interest because: 1) on 8/9/82, Leff filed a proof of claim, indicating that she received an assignment of condemnation award as "security" for her loan, and that she had "a secured interest" in \$131,000; and 2) in an application to the

court shortly before Sarf filed the adversary proceeding, Leff sought an order declaring that her \$131,000 claim was secured by the condemnation award. Id. at 577. According to the court, the legal posture adopted by Leff, although “not dispositive of this issue,” tended to rebut the presumption that the assignment was absolute. Id. The court also highlighted Rubin’s letter that described the assignment “as further security” and noted that the amount of the assignment and the timing of the transfer (\$131,000 and 3/21/78) as compared to the loans made by Leff (between 1/13/77 and 3/15/78, totaling \$131,000) indicated that a security interest was created. Id. The court denied Leff’s motions to dismiss and for summary judgment, finding that there was a triable issue of fact whether the assignment was absolute or intended as security. Id.

In re Voboril, 568 B.R. 797 (Bankr. E.D. Wis. 2017), involved Stephen Voboril (Voboril), a retired insurance salesman. Id. at 799. During his career, Voboril received commissions for selling insurance policies and other financial products, and after retirement, he continued earning commissions when customers renewed their policies. Id. In June 2012, the First Bank Financial Centre (First Bank) made a loan to Voboril Financial, and Voboril personally guaranteed the loan and executed a “Collateral Assignment of Renewal Commissions” (Collateral Agreement). Id. The Collateral Agreement indicated that it was “made and accepted as collateral security for the repayment” of Voboril’s indebtedness to First Bank “existing or hereafter incurred.” Id. First Bank did not file a financing statement to perfect its security interest. Id. After Voboril filed bankruptcy, Bruce Lanser (Lanser) was appointed as the chapter 7 trustee and filed an avoidance action against First Bank to avoid liens that it held on the insurance renewal commissions and a promissory note payable Voboril. Id. Lanser moved for summary judgment, arguing that the renewal commissions were “accounts” as defined by the UCC Article 9, and First Bank’s failure to file a financing statement meant that it had an unperfected security interest that he could avoid under his “strong arm powers.” Id. at 798-99. First Bank countered that the Collateral Agreement was an assignment of a single account and it did not need to file a financing statement. Id. at 799.

Although the court acknowledged the Collateral Agreement’s language indicating that Voboril had assigned all right, title and interest in the commissions to First Bank, it held that the Collateral Agreement bore the hallmarks of a security agreement rather than an absolute assignment, including: 1) its complete title was a “Collateral Assignment of Renewal Commissions (For use where payment to Assignee is to commence only after default and delivery of written notice)” suggesting that the parties did not contemplate an absolute assignment; 2) it indicated that its purpose was to provide “collateral security” for the repayment of Voboril’s existing or future debts; 3) it did not state or imply that the assignment reduced or eliminated the debt; 4) Voboril, rather than First Bank, continued to receive the renewal commissions unless and until First Bank notified him and his employer of a default, and Voboril continued to receive the commissions as of the petition date; and 5) if Voboril paid off the loan, First Bank’s interest in the renewal commissions would terminate. Id. at 799-800. The court concluded that Article 9 of the UCC governed the Collateral Agreement, the assignment exception to Article 9 did not apply, and First Bank was required to file a financing statement to perfect its

security interest in the renewal commissions. Id. at 800. Because it had not done so, First Bank’s security interest in the commissions was avoidable by Lanser, and the court granted his motion for summary judgment. Id. at 800, 803.

There is no dispute that New York law governs the APA, the APA Assignment, and the Bombardier Consent. Motion at 26; Opposition at 14, 28 n.14. New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose be read together, even when they were “executed on different dates and were not all between the same parties.” This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998). In assessing the correct meaning of a contract comprised of more than one document, “it is good sense and good law that . . . closely integrated and nearly contemporaneous documents be construed together.” Gordon v. Vincent Youmans, Inc., 358 F.2d 261, 263 (2d Cir.1965). The Court must consider the contract “as a whole to ensure that undue emphasis is not placed upon particular words and phrases . . . and seek to give effect and meaning to every term of a contract.” In re AAGS Holdings LLC, 608 B.R. 373, 378 (Bankr. S.D.N.Y. 2019) (internal quotation marks omitted). The law requires courts to harmonize all contract terms. Spinelli v. Nat’l Football League, 903 F.3d 185, 200 (2d Cir. 2018).

Under New York law, if a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. Spinelli, 903 F.3d at 200. But, if the parties’ intent cannot be ascertained from the face of their agreement, the contract is ambiguous and its interpretation presents a question of fact. Id. A contract is ambiguous if it could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. AAGS Holdings, 608 B.R. at 378. A contract is unambiguous if it has a “definite and precise meaning.” Id. Unambiguous language does not become ambiguous because a party urges a different interpretation that strains the language beyond its ordinary meaning. Id.

ii. Relevant Documents

Here, the patchwork of relevant documents is as follows.

On 12/10/15, Zetta Singapore, as “Buyer” and Bombardier as “Seller” executed the APA, with Bombardier agreeing to manufacture, sell and deliver, and Zetta Singapore agreeing to take delivery of, and pay [REDACTED]. Ex. A §§ 1.1, 2.1.

Regarding “TERMINATION,” the APA provided that if, before delivery, Zetta Singapore:

terminates this Agreement pursuant to Article 9.1,²³ then [REDACTED]

²³ Article 9.1 stated:

[REDACTED]

Ex. A § 9.2.

The APA also contained the following limitation on assignments:

[REDACTED]

Ex. A § 10.1.

Between 2/25/16 and 11/10/16, Bombardier and Zetta Singapore amended the APA twice. Exs. B, C. As relevant to this dispute, "Amendment No. 1" (First Amendment), executed on 2/25/16 updated the payment schedule to make the second payment of [REDACTED], and "Amendment No. 2" (Second Amendment), executed on 11/10/16, changed the delivery date. Exs. B § 2, C § 2.

The unsigned Term Sheet, which indicates that it was a [REDACTED] and is dated 11/17/16, included two tables: a [REDACTED] and a [REDACTED] [REDACTED]²⁴ Ex. D. The [REDACTED] contains the following entries relevant to this Motion:

Either party may terminate this Agreement before Delivery Time . . . upon the occurrence of any of the following events: (i) the other party makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts; . . . (iii) proceedings under any law relating to bankruptcy, insolvency or the reorganization or relief of debtors are instituted by or against the other party . . .

Ex. A § 9.1.

²⁴ According to the Trustee, the "PDP Finance term sheet" governed the repayment of "the loan" from CAVIC before delivery of Aircraft 9788 and the "Long Term Finance Term Sheet" governed the repayment of "the loan" from CAVIC after delivery of Aircraft 9788. Complaint ¶ 71.

- 5) On 12/23/16, Zetta Singapore, Zetta USA, Asia Aviation Holdings Pte Ltd., and Geoffrey Cassidy as “Guarantors” and CAVIC as “Beneficiary” executed the FPA Guarantee, under which each “Guarantor” guaranteed TVPX’s performance of its obligations under the FPA. Ex. L §§ 1.1, 2.1.
- 6) On 12/23/16, TVPX, as “owner trustee” and “Lessor,” and Zetta USA, as “Lessee,” executed the Sublease under which TVPX leased Aircraft 9788 to Zetta USA. Ex. M.
- 7) On 12/23/16, CAVIC as “Borrower” and EDC as “Security Trustee” executed the Security Agreement, under which CAVIC granted EDC a security interest in the APA, the APA Assignment,²⁶ the FPA, and the FPA Guarantee. Ex. N § 2.1.

On 3/25/17, Zetta Singapore as “Buyer” and Bombardier as “Seller” executed two more amendments to the APA: “Amendment No. 4” (Fourth Amendment), acknowledging that Zetta Singapore had paid Bombardier [REDACTED], Ex. P; and “Amendment No. 5” (Fifth Amendment), amending the payment schedule so that the [REDACTED]. Ex. Q.

Exhibit R is the 3/31/17 APA Assignment among Bombardier as itself, Zetta Singapore as “Assignor,” and CAVIC as “Assignee,” which was executed approximately 15 months after the parties executed the 12/10/15 APA. Exs. A, R. The APA Assignment, which is one of the documents that is central to the dispute between the Trustee and CAVIC, provides in the “WHEREAS” provisions and Article 1 that:

[Zetta Singapore] desires to transfer and absolutely assign to [CAVIC] all of [Zetta Singapore]’s rights, interests, liabilities and obligations in connection with and arising out of the Agreement²⁷ and [CAVIC] accepts such transfer and assignment.

²⁶ The Court notes that the Security Agreement was executed approximately three months before the APA Assignment. Security Assignment § 2.1, however, provided that CAVIC granted EDC a continuing security interest in, among other things, “each Purchase Agreement Assignment,” and § 1.2 indicated that unless otherwise defined, terms had the meanings provided in the PDP Facility Agreement. Ex. N. The term “Purchase Agreement Assignment” was not defined in the Security Agreement and therefore the definitions in the PDP Facility Agreement control.

The PDP Facility Agreement defined the “Purchase Agreement Assignment” for Aircraft 9788 as an assignment agreement “entered into *or to be entered into, as the context may require,*” between Zetta Singapore as assignor, CAVIC as assignee, and Bombardier Inc. Ex. F Appx. A (emphasis added). Although the APA Assignment was executed by Bombardier (rather than Bombardier Inc.), Ex. R, the APA Assignment otherwise fits the definition of “Purchase Agreement Assignment” as used in the PDP Facility Agreement.

²⁷ The “Agreement” is defined as the APA and all: i) schedules, completion work and other specifications; ii) amendments (including the First through Fifth Amendments), supplements, exhibits and letter agreements relating thereto; and iii) any warranty “Bill of Sale” thereto. Ex. R.

...

[Zetta Singapore] hereby absolutely assigns, conveys and transfers to [CAVIC] all of [Zetta Singapore's] rights, title, interests, liabilities and obligations under the Agreement including, without limitation, i) the benefits of the advance payments already made by [Zetta Singapore] in respect of the Aircraft, ii) its obligation to make all remaining payments under the Agreement, iii) its right to accept Delivery of the Aircraft and take title to the Aircraft and be named as buyer in the bill of sale for the Aircraft provided all of [Zetta Singapore's] obligations are fulfilled pursuant to the terms thereof under the Agreement, and iv) any and all rights of [Zetta Singapore] to compel performance of the terms of the Agreement by Bombardier corresponding to the rights assigned under this clause in respect of the Aircraft, and [CAVIC] accepts such transfer and assignment.

Ex. R. And, Article 4 of the APA Assignment indicates that:

Bombardier and [Zetta Singapore] acknowledge and agree that, for the purposes of Article 10.1 of the Agreement, [CAVIC] is an entity that has been established by a third party financier in connection with [Zetta Singapore]'s acquisition of the Aircraft. Notwithstanding the provisions of Article 10.1 of the Agreement, Bombardier and Assignor individually and collectively acknowledge and agree that this Assignment is made in conformity with Article 10.1 of the Agreement.

Ex. R. The APA Assignment was executed by Zetta Singapore and CAVIC, and "[a]greed and consented to" by Bombardier. Ex. R.

On that same day, 3/31/17, Bombardier on behalf of itself, EDC as "Assignee," CAVIC as "Assignor," and TVPX as "owner trustee" and "Forward Purchaser," executed the Bombardier Consent, in which Bombardier: 1) acknowledged and consented to the Security Agreement and the FPA; and 2) confirmed that upon receipt of the \$30 Million PDP, it would have received advance payments totaling [REDACTED]. Ex. T §§ 1-2, 4; Complaint ¶ 53. Bombardier also agreed that if it defaulted under the APA or for any other reason, it would pay, directly to EDC and not to CAVIC, the \$30 Million PDP. Ex. T § 11.

Finally, on 6/21/17, Bombardier, as "Seller;" Zetta Singapore, as "Original Buyer;" CAVIC, as "Assignee;" and EDC, as "Security Assignee," executed the Sixth Amendment to the APA, which was signed by CAVIC and Bombardier as parties, and "Acknowledged and Agreed to by" EDC and Zetta Singapore. Ex. U.

iii. Was the Assignment Absolute or for Security?

Here, if the assignment from Zetta Singapore to CAVIC was absolute, then the Debtors had no interest in the \$30 Million PDP as of the commencement of the Cases, the PDP would not be property of the estate, and CAVIC’s interest in the PDP would not be subject to § 544 avoidance. In contrast, if the assignment from Zetta Singapore to CAVIC was for security, then the Debtors had an interest in the \$30 Million PDP as of the commencement of the Cases, the PDP would be property of the estate, and CAVIC’s interest in the PDP, which is unperfected, would be subject to § 544 avoidance. The determinative question is therefore whether the assignment was absolute or for security.

The Trustee relies on the Term Sheet, Article 4 of the APA Assignment, and Bombardier’s filings in the Cases to support his position that the APA Assignment was for security. CAVIC relies on the APA Assignment and the Bombardier Consent in support of its argument that the APA Assignment was absolute.

A. Term Sheet

In the Motion, CAVIC does not mention the Term Sheet in its arguments regarding Counts III, IV, V, and VI. But, in its analysis of Count I, CAVIC argues that the Trustee’s reliance on the Term Sheet is misplaced because: 1) the Term Sheet attached to the Complaint is unsigned; 2) AVIC, not CAVIC, is the party to the Term Sheet, there are no factual allegations demonstrating that the Term Sheet was negotiated for CAVIC’s benefit, and AVIC is not a party to the Complaint; and 3) the Term Sheet is a non-binding letter of intent which may or may not have been accepted, amended or superseded and is not relevant in light of integration clauses in subsequent agreements. Motion at 19.

In the Opposition, the Trustee highlights that the APA Assignment is listed on the Term Sheet as one of the “securities” for the PDP. Opposition at 29 (citing Complaint ¶¶ 95). He argues that it is irrelevant for purposes of a motion to dismiss that the Term Sheet is unsigned because all factual allegations, including the provisions in the unsigned Term Sheet, are assumed to be true. Opposition at 22. The Trustee also notes that: 1) the Complaint alleges that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases on behalf of CAVIC, Complaint ¶¶ 26, 46; 2) [REDACTED] under the Head Lease and Sublease, Exs. I at § 30.1.4, M § 27.1; and 3) the provisions of the Term Sheet “found their way into the transaction documents,” Complaint ¶¶ 71-73. Opposition at 21-22. CAVIC does not address the Term Sheet in the Reply.

The Complaint alleges on information and belief that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases on CAVIC’s behalf. Complaint ¶ 26. It also alleges that on 11/17/16, Zetta Singapore and AVIC, on behalf of CAVIC, memorialized the terms of the loan and financing agreement in the Term Sheet, which was a “letter of intent” and provided the “master framework” that governed the structure of the financing arrangement for Aircraft 9788 and all but a few of the Term Sheet’s terms are contained in the Financed Lease

Singapore’s acknowledgement and agreement that the assignment conformed with Article 10.1 of the APA. Id.

The Trustee homes in on APA Assignment Article 4, and under New York law, the Court must consider the contract “as a whole to ensure that undue emphasis is not placed upon particular words and phrases and all writings that are “part of a single transaction” must be read together even if they are were “executed on different dates and were not all between the same parties.” In re AAGS Holdings LLC, 608 B.R. 373, 378 (Bankr. S.D.N.Y. 2019) (internal quotation marks omitted); This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998). It would therefore be improper for the Court to decide whether the assignment was absolute or for security based only on two sentences in the APA Assignment, especially when the APA Assignment stated explicitly that it was “absolute” and there are no words or phrases, as there were in the cases cited by the Trustee, indicating that it was intended as a security agreement.

The Trustee’s focus on APA Assignment Article 4 and its reference to APA Article 10.1, which [REDACTED] is unavailing. There is no evidence from which the Court could find that the “financing,” which the Trustee asserts was provided by CAVIC under the APA Assignment was secured.

C. Bombardier’s Filings During the Chapter 11 Cases

In the Motion, CAVIC does not address Bombardier’s filings in the Cases. The Trustee contends that Bombardier treated Zetta Singapore as the counterparty to the APA during the chapter 11 Cases, which weighs in favor of a security assignment. Opposition at 10-11 (citing Complaint ¶¶ 55-62). CAVIC does not reply to the Trustee’s argument.

Bombardier was not named as a defendant in Count III, which alleges that the APA Assignment was a security assignment and not an absolute assignment in favor of CAVIC, Complaint ¶ 142, and the Trustee does not explain how Bombardier’s filings in the Cases are relevant to Zetta Singapore’s and CAVIC’s intent in the APA Assignment. Bombardier was also not a party to Count IV, which alleged that CAVIC does not hold a valid, enforceable, perfected, and avoidable security interest in the APA, or Count V, which alleged that the Trustee is entitled to recover the right to the PDP for the benefit of the estate. Complaint ¶¶ 150, 153. And, although Bombardier was the named defendant in Count VI, which alleged that the \$30 Million PDP is property of the estate under § 542(a) and requested that Bombardier be ordered to turn it over to the Trustee, that count does not contain any allegation that the APA Assignment was for security.

Finally, the fact that Bombardier sought to compel Zetta Singapore to assume or reject the APA as an executory contract, Complaint ¶¶ 55-62, does not further the Trustee’s position. The motions filed by Bombardier: 1) for relief from the automatic stay under 11 U.S.C. § 362; and 2) for an order compelling the Debtors to assume or reject purchase

and service agreements, Zetta Singapore Docket #s 77-79²⁸—only addressed the APA and not the APA Assignment and all writings that are part of a transaction must be read together. This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998).

D. Bombardier Consent

CAVIC argues that in the Bombardier Consent, EDC agreed that the APA would bind it to the same extent as if it had been the original “Buyer” under the APA. Motion at 26-27 (quoting Ex. T § 7). CAVIC highlights that if the APA Assignment were anything *other than* an absolute assignment, Bombardier and EDC would have required Zetta Singapore to sign the Bombardier Consent given Zetta Singapore’s possible residual rights in and to the PDP. Id. at 27 (emphasis in original). CAVIC contends that Zetta Singapore’s approval was unnecessary because the APA Assignment and the Bombardier Consent were clear, as was the parties’ intent that EDC—not Zetta Singapore—would receive the \$30 Million PDP if Bombardier defaulted or “for any other reason.” Id.

The Trustee responds that neither Bombardier nor EDC—two of the parties to the Bombardier Consent—were parties to the APA Assignment, and their intent is irrelevant, if it could be determined on a motion to dismiss when a complaint pleads otherwise. Opposition at 32. The Trustee argues that the Bombardier Consent does not affect Zetta Singapore and the fully integrated APA and APA Assignment. Id. at 32-33. He contends that it would be strange if the Court ignored the Complaint’s allegations in favor of a document to which Zetta Singapore was not a party to infer Zetta Singapore’s intent. Id. at 33.

CAVIC replies that the Bombardier Consent binds the Trustee. Reply at 16. It claims that both the Complaint and the Opposition acknowledge that Zetta Singapore controlled and directed TVPX, and Zetta Singapore was bound by the terms of the Bombardier Consent because TVPX signed that document. Id. at 16-17. According to CAVIC, the plain language of the Bombardier Consent required Bombardier to return the \$30 Million PDP to EDC (and by extension to CAVIC as subrogee for EDC) upon receiving the requisite notice from EDC. Id. at 17. CAVIC contends that it does not matter whether Zetta Singapore signed the Bombardier Consent because Bombardier and EDC agreed to the disposition of the \$30 Million PDP, and Zetta Singapore did not object to that agreement. Id.

In the Bombardier Consent, EDC and TVPX agreed that APA was binding on them as if they had been the original “Buyer” under the APA. Ex. T § 7. And, Bombardier agreed that if it was required to reimburse any advance payment after it defaulted under the APA “or for any other reason,” it would repay the \$30 Million PDP directly to EDC. Ex. T § 11. The fact that Bombardier agreed to reimburse the PDP directly to EDC, as

²⁸ The Court may take judicial notice of its own docket. In re Tuma, 916 F.2d 488, 491 (9th Cir. 1990); In re Eckert, 485 B.R. 77, 81 (Bankr. M.D. Penn. 2013); In re Harmony Holdings, LLC, 393 B.R. 409, 413 (Bankr. D.S.C. 2008).

I. The Plain Language of the Documents

In the Motion, CAVIC argues that because the plain language of the APA Assignment indicates that it was “absolute”, it became the buyer of Aircraft 9788. Motion at 24. The Trustee counters that the APA Assignment’s use of the term “absolute” in § 1 does not demonstrate that the assignment was absolute. Opposition at 29. The Trustee highlights that the Bombardier Consent defines Zetta Singapore as the “Buyer.” Id. at 30-31. CAVIC replies that that First through Fifth Amendments were executed by Zetta Singapore as “Buyer” and Bombardier as “Seller.” Reply at 18. But, the Sixth Amendment, which was executed after the APA Assignment: 1) defined Zetta Singapore as the “Original Buyer;” 2) referred to the APA Assignment as an “assignment” and CAVIC’s assignment to EDC as a “security assignment;” and 3) was executed by CAVIC and Bombardier as parties and was acknowledged and agreed to by Zetta Singapore and EDC. Id. at 19-20.

The APA Assignment, which among other things, assigned the APA to CAVIC, described the assignment as “absolute”, and indicated that Zetta Singapore desired to transfer and “absolutely assign” to CAVIC all of Zetta Singapore’s rights, interests, liabilities and obligations under the APA, weighing in favor of it being an absolute assignment rather than for security. Ex. R; see Matter of Candy Lane Corp., 38 B.R. 571, 576 (Bankr. S.D.N.Y. 1984) (noting that an assignment being “absolute on its face” was a fact that weighed in favor of the assignment being absolute); In re Evergreen Valley Resort, Inc., 23 B.R. 659, 662 (Bankr. D. Maine 1982) (holding that an assignment was a security interest in part because the agreement provided that the “assignment made and security given herein is made as security . . .”).

The Trustee is correct that the language used by the parties is not determinative although it is certainly a fact that courts consider. See In re Voboril, 568 B.R. 797, 799-800 (Bankr. E.D. Wis. 2017) (holding that an assignment was for security even though the agreement stated that Voboril “assign[ed]” all right, title and interest in the commissions to First Bank); Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973) (holding that the assignment was for security despite the assignment stating that it was “absolute”). But, the other documents attached to the Complaint bolster the conclusion that the parties’ intent was for the assignment to be absolute. The APA and the First through the Fifth Amendments—all of which predated the APA Assignment—identified Zetta Singapore as the “Buyer” and Bombardier as the “Seller,” and each of those documents was executed by Zetta Singapore and Bombardier. Exs. A, B, C, E, P, Q. In contrast, the Sixth Amendment, executed on 6/21/17 (approximately three months after the APA Assignment), defined Bombardier as the “Seller,” CAVIC as the “Assignee,” Zetta Singapore as the “Original Buyer,” and EDC as the “Security Assignee.” Ex. U. The Sixth Amendment was executed by Bombardier and CAVIC but only “Acknowledged and Agreed to” by EDC and Zetta Singapore. Ex. U. Defining Zetta Singapore as the “Original Buyer” rather than the Buyer, as it was

authority cited by the Trustee, the Court finds that the APA Assignment from Zetta Singapore to CAVIC was not for security but was absolute.

defined in the First through Fifth Amendments and Zetta Singapore merely “acknowledging and agreeing” to the terms of the Sixth Amendment suggest that CAVIC had replaced Zetta Singapore as a party to the APA and the APA Assignment was absolute rather than a security assignment. Exs. A, B, C, E, P, Q, U. It is clear that the parties knew how to draft documents to differentiate between an absolute and security assignment: the Sixth Assignment refers to the APA as being assigned from CAVIC to EDC (“**Security Assignee**”) pursuant to a security assignment dated December 23, 2016” Ex. U (emphasis added).

Further, the language of the Bombardier Consent does not alter this analysis. While the Bombardier Consent, which was executed on the same day as the APA Assignment, defined Zetta Singapore as the “Buyer,” it indicated that the APA had been “assigned by Buyer, as assignor, to [CAVIC].” Ex. T §§ 1, 14.³⁰

II. The Timing of the Assignment and the Loan

In the Motion, CAVIC does not address the timing of the assignment and the PDP. The Trustee argues that the timing of the APA Assignment, within one day of the \$30 Million PDP, suggests that it was for security rather than an absolute assignment. Opposition at 30 (citing Complaint ¶ 100). CAVIC replies that the loan from EDC was a fully recourse loan under the PDP Facility Agreement, and Zetta Singapore was not a party to that transaction. Reply at 22 (citing Ex. F).

Pursuant to the PDP Facility Agreement, EDC transferred \$30 million to Bombardier the day that the APA Assignment was executed, 3/31/17. Complaint ¶ 100 (citing Ex. S); Ex. F. Some cases indicate that an assignment at the same time as a loan suggests that the assignment was for security. Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973); Matter of Candy Lane Corp., 38 B.R. 571, 577 (Bankr. S.D.N.Y. 1984). But, in each of those cases, a borrower made an assignment to its lender. Here, in contrast, CAVIC was the borrower under PDP Facility Agreement and EDC was the lender. Ex. F. And, Zetta Singapore—which was not a party to the PDP Facility Agreement between CAVIC and EDC—made the APA Assignment to CAVIC. Exs. F, R.

III. Whether Payments Received Under the Assignment Would Be Applied to Reduce the Amount of the Loan

CAVIC does not address this factor in the Motion. The Trustee contends that the payments made on the Undelivered Financed Lease would be applied to reduce the amount of the \$30 Million PDP after it was rolled into the Financed Amount (██████████). Opposition at 30 (citing Complaint ¶¶ 101-04). In the Reply, CAVIC

³⁰ CAVIC claims that “as Buyer,” it was a party to the PDP Facility Agreement, the Security Agreement, the CAVIC-TVPX Trust Agreement, the Bombardier Consent, the Head Lease, and the FPA Guarantee, and it executed these agreements “as Buyer of Aircraft 9788.” Motion at 24 (emphasis in original). None of these documents identify CAVIC as the “Buyer.” Exs. F, N, H, T, I, L.

In the Motion, CAVIC does not address this element. In the Opposition, the Trustee asserts that in the event of a loss of the aircraft, CAVIC was required to pay any amounts recovered in excess of the remaining amount due under the lease to Zetta Singapore. Opposition at 30 (citing Complaint ¶¶ 105-06). In the Reply, CAVIC notes that it had obligations under the Head Lease to make payments in the event of loss, but those obligations do not mean that the APA Assignment was for security. Reply at 23.

As the Trustee notes, if there were a [REDACTED] [REDACTED] Ex. I § 19. In Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973), the court held that an assignment was for security in part because if the assignor made payments to the assignee, any excess over the amount of the loan received for the assignment would have been returned to the assignor. Here, in contrast, it is not the excess proceeds from the assigned property—the APA—that would be paid to TVPX and Zetta Singapore in the event of a [REDACTED] [REDACTED] Ex. I § 19.

VI. Whether the Assignee Retains a Right to Deficiency If the Assignment Does Not Satisfy the Amount of Debt Owed

CAVIC does not discuss any right of deficiency in the Motion. The Trustee contends that CAVIC retained a right of deficiency on the debt because Zetta Singapore was jointly and severally liable under the APA Assignment. Opposition at 30 (citing Complaint ¶¶ 98-99, 108). CAVIC replies that “deficiency” is not the right word, and it had a right of contribution which would have been for at least half under New York law. Reply at 23.

The APA indicated that if it were assigned, Zetta Singapore would “remain jointly and severally liable with the assignee for the fulfilment of all the obligations under this Agreement.” Ex. A § 10.1. And, the APA Assignment indicated that Zetta Singapore remained jointly and severally liable under the APA. Complaint ¶¶ 98-99, 108; Ex. R § 2. The fact that Zetta Singapore remained jointly and severally liable after the APA Assignment does not mean that CAVIC retained a right of deficiency. “Joint and several liability” is liability “that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary’s discretion.” Liability, Black’s Law Dictionary (11th ed. 2019). Each party is individually responsible for the entire obligation, and if one party pays the amount owed, that party may have a right of contribution or indemnity from the nonpaying parties. Id. A “deficiency” is a “lack, shortage, or insufficiency of something that is necessary.” Deficiency, Black’s Law Dictionary (11th ed. 2019). The Trustee’s claim, that CAVIC retained a right of deficiency, is an inaccurate description of Zetta Singapore’s joint and several liability.

Further, EDC transferred the \$30 Million PDP to Bombardier on 3/31/17, the same day that the APA Assignment was executed, Complaint ¶ 100 (citing Ex. S), resulting in

CAVIC asserted essentially the same legal theory in POC #162 as it does in this AP—namely, that the assignment was absolute—and the POC indicated that it was filed as a “prophylactic” measure due to the claims bar date. Ex. Y. This scenario is distinguishable from that in Matter of Candy Lane Corp., 38 B.R. 571, 577 (Bankr. S.D.N.Y. 1984), where the court inferred the parties’ intent that the assignment was for security based on the claimant’s proof of claim, which indicated that the claim was secured and only after the chapter 11 trustee challenged the claimant’s secured status did she begin to assert that the assignment was absolute. Id. In contrast, here, CAVIC has never wavered in arguing that the APA Assignment was absolute.

5. Conclusion

Because the Complaint does not sufficiently plead that the APA Assignment was for security rather than an absolute assignment, it is not avoidable as an unperfected security interest under § 544, and the \$30 Million PDP is not property of the estate.

c. Count VII

1. Motion

CAVIC argues that Count VII should be dismissed because courts require preference claims to allege more than just the statutory elements of a preference, and must identify “*the nature and amount of each antecedent debt.*” Motion at 27-28 (emphasis added by CAVIC) (citing Valley Media Inc. v. Borders, Inc. (In re Valley Media, Inc.), 288 B.R. 189, 192 (Bankr. D. Del. 2003); In re Doorman Prop. Maint., 2017 WL 90332, at *3 (Bankr. N.D. Cal. Jan. 10, 2017)). CAVIC acknowledges that the Complaint indicates that the Debtors paid it invoices, but it does not state the amounts due under each invoice or attach the relevant invoices. Id. at 28.

CAVIC claims that its preference defenses—subsequent new value and ordinary course of business—are valid regardless of whether it was a lessor or a long-term or short-term lender. Id. (citing Union Bank v. Wolas, 502 U.S. 151, 162 (1991); Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178, 1189 (11th Cir. 2018)).

CAVIC contends that a complaint may be subject to Rule 12(b)(6) dismissal when an affirmative defense appears on its face and presents an “insuperable barrier to recovery by the plaintiff.” Id. at 30 (quoting Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 212 B.R. 76, 84 (Bankr. E.D. Pa. 1997); citing Gellert v. Coltec Indus., Inc. (In re Crucible Materials Corp.), 2012 WL 5360945 (Bankr. D. Del. 2012); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127 (3d Cir. 1997); Burtch v. Revchem Composites, Inc. (In re Sierra Concrete Design, Inc.), 463 B.R. 302, 306 (Bankr. D. Del. 2012)).

CAVIC claims that the subsequent new value defense under § 547(c)(4) has two interrelated purposes: 1) to encourage trade creditors to continue dealing with troubled businesses; and 2) to treat creditors fairly who have replenished the estate after

receiving a preference. Id. at 33 (citing PMC Mktg. Corp. v. PDCM Assoc. (In re PMC Mktg. Corp.), 518 B.R. 150, 157 (B.A.P. 1st Cir. 2014); Wahoski v. Am. & Efrid, Inc. (In re Pillowtex Corp.), 416 B.R. 123, 130 (Bankr. D. Del. 2009)). According to CAVIC, the subsequent new value defense allows a preference defendant to offset an avoidable transfer by the amount of “new value” extended to the debtor after the transfer. Id.

CAVIC indicates that to establish this defense, it must show that: 1) it advanced new value to the Debtors after the preferential transfer; 2) the amount was unsecured; and 3) it did not receive payment for the new value. Id. (citing Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228, 231 (9th Cir. 1995)). CAVIC claims that new value is created where a debtor-lessee, like Zetta USA, retains possession and use of leased property. Id. (citing PMC Mktg., 518 B.R. at 158; Brown v. Morton, 201 B.R. 563, 567 (Bankr. W.D. Wash. 1999)).

CAVIC argues that the Complaint and the record in the Cases establish the applicability of the subsequent new value defense as a matter of law. Id. at 33. CAVIC indicates that the Complaint identifies: 1) each of the transfers that Zetta Singapore made to it on 6/27/17 (6/27/17 Transfers), including the amount and that the payments were made under the Financed Leases; 2) the Debtors continued to use the “Aircraft,” and CAVIC advanced subsequent new value to the Debtors in excess of the amount of the 6/27/17 Transfers; and 3) Debtors did not pay for these advances, which were unsecured. Id. at 30. CAVIC claims that the Debtors made: 1) no payments after 6/28/17; 2) experienced serious liquidity issues; and 3) missed a payment due on 6/24/17 to the ZJ6000-1 Statutory Trust. Id. 33. CAVIC highlights that the ZJ6000-1, ZJ6000-2, and ZJ6000-3 Statutory Trusts allowed the Debtors to continue using Aircraft 9716, 9740, and 9764 up to and after the Debtors’ bankruptcy filing. Id. CAVIC indicates that lease payments were made in arrears, so the 6/27/17 Transfers made by Zetta Singapore were not prepayments for using Aircraft 9716, 9740, and 9764 during July, August, and September. Id. at 33-34.

CAVIC asserts that the amount of “new value” it extended is not in dispute based on the schedule of prepetition quarterly payments due or accrued but not made:

- 1) \$1,899,215.45 for Aircraft 9716, based on an unpaid quarterly payment of \$1,533,359.99 due 8/24/17, plus \$365,855.46, a portion of the next quarterly payment of \$1,529,941.73 accrued before the Petition Date.
- 2) \$1,447,580 for Aircraft 9740, based on a portion of the next quarterly payment of \$1,556,793.36 accrued before the Petition Date.
- 3) \$1,291,087.34 for Aircraft 9764, based on a portion of the next quarterly payment of \$1,503,544.75, accrued before the Petition Date.

Id. at 34. CAVIC claims that this \$4,637,882.79 “new value” exceeds the \$1,519,806.61 it was owed for Aircraft 9716 and is approximately the amount of all transfers it received within the 90-day preference period. Id.

CAVIC also argues that the § 547(c)(2) ordinary course of business defense shelters it from liability regarding the 6/27/17 Transfers. Id. at 31. It asserts that the payments for Aircraft 9740 and 9764, totaling \$3,119,809.99, were made either on or within a few days of the scheduled lease payment date, which conclusively establishes that they were made in the “ordinary course of business.” Id. CAVIC claims that the Supreme Court and California bankruptcy courts recognize that the ordinary course of business defense should be broadly construed because it furthers the policy of preventing dismemberment of a debtor by enabling it to continue operating. Id. (citing McGranahan v. Harris Woolf Cal. Almonds (In re Cent. Valley Processing, Inc.), 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007)). CAVIC highlights that the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amended § 547(c)(2) to increase the protection for creditors who provide goods and services to financially distressed debtors. Id. (citing Cent. Valley Processing, 2007 WL 2119002, at *3 n.4). According to CAVIC, the defense can be established by showing that the disputed transfer was consistent with either a “subjective test” or an “objective test.” Id.

CAVIC argues that under the “subjective test,” the Trustee’s claim to \$3,119,809 fails as a matter of law. Id. at 32. CAVIC indicates that factors courts consider in determining whether transfers are ordinary when compared with past practices under the subjective test are: 1) the length of time the parties were engaged in the transactions; 2) whether the amount or form of tender differed from past practices; 3) whether the debtor or creditor engaged in any unusual collection or payment activity; and 4) whether the creditor took advantage of the debtor’s deteriorating financial condition. Id. (citing In re Grand Chevrolet, Inc., 25 F.3d 728, 732 (9th Cir. 1994)). CAVIC contends that the Trustee relies on a single factor—unusual collection or payment activity—to challenge the “ordinary course” defense. Id. at 32. But, CAVIC claims that the allegations in the Complaint do not establish that there was any “unusual collection or payment activity” because to meet this threshold, the Trustee must allege that it engaged in some proscribed practice such as a work stoppage or legal action. Id. at 32 (citing Cent. Valley Processing, 2007 WL 2119002, at *6).

CAVIC asserts that here, there is no allegation that the 6/27/17 Transfers resulted from any prohibited practices. Id. It argues that the two emails that form the basis of the Trustee’s claims merely discuss issuing a default notice. Id. (citing Complaint ¶ 115). CAVIC argues that despite Zetta Singapore’s financial instability, which included missing an 8/24/17 payment for Aircraft 9716, the Trustee does not allege that the ZJ6000-1, ZJ6000-2, and ZJ6000-3 Statutory Trusts prevented the Debtors from continuing to use Aircraft 9716, 9740, and 9764 during the period up to and after the Petition Date. Id.

Regarding the “objective test,” CAVIC contends that there is no question that the quarterly lease payments for Aircraft 9740 and 9764 were according to “contract terms” between the parties and \$3,119,809 of the 6/27/17 Transfers are not recoverable by the Trustee as a matter of law. Id.

notwithstanding an affirmative defense's likelihood of success, it cannot be the basis for dismissal of a complaint under Rule 12(b)(6). Id. (citing In re The Russ Co., Inc., 2013 WL 4028098, at *5 (Bankr. D.N.J. Aug. 6, 2013); In re Autobacs Strauss, Inc., 473 B.R. 525, 571 (Bankr. D. Del. 2012)).

The Trustee asserts that the defenses CAVIC raises involve numerous factual issues, making them inappropriate for decision at this time. Id. The Trustee contends that the subsequent new value defense is inapplicable because the Financed Leases were not true leases, but rather security agreements. Id. at 34-35. According to the Trustee, to establish a new value defense, a creditor must show: 1) it advanced new value to the debtor after the preferential transfer; 2) the advance of new value was unsecured; and 3) the advance of new value remains unpaid or, if paid, the payment must also be avoidable. Id. at 35 (citing In re Modtech Holdings, Inc., 503 B.R. 737, 745 (Bankr. C.D. Cal. 2013)).

The Trustee argues that CAVIC cannot meet its burden because missed "lease payments" to acquire a capital asset under a disguised financing arrangement do not provide new value to a debtor or its estate. Id. (citing United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 613 (7th Cir. 2005), cert. denied 126 S. Ct. 1465 (Mar. 6, 2006); In re Nucorp Energy, Inc., 116 B.R. 872 (B.A.P. 9th Cir. 1989)). He claims that the United Airlines court held that a debtor was not required to assume a disguised financing lease under § 365 and pay post-assumption "rent" for what were obligations incurred to acquire a capital asset. Id. (citing United Airlines, 416 F.3d at 617). The Trustee argues that the future obligation to pay "rent" under a disguised financing is no different from a debtor's obligation to pay prepetition principal and interest under an asset acquisition loan, which should be dealt with, along with other prepetition claims, in a plan of reorganization. Id. (citing United Airlines, 416 F.3d at 617). The Trustee asserts that the same rationale applies to negate CAVIC's subsequent new value theory. Id. He claims that CAVIC provided value to the Debtors by funding loans under the disguised financings at the inception of the Financed Leases, not when the Debtors missed debt service payments following the 6/27/17 Transfers. Id.

The Trustee contends that the ordinary course of business defense requires a "peculiarly factual analysis," and "unusual collections practices" like threats are viewed as not in the ordinary course of business. Id. at 36 (citing Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991); In re Bender Shipbuilding & Repair Co., Inc., 479 B.R. 899, 905 (Bankr. S.D. Ala. 2012)). The Trustee argues that the Complaint's allegations of threats and other unusual practices require a factual analysis. Id. (citing Complaint ¶¶ 115(a)-(b), 120).

The Trustee contends that the "earmarking doctrine," a judge-made exception to § 547, is construed against a defendant and is inapplicable here. Id. (citing In re BR Festivals, LLC, 2015 WL 1216836, at *2 (Bankr. N.D. Cal. Mar. 11, 2015)). According to the Trustee, it applies where the only change regarding the debt is the identity of the creditor. Id. (citing 5 Collier on Bankruptcy ¶ 547.03[2][a]).

The Trustee argues that CAVIC has demonstrated none of the “earmarking doctrine’s” elements: 1) an agreement between the new lender and the debtor that new funds will be used to pay a specified antecedent debt; 2) performance of that agreement according to its terms; and 3) the transaction viewed as a whole does not result in any diminution of the estate. Id. (citing In re Straightline Invs., Inc., 525 F.3d 870, 881-82 (9th Cir. 2002)).

The Trustee contends that the “lender” was a shareholder and pre-existing lender of the Debtors and the “earmarking doctrine” typically applies when “a *new creditor is substituted for an old creditor.*” Id. at 36-37 (emphasis added by the Trustee) (citing In re Interior Wood Prods. Co., 986 F.2d 228, 231 (8th Cir. 1993)). The Trustee asserts the Complaint does not allege that the Shareholder Loan agreement required the Debtors to use the proceeds of the loan to pay any specific debt. Id. at 37. Finally, the Trustee argues that the 6/27/17 Transfers diminished the Debtors’ estates because without the transfers to CAVIC, the money from the Shareholder Loan could have been used to pay other creditors. Id. (citing In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988)).

3. Reply

CAVIC replies that Count VII contains all material facts necessary to establish its §§ 547(c)(2) and (4) defenses and must be dismissed. Reply at 24. CAVIC asserts that the Trustee ignores the precedent it cited holding that where the facts of the complaint establish a subsequent new value or ordinary course of business defense as they do here, a claim should be dismissed. Id. (citing Tatung Co., Ltd. v. Shu Tze Hsu, 43 F.Supp.3d 1036, 1057 (C.D. Cal. 2014); ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 860 (3d Cir. 1994)).

CAVIC contends that Zetta Singapore’s continued use of Aircraft 9716, 9740, and 9764 constitutes “subsequent new value” in excess of the alleged preferential payments. Id. CAVIC indicates that the Trustee’s argument presumes that the Court will ignore the parties’ choice of English law, which prohibits recharacterization. Id. at 24-25. CAVIC asserts that the Opposition provided no authority holding that continued use of the aircraft cannot constitute “subsequent new value” because it is a financing. Id. at 25. CAVIC argues that based on the undisputed schedule of unpaid prepetition quarterly payments due or accrued for Aircraft 9716, 9740, and 9764, the amount of “subsequent new value” extended by CAVIC is \$4,637,882.79, which is approximately the same amount as the alleged preferential transfers. Id. (citing In re PMC Mktg. Corp., 518 B.R. 150, 153 (1st Cir. 2014)).

CAVIC asserts that the Complaint establishes that the “ordinary course of business” defense creates a barrier to the Trustee’s recovery under § 547. Id. CAVIC highlights that the 6/27/17 Transfers regarding Aircraft 9740 and 9764, totaling \$3,119,809, were made on or within a few days of their scheduled lease payment due dates and were made per the exact terms of the parties’ original agreements. Id. (citing In re Globe Mfg. Corp., 567 F.3d 1291, 1298 (11th Cir. 2009)). In response to the Trustee’s

contention regarding “unusual collection practices,” CAVIC claims that the two emails are not “unusual collection activity” as a matter of law. Id. CAVIC highlights that it requested repayment after learning of Zetta Singapore’s financial difficulties. Id. at 25-26 (citing Complaint ¶¶ 112, 115(a)-(b)). CAVIC argues that in the Ninth Circuit, a request for payment is not “unusual collection activity.” Id. at 26 (citing In re Comark, 145 B.R. 47 (B.A.P. 9th Cir. 1992)).

CAVIC notes that the Trustee cites In re Bender Shipbuilding & Repair Co., Inc., 479 B.R. 899 (Bankr. S.D. Ala. 2012), in support of his argument that “unusual collections practices” such as threats are not in the ordinary course of business. Id. CAVIC argues that unlike Bender, here, there were no late payments, no allegations of threats of revoking a critical vendor service, and no 20-year relationship. Id. CAVIC claims that there were only timely payments made pursuant to the parties’ express agreement. Id.

CAVIC maintains that the “earmarking doctrine” applies because the Debtors’ transfer of the Shareholder Loan proceeds was not a transfer of an interest they had in property. Id. CAVIC highlights that a shareholder loaned the Debtors \$15 million, and one day later, \$14.5 million was used to pay creditors, including the \$4,768,654.10 6/27/17 Transfers. Id. (citing Complaint ¶¶ 116-18).

CAVIC notes that in evaluating whether the earmarking doctrine applies, courts examine the entire transaction. Id. at 26-27 (citing In re TriGem Am. Corp., 431 B.R. 855 (Bankr. C.D. Cal. 2010)). CAVIC contends that it is readily apparent from the Complaint that the purpose of the Shareholder Loan was to pay it and other creditors. Id. at 27. According to CAVIC, this payment resulted in no diminution to the Debtors’ estates, there was no transfer of an interest of the Debtors in property, and the Trustee’s preference claims must be dismissed. Id.

4. Analysis

The parties raise a number of issues, which the Court will address in the following order: 1) whether the Complaint alleges the nature and amount of the antecedent debt; 2) raising affirmative defenses at the motion to dismiss stage; 3) the ordinary course of business defense; 4) the subsequent new value defense; and 5) the earmarking doctrine.

i. Allegations Regarding the Nature and Amount of the Antecedent Debt

CAVIC contends that the Complaint does not explain the nature and amount of the debt on account of which the 6/27/17 Transfers were made, as it was required to do. Motion at 28. The Trustee responds that the Complaint sufficiently pleads the nature and amount of each antecedent debt, arguing that the 6/27/17 Transfers were made on account of amounts owed on the Delivered Financed Leases and the Complaint identifies, by aircraft, the payments made on account of each antecedent debt. Id. at

33-34 (citing Complaint ¶¶ 119(a)-(d), 122, 167). In the Reply, CAVIC does not address this element.

To survive a motion to dismiss, a claim to avoid preferential transfers must identify: 1) the nature and amount of each antecedent debt; and 2) each alleged preference transfer by i) date, ii) name of debtor/transferor, iii) name of transferee, and iv) amount of the transfer. In re Valley Media, Inc., 288 B.R. 189, 192 (Bankr. D. Del. 2003); In re Doorman Prop. Maint., 2017 WL 90332, at *3 (Bankr. N.D. Cal. Jan. 10, 2017). “A debt is ‘antecedent’ if it is incurred before the transfer: the debt must have preceded the transfer.” 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy § 547.03[4] (16th ed. 2013); see In re Bullion Reserve of N. Am., 836 F.2d 1214, 1218-19 (9th Cir. 1988); In re Pfankuch, 393 B.R. 18, 25 (Bankr. D. Idaho 2008).

Here, the Complaint alleges that the 6/27/17 Transfers from Zetta Singapore to CAVIC included:

- 1) \$1,519,806.61 regarding Aircraft 9716;
- 2) \$1,568,638.06 regarding Aircraft 9740;
- 3) \$1,551,171.93 regarding Aircraft 9764; and
- 4) \$129,037.50 regarding Aircraft 9788.

Complaint ¶ 119(a)-(d). It also alleges that these 6/27/17 Transfers were made on account of debts owed to CAVIC pursuant to the Financed Leases, which were executed before the transfers. Complaint ¶ 167. The Complaint alleges that the amounts owed under the Delivered Financed Leases were at all times during the preference period “vastly undersecured,” making the undersecured portion a deficiency claim, which was a general unsecured claim. Complaint ¶ 122. According to the Complaint, it is highly likely that distributions to unsecured creditors will be significantly below the allowed amounts of such claims, and because of the 6/27/17 Transfers, CAVIC received more than it would have in these Cases if the 6/27/17 Transfers had not been made. Complaint ¶ 122.

Count VII contains sufficient allegations to withstand a motion to dismiss regarding the date, name of debtor/transferor, name of transferee, and amount of the transfer. It does not, however, sufficiently allege the nature or amount of each antecedent debt. Therefore, Count VII must be dismissed.

ii. Raising Affirmative Defenses at the Motion to Dismiss Stage

CAVIC claims that it is “well-established” that a Rule 12(b)(6) motion can be granted when an affirmative defense appears on the face of a complaint, which presents an “insuperable barrier to recovery by the plaintiff.” Motion at 30. The Trustee counters that affirmative defenses are irrelevant for purposes of a motion to dismiss. Opposition at 34. CAVIC replies that Rule 12(b)(6) motions can be granted where a complaint’s allegations establish an affirmative defense. Reply at 24.

CAVIC and the Trustee cite out of circuit and district court cases to support their positions that dismissal under Rule 12(b)(6) is or is not appropriate on the basis of affirmative defenses. Motion at 30 (citing Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 212 B.R. 76, 83 n.7 (Bankr. E.D. Pa. 1997) (noting that a complaint may be subject to Rule 12(b)(6) dismissal when an affirmative defense appears on its face and presents an insuperable barrier to recovery by the plaintiff); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127 (3d Cir. 1997) (same); Gellert v. Coltec Indus., Inc. (In re Crucible Materials Corp.), 2012 WL 5360945, at *4 (Bankr. D. Del. Oct. 31, 2012) (rejecting the trustee's argument, that affirmative defenses—particularly the ordinary course of business defense—cannot be considered in the context of a motion to dismiss, and indicating that when an affirmative defense appears on the face of the complaint and presents an insuperable barrier to recovery by the plaintiff, the court may dismiss the count)); Opposition at 34 (citing Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008) (refusing to consider the defendant's qualified immunity defense at the motion to dismiss stage because the defense looks to whether the officer's conduct violated a clearly established constitutional right, and the complaint sufficiently alleged a violation of a clearly established constitutional right); In re Gluth Bros. Const., Inc., 424 B.R. 379, 398 (Bankr. N.D. Ill. 2009) (indicating that the defendant's § 547(c)(2) ordinary course of business defense was irrelevant for purposes of a motion to dismiss, because the preference exceptions in § 547(c) are affirmative defenses); In re The Russ Co., Inc., 2013 WL 4028098, at *5 (Bankr. D.N.J. Aug. 6, 2013) (holding that affirmative defenses cannot be used to dismiss a plaintiff's complaint under Rule 12(b)(6)); In re Autobacs Strauss, Inc., 473 B.R. 525, 571 (Bankr. D. Del. 2012) (indicating that the subsequent new value defense was not appropriate to consider at the motion to dismiss stage); Adelphia Commc'ns Corp. v. Bank of Am., N.A., 365 B.R. 24, 79 (Bankr. S.D.N.Y. 2007) (indicating that if facts outside the complaint were true, the preference claims might not survive but denying a Rule 12(b)(6) motion because the ordinary course defense raised factual issues)); Reply at 24 (citing ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994) (noting that a complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense like the statute of frauds appears on its face); Tatung Co., Ltd. v. Shu Tze Hsu, 43 F.Supp.3d 1036, 1057 (C.D. Cal. 2014) (holding that a motion to dismiss may be granted where the complaint's allegations, with all inferences drawn in the plaintiff's favor, nonetheless show that an affirmative defense is apparent on the face of the complaint)).

Neither party cites controlling Ninth Circuit authority, which holds that dismissal under Rule 12(b)(6) based on an affirmative defense is proper only if the defendant shows an obvious bar to securing relief on the face of the complaint. ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014). But if, from the allegations of the complaint and any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper. Id.

iii. Subsequent New Value Defense

CAVIC argues that the Complaint specifies the amount and date on which the 6/27/17 Transfers were made and the payments were made pursuant to the Financed Leases.

Motion at 31. CAVIC contends that the Trustee’s claims to recover the \$3,119,809 fail under the “subjective test” because the Complaint’s allegations do not establish that there was any “unusual collection or payment activity” as a matter of law. Id. at 32. Alternatively, CAVIC asserts that there is no question that the “objective test” is met because quarterly lease payments for Aircraft 9740 and 9764 were made according to contract terms. Id.

The Trustee responds that the ordinary course of business defense requires a factual analysis, and “unusual collections practices” like threats are viewed as not in the ordinary course of business. Opposition at 36. CAVIC replies that the 6/27/17 Transfers for Aircraft 9740 and 9764 were made on or within a few days of their scheduled lease payment due dates. Reply at 25. And, CAVIC claims that the two emails that the Trustee relies on cannot be “unusual collection activity” because CAVIC requested repayment after learning of Zetta Singapore’s financial difficulties. Id. at 25-26.

The § 547(c)(2) “ordinary course of business defense” provides:

The trustee may not avoid under this section a transfer . . . to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

- (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
- (B) made according to ordinary business terms.

The ordinary course of business defense deters a “race to the courthouse” and enables struggling debtors to continue operating their business. Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197 (9th Cir. 2003). It is construed broadly because it furthers the policy of preventing dismemberment of a debtor during its slide into bankruptcy by enabling the struggling debtor to continue operating its business. In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007). The ordinary course of business defense involves a “peculiarly factual analysis,” and examines whether: 1) the debt and its payment were “ordinary” regarding past practices between the debtor and the creditor (Subjective Test); or 2) the payment was “ordinary” in relation to prevailing business standards (Objective Test).³³ Lovett v. St. Johnsburry Trucking, 931 F.2d 494, 497 (8th Cir. 1991); Cent. Valley Processing, 2007 WL 2119002, at *3 & n.4.

³³ Under the Bankruptcy Abuse and Consumer Protection Act of 2005, the ordinary course of business defense can be established by a showing that the disputed transfer of property was consistent with either the Subjective Test or the Objective Test. In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 n.4 (Bankr. E.D. Cal. July 19, 2007).

A. The Subjective Test

The Subjective Test cannot be reduced to a “bright line.” In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *5 (Bankr. E.D. Cal. July 19, 2007) (citing In re Grand Chevrolet, Inc., 25 F.3d 728 (9th Cir. 1994)). The Ninth Circuit has announced four nonexclusive factors to consider regarding the Subjective Test:

- 1) The length of time the parties were engaged in the transactions;
- 2) Whether the amount or form of tender differed from past practices;
- 3) Whether the debtor or creditor engaged in any unusual collection or payment activity; and
- 4) Whether the creditor took advantage of the debtor’s deteriorating financial condition.

Id. (citing Grand Chevrolet, 25 F.3d at 732).

Here, the parties only address the third factor and dispute whether CAVIC engaged in unusual collection activity involving two emails:

- 1) On 6/14/17, a CAVIC representative emailed Geoffrey Cassidy (Cassidy),³⁴ stating that things were reaching a “critic[al] point” and EDC would not provide further financing in the future, and threatening to tell EDC about “unpaid overdue rents.” The CAVIC representative added that he was “not bluffing” (6/14/17 Email).
- 2) On 6/23/17, in response to a CAVIC representative forwarding an email from EDC in which EDC noted that it was considering issuing a default notice to Zetta Singapore, Cassidy asked to be given until 6/27/17 to make all payments or they could get him “from all angles!” The CAVIC representative replied that it needed “to be solved today not Monday or Tuesday” (6/23/17 Email).

Complaint ¶ 115 (citing Ex. AA).

CAVIC cites In re Comark, 145 B.R. 47 (B.A.P. 9th Cir. 1992), in support of its argument that the 6/14/17 Email and 6/23/17 Email cannot be considered “unusual collection activity” because it requested repayment after learning about Zetta Singapore’s financial difficulties. Reply at 25-26. In Comark, the BAP held that a creditor’s request for repayment after it learned of the debtor’s financial difficulties did not compel a conclusion that the payment was outside the ordinary course of business because that conduct was consistent with prior dealings between the parties and industry practices that occurred during the debtor’s downward slide into bankruptcy. Comark, 145 B.R. at 56. Here, in contrast, CAVIC highlights no evidence regarding its past dealings with Zetta Singapore, and in fact, the Complaint alleges that the 6/27/17 Transfers were extraordinary because they “were over \$2.4 million more than the Debtors had ever paid to CAVIC on a single day.” Complaint ¶ 120.

³⁴ Cassidy was the managing director of the Debtors. Complaint ¶ 115(a).

Singapore, and as noted above, the Complaint indicates that the 6/27/17 Transfers were extraordinary.

B. The Objective Test

CAVIC summarily argues that based on the Complaint's allegations, there is no question that the quarterly lease payments for Aircraft 9740 and 9764 were according to contract terms. Motion at 32. CAVIC, however, does not address "prevailing business standards," and the Court finds that the Objective Test is not a basis for dismissal. See In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007) (indicating that the Objective Test looks to whether the payment was "ordinary" in relation to prevailing business standards).

v. Earmarking Doctrine

CAVIC argues that the funds used for the 6/27/17 Transfers were "earmarked." Motion at 34-35. The Trustee counters that the earmarking doctrine does not apply because the funds used for the 6/27/17 Transfers were not earmarked to go to CAVIC. Opposition at 36-37. CAVIC replies that the purpose of the Shareholder Loan was to pay it and other creditors, and the earmarking doctrine is a basis for dismissal of Count VII. Reply at 27.

The earmarking doctrine applies when a third party lends money to a debtor for the specific purpose of paying a selected creditor. In re Straightline Invs., Inc., 525 F.3d 870, 881-82 (9th Cir. 2008). It requires:

- 1) an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt;
- 2) performance of that agreement according to its terms; and
- 3) the transaction viewed as a whole does not result in any diminution of the estate.

Anderson v. Adams (In re Superior Stamp & Coin Co., Inc.), 223 F.3d 1004, 1008 (9th Cir. 2000). Because the earmarking doctrine is a judicially created exception to § 547, it is narrowly construed. 5 Collier on Bankruptcy ¶ 547.03 (2020). As long as a trustee demonstrates that the debtor had an interest in property, the burden shifts to the defendant to prove earmarking. In re FBI Wind Down, Inc., 581 B.R. 116, 133 (Bankr. D. Del. 2018).

Here, CAVIC relies on the Debtors receiving the \$15 million Shareholder Loan and making the 6/27/17 Transfers to CAVIC the next day to infer that there was an agreement between the Debtors and the shareholder for CAVIC to be paid. Motion at 34-35; Complaint ¶¶ 116-18. CAVIC, however, provides no evidence that such an agreement existed. Because there is no evidence that the Shareholder Loan proceeds were to be used to pay a debt to CAVIC, the second element is not met. And, when funds could have been used to pay other creditors, "it presumptively constitutes

property of the debtor's estate.” In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988). Here, all indications are that the 6/27/17 Transfers could have been paid to other creditors, and when the funds were paid to CAVIC, the Debtors’ estates were diminished. Because CAVIC has not shown that any of the elements of the earmarking doctrine are satisfied, this defense is not a basis for dismissal of Count VII.

5. Conclusion

For the reasons stated above, Count VII, which seeks avoidance and recovery of the 6/27/17 Transfers as preferential transfers, is dismissed.

d. Leave to Amend

In the Motion, CAVIC summarily argues that Counts I, III, IV, V, VI, and VII should be dismissed without leave to amend. Motion at 2. The Trustee argues that in the event of dismissal, he should be granted leave to amend. Opposition at 37 (citing Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc); Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 983 (9th Cir. 2000)). CAVIC does not address leave to amend in the Reply.

Federal Rule of Bankruptcy Procedure 7015 provides that Rule 15 of the FRCP applies to supplemental and amended pleadings in bankruptcy cases. Rule 15(a)(2) indicates that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”

Courts have the discretion to grant or deny leave to amend a complaint. Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996). “In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). Consequently, the policy to grant leave to amend is applied with “extreme liberality.” Id.

Parties seeking leave to amend have the initial burden to show a legitimate reason for seeking amendment. See Foman v. Davis, 371 U.S. 178, 182 (1962); Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 989 F. Supp. 1237, 1241 (N.D. Cal. 1997). Assuming the movant meets that burden, the burden then shifts to the party opposing amendment to show that leave to amend is not warranted. Advanced Cardiovascular Sys., 989 F. Supp. at 1241 (“Once a party seeking leave to amend has given a legitimate reason for amendment, the burden shifts to the party opposing amendment to demonstrate why leave to amend should not be granted.”) (citing Genentech, Inc. v. Abbott Labs., 127 F.R.D. 529, 530-31 (N.D. Cal. 1989)). The party opposing amendment must demonstrate that the following factors warrant denial of leave to amend:

1. Bad faith;
2. Undue delay;

3. Prejudice to the opposing party; and
4. Futility of amendment.

Ditto v. McCurdy, 510 F.3d 1070, 1079 (9th Cir. 2007) (internal citations omitted); Smith v. Chrysler Corp., 938 F. Supp. 1406, 1412 (S.D. Ind. 1996) (“Defendants have the burden of showing that the amendment is sought in bad faith, that it is futile, or that it would cause substantial prejudice, undue delay or injustice.”) (internal citations omitted).

Of the factors courts analyze when adjudicating motions for leave to amend, the potential for prejudice to the opposing party “carries the greatest weight.” Reed v. Dynamic Pet Prods., 2016 WL 4491597, at *1 (S.D. Cal. Jan. 5, 2016). The opposing party has the burden of establishing prejudice. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir.1987). Absent prejudice or a strong showing of any of the remaining factors, “there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis in original). “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). “For an amendment to be futile, it must appear on its face that it is not actionable.” Coble v. Derosia, 2011 WL 444961, at *4 (E.D. Cal. Feb. 8, 2011).

Because of the policy to grant leave to amend with “extreme liberality,” and there have been no previous amendments, the Court finds that it is appropriate to grant the Trustee leave to amend Counts I, III, IV, V, VI, and VII.

IV. Conclusion

For the reasons stated above, Counts I, III, IV, V, VI, and VII are dismissed with leave to amend. Pursuant to LBR 9021-1(b)(1)(B), CAVIC must serve and lodge a proposed order via LOU within 7 days of the filing of this memorandum of decision.

EXHIBIT J

Planned Parenthood Federation of America, Inc. v. Center for Medical Progress

United States District Court, N.D. California. | December 22, 2020 | Slip Copy | 2020 WL 7626410

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Outline

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[All Citations](#) (p.10)

2020 WL 7626410
United States District Court, N.D. California.

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., et al., Plaintiffs,

v.

CENTER FOR MEDICAL
PROGRESS, et al., Defendants.

Case No. 16-cv-00236-WHO

Signed 12/22/2020

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ORDER ON MOTION FOR ATTORNEY FEES AND COSTS

Re: Dkt. No. 1131

William H. Orrick, United States District Judge

*1 Plaintiffs move for an award of attorney fees and non-statutory costs after winning a significant verdict and securing injunctive relief under claims that provide for an award of attorney fees. There is no dispute that they are entitled to fees and costs—the issue is, how much?

Plaintiffs' request represents a substantial reduction from their lodestar. That said, it remains indisputably large—\$14,816.034.70, including costs. The amount is not surprising in light of more than four years of very active litigation that led to a six-week trial. I know how hotly contested each phase—discovery, motion practice, hearings, trial, and post-trial proceedings—of the litigation was. The numerous attorneys on both sides represented their clients with tenacity and skill. Plaintiffs have exhibited good billing judgment in this application for fees, although in this Order I will reduce the amount further. With the reductions I describe below, plaintiffs' motion for attorney fees and non-statutory costs is GRANTED.

DISCUSSION

More than 130 attorneys worked on the case for plaintiffs and 22 of them billed more than 250 hours each. Declaration

of Amy L. Bomse (Dkt. No. 1131-1), ¶ 10. Plaintiffs seek an award of fees covering the time billed by only twelve of those attorneys as well as two paralegals. Those individuals seek compensation for a total of 21,200.25 hours; at current rates, that represents \$18,373,755 in attorney fees. Reply Declaration of Diana K. Sterk (Dkt. No. 1148-2, Ex. A). To account for potential inefficiency or duplication of efforts, plaintiffs reduced that amount by 25% and seek an award of \$13,780,317.00 in attorney fees. *Id.*; *see also* Bomse Decl. ¶12. Plaintiffs also seek \$1,035,717.68 in non-statutory costs. Reply Declaration of Meghan C. Martin (Dkt. No. 1148-1).

In support of their motion, plaintiffs did not submit their underlying contemporaneous timesheets. Instead, each billing attorney provided a detailed declaration breaking down the tasks that attorney completed in each of the nine specifically identified phases of this litigation. *See* Declaration Amy Bomse (Dkt. No. 1131-1); Declaration Steven Mayer (Dkt. No. 1131-2); Declaration Meghan Martin (Dkt. No. 1131-3); Declaration Matthew Diton (Dkt. No. 1131-4); Declaration Arielle Feldshon (Dkt. No. 1131-5); Declaration Jeremy Kamras (Dkt. No. 1131-6); Declaration Sharon Mayo (Dkt. No. 1131-7); Declaration Beth Parker (Dkt. No. 1131-8); Declaration Oscar Ramallo (Dkt. No. 1131-9); Declaration Maithreyi Ratakonda (Dkt. No. 1131-10); Declaration Diana Sterk (Dkt. No. 1131-11); Declaration Rhonda Trotter (Dkt. No. 1131-12).¹ Plaintiffs then identified the precise hours for which they seek compensation for each biller in each of the nine phases in one chart. Dkt. Nos. 1131-1, Ex. A. & 1148-2, Ex. A (revised, collectively "Chart").

¹ The two billing paralegals have not submitted declarations, but the scope and extent of their work is detailed in the Martin Declaration (Dkt. No. 1131-3,) and their hours for each phase detailed in the Chart. Dkt. Nos. 1131-1, Ex. A & 1148-2, Ex. A; *see also* Bomse Decl. ¶91.

*2 Defendants object to the rates charged by the billing attorneys and paralegals, to the amount of attorney fees sought as compared to their view of the limited success of plaintiffs, to the availability of fees for in-house counsel, to the reasonableness of the hours claimed by plaintiffs (as unsubstantiated by actual timesheets), and to the costs sought (as unsupported by evidence that these costs are typically reimbursed in this District and given plaintiffs' failure to provide invoices of the expenses). I will analyze those objections below.

I. DEFENDANTS' EXPERT DECLARATION

As an initial matter, I address defendants' submission of an "expert report" by Andre E. Jardini in support of their opposition. Jardini's declaration was attached as an exhibit to the Declaration of Jeffrey M. Trissell, but is not discussed in substance *anywhere* in defendants' opposition. The only mention of Jardini's declaration is on the last page of defendants' 23-page brief where, in 17 lines of text and bullet points, defendants simply identify the topics Jardini addresses in his declaration. That is improper. While declarations regarding prevailing rates are routinely considered in connection with attorney fee motions, those declarations should be discussed as part of the motion or opposition. That was not done here.

Moreover, the Jardini declaration goes beyond the question of prevailing rates in this district for similarly complex litigation and raises arguments never discussed in defendants' opposition. For example, Jardini's conjecture regarding review and transmission of invoices (or the lack thereof) in cases of *pro bono* representation was never mentioned, let alone supported by any case citation or authority, in defendants' opposition. Similarly, Jardini purports to contest the reasonableness of time charged and hours spent by specific billers identified in plaintiffs' billing summaries, but those challenges were not identified in the opposition brief or otherwise discussed by defense counsel.²

² For example, Jardini argues for reductions because the summaries provided by the billing paralegals are not supported by a declaration, the paralegals may have billed for overhead and administrative tasks, and that Feldshon was never admitted to practice in California nor admitted *pro hac vice* and therefore her time should be compensated at a "non-attorney rate." Dkt. No. 1146-2 ¶¶ 28, 37, 38. These are legal arguments improperly raised in Jardini's declaration and/or never mentioned in the opposition or otherwise by defense counsel.

Defendants' failure to discuss the contents or theoretical support Jardini's declaration might provide for the arguments they do make in their opposition brief was not for lack of space. Given the size of plaintiffs' fee and cost request as well as the many stages and long duration of this case, I granted the parties' mutual request for longer briefs to address all of the issues. I gave defendants 30 pages to oppose plaintiffs' motion. Dkt. No. 1144. They chose not to use the extra pages they requested and submitted a 23-page opposition.

Jardini's declaration suffers from numerous other deficiencies. It contains unsupported and inadmissible legal opinions and miscalculations. Given defendants' failure to incorporate Jardini's opinions in their opposition, his impermissible legal conclusions, and the errors in his analysis, it would be appropriate to strike Jardini's declaration.³ I will nonetheless consider Jardini's opinions in connection with the arguments actually made by defendants in their opposition.

³ See, e.g., *Stathakos v. Columbia Sportswear Co.*, 15-CV-04543-YGR, 2018 WL 1710075, at *5 (N.D. Cal. Apr. 9, 2018) (striking multiple paragraphs of Jardini's declaration "on the ground that these paragraphs contain improper legal opinions which either interpret or merely quote case law, the American Bar Associate Code of Professional Responsibility, the State Bar of California Professional Code, and the U.S. Attorney Offices' Attorney Fee Matrix"); *Lira v. Cate*, C00-0905 SI, 2010 WL 727979, at *4 & n.5 (N.D. Cal. Feb. 26, 2010) (striking two-thirds of Jardini's declaration as improper legal opinion).

II. RATES

*³ Defendants first challenge the rates sought for the 12 billing attorneys (partners and associates) and the two billing paralegals, arguing that the rates sought are "inflated."⁴ I find that the rates are reasonable given the scope and complexity of this case, as well as in light of rates approved in this District for partners, associates, and paralegals for similarly experienced counsel and staff at similar firms. The rates, while high, are supported by the authority cited by plaintiffs in their Motion. Dkt. No. 1131 at 20-21. They are rates paid by the clients of the billing attorneys in other matters.

⁴ Plaintiffs seek an award based upon the current (not historical) rates for the following billers: Mayer (\$1,280/hour); Trotter (\$1,150/hour); Parker (\$1,115/hour); Mayo (\$1,085/hour); Kamras (\$1,015/hour); Bomse (\$925/hour); Ratakonda (\$910/hour); Ramallo (\$910/hour); Sterk (\$910); Diton (\$815/hour); Feldshon (\$675); Martin (\$545/hour), and the two paralegals Ferrer (\$405) and Yee (\$390/hour).

Defendants do not challenge the use of current as opposed to historical rates, except for two attorneys; associates Feldshon

and Diton whose rates increased from 2016 to 2020 by 50% and 60% respectively. Opposition (Dkt. No. 1146) at 4. Defendants contend that these two attorneys should not be awarded such unexplained “rapidly-increasing” rates. Plaintiffs do not address or otherwise provide a justification for such large increases in Feldshon or Diton's rates in their motion, reply, or supporting declarations. Therefore, Feldshon and Diton's time will only be awarded at the rate they initially billed plus 25%, which is a rate of increase consistent with other plaintiff counsel.

Otherwise, plaintiffs have justified the rates sought by the other attorneys and paralegals sought here.⁵

⁵ Jardini characterizes the rates sought as at the “upper end of those that would be typically charged by firms in cases of this size and complexity.” Dkt. No. 1146-2, ¶ 30. Jardini does not say the rates are beyond or in excess of rates charged and approved in this District, nor do defendants offer any opinions from this or similar districts rejecting these rates for similarly sized firms and similarly experienced billers. Instead, Jardini suggests rates that are more “reasonable” in his view based on his firm's audit of “comparable firms,” that are not, in fact, comparable to similarly sized firms billing in the Bay Area. In the end, Jardini suggests reductions only for the rates of Kamras, Diton, Sterk, and the two paralegals. Jardini's proposed “Rate Adjustment” to those five billers is not justified. In their opposition brief, defendants primarily attack the partner rates (Oppo. at 2-3), but opinions from this District and evidence (including the Valeo database, the 2017 NLJ Survey, and Jardini's own opinion) supports awarding the partner rates sought.

III. DEGREE OF SUCCESS

Plaintiffs claim they are entitled to fees given their success on: (i) their RICO claims; (ii) the federal, Florida, and Maryland recording claims; and (iii) the PPCG NDA claim under Texas law. Mot. at 14-15. Defendants do not dispute that under these statutes attorney fees may be awarded, and for the RICO claims must be awarded. Instead, defendants argue that plaintiffs' limited success requires rejection of plaintiffs' fee request as not proportional to plaintiffs' success.

Defendants contend that plaintiffs recovered only 3% of the damages they originally sought,⁶ that their request for injunctive relief was significantly narrowed, that they were forced to drop claims in light of adverse rulings, and that some plaintiffs did not recover any damages. None of these arguments counsels reducing plaintiffs' requested fees.

⁶ Oppo. at 11-12. Defendants' calculation is based on plaintiffs' recovery of \$366,000 in compensatory damages and ignores plaintiffs' award of treble RICO damages, statutory damages, and punitive damages.

*4 Numerous courts have recognized that the “fee shifting provisions serve the [] purpose of encouraging private citizens to enforce the objectives of the RICO statute” and held that Congress did not intend “that attorneys' fees should be awarded only in some proportion to the plaintiff's damages.” *N.E. Women's Ctr. v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989); see also *Rosario v. Livaditis*, 963 F.2d 1013, 1019 (7th Cir. 1992) (“we do not believe that *Hensley* nor our own opinions following *Hensley* require a trial court to grant attorney's fees to a prevailing plaintiff in direct proportion to the overall relief obtained.”). Plaintiffs were successful on their RICO claims, even if the amount of damages at stake was significantly reduced during the course of the litigation. If I were required to address proportionality, it would not change my analysis because plaintiffs were likewise successful on their federal, Florida, and Maryland recording claims and the Texas breach claim, further supporting a robust fee award. Finally, the injunctive relief, secured in part under the federal and Florida recording statutes, also weighs in favor of the fee award even though the scope of injunctive relief awarded was narrower than requested by plaintiffs.

The claims that plaintiffs successfully pursued through trial – especially but not limited to their substantive and conspiracy RICO claims and the recording claims – were broad. All or very nearly all of the discovery sought and defended against was relevant to those claims, considering the elements of and defenses to those particular claims. The legal theories and evidence relevant to the claims providing for attorney fees broadly overlapped with the legal theories and evidence relevant to the claims on which plaintiffs were successful but do not independently provide for fees.⁷

⁷ Defendants make a number of arguments as to why plaintiffs should not recover for time

researching, briefing, or arguing claims that do not independently provide a right to attorney fees. *See e.g.*, Oppo. 9-10 & fns.10, 12 (arguing plaintiffs are not entitled to fees for work on UCL and trespass claims or the [California Penal Code § 633.5](#) defense). But those legal claims significantly overlap with the legal theories (and facts) underlying the RICO and recording claims generally.

Plaintiffs were arguably forced to drop a significant portion of their compensatory damage request, either because discovery did not establish a direct-enough connection between events and these defendants (*e.g.*, no evidence that defendants participated in or incited others to hack plaintiffs' system or vandalize plaintiffs' clinics) or because of adverse rulings from me (*e.g.*, cutting out publication damages). That does not mean that the time and effort to secure that discovery or brief those issues on summary judgment or *in limine* should be uncompensated. The disputed evidence about defendants' intent, conduct and the impact of that conduct on plaintiffs constituted the majority of the evidence introduced at trial. That "common core" of evidence and the related legal theories were directly relevant to the successful RICO and recording claims, as well as the scope of injunctive relief awarded.⁸ *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (where "plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories" ... "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) ("Thus, the test is whether relief sought on the unsuccessful claim 'is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.'") (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (7th Cir. 1983)).

⁸ Relatedly, defendants argue that plaintiffs should not be compensated for time spent on tasks that were only necessitated because of – in defendants' views – plaintiffs' unreasonable positions taken in the litigation. In particular, defendants identify time spent negotiating and making arguments to Judge Ryu and myself regarding the Protective Order

and the use of Doe identifiers. Oppo. at 6-7 & fns. 6, 8. Plaintiffs retort that it was defendants' unreasonable litigation conduct that drove up their hours. In particular, defendants filed dozens of motions to compel discovery, the vast majority of which were appealed to me and affirmed. All of these arguments simply evidence how hard fought this uniquely contentious case was. In the end, the negotiated Protective Order and use of Doe identifiers were approved by Judge Ryu and myself.

*5 Defendants do not attempt to argue, much less show, that the facts supporting any particular claim that plaintiffs dropped were unrelated to the facts underlying the claims on which plaintiffs were successful. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) ("We read *Hensley* as establishing the general rule that plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit. Thus, even if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims."). Accordingly, I will make no deductions because plaintiffs were unsuccessful on discrete claims or because some claims do not independently provide for attorney fees.

IV. IN-HOUSE COUNSEL

Defendants object to plaintiffs' request for \$1,432,659 in fees for 1,329.15 hours of work performed by in-house counsel Beth Parker and Maithreyi Ratakonda. Defendants contend that plaintiffs cannot recover for this time because the declarations of counsel show that they were either: (i) performing work typically performed by in-house counsel that is not compensable (*e.g.*, acting as a client liaison, providing client direction or general strategy oversight); or (ii) performing work that was duplicative of outside counsel that should not be compensated. *See, e.g., BladeRoom Group Ltd. v. Emerson Electric Co.*, 5:15-CV-01370-EJD, 2020 WL 1677328, at *6 (N.D. Cal. Apr. 6, 2020) (reducing in-house counsel's fees by 55% "because his work was primarily that of a traditional in-house counsel, and in other respects, appears to have been duplicative of work performed by the Farella attorneys"); *see also Milgard Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553, 558 (9th Cir. 1985) ("Of course, if in-house counsel are not actively participating (*e.g.*, acting only as liaison), fees should not be awarded."); *Scripps Clinic and Research Found., Inc. v. Baxter Travenol Laboratories, Inc.*, CIV. A. 87-140-CMW, 1990 WL 146385, at *1 (D. Del. July

31, 1990 (“time spent by in-house counsel in the role of a client, such as time spent keeping abreast of the progress of the litigation and advising outside counsel of the client's views as to litigation strategy, is not compensable in a fee award.”).

I agree in large part with defendants. Reviewing the Parker declaration, it appears that a significant portion of the time she spent was advising affiliates about the status and strategy of the litigation, seeking guidance for and making strategic decisions for her clients, performing initial factual investigation, and then reviewing and revising pleadings and motions. *See, e.g.*, Dkt. No. 1131-8, ¶¶ 12-14, 17. Those are typical in-house counsel tasks: acting as the point person for client communication, supervising outside counsel and revising their work, and making strategic decisions. That time is not compensable.

However, Parker also spent significant time performing actual litigation tasks including coordinating document collection and production, reviewing document productions to make redactions, gathering documents in advance of depositions, drafting fact declarations, and performing legal research in areas where Parker has particular expertise. *Id.* ¶¶ 14, 15, 16. That work would otherwise have been performed by outside counsel and is compensable. That said, it is unclear how much of that core litigation work was conducted solely or primarily by Parker (some clearly was) and how much was duplicative of the work also being conducted by outside counsel (some apparently was). In light of these facts, I will reduce the time sought by Parker by 70% to capture only the time she performed litigation tasks that were not duplicative of efforts of outside counsel.

*6 Turning to Ratakonda, her “review” of the PPFA document production and redactions (Dkt. No. 1131-10, ¶ 9), “contributing” to and “helping” with witness preparation and outlines for deposition (*id.* ¶¶ 10, 13), reviewing briefs (*id.* ¶ 11) and participating in strategy sessions (*id.* ¶ 12), appear to be duplicative of the work of outside counsel or work typically expected of in-house counsel. That work is not compensable. However, Ratakonda's work locating documents for production in advance of depositions (*id.* ¶ 10) and preparing PPFA-specific witnesses for depositions or trials on PPFA-specific topics (*id.* ¶¶ 10, 13) is compensable. This non-duplicative litigation time appears to be a small fraction of the work Ratakonda billed. I will reduce the time she seeks by 90% to account for the more significant traditional in-house counsel tasks and tasks that were duplicative of outside counsel that she performed.⁹

9 The primacy of Parker and Ratakonda's performance of typical in-house counsel functions is confirmed by the Bomse declaration which states that Parker and Ratakonda were “instrumental in securing outside counsel and interfacing between outside counsel and the California affiliates.” Bomse Decl. ¶ 9. Those are typical in-house counsel tasks.

V. REASONABLENESS OF HOURS

Defendants argue that plaintiffs cannot meet their burden of demonstrating the reasonableness of the hours billed or exercise of billing judgment because they failed to produce underlying timesheets. They contend that plaintiffs' summary attestations regarding tasks performed and hours billed are inconsistent and unreliable, and that the tasks performed are themselves insufficiently detailed.

I addressed the issue of production of timesheets in denying defendants' motion to compel the production of plaintiffs' timesheets. Dkt. No. 1139. As noted there, plaintiffs objected to producing contemporaneous timesheets because of the undue burden of having to redact hundreds of pages of timesheets for privileged and otherwise protected information (*e.g.*, references to individuals whose identities had not been disclosed at trial and work product/attorney client information). Plaintiffs also argued that production of timesheets with those necessary redactions would undermine their utility to defendants.

In rejecting defendants' motion to compel, I noted that plaintiffs supported their fee and cost motion with their detailed declarations and Chart. Dkt. No. 1131-1, Ex. A, and as revised, Dkt. No. 1148-2, Ex. A. After reviewing each side's caselaw, I concluded that plaintiffs' highly detailed declarations and Chart provided sufficient information to allow me to determine and defendants to contest the reasonableness of plaintiffs' fee request. I explained:

Given the very detailed nature of the declarations and chart, there is only limited potential utility in providing the defendants access to the underlying time sheets. That limited potential utility does not merit requiring plaintiffs to undertake the time-intensive effort to redact

attorney-client information from their over 700 pages of time sheets. I do not preclude defendants from identifying particular tasks (or parts of the phases as broken down by plaintiffs) about which they believe they or the Court do not have sufficiently detailed information when they oppose the motion for fees. They may explain at that time why there is insufficient information to test the reasonableness of the fees claimed by plaintiffs for those tasks. If necessary, I can then continue the hearing on the motion for fees and require plaintiffs to produce some subset of redacted time sheets. But given my inclination at this juncture, I advise defendants to also make their best arguments based on the information provided.

Dkt. No. 1139 at 2.

Defendants did not take my advice to heart. Their opposition mainly repeats the rejected argument that due process requires the production of the underlying timesheets despite the highly detailed declarations and the Chart. **Defendants submitted no evidence from their counsel to support an argument that plaintiffs engaged in unnecessary duplication of effort at any stage of this litigation for which plaintiffs seek compensation—not on any particular motion, in any deposition, in any hearing or case management conference, or during trial.** Numerous defense counsel were present at every step of this case, yet defense counsel did not identify from their readily available personal knowledge any reason why plaintiffs’ hours should be cut as unreasonable or duplicative. Nor did they identify (as I suggested) any particular phase or segment of this litigation for which they could not make those sorts of targeted challenges to plaintiffs’ hours without underlying billing records.¹⁰ Defendants instead apparently rest on the Jardini declaration. But there is no evidence that the Jardini declaration was informed by a comparison to defense counsels’ hours billed or the personal knowledge of defense counsel.¹¹

¹⁰ Had defense counsel attested that there was serious duplication of effort or unnecessary hours spent by

plaintiffs’ counsel in specific phases, as I indicated in my October Order, I could have ordered plaintiffs to produce timesheets for that specific phase or part of a phase. For example, defense counsel could have argued that in specifically identified meet and confers regarding identified discovery, plaintiffs’ staffing was unreasonable. They could have argued, based on that personal knowledge, that similar over-staffing or otherwise unreasonable staffing extended to an identified percentage of discovery disputes. That sort of evidence-based showing has not been attempted much less made. *But see Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1160 (9th Cir. 2018) (“In a contested case, a district court ordinarily can rely on the losing party to aid the court in its duty by vigorously disputing any seemingly excessive fee requests.”).

¹¹ In his declaration, Jardini proposes a reduced number of hours that he believes is more reasonable for various tasks; specifically the work on the complaints in Phase 1, the summary judgment motions in Phase 5, and the post-trial work in Phase 8. *See, e.g., Jardini Decl.*, ¶¶ 60-67. Similar to the conclusions of other district court judges, I find that Jardini’s assertions are wholly unsupported, do not account for all of the research and pleadings actually drafted by plaintiffs during the phases he purports to address, and do not support a particularized deduction in hours for any specific task or phase. *See, e.g., Stathakos v. Columbia Sportswear Co.*, 15-CV-04543-YGR, 2018 WL 1710075, at *5 (N.D. Cal. Apr. 9, 2018) (“Mr. Jardini fails to offer any factual support for or articulate the principles or methods used to derive his opinions regarding the “reasonable” amount of time spent on these projects. Accordingly, plaintiffs’ motion to strike paragraphs 42–44, 52–57, 62–64, 78–80, and the Outline of Services Performed of Mr. Jardini’s declaration pursuant to Fed. R. Evid. 702(b)–(d) is GRANTED and these paragraphs are hereby STRICKEN.”).

*7 Viewing the ample evidence plaintiffs submit regarding the time they spent on the categories of tasks in each phase of this highly contested litigation, and relying on my own knowledge and understanding of the unusually significant time required to develop and try this case, I have a sufficient basis to conclude that the hours plaintiffs seek are reasonable.

I note that general concerns regarding duplication of effort among the significant number of attorneys who billed on this case has been addressed in the first instance by two measures. First, plaintiffs only seek compensation for hours of the twelve attorneys identified, despite the fact that more than 130 attorneys worked on the case and 22 attorneys spent more than 250 hours on the case. Bomse Decl. ¶ 10. Second, from that subset of still-significant time, plaintiffs take a 25% deduction to account for potential duplication of effort and inefficiencies. *Id.* ¶ 12.¹²

¹² Both of these deductions adequately address Jardini's allegation that the litigation of this case was "top heavy" and that plaintiffs did not staff this case in a reasonable manner. *See* Jardini Decl. ¶ 47. In addition, given the complexity of the legal issues raised as well as the highly sensitive nature of much of the information sought and used by defendants regarding plaintiffs' operations, the presence of actively involved senior counsel on *both* sides was eminently reasonable. If there was a practice by plaintiffs of having senior counsel handle low-level issues, defendants could have relied on their personal knowledge to point that out. That have not.

Defendants argue that they cannot test the separate "billing judgment" determinations – where counsel voluntarily did not charge time for various phases or tasks before totaling the time they seek in the Chart (Ex. A and revised Ex. A) – without being able to see the underlying timesheets. *Oppo.* at 18. That may be true for billing judgment determinations made prior to totaling the time sought in plaintiffs' Chart. However, the 25% cut taken *after* the time had been totaled is transparent. That significant reduction – given the descriptions of the tasks undertaken by each biller, my informed view of the amount of work that was required by both sides to litigate and defend this case, and defense counsels' failure to identify any significant duplications of effort or unnecessary time based on their own personal knowledge – adequately accounts for potential duplication and inefficiencies.

It bears emphasis that I am not simply taking "at face value" the word of the plaintiffs regarding the number of hours expended on this case and the reasonableness of those hours. *See Gates v. Deukmejian*, 987 F.2d 1392, 1398–99 (9th Cir. 1993). I have looked closely at the detailed declarations and the Chart. A review of the docket in this case and my intimate knowledge of the complexity of the issues raised

to Magistrate Judge Ryu and me in the different stages of litigation further support my conclusion that the hours sought – after the 25% discount – were reasonably incurred. Absent *any* evidence from defendants identifying specific unreasonableness in terms of subject matter or duplication of effort, I have an ample basis to conclude the hours sought are reasonable without requiring plaintiffs to produce underlying timesheets.¹³

¹³ Defendants identify a few discrepancies between the Chart and the declarations submitted. *Oppo.* at 19. Those discrepancies are explained and accounted for in the Reply and supporting declarations, and resulted from rounding or discounting, discrete errors, or errors in defendants' expert's own calculations. *See* Reply at 15; *see also* Dkt. Nos. 1148-1 through 1148-4.

The hours sought for the tasks identified in the phases outlined by plaintiffs, after the 25% reduction, are reasonable and should be compensated.

VI. COSTS

Plaintiffs seek recovery of \$1,035,717.68 in non-compensatory costs. Declaration of Martin Decl. ¶ 7; Martin Reply Decl. ¶ 8. They seek reimbursement for: a court reporter to transcribe video clips for use at trial (\$18,921.60); attorney travel for depositions, hearings, and trial (\$85,200.37); deposition costs not included in the Bill of Costs (\$49,792); E-discovery costs from plaintiffs' E-discovery vendor not included in the Bill of Costs (\$223,543.56); contract attorney costs for document review and redaction during written discovery (\$18,101.25)¹⁴; trial technical services and support from On the Record (\$168,632.08); jury consulting services from JuryScope (\$54,000); travel costs for plaintiffs' witnesses for trial and depositions (\$28,488.36); hotel costs for out-of-town trial team and witnesses during the trial (\$176,609.10); executive protection services for witnesses to, from, and at the courthouse during trial (\$37,598.51); and expert witness fees and travel expenses (\$174,830.85). Martin Reply Decl. ¶ 8.¹⁵

¹⁴ Jardini complains that he did not know how many hours the contract attorneys billed (Jardini Decl. ¶¶ 55, 83), but plaintiffs disclose that the contract attorneys billed over 412 hours at the document

review and redaction stage. Bomse Decl. ¶ 41; Martin Decl. ¶ 6.

15 Defendants point out a discrepancy between the amount of costs stated in plaintiffs' motion and the amount itemized in the Martin Declaration. Oppo. at 22. Martin explains the discrepancy and clarifies the total amount sought in her Reply declaration. Martin Reply Decl. ¶ 8.

*8 Defendants do not dispute that non-statutory costs could be awarded in connection with the award of attorney fees. They argue generally that plaintiffs are not entitled to the non-statutory costs they seek because plaintiffs failed to submit evidence showing that each category of non-statutory costs they seek here are the types of costs counsel in this District typically seek from clients separate from their attorney fees and because plaintiffs do not provide the underlying invoices.

Martin declares that all of these costs were "billed to this case, all of which was passed along to PPFA for payment, along with all supporting invoices and documentation." Martin Decl. ¶ 7. In her Reply declaration, Trotter declares that the majority of these costs (attorney travel-related costs, consultant and expert fees, document review and document production related fees, and trial technical consultant costs) are typically passed onto and billed to clients in California generally and San Francisco specifically. Dkt. No. 1148-3 ¶¶ 2-4; see also *Trustees of Const. Indus. and Laborers Health and Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (noting "reasonable attorney's fees" include litigation expenses when it is the "prevailing practice" in the community for lawyers to bill those costs separately from their hourly rates). That evidence is sufficient to support an award of the non-statutory costs to plaintiffs.

Defendants made one specific challenge to the costs plaintiffs seek. They objected to the personal security costs plaintiffs incurred to provide security to testifying witnesses travelling to and from court. The issue of witness security was raised with me during trial after a disturbing incident. I concluded there was insufficient evidence of witness intimidation or harassment to justify assigning a United States Marshal to provide witness escorts to the courtroom. Trial Tr. 1397:20-24. There was no evidence that defendants themselves had been responsible for the incident. Because there is no evidence that these sorts of security costs are typically incurred and compensated in this District, even in a highly charged case, it is not appropriate to require defendants to foot the security bill. ¹⁶

16 Defendants identify only this particular cost as objectionable, and argue the costs seem unreasonably high given the number of hours involved. Oppo. at 22. That particularized objection is well-taken and not addressed in plaintiffs' Reply or declarations. Plaintiffs' failure to address it, for example by identifying the number of hours of security provided and for how many witnesses, further supports excluding this one category of non-statutory costs from the award.

As to the exact costs themselves, plaintiffs did not submit the underlying invoices and instead submitted a description of the 11 categories of costs they seek with a total for each. Martin Reply Decl. ¶ 8. While not particularly fulsome, the declarations provide a sufficient description of the costs. The major costs (not surprisingly) are for e-discovery, trial technical support, hotel rooms, and expert witnesses. *Id.* ¹⁷ Those costs are typically billed separately from attorney time and charged to clients in this District. Trotter Reply Decl. ¶¶ 2-4. No category of costs – other than the personal security costs – is specifically challenged by defendants. ¹⁸

17 Defendants' reliance on *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326 (N.D. Cal. 2014) is misplaced. There, the only information provided by counsel seeking recovery of expenses was the "dollar amount spent by each class counsel firm. For example, Morgan & Morgan Complex Litigation Group's only documentation for costs is as follows: 'Expenses \$46,309.84.' " *Id.* at 334 n.3. That was clearly inadequate and different from the detailed list of each type of cost sought here.

18 Jardini asserts – without any explanation or evidence – that the hotel, contract attorney, and some of the e-discovery expenses are "high" and may "possibly" be inappropriate. He does not explain the basis for his assertions. Jardini Decl. ¶¶ 83-84. For example, Jardini does not analyze the typical cost of a hotel room in San Francisco along with an estimate of the number of trial days/nights to support his assertion that the hotel expenses are "possibly" inappropriate. Without any evidentiary basis in support, Jardini's assertions are rejected.

*9 Plaintiffs are awarded the non-statutory costs they seek, except for the \$37,598.51 in "executive security" costs.

CONCLUSION

Within fourteen days of the date of this order, plaintiffs' counsel shall submit a revised Proposed Order Awarding Fees and Costs, along with a declaration explaining the deductions and recalculations required by this Order. Any objection to

that revised Proposed Order shall be submitted no later than five days thereafter.

IT IS SO ORDERED.

All Citations

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EXHIBIT K

Willcox v. Lloyds TSB Bank, plc

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Outline

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[ORDER PRELIMINARILY APPROVING DEFENDANT'S OFFER OF COMPROMISE, PRELIMINARILY APPROVING PLAINTIFFS' MOTION TO APPROVE AND ENTER JUDGMENT, PRELIMINARILY APPROVING PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES AND COSTS, AND PRELIMINARILY APPROVING PLAINTIFFS' REQUEST FOR INCENTIVE AWARD FOR CLASS REPRESENTATIVE](#)
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2016 WL 7238799

Only the Westlaw citation is currently available.

United States District Court, D. Hawai'i.

Bradley WILLCOX, Frank Dominick,
and Michele Sherie Dominick, Plaintiffs,

v.

LLOYDS TSB BANK, PLC
and Does 1-15, Defendants.

Civ. No. 13-00508 ACK-RLP

Signed 12/14/2016

Attorneys and Law Firms

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**ORDER PRELIMINARILY APPROVING
DEFENDANT'S OFFER OF COMPROMISE,
PRELIMINARILY APPROVING PLAINTIFFS'
MOTION TO APPROVE AND ENTER JUDGMENT,
PRELIMINARILY APPROVING PLAINTIFFS'
REQUEST FOR ATTORNEYS' FEES AND
COSTS, AND PRELIMINARILY APPROVING
PLAINTIFFS' REQUEST FOR INCENTIVE
AWARD FOR CLASS REPRESENTATIVE**

Alan C. Kay Sr., United States District Judge

*1 For the reasons set forth below, the Court preliminarily APPROVES the Offer of Compromise by Defendant Lloyds TSB Bank plc, now known as Lloyds Bank plc, Pursuant to [Federal Rule of Civil Procedure 68](#) ("Offer of Judgment"). ECF No. 539-2. Accordingly, the Court preliminarily APPROVES Plaintiffs' Motion to Approve and Enter Judgment ("Motion"). ECF No. 547. The Court further preliminarily APPROVES Plaintiffs' request for \$800,000.00

as an award of attorneys' fees and costs, as described in Plaintiffs' Petition in Support of Distribution of Fees and Expenses, ECF No. 556; and preliminarily APPROVES Plaintiffs' request for \$10,000.00 as an award for Dr. Bradley Willcox for his role as class representative in this action, ECF No. 558.

BACKGROUND

The instant case involves the issuance by Defendant Lloyds TSB Bank plc, now known as Lloyds Bank plc ("Lloyds"), of certain dual currency loans, also referred to as International Mortgage System ("IMS") loans.¹ The Court and the parties are familiar with the extensive factual and procedural history of this case, and the Court will not repeat it here except as necessary.

¹ The Court notes that several other class actions have been filed against Lloyds that involved Lloyds' IMS loan product. The Dugan litigation was a consolidated action in the Northern District of California comprised of both Dugan, et al. v. Lloyds TSB Bank, plc, Case No. 3:12-cv-02549-WHA (N.D. Cal.), and another case that had been filed in the Northern District of California, Osmena, et al. v. Lloyds TSB Bank, plc, et al., Case No. 3:12-cv-02937-WHA (N.D. Cal.). The parties in Dugan ultimately settled. Another related action, Washington Land Development, LLC v. Lloyds TSB Bank, plc, Case No. 2:14-cv-00179-JCC (W.D. Wash.), was filed in the Western District of Washington and ultimately voluntarily dismissed. Various factors in those cases distinguish them from the instant action.

On March 27, 2015, Plaintiffs filed the operative Third Amended Complaint ("TAC"). ECF No. 100. The TAC names Frank Dominick, Michele Sherie Dominick, and Bradley Willcox (collectively, "Plaintiffs") as class representatives and brings claims against Lloyds for Breach of Contract (Count I) and Breach of an Implied Term Limiting Lloyds' Discretion to Change the Interest Rate (Count II). Id. ¶¶ 6-8, 55-72.

I. Class Certification

On July 15, 2015, Plaintiffs filed a Motion for Class Certification pursuant to [Federal Rule of Civil Procedure](#)

(“Rule”) 23. ECF No. 156. After briefing and oral argument from the parties, Magistrate Judge Puglisi issued his Findings and Recommendation to Grant in Part and Deny in Part Plaintiffs' Motion for Class Certification (“F&R”) on November 12, 2015. ECF No. 317. The F&R recommended: (1) certifying the instant case as a class action; (2) appointing Dr. Willcox (but not the Dominicks) as class representative; (3) appointing Alston Hunt Floyd & Ing and Steptoe & Johnson LLP as class counsel; (4) directing the parties to meet and confer regarding notice to class members; (5) denying any remaining relief requested in Plaintiffs' class certification motion; and (6) defining the certified class as:

*2 All persons and entities who entered prior to August 2009 into an IMS loan with Lloyds that contained a Hong Kong choice-of-law provision and an interest rate provision based upon Cost of Funds and who are, or were at any time during entering into such an IMS loan, residents or citizens of the State of Hawaii, or owners of property in Hawaii that was mortgaged to secure any such IMS loan.

Id. at 31-32. Lloyds filed Objections to the F&R on November 25, 2015, ECF No. 332, to which Plaintiffs filed a Response on December 9, 2015, ECF No. 335. The parties also submitted supplemental Reply and Sur-Reply briefs on December 17, 2015 and December 28, 2015, respectively. ECF Nos. 337, 340.

On January 8, 2016, the Court issued an Order Adopting in Part, Rejecting in Part, and Modifying in Part the Findings and Recommendations to Grant in Part and Deny in Part Plaintiffs' Motion for Class Certification (“Class Certification Order”). ECF No. 366. For the reasons explained therein, the Court adopted the F&R over Lloyds' objections, except as to the class definition, which the Court modified to include only plaintiffs of United States and Canadian citizenship.

On January 22, 2016, pursuant to [Rule 23\(f\)](#), Lloyds filed with the Ninth Circuit a Petition for Permission to Appeal the Class Certification Order (“[Rule 23\(f\)](#) Petition”). ECF No. 397. The Ninth Circuit issued its Order denying the [Rule 23\(f\)](#) Petition on May 16, 2016. ECF No. 430.

On July 15, 2016, the Court instructed the parties to submit for the Court's approval a proposed form of class notice informing potential class members of this lawsuit. ECF No. 446. Plaintiffs submitted a proposed notice on July 19, 2016, ECF No. 448-2, and the Court provided its comments on the proposed notice on July 21, 2016, ECF No. 449. After the Court provided Plaintiffs with one more round of comments on the proposed notice, a third party settlement administrator mailed the final Class Notice to the borrowers of 130 IMS loans that fit the class definition on August 5, 2016, and to the borrowers of two additional IMS loans on August 10, 2016. See ECF Nos. 453, 458, 554-3. The Class Notice informed potential class members that they could opt out of the class if they postmarked an “Exclusion Request” to the third party settlement administrator by September 30, 2016. See ECF No. 554-2 at 5. The administrator received one opt-out request on August 19, 2016. ECF No. 554-3.

II. Summary Judgment

Earlier, on October 16, 2015, Plaintiffs and Lloyds filed cross-motions for summary judgment. Lloyds moved for summary judgment as to both of Plaintiffs' Counts I and II. ECF No. 249. Plaintiffs moved for summary judgment only as to their Count I and requested “immediate declaratory relief” as to that claim. ECF No. 251.

The Court held a two-day hearing regarding the cross-motions for summary judgment on January 19-20, 2016. On February 11, 2016, the Court issued an Order Denying Plaintiffs' Motion for Partial Summary Judgment on Their and the Putative Class's Claim for Breach of Contract on Count I, Denying Plaintiffs' Request for Declaratory Relief, Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, and *Sua Sponte* Granting Partial Summary Judgment to Plaintiffs on Count II (“Summary Judgment Order”). ECF No. 419.

In its Summary Judgment Order, the Court made several findings as a matter of law with respect to Count I: (1) that the Cost of Funds provision is not ambiguous; (2) that the facility agreements do not prescribe a specific methodology for calculating the Cost of Funds component of the IMS loans' interest rate; do not specifically require the Cost of Funds component to track 3-month LIBOR; and do not specifically require Lloyds to fund Plaintiffs' loans with short-term money; (3) that the LTP charge was clearly an actual cost to Lloyds imposed on it by its parent company, Lloyds Banking Group plc (“LBG”); (4) that the Cost of Funds provision allows Lloyds to include in its Cost of Funds

calculation both liquidity costs and liquidity requirements, and does not specifically restrict Lloyds from altering the manner in which it calculates cost for purposes of determining the interest rate on the loans; and (5) that Lloyds has some degree of discretion with respect to the foregoing findings. Summary Judgment Order at 24, 36-37.

*3 However, the Court noted that several issues of material fact remained, including (1) whether, prior to 2009, Lloyds was itself funding Plaintiffs' IMS loans with 90-day money, and if so, whether it should have continued utilizing such short-term funding; (2) if Lloyds was funding the IMS loans itself prior to 2009, whether it was appropriate to change the funding to LBG's centralized funding model; (3) whether, prior to 2009, Plaintiffs' loans were funded through LBG's centralized funding model, and if so, whether the LTP charge added in 2009 was simply a different methodology appropriately applied to the computation of the Cost of Funds; (4) whether Lloyds appropriately acted pursuant to regulatory requirements or recommendations; (5) whether it was appropriate to pass the LTP charge on to Plaintiffs as an actual cost of funding the IMS loans; and (6) how the LTP charge was computed. *Id.* at 35-36.

With respect to Count II, the Court found that an implied term in the facility agreements limits Lloyds' exercise of the discretion afforded it by the Cost of Funds provision. *Id.* at 41. While Lloyds argued that no implied term should be read into the facility agreements in the first place, both parties agreed that the case *Nash, et al. v. Paragon Fin. PLC*, [2001] EWCA Civ. 1466 (15 Oct. 2001), was instructive regarding the breach of any implied term found to exist in the facility agreements. *See* ECF No. 249 at 24, 29-31; ECF No. 347 at 36; Transcript of Hearing at 118, Jan. 19, 2016, ECF No. 403; Transcript of Hearing at 34, Jan. 20, 2016, ECF No. 404. The Court therefore distilled a standard from that case to govern the exercise of a lender's discretion under the implied term. Summary Judgment Order at 43-45. The Court found that, "when exercising its discretion to change interest rates, Lloyds must do so in a manner that comports with 'purely commercial considerations,' including whether it 'is in financial difficulty because it is obliged to pay higher rates on interest to the money market'; however, Lloyds must refrain from acting 'dishonestly, for an improper purpose, capriciously, or arbitrarily,' or in a manner so unreasonable that no reasonable lender would do the same." *Id.* at 45 (citing *Nash*, [2001] EWCA Civ. 1466). For ease of reference, the Court referred to this standard as the "*Nash* standard."

The Court concluded that, as with Count I, various questions of material fact remained as to Count II that precluded the Court from determining whether Lloyds had breached an implied term limiting its discretion to adjust interest rates, as determined by the *Nash* standard. *Id.* at 46-47.

III. Rule 68 Offer of Judgment and Distribution of Judgment Amount

On September 11, 2016, Lloyds signed and delivered to Plaintiffs' counsel the Offer of Judgment. Decl. of Glenn T. Melchinger ¶ 3, ECF No. 539-1. Plaintiffs' counsel signed the Offer of Judgment and delivered it upon the Court on September 22, 2016. ECF No. 539. Accordingly, the Court stayed all pretrial proceedings and vacated the October 18, 2016 trial date. ECF No. 544.

Pursuant to the Offer of Judgment, Plaintiffs and Lloyds agree as follows: (1) judgment shall be entered in favor of Plaintiffs and each borrower that has not opted out of the certified class as of September 25, 2016 (the "Judgment Class"); (2) Lloyds shall pay \$2,000,000.00 in full and final satisfaction of all relief sought in the TAC, with payment to be apportioned among the Judgment Class, the class representative, and class counsel in a manner to be determined by class counsel and the class representative;² (3) nothing in the Offer of Judgment shall be deemed an admission by Lloyds of any fact or allegation relating to its alleged liability; and (4) the Offer of Judgment is conditioned on acceptance by the entire Judgment Class.

² The class representative in the instant action is Dr. Willcox.

As noted, the Offer of Judgment purports to bind the named plaintiffs to this suit, as well as "each borrower on each loan that has not opted out of the certified class as of September 25, 2016." Offer of Judgment at 2. While the initial Class Notice mailed to members provided an opt-out deadline of September 30, 2016, no member opted out of the class between September 25 and September 30, obviating any potential problems that could arise as a result of the conflict between the two deadlines. Indeed, the only individual to opt out of the class mailed his Exclusion Request to the settlement administrator in August. Accordingly, by the terms of the Offer of Judgment, the borrowers of 131 IMS loans will be bound by the Judgment.

*4 With respect to the distribution of the Judgment, on October 3, 2016, Plaintiffs submitted a Petition in Support

of Distribution of Fees and Expenses (“Petition”), requesting that \$800,000.00 of the Judgment amount be apportioned to class counsel as an award for attorneys' fees and costs. ECF No. 556. On October 6, 2016, Plaintiffs filed a Supplemental Brief in Support of a Compensation Award for Class Representative (“Supplemental Brief”), requesting that Dr. Willcox be granted a compensation award of \$10,000.00 for his role as class representative. ECF No. 558.

The Court held a hearing on December 7, 2016 to determine whether the Offer of Judgment is “fair, reasonable, and adequate,” in accordance with [Rule 23\(e\)\(2\)](#).³ During the hearing the Court also heard arguments regarding Plaintiffs' Motion and the distribution of the Judgment amount.

³ In two prior Minute Orders dated September 22, 2016, ECF No. 544, and September 28, 2016, ECF No. 548, the Court recognized that a potential conflict exists between [Rule 23\(e\)\(2\)](#), which requires the Court to hold a hearing to determine whether any settlement, voluntary dismissal, or compromise that would bind class members is “fair, reasonable, and adequate,” and [Rule 68\(a\)](#), which directs the clerk to enter judgment upon a party's acceptance of an offer of judgment.

While several courts, including the Supreme Court, have likewise acknowledged this conflict, neither the Court nor the parties were able to locate any binding authority regarding how to reconcile the two rules. See [Marek v. Chesny](#), 473 U.S. 1, 33 n.49 (1985) (noting that [Rule 68](#) does “not mesh with [[Rule 23\(e\)](#)]'s careful supervision” and that “[Rule 68](#) sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval”); [Gay v. Waiters' and Dairy Lunchmen's Union Local No. 30](#), 86 F.R.D. 500, 503 n.8, 504 (N.D. Cal. 1980) (noting that “[Rule 68](#) may ... conflict with the policies and principles underlying [Rule 23](#),” and that a “conflict between the rules would occur where the court under 23(e) disapproves the [Rule 68](#) offer as a basis for settlement although acceptable to the class representative and the plaintiff class ultimately obtains a less favorable judgment”).

Observing that at least one other court has required a [Rule 23\(e\)\(2\)](#) fairness hearing when presented

with a [Rule 68](#) offer of judgment, the Court determined that a fairness hearing was appropriate here. See [Carducci v. Aetna U.S. Healthcare, No. CIV.A. 01-4675\(JBS\)](#), 2003 WL 22207204, at *5 (D.N.J. Apr. 16, 2003) (“[W]hen an offer of judgment is made in a class action, the court must hold a [Rule 23\(e\)](#) fairness hearing to approve the judgment *before judgment is entered* according to the offer.”) (emphasis added); see also Wright and Miller, [12 Federal Practice & Procedure Civil 2d § 3005](#) (“Once a [Rule 68](#) offer is accepted, either party may file the offer and acceptance, and the clerk must then enter judgment. In general, it is said that the court has no choice about entering the agreed judgment. But this general statement is too broad to encompass all instances in which [Rule 68](#) offers are made ... [I]n class actions the court has an independent duty under [[R](#)]ule 23(e) to decide whether a settlement is acceptable, and [Rule 68](#) cannot remove that authority and duty.”).

STANDARD

Under [Rule 23\(e\)](#), “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.” “The purpose of [Rule 23\(e\)](#) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights.” [In re Syncor ERISA Litig.](#), 516 F.3d 1095, 1100 (9th Cir. 2008). Before it may approve a class-action settlement that will bind class members, the Court must hold a hearing to determine whether the settlement is “fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#); [Lane v. Facebook, Inc.](#), 696 F.3d 811, 818 (9th Cir. 2012). “[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is ‘exposed to the litigants, and their strategies, positions and proof.’ ” [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1026 (9th Cir. 1998) (quoting [Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of S.F.](#), 688 F.2d 615, 626 (9th Cir. 1982)). Importantly, the Court must consider the fairness of the settlement agreement as a whole, rather than assessing its component parts. *Id.* The Court may not “delete, modify or substitute certain provisions” of the settlement agreement; “[t]he settlement must stand or fall in its entirety.” *Id.* (citation omitted).

*5 Furthermore, “the question whether a settlement is fundamentally fair within the meaning of [Rule 23\(e\)](#) is different from the question whether the settlement is perfect

in the estimation of the reviewing court.” [Lane](#), 696 F.3d at 819. The Court’s “only role in reviewing the substance of that settlement is to ensure that it is ‘fair, adequate, and free from collusion.’ ” [Id.](#) (quoting [Hanlon](#), 150 F.3d at 1027); see also [Officers for Justice](#), 688 F.2d at 625 (“[T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”). The fact that a settlement “could have been better” does not mean that the settlement is not fair, accurate, or reasonable. [Hanlon](#), 150 F.3d at 1027 (recognizing that “[s]ettlement is the offspring of compromise”).

The Court considers a number of factors in determining whether a settlement agreement is fair, accurate, and reasonable:

[T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

[Id.](#) at 1026 (hereinafter the “[Hanlon](#) factors”). “The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.” [Officers for Justice](#), 688 F.2d at 625.

DISCUSSION

I. Notice

[Rule 23\(e\)](#) requires that notice of a proposed settlement, voluntary dismissal, or compromise be directed “in a

reasonable manner to all class members who would be bound by the proposal.” [Fed. R. Civ. P. 23\(e\)\(1\)](#). “Adequate notice is critical to court approval of a class settlement under [Rule 23\(e\)](#).” [Hanlon](#), 150 F.3d at 1025 (finding that notice provided to the class met the requirements of [Rule 23\(e\)](#)). For classes certified under [Rule 23\(b\)\(3\)](#), as here, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). “Notice provided pursuant to [Rule 23\(e\)](#) must ‘generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’ ” [Lane](#), 696 F.3d at 826 (quoting [Rodriguez v. W. Publ’g Corp.](#), 563 F.3d 948, 962 (9th Cir. 2009)). However, this standard “does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class’s claims, and it does not require an estimate of the potential value of those claims.” [Id.](#)

In a Minute Order dated September 22, 2016, the Court directed Plaintiffs to submit to the Court a proposed form of notice of the Offer of Judgment to all class members who will be bound by the Judgment. ECF No. 544. Plaintiffs submitted a proposed form of notice on September 26, 2016, ECF No. 547-2, and the Court provided comments on the proposed notice on September 28, 2016, ECF No. 548. The Court and Plaintiffs then engaged in several exchanges regarding the substance and timing of the proposed notice and the deadlines contained therein, before the Court approved the final Notice of the Offer of Judgment (“Notice”) and directed that it be mailed to class members by a third party settlement administrator. See ECF Nos. 549, 550, 559, 561, 562, 564, 565.

*6 The Notice provided a brief description of the lawsuit; the class definition; a brief description of the Offer of Judgment; details regarding the fairness hearing on December 7, 2016; the amount class counsel has requested for attorneys’ fees and costs, as well as for a compensation award for Dr. Willcox for his role as class representative; and the estimated portion of the Judgment amount each member will receive, along with information regarding how each portion is calculated. See Notice, ECF No. 564-2. The Notice also informed members that if they wished to object to the Offer of Judgment, they could do so by mailing their written objection to the third party settlement administrator with a postmark date no later than November 14, 2016. See Notice at 1, 3-4; see also ECF No. 565.

On October 19, 2016, the third party administrator mailed the Notice via first class mail to the borrowers of the 131 IMS loans who will be bound by the Judgment. Aff. of Kelly Kratz ¶¶ 4, 6. In order to ensure it had the most accurate information for the class members, the administrator cross-checked members' last known addresses with the National Change of Address database maintained by the United States Postal Service. *Id.* ¶ 5. Of the 131 Notices mailed, four were returned as undeliverable and sent to a professional address search firm for tracing. *Id.* ¶ 7. The firm was unable to locate updated addresses for the four class members, and therefore these Notices were not re-mailed. *Id.* On November 29, 2016, Plaintiffs notified the Court that the administrator did not receive any objections to the Offer of Judgment or to the proposed distribution of the Judgment amount outlined in the Notice. ECF No. 567.

The Court finds that the Notice complied with the requirements of [Rule 23\(c\)\(2\)](#) and [Rule 23\(e\)\(1\)](#). The Notice provided the best notice of the Offer of Judgment practicable under the circumstances, and provided individual notice to all members who could be identified through reasonable effort. See [Rule 23\(c\)\(2\)\(B\)](#). In fact, on July 13, 2016, Plaintiffs brought a Motion to Compel Defendant to Certify Completeness of Class Mailing List, requesting that Lloyds be required to “certify that the class mailing list includes all class members and loans satisfying the class criteria.” ECF No. 445 at 1. The purpose of that motion was to “redouble ... efforts to identify the universe of all potential IMS borrowers with loans secured by Hawaii property who could be class members,” and “require Defendant ... to explain what efforts have been taken to ensure that all class members have been identified and certify that the class mailing list is complete—that everyone who should be included has been.” *Id.* Plaintiffs' motion resulted in an order from the Magistrate Judge requiring Lloyds to conduct a search for additional borrowers (after a list of potential class members had already been identified) and to file a declaration confirming the process it used to identify these individuals. See ECF No. 463.

Serious efforts were made to identify the complete universe of potential class members, and additional Notices were mailed out after the settlement administrator had mailed out the initial round of Notices. The relatively small size of the class also allowed the parties to more accurately identify borrowers whose loans fit the relevant criteria, and all but four members successfully received Notice. The Notice itself included information to sufficiently apprise class members of the nature of the lawsuit, the class definition,

the Offer of Judgment, and class members' rights; indeed, the Court reviewed multiple versions of the Notice and provided several rounds of comments before permitting the settlement administrator to mail it to class members—a factor which further reinforces the Court's finding that the Notice was sufficient.

*7 For all of the foregoing reasons, the Court finds that the Notice of the Offer of Judgment was proper and complied with [Rule 23\(c\)\(2\)](#) and [Rule 23\(e\)\(1\)](#).

II. The Hanlon Factors

As noted above, the Court must evaluate and approve the proposed settlement as a whole, rather than on the basis of its component parts. In assessing the Offer of Judgment, the Court considers each of the Hanlon factors in turn.

a. Strength of the Plaintiffs' Case

“This factor considers both the likelihood of success on the merits and the range of possible recovery.” [In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.](#), No. 8:10ML 02151 JVS (FMOx), 2013 WL 3224585, at *7 (C.D. Cal. June 17, 2013) (citing [Rodriguez](#), 563 F.3d at 964-65). However, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.” [Officers for Justice](#), 688 F.2d at 625. The Court should not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Id.* The Offer of Judgment “is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators”; rather the Court's “determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” *Id.* (citation and quotation marks omitted).

The Summary Judgment Order considerably narrowed the issues in this case. Significantly, the Court granted partial summary judgment in favor of Lloyds on Count I, making several findings as a matter of law with respect to the Cost of Funds provision that allowed Lloyds a degree of discretion in changing the way it calculated interest rates for the IMS loans. These findings made judgment in favor of Plaintiffs on Count I quite unlikely. However, the Court also *sua sponte* granted

partial summary judgment in favor of Plaintiffs on Count II, finding that an implied term in the facility agreements limited Lloyds' exercise of the discretion afforded to it by the Cost of Funds provision. In order to succeed on Count II, Plaintiffs would have to convince a jury that Lloyds', in changing interest rates, had acted "dishonestly, for an improper purpose, capriciously, or arbitrarily," or in a manner so unreasonable that no reasonable lender would do the same. Summary Judgment Order at 45 (citing Nash, [2001] EWCA Civ. 1466, at ¶¶ 32, 36, 41-42, 46-47). Thus, judgment in favor of Plaintiffs on Count II was likewise uncertain.

In reviewing the terms of the Offer of Judgment, the Court finds that the Offer of Judgment properly strikes a balance between the strengths of Plaintiffs' case, as well as the risks of continued litigation before a jury. The terms of the Offer of Judgment provide Plaintiffs with a fair and meaningful resolution of their claims, and this factor therefore weighs in favor of approving the Offer of Judgment.

b. Risk, Expense, Complexity, and Likely Duration of Further Litigation

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." National Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citation omitted); see also Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) ("It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense.").

*8 The parties have been litigating this case for over three years. During that time, the Court has heard multiple motions to dismiss; a motion for class certification; lengthy and complex motions for summary judgment that necessitated a two-day hearing before the Court; and various other motions. The parties have exchanged over 700,000 pages of documents and brought multiple discovery disputes before the Magistrate Judge. Motion at 7-8. Trial was projected to last approximately three to four weeks, which, in the Court's view, was a conservative estimate; additionally, trial was set to take place in at least two phases.⁴

4 On August 15, 2016, the Court bifurcated "all issues and defenses common to all class members, insofar as they relate to Plaintiffs' claims for breach of contract and breach of an implied contractual term," and "any claims or defenses involving individual class members that are not common to the class, including the 'unique defenses' Lloyds intend[ed] to raise against the Dominicks." ECF No. 472. The Court noted that claims and defenses falling into the latter category would be adjudicated at a subsequent trial in the event Plaintiffs prevailed in the class action trial. Id.

Furthermore, the Offer of Judgment was accepted on the eve of the hearing regarding the parties' Daubert motions, which was expected to last several days and would have required multiple expert witnesses to fly to Honolulu from London, England and Cambridge, Massachusetts. In addition to the Daubert motions it filed, Lloyds also filed a motion for exclusionary sanctions, seeking to exclude the opinions and calculations of Plaintiffs' damages expert. Uncertainty with respect to whether either party could present expert testimony, and whether Plaintiffs could offer proof of their damages, further underscores the risk of continuing to litigate this case. Even if the Court did allow each of the parties' experts to testify, this likely would have been an incredibly difficult case for a jury to comprehend, involving complex loan products and topics such as foreign currency markets, benchmark index rates, and lending practices that are unfamiliar to the average layperson. Moreover, as the Court identified in its Summary Judgment Order, there remain outstanding questions regarding how the loans at issue were funded, which could only have been answered, if at all, by Lloyds' parent company, which is not a party to this lawsuit. See Summary Judgment Order at 36 n.16.

As Plaintiffs recognize, there is no guarantee that if this case were to go to trial Plaintiffs would recover anything. The Offer of Judgment, on the other hand, assures that Plaintiffs will receive some award of damages. The only thing that continued litigation would ensure is the accrual of further costs and attorneys' fees; it is also likely that any judgment would have led to a lengthy, expensive appeal.

All of these factors weigh in favor of approving the Offer of Judgment.

c. Risk of Maintaining Class Action Status

The Court issued its Class Certification Order on January 8, 2016, certifying the case as a class action. Lloyds attempted to appeal the Class Certification Order by filing a [Rule 23\(f\)](#) Petition, which the Ninth Circuit ultimately denied. For the reasons discussed in its Class Certification Order, as well as its Order Denying Defendant's Motion to Compel Plaintiffs to Present a Trial Plan ("Trial Plan Order"), the Court feels that it is highly unlikely that the class would have been decertified at any point. *See* Trial Plan Order at 7 ("The Court has also found that the 'key legal issue'—whether Lloyds permissibly passed on the 'liquidity transfer pricing' ('LTP') charge to borrowers by including it in the Cost of Funds—is common to all class members.... Thus, the Court can identify no problems with individualized proof that would require a trial plan at this stage in the litigation."), ECF No. 471.

*9 Nevertheless, the Court notes that an order granting class certification can be amended at any time before final judgment. [Fed. R. Civ. P. 23\(c\)\(1\)\(C\)](#). The Offer of Judgment mitigates any risk that the Plaintiff class would be decertified.

d. Amount Offered in Settlement

In assessing the settlement amount, the Court must again bear in mind that "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." [Officers for Justice](#), 688 F.2d at 625; *see also* [Lane](#), 696 F.3d at 823 ("[W]e reject Objectors' argument insofar as it stands for the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award."). Furthermore, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." [Linney v. Cellular Alaska P'ship](#), 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting [City of Detroit v. Grinnell Corp.](#), 495 F.2d 448, 455 (2d Cir. 1974)). The ultimate inquiry with which the Court is faced is whether the Offer of Judgment is "fair, adequate, and free from collusion." [Lane](#), 696 F.3d at 826 (citation omitted).

Here, the parties participated in arm's length settlement discussions in 2015; exchanged settlement communications

in July 2016; attended a settlement conference before the Magistrate Judge on July 27, 2016; and further discussed settlement both prior to and following the final pretrial conference before the Magistrate Judge. Motion at 12-13; Response at 5-6. Plaintiffs' damages expert, Mr. Petley, calculated approximately \$7.5 million in alleged overcharges. Response at 13. However, Plaintiffs contend that "Lloyds' settlement position initially was less than zero." Motion at 2, 13 (describing Lloyds' initial settlement position as "similar to [that] reached in the Washington Land Development case filed in Washington state, which was 'dismissed after a settlement payment was made by the plaintiff to Lloyds Bank.'").

In agreeing to the \$2,000,000.00 proposed by the Offer of Judgment, the parties appear to have made serious, good faith efforts to settle, with both ceding ground on their initial positions.⁵ The Offer of Judgment was made after multiple negotiations conducted at arm's length and after multiple attempts at settlement had failed. Furthermore, under the proposed Judgment distribution each borrower will receive a proportionate share of the Judgment based on the calculated interest overcharges on their loan(s). Notice at 3. Additionally, under the proposed distribution, named Plaintiff Dr. Willcox stands to recover less than other unnamed class members, even when taking into consideration the \$10,000.00 award Plaintiffs have requested that he receive for his role as class representative. The fact that members who allegedly suffered greater harm will receive greater compensation indicates that the proposed distribution is fair. [See Hendricks v. StarKist Co.](#), Case No. 13-cv-00729-HSG, 2015 WL 4498083, at *7 (N.D. Cal. July 23, 2015) ("A plan for allocation of a settlement fund is governed by the same legal standards that apply to the approval of a settlement: the plan must be fair, reasonable, and adequate.... This means that, to the extent feasible, the plan should provide class members who suffered greater harm and who have stronger claims a larger share of the distributable settlement amount."). Equally as important is that, as noted above, the Offer of Judgment provides certainty to class members that they will recover some amount of money, a benefit that cannot be overstated in this complex case.

⁵ In addition to the \$7.5 million Plaintiffs claimed for past damages, the TAC also requested a permanent injunction restraining and enjoining Lloyds from breaching the IMS loan agreements; attorneys' fees and costs; pre-judgment and post-judgment interest; an order declaring the formula

for the interest rate calculation and that Lloyds had breached the loan agreements by charging a higher interest rate than that agreed to by the parties; and a “judicial declaration made in accordance with findings in Plaintiffs' favor so that Plaintiffs and the Class may ascertain their rights and duties under the Loans.” TAC at 19-20. The Offer of Judgment does not provide the additional relief Plaintiffs seek in the TAC, nor will such relief be granted; however, Plaintiffs do not appear to seek such further relief, beyond what is proposed by the Offer of Judgment.

*10 For all of these reasons, the Court finds that this factor weighs in favor of approval of the Offer of Judgment.

e. Extent of Discovery Completed and Stage of Proceedings

“Consideration of the extent of discovery and the current stage of the litigation allows the Court to evaluate whether the parties are able to make decisions about their claims based on information received during the discovery process.” *In re Toyota*, 2013 WL 3224585, at *10 (citing *Linney*, 151 F.3d at 1239). “Where a settlement occurs in an advanced stage of the proceedings, this fact supports a finding that the parties had the opportunity to investigate their claims before resolving them.” *Id.*; see also *National Rural*, 221 F.R.D. at 527 (“If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement.”) (citation omitted).

Discovery was completed in this case over a year ago. See Fifth Am. Rule 16 Scheduling Order ¶ 12 (listing discovery deadline as October 30, 2015). As stated above, the parties have exchanged over 700,000 pages of documents and litigated multiple discovery disputes before the Magistrate Judge. Motion at 7-8. Plaintiffs and Lloyds both retained two experts who submitted various expert reports and who were deposed. *Id.* at 8. Additionally, the parties took six other depositions and consented to the use of multiple depositions from previous lawsuits involving Lloyds' IMS loans. *Id.* Furthermore, this case has undergone multiple motions to dismiss, full briefing on *Daubert* motions, and exchange of trial exhibits. A lengthy summary judgment order significantly narrowed the issues in this action, and the Offer of Judgment was made and accepted less than a month before trial.

Given these factors, the Court finds that the parties had a full opportunity to evaluate the strengths and weaknesses of their respective cases, and that Lloyds was in a position to make, and Plaintiffs were in a position to accept, a meaningful Offer of Judgment. This factor weighs in favor of approving the Offer of Judgment.

f. Experience and Views of Counsel

“ ‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.” *National Rural*, 221 F.R.D. at 528 (citation omitted); see also *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.”). “This is because ‘[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.’ ” *National Rural*, 221 F.R.D. at 528 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, Plaintiffs are represented by both mainland and local counsel. Plaintiffs' mainland counsel, Steptoe & Johnson LLP, has extensive experience in financial services class action litigation, including experience in two prior actions involving Lloyds' IMS loan product. Decl. of Stephen Fennell in Supp. of Pls.' Mot. for Class Certification ¶ 4, ECF No. 156-57; Motion at 22. Plaintiffs' local counsel, Alston Hunt Floyd & Ing, likewise has extensive experience litigating class actions. Decl. of Paul Alston ¶¶ 3-4, ECF No. 156-58. Given the history of this case, as well as the experience of class counsel, it is clear to the Court that Plaintiffs' attorneys are well-versed in the relevant issues and strengths and weaknesses of their case. It is class counsel's view that the Offer of Judgment is fair, adequate, and reasonable, and the Court therefore finds that this factor weighs in favor of approving the Offer of Judgment.

g. Presence of a Governmental Participant

*11 Because no governmental actor participated in the instant litigation, this factor is irrelevant to the Court's analysis.

h. Reaction of the Class Members to the Proposed Settlement

Notice of the Offer of Judgment was sent to all class members on October 19, 2016. Aff. of Kelly Kratz ¶ 6. The Notice informed members that if they wished to object to the Offer of Judgment, they could do so by mailing their written objection to the third party settlement administrator with a postmark date no later than November 14, 2016. See Notice at 1, 3-4; see also ECF No. 565. On November 29, 2016, Plaintiffs notified the Court that, as of November 28, 2016, the administrator had not received any objections to the Offer of Judgment or the proposed distribution of the Judgment amount outlined in the Notice. ECF No. 567. The absence of any objections weighs in favor of the Court's approval of the Offer of Judgment. See [National Rural](#), 221 F.R.D. at 529 (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”).

An assessment of the [Hanlon](#) factors leads the Court to conclude that the Offer of Judgment is fair, adequate, and reasonable. The Court therefore preliminarily APPROVES the Offer of Judgment and preliminarily APPROVES Plaintiffs' Motion to Approve and Enter Judgment.

III. Attorneys' Fees and Costs

[Rule 23\(h\)](#) provides, “In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” “A federal court sitting in diversity must apply state law with regard to the allowance or disallowance of attorneys' fees.... The applicable state law also includes state choice of law rules.” [DeRoburt v. Gannett Co., Inc.](#), 558 F. Supp. 1223, 1226 (D. Haw. 1983). “In the absence of any specific state directives, a choice of law determination regarding a claim for attorneys' fees should be guided by the applicable substantive law of a case.” [Id.](#)

The Court has been unable to locate any authority speaking to how Hawaii courts specifically treat attorneys' fees in a choice of law analysis. Helpfully, however, this Court has previously determined that Hong Kong law governs this dispute. See ECF No. 49. Hong Kong follows the “English Rule,” which provides that “the prevailing party is generally entitled to an attorney's fees award.” See [Alaska Rent-A-Car, Inc. v.](#)

[Avis Budget Grp., Inc.](#), 738 F.3d 960, 972 (9th Cir. 2013); Petition at 3 (“Hong Kong follows the ‘English Rule’”). Under Hong Kong law, “the costs of and incidental to all proceedings ... shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.” Hong Kong High Court Ordinance (CAP. 4) § 52A(1), ECF No. 545-1. “This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice, and the judge ought not to exercise it against the successful party except for some reason connected with the case.” [Halsbury's Laws of Hong Kong—Commentary](#) § 90.1281, ECF No. 545-2.

*12 Because the Court appears to have a great deal of discretion in awarding fees and costs under Hong Kong law, in exercising that discretion it will look to Ninth Circuit law as a guidepost for what constitutes a reasonable award. “Under federal law, reasonable attorneys' fees are generally based on the traditional ‘lodestar’ calculation set forth in [Hensley v. Eckerhart](#), 461 U.S. 424, 433 (1983).” [Howerton v. Cargill, Inc.](#), Civ. Nos. 13–00336 LEK–BMK, 13–00685 LEK–BMK, 14–00218 LEK–BMK, 2014 WL 6976041, at *4 (D. Haw. Dec. 8, 2014) (citing [Fischer v. SJB-P.D. Inc.](#), 214 F.3d 1115, 1119 (9th Cir. 2000)). The lodestar amount is determined by “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” [Hensley](#), 461 U.S. at 433. Subsumed in the lodestar calculation are the following factors: “(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, ... (4) the results obtained ... and (5) the contingent nature of the fee agreement.” [Morales v. City of San Rafael](#), 96 F.3d 359, 364 n.9 (9th Cir. 1996) (internal citations and quotation marks omitted).

Once calculated, the lodestar amount is presumed reasonable. [City of Burlington v. Dague](#), 505 U.S. 557, 562 (1992); [Fischer](#), 214 F.3d at 1119 n.4. However, in “rare and exceptional circumstances” a court may adjust the lodestar amount based on those factors articulated in [Kerr v. Screen Extras Guild, Inc.](#), 526 F.2d 67, 70 (9th Cir. 1975), that are not subsumed in the court's initial lodestar calculation. [Fischer](#), 214 F.3d at 1119 n.4; [Morales](#), 96 F.3d at 363-64. These factors are: the time and labor required for the case, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, time limitations imposed by the client or the circumstances, the “undesirability” of the case, the nature and length of the

professional relationship with the client, and awards in similar cases. [Kerr](#), 526 F.2d at 70.

With respect to the number of hours reasonably expended, “a party seeking attorneys’ fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained.” [Howerton](#), 2014 WL 6976041, at *6. Thus, in calculating the lodestar figure, a “district court ... should exclude from [the] initial fee calculation hours that were not ‘reasonably expended.’” [Hensley](#), 461 U.S. at 434. Hours are not “reasonably expended” if they are “excessive, redundant, or otherwise unnecessary.” *Id.* “In determining reasonable fees the court also must assess the extent to which fees and costs could have been avoided or were self-imposed.” [Tirona v. State Farm Mut. Auto. Ins. Co.](#), 821 F. Supp. 632, 637 (D. Haw. 1993).

In setting the reasonable hourly rate for purposes of the lodestar calculation, courts will look to the “prevailing market rates in the relevant community.” [Gonzalez v. City of Maywood](#), 729 F.3d 1196, 1205 (9th Cir. 2013). “Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.” *Id.* (quoting [Prison Legal News v. Schwarzenegger](#), 608 F.3d 446, 454 (9th Cir. 2010)). In making its determination, a court will consider the experience, skill, and reputation of the attorney. *Id.* at 1205-06.

Because the Court uses the lodestar analysis simply as a guide in determining the reasonableness of Plaintiffs’ requested attorneys’ fees and costs, the Court will not endeavor to conduct an in-depth analysis into the hourly rates and reasonable hours billed by class counsel. The Court will also use the hourly calculations supplied by class counsel.

The Court first notes that of the \$800,000.00 Plaintiffs have requested for attorneys’ fees and costs, approximately \$700,000.00 is comprised of litigation expenses. *See* ECF Nos. 556-2, 556-5. Such expenses include costs for services of the third party settlement administrator; expert fees; travel expenses; transcript fees; and court filing fees. The Court finds that such costs are largely reasonable and that Plaintiffs’ counsel is entitled to reimbursement for such. *See* [Alberto v. GMRI, Inc.](#), No. CIV. 07-1895 WBS DAD, 2008 WL 4891201, at *12 (E.D. Cal. Nov. 12, 2008) (“There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.”).

*13 Focusing solely on the hours incurred by Plaintiffs’ local counsel over the past three and a half years, the Court notes that counsel spent a total of 2,486.8 hours on this case. *See* Decl. of Glenn T. Melchinger ¶ 8, ECF No. 556-3; ECF No. 556-4. A review of these hours indicates that the time spent was largely reasonable. Multiplying these hours by the corresponding hourly rates, which are mostly within the relevant lodestar range, results in a total fee calculation of \$783,498.11. *See* Decl. of Glenn T. Melchinger ¶ 8. Per agreement, mainland counsel has paid all of local counsel’s fees and expenses out of pocket. Petition at 6 n.5.

Class counsel has not provided a detailed accounting of the hours expended by mainland counsel, but provides the hourly rates its attorneys usually command (which are not necessarily within the local lodestar range), multiplied by the hours the attorneys spent on this litigation in order to provide further context for the reasonableness of the requested attorneys’ fees amount. *See* ECF No. 556-1. Counsel represents that as of October 3, 2016, mainland counsel has accrued approximately \$3,257,163.00 in fees for certain named attorneys. *See id.* Additional attorneys and staff also accrued fees for work spent on various projects during the three-year litigation, which fees mainland counsel does not specifically delineate for the Court. *See id.* ¶ 13. Plaintiffs represent that, in total, class counsel has incurred in excess of \$5 million in attorneys’ fees. Petition at 4-5.

It is clear to the Court that, even taking into consideration the possibility that certain attorneys’ rates may exceed the permissible lodestar range and that certain hours spent might be unreasonable, the combined attorneys’ fees for Plaintiffs’ local and mainland counsel, for which mainland counsel has been entirely responsible, far exceed the amount Plaintiffs have requested for attorneys’ fees.

As an alternative basis to determine the reasonableness of the award, the Court considers the “percentage-of-recovery method.” *See* [Alberto](#), 2008 WL 4891201, at *11 (quoting [In re Rite Aid Corp. Sec. Litig.](#), 396 F.3d 294, 300 (3d Cir. 2005)) (“To determine attorneys’ fees, courts ‘typically apply either the percentage-of-recovery method or the lodestar method’ The percentage-of-recovery method is favored in common-fund cases because it ‘allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.’ ”). In the Ninth Circuit, “such fee awards range from 20 percent to 30 percent of the fund created.” [Paul, Johnson, Alston & Hunt v. Graulty](#),

886 F.2d 268, 272 (9th Cir. 1989). The Ninth Circuit has also “note[d] with approval” one court’s conclusion that “the ‘bench mark’ percentage for the fee award should be 25 percent.” *Id.* Since 25 percent of the Judgment award is \$500,000, Plaintiffs’ request for a fee award of approximately \$100,000 is reasonable.

Finally—and significantly—the Court did not receive any objections from any class members regarding the requested amount for class counsel’s attorneys’ fees and costs.

For all of the foregoing reasons, the Court is satisfied that the \$800,000.00 Plaintiffs have requested be set aside from the Judgment amount for attorneys’ fees and costs is both fair and reasonable. The Court preliminarily APPROVES Plaintiffs’ request for attorneys’ fees and costs.

IV. Compensation Award for Class Representative

“Incentive awards are fairly typical in class action cases.” *Rodriguez*, 563 F.3d at 958 (emphasis omitted). Such incentive, or compensation, awards are discretionary and “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at 958-59; see also *Alberto*, 2008 WL 4891201, at *12 (“[A] class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action.”) (citation omitted). The Court must assess these awards individually, “using ‘relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation.’ ” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Such awards “must be reasonable in light of applicable circumstances, and not ‘unfair’ to other class members.” *Alberto*, 2008 WL 4891201, at *12 (citation omitted).

*14 Dr. Willcox has played an important and involved role in the instant litigation over the past three years. He has responded to fifteen interrogatories and 39 requests for production; was deposed for a full day; attended the summary judgment hearing and one of the settlement hearings; and “has spent many hours with Counsel conferring on or approving major strategic decisions for both himself and the

Class, as well as reviewing pleadings and other documents.” Supplemental Brief at 2.

Here, an incentive award of \$10,000.00 for Dr. Willcox will have minimal impact on the amount of Judgment funds available to the rest of the class members. Such an award represents approximately one half of one percent of the total Judgment amount of \$2,000,000.00, and less than one percent of the amount to be distributed to the class after fees and costs. *Id.* at 4. Furthermore, as noted above, the total distribution Dr. Willcox will receive, including his compensation award, is less than what other unnamed class members will recover, indicating that such an award is reasonable. Importantly, the Court did not receive any objections from class members opposing the incentive award.

For all of the foregoing reasons, the Court finds that an incentive award of \$10,000.00 for Dr. Willcox to compensate him for his role as class representative is both fair and reasonable and preliminarily APPROVES Plaintiffs’ request for the same.

CONCLUSION

For the foregoing reasons, the Court preliminarily APPROVES the Offer of Judgment and preliminarily APPROVES Plaintiffs’ Motion to Approve and Enter Judgment. The Court further preliminarily APPROVES Plaintiffs’ request for \$800,000.00 as an award of attorneys’ fees and costs, as described in Plaintiffs’ Petition in Support of Distribution of Fees and Expenses, and preliminarily APPROVES Plaintiffs’ request for \$10,000.00 as an award for Dr. Bradley Willcox for his role as class representative in this action.⁶

⁶ During the fairness hearing Plaintiffs’ counsel proposed a *cy pres* remedy to address the undisbursed funds meant for the four borrowers the third party administrator was unable to locate. Plaintiffs’ counsel agreed to submit a memorandum to the court regarding the *cy pres* remedy. Because the Court has not yet received Plaintiffs’ memorandum, the Court will address the *cy pres* remedy by separate order.

The Court ORDERS Lloyds to serve the Class Action Fairness Act (“CAFA”) notice required by 28 U.S.C. § 1715(b) within ten days of the entry of this Order, and

then to file a declaration certifying compliance with the CAFA notice requirement. The Court ORDERS Plaintiffs to provide Lloyds with a list of the 131 loans by Class ID, along with the specific amount of the Judgment to be paid to each borrower on each loan. If no objections are received from the appropriate federal or state officials within the 90-day statutory period, see 28 U.S.C. § 1715(d), the Court will enter judgment in favor of Plaintiffs and issue an order granting final approval of the Offer of Judgment. Lloyds shall then have two weeks from the entry of the final order and judgment to issue payments to class members,

Plaintiffs' counsel, and the class representative in accordance with Plaintiffs' proposed distribution, after which Lloyds must file with the Court a notice certifying that such payments have been made and a final class list setting forth (by name and city) the class members bound by the Judgment.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7238799

End of Document

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **APPENDIX OF UNPUBLISHED OPINIONS CITED IN DEFENDANTS UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED AND TRULY GREAT GLOBAL LIMITED'S MOTION FOR ATTORNEY'S FEES** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) September 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On (*date*) September 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) September 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

09/03/2021
Date

Vicky Apodaca
Printed Name

/s/ Vicky Apodaca
Signature

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

United States Trustee	ustpregion16.la.ecf@usdoj.gov
Minsheng Business Aviation Limited; Minsheng Financial Leasing Co., Ltd.; Yuntian 3 Leasing Company Designated Activity Company; Yuntian 4 Leasing Company Designated Activity Company	jmester@jonesday.com; dtmoss@jonesday.com;
Jonathan D. King as Chapter 7 Trustee Export Development Canada	john.lyons@us.dlapiper.com mjedelman@vedderprice.com; ahudson@vedderprice.com; solson@vedderprice.com

EXHIBIT A

Boeing Company v. KB Yuzhnoye

United States District Court, C.D. California. | February 6, 2018 | Not Reported in Fed. Supp. | 2018 WL 735971

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Outline

[Attorneys and Law Firms \(p.1\)](#)
[ORDER DENYING YUZHNOYE'S MOTION TO ALTER JUDGMENT \(DKT. NO. 989\) AND BOEING'S MOTION TO REGISTER THE JUDGMENT \(DKT. NO. 971\), AND GRANTING IN PART BOEING'S MOTION FOR COSTS AND ATTORNEYS' FEES \(DKT. NO. 966\) \(p.1\)](#)
[All Citations \(p.5\)](#)

2018 WL 735971

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

The BOEING COMPANY and Boeing
Commercial Space Company, Plaintiffs,
v.
KB YUZHNOYE and PO Yuzhnoye
Mashinostroitelny Zavod, Defendants.

Case No. CV 13-00730-AB (AJWx)

|
Signed 02/06/2018

Attorneys and Law Firms

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Los Angeles, CA, for Plaintiffs.

ORDER DENYING YUZHNOYE'S MOTION TO ALTER JUDGMENT (DKT. NO. 989) AND BOEING'S MOTION TO REGISTER THE JUDGMENT (DKT. NO. 971), AND GRANTING IN PART BOEING'S MOTION FOR COSTS AND ATTORNEYS' FEES (DKT. NO. 966)

HONORABLE [ANDRÉ BIROTTE JR.](#), UNITED STATES
DISTRICT JUDGE

*1 Pending before the Court are Plaintiffs The Boeing Company and Boeing Commercial Space Company's (collectively "Boeing") Motion for Costs and Attorneys' Fees, Dkt. No. 966, Motion to Register the Judgment, Dkt. No. 971, and Defendants KB Yuzhnoye and PO Yuzhnoye Mashinostroitelny Zavod's (collectively "Yuzhnoye") Motion to Alter or Amend the Judgment Pursuant to [Federal Rule of Civil Procedure 59\(e\)](#), Dkt. Nos. 989, 993.

I. BACKGROUND

The Court assumes the parties are familiar with the background of this case and summarizes the facts only as necessary to understand the pending motions. The facts are drawn from the Court's prior orders and are not disputed for the purposes of these motions. Dkt. Nos. 650, 962. Sea Launch Co. LLC ("Sea Launch") was a joint venture

between Boeing, Old Kvaerner Invest AS ("Kvaerner"), S.P. Korolev Rocket and Space Corporation, Energia D/B/A Rocket and Space Corporation Energia After S.P. ("Energia"), and Yuzhnoye, a Ukrainian government entity, to launch commercial satellites into space from a sea-based platform. Following Sea Launch's bankruptcy, disputes among the four entities and their affiliates resulted in litigation, including the instant lawsuit. This lawsuit was brought by Boeing against Energia and Yuzhnoye for the breach of two agreements, the Creation Agreement, Compl. Ex. 1, Dkt. No. 1–2, and the Guaranty and Security Agreement, Compl. Exs. 2, 3. Dkt. No. 1–3, 4. The Creation Agreement created Sea Launch and obligated each party to pay the debts of Sea Launch according to its ownership stake. During its operations Sea Launch discovered it needed additional funding and sought loans from private banks. Sea Launch obtained loans from private banks, but the banks required that Boeing and Kvaerner guarantee the loans. Boeing and Kvaerner agreed to do so after Energia and Yuzhnoye signed the Guaranty and Security Agreements. Sea Launch later went into bankruptcy and defaulted on the loans, which were then repaid by Boeing pursuant to its guarantees.

Boeing initially attempted to recover the amounts it was owed from Energia and Yuzhnoye (collectively "Defendants") through arbitration in Sweden pursuant to the arbitration provision in the Creation Agreement. After that arbitration was dismissed for lack of jurisdiction Boeing filed this case against Energia and Yuzhnoye seeking repayment under the Creation Agreement and the Guaranty and Security Agreement. *See* Compl. The parties engaged in substantial motion practice in this Court which resulted in the Court granting summary judgment to Boeing on its breach of contract claims against Energia and Yuzhnoye, Order Granting Pls.' Mot. for Summary J., Dkt. No. 750, a bench trial finding Energia's subsidiaries were liable as alter ego corporations, Court's Findings of Fact and Conclusions of Law, Dkt. Nos. 961, 962, and the Judgment detailing how much Energia and Yuzhnoye each owe for violating their guarantees under both the Creation Agreement and the Guaranty and Security Agreement, Judgment, Dkt. No. 960. After the briefing was completed on these motions Boeing settled with Energia, leaving Yuzhnoye as the only remaining defendant. Dkt. No. 1059.

II. DISCUSSION

*2 Before the Court are three motions, Boeing's Motion for Costs and Attorneys' Fees, Boeing's Motion to Register the Judgment, and Yuzhnoye's Joinder in Energia's Motion to

Alter or Amend the Judgment. The Court will address each motion in turn.

A. Boeing's Motion for Costs and Attorneys' Fees

Boeing filed a Motion for Costs and Attorneys' Fees in its breach of contract case against Energia and Yuzhnoye. Pls.' Mot. for Attorneys' Fees, Dkt. Nos. 966, 967, 976 (collectively "Fees Motion"). Energia opposed, Dkt. No. 986 ("Fees Opposition"), Yuzhnoye joined in opposition, Dkt. No. 987, and Boeing replied, Dkt. Nos. 1000, 1001 ("Fees Reply").

Boeing asserted that it was entitled to \$9,686,251.06 in attorneys' fees for Defendants' breach of the Guaranty and Security Agreement, and the Creation Agreement. The Guaranty and Security Agreement has a choice of law provision which states that it is governed by English law and also contains an express attorneys' fees clause. Compl. Ex. 2, at 2. The Creation Agreement contains a choice of law provision which states that the "formation, interpretation, and performance of this Agreement shall be governed by and interpreted in accordance with the law of the Kingdom of Sweden." See Compl. Ex. 1, Article 13. The Creation Agreement does not contain an express attorneys' fees clause, but the Swedish Code of Judicial Procedure does require the losing party to pay the reasonable costs and attorneys' fees of the prevailing party. RÄTTÅNGANGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE] 18:1, 8 (Swed.) ("Swedish Code of Judicial Procedure").

Defendants concede that Boeing is entitled to attorneys' fees under the Guaranty and Security Agreement, and that Boeing's request is reasonable, but argue that Boeing is not entitled to fees for their breach of the Creation Agreement because: (1) Sweden's provision for attorneys' fees is procedural and should not be applied by this Court, (2) it would be unfair to apply Sweden's laws on attorneys' fees given the differences in litigation between Sweden and the United States, and (3) Boeing did not comply with the relevant Swedish procedures for requesting attorneys' fees. Fees Opp'n at 1.

1. Legal Standard

Federal Rule of Civil Procedure 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must

be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. Proc. 54(d)(2). The motion must be made within fourteen days after the entry of judgment. *Id.*

2. Swedish Law Governs Boeing's Request for Attorneys' Fees

This case is in federal court based on federal question jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). While for a diversity case this Court would apply California's choice of law rules, for a case arising under the FSIA this Court must apply the choice of law rules of federal common law. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). The Court of Appeals for the Ninth Circuit follows the Restatement (Second) of Conflict of Laws (1971) ("Restatement") to the extent it concludes that the Restatement is persuasive. *In re Sterba*, 852 F.3d 1175, 1179 (9th Cir. 2017), *petition for cert. filed* (U.S. Sept. 15, 2017) (No. 17-423). Federal common law will therefore determine whether this Court must apply Sweden's provisions on attorneys' fees. *Schoenberg*, 930 F.2d at 782–783.

*3 The Ninth Circuit's rulings in *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 916 (9th Cir. 2003) ("Flores"), and *APL Co. Pte. v. UK Aerosols Ltd.*, 582 F.3d 947, 951 (9th Cir. 2009) ("APL"), are instructive. In both *Flores* and *APL* the Ninth Circuit reversed the district court and instead applied the attorneys' fees rule of the jurisdiction chosen by the parties in their contract. Importantly, the Ninth Circuit never considered whether the chosen rule is substantive, procedural, mandatory, or optional. Such questions may be relevant in other circumstances. *E.g.*, *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 974 (9th Cir. 2013) (applying Alaska's general attorneys' fees provision in a diversity case after determining it is procedural for choice of law purposes). However, if the dispute arises out of a contract with a valid choice of law provision then such distinctions are irrelevant to determining what law the Court will apply. *Chuidian v. Philippine Nat. Bank*, 976 F.2d 561, 564 (9th Cir. 1992) ("[Restatement] Section 187 sets out the rule when the parties to a contract have designated the law to govern their relationship.").¹

¹ Restatement § 187 states:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Flores concerned an employment contract that contained an express choice of law provision selecting federal maritime law. 335 F.3d at 916. Federal maritime law does not generally provide for attorneys' fees in maritime employment contracts. However, the district court sitting in Washington applied that state's rule providing for attorneys' fees in employment contracts because the state had a strong public interest in providing for attorneys' fees in employment disputes. *Id.* at 917. Reversing the district court, the Ninth Circuit began its analysis with Restatement § 187. *Id.* at 917–18. The Ninth Circuit found that § 187(2) applied instead of § 187(1) because the contract's choice of law provision did not specifically speak to attorneys' fees. *Id.* The Ninth Circuit held that § 187(2)(a) was satisfied because the United States had a substantial relationship to the subject matter, and § 187(2)(b) was satisfied because there was no evidence that Washington's interest was materially greater than that of the United States. *Id.* Because federal common law provided no reason to disturb the parties' choice of federal maritime law, and because federal maritime law did not provide for attorneys' fees for the prevailing party, the Ninth Circuit reversed the district court's grant of attorneys' fees.

Similarly, in *APL* the Ninth Circuit had to determine whether a bill of lading that incorporated Singaporean law for issues not otherwise “dealt with” allowed for attorneys' fees under Singaporean law when the substantive law governing the dispute was provided by a federal statute. *APL*, 582 F.3d

at 956–58. The district court held that the plaintiff was not entitled to attorneys' fees because federal law governed the substantive dispute and did not provide for attorneys' fees under the general American rule. *Id.* at 957. Finding that the issue of attorneys' fees was not specifically addressed in the bill of lading or the substantive federal law, the Ninth Circuit reversed the district court and applied Singapore's provision on attorneys' fees because the parties had agreed that issues not otherwise dealt with would be governed by Singaporean law. *Id.* Because Singaporean law generally followed the English rule and provided fees for the prevailing party, it was therefore an error for the district court to apply the general American rule merely because a federal statute provided the substantive law. *Id.*

*4 Following *Flores* and *APL*, the Court must apply Sweden's provision on attorneys' fees unless both of the factors in Restatement § 187(2) are met. *Flores*, 335 F.3d at 918 (“To be effective, ASC's choice of federal maritime law needs to satisfy only one of the two alternative requirements under section 187(2)”). The Court finds that neither factor in Restatement § 187(2) is met in this case. The choice of Swedish law was reasonable under Restatement § 187(2)(a) because the Creation Agreement also contained a provision for arbitration in Sweden. Compl. Ex. 1, Article 13. In addition, the Court cannot say that the choice of Swedish law was unreasonable for a contract involving entities from the United States, Norway, Ukraine, and Russia. The parties' choice of law is particularly reasonable because the parties reasonably anticipated that they would need waivers of sovereign immunity because at least one defendant is owned by a foreign government. Restatement § 187(2)(b) is similarly not implicated in this case because the Court is not aware of any jurisdiction relevant to this case that has a fundamental policy of *prohibiting* prevailing parties in a breach of contract dispute from recovering their attorneys' fees.

In conclusion, federal common law requires the Court to enforce the parties' choice of Swedish law to govern their dispute, including its provisions on attorneys' fees.

3. Reasonableness of Boeing's Fee Request Under Swedish Law

The Court finds that the total amount of fees requested is reasonable under Swedish law. The Swedish Code of Judicial Procedure provides that “[c]ompensation for litigation costs shall fully cover the costs of preparation for trial and

presentation of the action including fees for representation and counsel, to the extent that the costs were reasonably incurred to safeguard the party's interests.” Swedish Code of Judicial Procedure 18:8. Defendants argued that the Court should deny the Fees Motion because of differences in litigation between the United States and Sweden, and because Boeing failed to comply with the timing requirements for requesting attorneys' fees under the Swedish Code of Judicial Procedure.

Defendants' Swedish law expert Maria Tufvesson Shuck argued that differences in discovery, pleading, and the rates attorneys charge make it unreasonable to apply Sweden's provisions for attorneys' fees in this case. Shuck Decl. ¶¶ 12–14, Dkt. No. 986-1. However, Defendants have provided no evidence that these differences were relevant to the fees actually incurred, or that the total amount of fees would have been smaller had this case been litigated in Sweden. Shuck also noted in general terms that attorneys' fees awarded by Swedish courts tend to be moderate when compared to U.S. cases, and that she was not aware of any Swedish court case where a party was awarded attorneys' fees of this magnitude. Shuck Decl. ¶ 19. This leads to her conclusion that a Swedish court would be reluctant to grant this request. *Id.* However, her evidence is less useful because she only speaks in general terms, does not appear to have actually examined the details of the fee request, nor does she actually conclude whether or not the fee request is reasonable. In addition, her points on Swedish law were persuasively refuted by Boeing's Swedish law expert Fredrik Forssman. He stated that while Sweden does not have the same manner of discovery known to U.S. practitioners, the Swedish Code of Judicial Procedure does permit the Court to issue evidentiary orders to opposing or third parties to produce evidence which can be quite large. Forssman Decl. ¶ 12, Dkt. No. 1001. He specifically noted that in a case such as this evidentiary requests would be filed and granted and would lead to “a great deal of documentary evidence provided to either side....” *Id.* He also stated in his declaration that “in comprehensive and complex cases with substantial monetary claims, it is not in any respect unusual that attorneys' fees amount to several million USD.” *Id.* ¶ 13. Forssman also disagreed with Shuck's assertion that Swedish Courts often reject or adjust requests for attorneys' fees. *Id.* ¶ 14. He stated that to his knowledge a Swedish court has never rejected a prevailing party's request for attorneys' fees, and that even in the rare cases that a Swedish court would adjust the amount granted, it would only be for a specific reason outlined in the Swedish Code of Judicial Procedure. *Id.* Boeing pointed out that Defendants were awarded over

\$1.5 million in attorneys' fees under the same provision of the Swedish Code of Judicial Procedure for the parties' Swedish arbitration that had one short hearing and did not lead to a verdict. Fees Reply at 7. Based on the parties own history in Sweden, the more specific and detailed nature of Forssman's declaration, and the extensive litigation costs specifically because of Defendants' actions, the Court finds that the request for \$9,686,251.06 is reasonable and in line with what a Swedish court would grant in this case.

*5 The only ground identified by Defendants to deny the fee request in Swedish law is that Boeing did not comply with the timing requirements under the Swedish Code of Judicial Procedures. Fees Opp'n at 1. Swedish law requires that a request for attorneys' fees be presented before the termination of the lawsuit. Shuck Decl. ¶ 16 (citing Swedish Code of Judicial Procedure 18:14). By contrast, [Rule 54](#) requires a party to file a motion seeking attorneys' fees within 14 days of the judgment. The Court is uncertain how the timing requirement of the Swedish Code of Judicial Procedure would apply to the current procedural posture of this case, but it is irrelevant because the procedures for requesting attorneys' fees in a Swedish court are not applicable to the Fees Motion. Even in a diversity case where the district court applies the fee-shifting laws of the state where it is located, “the procedure for requesting an award of attorney fees is governed by federal law.” [Carnes v. Zamani](#), 488 F.3d 1057, 1059 (9th Cir. 2007). This rule must apply equally to federal question cases, particularly when there is a Federal Rule of Civil Procedure that is directly on point. It also comports with how the Restatement applies procedural rules. Restatement § 122 (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”). Boeing's failure to follow the timing requirements of the Swedish Code of Judicial Procedure that contradict the Federal Rules of Civil Procedure is thus irrelevant.

Although not addressed by any party, subsequent to the filing of the Fees Motion Energia settled with Boeing, leaving Yuzhnoye as the only remaining defendant. Boeing must therefore submit additional briefing and/or documentation to clarify what portion of the \$9,686,251.06 it seeks solely from Yuzhnoye.

B. Boeing's Motion to Register the Judgment

Boeing asks the Court for permission to register the judgment under 28 U.S.C. § 1963. Pls.' Mot. to Register the J., Dkt. No. 971. Energia opposed, Dkt. No. 984, Yuzhnoye joined in opposition, Dkt. No. 985, and Boeing replied, Dkt. No. 1002. 28 U.S.C. § 1963 permits a party to register a judgment when it has become final or “when ordered by the court that entered the judgment for good cause shown.” “Good cause” is not a term defined by statute, and the Ninth Circuit has observed that “there is no Ninth Circuit law defining ‘good cause.’” *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1197 (9th Cir. 2001). While Boeing did identify assets of Energia in this district, it conceded that it has “not yet located any assets of Yuzhnoye in California.” McKeever Decl. ¶¶ 2–4, Dkt. No. 972. In this Motion Boeing has not identified any facts or reasons related to Yuzhnoye that would constitute good cause to register the judgment.

Boeing's Motion to Register the Judgment is therefore **DENIED**.

C. Yuzhnoye's Motion to Amend or Alter the Judgment

Energia filed a motion to alter or amend the judgment under Rule 59. Defs.' Mot. to Alter or Amend the J. Pursuant to Federal Rule of Civil Procedure 59(e), Dkt. Nos. 989, 999 (“Motion to Amend”). Boeing opposed the motion, Dkt. Nos. 1010, 1011, and Energia replied, Dkt. Nos. 1012, 1025. Energia filed two requests for judicial notice.² Dkt. Nos. 990, 1013. Yuzhnoye joined Energia's motion, Dkt. No. 993, reply, Dkt. No. 1016, and requests for judicial notice, Dkt. Nos. 994, 1017.

² Defendants' Requests for Judicial Notice are **GRANTED**.

Briefly, Energia brought the Motion Amend because it believed that the Court's summary judgment opinion ignored the impact of Kvaerner, a former party to this litigation, and its separate settlements with both Energia and Boeing. Energia argued that the amount it owed to Boeing must be reduced by the amount that Kvaerner paid Boeing, because that payment was made on behalf of Energia. See Dkt. No. 989–1.

Regardless of whether or not Energia is correct, is has since settled with Boeing and is no longer a party in this case. The Court also found Energia and Yuzhnoye were separately liable for specific amounts. Amending the Court's previous judgment to reduce the liability of Energia will therefore not impact the liability of Yuzhnoye. This is further shown in the motion itself which specifically cites paragraph 1-a of the Court's Judgment, a paragraph which expressly applies to Energia and not Yuzhnoye. Mot. to Amend at 3 (citing Dkt. No. 960 at ¶ 1-a). A motion to alter or amend a judgment under Rule 59 is properly denied when its resolution could not impact the rights or liabilities of any party. Cf. *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987) (noting that a court should deny a motion under Rule 59 unless the new evidence was “of such magnitude that production of it earlier would have been likely to change the disposition of the case.”). Yuzhnoye has not provided any argument for how it could benefit from this Motion.

*6 Because the motion will not impact Yuzhnoye, its Motion to Amend is **DENIED**.

III. CONCLUSION

The Fees Motion is **GRANTED** as to the applicability of Swedish law, Boeing's entitlement to fees under Swedish law, and that the total amount requested of \$9,686,251.06 was reasonable under Swedish law. Boeing may submit additional briefing and/or documentation within two weeks from the receipt of this order delineating what portion of the \$9,686,251.06 it still seeks from Yuzhnoye. Yuzhnoye will then have two weeks to file any opposition.

Boeing's motion to register the judgment is **DENIED**.

Yuzhnoye's motion to amend or alter the judgment is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 735971

EXHIBIT B

Capital Bank, PLC v. M/Y Birgitta

United States District Court, C.D. California. | October 18, 2010 | Not Reported in F.Supp.2d | 2010
WL 4241584

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Outline

[Attorneys and Law Firms](#) (p.1)
[Proceedings: \(In Chambers\) Order Awarding Attorneys' Fees and Related Expenses](#) (p.1)
[All Citations](#) (p.7)

2010 WL 4241584

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.

CAPITAL BANK, PLC

v.

The M/Y BIRGITTA, et al.

No. CV 08-5893 PSG (SSx).

|

Oct. 18, 2010.

Attorneys and Law Firms

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Proceedings: (In Chambers) Order Awarding Attorneys' Fees and Related Expenses

The Honorable [PHILIP S. GUTIERREZ](#), District Judge.

*1 Wendy K. Hernandez, Deputy Clerk.

Before the Court is Plaintiff Capital Bank, PLC's Motion to Prove Up Attorney's Fees and Other Related Expenses. The Court finds the matter appropriate for decision without oral argument. See [Fed.R.Civ.P. 78](#); L.R. 7-15. Having considered the papers submitted in support of Plaintiff's motion, the Court GRANTS the motion.

I. Background

The in rem Defendant in this case, M/Y Birgitta ("Defendant" or "vessel") has been the subject of litigation in this Court for well over four years. In July 2005, Plaintiff Capital Bank, PLC ("Plaintiff" or the "Bank") issued a six million dollar loan to Juanita Group, Ltd. ("Juanita") for the purchase of the vessel, secured by a first preferred statutory ship mortgage. Before doing so, Juanita and the Bank executed both a Marine Mortgage and a Marine Loan Agreement in the principal amount of six million dollars plus interest, payable in 120 monthly payments. Both contain a list of defaulting events,

any one of which would trigger immediate repayment of the loan. Included in the list of defaulting events is failure to make a payment within 14 days of its due date and any material change in ownership or control of Juanita.

On July 26, 2010, this Court granted summary judgment in favor of the Bank because there was no factual dispute that "(1) Juanita failed to make *any* payments after the vessel was arrested and (2) Juanita underwent a material change in ownership after the arrest." See Dkt. # 201 (emphasis in original) (Minute Order granting summary judgment). All that remains is Plaintiff's Motion to Prove Up Attorney's Fees and Other Related Expenses now pending before the Court. Plaintiff's motion is unopposed.

II. Legal Standard

For a district court sitting in admiralty, the "American" rule provides that "absent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees." [APL Co. Pte. Ltd. v. UK Aerosols Ltd.](#), 582 F.3d 947, 957 (9th Cir.2009). "Where the parties specify in their contractual agreement which law will apply," however, "admiralty courts will generally give effect to that choice." *Id.* In contrast to the "American" rule, the "English" rule generally allows the recovery of attorneys' fees and costs by the prevailing party. See [Alyeska Pipeline Serv. Co. v. Wilderness Soc'y](#) 421 U.S. 240, 247, 95, S.Ct. 1612, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Moreover, where an attorneys' fees provision is included in a valid contract, a district court has discretion not to award the fees, but only where an award would be "inequitable and unreasonable." [DeBlasio Constr. Co. v. Mountain States Constr. Co.](#), 588 F.2d 259, 263 (9th Cir.1978); see also [McDonald's Corp. v. Watson](#), 69 F.3d 36, 45 (5th Cir.1995) (holding that a district court "abuses its discretion if it awards contractually-authorized attorney's fees under circumstances that make the award inequitable or unreasonable or fails to award such fees in a situation where inequity will not result"). If a court determines that a fee award is in order, the court must calculate the proper amount of the award to ensure that it is reasonable. See [Hensley v. Eckerhart](#), 461 U.S. 424, 433-34, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

III. Discussion

*2 Plaintiff seeks recovery of \$4,069,569.10 in attorneys' fees and other related expenses. The "English" rule and the loan agreements provide independent grounds for Plaintiff's

request for attorneys' fees, and the loan agreement provides for recovery of the other expenses incurred by Plaintiff.

A. Attorneys' Fees

1. Plaintiff's Entitlement to an Award of Attorneys' Fees

Clause 12.8 of the Marine Loan Agreement provides that “[t]his agreement shall be governed by and construed in accordance with English Law,” and clause 14(m) of the Marine Mortgage similarly states that “[t]his Mortgage shall be governed by and construed in accordance with English Law.” See *Compl.*, Exs. A-B. As English law controls, the “English” rule for attorneys' fees applies and the Bank is entitled to attorneys' fees as a prevailing party. See *Alyeska Pipeline Serv. Co.*, 421 U.S. at 247. In addition, Plaintiff is contractually entitled to attorneys' fees. Clause 12.1 of the Marine Loan Agreement provides that the borrower “shall, from time to time on [Bank's] demand reimburse [Bank] for all costs and expenses (including legal fees) reasonably incurred ... in connection with the preservation and/or enforcement of any of [Bank's] rights under this Agreement or as a consequence of any default by [borrower].” *Compl.*, Ex. A. Clause 14(g) of the Marine Mortgage likewise provides that borrower “shall repay to us on demand all expenses, fees, legal or other charges whatsoever incurred by [Bank] in applying for or enforcing payment of any sums payable by [borrower] ... or in preparing to recover or recovering possession of the Vessel from [borrower] or from any other person (including any payment made by [Bank] in discharge or satisfaction of any lien or alleged lien on the Vessel).” It is clear that reasonable attorneys' fees are owed under both the “English” rule and the relevant provisions of the mortgage agreements.

2. Plaintiff's Request for Attorneys' Fees

The customary method of determining reasonable attorneys' fees is known as the “lodestar” method. See *Morales v.*

City of San Rafael, 96 F.3d 359, 363 (9th Cir.1996). The “lodestar” method involves “multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate.” *Id.* The resulting “lodestar” figure is presumptively reasonable. See *id.* at 364, n. 8. The reasonableness of the time expended and the hourly rate charged can be determined by considering the following factors: (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the necessary skill required; (4) the preclusion of other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys on the case; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir.1975). The court need only consider those factors that are relevant to the case. *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069, 1073 (9th Cir.1983). A court may reduce the hours claimed where the documentation is inadequate or the time was not “reasonably expended,” such as where the record reflects duplicative efforts or excessive staffing. See *Sorensen v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001). In such a case, the court must provide a clear explanation for any reduction. See *id.*

*3 Plaintiff requests \$963,647.50 in attorneys' fees. In support of its motion, Plaintiff provides billing statements from May 2006 through July 2010, which itemize the number of hours spent by each attorney on the matter and the attorney's hourly rate for each month of litigation. Because the litigation lasted for over four years, the attorneys' rate per hour increased at semi-regular intervals, which is reflected on each month's billing statements. The Court has reviewed the monthly billing statements and calculates the lodestar as follows:

Name	Rate Per Hour	Hours	Total
Frank C. Brucculeri	\$215.00	204.6	\$43,989.00
	\$265.00	798.5	\$211,602.50
	\$300.00	785.7	\$235,710.00
Bradley M. Rose	\$250.00	66.4	\$16,600.00

	\$300.00	323.8	\$97,140.00
Gerald L. Gorman	\$215.00	46	\$9,890.00
	\$265.00	247.5	\$65,587.50
Daniel F. Berberich	\$235.00	969.2	\$227,762.00
Lauren F. Griffo	\$95.00	0.7	\$66.50
	\$110.00	1.7	\$187.00
Aksana Moshaiiv	\$165.00	13.7	\$2,260.50
	\$200.00	1	\$200.00
Michelle E. Ceja	\$165.00	3	\$495.00
	\$190.00	41.2	\$7,828.00
Sherilyn A. Winford	\$110.00	13.6	\$1,496.00
	\$125.00	18.2	\$2,275.00
Jamie A. Moran	\$200.00	5.3	\$1,060.00
Lisa G. Taylor	\$250.00	59.2	\$14,800.00
Andre M. Picciurro	\$235.00	27	\$6,345.00
William D. Carey	\$235.00	78.1	\$18,353.50
Total			\$963,647.50

Though the total amount of attorneys' fees is large, the Court finds that they are generally reasonable for the reasons that follow.

a. *The Time and Labor Involved*

This litigation started in 2006, had two lives with three different judges, and continues to the present. On February 27, 2006, the Bank filed the first iteration of the case in this Court. *See Capital Bank Plc. v. The M/Y Brigitta* ("Case 1"), No. CV 06-2740 PSG (SSx), Dkt. # 1. Almost two years later, the parties voluntarily dismissed the case without prejudice to promote settlement. *See id.*, Dkt. # 76 (Stipulation for voluntary dismissal on January 10, 2008). Settlement turned out to be too lofty a goal, and the case was refiled with this Court in September of 2008. *See Capital Bank PLC v. The M/Y Brigitta* ("Case 2"), No. CV 08-5893 PSG (SSx), Dkt. # 1. Both cases featured hotly contested motions including jurisdictional motions involving complex questions of English maritime law, *see Case 1*, Dkt.13-32; *Case 2*, Dkt.47-54, 59-79, motions to dismiss and vacate the arrest of the vessel, *Case 2*, Dkt.92-99, a motion for the sale of the vessel, *see id.*, Dkt.122, 125-26, 166-69, a motion for summary judgment against specially appearing party Cover Drive, *see id.*, Dkt.155-60, a motion for evidentiary sanctions, *see id.*, Dkt.124, 165, and, among others, the dispositive motion for summary judgment against the vessel, *see id.*, Dkt. # 132. Moreover, there were 23 depositions, 18 of which were noticed by the Defendants, *see Brucculeri Decl.* ¶ 10, and the case came so close to going to trial that the parties filed pre-trial documents as required by the Court, *see id.*, Dkt.136-38, 164. Plainly, a case filed twice, involving over 280 pleadings and numerous quarrels over obscure English maritime-mortgage law required a significant amount of time and labor on the part of the attorneys involved.

b. *The Novelty and Difficulty of the Questions Presented and the Skill Required to Litigate the Case*

*4 The M/Y Brigitta litigation involved extremely difficult questions of English law, which required the Plaintiffs to retain two English law experts. *See Brucculeri Decl.* ¶ 11. For example, in the Motion to Dismiss for Lack of Subject Matter Jurisdiction, the parties had to brief the question of whether the Bank's mortgage on the vessel was valid. *See* Dkt. # 47. The mortgage could be valid only if it was met the requirements of the Ship Mortgage Act, 46 U.S.C. § 31321, which recognizes a foreign mortgage only if the mortgage is valid under the laws of the country where it was executed. *See* Dkt. # 117 (Minute Order denying Defendants' Motion to

Dismiss for Lack of Subject Matter Jurisdiction). In addition, specially appearing Cover Drive made a claim to the vessel and the Bank had to show that it had a superior interest as determined by English mortgage law. *See* Dkt. # 196 (Minute Order granting Plaintiff's Motion for Summary Judgment against Cover Drive). The issues were novel and difficult, requiring significant attention by the attorneys and experts involved. *See id.* n. 1 (explaining the qualifications of one of the experts retained by Plaintiffs, Mr. Michael Joseph McParland).

c. *The Customary Fee and the Experience, Reputation, and Ability of the Attorneys*

In determining whether an hourly rate is reasonable, courts consider the experience, skill, and reputation of the attorney requesting fees, as well as whether the hourly rate reflects the prevailing market rates in the community. *Webb v. Ada County*, 285 F.3d 829, 840 n. 6 (9th Cir.2002); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir.1992). Frank Brucculeri is a partner at Kaye, Rose & Partners, licensed to practice law in California since 1988, and rated "AV" by Martindale Hubbell. *Brucculeri Decl.* ¶ 7. Bradley Rose is a founding partner of Kaye, Rose & Partners, licensed to practice law in California since 1987, and rated "AV" by Martindale Hubbell. *Id.* ¶ 6. Together, Mr. Rose and Mr. Brucculeri have conducted over 35 maritime trials. *Id.* ¶ 7. Daniel Berberich is an associate at Kaye, Rose & Partners, licensed to practice in California since 2001, and has specialized in civil and maritime litigation since becoming a member of the bar. *Id.* ¶ 8. Although the rates charged by the firm increased as litigation progressed, partners never charged more than \$300.00 per hour and the main associate on the case, Mr. Berberich, never charged more than \$235.00 per hour. Based on the amount charged by Defendants' counsel-\$450 per hour-and an examination of cases where similar fees were held to be reasonable, the Court finds that the rates charged by Plaintiff's attorneys are within the customary fee range considered to be reasonable. *See e.g., Schultz v. Ichimoto*, No. CV 08-526 OWW (SMSx), 2010 WL 3504781, at *6-7 (E.D.Cal. Sept.7, 2010) (finding that rates of \$300 per hour were reasonable and customary based on other cases where \$315 and \$350 per hour were reasonable and customary); *Armada Bulk Carriers v. ConocoPhillips*, 505 F.Supp.2d 621, 624 (N.D.Cal.2007) (finding that a rate of \$325 per hour was a customary and reasonable rate for an attorney in California with 23 years of litigation and trial experience).

d. *Time Limitations Imposed by the Client or the Circumstances*

*5 Though not determinative, several occurrences over the course of this case required Plaintiff's attorneys to act with a certain degree haste not necessarily present in other cases. For example, when the vessel arrived in California waters, the attorneys had to move to arrest it before it could leave the jurisdiction. *See Brucculeri Decl.* ¶ 12. In addition, Defendants brought an *ex parte* application to stay the case because Juanita filed for liquidation in the British Virgin Islands, requiring the attorneys for the Bank to file an opposition in one business day addressing maritime law, bankruptcy law and the laws of the British Virgin Islands. *Id.*

e. *The Amount Involved and the Results Obtained*

The original mortgage on the vessel was for \$6,000,000. *See* Dkt. # 206, ¶ 7 (Final Judgment). Juanita made ten monthly payments of \$62,908.56 each, leaving an unpaid principal balance of \$5,370,914.40. *Id.* Moreover, late charges and interest accrued on the mortgage add up to \$2,601,835.35. Together, the Bank is entitled to \$7,972,749.75 based on Juanita's default on the loan. While the attorneys' fees look high upon initial examination, the Court finds that it is reasonable for a Plaintiff to spend just over one-tenth of the amount of the final judgment to litigate the case.

f. *Departures from the Requested Amount*

The Court, however, has concerns with some entries submitted for reimbursement. From August 2009 through October 2009, Plaintiff's attorneys billed over 400 hours, for a total amount of \$105,130.00 in fees. *See Brucculeri Decl.* (billing entries dated 8/31/09, 9/30/09, and 10/31/09). The entries do not specifically address what the hours were billed for, and the Court is unable to find any correlation between the billing entries and the Court's docket that would warrant such high fees. For example, from August 2009 through October 2009, Plaintiff filed an opposition to the motion to dismiss for lack of subject matter jurisdiction, participated in a status conference, and objected to a status report. *See* Dkt.92-112. To put it in perspective, Plaintiff billed 293.6 hours in April and May of 2010, presumably to prepare for May's *ex parte* application for sale of the vessel, motion for sanctions, motion for summary judgment and motion in limine. *See* Dkt.122-33. Without additional information from Plaintiff, it is impossible to determine whether the 400 hours billed from August 2009 through October 2009 were reasonable and necessary. As

a result, the Court reduces that time by half and subtracts \$52,565.00 from the total amount of attorneys' fees requested.

Based on the complexity of the case, the total time it has consumed, the rates charged, the hours billed, and the results obtained, the Court finds that Plaintiff is entitled to an award of attorneys' fees in the amount of \$911,082.50.

B. *Other Related Expenses*

In addition to attorneys' fees, the Marine Loan Agreement and the Marine Mortgage also allow Plaintiff to recover reasonable costs incurred in the litigation. *See* Dkt. # 206, ¶ 8 (Final Judgment); *see also Compl.*, Exs. A-B (Clause 12.1 of the Marine Loan Agreement provides that the borrower "shall, from time to time on [Bank's] demand reimburse [Bank] for all costs and expenses (including legal fees) reasonably incurred ... in connection with the preservation and/or enforcement of any of [Bank's] rights under this Agreement or as a consequence of any default by [borrower].") Clause 14(g) of the Marine Mortgage provides that borrower "shall repay to us on demand all expenses, fees, legal or other charges whatsoever incurred by [Bank] in applying for or enforcing payment of any sums payable by [borrower] ... or in preparing to recover or recovering possession of the Vessel from [borrower] or from any other person."). Plaintiff requests that the Court award (1) accrued interest and late penalties, (2) insurance expenses, (3) expert witness fees, and (4) expenses for mediation, travel and private investigation.

1. *Interest Accrued and Penalties Assessed*

*6 On August 6, 2010, the Court entered final judgment in this case and expressly stated that the Bank is entitled to recover interest and late charges on the principal amount of the loan pursuant to the mortgage agreements and English law. *See* Dkt. # 206, ¶ 8 (Final Judgment). The terms of the agreements set the annual interest rate on the principal amount of the loan at 1.75 percent above the "U.S. Base Rate." *Ratcliffe Decl.* ¶ 6. After subtracting the 10 payments made by Juanita, the interest accrued between July 9, 2005 and October 3, 2010 is \$1,533,223.43. *See id.* In addition, Plaintiff is entitled to late charges which accrue annually as interest set at 5 percent above the "U.S. Base Rate." *See* Dkt. # 206, ¶ 8 (Final Judgment); *Ratcliffe Decl.* ¶ 6. That penalty started accruing in April of 2006-after Juanita's last payment-and amounts to \$1,068,611.92. *Ratcliffe Decl.* ¶ 6. The total of interest and penalties, therefore, is \$2,601,835.35.

2. Insurance Expenses

Under the terms of the agreements, the vessel was to be continuously covered by an insurance policy. *See Compl.*, Ex. B (Marine Mortgage § 8(a)). According to the Bank, insurance on the vessel lapsed on April 20, 2006, requiring the Bank to provide insurance at its own expense. *See Mot.* 13:9-14. In the present motion, the Bank calculates the cost of providing insurance from the April 20, 2006 lapse until now to be \$359,844.33. *See Ratcliffe Decl.* ¶ 7. However, in the July 2010 Minute Order granting summary judgment in favor of the Bank, the Court expressly stated that there was a material factual dispute about whether the vessel was insured at the time of its arrest through part of 2007. *See Dkt.* # 201 at 9. It would be unreasonable for this Court to reimburse costs needlessly expended, and the Court cannot determine the insurance expenses necessarily incurred. Presumably, the Bank is entitled to costs related to insurance premiums for the 2007-2008, 2008-2009, and 2009-2010 policies. Until the Bank provides additional information about those specific policies, the Court declines to award costs for insurance premiums.

3. Expert Witness Fees

The Bank retained two expert witnesses on English law, Mr. Michael McParland and Mr. Nicolas Craig. *See Brucculeri Decl.* ¶ 10. As discussed above, the issues presented in this case were complex and it was reasonable for the Bank to incur costs for the expert witnesses' services. Moreover, courts regularly award expert witness fees where the parties' contract provides for the recovery of costs. *See Armada Bulk Carriers*, 505 F.Supp.2d at 624 (awarding experts' fees where the contract stated: “[T]he prevailing party shall recover all costs and expenses incurred in the exercise of any remedies under the contract.”). Like the provision in *Armada Bulk Carriers*, the costs provisions here allow for reimbursement for “all costs and expenses ... reasonably incurred ... in connection with the preservation and/or enforcement of any of [the Bank's] rights under this Agreement or as a consequence of any default by [borrower].” *See Compl.*, Ex. A (Marine Loan Agreement, § 14(g)). Mr. McParland and Mr. Craig were paid \$96,327.95 in fees, an amount the Court finds reasonable

a. Attorneys' Fees:	\$911,082.50
b. Other Expenses:	\$2,746,077.27

The total amount awarded is \$3,657,159.77. Plaintiff is ordered to provide supplemental briefing on the insurance

given the complexity and duration of this case. *See Brucculeri Decl.* ¶ 10.

4. Expenses for Mediation, Travel and Private Investigation

*7 Finally, the Bank seeks an award of expenses for mediation, travel, and private investigation as costs covered in the agreements. First, the parties participated in two days of mediation after dismissing the first case and before filing the complaint in the second. *See Brucculeri Decl.* ¶ 15. The cost for the mediation session was \$6,650.00, as reflected by the mediation service's invoice. *Id.* Second, the Bank's attorneys were “required to travel abroad on two separate occasions” in order to depose witnesses, and were required to travel to Aspen, Colorado in order to depose the former director of Juanita. *See id.* ¶ 16. While the amount requested looks high, \$32,439.59, there is no indication that it is unreasonable such that it should not be awarded under the parties' contract. *See id.* Last, the “Bank incurred costs in connection with private investigation in order to locate the Vessel, which was ultimately found [and arrested] in Marina Del Rey, California.” *Id.* ¶ 17. The Bank also incurred private investigation costs to locate the former director of Juanita and serve him with a subpoena. *Id.* A total of \$8,824.38 was paid for those private investigative services, an amount the Court considers reasonable. As a result, the Bank is entitled to recover \$47,913.97 in expenses for mediation, travel and private investigation.

All costs discussed above were incurred by the Bank in this litigation and are recoverable under the parties' contract. However, the Court cannot determine a reasonable amount of costs associated with insurance premiums and thus declines to award any costs for insurance until detailed coverage statements are provided by the Bank. In sum, Plaintiff is awarded \$2,746,077.27 in expenses.

IV. Conclusion

Based on the foregoing, Plaintiff is entitled to an award for attorneys' fees and other expenses in the following amounts:

premiums paid on the vessel by **November 8, 2010** if it seeks recovery of those costs.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4241584

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EXHIBIT C

Doddie Alvarez Lapuz v. Saul

United States District Court, C.D. California. | April 27, 2021 | Slip Copy | 2021 WL 3202462

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Outline

[Attorneys and Law Firms](#) (p.1)
ORDER RE: MOTION FOR ATTORNEY FEES PURSUANT TO 42 U.S.C. § 406(b)
(p.1)
[All Citations](#) (p.3)

2021 WL 3202462

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

DODDIE ALVAREZ LAPUZ, Plaintiff,
v.
Andrew M. SAUL, Commissioner
of Social Security,¹ Defendant.

¹ The Court previously ordered that the caption be amended to substitute Andrew M. Saul for Nancy A. Berryhill as the defendant in this action.

No. SACV 17-1496-KS
|
Signed 04/27/2021

Attorneys and Law Firms

Shanny J. Lee, Young Bin Yim, Charles E. Binder and Harry J. Binder LLP, New York, NY, for Plaintiff.

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ORDER RE: MOTION FOR ATTORNEY FEES PURSUANT TO 42 U.S.C. § 406(b)

KAREN L. STEVENSON, UNITED STATES MAGISTRATE JUDGE

*1 On August 17, 2020, Plaintiff, through counsel, filed a Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b) (“2020 Motion”). (Dkt. No. 24.) Plaintiff subsequently requested a stay of the 2020 Motion, which the Court granted. (Dkt. Nos. 29, 30.) On March 16, 2021, Plaintiff’s counsel filed a new Motion for Attorney Fees (the “2021 Motion”). (Dkt. No. 41.) Plaintiff’s counsel also filed a Memorandum in Support of the 2021 Motion (“Memo.”) and a declaration by Plaintiff’s counsel, Young Yim (“Yim Decl.”). (Dkt. Nos. 42, 43.) Additionally, on March 19, 2021, Plaintiff’s counsel filed a motion to lift the stay and withdraw the 2020 Motion. (Dkt. No. 46.) On March 22, 2021, the Court granted the motion, lifted the stay, and ordered the 2020 Motion withdrawn. (Dkt. No. 47.) On March 23, 2021, Defendant filed a response

(“Response”). (Dkt. No. 48.) For the reasons stated below, the 2021 Motion is GRANTED.

BACKGROUND

Plaintiff’s counsel represented Plaintiff before the United States District Court pursuant to a contingency fee agreement (“Agreement”) dated August 21, 2017, which provides for counsel to receive “twenty-five percent (25%) of the past due benefits,” if the matter is successfully prosecuted following judicial review. (Yim Decl., Ex. A [Dkt. No. 43-1 at 2].) On November 28, 2018, the Court issued a Memorandum Opinion and Order reversing the decision of the Administrative Law Judge and remanding the matter to the Commissioner for further proceedings; and entered judgment. (Dkt. No. 20, 21.) The Commissioner subsequently awarded Plaintiff \$119,895.00. (See Yim Decl., Ex. C [Dkt. No. 43-1 at 12].) Additionally, in accordance with a stipulation of the parties and related court order filed on January 31, 2019, Plaintiff’s counsel was awarded the sum of \$4,878.95 in attorney fees pursuant to the Equal Access to Justice Act (“EAJA”). (Dkt. No. 23.)

APPLICABLE LAW

Section 406(b) of Title 42 provides:

Whenever a court renders a judgment favorable to a claimant ... who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled.... In case of any such judgment, no other fee may be payable ... for such representation except as provided in this paragraph.

42 U.S.C. § 406(b)(1)(A).²

² For representation of a benefits claimant at the administrative level, an attorney may file a fee

petition or fee agreement. 42 U.S.C. § 406(a). In the event of a determination favorable to the claimant, the Commissioner “shall ... fix ... a reasonable fee” for the attorney’s services. 42 U.S.C. § 406(a)(1).

In *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court made clear that “the primacy of lawful attorney-client fee agreements” must be respected. *Id.* at 793. Thus, the Court must “approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness.” *Id.* at 808. The Supreme Court held that Section 406(b):

*2 does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases. Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due benefits. Within the 25 percent boundary, ... the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.

Id. at 807 (citations omitted).

In *Crawford v. Astrue*, 586 F.3d 1142 (9th Cir. 2009), the Ninth Circuit examined the various factors a district court may consider when conducting a “reasonableness analysis” of an attorney’s fee request. *Id.* at 1153. The Ninth Circuit recognized that:

[a]lthough *Gisbrecht* did not provide a definitive list of factors that should be considered in determining whether a fee is reasonable or how those factors should be weighed, the Court directed the lower courts to consider “the character of the representation and the results the representative achieved.” ... The court may properly reduce the fee for substandard performance, delay, or benefits that are not in proportion to the time spent on the case....

Id. at 1151 (citations omitted). *Crawford* states that a court may “consider the lodestar calculation, but only as an aid in assessing the reasonableness of the fee.”³ *Id.* at 1148 (citing *Gisbrecht*, 535 U.S. at 808). Applying these factors, the Ninth Circuit has found reasonable fees with effective hourly rates of \$519, \$875, and \$902. *Crawford*, 586 F.3d at 1153 (Clifton, J., concurring in part and dissenting in part).

3 Under the “lodestar” method, attorney fees are calculated by multiplying the number of hours reasonably expended in representing a client by a reasonable hourly fee. See *Gisbrecht*, 535 U.S. at 797-98 (discussing application of the “lodestar” method in the Ninth Circuit). The “lodestar” may be adjusted upward or downward to account for a variety of factors. See *id.* at 798-99. Courts in this and other circuits look to the following factors to determine whether the lodestar should be adjusted: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. In *Crawford*, the Ninth Circuit expressed concern that the lodestar method “under-compensates attorneys for the risk they assume in representing SSDI claimants and ordinarily produces remarkably smaller fees than would be produced by starting with the contingent fee agreement.” *Crawford*, 586 F.3d at 1149.

When a district court determines that a fee request is unreasonable, it must provide a “concise but clear explanation of its reasons.” *Crawford*, 586 F.3d at 1152 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). In particular, the Court must consider the complexity and risk involved in the case at issue before deciding that a particularly substantial fee award constitutes an unreasonable “windfall.” See *id.* at 1152-53.

DISCUSSION

*3 In testing the reasonableness of fees yielded by contingency fee agreements within the statute's 25 percent ceiling, *Gisbrecht* provided some guidance by identifying the following examples of factors or circumstances that may warrant a reduction: (1) the result achieved; (2) "substandard" representation by counsel; (3) delay by counsel (justifying a reduction to prevent counsel from profiting from the accumulation of benefits while the case is pending due to any foot-dragging); (4) "if the benefits are large in comparison to the amount of time counsel spent on the case," thereby resulting in a windfall; and (5) counsel's record of the hours spent representing the claimant and counsel's normal hourly billing rate for non-contingency work. *Id.* at 808; *see also Ellick v. Barnhart*, 445 F. Supp. 2d 1166, 1168-72 (C.D. Cal. 2006) (providing a thorough analysis of post-*Gisbrecht* case law and factors considered by various courts).

As prescribed by *Gisbrecht* and *Crawford*, the Court here begins with the executed contingency fee agreement between Plaintiff and his counsel. (*See* Yim Decl., Ex. A.) Plaintiff agreed that counsel shall receive "twenty-five percent (25%) of the past due benefits" if the matter was successfully prosecuted following judicial review. (*Id.*) As discussed above, according to the parties, the Commissioner subsequently awarded Plaintiff \$119,895.00 in past-due benefits. (*See* Yim Decl., Ex. C.) Plaintiff's counsel now seeks attorney's fees in the amount of \$29,973.75 for his work related to Plaintiff's case, with a credit to Plaintiff for the EAJA fees previously paid in the amount of \$4,878.95; this constitutes exactly 25% of Plaintiff's past-due benefits, the precise amount to which he is entitled under the fee agreement. (*See* 2021 Motion at 1; Memo. at 1-2.)

The Court finds no evidence of delay or substandard representation. Plaintiff's counsel pursued this matter efficiently and successfully. Counsel assumed the risk of nonpayment inherent in a contingency agreement. Accordingly, the only question is whether the fees sought

are unreasonable because they would result in a windfall to Plaintiff's counsel – that is, whether they are large in comparison to the amount of time counsel spent on the case. (*See* Memo. at 5-10; *see also* Yim Decl., Ex. B [Dkt No. 43-1 at 9].) Plaintiff's counsel's billing records show that counsel expended 27.30 hours on litigating this case in federal court. (Yim Decl., Ex. B.) This award amounts to an hourly rate of \$1,097.94 ($\$29,973.75 \div 27.3 = \$1,097.94$). The Ninth Circuit has found reasonable fees with effective hourly rates exceeding \$900, and the Central District of California has repeatedly found reasonable fees with effective hourly rates exceeding \$1,000 per hour. *See, e.g., Crawford*, 586 F.3d at 1153; *Radford v. Berryhill*, No. EDCV 15-1723-KK, 2017 WL 4279217, at *3 (C.D. Cal. Sept. 26, 2017) (approving fees amounting to \$1,197.92 per hour of attorney time); *Palos v. Colvin*, No. CV 15-4261-DTB, 2016 WL 5110243, at *2 (C.D. Cal. Sept. 20, 2016) (approving fees amounting to \$1,546.39 per hour of attorney time); *Daniel v. Astrue*, No. EDCV 04-1188-MAN, 2009 WL 1941632, at *2-*3 (C.D. Cal. July 2, 2009) (approving fees amounting to \$1,491.25 per hour of attorney time). When considered in this context, counsel's fee request is reasonable and would not result in a windfall to Plaintiff's counsel.

CONCLUSION

For the reasons set forth above, Plaintiff's counsel's request for an award of fees is GRANTED. Section 406(b) fees are allowed in the total amount of \$29,973.75 and are to be paid out of the amount withheld by the Commissioner from Plaintiff's benefits. In view of the previous award of EAJA fees to counsel in the amount of \$4,878.95, counsel is ordered to refund that amount to Plaintiff. The balance of the withheld funds shall be paid to Plaintiff.

*4 IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 3202462

EXHIBIT D

Ho Wing On Christopher and others
v
ECRC Land Pte Ltd (in liquidation)

[2006] SGCA 25

Court of Appeal — Civil Appeal No 139 of 2005

Chan Sek Keong CJ, Andrew Phang Boon Leong JA and Judith Prakash J

22 May; 16 August 2006

Insolvency Law — Winding up — Liquidators unsuccessfully bringing action in company's name — Company ordered to pay opposing party's costs — Company having insufficient assets to satisfy costs order because of liquidators' breach of estate costs rule — Scope of personal liability of liquidators for unpaid costs — Scope of court's power to exempt liquidators from liability for unpaid costs — Sections 283(3), 323(1), 328(1) Companies Act (Cap 50, 1994 Rev Ed)

Facts

The liquidators of the respondent company (“ECRC”) commenced a suit against the appellants in ECRC’s name, seeking the repayment of moneys that had allegedly been wrongfully paid out. ECRC’s claim was eventually dismissed both at first instance and on appeal, and it was accordingly ordered to pay the appellants’ legal costs.

The appellants then commenced the present proceedings to recover their unpaid legal costs from ECRC’s liquidators personally. ECRC had been unable to pay the appellants’ legal costs because its liquidators had used its moneys to satisfy its own legal costs before the appellants’. Most of these payments had been made before ECRC’s claim against the appellants was first dismissed by the High Court; only the final two payments had been made whilst ECRC’s appeal against the dismissal of its claim was pending.

The appellants alleged that the liquidators had breached a rule of corporate insolvency called the estate costs rule by paying ECRC’s solicitors before the appellants. Therefore, it was only fair that the liquidators be held personally liable for any resultant shortfall in ECRC’s assets. The judge in the High Court dismissed the appellants’ application to hold the liquidators personally liable. The appellants then brought the present appeal against this decision.

Held, allowing the appeal with costs:

(1) The estate costs rule supplemented the position under the Companies Act (Cap 50, 1994 Rev Ed) (“the CA”) by clarifying the relative priority between the various types of liquidation expenses *inter se*. In particular, the rule stated that a successful litigant against a company in liquidation was entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator: at [9].

(2) When considering the circumstances in which a liquidator should be made personally liable for a defendant’s costs, a distinction had to be drawn between: (a) the adjudicatory jurisdiction of the court hearing the litigation to

order costs against a non-party; and (b) the supervisory jurisdiction of the court over liquidators. The present case concerned the court's supervisory jurisdiction over a liquidator's decision to make payments in breach of the estate costs rule. It therefore concerned a liquidator's liability for a successful defendant's litigation expenses *qua* a debt of the company. Cases which dealt with a liquidator's liability for an opposing litigant's expenses *qua* costs had no bearing on this issue: at [44] to [46], [51], [54].

(3) A liquidator's duty to recover the company's assets was no excuse for him to pay the company's solicitors in breach of the estate costs rule. This duty was subject to the overriding question of whether the company's existing assets were sufficient to enable him to do so. If a liquidator believed that the company had a viable cause of action against someone, but the company's assets appeared to be insufficient to sustain both the company's legal fees and the opposing party's costs, the proper course of action was for the liquidator to seek an indemnity from the creditors for the costs of the litigation. He could not unilaterally ignore the estate costs rule and deplete the company's available resources: at [59], [66] to [68].

(4) The imposition of personal liability on liquidators in such situations would not contravene the principle that an impecunious claimant must not be denied access to the courts. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs had to be struck differently depending on the type of claimant involved. In this respect, there was a real and tangible justification for deterring insolvent companies from commencing litigation without any real possibility of satisfying a successful defendant's costs: at [70], [71] and [75].

(5) An order of security for costs was not a sufficient alternative to imposing personal liability upon liquidators. Such an order was a provisional remedy, and would not provide adequate protection against the possibility that an insolvent plaintiff company would be unable to satisfy the defendant's costs if it lost the action. In addition, it would be unfair to make defendants bear the burden of applying for security. A defendant would not know whether the company had sufficient assets to pay his costs, but the liquidator would or should know since he was the person with full knowledge of the company's financial condition: at [73], [76], [79] and [80].

(6) The liquidators in the present case would be held personally liable for the appellants' unpaid costs. The liquidators had breached the estate costs rule by making the relevant payments to ECRC's solicitors in priority to the appellants. If the liquidators were not held personally liable, this would lead to the wholly inequitable result of making the appellants bear the burden of sustaining the company's litigation for the creditors' benefit: at [18], [30], [42] and [81].

(7) Section 283(3) of the CA conferred the court with a discretionary power to override the application of the estate costs rule in appropriate circumstances. This discretion would be exercised sparingly in exceptional situations. On the present facts, there were no extenuating circumstances calling for an exercise of the court's discretion to relieve the liquidators from liability for the appellants' unpaid costs: at [85], [89] and [90].

[Observation: As a cautionary note to insolvency practitioners, it had to be pointed out that the rationale for imposing personal liability on the present facts applied equally to situations where a liquidator commenced proceedings though the company was completely insolvent and had no prospects of satisfying any costs order made against it. While the position on this issue was not entirely settled, a liquidator would be well-advised to obtain an indemnity from the creditors in such a situation: at [69].]

Case(s) referred to

Abraham v Thompson [1997] 4 All ER 362 (refd)
Beni-Felkai Mining Company, Limited, Re [1934] Ch 406 (folld)
Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd
[2003] 2 SLR(R) 571; [2003] 2 SLR 571 (folld)
Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd [1999] 3 SLR(R) 907;
[2000] 1 SLR 137 (folld)
Cowell v Taylor (1885) 31 Ch D 34 (refd)
Deputy Commissioner of Taxation v Tideturn Pty Ltd (2001) 37 ACSR 152 (folld)
Dominion of Canada Plumbago Company, In re (1884) 27 Ch D 33 (folld)
Dronfield Silkstone Coal Company (No 2), In re (1883) 23 Ch D 511 (refd)
Eastglen Ltd (in liquidation) v Grafton [1996] 2 BCLC 279 (refd)
Hamilton v Al Fayed (No 2) [2003] QB 1175 (refd)
Home Investment Society, In re (1880) 14 Ch D 167 (folld)
Hypac Electronics Pty Ltd v Mead (2004) 185 FLR 76 (distd)
Knight v FP Special Assets Limited (1992) 174 CLR 178 (folld)
Linda Marie Ltd, Re [1989] BCLC 46 (refd)
London Metallurgical Company, In re [1895] 1 Ch 758 (refd)
Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613 (not folld)
Pacific Coast Syndicate, Limited, In re [1913] 2 Ch 26 (folld)
Pearson v Naydler [1977] 1 WLR 899 (refd)
Peng Ann Realty Pte Ltd v Liu Cho Chit [1992] 3 SLR(R) 178; [1993] 1 SLR 630
(refd)
Project Construction & Development Pty Ltd v Ellison [2002] NSWSC 372 (refd)
R Bolton and Company, In re [1895] 1 Ch 333 (refd)
Staffordshire Gas and Coke Company, In re [1893] 3 Ch 523 (refd)
Trent and Humber Ship-Building Company, In re (1869) LR 8 Eq 94 (refd)
Wenborn & Co, In re [1905] 1 Ch 413 (refd)
Wilson Lovatt & Sons Ltd, In re [1977] 1 All ER 274 (refd)

Legislation referred to

Companies Act (Cap 50, 1994 Rev Ed) ss 283(3), 323(1), 328(1) (consd);
ss 313(2), 315, 323(2), 328(1)(a), 388(1)
Companies (Winding up) Rules (Cap 50, R 1, 1990 Rev Ed) r 173
Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59 r 2(2)
Corporations Act 2001 (Aust) s 536(1)(b)
Insolvency Act 1986 (c 45) (UK) s 202

*Francis Xavier and Lai Yew Fei (Rajah & Tann) for the appellants;
Oommen Mathew (Haq & Selvam) for the respondent.*

[Editorial note: The decision from which this appeal arose is reported at [2006] 2 SLR(R) 103.]

16 August 2006

Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

1 This was an appeal against the High Court decision in Summons in Chambers No 600611 of 2004 (“the application”). The judge dismissed the ten appellants’ application for an order that the liquidators of the respondent company, ECRC Land Pte Ltd (“ECRC”), be held personally liable for the appellants’ unpaid costs in successfully defending an action brought against them by ECRC.

Background facts

2 ECRC was placed in compulsory liquidation in 1999, with Chee Yoh Chuang and Lim Lee Meng appointed as liquidators (collectively referred to as “the liquidators”). The present appeal concerns the liquidators’ liability for costs incurred by the appellants in defending Suit No 1210 of 2001 (“the main suit”) and the appeal therefrom in Civil Appeal No 117 of 2003 (“the main appeal”). The essential facts are not in dispute, and are as follows.

3 The main suit and the main appeal were proceedings the liquidators commenced in ECRC’s name, seeking to recover moneys from the appellants based on allegations of fraud, breach of fiduciary duty, constructive trust and conspiracy to injure ECRC. In the course of the proceedings, ECRC provided a total of \$105,000 as security for costs, of which \$60,000 was security for the appellants’ costs in the main suit and \$45,000 for their costs in the main appeal. Before the main suit was decided, the appellants had applied for additional security of \$250,000 (“the first security application”), but the application had been opposed by ECRC. The assistant registrar (“the AR”) dismissed the first security application, relying on the principle that where a defendant’s alleged misconduct is the purported cause of a plaintiff company’s impecuniosity, the court may refuse to award security for costs if the provision of security would stultify the claim: *Peng Ann Realty Pte Ltd v Liu Cho Chit* [1992] 3 SLR(R) 178 (“*Peng Ann*”) at [15]. As there was no evidence of a third party providing funds to finance the litigation, the AR found that ECRC would have difficulty continuing with the action if the order of security was made.

4 ECRC’s claims against the appellants were largely unsuccessful, and costs were ordered in favour of the appellants in both the main suit and main appeal. After the main appeal was dismissed, the appellants filed Summons in Chamber No 600479 of 2004, asking that their costs in the

main suit and main appeal be paid in priority to all other claims against ECRC. The judge ordered that subject to the liquidators' costs of getting in, maintaining and realising ECRC's assets ("the realisation costs"), ECRC should pay the appellants' costs in the main suit and main appeal in priority to all other claims and expenses, *including the liquidators' remuneration and ECRC's legal costs for the same*.

5 After setting off the amounts provided as security for costs and other relevant deductions, ECRC found itself owing the appellants \$208,179.32 ("the shortfall"). The present proceedings were commenced to recover the shortfall from the liquidators.

6 At present, ECRC has only a balance of \$18,105.76 in its bank account. The shortfall has arisen because the liquidators paid themselves \$108,754.04 as remuneration and paid ECRC's lawyers, who were initially M/s Arthur Loke Bernard Rada & Lee (since dissolved) and subsequently M/s Arthur Loke & Partners (collectively referred to as "ALP"), an even more sizable amount of \$409,829.64 as ECRC's legal fees for the main suit and main appeal. The payments to ALP were made on various occasions after the main suit was commenced. The final two payments (totalling \$26,391.85) were made in February and March 2004, whilst the main appeal was pending and *after* Tay J had ordered that ECRC pay 80% of the appellants' costs in the main suit. Before these two payments were made, the appellants had written to the liquidators twice (in December 2003 and January 2004), asking that they pay the appellants' costs in the main suit *in priority to all other claims*. It would appear that the liquidators had decided to ignore the appellants' letters. Furthermore, all the sums paid to ALP were not taxed. This was in breach of r 173 of the Companies (Winding up) Rules (Cap 50, R 1, 1990 Rev Ed) ("the CWU Rules"), which provides, *inter alia*, that "[n]o payment in respect of bills of costs, charges or expenses of solicitors ... shall be allowed out of the assets of the company without proof that the same have been duly taxed".

7 As a result of ECRC's inability to pay the shortfall, the appellants filed the application, seeking two main orders:

- (a) that the liquidators pay the appellants the balance of \$18,105.76 currently standing to ECRC's credit as well as all sums previously paid to themselves as payment of the shortfall and the costs of the application; and
- (b) that the liquidators be held personally liable for the costs of the application and any part of the shortfall outstanding after payment is made under prayer (a) ("the outstanding shortfall").

Proceedings in the High Court

8 In the High Court, the appellants relied on a rule of priority known as the estate costs rule to support their application for relief under both

prayers (a) and (b). The judge granted prayer (a), but dismissed prayer (b). The exact quantum that the liquidators were liable to repay under prayer (a) would depend on how much of what they had paid themselves represented the realisation costs (see [4] above). This appeal concerns the judge's refusal to grant prayer (b). The issue under prayer (a), *ie*, whether the liquidators should be made to disgorge their remuneration, is not in contention before us.

9 The estate costs rule is a recognised common law rule of priority in the liquidation of companies. It was established in the 19th century by cases such as *In re Home Investment Society* (1880) 14 Ch D 167 (“*Home Investment*”), and has since been followed by courts in Singapore and other common law jurisdictions. The estate costs rule supplements s 328(1)(a) of the Companies Act (Cap 50, 1994 Rev Ed) (“CA”), which provides that “the costs and expenses of the winding up” including the remuneration of the liquidator shall be paid in priority to all other unsecured debts. Whilst legislation has provided that liquidation expenses take first priority over *other categories* of unsecured claims, the estate costs rule clarifies the *relative* priority between the various types of liquidation expenses *inter se*. In particular, the rule states that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator: see *eg*, *In re Pacific Coast Syndicate, Limited* [1913] 2 Ch 26 (“*Pacific Coast*”) at 28; *In re London Metallurgical Company* [1895] 1 Ch 758 at 764 (“*LMC*”). As stated in *In re Trent and Humber Ship-Building Company* (1869) LR 8 Eq 94 (“*Trent and Humber*”) at 97, the rationale for the estate costs rule lies in the fact that:

[A] company in winding up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly, or defended fruitlessly, then *the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent.* [emphasis added]

10 The appellants' case before the judge was fairly simple. It rested on the proposition that the liquidators had wrongfully caused the outstanding shortfall and therefore should have to remedy it. According to the appellants, the liquidators would have had sufficient assets in hand to pay the appellants' costs but for their breach of the estate costs rule by paying ALP's legal fees first. Thus, it was only fair that the liquidators should personally make good the resultant deficiency in the company's assets. If the liquidators were not made liable, future liquidators would be given the “green light” to flout the estate costs rule with impunity.

11 The judge refused to hold the liquidators personally liable for the outstanding shortfall, and found the appellants' proposition to be “as disingenuous ... as it was novel”: *Ho Wing On Christopher v ECRC Land Pte*

Ltd [2006] 2 SLR(R) 103 (“GD”) at [21]. He affirmed the position by the English Court of Appeal in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 (“*Metalloy*”), and held that a liquidator who was a non-party to an action would only be held personally liable for costs in exceptional circumstances where impropriety on his part was proved: GD at [19] and [46].

12 The judge accepted counsel for ECRC’s submission that the court should exercise considerable caution before ordering costs personally against liquidators. In his view (GD at [47]):

... There were powerful policy considerations in this regard, in particular, that office holders such as the liquidators should not be unduly restricted or held back in the honest and proper performance of their duties for fear of incurring personal liability for costs simply because they acted for an insolvent company with insufficient assets to pay the costs of a winning party. *Otherwise, the very purpose of the liquidator’s role in realising as much of the company’s assets as was possible would be subverted.* I concurred with Millett LJ’s astute observation in *Metalloy* that *a liquidator was under no obligation to a defendant to protect his interest by ensuring that he had sufficient funds in hand to pay the defendant’s costs as well as his own if the proceedings failed.* [emphasis added]

13 For all these reasons, the judge held that a breach of the estate costs rule, in itself, could not warrant the imposition of personal liability upon the liquidators: GD at [21] and [49]. According to the judge, the *only* costs consequences to be borne by a liquidator who unsuccessfully commenced an action for the company was that the payment of the liquidator’s expenses and remuneration would enjoy lesser priority than the payment of the winning party’s costs: GD at [44].

14 In reaching this conclusion, the judge considered a number of authorities which he held were either inapplicable or distinguishable: see, eg, GD at [35] and [39]. As we will be re-examining a number of these cases in our judgment, it would be apposite to mention them at this juncture by way of introduction. In our view, the key cases which merit this court’s reconsideration are: (a) *Pacific Coast* ([9] *supra*); (b) *Hypec Electronics Pty Ltd v Mead* (2004) 185 FLR 76 (“*Hypec*”); (c) *In re Dominion of Canada Plumbago Company* (1884) 27 Ch D 33 (“*Dominion of Canada*”); and (d) *Deputy Commissioner of Taxation v Tideturn Pty Ltd* (2001) 37 ACSR 152 (“*Tideturn*”).

The appeal

15 The sole issue in this appeal is whether the liquidators should have to make good the outstanding shortfall because they breached the estate costs rule. Counsel for the appellants, Mr Xavier, made four main submissions in support of their appeal:

(a) Where the liquidator of an insolvent company commences litigation with insufficient funds, he takes the risk of being made personally liable for the unpaid costs of the successful defendant if he also breaches the estate costs rule: *Pacific Coast* ([9] *supra*). If the law were otherwise, the estate costs rule would, for all effects and purposes, be nullified.

(b) It would not be inequitable to hold a liquidator who breaches the estate costs rule personally liable. Liquidators can easily “insure” themselves against that risk by getting a suitable indemnity from the creditors.

(c) In contrast, litigants such as the appellants have no means of protecting themselves against a company’s insolvency, except by obtaining an order of security for costs. An order for security is however an inadequate remedy for a liquidator’s breach of the priority rule(s). This is amply demonstrated by the present facts since the liquidators denied the appellants of this remedy by resisting the first security application.

(d) There is no principle which limits a liquidator’s personal liability to instances where he has conducted *the litigation* improperly.

16 Mr Xavier also made the following subsidiary submissions regarding the *timing* of the liquidators’ payments to ALP:

(a) The liquidators should be made personally liable for all sums paid to ALP, *regardless of when those payments were made*. The liquidators have been made to disgorge *all* their remuneration, including the sums paid before the main suit was decided and the adverse costs order made against ECRC. There is no basis for making a distinction between amounts paid in breach of the estate costs rule to: (i) a liquidator as his fees; and (ii) a third party.

(b) In any event, the liquidators paid out approximately \$26,000 to ALP *after* the verdict in the main suit was delivered. Those sums are clearly sums for which the liquidators should be personally liable.

17 In response, Mr Mathew, counsel for ECRC, advanced the following arguments:

(a) The issue of costs is a matter entirely at the discretion of the court, and this court should therefore only interfere with the judge’s decision if it was manifestly wrong or exercised on wrong principles.

(b) There is no authority which has held that a liquidator should be held personally liable for breaching the estate costs rule. When considering a liquidator’s personal liability for costs, a distinction must be drawn between situations where the litigation is commenced in the *company’s* name, and where it is brought in the *liquidator’s* own

name. The English and Australian authorities adopt the position that a liquidator who commences litigation *in the company's name* can only be made personally liable if he has been guilty of some impropriety or unreasonableness *in the conduct of the litigation*.

(c) Imposing personal liability upon the liquidators here would deter future liquidators from carrying out their duty to recover all the company's assets. It is impractical to expect liquidators to get an indemnity from creditors because creditors are rarely willing to fund litigation out of their own pockets.

(d) An order of security for costs is a *sufficient and adequate* safeguard against a liquidator's potential breach of the estate costs rule. There is therefore no reason to additionally visit personal liability upon the liquidators in question.

The basis for imposing liability on the liquidators

18 Before proceeding to assess the merits of the parties' respective arguments, it would be appropriate to first delineate the *exact* scope of the issue which falls for our determination. In the present proceedings, it is undisputed that the liquidators breached the estate costs rule by making the relevant payments to themselves and to ALP in priority to the appellants. Counsel for ECRC accepts that the estate costs rule applies to company liquidations in Singapore. That being the case, authorities cited by the appellants such as *Home Investment* ([9] *supra*), *In re Wenborn & Co* [1905] 1 Ch 413 ("*Wenborn*") and *Trent and Humber* ([9] *supra*), which merely affirm the content of the estate costs rule, are of limited assistance to us.

19 In their written submissions, the appellants contend that the judge failed to appreciate the true basis upon which they had sought to hold the liquidators personally liable. According to them, the judge was under the erroneous impression that they were seeking to make the liquidators liable *over and above* the amounts paid in breach of the estate costs rule. In the judge's view, "the application of the estate costs rule was not in issue in the present proceedings *since the liquidators had already been ordered to make good those payments made in breach of the estate costs rule*" [emphasis added]: GD ([11] *supra*) at [30]. As a result, he perceived the issue as being "whether... [a] liquidator could be made to bear any shortfall in costs personally, *despite having returned moneys paid in breach of the estate costs rule*" [emphasis added]: GD at [25]. Notably, ECRC does not dispute that the judge erred in finding that the liquidators had fully repaid the moneys taken from ECRC, and relies instead on the proposition that there is no basis for requiring a liquidator to make good his breach of the estate costs rule.

20 In considering the basis upon which the appellants seek to make the liquidators personally liable, it is crucial to distinguish between two sets of

breaches of the estate costs rule: (a) the liquidators' use of ECRC's funds to pay *their own* remuneration; and (b) their use of ECRC's funds to pay *ALP*. The judge's other order that the liquidators disgorge the sums paid to *themselves* only makes good the liquidators' *former* breach of the estate costs rule in paying their own remuneration before the appellants' costs. The effects of the liquidators' *latter* breach by paying *ALP* have not been mitigated or remedied in any way. That being the case, the judge erred in so far as he held that the liquidators had already *fully* remedied their breaches of the estate costs rule. It is the linchpin of the appellants' case that the liquidators have done *nothing* to remedy their wrongful payments to *ALP*.

21 The judge's misconception that the liquidators had *completely* "made good" their breach led to a misapprehension of the basis upon which the appellants seek to render the liquidators personally liable. Contrary to the judge's view, the appellants do not seek to render the liquidators personally liable "simply because" they have breached the estate costs rule: GD at [49]. The liquidators' supposed liability in fact rests on two *cumulative* grounds: (a) their breach of the estate costs rule by paying *ALP*; *and* (b) their failure to remedy the deficiency in ECRC's assets caused by this breach. The issue presently before us is therefore *not* whether the liquidators should be made liable *even after they have remedied their breach*, but instead whether they should be held personally liable for the outstanding shortfall *which has resulted from their breach of the estate costs rule*.

Competing considerations for and against personal liability

22 The issue in this appeal, as presently framed (see [21] above), can be approached on two varying levels of specificity. *On a more generic level*, there is the more abstract question of whether, *as a matter of general principle*, a liquidator who breaches the estate costs rule should be made to remedy the consequences of his breach. *On a more specific level*, there is also the issue of whether it would be justifiable to impose personal liability upon the liquidators given the *particular* circumstances attending *their* breach of the estate costs rule. Each of these questions attracts a host of divergent legal and policy concerns, which must be addressed before this court can reach a decision in these proceedings.

23 Turning first to the *general* question of how the courts should approach a breach of the estate costs rule, one starts with the concern, which the judge highlighted in his judgment, that the imposition of personal liability for breaching the estate costs rule will deter future liquidators from commencing actions to recover companies' assets. According to the judge, there is an element of public interest involved in allowing liquidators to perform their duties without the fear of personal liability: GD ([11] *supra*) at [47]. In addition, the *separate legal personality* of a company also suggests that a liquidator who sues in the name of the company is technically a non-party to the suit and, as such, should only be

ordered to pay the opposing party's costs in *exceptional circumstances*: *Metalloy* ([11] *supra*) at 1620–1621. These considerations converge to support the proposition that a liquidator should not be liable for the legal costs of a successful defendant unless he has acted with impropriety.

24 These considerations must, however, be balanced against the need to uphold the efficacy of the estate costs rule, which would be rendered illusory if errant liquidators who breach it are not taken to task. Further, the law should refrain from placing too much emphasis on the consideration that a liquidator suing in the name of an insolvent company is a non-party. In our view, this is only a technical consideration. The strict adherence to the principle of the separate corporate personality of an insolvent company during a winding up is not necessarily in the public interest if it allows liquidators to hide behind an invisible shield to launch unmeritorious claims against defendants who ultimately emerge victorious but end up being the poorer for it. In any case, if the element of impropriety is a condition precedent to imposing personal liability on a liquidator, a breach of the estate costs rule would surely be such a form of impropriety. Ignorance of the rule would not make the breach any less improper.

25 The *specific factual matrix* in the present case also gives rise to the additional question of how a liquidator should *balance* the competing interests of the company and a defendant to an action brought in the company's name. In the present case, the breaches of the estate costs rule arose because the liquidators paid *ECRC's legal costs* in the main suit and the main appeal in priority to the appellants' legal costs. Most of these payments to ECRC's solicitors, ALP, took place whilst the main suit was *still ongoing* and *before* the costs order against ECRC had been made. The liquidators' infringements of the estate costs rule were therefore a *direct consequence* of having to finance the suit from which the company's subsequent liability in costs to the appellants arose. As a result, the question of whether the liquidators should be held personally liable raises an inherent tension between the interest in maximising the recovery of an insolvent company's assets and the need to protect the interests of a successful defendant to an action brought by such a company.

26 In this regard, a number of cases appear to suggest that a liquidator's duty to recover the company's assets takes precedence over a defendant's interests. According to Millett LJ in *Metalloy* ([11] *supra*) at 1620, the liquidator of an insolvent company is under no duty to ensure that the company's assets would be sufficient to satisfy *both the company's as well as a successful defendant's legal costs*. In addition, as he subsequently held in another case, “[i]t is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it”: *Abraham v Thompson* [1997] 4 All ER 362 at 377.

27 However, whilst there may be compelling reasons to facilitate a liquidator's recovery of corporate assets, equally, it may be said that a successful defendant has a right to be paid his legal costs. The need to protect a defendant against an unsatisfied costs order may be said to be *a fortiori* where the plaintiff is a company that is *already* in insolvent liquidation. Such a company is in effect little more than an empty shell. The emphasis placed on a liquidator's duty to recover the company's assets must also be reconciled with s 323(1) of the CA, which provides that a liquidator shall not be liable to incur any expense if the company does not have sufficient assets. Cases such as *Metalloy* therefore need to be re-evaluated to ensure that the credence accorded to the realisation of an insolvent company's assets is reconcilable with the general purport of the corporate insolvency regime.

28 These divergent considerations must be reconciled before this court can decide whether the liquidators should be held liable for the appellants' unpaid costs. The resolution of these competing factors will require an assessment of the policy concerns underpinning each of them in order to determine which of them are consonant with the statutory framework of our CA.

Personal liability for infringing the estate costs rule

29 To support the imposition of personal liability upon liquidators who breach the estate costs rule, the appellants cited a plethora of authority, including some cases where the liquidator was made liable for costs incurred in litigation that was commenced *in his own name*. These cases are inapplicable since the issue presently in contention concerns a liquidator's potential liability for the costs of proceedings brought *in the company's name*. Where a liquidator brings an action *in his own name*, he is himself a party to the proceedings and therefore "litigates at his own risk": *In re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 285. That being the case, he will be held liable for the opposing party's costs even if the company's assets are inadequate to provide a complete indemnity: *In re Staffordshire Gas and Coke Company* [1893] 3 Ch 523 at 526. In contrast, where litigation is commenced *in the company's name*, the liquidator is a non-party, and an order of costs against him *would not follow as a matter of course*: *Project Construction & Development Pty Ltd v Ellison* [2002] NSWSC 372. But, as we will observe later, a liquidator's status as a non-party will not always be sufficient reason to shield him from personal liability, especially when he has other means at his behest to protect himself against an order for costs.

30 In our view, case law clearly requires a liquidator who makes payments in breach of the estate costs rule to remedy his breach. *Pacific Coast* ([9] *supra*) is direct authority for this proposition. In that case, the company in question went into voluntary liquidation. Following that, the liquidator of the company commenced an action against B Ltd in the

company's name. Judgment was entered for B Ltd with costs, which were taxed at £300. At the date of the judgment, the company still had assets amounting to about £500. However, the liquidator subsequently paid out £375 in legal fees to the solicitors who represented the company in the action, and made a few other disbursements. This left him with a balance of approximately £86, which he paid to B Ltd. B Ltd then applied for an order that the liquidator of the company pay the remainder of its unpaid costs of about £214. Neville J ordered the liquidator to pay B Ltd its outstanding costs and held (at 28–29):

Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants [B Ltd]. I hold, therefore, that he must pay the applicants their taxed costs of the action, and he may repay himself out of any further assets that may come to his hands.

31 In its written submissions, ECRC contends that *Pacific Coast* merely emphasises the application of the estate costs rule, and is not authority for the proposition that a liquidator will be ordered to personally repay any sums paid out in breach of the estate costs rule. It submits that the *ratio* of the case was simply that where judgment with costs is ordered against a company in liquidation, the party entitled to costs is entitled to payment *before* the liquidator's costs are paid, regardless of whether the order is merely for costs, or for costs to be paid out of the company's assets. In his judgment, the judge concurred with ECRC on this point, and held that the issue of whether a liquidator could be made to personally bear any shortfall in costs did not arise for determination in *Pacific Coast*: GD ([11] *supra*) at [23]–[25].

32 With respect, both the judge and ECRC erred in their reading of *Pacific Coast*. Neville J's order (see [30] above) was clearly an order that entailed personal liability on the part of the liquidator in question. The company had no assets at the time the order was made. The ruling that the liquidator could subsequently avail himself of any additional assets coming into the company's hands did not immunise him from having to personally make good B Ltd's costs first. As a result of Neville J's order, it was the liquidator, and not B Ltd, who had to bear the risk of the company not having sufficient assets to pay *both* B Ltd and the company's solicitors.

33 During the hearing, counsel for ECRC additionally referred us to a passage in the Australian case of *Hyppec* ([14] *supra*), which he contended supported his position. There, Campbell J stated (at 102):

I am not aware of any case where a court has ordered a liquidator, in the exercise of its supervisory jurisdiction over liquidators, to pay the costs which have been ordered against the company as a result of litigation which was instigated and carried through by the liquidator.

Counsel further pointed out that Campbell J had referred to *Pacific Coast* ([9] *supra*) in his judgment and submitted that that was conclusive evidence that *Pacific Coast* did not decide that personal liability could be imposed on liquidators who breach the estate costs rule. This argument is devoid of substance. In our view, counsel misunderstood the purport of the passage above. The interpretation placed on Campbell J's *dictum* must be tempered by the fact that his attention in *Hypac* was directed towards a *completely different aspect* of the court's supervisory jurisdiction over liquidators. *Pacific Coast* and the estate costs rule were in fact only referred to *en passant* (at 103) as *another* distinct example of how the court's supervisory jurisdiction might be exercised. We will return to this point later in this judgment (see [51]–[53] below).

34 When confronted with the actual terms of the order in *Pacific Coast*, counsel for ECRC conceded that Neville J's order did in fact result in the liquidator having to assume *personal liability* for the deficit caused by his breach of the estate costs rule. However, he then contended that the decision in *Pacific Coast* had been made erroneously, contrary to the decision in *In re R Bolton and Company* [1895] 1 Ch 333 ("*Re Bolton*"). In *Re Bolton*, a contributory brought an action *against the liquidator of a company*, seeking to have its name removed from the list of contributories. The claim succeeded on appeal, and the liquidator was ordered to pay the costs of the appeal and of the application out of the company's assets. The contributory sought to vary that order by directing the liquidator to personally pay its costs. The Court of Appeal rejected the contributory's attempt to hold the liquidator personally liable, holding that since the application had been taken out by the contributory against the liquidator and not *vice versa*, the contributory's costs would be paid out of the company's assets: *Re Bolton* at 334. Counsel for ECRC placed particular reliance on Lindley LJ's statement that "an order ought [not] to be made against the liquidator personally ... unless the liquidator *has done something to make himself personally liable for the costs*" [emphasis added]: *Re Bolton* at 334.

35 In our opinion, *Re Bolton* does not assist ECRC. First, the case concerned litigation in which the *liquidator* of the company was the *defendant*, and is clearly distinguishable from the case before us where the *company* itself is the *plaintiff*. Second, Lindley LJ's statement of principle left unanswered the critical question of when a liquidator "has done something" to make himself personally liable. In our view, even if we were to apply Lindley LJ's statement of principle to the liquidators' conduct in the present case, the answer to this question has been provided by *Pacific Coast*, which illustrates that a liquidator does "something" to make himself liable when he breaches the estate costs rule.

Personal liability for breaching other priority rules

36 There are other authorities that in principle support the ruling in *Pacific Coast* ([9] *supra*). These are cases where liquidators have been held personally liable for breaches of *other* kinds of priority rules. In *Tideturn* ([14] *supra*), the Deputy Commissioner of Taxation sought to hold a liquidator personally liable for his failure to ensure the retention of moneys to pay group tax. The taxes were post-liquidation debts payable in priority to other creditors' claims. The Commissioner made no allegations of dishonesty, but instead contended that the liquidator's negligence in failing to ensure that all priority debts were paid proportionately sufficed to render him liable. The court held that the liquidator, in failing to follow the priority rules, was in breach of duty and was personally liable to pay the unpaid group tax as a condition to his release as a liquidator: *Tideturn* at 156.

37 *Tideturn* clearly supports the proposition that a liquidator who breaches a priority rule should be held personally liable. With respect, the judge erred in holding that *Tideturn* was "unhelpful" to the appellants' case: GD ([11] *supra*) at [32]. In the judge's own words:

... There, upon the application of the Deputy Commissioner of Taxation, a liquidator was held personally responsible for his failure to retain moneys for tax purposes, and was made to cough up the moneys he had failed to hold back. ... [emphasis added]

The analogy between *Tideturn* and the present case, where the appellants seek to hold the liquidators liable for *failing to withhold the company's assets* to pay their legal costs, is undeniable. The judge's rejection of *Tideturn* stemmed from his misapprehension that the appellants sought to hold the liquidators liable *simply because* they had failed in legal proceedings commenced on behalf of an insolvent estate: GD at [32].

38 ECRC sought to distinguish *Tideturn* on the ground that it concerned a breach of a *statutory* priority rule whereas the estate costs rule is a *common law* rule. According to counsel for ECRC, it would be inequitable to hold insolvency practitioners liable for breaches of *common law* priority rules since they would not be aware of such rules. We find this submission to be wholly misconceived. Ignorance of the law is no excuse, even in civil matters. There is, or should be, no difference in principle between a statutory rule and a common law rule.

39 A liquidator's personal liability for breaches of *common law* priority rules was also upheld in *Dominion of Canada* ([14] *supra*). In that case, the liquidator's solicitor, Beall, sought an order that the company be ordered to pay his legal fees. The liquidator had earlier paid a successful litigant against the company, Kirby, his costs in the relevant action. The company was insolvent, and had insufficient assets to discharge *both* Kirby's and Beall's claims. Beall argued that the liquidator had breached a common law priority rule, established in the case of *In re Dronfield Silkstone Coal*

Company (No 2) (1883) 23 Ch D 511, which required that the general costs of winding up be paid *pari passu* with the costs of internal litigation.

40 Pearson J's *dictum* in *Dominion of Canada* supports a finding of personal liability against a liquidator who applies the company's moneys in breach of *common law* priority rules. According to Pearson J (at 36):

If ... the liquidator were wrong in paying Mr Kirby, and if Mr Kirby ought to have been paid *pari passu* with the general costs of the liquidation, then *the liquidator ought to have, and must be deemed to have, a larger sum in his hands than he has accounted for.* [emphasis added]

Though the court ultimately found that the liquidator had been correct in paying Kirby in priority to Beall, the passage quoted above clearly suggests that if the liquidator had been in breach of a common law priority rule, he would have been held personally liable for the company's inability to pay Beall because of his wrongful prior payment to Kirby.

41 The judge failed to consider this aspect of Pearson J's judgment when he held that *Dominion of Canada* "merely affirmed the estate costs rule or showed how the rule was to be applied, *viz*, a liquidator having to subordinate the payment of his costs to the payment of the winning party's costs": GD ([11] *supra*) at [31]. The decision in *Dominion of Canada* did not stop at merely affirming the efficacy of the estate costs rule, but went on to stipulate the *consequences* that would follow from a breach thereof.

42 In our view, *Tideturn* and *Dominion of Canada* reinforce the correctness of the decision in *Pacific Coast*. These cases confirm that the imposition of personal liability for a breach of the estate costs rule is just a manifestation of the *general* approach towards breaches of priority rules in corporate liquidation.

The requirement of "impropriety" – adjudicatory versus supervisory jurisdiction

43 To support its argument that there is no general principle requiring a liquidator to be held personally liable for breaching the estate costs rule, ECRC additionally submits that established jurisprudence states that where a liquidator commences an action in the company's name, the court can *only* order the liquidator to pay costs where there has been *impropriety in his conduct of the action*. As authority for its proposition, ECRC cites the English Court of Appeal decision in *Metalloy* ([11] *supra*). This submission was accepted by the judge in the court below: GD ([11] *supra*) at [19].

44 The appellants' contention on this point is that the judge erred in accepting ECRC's submission. Counsel submitted that the impropriety of a liquidator's conduct in the litigation is not the *only* instance when a liquidator may be visited with personal liability for a defendant's costs. When considering the circumstances in which a liquidator should be made

personally liable for costs, a distinction must be drawn between: (a) the *adjudicatory* jurisdiction of the court *hearing the litigation* to order costs against a non-party; and (b) the *supervisory* jurisdiction of the court over liquidators. In the former, the court would be more concerned with the reasonableness and propriety of the liquidator's conduct of *the litigation*. No issue concerning the breach of priority rules would arise. Conversely, in the latter situation, it would not be necessary in all cases to show misconduct by the liquidator in his conduct of the litigation. According to the appellants, *Metalloy* was concerned with the court's *adjudicatory* jurisdiction to order costs against non-parties, and is not authority for the scope of the court's *supervisory* jurisdiction to order a liquidator to personally pay a defendant's costs.

45 In our view, the distinction which counsel for the appellants has drawn between the court's supervisory and adjudicatory jurisdictions is well-founded. The court's power to order costs against a non-party under O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is *ancillary* to its jurisdiction to adjudicate the merits of the case. Such an order is a "*consequential order that follows the principal decision* reached by the court with regard to the issues of the case" [emphasis added]: *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 at [26]. As such, an order of costs made in exercise of this power would be *inextricably linked* with the main proceedings as a result of which the costs were incurred. Hence, when deciding whether to order costs against a non-party, the court would naturally be concerned with factors relating to the proceedings, and nothing else. As stated by Lindsay J in *Eastglen Ltd (in liquidation) v Grafton* [1996] 2 BCLC 279 at 289:

[T]he bona fides of the proceedings and of the non-party's support for them are an important feature of the ... discretion [to order costs against a non-party].

46 In contrast, the court's *supervisory* jurisdiction over liquidators is significantly broader and extends beyond the purview of the liquidator's conduct of the litigation in question. Section 313(2) of the CA provides that the court "shall take cognizance of the conduct of liquidators", and allows the court, *inter alia*, to inquire into any complaint made by a creditor regarding the liquidator's performance of his duties or observance of the prescribed requirements, and to "take such action as it thinks fit". In addition, s 315 of the CA allows any person aggrieved by *any act* of the liquidator to apply to court, and confers the court in question with the power to reverse or modify the act complained of and make such order "as it thinks just". These provisions confer a *broad* power on the courts to supervise *all* aspects of a liquidator's conduct of the winding up to ensure that his conduct accords with the statutory regime of liquidation dictated by the CA. Hence, the court would be justified, in exercising its supervisory jurisdiction under the CA, to order a liquidator to pay a defendant's costs

even if he had conducted the proceedings properly, provided that there was some *other* aspect of his conduct that rendered such an order equitable.

47 In the present case, the appellants' application to render the liquidators personally liable is one which was made pursuant to this court's *supervisory*, and not adjudicatory, jurisdiction. The court's jurisdiction to order costs under O 59 of the Rules was already spent by the time the application was made. The application was made *after* costs orders in the main suit and in the main appeal had *already been made against ECRC*. Therefore, what is currently sought is an exercise of the court's *supervisory* jurisdiction over the liquidators under the CA to render them liable for failing to accord the appellant's *established* entitlement to costs with the requisite priority.

48 It follows from this conclusion that ECRC's reliance on *Metalloy* ([11] *supra*) is misplaced. In *Metalloy*, the liquidator of a company had commenced an action in the company's name. The defendants successfully obtained an order of security for costs, which the company failed to satisfy. As a result, the action against the defendants was dismissed. The defendants then sought an order that the liquidator be made personally liable for the defendants' costs in the action. In our view, the English Court of Appeal was, in that case, dealing with the issue of whether the court should exercise *its adjudicatory jurisdiction to order costs against a non-party*. This is evident from the following passage in Waller L]'s judgment (at 1618):

I think ... that there is jurisdiction to order a liquidator *as a non-party* to pay the costs personally; but it will only be in exceptional cases that the jurisdiction will be exercised, and impropriety will be a necessary ingredient, particularly having regard to the fact that the normal remedy of obtaining an order for security for costs is available; the caution necessary *in all cases where an attempt is being made to render a non-party liable for costs* will be the greater in the case of a liquidator having regard to the public policy considerations. [emphasis added]

49 If ECRC's interpretation of *Metalloy* were correct, we would have to reconcile it with *Pacific Coast* ([9] *supra*), which clearly establishes that a liquidator can be made liable for costs even if his conduct *of the litigation* was not improper. In our view however, *Metalloy* and *Pacific Coast* are nothing more than *discrete examples* of how liquidators may find themselves being made personally liable for costs, and are not in conflict with each other.

Scope of court's supervisory jurisdiction over liquidators

50 Our findings as regards *Metalloy* do not completely dispose of ECRC's submissions on this point. ECRC's reliance on the requirement of impropriety *concerning the litigation* rests additionally on another authority, which cannot be similarly disposed of by relying on the distinction between the court's adjudicatory and supervisory jurisdictions.

ECRC submits that even if this court is not minded to accept *Metalloy* as authority for the proposition which ECRC advances, we should in any event accept the principle adopted by the New South Wales Supreme Court in *Hypec* ([14] *supra*). In that case, the liquidator of a company was made personally liable for a defendant's costs because it was found that he had acted unreasonably in causing the company to commence the litigation. Campbell J held that the court would *only* exercise its *supervisory* jurisdiction over liquidators and hold a liquidator personally liable for a defendant's costs *if the liquidator had acted improperly in causing the defendant to incur the costs in question*. ECRC places particular reliance on the following statement from Campbell J's judgment (at 102):

I cannot identify any principle on which the Court would, in exercise of its supervisory jurisdiction, order a liquidator to pay costs of litigation brought by a company in liquidation when those costs are properly incurred, in the Beddoe sense [ie, reasonably and honestly]. [emphasis added]

According to ECRC, Campbell J's statement supports the conclusion that even the court's *supervisory* jurisdiction over liquidators is limited to instances where the liquidator had acted with some unreasonableness *in the conduct of the litigation*.

51 To our minds, though *Hypec* was a case involving the court's supervisory, and not adjudicatory, jurisdiction, one must always ask the additional question: *Which act* of the liquidator was the court seeking to "supervise"? In *Hypec*, the issue was whether a liquidator should be made personally liable for litigation costs that were *unreasonably incurred* which, as a result, were not payable out of the company's assets under the Australian Corporations Act 2001. The case therefore involved the court's supervisory jurisdiction over the liquidator's decision *to commence and conduct litigation in the company's name*. One should not treat Campbell J's *dictum* as excluding the court's supervisory jurisdiction over *other acts* of liquidators which may similarly render them personally liable for the costs of an action. In the present case, this court is being asked to exercise its supervisory jurisdiction over a different kind of conduct from that in *Hypec*, *ie*, a liquidator's decision *to make payments in breach of the estate costs rule*. For this reason, the decision in *Hypec* is not relevant to the exercise of our supervisory jurisdiction over this matter.

52 It is evident from *Hypec* itself that Campbell J did not intend the *sole* criterion of a liquidator's personal liability for costs to be that of whether the costs in question were "properly incurred". Immediately after the passage which ECRC has cited (see [33] above), Campbell J went on to observe (at 102):

As well as this inherent jurisdiction, s 536 of the Corporations Act confers power on the Court with administrative control of the liquidation, in appropriate cases, to order that a liquidator should

personally pay the amount which the company has been ordered to pay under a costs order. However, that power is dependent upon whether any of the circumstances identified in s 536 have arisen. *That, in turn, depends on questions of whether the liquidator has performed his or her duties.* [emphasis added]

53 Section 536(1)(b) of the Australian Corporations Act 2001 provides that:

[W]here a complaint is made to the Court ... by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties, the Court ... may inquire into the matter and ... take such action as it thinks fit.

This provision is, in effect, no different from s 313(2) of our CA, which states that:

[T]he Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties ... or if any complaint is made to the Court by any creditor ... in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

Accordingly, even in *Hypec* itself, Campbell J recognised that the court's supervisory jurisdiction over liquidators could extend to ordering a liquidator who has breached his duties (in our case, the estate costs rule) to pay costs, even if he is beyond reproach *vis-à-vis* the conduct of the litigation itself.

54 In the ultimate analysis, *Metalloy* and *Hypec* were really cases which dealt with a liquidator's liability for an opposing litigant's expenses *qua* costs. The courts' focus in these cases was accordingly directed to the liquidator's conduct in the litigation as a result of which these costs had been incurred. These cases have no bearing on the present case, which concerns a liquidator's liability for a successful defendant's litigation expenses *qua* a debt of the company. The issue which is presently before us is not whether the liquidators acted reasonably in causing the appellants to incur the costs in question (under the *Hypec* test) or whether the liquidators acted with impropriety in the conduct of the main suit and the main appeal (under the *Metalloy* test), but whether ECRC's debt to the appellants (for their costs in the main suit and the main appeal) has been accorded the proper treatment by the liquidators. On the authority of cases such as *Pacific Coast* ([9] *supra*), *Tideturn* ([14] *supra*) and *Dominion of Canada* ([14] *supra*), we find that an order of personal liability *should* be made against a liquidator if he has failed to accord a costs order against the company with the requisite degree of priority required under the estate costs rule.

Competing interests in collection of corporate assets

55 Our enquiry thus far has led us to the conclusion that imposing personal liability for infringing the estate costs rule would accord with established principle and authority. However, an additional issue that needs to be addressed is whether the imposition of personal liability *on the present facts* would breach any broader principle of corporate insolvency law.

56 As we mentioned earlier, the moneys paid out in breach of the estate costs rule were applied towards satisfying ECRC's own legal costs for the main suit and main appeal. At the time when most of these payments were made, it was still a distinct possibility that ECRC might win the main suit and avoid any liability in costs to the appellants. To our minds, the issue is really as follows: When a company in liquidation commences an action with limited funds, is the liquidator entitled to use the funds available to sustain the litigation and risk irreparably prejudicing the defendant in the event that the company loses the action and a costs order against the company is made?

57 Based on our analysis above, where a liquidator has sufficient assets in his hands to fully discharge the defendant's legal costs, the estate costs rule clearly prohibits a liquidator from jeopardising a defendant's interest in this manner and requires the liquidator to preserve the company's assets to ensure that the company will be able to meet any costs order made against it. It may be argued that such a ruling could deter or impede insolvent companies from commencing litigation to recover their assets. In situations where a company's assets are inadequate to meet *both* its legal fees and the opposing litigant's costs, liquidators would, on pain of personal liability, have to preserve the company's assets unless and until the entire action is determined and the issue of entitlement to costs is decided. In these circumstances, a liquidator might be hard pressed to find continuing legal representation for the company. Few lawyers would be willing to hold their legal fees in abeyance or to agree to defer receiving payment thereof until: (a) the opposing litigant's potential entitlement to costs is resolved; and (b) if a costs order against the company is indeed made, the opposing litigant's costs are fully paid.

58 In our view, there are two possible considerations which might weigh against inhibiting corporate litigation in this manner. First, a liquidator has a *duty* to recover assets belonging to the company, and therefore should be allowed to take all necessary measures to do so. Second, this would create a *de facto* requirement that creditors should provide liquidators of insolvent companies with the requisite indemnities before commencing litigation. The difficulty in obtaining such indemnities would consequently prevent genuine claims from being ventilated. However, for the reasons that follow, it is our view that neither of these concerns is sufficiently important to overrule a strict application of the estate costs rule.

A liquidator's duty to recover the company's assets

59 In situations where a company would not be able to pay *both* the defendant's and its own legal costs, a liquidator's duty to adhere to the estate costs rule and his duty to recover assets rightfully belonging to the company may seem to pull him in opposing directions. In our view, this conflict is apparent rather than real. Whilst a liquidator has a duty to recover the company's assets, this duty is not absolute and is subject to the overriding question of whether the company's existing assets are sufficient to enable him to do so.

60 Section 323(1) of the CA, which applies to every mode of winding up, provides that:

Unless expressly directed to do so by the Official Receiver, a liquidator *shall not be liable to incur any expense* in relation to the winding up of a company unless there are sufficient available assets. [emphasis added]

Accordingly, if a company does not have sufficient resources, the liquidator need not commence any action on the company's behalf unless so directed by the Official Receiver. Similarly, if no lawyer will act for the company unless his legal fees are paid upfront and as the case proceeds, but the liquidator is unsure whether the company's existing assets would be sufficient to meet *both* the opposing litigant's potential costs and the company's own legal fees, the liquidator would be completely justified on the authority of s 323(1) in refraining from commencing the litigation.

61 In advocating the need to give credence to a liquidator's duty to get in assets, counsel for ECRC has placed much emphasis on the following passage from Millett LJ's judgment in *Metalloy* ([11] *supra*). Millett LJ held (at 1620) that:

Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. If he does so in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. If he brings proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail. [emphasis added]

62 This passage suggests that in situations such as the present, where the company's assets are inadequate to meet both the defendant's and its own legal costs, a liquidator should give precedence to his duty to recover the company's assets and may legitimately disregard any potential prejudice to the defendant if the claim should fail. However, we would point out that the Singapore position on liquidators' duties to recover corporate assets differs from the English position. Section 323(1) of our CA (see [60] above) appears to be absent from the Insolvency Act 1986 (c 45) (UK). Section 202

of the UK Insolvency Act allows the liquidator of a company to apply for an early dissolution of the company on the ground that the company's realisable assets are insufficient to cover the expenses of winding up. However, under s 202(4), the liquidator is only discharged from performing his duties *after* he gives the company's creditors and contributories notice of his intention to make such an application. These two sections, read together, suggest that the *default* position under the UK Act is that unless and until proceedings to obtain a dissolution order are commenced, a liquidator remains subject to the full extent of his statutory duties, regardless of whether the company has sufficient assets for him to do so. In contrast, s 323(1) of our CA *prima facie* allows a liquidator to abstain from taking *any* action where the company's assets are insufficient.

63 Millett LJ's *dictum* in *Metalloy* (see [61] above) is therefore inapplicable locally. A liquidator's duty to get in corporate assets is no excuse for him to pay the company's solicitors in breach of the estate costs rule. In light of s 323(1), a liquidator does not need to single-mindedly pursue the recovery of the company's assets. Where the company has insufficient assets, he may have to exercise prudence to hold in abeyance his duty to recover the company's assets. The estate costs rule therefore assumes primary importance. In our view, a Singapore liquidator *does* have a positive duty to avoid subjecting a defendant to the unfairness of an unsatisfied costs order.

The requirement of obtaining an indemnity

64 The practical effect of holding the liquidators personally liable would be to require liquidators to obtain an indemnity from the creditors if they wish to bring an action but the company has limited assets. In the future, when liquidators are faced with a situation where the company's existing assets are not sufficient to fund the legal costs of an unsuccessful suit, they should look to the creditors to fund the litigation. If no indemnity is forthcoming, they would have to decide whether to commence litigation for fear of being held personally liable for breaching the estate costs rule. In some cases, this might result in meritorious claims having to be abandoned. However, in our view, this is a justifiable consequence of the creditors' refusal to provide an indemnity.

65 During the hearing, counsel for ECRC stressed that this *de facto* requirement of obtaining an indemnity would make it arduous for liquidators to sue since creditors are often reluctant to provide any form of indemnity. With respect, we do not consider that the difficulty of obtaining an indemnity is a relevant factor that should affect the outcome of the present appeal. The following passage from Vaughan Williams J's decision in *LMC* ([9] *supra*) unequivocally rejects any suggestion that the difficulty in obtaining an indemnity should be a reason not to enforce the estate costs rule. According to Williams J (at 768):

It is said that if liquidators were bound at once to pay the costs of successful litigants, winding-up would soon come to an end. But that is not so. *If necessary, creditors in liquidations, as in bankruptcy, must provide an indemnity fund.* If the result of the rule of practice I am laying down is that, where liquidators now start proceedings knowing there is no estate on which the adverse litigant can come, creditors should find that liquidators will not go on without an indemnity fund, so much the better. *I am not to be deterred from laying down the rule because it is suggested that, where there is a doubt as to the sufficiency of the assets, liquidators will be deterred from commencing proceedings because those who have present claims may swallow up the assets.* [emphasis added]

66 The creation of a *de facto* requirement that liquidators seek an indemnity would not lead to any unjust consequences. Under sub-s (2) to s 323 of the CA, which section is titled “Expenses of winding up where assets insufficient”, if the Official Receiver directs a liquidator to incur an expense, he may order that the liquidator be indemnified by *the contributory or the creditor who requested that that particular expense be incurred*. The Official Receiver will, perforce, order an indemnity if the company has insufficient assets to pay for the expense in question. In our view, s 323(2) is reflective of a broader underlying principle which should determine whether a liquidator should initiate an action on the company’s behalf. The principle may be stated as follows: Where a company is insolvent and the liquidator has insufficient resources at his disposal to take a particular course of action, *the individual who reaps the fruit of that action should be the one to shoulder the risk of taking it.*

67 When a liquidator commences an action in the company’s name to recover its assets, the potential beneficiaries are the company’s creditors. It is the creditors who stand to gain the most if the company’s assets are increased because their claims against the company will have a greater chance of being satisfied. In the passage from *Metalloy* cited at [61] above, Millett LJ expressed the view that where an insolvent company commences litigation, *“the company is the real plaintiff”* [emphasis added]. With respect, we disagree with this statement. Where a company has already entered into liquidation, the “real plaintiff[s]” are *the creditors*, and not the company. When winding up commences, the company ceases to be a going concern with distinct interests of its own and is, in effect, little more than a projection of its creditors’ composite interests. The continued existence of the company following the commencement of liquidation is solely to ensure that the company’s affairs are satisfactorily terminated and any outstanding claims against the company are resolved. The fruits of any successful litigation would accrue primarily for the creditors’ benefit and be used to satisfy the company’s outstanding debts owed to them.

68 Hence, if a liquidator believes that the company has a viable cause of action against someone, but the company’s assets appear to be insufficient

to sustain *both* the company's legal fees and the opposing party's costs, the proper course of action is for the liquidator to seek an indemnity from the creditors for the costs of the litigation. Since the creditors are the ultimate beneficiaries of any asset-swelling activities, it is only fair that they should shoulder the risk of litigating to increase the company's assets. If the creditors decide against incurring litigation expenses in the hope of recovering more assets, the liquidator can either shoulder this burden himself, or refrain from bringing proceedings. His status as a liquidator does not entitle him to disregard a successful defendant's right to legal costs by unilaterally ignoring the estate costs rule and depleting the company's available resources.

69 As a cautionary note to insolvency practitioners, we should point out that given our statutory framework (see [60] above), this rationale for imposing personal liability should apply *equally* to situations where a liquidator commences proceedings though the company's coffers are *completely empty* and it has no assets to satisfy *either its own or the defendant's legal costs*. It may be necessary in future to revisit the English position in *Metalloy* ([11] *supra*) that a liquidator is not liable to pay costs personally in such situations unless he has acted improperly in commencing the suit in the name of the company. It may well be that where, as here, the law allows a liquidator to desist from taking action if the company does not have any or sufficient assets to meet the full costs of the litigation, and where, as here, he is entitled to an indemnity from the creditors in performing his duty to augment the pool of assets for their benefit, a liquidator who proceeds to commence litigation without an adequate indemnity will be liable personally for the unsatisfied costs of a successful defendant. In deciding to proceed without an indemnity covering potential liability for the defendant's costs, the liquidator would in effect be making *the defendants* bear the part of the risk of litigating, albeit for *the creditors'* benefit. Such a result would not be fair and a liquidator who chooses to sue knowing that the company will be unable to satisfy any costs order made against it should be held personally liable for a successful defendant's costs.

70 In reaching this conclusion, we are mindful of the over-arching principle that an impecunious claimant must not be denied access to the courts, even if this would result in injustice to a successful defendant who may be unable to recover his legal costs: *Hamilton v Al Fayed (No 2)* [2003] QB 1175 ("*Al Fayed*") at 1200, *per* Chadwick LJ. However, we do not feel that imposing personal liability on liquidators in the situations outlined above would contravene this principle. As explained above, where a company in liquidation commences litigation, the "real plaintiff[s]" are the creditors. If the creditors *themselves* decide against commencing litigation, it cannot be gainsaid that they have been denied access to the courts. It has

always been an individual's prerogative to decide how and *whether* he wishes to enforce his legal rights.

71 In addition, we feel that the courts' approach to the principle expressed in *Al Fayed* must be sufficiently nuanced to discern between *different categories of impecunious claimants*. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs needs to be struck *differently* depending on the type of claimant involved. The distinction that needs to be drawn between differing categories of claimants is illustrated by the principles governing security for costs. Whilst it is trite law that poverty is no bar to a litigant who is a *natural person* (*Cowell v Taylor* (1885) 31 Ch D 34 at 38), s 388(1) of the CA subjects all *companies* to the potential liability to furnish security for costs where "there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". As Megarry VC stated in *Pearson v Naydler* [1977] 1 WLR 899 at 905, the rationale for this distinction between natural persons and companies is as follows:

A man may bring into being as many limited companies as he wishes, with the privilege of limited liability; and section 447 [the equivalent of our s 388] provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. [emphasis added]

72 In our view, the law on security for costs is express recognition that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts. This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company.

The sufficiency of security for costs

73 The availability of an order of security for costs against an impecunious company gives rise to the additional question of whether such an order provides a sufficient alternative to imposing personal liability upon liquidators. A number of decisions suggest that the availability of an order for security for costs provides sufficient protection for would-be defendants since public policy does not *per se* prohibit an insolvent company from commencing litigation. In *Metalloy* ([11] *supra*), Millett LJ aligned himself with this view, saying (at 1619):

It is not an abuse of process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid. If the plaintiff is an individual, the defendant's only recourse is to threaten the plaintiff with bankruptcy. If the plaintiff is a limited company, the defendant may apply for security for costs and have the proceedings dismissed if the plaintiff fails to provide whatever security is ordered. [emphasis added]

74 Similarly, in *Knight v FP Special Assets Limited* (1992) 174 CLR 178 (“*Knight*”), two of the five judges in the High Court of Australia expressed views similar to those of Millett LJ. In that case, the issue was whether the court should order costs against a receiver *qua* non-party to the litigation. According to McHugh J (at 217):

As a matter of policy, provision for security for costs is a better remedy for protecting persons involved in litigation with insolvent companies than ordering a receiver to pay the costs of litigation after verdict. *Public policy does not preclude an insolvent company from bringing or defending an action. Where it does so, the ordinary remedy is to stay the action until security for costs is provided.* [emphasis added]

Dawson J agreed, and held (at 204) that an order of security for costs should ordinarily be the appropriate remedy where a receiver conducts litigation through a company that will be unable to pay the defendant's costs if the defendant is successful in the litigation.

75 Contrary to what these *dicta* suggest, for the reasons discussed above (at [66]–[72]), there is a real and tangible justification for deterring insolvent companies from commencing litigation without any real possibility of satisfying a successful defendant's costs. In addition, we are unable to align ourselves with the view that security for costs provides adequate protection for successful defendants who face the risk of bearing their own costs. McHugh and Dawson JJ's views in *Knight* should be contrasted with the joint judgment of the majority judges, Mason CJ and Deane J (at 190–191), with whom Gaudron J agreed:

No doubt [an order for security for costs] is an appropriate remedy in many cases but there are limitations attaching to the availability of security for costs. *These limitations are such that security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party. ...* The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that the costs are escalating so as to render the amount of security previously awarded insufficient. [emphasis added]

76 We agree with the majority judgment in *Knight* on this issue. First, an order for security is a *provisional* remedy provided at a preliminary stage of

the proceedings where the merits of the litigation have not been decided upon. Thus, the court hearing a security application would invariably take a conservative approach in order to balance the interests of all the parties. For instance, the court may refuse to order security if the defendant's conduct is *prima facie* the cause of the company's insolvency: *Peng Ann* ([3] *supra*) at [15].

77 Secondly, as was the situation here, where the defendant (here the appellants) applies for security but is *successfully* opposed by the liquidator, it cannot lie in the liquidator's mouth to subsequently contend that an order granting security for costs is an appropriate remedy when it is contradicted by the outcome of his own conduct.

78 Thirdly, a defendant cannot be expected, as ECRC has argued, to repeatedly apply for security for costs when more costs accrue as the litigation proceeds. As Mason CJ and Deane J pointed out in *Knight*, it is simply not practical for defendants to *continually* apply for security for costs at *every* stage in the litigation against the company.

79 Fourthly, it is unfair to make defendants bear the burden of applying for security. The liquidator is the person with full knowledge of the company's financial condition, and is therefore in the best position to know whether an indemnity from the creditors is needed. A defendant would not know whether the company has sufficient assets to pay his costs, but the liquidator would or should know. The onus should therefore fall on a liquidator to seek an indemnity from the creditors where necessary. It would place an overly onerous burden on defendants if they have to determine from time to time in the course of litigation whether the company is able to pay their costs if they succeed in their defence.

80 For these reasons, we disagree with the strong judicial statements by Millett LJ in *Metalloy* (see [73] above) and by the minority judges in *Knight* (see [74] above) that security for costs furnishes adequate protection against the possibility that an insolvent plaintiff company may be unable to satisfy the defendant's costs if it loses the action. None of the statements considered the availability of an indemnity from the creditors as an appropriate, and indeed the most equitable, means of balancing a liquidator's duties with a defendant's interests. In our view, this is the *best* form of protection for a liquidator when discharging his duty to recover the assets of the company for the benefit of the creditors.

The liquidators' liability for the outstanding shortfall

81 For the reasons considered above, we hold that the liquidators in the present case should be held personally liable for the secondary insolvency resulting from their breach of the estate costs rule. If this court were to refuse to hold the liquidators personally liable in the present case, it would lead to the wholly inequitable result of making the successful defendants, *ie*,

the appellants, bear the burden of sustaining the company's litigation for the creditors' benefit. When the liquidators decided to pay ALP for their legal fees in the main suit and main appeal, they knew or ought to have known that ECRC's remaining assets would not be sufficient to meet the defendants' costs if they lost the case. As was correctly held in *In re Beni-Felkai Mining Company, Limited* [1934] Ch 406 ("*Beni-Felkai*") at 422, the liquidator is the "person who can see what the position is" and has the means to ascertain the company's financial position at any time. Yet, the liquidators decided to proceed without an indemnity and exposed the appellants' to the risk of getting a Pyrrhic victory. It is therefore eminently reasonable that the liquidators, and not the appellants, should bear the consequences of deciding to proceed with the litigation despite the company's limited resources. As this court held in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 at [46]:

The rationale for the Estate Costs Rule is that where an action is taken by a liquidator for the benefit of the insolvent estate, it is only fair that the defendant's costs should rank in priority over the liquidator's expenses and remuneration and the claims of the unsecured creditors in general. *The liquidator should take the risk for his own actions*: see *In re Home Investment Society* (1880) 14 Ch D 167 at 169 to 170. [emphasis added]

82 Notably, in *Wenborn* ([18] *supra*), Buckley J held (at 417):

When the voluntary liquidator, or the liquidator in a compulsory winding up, comes to the Court for leave to bring or defend an action by or against the company, and obtains this leave, *the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or adopt or defend*. [emphasis added]

83 Even though leave of court is no longer needed for a liquidator to commence litigation in the company's name, the principle in *Wenborn* still applies with equal force. When a liquidator commences an action on behalf of the company, he "pledges the assets of the company for the costs of the action" – in particular the defendant's costs, which would be entitled to first priority if the company is unsuccessful. The liquidator therefore cannot use these assets to pay claims of a lower priority before the outcome of the litigation is determined.

84 As Mr Xavier has highlighted, the liquidators have been ordered to disgorge all the sums that they had paid themselves as remuneration, even those paid *before* the main suit was commenced. Just as a liquidator should not pay *himself* until he is sure that the company will have sufficient assets to satisfy any potential claims of a higher priority under the estate costs rule, similarly, he should not pay *the company's legal fees* until he is sure of the same. If he is unsure, he should seek an indemnity from the creditors to meet any demand for legal fees by the company's lawyers.

The court's discretion to exempt liquidators from liability for costs

85 Section 283(3) of the CA confers the court with a discretionary power to override the application of the estate costs rule in appropriate circumstances. The section provides that where a company's assets are insufficient to satisfy its liabilities, *the court* may stipulate the order of priority in which "the costs, charges and expenses incurred in the winding up" should be paid. The court's power under s 283(3) allows it to retroactively reverse the order of priorities between liquidation expenses *inter se*, thereby absolving a liquidator, who is otherwise in breach of the common law priority rules, of personal liability. This discretion to reverse the erstwhile order of priorities will only be exercised in *exceptional* situations: *Re Linda Marie Ltd* [1989] BCLC 46.

86 The ambit of the court's power under s 283(3) is exemplified by the case of *Beni-Felkai* ([81] *supra*). In that case, the liquidator paid himself without first making provision for the other liquidation creditors. In doing so, he breached a general principle of corporate insolvency which dictates that the whole of the liquidation expenses are to be paid before a liquidator's remuneration: *Beni-Felkai* at 422. Notwithstanding this, Maugham J declared that the liquidator was entitled to retain the remuneration he had already paid himself. Maugham J held that the discretion under the UK equivalent of our s 283(3) should be exercised to reverse the order of priorities since the liquidator had taken his remuneration at a time when the company was deemed to be completely solvent and "*he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding up*" [emphasis added]: *Beni-Felkai* at 422.

87 Similarly, where a liquidator pays the company's legal costs in the course of a trial, leaving the company with insufficient assets to satisfy a subsequent costs order made against it, the court might, in a sufficiently deserving case, be minded to exercise its discretion under s 283(3) to exempt the liquidator from liability for his breach of the estate costs rule. For instance, a liquidator might have paid the company's legal fees without first obtaining a creditors' indemnity because he was of the *reasonable, albeit erroneous*, view that the company's remaining assets would be sufficient to discharge any costs order made against it. We should, however, reiterate that the discretion under s 283(3) is one that will be exercised sparingly. If a liquidator turns a blind eye to the limited nature of the company's assets, and recklessly decides to proceed without an indemnity from the creditors, the court would undoubtedly uphold the general rules of priority and hold such a liquidator personally liable.

88 On the present facts, there is nothing to suggest that there were any unexpected or exceptional circumstances, such as in *Beni-Felkai*, which justified the liquidators' decision to pay ALP in priority to the appellants. In their affidavits, the liquidators never suggested that there was cause for

them to believe, when they paid ALP, that there would nevertheless be sufficient funds to satisfy the appellants' costs. ECRC appears to accept that the liquidators will be liable once the appellants' general propositions are accepted, and has not called for this court to exercise its discretion under s 283(3) of the CA.

89 In addition to the absence of any extenuating circumstances to mitigate the liquidators' breach of the estate costs rule, their ignorance or denial, as the case may be, of this rule was made even less defensible by the fact that ALP's fees were paid without taxation, contrary to r 173 of the CWU Rules. Hence, not only did the liquidators prejudice the appellants' potential claims by first paying ALP, they compounded their breach by failing to ensure that the fees ALP claimed were not inflated. Given ECRC's precarious financial situation, the liquidators should have been especially careful to preserve its existing assets.

Conclusion

90 In the ultimate analysis, this court has been asked to strike a balance between: (a) the interests in facilitating liquidators' duties to recover insolvent companies' assets for the benefit of their creditors; and (b) the need to protect defendants from having to shoulder the legal costs of defending unmeritorious suits. In our opinion, the estate costs rule encapsulates the appropriate balance that should be struck between these two opposing tensions. One must always have regard to the fact that liquidators are in a far more advantageous position than defendants to suits commenced in the company's name. A liquidator is in the best position to know whether he will be able to comply with the estate costs rule. With this knowledge, he can then decide whether to limit his potential liability for the defendant's legal costs by availing himself of the other means at his disposal, such as by obtaining an indemnity from creditors. In the present case, there are no extenuating circumstances calling for an exercise of the court's discretion to relieve the liquidators from liability for the appellants' unpaid costs. The liquidators created the present state of affairs for which they must now be held accountable.

91 We expect that after our decision in this case, liquidators will be more mindful to protect themselves from potential liability for legal costs when discharging their duties for the benefit of creditors. Liquidators should at all times uphold the existing legal regime affecting corporate insolvency, which includes the estate costs rule. Future liquidators who wish to commence litigation on the company's behalf may want to consider the following points before deciding whether to proceed:

- (a) As a matter of general principle, a liquidator who breaches the estate costs rule will be held personally liable for any shortfall in the company's assets which results from his breach. An order of personal liability will usually follow from such a breach *regardless* of whether it

is the liquidator himself or a third party who receives the money in breach of the rule.

(b) In the absence of extenuating circumstances, the courts will hold a liquidator liable for breaching the estate costs rule *even if* the company's moneys were used to pay the company's own costs of sustaining the litigation. Where a liquidator has insufficient assets at his disposal to satisfy *both* the company's legal costs of maintaining the litigation *as well as* any potential costs order made against the company, a liquidator would be well-advised to obtain an indemnity from the creditors. If such an indemnity is not forthcoming, a liquidator should only proceed with the litigation if he is prepared to be held personally liable for a successful defendant's costs in the event that he is found in breach of the estate costs rule.

(c) By way of analogy with the principle in (b), if a company is completely insolvent and therefore has *no prospects of satisfying any costs order made against it*, it would be advisable for a liquidator to refrain from commencing proceedings unless he has managed to obtain a creditors' indemnity. Whilst the position on this issue is not entirely settled, a liquidator who omits to do so in a future case may well be held personally liable for the defendant's costs if the company's claim is unmeritorious.

(d) In appropriate cases, the courts might exercise its power under s 283(3) of the CA to exempt a liquidator from personal liability for breaching the estate costs rule. In deciding whether to reverse the erstwhile rules of priority, the court will consider whether *the liquidator* in question is able to show that the company's inability to satisfy the opposing litigant's costs did not result from his disregard of that other party's interests.

92 For these reasons, the appeal against the judge's decision is allowed with costs. We find that the liquidators are liable to compensate the appellants for the outstanding shortfall, which will be payable following the determination of the quantum of the realisation costs.

Reported by Harikumar Sukumar Pillay.

EXHIBIT E

In re Crescent Associates, LLC.

United States Bankruptcy Court, C.D. California, Los Angeles Division. | March 30, 2021 | Slip Copy |
2021 WL 1245913

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Outline

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United States Bankruptcy Court, C.D. California,
Los Angeles Division.

IN RE: [CRESCENT ASSOCIATES, LLC.](#), Debtor(s).
[Crescent Associates, LLC.](#), Plaintiff(s),

v.

Eyal Ben Dror, Defendant(s).

Case No.: 2:18-bk-20654-WB

|

Adv No: 2:18-ap-01310-WB

|

Signed March 30, 2021

|

Date: January 26, 2021, Time: 2:00
PM, Courtroom: 1375 (via Zoomgov)

MEMORANDUM OF DECISION

[Julia W. Brand](#), United States Bankruptcy Judge

*1 This matter is before the Court for ruling on the Trial Brief and Motion for Damages and Attorney Fees (“Motion for Damages”) [Docket No. 63] filed by the plaintiff, Crescent Associates LLC. Oral argument on the Motion for Damages was heard on October 20, 2020 and January 26, 2021. Based on the pleadings, record, and oral argument of the parties, and for the reasons that follow, the Court finds that the plaintiff is entitled to its attorneys’ fees under [Civil Code section 1717](#)¹ in the amount of \$98,369.00 as the prevailing party with respect to this adversary proceeding.

¹ All references to Civil Code refer to the California Civil Code.

I. FACTS

On October 4, 2018, debtor and plaintiff, Crescent Associates LLC (“Plaintiff”), filed a Notice of Removal of Action styled *Crescent Associates LLC v. Eyal Ben Dror, et al.* (the “Complaint”) from the Los Angeles County Superior Court to the bankruptcy court. The Complaint alleged claims for declaratory relief and damages for slander of title and

for cancellation of instrument. Plaintiff alleged that it was the record title holder of two parcels of real property (the “Multiview Properties”) as a result of a foreclosure sale on May 14, 2018. Prior to the foreclosure sale, ADY Property, LLC and MJK 18 LLC owned the Multiview Properties.

Approximately four years earlier, on September 8, 2014, Joe Klein and his business entity, MJK 18 LLC, entered into an agreement with Eyal Ben Dror (“Dror” or “Defendant”) entitled Statement of Understanding and Investment Agreement (the “Klein Agreement”). In summary, the Klein Agreement provided the terms for the parties’ acquisition of unrelated real property on Beverly Glen Drive (the “Beverly Glen Property”). Defendant was to advance all funds, and any additional costs, for the purchase of the Beverly Glen Property with Defendant and Klein each holding a 50% interest. In turn, Klein and MJK 18 agreed to guarantee Defendant’s investment and provided, as security for the guarantee, junior deeds of trust on the Multiview Properties (the “Dror Deeds of Trust”). The Klein Agreement provided that in the event Klein was unable to provide his required funds, Klein would withdraw his ownership in the Beverly Glen Property or quitclaim his interest to Defendant. In the event of withdrawal of Klein’s shares, Dror agreed not to seek any recovery on the Klein guarantee. Because Klein was unable to fulfill his obligations under the Klein Agreement, Defendant sued, and obtained judgment against Klein, granting Dror sole ownership of the Beverly Glen Property pursuant to the Klein Agreement. However, Dror did not release the Dror Deeds of Trust and subsequently filed a claim in Plaintiff’s bankruptcy case.

In the Complaint, Plaintiff sought declaratory relief that the obligations secured by the Dror Deeds of Trust have been satisfied and that the guarantees were extinguished by the entry of judgment in favor of Dror and the transfer of title to the Beverly Glen Property to Dror. Plaintiff sought cancellation of the Dror Deeds of Trust and sought damages for slander of title (the “Slander of Title Claim”) based on Dror’s refusal to remove the Dror Deeds of Trust from and after July 26, 2018 as demanded by Plaintiff. Plaintiff sought punitive damages in connection with the Slander of Title Claim.

*2 On January 30, 2019, Plaintiff filed its motion for partial summary judgment. On February 11, 2019, Defendant filed his motion for summary judgment. The Court held a hearing on the motions on February 26, 2019 and issued an oral ruling and findings of fact and conclusions of law on April

9, 2019. The Court entered orders granting Plaintiff's motion and denying Dror's motion on May 17, 2019 (see Docket Nos. 43, and 44). In granting Plaintiff's Motion for Summary Judgment in part, the Court determined that in electing to take title to the Beverly Glen Property, Defendant no longer had the right to "seek any recovery on any guarantees" provided in the Klein Agreement, which "guarantees" were secured by the Dror Deeds of Trust at issue here. By enforcing paragraph 25 of the Klein Agreement, the guarantee obligations were extinguished and the obligations under the Dror Deeds of Trust were extinguished. The Court ordered the Dror Deeds of Trust cancelled and of no further force and effect and held that, as a result, Dror had no claim against the estate. The issue of damages remained open as well as Plaintiff's right to attorneys' fees.

The Court scheduled a trial for July 28, 2020 to determine damages and attorneys' fees. This hearing was continued to address the form of the trial and to allow Dror the opportunity to obtain counsel. At the continued status conference, Dror appeared without counsel. The parties agreed on the record that the matter would be submitted on written evidence and argument (the "Trial by Motion"). The Court set a briefing schedule and scheduled a hearing for October 20, 2020.

Plaintiff timely filed its Motion for Damages, the Declaration of Steven Morris in Support of Motion for Damages and Attorney Fees (see Docket No. 64), the Declaration of Edward Friedman in Support of Motion for Damages and Attorney Fees (see Docket No. 65) and the Declaration of Robert Yaspan in Support of Motion for Damages and Attorney Fees (see Docket No. 66). Dror did not file any opposition and did not appear at the hearing on October 20, 2020. The Court heard oral argument from Plaintiff's counsel, Steven A. Morris ("Morris"), and took the matter under submission.

On November 18, 2020, Defendant filed a Stipulation re Continuance of Hearing on Motion for Damages ("Stipulation"). See Docket No. 68. Pursuant to the Stipulation, the parties agreed to continue the deadline for Defendant to file an opposition to the Motion For Damages and to continue the hearing on the Motion For Damages. The Stipulation was signed by Defendant on October 5, 2020 and by Morris, on behalf of Plaintiff, on October 8, 2020. Morris failed to mention the Stipulation at the hearing on October 20, 2020.

Approving the Stipulation, the Court set a continued hearing on the Motion for Damages for January 12, 2021 at 2:00

p.m. On December 30, 2020, Defendant filed an Opposition to Trial Brief and Motion for Attorneys Fees ("Opposition") (see Docket No. 71), the Declaration of Michael P. Rubin in Support of Eyal Ben Dror's Opposition (see Docket No. 72), and the Declaration of Eyal Ben Dror in support of Opposition (see Docket No. 73). The Court entered an order accepting the Defendant's late-filed Opposition and declarations for consideration, set a reply deadline and continued the hearing to January 26, 2021. See Docket No. 74.

II. DISCUSSION

In the Motion for Damages, Plaintiff argues that as the prevailing party in the adversary proceeding it is entitled to attorneys' fees and costs under [Civil Code § 717](#) from July 11, 2018, the date of entry of judgment in the state court litigation (the "State Court Judgment"), through confirmation of the plan in the underlying bankruptcy case. Plaintiff seeks additional damages pursuant to [Civil Code § 2941\(d\)](#) and punitive damages under Plaintiff's Slander of Title Claim.

Plaintiff asserts the following attorneys' fees and costs were incurred:

- 1) Bankruptcy counsel's fees in the amount of \$178,804.94 (see Docket No. 66, Declaration of Robert Yaspan);
- 2) Special counsel's fees in the amount of \$98,369 (see Docket No. 64, Declaration of Steven Morris); and
- 3) United States Trustee's ("U.S. Trustee") fees in the amount of \$27,324.34 (see Docket No. 65, Declaration of Edward Friedman).

*3 In total, Plaintiff seeks actual damages of attorneys' fees and costs of \$304,498.28 pursuant to the Klein Agreement and [Civil Code § 1717](#) and as damages, and punitive damages of \$76,124.57.

A. Award of Fees under [Civil Code § 1717](#)

Plaintiff argues it is entitled to attorneys' fees and costs under [§ 1717](#) as the prevailing party in this adversary proceeding based on the attorneys' fees provision in the Klein Agreement. Section 14 of that agreement provides that the prevailing party in any dispute arising from or relating to the Klein Agreement shall be awarded costs and attorneys' fees. Plaintiff contends that while it is not a party to the original contract, established

case law indicates that in certain circumstances such as this, that distinction is without a difference.

Defendant argues that Plaintiff is not entitled to attorneys' fees because it is not a party to the Klein Agreement, § 1717 is not applicable because the attorneys' fees provision is not unilateral and Plaintiff is not a third party beneficiary to the agreement nor a successor to the agreement.

Section 1717 provides that in any action on a contract, where a contractual provision provides a right to attorneys' fees recovery to one party or to the prevailing party, the prevailing party is entitled to reasonable attorneys' fees, whether it is the party specified in the contract or not.² Cal. Civ. Code § 1717(a).

² Section 1717(a) states that: “[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.” Cal. Civ. Code § 1717(a).

In *Santisas v. Goodin*, the California Supreme Court made clear that § 1717 does not just apply to contracts with one-sided provisions but that it applies to “contracts containing reciprocal ... attorney fee provisions ... authorizing recovery of attorney fees by a ‘prevailing party.’” *Santisas v. Goodin*, 17 Cal.4th 599, 614–16 (1998). Section 1717, which was enacted to ban unfair one-sided fee provisions, has been expanded over time to cover reciprocal fee agreements as well. For example, the rules in § 1717 regarding the identification of a “prevailing party”—including the rule that there is no prevailing party in an action that is voluntarily dismissed or that is settled—apply to all actions “on a contract” in which parties seek to recover attorneys' fees. *Id.* at 616-17. Section 1717, thus, allows recovery of attorneys' fees by whichever contracting party prevails in a contract enforcement action, whether the prevailing party is the party specified in the contract or not. *Id.* at 611. Section 1717 applies, however, only to actions that contain at least one contract claim. *Id.* at 615 (citation omitted). The action must be “on the contract” and the party must prevail “on the contract.” Thus, any contractual attorney fee provision must be interpreted in light of Civil Code § 1717. *Khan v. Shim*,

7 Cal.App.5th 49, 55 (2016). Contrary to Dror's assertion, § 1717 does apply to the Klein Agreement and its provision providing attorneys' fees to the prevailing party.

*4 Next, the Court must determine whether Plaintiff, as a non-signatory party to the Klein Agreement, may recover attorneys' fees under the contract and § 1717. Generally, absent contractual language providing otherwise, a contract providing for attorneys' fees to be awarded to a contracting party does not typically apply to a non-signatory party. *See Cargill, Inc. v. Souza*, 201 Cal.App.4th 962, 966, 968–69 (2011). However, a non-signatory party may be entitled to contractual attorneys' fees for litigation in which “the non-signatory party “stands in the shoes of a party to the contract.”” *Id.* at 966 (citation omitted). That is, if the non-signatory party sues or is sued “as if he were a party” to the contract containing the attorneys' fees provision, the prevailing party may be entitled to an award of fees. *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 127–28 (1979) (non-signatory party who was sued as alter ego of signatory party entitled to contractual attorneys' fees); *Cargill*, 201 Cal.App.4th at 966–70 (third party beneficiary of contracting party entitled to attorneys' fees); *Exarhos v. Exarhos*, 159 Cal.App.4th 898, 900, 903–8 (2008) (non-signatory party who sued as deceased contracting party's successor in interest required to pay contractual attorneys' fees); *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, 96 Cal.App.4th 598, 601, 608 (2002) (non-signatory party who brought action based on assignment of contract rights from signatory party required to pay contractual attorneys' fees).

Here Plaintiff, as purchaser of the Multiview Properties at a foreclosure sale, stood in the shoes of Klein and was required to litigate with Defendant to enforce the terms of the Klein Agreement in order to obtain removal of the Dror Deeds of Trust. Section 14 of the Klein Agreement provides that the prevailing party in any dispute arising from or relating to the Klein Agreement shall be awarded costs and attorneys' fees. Thus, Plaintiff as successor to the prior owners of the Multiview Properties may recover reasonable attorneys' fees incurred in an action on the contract.

Plaintiff seeks attorneys' fees under the Klein Agreement for the successful prosecution of the adversary proceeding, the conduct and confirmation of a plan of reorganization and for the U.S. Trustee fees paid in the bankruptcy case. There is no dispute that the adversary proceeding is an action on the contract. The Complaint sought a declaration regarding the Klein Agreement and cancellation of the Dror Deeds of

Trust pursuant to the terms of the Klein Agreement. The same cannot be said for the pursuit of the bankruptcy case and the concomitant payment of U.S. Trustee fees. Plaintiff seeks the fees of its chapter 11 bankruptcy's general counsel, Robert Yaspan ("Yaspan"), in the amount of \$178,804.94, and quarterly fees charged by the U.S. Trustee, among other costs, in the amount of \$27,324.34.³ Plaintiff maintains that the only reason the bankruptcy was filed was to enable Plaintiff to sell the Multiview Properties, free and clear of the Dror Deeds of Trust. Further, Plaintiff contends that its other option, remaining in state court, presented significant delays inherent within that judicial system. Plaintiff asserts that but for the Dror Deeds of Trust, Plaintiff had no other reason to file bankruptcy as it was not insolvent and there was sufficient equity to pay all debts, including Defendant's, had he prevailed.

³ The Declaration of Robert Yaspan (see Docket No. 66) provides a breakdown of fees and costs incurred by Plaintiff for bankruptcy services for the period of September 11, 2018 through July 31, 2020 in the following general categories of: case administration, fee applications, motions, chapter 11 plan, Defendant related issues, sale of real property and costs.

Plaintiff has not demonstrated that the bankruptcy case was an action on the contract. In *Bos v. Board of Trustees*, 818 F.3d 486 (9th Cir. 2016), the Ninth Circuit explained that where the contract is collateral to the dispute, it is not an action on the contract and attorneys' fees cannot be awarded under § 1717. It is not an action on a contract if the action does not litigate the validity of the contract or consider state law governing the contract. The Court is unpersuaded by Plaintiff's contention that the bankruptcy case was an action on the contract. Plaintiff's assertion that it had no other recourse but to file bankruptcy in order to clear title and sell the Multiview Properties does not make the case an action on the contract. Filing bankruptcy was merely one of Plaintiff's options. Plaintiff could have settled or resolved its dispute in state court and brought the matter to a conclusion there. But, as asserted by Plaintiff, under these circumstances it chose to seek what in its view was a more expeditious route via the bankruptcy courts.

*⁵ Moreover, Plaintiff addressed issues related to confirmation of the plan of reorganization that were unrelated to the Dror Deeds of Trust, including the claims asserted by EPCO Consultants, Inc. The Court cannot find that pursuit of

the bankruptcy case through confirmation was an action on the contract. Accordingly, the Court denies Plaintiff's claim to recover its chapter 11 bankruptcy's general counsel's fees and costs and the quarterly fees imposed by the U.S. Trustee under the Klein Agreement and § 1717.

Plaintiff is entitled to its reasonable attorneys' fees and costs as the prevailing party in the adversary proceeding. Plaintiff seeks attorneys' fees and costs of its special counsel, Morris, in the amount of \$98,369.00. Morris was principally responsible for the litigation against Defendant in this adversary proceeding. Morris and his firms' services commenced from the date the judgment was entered in the *Klein v. Dror* state court action on July 11, 2018 (the date Defendant should have reconveyed the Dror Deeds of Trust) until title on the Multiview Properties was cleared. See Declaration of Steven Morris, Docket No. 64. Morris attests that the work included: (1) in-depth legal research concerning the sale of real property subject to the Multiview Deeds of Trust; (2) basic discovery (including a document demand and deposition of Defendant); (3) preparation of the Motion for Partial Summary Judgment; and (4) opposing Defendant's Motion for Summary Judgment. The Court grants Morris' fees in the amount of \$98,369.00 under § 1717 and finds that they are reasonable and necessary costs incurred with respect to the action on the contract.

B. Civil Code § 2941(d)

Plaintiff also seeks an award of attorneys' fees under Civil Code § 2941(d). Plaintiff did not assert a claim for recovery of fees under § 2941(d) in the Complaint, raising this claim for the first time in the Motion for Damages.⁴

⁴ Although Plaintiff did not allege a claim for damages under § 2941(d) in the Complaint, Fed.R.Bankr.P. 7015(b) allows the pleadings to be conformed to the evidence raised at trial "at any time." "[T]he lack of an amendment will not affect the judgment in any way." *Dunn v. Trans World Airlines*, 589 F.2d 408, 412-13 (9th Cir. 1978). "Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to the pleadings to conform to the proof should have been made, the Courts of Appeals will presume that it is so made to support the judgment." *Id.* quoting *Decker v. Korth*, 219 F.2d 732, 739 (10th Cir. 1955).

Section 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. Code § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property. Cal. Civ. Code § 2941(b)(1)(B)(ii).

Section 2941(d) provides that a violation of § 2941 makes the violator liable to the plaintiff for all damages sustained by reason of the violation, and additionally requires the violator to pay the plaintiff \$500.00 in statutory damages. Cal. Civ. § 2941(d). Section 2941(d) does not grant a statutory right to attorneys' fees for § 2941 litigation with the creditor. See *In re Luchini*, 511 B.R. 664, 677 (Bankr. E.D. Cal. 2014).

*6 Plaintiff asserts that Dror failed to reconvey the Dror Deeds of Trust by August 29, 2018 (the last day to do so following entry of the July 11, 2018 judgment in the state court action). Plaintiff's alleged damages from this violation are attorneys' fees incurred for the Dror litigation, the sale of the Multiview Properties through these bankruptcy proceedings and the attorneys' fees associated with the administration of this bankruptcy case. First, the Court will award attorneys' fees for the Dror litigation under the Klein Agreement. With respect to the attorneys' fees and U.S. Trustee fees incurred in connection with the bankruptcy case, Plaintiff has not demonstrated that these are damages that flow from the refusal to reconvey the Dror Deeds of Trust. This Court was required to make a determination as to the application of the reconveyance requirement in the Klein Agreement based on the ruling in the state court litigation. Further, as noted above, Plaintiff did not demonstrate that the bankruptcy case was necessary for it to enforce the Klein Agreement. Indeed, the adversary was filed originally in state court and removed to the bankruptcy court upon the filing of the chapter 11 case. The Court cannot find that all of the fees associated with the chapter 11 case were the result of the Dror litigation and his failure to release the Dror Deeds of Trust. As a result, no damages will be awarded. Finally, Plaintiff did not demand an award of the statutory damages of \$500.00.

C. Slander of Title

Slander of title is a "tortious injury to property resulting from unprivileged, false, malicious publication of disparaging statements regarding the title to property owned by plaintiff, to plaintiff's damage." *Southcott v. Pioneer Title Co.*, 203 Cal.App.2d 673, 676 (1962). " 'The recordation of an instrument facially valid but without underlying merit will give rise to an action for slander of title.' " *Nguyen v. Bank of Am. Nat. Ass'n*, 2011 WL 5574917 at *7 (N.D. Cal. Nov. 15, 2011), citing *Stamas v. County of Madera*, 2011 WL 2433633 at *14 (E.D. Cal. June 14, 2011).

Under California law, slander of title requires allegations that a person, without a privilege to do so, published a false statement that disparaged title to property and caused the property owner some special pecuniary loss or damage. *Sumner Hill Homeowners' Ass'n, Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1030 (2012), citing *Fearon v. Fodera*, 169 Cal. 370, 379–80 (1915). The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 84 (1997).

Plaintiff alleges in the Complaint that Defendant maintained and refused to reconvey the Dror Deeds of Trust on the Multiview Properties which Defendant had a legal duty to reconvey. The Complaint essentially alleges that the act of failing to reconvey the Dror Deeds of Trust constitutes a false representation and disparages, without authority, Plaintiff's title to the Multiview Properties. However, Plaintiff cites no authority for the proposition that Defendant's failure to remove a lien can form the basis for a slander of title claim; specifically, that such failure satisfies the publication requirement, and the Court has found none. Having failed to satisfactorily establish an essential element of its Slander of Title Claim, the Court declines to award actual or punitive damages.

III. CONCLUSION

Based on the foregoing, the Court awards Plaintiff attorneys' fees in the amount of \$98,369.00. A separate order consistent with this memorandum of decision will be entered.

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EXHIBIT F



In re Mac-Go Corporation

United States Bankruptcy Court, N.D. California. | March 20, 2015 | Not Reported in B.R. Rptr. |
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United States Bankruptcy Court, N.D. California.

IN RE : MAC-GO CORPORATION, Debtor.

Case No. 14-44181 CN

Signed March 20, 2015

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MEMORANDUM DECISION RE: FEE CLAUSES

[Charles Novack](#), U.S. Bankruptcy Judge

*1 After numerous motions to dismiss, one summary judgment motion, and a day long trial, First National Bank (the “Bank”) now moves to recover some of the attorney’s fees and costs that it incurred in this adversary proceeding. While the Bank’s attorney’s fees are substantial, it has (for the moment) limited its request to \$62,480.41. The Bank contends that the attorney’s fee clauses in the Mac-Go loan documents entitle it to recover the fees and costs that it incurred in defending the Chapter 7 Trustee’s [Bankruptcy](#)

[Code §§ 547, 548](#) and [549](#) claims for relief arising from the MacGo loans.¹ The Trustee disagrees.

¹ The Trustee’s claims against the Bank are described at length in the memorandum decision granting the Bank’s summary judgment motion and the memorandum after trial. The court presumes that the parties are well versed in these facts, that they recognize that the loan in question was made directly by the Bank to Mac-Go, and that this memorandum does not refer to the personal Macchia loans which Mac-Go guaranteed. Accordingly, this memorandum will only address those facts necessary to make this decision coherent.

Procedurally, the Bank’s request raises further questions. After trial (and well after the claims bar date), the Bank filed a \$346,745.24 proof of claim, which included a secured claim for the \$62,480.41 in fees and costs at issue herein. The Bank alternatively argues that (1) regardless of its proof of claim, it is entitled to recover its attorney’s fees under *Travelers Cas. & Sur. Co. of Am. v. PG & E*, 549 U.S. 443 (U.S.2007) and its progeny, and (2) that it is over-secured and thus entitled to reasonable fees and costs under the Mac-Go loan documents pursuant to [Bankruptcy Code § 506\(b\)](#). The Trustee objected to the Bank’s proof of claim and filed an opposition to the Bank’s motion. The Trustee first contends that the fee clauses are limited in scope and that the Bank’s fees and costs are not covered by them under any circumstances. The Trustee alternatively argues that even if the fees and costs do fall within the fee clauses, the Bank is undersecured and that its request for fees and costs constitutes a time-barred unsecured claim. While the Trustee’s objection raises serious questions, most of his arguments will be resolved on another day. This decision only addresses whether the Bank’s requested fees (analyzed under [§ 506\(b\)](#) or the *Travelers* doctrine) fall within the fee clauses in the Mac-Go loan documents.

*2 In December 2009, Mac-Go borrowed \$250,000.00 from the Bank and secured the loan by providing the Bank with a perfected security interest encumbering all of its assets, including its inventory, chattel paper, accounts and equipment (the “Mac-Go Loan”). Mac-Go and the Bank signed three documents as part of the Mac-Go Loan: the Business Loan Agreement (the “Loan Agreement”), the Promissory Note (the “Note”) and the Commercial Security Agreement (the “Security Agreement”). Each contains an attorney’s fee clause.

a.) *Note*: Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's Attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Borrower also will pay any court costs, in addition to all other sums provided by law.

b.) *Loan Agreement*: Borrower agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Borrower shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's Attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower also shall pay all court costs and additional fees as may be directed by the court.

c.) *Commercial Security Agreement*: Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's Attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor shall also pay all court costs and additional fees as may be directed by the court.²

² 2 These fee clauses will collectively be referred to as the "Fee Clauses."

While the Fee Clauses are similar, they are not identical. Moreover, neither the Bank nor the Trustee convincingly argued which clause governs. The court believes that it should utilize all three clauses. First, the Note states that "in addition to the terms and conditions contained in the Note,

it is also subject to the terms and conditions contained in that certain Business Loan Agreement." Since the Trustee sought to avoid payments made under the Note, the court should at the very least rely on these two clauses. Second, the Trustee conceded summary judgment on his preference claims because the Bank was over-secured (at least when these pre-petition payments were made). This court therefore should also examine the clause in the Security Agreement.

This court looks to California law to determine the scope of the Fee Clauses. [Bankruptcy Code § 506\(b\)](#) allows over-secured creditors to recover "reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." California is the governing law in the Note, Loan Agreement, and Security Agreement. [Travelers Cas. & Sur. Co. of Am. v. PG & E, 549 U.S. 443 \(U.S.2007\)](#), which upended long-standing Ninth Circuit law precluding the award of post-petition attorney's fees in bankruptcy litigation, also requires that this court apply California law. In *Travelers*, the Supreme Court affirmed the general presumption that "claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." The Court concluded that "[t]he character of [a contractual] obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy." *Id.* at 454 (citations omitted). *See also, In re SNTL Corp.*, 380 B.R. 204, 221 (9th Cir. B.A.P. 2007) *aff'd*, 571 F.3d 826 (9th Cir. 2009) ("[W]e hold that attorney's fees arising out of a prepetition contract but incurred postpetition fall within the Bankruptcy Code's broad definition of claim ...").

*3 The Bank contends that [Cal. Civ.Code § 1717](#) and [Cal.Code of Civ. Procedure § 1021](#) allow it to recover fees under the Fee Clauses. [Section 1717](#) states, in relevant part:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract ... then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs....

Section 1717 only applies in contract actions. *Santisas v. Goodin*, 17 Cal.4th 599, 615 (1998). As a result § 1717 may not be applicable herein, as it is unclear whether §§ 547, 548, and 549 claims for relief are “action[s] on a contract ... [to] enforce that contract.” The court need not, however resolve this issue, since the Bank is the explicit beneficiary of the Fee Clauses and need not rely on § 1717. See *MRW, Inc. v. Big-O Tires, LLC*, 684 F.Supp.2d 1197, 1202–1203 (E.D.Cal. 2010) (when a unilateral fee-shifting provision is drafted in favor of the party relying on such provision, the party seeking fees need not rely on section 1717(a) 's “enforced bilateralism”).

Instead, the Bank may rely on Cal.Code of Civ. Procedure § 1021, which allows a party to recover attorney's fees in actions other than breach of contract complaints. Section 1021 provides in relevant part that “[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.” Thus, under § 1021, parties may contract for the recovery of attorney's fees regardless of whether such litigation is premised on contract claims, tort claims, statutory claims, or otherwise, so long as the fee clause is sufficiently broad to encompass such claims. “[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.” *Xuereb* 3, Cal.App. 4th at 1341; *Excess Electronix v. Heger Realty Corp.*, 64 Cal.App. 4th 698, 706 (1998). Examples of such broadly worded language include clauses that allowed fees: “arising out of the execution of the agreement” (*Santisas*, 17 Cal. 4th at 607); “relating to the contract” (*Moallem v. Coldwell Banker Com. Group, Inc.* 25 Cal.App.4th 1827, 1831 (1994)); “to which this Agreement gives rise” (*Xuereb*, 3 Cal.App.4th at 1342); incurred in “any dispute under the agreement” (*Thompson v. Miller*, 112 Cal.App.4th 327, 333 (2003)); incurred in “any dispute” (*Maynard v. BTI Group, Inc.*, 216 Cal. App. 4th 984, 993 (2013)); incurred pursuant to a “civil action instituted in connection with this Agreement” (*Cruz v. Ayromloo*, 155 Cal.App. 4th 1270, 1277 (2007)).

This court cannot look past the express terms of the Fee Clauses (Cal. Civ.Code § 1639) if their language is “clear and explicit, and does not involve an absurdity” Cal. Civ.Code § 1638. The Fee Clauses will be construed “in their ordinary and popular sense, rather than according to their strict legal meaning” unless the parties use language in a “technical

sense” or usage indicates the language is to be given “special meaning.” See *Santisas* 17 Cal.4th at 608 (“[I]f the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning.”).

*4 The Bank incurred its fees defending against §§ 547, 548 and 549 claims for relief. Since the elements of these claims differ, the court must separately analyze whether the Bank may recover the fees incurred in defending them.

The Fraudulent Conveyance Claims

The Bank contends that the fee clause in the Loan Agreement unambiguously authorizes it to recover its fees, since it encompasses all fees for “bankruptcy proceedings.” The Bank gives this clause too broad a swath, and ignores the preceding sentences that fundamentally limit its scope. While the fee clause does allow for fees incurred in bankruptcy proceedings, such proceedings must have been “incurred in connection with the enforcement of this [Loan] Agreement.” The question thus becomes whether defending against the Trustee's fraudulent conveyance claims required the Bank to “enforce” the Loan Agreement.

In his third amended complaint, the Trustee alleged that twenty-two transfers made by MacGo between February 8, 2010 and January 6, 2012 were fraudulent transfers under Bankruptcy Code § 548(a)(1)(B). This code section provides in pertinent part:

“The trustee may avoid any transfer ... of an interest of the debtor in property ... that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(B)(I) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

The Bank obtained summary judgment on these claims because it demonstrated, not surprisingly, that MacGo received “reasonably equivalent” value in exchange for these transfers. *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP)*, 408 B.R. 318, 341 (Bankr.N.D.Cal. 2009). Section 548(d)(2)(A) defines “value” as the “satisfaction or securing of a present or antecedent debt of the debtor.” The twenty-two transfers were, in fact, MacGo

payments on the Mac-Go Loan. “To the extent a transfer constitutes repayment of the debtor’s antecedent or present debt, the transfer is not constructively fraudulent.” *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int’l, Inc.)*, 714 F.3d 1141, 1145–1146 (9th Cir. 2013).

The Trustee’s fraudulent conveyance claims did not directly question the validity of the Loan Agreement or Note. In fact, the Trustee appeared to be ignorant of the existence of the Mac-Go Loan and believed that the transfers had been made entirely for the Macchias’ benefit. The Bank’s defense against these claims, however, was premised on the validity of the Loan Agreement and Note. It successfully argued that the Note and Loan Agreement were valid, enforceable agreements that required Mac-Go to make the twenty-two payments in question.³ Utilizing the Note and Loan Agreement in order to retain these payments is the functional equivalent of relying on these documents to pursue a collection action. Both should qualify as the “enforcement” of the Loan Agreement and Note.

³ That’s why the Trustee conceded summary judgment on his fraudulent conveyance claims.

*5 There is California case law, however, that holds to the contrary. For example, in *Excess Electronixx v. Heger Realty Corp.*, 64 Cal.App. 4th 698 (1998), the court of appeal examined whether a real estate broker sued on several tort claims could rely on an attorney’s fee clause in a lease to recover its fees. In *Excess*, the plaintiff asserted tort claims against a real estate broker which had negotiated its lease. The parties settled the case, and the broker sought to recover its attorney’s fees under a lease provision that read that “[i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party ... or Broker ... shall be entitled to reasonable attorney’s fees.” The broker argued that because its defense required that it assert an “as is” clause in the lease, it effectively enforced the lease. While the court of appeal agreed that asserting the defense may have had the effect of “enforcing the terms of the lease,” it refused to award fees because the real estate broker had not asserted any affirmative claims and thus had not “brought” an action or proceeding. *Excess Electronixx*, 64 Cal.App. 4th at 712.

In *Gil v. Mansano*, 121 Cal.App. 4th 739 (2004), the court also narrowly interpreted an attorney’s fees clause in a release and rejected the defendant’s fee motion. Here, two real

estate investors were parties to a purchase agreement and a related release. When one investor asserted a fraud claim against the other, the defendant successfully relied on the release language, and thereafter filed a motion to recover his attorney’s fees. The release’s fee clause provided that “[i]n the event action is brought to enforce the terms of this [Release], the prevailing party shall be paid his reasonable attorney fees and costs incurred therein.” The court of appeal reversed the trial court’s award of attorney’s fees. It determined that where “a defense to a tort action based on a provision of the contract may have the effect of enforcing the provisions of the contract .. [t]he assertion of a defense does not constitute the bringing of an action to accomplish that goal.” *Gil*, 121 Cal.App. 4th at 744. Simply, the court held that the phrase “brings an action to enforce the contract” was “quite narrow.” *Id.*

While the *Excess* and *Gil* decisions are distinguishable by reason that the Loan Agreement is not limited to parties who “bring” an action, these cases also clash with California Supreme Court caselaw (and intermediate appellate decisions) which reject the proposition that California courts should narrowly interpret fee clauses. The California Supreme Court has held that fee provisions are subject to “the ordinary rules of contract interpretation.” *Santisas*, 17 Cal.4th at 608 (emphasis added). See also *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 231 Cal.App. 4th 805, 818, n.7 (2014). In addition, other California courts have expressly rejected *Excess* and *Gil* and hold that a defendant may recover attorney’s fees under the terms of a contract which formed its defense. For example, in *Windsor Pacific LLC v. Samwood Co., Inc.*, 213 Cal.App. 4th 263 (2013), Windsor contended that it held prescriptive easement rights which allowed it to use certain roads on Shadow’s property. It then sued Shadow to enforce these rights. Shadow prevailed in the litigation, and it sought attorney’s fees under a fee clause in the easement document that authorized the prevailing party to recover fees “[i]n any action or proceeding to enforce or interpret the provisions of this agreement.” The trial court denied the request for attorney’s fees but the court of appeal reversed. It reasoned that an “an action in which a party seeks to enforce or interpret a contract in connection with ... a defense alleged in an answer will constitute an action to ‘enforce or interpret’ the contract.” *Id.* at 275.⁴

⁴ The *Windsor* court expressly acknowledged its conflict with the *Excess* and *Gil* decisions. *Id.* at 275.

In *Finalco, Inc. v. Roosevelt*, 235 Cal.App.3d 1301 (1991), the court similarly determined that using a contract provision as a defense to tort litigation is akin to enforcing the contract's terms. There, a lender sued a borrower to collect on its promissory note. The borrower cross-claimed, asserting fraud and misrepresentation claims, along with numerous violations of federal and state securities laws. The trial court dismissed the borrower's claims and awarded the lender its attorney's fees in defending against the cross-claims based on a fee clause that required the borrower "to pay all costs of collection ... including, without limitation, all attorney's fees and expenses and court costs." The court of appeal upheld the fee award and held that the lender's defense was "inextricably intertwined" with its collection efforts and that it had to defend against borrower's fraud claims in order to collect on the note. *Id.* at 1308. "[A] borrower's obligation to pay attorneys' fees incurred in the collection of [a] note includes attorneys' fees incurred in defending against a challenge to the underlying validity of the obligation." *Id.* See also *Siligo v. Castellucci*, 21 Cal. App. 4th 873 (1994); *MRW, Inc. v. Big-O Tires, LLC*, 684 F.Supp.2d 1197 (E.D.Cal. 2010); *Wagner v. Benson*, 101 Cal.App.3d 27, 37 (1980); and *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 231 Cal.App. 4th 805 (2014).

*6 This court agrees with *Windsor Pacific* and also believes that it must follow California Supreme Court caselaw and apply "ordinary" rules of interpretation when analyzing a fee clause.⁵ The Loan Agreement's fee clause is not limited to the party who "brings" an action. As such, it must also apply to the party who successfully defends an action by raising the enforceable terms of the litigants' binding contract. This is an ordinary and common sense interpretation of the Loan Agreement's fee clause. Accordingly, the Bank is entitled to recover the (reasonable) fees and costs that it incurred defending against the fraudulent conveyance claims for relief.

⁵ When interpreting California law, this court is bound by California Supreme Court precedent. *See Pacific Nat'l Bank v. Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). In the absence of a controlling decision from the California Supreme Court, "a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other

jurisdictions, statutes, treatises, and statements as guidance." *Id.* at 1239.

The Preference Claims

The Bank is also entitled to recover the fees incurred in defending against the Trustee's preference claims for relief. Bankruptcy Code § 547(b) authorizes the Trustee to avoid transfers of "an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; ... and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

The Bank successfully argued that it was fully secured when it received the payments in question, and that the Trustee therefore could not establish that the Bank received more than it would have in a hypothetical Chapter 7 case. *See, e.g., Batlan v. Transamerica Commer. Fin. Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 971 (9th Cir. 2001). This argument required the Bank to establish that it had (at the relevant times) a perfected security interest in Mac-Go collateral, the value of which was equal to or exceeded the amount due under the Mac-Go Loan. The Trustee conceded these points when he dismissed his preference claims. The question here is whether the Bank's efforts constituted the "enforcement" of the Security Agreement.

Enforcement of a security agreement extends beyond the simple foreclosure of collateral. Secured creditors frequently use security agreements to establish their priority to receive payments when a third party (such as a receiver or trustee) liquidates its collateral. This issue is regularly litigated in bankruptcy cases, as the Bankruptcy Code has established a firm framework regarding how Chapter 11 debtors and Chapter 7 trustees recover and distribute property of the bankruptcy estate. With rare exception, a Chapter 7 trustee cannot disburse to unsecured creditors the proceeds of collateral subject to a perfected security agreement without first fully satisfying the secured creditor. Similarly, a Chapter 7 trustee cannot avoid and recover payments made to a fully secured creditor on a preference theory. The secured creditor, by dint of its secured claim, has a right to retain the allegedly preferential payments. This argument is premised, however, on the secured creditor establishing the bonafides of

its secured claim. This is exactly what the Bank did to prevail on the preference claims. *Windsor Pacific, FinalCo, Siligo*, and *MRW* are equally applicable in the preference context, and the Bank therefore can recover the (reasonable) fees and costs that it incurred in defending against the preference claims.⁶

⁶ This court's research unearthed *Williams v. Official Unsecured Creditors' Comm. (In re Connolly)*, 238 B.R. 475 (9th Cir. B.A.P. 1999), where the BAP held that a secured creditor could not recover the fees that he incurred in prevailing against the plaintiff's preference claim for relief. There, the successful creditor sought fees under the fee clause in its security agreement which authorized fees to "the prevailing party only in connection with the enforcement or interpretation of the security agreement." Unlike this case, the plaintiff Creditors' Committee sought to avoid the security agreement itself as a preferential transfer. As a result, the BAP held that the litigation addressed the "ownership of the security interest in the promissory note, not the enforcement or the interpretation of the security agreement itself." *Id.* at 479. *Connolly* therefore is distinguishable, as the secured creditor was forced to defend the creation of the security agreement itself.

The Post-Petition Claims

*7 Similarly, the Bank can also recover the fees that it incurred in successfully litigating the Trustee's § 549 claims. A trustee may avoid a transfer under *Bankruptcy Code* § 549(a) "(1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by this court." A Trustee may not, however, recover post-petition payments made to a fully secured creditor. See *Weiss v. People Sav. Bank (In re Three Partners)*, 199 B.R. 230, 237 (Bankr.D.Mass. 1995). The purpose of § 549 "is to ensure that similarly situated pre-petition creditors are treated even-handedly." *Dave Noake, Inc. v. Harold's Garage, Inc. (In re Dave Noake, Inc.)*, 45 B.R. 555, 557 (Bankr.D.Vt. 1984). If a creditor is fully secured, postpetition payments on such debt does not effect other creditors and the estate derives no benefit from avoiding such payments. *Dave Noake, Inc.*, 45 B.R. at 557.

Thus, for all the same reasons, the Bank can recover the fees that it incurred in defending against the Trustee's § 549 claims for relief. The Bank's defense was premised on the Loan Agreement and Security Agreement, which constituted the enforcement of these documents.

All Citations

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EXHIBIT G

Instrumentation Laboratory Co. v. Binder

United States District Court, S.D. California. | September 18, 2013 | Not Reported in Fed. Supp. |
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Outline

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2013 WL 12049072

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

INSTRUMENTATION LABORATORY CO., Plaintiff,

v.

Walter BINDER (Individually and as Trustee
of the 1998 Binder Family Living Trust
Dated June 1, 1998) et al., Defendants.

Case No. 11cv965 DMS (KSC)

Signed 09/18/2013

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

HON. [DANA M. SABRAW](#), United States District Judge

*1 Plaintiff Instrumentation Laboratory Co. (“ILC”) filed this action alleging Defendants' breach of indemnity contract. Judgment in ILC's favor was entered on April 26, 2013. Pending before the Court is ILC's motion for attorneys' fees and related expenses pursuant to [Federal Rule of Civil Procedure 54\(d\)](#), requesting approximately \$5.4 million in attorneys' fees and costs incurred from 2008 through June 2013, any further attorneys' fees and costs incurred in this action, including on appeal, and more than \$420,000 in prejudgment interest on the award. Defendants filed an opposition¹ and ILC replied. Following briefing on Defendants' motion to alter or amend judgment, ILC filed a supplemental declaration with a supplemental request for fees and costs incurred in June 2013. Defendants objected to the supplemental request and ILC responded. Defendants' objection is overruled. ILC's motion is granted to the extent \$4,420,982.90 is awarded for attorneys' fees and costs.

¹ Defendants' evidentiary objections, included in the opposition briefing, are overruled.

Background

This action arises from a Stock Purchase Agreement (“SPA”) whereby Werfen Life Group, S.A. (“Werfen”) acquired all shares of Inova Diagnostics, Inc. (“Inova”) from Defendants. Defendants are Inova founders and the family trusts created by them to hold Inova shares. In connection with the closing, Werfen assigned to ILC all rights it acquired under the SPA, and Inova became ILC's wholly-owned subsidiary. The SPA included a number of representations and warranties, including representations regarding the absence of litigation threats against Inova, and an indemnity clause, in case any representations or warranties proved to be inaccurate. Less than two weeks after the sale closed, Inova's key supplier sued Inova for patent infringement in Germany. Shortly thereafter, the same supplier and another licensee of the same technology issued cease and desist letters threatening patent infringement litigation against Inova in the United States. Inova defended the patent infringement action in Germany and filed a lawsuit in California seeking a declaration that the patent was invalid and not infringed. Both patent actions were settled.

From the inception of the patent litigation, ILC sought indemnity under the SPA from Defendants. Faced with Defendants' refusal, Plaintiff filed this action on May 4, 2011, seeking indemnification for expenses incurred in the underlying patent litigation. After two sets of cross-motions for summary judgment, a judgment in ILC's favor was entered on April 26, 2013, awarding ILC approximately \$5.3 million for the underlying patent litigation expenses and settlement, the right to receive reimbursement for any future settlement payments up to a total of \$5.25 million, and approximately \$1.9 million in prejudgment interest. Pursuant to Section 6.1 of the SPA, ILC now seeks an award of attorneys' fees and costs incurred in prosecuting this action.

Attorneys' Fees

In a diversity case such as this, “the law of the state in which the district court sits determines whether a party is entitled to attorney fees, and the procedure for requesting an award of attorney fees is governed by federal law.” [Carnes v. Zamani](#), 488 F.3d 1057, 1059 (9th Cir. 2007). Accordingly, [Rule 54\(d\)](#) governs the procedure. As noted in the March 28,

2013 Order, because ILC prevailed on its indemnity claim, it is also entitled to recover the attorneys' fees and costs incurred in enforcing the indemnity provision. (Docket no. 104 (Order Denying Defendants' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment ("March 28, 2013 Order") at 32.) Under these circumstances, [California Civil Code Section 1717](#) governs the substance of ILC's request. See [Baldwin Builders v. Coast Plastering Corp.](#), 125 Cal. App. 4th 1339 (2005). ILC's motion is supported by declarations describing attorney work and costs, together with supporting documentation, including numerous itemized invoices. ILC seeks \$131,488.98 for fees billed by attorneys at Fried Frank (Peterson Decl. at 3-4 & n. 2), and \$4,595,596.95² for attorney and paralegal fees billed by Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), for a total of \$4,727,085.93 in fees.

2 The amount of Milbank's fees is calculated as follows: the \$4,463,601.53 total of all invoices through April 2013 (Pl.'s App. 1) is reduced by \$133,918.62 for Fried Frank invoices (*id.*) and \$229,477.86 for Milbank's in-house costs (Pl.'s App. 5), for a total of \$4,100,205.05 for fees incurred through April 2013. Added to this sum is \$235,673.15 for May 2013 fees (Marks Reply Decl. Ex. B) and \$259,718.75 for June 2013 fees (Marks Supp. Decl. Ex. A).

*2 State substantive law determines the amount of recoverable attorneys' fees. [Mangold v. Cal. Pub. Util. Comm'n](#), 67 F.3d 1470, 1478 (9th Cir. 1995). The parties agree that [PLCM Group v. Drexler](#), 22 Cal.4th 1084 (2000), governs the determination of recoverable fees. (Pl.'s Mem. of P.&A. at 7; Opp'n at 2.) The fee award is based on the "lodestar," *i.e.*, the number of hours reasonably expended multiplied by the reasonable hourly rate.... The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." [PLCM Group](#), 22 Cal.4th at 1095. The burden to show the requested fees are reasonable is on the requesting party. [Ajaxo Inc. v. E*Trade Group, Inc.](#), 135 Cal. App. 4th 21, 65 (2005).

To calculate the lodestar, the Court must determine the reasonable hourly rate. [PLCM Group](#), 22 Cal.4th at 1095. Milbank billed approximately 7,527.8³ hours from March 2011 through June 2013 to enforce the indemnity provision. The primary partner on the case, Jerry Marks, billed over 80%

of all partner time and approximately 16% of all attorney time on the case; he has over 25 years of experience in business litigation and corporate matters, including investigations. His hourly rate over the life of the case ranged from \$995 to \$1,160 per hour. The other two partners on the case were Timothy Peterson, with over 25 years of corporate transaction experience, and Robert Liubicic, with 13 years of complex business litigation experience. Mr. Peterson, located at Milbank's London office, was Werfen's lead counsel in the Inova stock acquisition. He participated in the litigation by providing familiarity with the underlying Inova acquisition, and billed at a rate of \$950 to \$1,030 per hour. Mr. Liubicic was involved mainly to assist with expert discovery and summary judgment briefing. His hourly rate was \$900. The primary associate on the case was Elizabeth Koenig. Her work represented almost 70% of all associate time on the case and approximately one third of all time billed. She has seven years of complex business litigation experience, and billed at a rate of \$650 to \$740 per hour. The other associates on the case were James Whooley, Ashlee Lin and Miguel Ruiz, all of whom work in the complex business litigation area. Mr. Whooley, a ninth-year associate, billed at a rate of \$735 to \$780 per hour; Mr. Ruiz, a seventh-year associate, billed at a rate of \$650 per hour; and Ms. Lin, a third-year associate, billed at a rate of \$345 to \$570 per hour. In addition, Milbank employed three paralegals, who collectively billed approximately 33% of the time logged to this case and billed at an hourly rate ranging from \$210 to \$310. (Marks Decl. at 18-20 & Pl.'s App. 4.)

3 The number of Milbank's hours is calculated by adding 6,762.55 for total hours through April 2013 (Pl.'s App. 4), 372 hours billed in May 2013 (Marks Reply Decl. Ex. B), and 393.25 hours billed in June 2013 (Marks Supp. Decl. Ex. A).

The reasonable hourly rate to calculate the lodestar is the rate "prevailing in the community for similar work." [PLCM Group](#), 22 Cal.4th at 1095. The parties disagree whether the pertinent community is San Diego, where the case is pending, or Los Angeles, where ILC's attorneys are located. ILC points to [PLCM](#), where the court noted the fees awarded were at "the prevailing market rate ... where counsel is located." [PLCM](#), 22 Cal.4th at 1096. However, the issue presented here was not presented in [PLCM](#), and the court did not address it. In [Ketchum v. Moses](#), the standard for the applicable rate was refined and articulated as "the general local hourly rate for a fee-bearing case." 24 Cal.4th 1122, 1138 (2001) (emphasis added). In subsequent California Court of Appeal decisions, this standard has been interpreted as referring to the local

community of the court rather than the local community of out-of-town counsel. *Nichols v. City of Taft*, 155 Cal.App.4th 1233, 1242-43 (2007); *Rey v. Madera Unif. Sch. Dist.*, 203 Cal. App. 4th 1223, 1241 (2012); *Ctr for Biological Diversity v. County of San Bernardino*, 188 Cal. App. 4th 603, 617-19 (2010).

*3 A higher rate of non-local attorneys may be found reasonable if the requesting party shows that hiring local counsel was impracticable. *Nichols*, 155 Cal. App. 4th at 1244. Milbank was retained in this case because Mr. Peterson, formerly with Fried Frank, was lead counsel for Werfen in the underlying acquisition of Inova. (Peterson Decl. at 2.) He was subsequently involved in Fried Frank's efforts to negotiate a settlement of ILC's indemnity claim prior to filing this action. (*Id.* at 2-3.) When Mr. Peterson left Fried Frank for Milbank, ILC retained Milbank for further representation on the indemnity issue because of Mr. Peterson's prior experience with the case, which enabled Milbank to efficiently gain an understanding of the underlying transaction, including the terms of the SPA and the due diligence process, both of which were critical to the liability stage of the case. (Marks Reply Decl. at 14-15; Peterson Reply Decl. at 2-3.) In addition, ILC retained Milbank and Mr. Marks because of Milbank's litigation reputation and Mr. Marks' good reputation in the legal community, strong background with mergers and acquisitions litigation, and experience in San Diego courts. (Peterson Reply Decl. at 3.) The burden of showing that retaining counsel local to the court was impracticable is not onerous. *Ctr for Biological Diversity*, 188 Cal. App. 4th at 618. ILC has presented "sufficient and competent evidence that [it] acted in good faith and hiring qualified counsel in the [San Diego] area would be impracticable," as it would serve to increase the number of hours necessary for adequate representation. *Id.* at 618-19. The Court shall therefore apply the prevailing rates in the local community of ILC's counsel as the appropriate benchmark.⁴

⁴ Defendants' Exhibits 2, 3 & 5 are reports of attorneys' fees charged by law firms with offices in San Diego. Accordingly, these exhibits are not helpful in arriving at a reasonable rate in this case.

As the relevant reference point for reasonable hourly rates, ILC offers (a) the rates the Court approved in the March 28 Order for Irell & Manella to indemnify ILC for the patent litigation fees; and (b) the Thomson Reuters Public Rates report for 2012 and 2013 for the one hundred largest national law firms (Marks Decl. Ex. G). Neither reference point is

relevant in this case. This is not a patent case, although patent litigation formed a part of relevant facts. Because Irell & Manella's rates were charged for patent litigation, they are not relevant.⁵ For the most part, the Public Rates Report includes the rates charged nation-wide, while the relevant reference points are the rates charged in the attorneys' local community. However, the report includes a few references to the rates charged by California attorneys and paralegals who represent clients in California's Central and Northern Districts.⁶ The rates charged by Milbank substantially exceed those rates.

⁵ Defendants' Exhibit 7 includes only intellectual property practice fees for 2010, and is therefore not relevant for the same reason.

⁶ The report does not disclose the law firms' locations within California.

To find an appropriate reference point, the Court looks to the CEB and TyMetrix Real Rate Report of 2012 attorneys' fee rates in Los Angeles for partners and associates in the comparable areas of practice.⁷ (Defs' Ex. 6.) The rates are presented by quartile. Based on Milbank's high national ranking (*see* Pl.'s Ex. F), the Court applies rates in the highest quartile. The nature of this case spans two practice areas covered in the report – "non-insurance company litigation" and "corporate and general." (*Id.* at 59-63 (description of categories).) Given Mr. Marks' background in representing corporations, directors, and officers in investigations and mergers and acquisition litigation, in addition to contract disputes and complex business litigation (Marks Decl. at 18-19), the higher partner fee in the area of corporate work is warranted, as the factual background of the case called for experience in this area. Accordingly, the reasonable rate for Mr. Marks is \$842. (Defs' Ex. 6 at 38.) On the other hand, Mr. Liubicic and all associates practice in the complex business litigation area. (Marks Decl. at 19-20.) Generally, the nature of this case was breach of contract with a complex factual background. Accordingly, the more appropriate reference point for Mr. Liubicic and the associates is for work in non-insurance company litigation. The third quartile hourly rate is \$725 for partners and \$475 for associates, which the Court finds to be reasonable for this case. (Defs' Ex. 6 at 50.) The foregoing rates, including the reasonable rate for Mr. Marks, are comparable to the rates in the Public Rates Report of the top one hundred nationally ranked firms for the fees charged by attorneys located in California representing clients in California courts in 2012 and 2013. (Marks Decl. Ex. G.)

7 No comparable report was provided for 2011 and 2013 rates. The report of 2012 rates is adequate, however, as approximately 76% of Milbank's fees and approximately 78% of the hours charged in this case were charged in 2012, while approximately 8% of the fees and hours were charged in 2011, and 16% of the fees and 14% of the hours were charged in 2013.

*4 With respect to Mr. Peterson, who charged a total of 35.75 hours to the case, the Court finds the rates charged to be reasonable. Mr. Peterson is located in London. Neither side has presented any information for prevailing rates in London. Given that the client was informed about his rates in advance and paid them (Peterson Reply Decl. at 3), the Court finds the rates as charged to be reasonable. *See Cintas Corp. v. Perry*, 517 F.3d 459, 469 (7th Cir. 2008).

Finally, in a general manner Defendants appear to object to awarding any "staff fees." (Opp'n at 16.) Their reference to "legal assistant" and "case manager," and the general argument that only "legal work" is compensable (*id.* at 16-17), suggest they object to awarding any fees for the work performed by Jennifer Gibbs, Ricky Windom and Bryan Loper, who provided various types of support to the case. Ms. Gibbs is a certified paralegal in civil litigation with over 20 years of experience, Mr. Windom has a J.D. from Ohio State University, and Mr. Loper has 20 years of experience as a litigation paralegal. (Marks Decl. at 20.) Their work was primarily related to document discovery and coordinating voluminous court filings. (*Id.* at 8, 10 & 20.)

Under California law, paralegal fees may be recovered as attorneys' fees. *Gorman v. Tessajara Dev. Corp.*, 178 Cal. App. 4th 44, 92 (2009); *Guinn v. Dotson*, 23 Cal. App. 4th 262, 268-69 (1994). *See also Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571 (2008) (under the Equal Access to Justice Act, the prevailing party entitled to reasonable attorneys' fees may also recover paralegal fees at prevailing market rates). Whether paralegal fees are recoverable depends on the prevailing practice in the relevant community. *See Guinn*, 23 Cal. App. 4th at 269-70. The fees are recoverable where the prevailing practice is to bill separately for paralegal services at a reasonable market rate. *Id.* Moreover, where, as here, "a contract provides for payment of costs and attorney fees, a court may allow as attorney fees any expenses ordinarily billed to a client which are not included in the overhead component of the attorney's hourly rate." *Id.* at 268.

Milbank's practice was to separately charge for paralegal services on an hourly basis. (*See* Pl.'s Ex. A.) This is consistent with the Court's understanding of the prevailing practice in the legal community. Accordingly, Defendants' argument that no paralegal fees may be awarded is rejected.

Defendants do not object to the hourly rates charged by Milbank's paralegals. The Court notes that the rates charged are consistent with paralegal rates reflected in the Public Rates Report for the fees charged by attorneys located in California representing clients in California courts in 2012 and 2013. (*see* Marks Decl. Ex. G.) The rates are therefore reasonable.

To arrive at the lodestar, the Court must also determine a reasonable amount of hours. *PLCM Group*, 22 Cal.4th at 1095. ILC seeks payment for 7,527.8 hours billed by Milbank attorneys and paralegals on this case. Defendants dispute the reasonableness of Milbank's time.

As an initial matter, the Court notes that the high number of hours Milbank attorneys worked on this case is not surprising, given the complex factual background, which involved an investigation into the due diligence performed in the underlying acquisition of Inova's stock, and a damages analysis that involved evaluation of international patent litigation and a license agreement. In addition, the action was defended with extreme vigor, and nearly every factual and legal issue was aggressively disputed. To the extent the number of hours Milbank's attorneys worked on the case was needed to meet Defendants' efforts, this is not a reason to find the hours unreasonable. "A defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 114 (2009) (internal quotation marks and citations omitted).

*5 Defendants assert that attorney time spent on discovery was excessive and/or duplicative. Milbank attorneys billed 871.5 hours for written discovery and document production (72.25 hours by Mr. Marks, 589.5 hours by Ms. Koenig, and 209.75 hours by Ms. Lin) and 781.75 hours for fact witness depositions not including Mr. Guerrero (335.5 hours by Mr. Marks, 426.5 hours by Ms. Koenig, and 19.75 hours by Ms. Lin). (Defs' Ex. 23 at 232 & 239.) Defendants neither point to any particular billing that was excessive or duplicative, nor explain why the time was excessive or duplicative. The case included 62 requests for production, 47 interrogatories and 17 requests for admissions propounded by Defendants, as well as 20 fact witness depositions, which were evenly

divided between ILC and Defendants. In addition to the large number of witnesses and Defendants' discovery requests, the case was document-intensive, because it included due diligence documents from Inova's acquisition and the files in the underlying patent litigation, among other things, resulting in over 250,000 pages of documents produced by ILC to Defendants.⁸ (Marks Decl. at 7; Tyrell Decl. at 5-9.) Moreover, the work was appropriately staffed with as much work delegated to associates and paralegals as possible.⁹ (Marks Decl. at 7-11& 15-16.) The Court finds the number of hours worked on fact discovery reasonable.

⁸ Because Inova was acquired by ILC, the majority of the transaction-related documents were out of Defendants' possession. It was therefore incumbent on ILC to produce them. (Tyrell Decl. at 4 & 5.) Due to the highly contentious nature of the case, it is understandable why ILC did not accept Defendants' offer to let them sort through Inova's computer records. (*See id.* at 5-6.) Furthermore, Defendants complain about delay in producing some of the documents to them. (*Id.* at 7-9.) As they do not show that the delay resulted in any increase in the number of hours spent by Milbank on the document production, this is irrelevant to determining the reasonable number of hours.

⁹ Overall, partners billed approximately 19% of all hours on the case, associates billed approximately 48%, and paralegals billed approximately 33%.

Defendants next contend that attorneys' fees charged for expert discovery were excessive because two attorneys worked together on preparing for depositions of three experts — Messrs. Smegal, Weinstein and Daly. According to Defendants, Mr. Liubicic and Ms. Lin worked 24 and 13 hours, respectively, in preparing for Mr. Smegal's deposition; they worked 20 and 15 hours, respectively, in preparing Mr. Weinstein for deposition; and they worked 12 and 9 hours, respectively, in preparing Mr. Daly for deposition. (Defs' Memo. of P.&A. at 14-15.) Given the document-intensive nature of the case, and the breadth of issues raised by the case, the Court does not find it excessive that associates sometimes assisted in expert preparations, especially when, as here, the amount of hours expended was modest. The suggestion that the fees incurred in preparing Mr. Weinstein for deposition were excessive because the deposition did not take place after Defendants withdrew their subpoena (*see* Marks Reply Decl. at 7) is rejected.

Defendants also challenge the number of attorney hours expended on preparing expert reports. ILC retained three experts who issued reports of their opinions, as well as reports in rebuttal to Defendants' four experts. (Marks Decl. at 11 & Marks Reply Decl. at 6-7.) According to Defendants, Messrs. Marks and Liubicic and Ms. Koenig collectively spent 107 hours working on expert reports. (Opp'n at 15.) Considering that a least six expert reports exist, the Court does not find the amount of time excessive or duplicative.

Furthermore, Defendants assert that attorney time billed on two sets of cross-motions for summary judgment was excessive and duplicative. The first set of cross-motions involved approximately 2,500 pages of filings, and the second set involved approximately 4,000 pages, including voluminous exhibits, declarations, and evidentiary objections. In their briefing, Defendants vigorously defended this action, raising every conceivable legal and factual issue and objecting to nearly every piece of evidence submitted by ILC. According to Defendants, Milbank attorneys billed approximately 737 hours drafting their summary judgment motion, responding to Defendants' motion and replying to Defendants' opposition. (Opp'n at 13-14.) With respect to the second set of cross-motions, ILC's attorneys billed 414 hours. (*Id.* at 14.) Although the number of hours billed is high and at times as many as five attorneys worked on the same filing, the Court finds the time billed reasonable, considering that (a) the briefing on the first set of cross-motions occurred simultaneously with fact and expert discovery, (*see* Marks Decl. at 10 & 12), (b) in the context of concurrent cross-motions the time schedule for filing of responsive papers was very compressed, (c) a large number of legal and factual issues were raised, and (d) the filings themselves were extremely voluminous.

*6 Defendants also object to the time billed for discovery related to Mr. Guerrero. In its opposition to Defendants' first set of cross-motions for summary judgment, ILC filed Mr. Guerrero's declaration. Mr. Guerrero had not previously been disclosed as a potential witness. Accordingly, Defendants were given an opportunity to depose him and seek a related production of documents. (Docket no. 73 (Order (1) Denying Defs' Mot. for Summ. J.; (2) Granting in Part and Denying in Part Pl.'s Mot. for Summ. J.; and (3) Denying Defs' Mot. for Partial Summ. J.) at 6 & 14.) Defendants argue that they should not have to pay any of ILC's attorneys' fees incurred for this discovery, claiming that such fees were incurred as a result of the untimely disclosure. (Opp'n at

15-16.) Defendants have presented no reason to conclude that the same fees would not have been incurred had the discovery been taken in the normal schedule. Accordingly, their argument is rejected.

Next, Defendants contend that the time billed to file the instant motion and respond to Defendants' opposition and to oppose Defendants' motion to amend judgment "is excessive and should be reduced." (Opp'n at 16; *see also* Obj. to Supp. Marks Decl.) General assertions such as this, "unaccompanied by any citation to the record or any explanation of which fees were unreasonable or duplicative" provides no basis to deny a properly supported request. *See Tuschler Development Enters, Inc. v. San Diego Unif. Port Dist.*, 106 Cal. App. 4th 1219, 1248 (2003).

Based on the foregoing, Milbank's fees shall be based on the actual number of hours billed and the hourly rates as adjusted above. Based on the September 5, 2013 Marks declaration, the total reduction is \$1,010,920.65.¹⁰ Accordingly, the lodestar for Milbank's fees is \$3,584,676.30.¹¹

¹⁰ This amount consists of adjustments of \$311,564.40 for Mr. Marks' fees, \$42,437.50 for Mr. Liubicic's fees, \$556,523.75 for Ms. Koenig's fees, \$58,185 for Mr. Wholley's fees, \$30,353.75 for Ms. Lin's fees, and \$11,856.25 for Mr. Ruiz' fees. The calculation of each of the foregoing is included in the Appendix at the end of this order.

¹¹ The request for \$4,595,596.95 less \$1,010,920.65.

Finally, ILC seeks reimbursement for \$131,488.98 for the fees billed by attorneys at Fried Frank's London office.¹² (Peterson Decl. at 3-4 & n. 2). Fried Frank's London office employed two partners and three associates on the case, who billed 260.9 hours on the attempts to enforce the indemnity clause without litigation, and whose average billing rate was \$637.61 per hour. (*Id.* at 4-5 & Pl.'s Ex. B.) The request is supported by a detailed declaration describing the work and supporting documentation, which demonstrate that the requested fee is reasonable. Defendants' entire opposition to this request is that Fried Frank invoices warrant close scrutiny because they may overlap with the underlying patent litigation and contain duplication due to Mr. Peterson's transition to Milbank. (Opp'n at 11 n.10.) A similar argument that billings require "careful review" by the court was rejected in *Tuschler Development* for failure to support the bare assertion with any explanation of which fees were

unreasonable or duplicative, or citation to the relevant record. 106 Cal. App. 3d at 1248. Defendants' argument is therefore rejected. The Court finds the lodestar for Fried Frank fees is \$131,488.98.

¹² The client is located in Europe. (Peterson Decl. at 5.)

After calculating the lodestar, the court considers whether the total award so calculated is reasonable. *PLCM Group*, 22 Cal.4th at 1095-96. In adjusting the lodestar, the court may consider: "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." *Id.* at 1096 (internal quotation marks and citation omitted). Under the circumstances of this case, the lodestar award is reasonable without further adjustment, in light of the highly disputed nature of this litigation, complexity of the evidence, and success. The attorneys' fee award is therefore \$3,716,165.27.¹³

¹³ \$3,584,676.30 for Milbank's fees and \$131,488.98 for Fried Frank's fees.

Costs

*7 In addition to attorneys' fees, ILC also seeks reimbursement of its costs. Rule 54(d) contains two separate provisions for costs. To request taxable costs, the prevailing party must file a bill of costs with the clerk. Civ. Local Rule 54.1(a). Taxable costs are taxed by the clerk rather than the court. Fed. R. Civ. Proc. 54(d)(1); Civ. Local Rule 54.1. The categories of taxable costs are circumscribed by 28 U.S.C. Section 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *see also* Civ. Loc. Rule 54.1. For example, some of ILC's costs which fall in this category are \$350 for the court filing fee and \$2,067.25 for service of process. (Pl's App. 5.) *See* 28 U.S.C. § 1920(1) & Civ. Loc. Rule 54.1(b).

ILC has not filed a bill of costs and has not obtained prior leave of Court to forego the procedure set forth in Rule 54(d)(1) and Civil Local Rule 54.1(a).¹⁴ Defendants object to ILC's request for taxable costs solely on this basis and do not claim to be prejudiced. Although Defendants are correct that ILC should have timely filed a bill of costs with the Clerk, ILC's request is granted notwithstanding failure to follow proper procedure. Had ILC filed a bill of costs, its taxable costs would be awarded. *See* Civ. Loc. Rule 54.1(a). ILC

could have sought and obtained leave of Court to include taxable costs in its motion for attorneys' fees. (See [Fed. R. Civ. Proc. 54\(d\)\(1\)](#)). Furthermore, because the SPA provides for recovery of all reasonable litigation expenses, the Court will not deny ILC's request based solely on a point of procedure that does not prejudice Defendants in any way. See [Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co.](#), 47 Cal. App. 4th 464, 491-92 (1996). ILC's request for taxable costs is therefore granted.

¹⁴ Instead, ILC offered to file a Bill of Costs if the Court held ILC could not recover taxable costs by a [Rule 54\(d\)\(2\)](#) motion. (Mem. of P.&A. at 18 n.16.) The Court does not approve this procedure, as [Rule 54\(d\)\(1\)](#) contemplates seeking leave of Court before filing a [Rule 54\(d\)\(2\)](#) motion.

ILC also requests non-taxable costs. The total amount of ILC's request for costs is \$704,817.63.¹⁵ In contrast to taxable costs, nontaxable costs are recoverable on a motion to the court under [Rule 54\(d\)\(2\)](#) along with attorney's fees. [Fed. R. Civ. Proc. 54\(d\)\(2\)](#) ("claim for attorney's fees and related nontaxable expenses"). Federal law provides the procedure for recovery of nontaxable costs and California law determines whether they are recoverable. See [MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.](#), 197 F.3d 1276, 1281-82 (9th Cir. 1999). ILC's request for nontaxable costs includes supporting documentation. (Marks Decl. at 22-26; Peterson Decl. at 5 & Pl.'s Exs B-E.)

¹⁵ This amount is comprised of \$229, 477.86 for Milbank in-house costs through April 2013 (Pl.'s App. 5), \$5,005.26 for Milbank May 2013 in-house costs (Marks Reply Decl. Ex. B), \$12,562.08 for Milbank June 2013 in-house costs (Marks Suppl. Decl. Ex. A), \$2,429.65 for Fried Frank in-house costs (Peterson Decl. at 5), \$420,284.08 for expert fees (Pl.'s App. 2), and \$35,058.70 for document processing vendors. (Pl.'s App. 3).

Defendants' challenge to the nontaxable costs is not based on [California Code of Civil Procedure 1033.5](#). Because the SPA provides for a broader recovery than allowed by [Section 1033.5](#). (SPA ¶¶ 6.1 & 6.5(d)), the Court's review is not limited by [section 1033.5](#). See [Arntz Contracting](#), 47 Cal. App. 4th at 491-92 ("While it is reasonable to interpret general contractual cost provision by reference to an established statutory definition of costs," where sophisticated parties freely choose to provide "a broader standard authorizing

recovery of reasonable litigation charges and expenses," that standard may be enforced.).

*8 Defendants object to the expert fees charged by Gilbert Matthews and Michelle Patterson of Sutter Securities, who prepared a report regarding due diligence in the Inova acquisition. Mr. Matthews also gave deposition testimony regarding the report. ILC seeks reimbursement of \$102,141.81 for the fees paid Sutter Securities for these services. (See Pl.'s App. 2.)¹⁶ Defendants' main complaint is that Mr. Matthews and Ms. Patterson attended a conference in London and continued on to family vacations in England while they were writing the report, suggesting "run-amok billing." (Opp'n at 20.) According to Mr. Matthews' deposition testimony, he and Ms. Patterson worked long hours during their respective family vacations to prepare the report, foregoing spending time with their families. (Defs' Ex. 19.) Defendants' suggestion that the experts billed for time when they were not working is contradicted by the evidence. (*Id.*) Their argument to reduce the fees charged by Sutter Securities as unreasonable is therefore rejected.

¹⁶ ILC paid \$50,097.04 less than the amount billed by Sutter Securities. (*Cf.* Pl.'s Ex. C at 338-341.)

Defendants argue that expenses for travel are recoverable only if the party made a good faith attempt, but was unable to locate a competent local attorney to take the case. Based on the broad wording of the SPA, and the discussion about local counsel in the context of hourly rates, this argument is rejected. ILC requests \$18,549.39 mostly for travel between Los Angeles and San Diego to attend depositions and court hearings. Upon review of the supporting documentation together with the testimony about the timing, staffing, and location of depositions, the Court finds the travel charges reasonable. (See Pl.'s Ex. Eat 436-38; Marks Decl. at 23; *see also id.* at 9-11, 13, 15-16.)

Defendants object to ILC's \$86,714.48 request for Lexis, Westlaw, Pacer and other computerized research. (*Cf.* Pl.'s App. 5 & Pl.'s Ex. E at 491-504.) Defendants note that not all courts award computerized legal research costs; however, in this case, the broad wording of the SPA allows for any type of reasonable expense. Furthermore, given the large number of disputed legal and factual issues in this case, and upon review of the itemized legal research entries, the requested amount is reasonable.

Finally. Defendants object to a \$1,758.18 charge for word processing. (See Pl.'s App. 5.) The word processing charges appear reasonable given the large volume of filings in this case. Because it appears these charges were passed on to the client (cf. Pl.'s Ex. E at 553-54 & Pl.'s Ex. A), and based on the broad wording of the SPA, ILC's request for this item is granted.

Prejudgment Interest

Finally, ILC requests \$421,906.24 in prejudgment interest on the award of attorneys' fees and costs. In diversity cases, state law applies to the issues whether prejudgment interest should be awarded and the rate of interest. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 961 (9th Cir. 2008); *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1107-08 (9th Cir. 1998). California Civil Code Section 3287(a) provides for prejudgment interest when a person "is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day" Such prejudgment interest is therefore calculated on the amount recovered as damages, and "is an element of compensatory damages, not a court cost." *Bodell Constr. Co. v. Trustees of the Cal. State University*, 62 Cal. App. 4th 1508, 1526 (1998). Recovery of prejudgment interest on attorneys' fees and costs

therefore depends on whether ILC's recovery is an element of compensatory damages. As stated in the March 28 Order, because the attorneys' fee clause in the SPA contemplates an action to enforce the indemnity obligation, such fees and costs are not damages, but are recoverable as prevailing party fees. (March 28, 2013 Order at 33, citing *Baldwin Builders v. Coast Plastering Corp.*, 125 Cal. App. 4th 1339 (2005).) See also *Berkla v. Corel Corp.*, 302 F.3d 909, 919 (9th Cir. 2002) (applying Cal. law). ILC's request for prejudgment interest on its award of attorneys' fees and costs is therefore denied.

Conclusion

*9 For the foregoing reasons, ILC's motion is granted to the extent of \$3,716,165.27 for attorneys' fees and \$704,817.63 for costs. The motion is denied in all other respects. The request for any future attorneys' fees and costs incurred in this action, including on appeal, is denied without prejudice.

IT IS SO ORDERED.

APPENDIX

Milbank Hourly Rate Adjustments

Jerry Marks			Robert Liubicic				
Rate	Hours	Total	Rate	Hours	Total		
2011	\$995	67.50	\$67,162.50	2011	0.00	0.00	
2012	1,100	971.30	1,068,430.00	2012	\$900	220.50	\$198,450.00
2013	1,100	159.25	184,730.00	2013	1,000	14.00	14,000.00
Total		1,198.05	\$1,320,322.50	Total		234.50	\$212,450.00
Adj. Rate	\$842	1,198.05	\$1,008,758.10	Adj. Rate	\$725	234.50	\$170,012.50
Decrease			\$311,564.40	Decrease			\$42,437.50
Elizabeth Koenig			James Whooley				
Rate	Hours	Total	Rate	Hours	Total		
2011	\$650	291.25	\$189,312.50	2011	0.00	0.00	
2012	695	1,986.00	1,380,270.00	2012	\$735	305.50	\$114,542.50

2013	740	259.00	191,660.00	2013	780	291.00	226,980.00
Total		2,536.25	\$1,761,242.50	Total		596.50	\$341,522.50
Adj. Rate	\$475	2,536.25	\$1,204,718.75	Adj. Rate	\$475	596.50	\$283,337.50
Decrease			\$556,523.75	Decrease			\$58,185.00

Ashlee Lin				Miguel Ruiz			
	Rate	Hours	Total		Rate	Hours	Total
2011	\$460	118.00	\$54,280.00	2011	\$650	67.75	\$44,037.50
2012	570	269.25	153,472.50	2012		0.00	0.00
2013	645	38.50	24,832.50	2013		0.00	0.00
Total		425.75	\$232,585.00	Total		67.75	\$44,037.50
Adj. Rate	\$475	425.75	\$202,231.25	Adj. Rate	\$475	67.75	\$32,181.25
Decrease			\$30,353.75	Decrease			\$11,856.25

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EXHIBIT H

Johnson v. Astrue

United States District Court, N.D. California. | August 27, 2008 | Not Reported in F.Supp.2d | 2008
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Outline

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2008 WL 3984599

Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

Robin A. JOHNSON, Plaintiff,

v.

Michael J. ASTRUE, Defendant.

No. C-07-2387 EMC.

|
Docket No. 18.

|
Aug. 27, 2008.

Attorneys and Law Firms

[Barbara Marie Rizzo](#), Attorney at Law, Moss Beach, CA, for Plaintiff.

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**ORDER GRANTING PLAINTIFF'S
MOTION FOR AWARD OF ATTORNEY
FEES, COSTS, AND EXPENSES**

[EDWARD M. CHEN](#), United States Magistrate Judge.

*1 Previously, the Court issued an order granting in part Plaintiff's motion to remand for further administrative proceedings. *See* Docket No. 15 (order, filed on 4/25/2008). Now pending is Plaintiff's motion for attorney's fees, costs, and expenses. Having reviewed the parties' briefs and accompanying submissions, the Court hereby **GRANTS** Plaintiff's motion.¹

¹ The Court issues this order based on the parties' written submissions. Neither party asked for a hearing on the motion, and the Court also concluded that no hearing was necessary.

I. DISCUSSION

A. Attorney's Fees

The Equal Access to Justice Act ("EAJA") provides that,

[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). Under the statute,

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (I) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$ 125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

Id. § 2412(d)(2)(A).

Here, the Commissioner does not dispute that Plaintiff is entitled to some attorney's fees under the EAJA. Rather, the Commissioner's sole dispute is that the fees requested by Plaintiff are not reasonable. More specifically, the Commissioner contends that Plaintiff should be compensated for only 35 hours of attorney time, not 47 hours.² See Opp'n at 1. The Commissioner does not object to the hourly rate requested by Plaintiff (*i.e.*, \$166.46 per hour).

² Six of the 47 hours were related to the currently pending fee and cost motion. See Rizzo Decl., Ex. A.

The Court finds that the Commissioner's position is not persuasive. Neither of his main arguments is convincing. First, while the instant case was not overly complex and fairly routine, the Commissioner's own authority indicates that an award of 47 hours would not be out of line-particularly where, as here, some of the 47 hours were related to the currently pending fee and cost motion. See *Harden v. Commissioner*, 497 F.Supp.2d 1214, 1215-16 (D.Or.2007) (noting, that absent unusual circumstances or complexity, 20-40 hours is a reasonable amount of time to spend on a social security case; ultimately awarding fees for 40 hours of time); *Patterson v. Apfel*, 99 F.Supp.2d 1212, 1215 n. 2 (C.D.Cal.2000) (citing cases in which as many as 41-46.5 hours of time were compensated); see also *Hardy v. Callahan*, No. 9:96-CV-257, 1997 U.S. Dist. LEXIS 12161, at *27-29, 1997 WL 470355 & n. 10 (E.D.Tex.1997) (awarding fees for 46.5 hours, including 6.5 hours for fee petition; noting that "the typical EAJA application in social security cases claims between thirty and forty hours," and concluding that "this appears to be an appropriate average" for "relatively non-complex" social security cases).

*2 Second, the Commissioner's contention that Plaintiff's counsel should not have billed multiple times for legal research given her experience-*i.e.*, the research was not necessary or redundant-is unconvincing. The time entries that the Commissioner cites show that legal research was conducted in conjunction with the drafting of a brief (*e.g.*, opening motion for summary judgment, reply brief, fee and cost motion). The fact that some research is required is not remarkable and the total hours spent per entry appears reasonable.

The Court therefore awards Plaintiff the full fee award requested, based on 47 hours. In addition, the Court awards

Plaintiff an additional fee based on the time spent by counsel to review and prepare a reply to the Commissioner's opposition to the fee motion. Plaintiff's attorney spent 10 hours on these tasks. The Court concludes that this was a reasonable amount of time. Notably, the Commissioner did not file any brief contesting the reasonableness of this time.

To summarize, the Court awards Plaintiff a total of \$9,488.22 in attorney's fees, representing 57 hours at a rate of \$166.46.

B. Costs
Under the EAJA,

[e]xcept as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title [28 U.S.C. § 1920], but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C. § 2412(a)(1).

In its opposition, the Commissioner does not dispute that Plaintiff is entitled to costs. Instead, the Commissioner's only argument is that any award of costs pursuant to § 1920 should be paid, not by his own agency, but rather by the Treasury Department. See 28 U.S.C. § 2412(c)(1) ("Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title [28 U.S.C. §§ 2414] and shall be in addition to any relief provided in the judgment."); *id.* § 2414 ("Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the

Court of International Trade against the United States shall be made on settlements by the Secretary of the Treasury.”).

The Court agrees with the Commissioner that the only items that qualify as costs under § 1920 are the filing fee (\$350) and the copying costs (\$37).³ See Rizzo Decl., Ex. B. However, the Court does not agree that Plaintiff must seek these costs from the Treasury Department directly. While the Commissioner may be right that costs ultimately come out of the Treasury Department's pocket, the Court is not aware of any requirement that, in litigation such as this, Plaintiff seek the costs from the Treasury Department instead of the Commissioner. Both the Commissioner and the Treasury Department are part of the United States government. Costs are normally assessed against the party who loses. The Court therefore orders that costs in the amount of \$387 be paid by the Commissioner.

³ In the opening brief, Plaintiff asked for copying costs in the amount of \$35.40. In the reply brief, Plaintiff asked for an additional \$1.60 for copying costs.

C. Expenses

*3 As noted above, the EAJA authorizes the award of not only reasonable attorney's fees but also reasonable expenses. See 28 U.S.C. § 2412(d)(1)(A). The Commissioner challenges only one type of expense sought by Plaintiff-*i.e.*, the expense of electronic legal research. According to the Commissioner, the expense of electronic legal research is an overhead expense which is generally not reimbursable. The Commissioner also argues that “allowing a reimbursement for counsel's time performing legal research as well as the computer charges [would] be duplicative.” Opp'n at 6.

The Court does not agree. Other courts have routinely awarded the expense of electronic legal research pursuant to the EAJA. See, e.g., *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir.1988) (“[W]e reject the government's argument that telephone, reasonable travel, postage, and computerized research expenses are not compensable under the EAJA.”); *Washington Dep't of Wildlife v. Stubblefield*, 739 F.Supp. 1428, 1433 (W.D.Wash.1989) (“The expense of computerized legal research is ... recoverable.”). And notably, the very

authority cited by the Commissioner indicates that it would not be duplicative if an attorney were to charge both for her time spent on legal research as well as the computer fee itself. See *Haroco v. American Nat'l Bank & Trust of Chicago*, 38 F.3d 1429, 1440-41 (7th Cir.2004) (stating that “computer research costs ‘are more akin to awards under attorney's fees provisions than under costs’ and that “such costs are indeed to be considered attorney's fees”; then stating that “[t]he added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching” such that “we see no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee”); see also *In re Media Vision Tech. Secs. Litig.*, 913 F.Supp. 1362, 1371 (N.D.Cal.1995) (stating that “Lexis is an essential tool of a modern efficient office” and, “[a]s such, it saves lawyers' time by increasing the efficacy of legal research”) (internal quotation marks omitted).

Accordingly, the Court awards all of Plaintiff's expenses, including that for electronic legal research, in the amount of \$533.83.⁴

⁴ In the opening brief, Plaintiff asked for expenses in the amount of \$449.23. In the reply brief, Plaintiff asked for an additional \$84.60 for expenses.

II. CONCLUSION

For the foregoing reasons, the Court grants Plaintiff's motion and awards \$9,488.22 in attorney's fees, \$387 in costs, and \$533.83 in expenses. Pursuant to Plaintiff's request, the attorney's fees shall be paid directly to his attorney. See Johnson Decl. ¶¶ 3-4.

This order disposes of Docket No. 18.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3984599, 134 Soc.Sec.Rep.Serv. 4

EXHIBIT I

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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

Zetta Jet USA, Inc.

Debtor(s).

Jonathan D. King

Plaintiff(s),

v.

Bombardier Aerospace Corporation,
CAVIC Aviation Leasing (Ireland) 22 Co.
Designated Activity Company

Defendant(s).

CHAPTER 7
Case No.: 2:17-bk-21386-SK
Adv. No.: 2:19-ap-01147-SK

**REDACTED COURT'S MEMORANDUM OF
DECISION ON "MOTION TO DISMISS
COUNTS I, III, IV, V, VI, AND VII OF THE
TRUSTEE'S ADVERSARY COMPLAINT,"
DOCKET #59, FILED BY CAVIC AVIATION
LEASING (IRELAND) 22 CO. DESIGNATED
ACTIVITY COMPANY**

Date: 9/30/2020
Time: 9:00 a.m.
Courtroom: 1575

1 On 9/30/20 at 9:00 a.m., the Court heard the “Motion to Dismiss Counts I, III, IV, V, VI, and VII of
2 the Trustee’s Adversary Complaint” (Motion), Docket #59, filed by CAVIC Aviation Leasing
3 (Ireland) 22 Co. Designated Activity Company (CAVIC). Appearances were as noted on the record.
4 All parties were given an opportunity to be heard. At the conclusion of the 9/30/20 hearing, the
5 Court took the Motion under submission.

6
7 On 10/7/20, the Court issued a Memorandum of Decision regarding the Motion. Docket #157. On
8 10/10/20, Bombardier Aerospace Corporation and CAVIC Aviation Leasing (Ireland) 22 Co.
9 Designated Activity Company filed a “Joint Unopposed Emergency Motion to Remove
10 Memorandum Decisions and Substitute Them with the Attached Redacted Memorandum Decisions”
11 (Redaction Motion). Docket #161. On 10/13/20, the Court entered an order granting the Redaction
12 Motion. Docket #163. A copy of the Court’s Memorandum of Decision, which was redacted per
13 Docket #163, is attached hereto.

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Date: October 15, 2020


Sandra R. Klein
United States Bankruptcy Judge

Before the Court is a “Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustee’s Adversary Complaint” (Motion) filed by CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company (CAVIC). AP Docket #59.¹ On 2/14/20, Jonathan D. King (King), in his capacity as chapter 7 trustee (Trustee) of Zetta Jet USA, Inc. (Zetta USA) and Zetta Jet PTE, Ltd. (Zetta Singapore, and together with Zetta USA, the Debtors), filed an “Opposition to CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company’s . . . Motion to Dismiss Counts I, III, IV, V, VI, and VII of the Trustee’s Adversary Complaint” (Opposition). AP Docket #75. On 2/28/20, CAVIC filed a “Reply in Further Support of Their Motion to Dismiss Counts I, III, IV-VII of the Trustee’s Adversary Complaint” (Reply). AP Docket #82.

On 9/30/20, the Court held a hearing on the Motion, during which counsel for the Trustee and CAVIC appeared and were given an opportunity to be heard. At the conclusion of the hearing, the Court took the Motion under submission. Based on the argument in the pleadings and argument of counsel during the hearing, and for the reasons stated in the analysis below, the Court rules as follows: Counts I, III, IV, V, VI, and VII are dismissed with leave to amend. This memorandum constitutes the Court’s findings of fact and conclusions of law regarding the legal sufficiency of the counts at issue in the Motion.

I. Facts

a. Bankruptcy Cases

On 9/15/17 (Petition Date), Zetta USA and Zetta Singapore filed chapter 11 petitions (collectively, Cases). Zetta USA Docket #1; Zetta Singapore Docket #1. King was appointed as the chapter 11 trustee, and after the Cases were converted, he was appointed as the chapter 7 trustee. Zetta USA Docket #s 159, 452, 458.

b. Adversary Proceeding

On 5/21/19, the Trustee filed an adversary complaint (Complaint) against CAVIC and Bombardier Aerospace Corporation (Bombardier), which alleges that the Debtors, CAVIC, and Bombardier were parties to a series of complex leveraged lease financing transactions involving four Bombardier Global 6000 Aircraft (Four Aircraft).² AP Docket #1. According to the Complaint, CAVIC financed the Four Aircraft and the parties intended that the Debtors would pay the financed amount, plus interest, over time under disguised financing arrangements. AP Docket #1.

¹ All references to “Zetta USA Docket” are to the docket in In re Zetta Jet USA, Inc., 17-bk-21386-SK. All references to “Zetta Singapore Docket” are to the docket in In re Zetta Jet PTE Ltd., 17-bk-21387-SK. All references to “AP Docket” are to the docket in Jonathan D. King v. CAVIC Aviation Leasing (Ireland) 22 Co. Designated Activity Company et al., 19-ap-01147-SK (AP).

² The Four Aircraft are Bombardier Global 6000 aircraft with manufacturer serial numbers ending in: 1) 9764 (Aircraft 9764); 2) 9740 (Aircraft 9740); 3) 9716 (Aircraft 9716); and 4) 9788 (Aircraft 9788). Complaint ¶ 1; Ex. I.

The Complaint contains the following counts against the following parties that are at issue in the Motion:

- 1) Declaratory Judgment that the Financed Leases³ Are Financings and Not True Leases, against CAVIC (Count I);
- 2) Declaratory Judgment that CAVIC's Security Interest in the Refund⁴ Is Not Perfected, against CAVIC (Count III);
- 3) The Unperfected Security Interest in the Refund Must Be Avoided and Preserved for the Benefit of the Debtors' Estate, under 11 U.S.C. § 544(a)(1), against CAVIC (Count IV);
- 4) The Right to the Refund Is Recoverable for the Benefit of the Estate, under 11 U.S.C. § 550(a), against CAVIC (Count V);
- 5) The Refund Is Property of the Estate, under 11 U.S.C. § 542(a), against Bombardier (Count VI); and
- 6) Avoidance and Recovery of Preferential Transfers, under 11 U.S.C. §§ 547 and 550, against CAVIC (Count VII).

Complaint ¶¶ 123-33, 140-70.

II. Legal Standards

a. Motions to Dismiss Generally

Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP or Rules) applies in adversary proceedings and provides that a party may assert the defense of "failure to state a claim upon which relief can be granted." Fed. R. Bankr. P. 7012(b); In re Kvassay, 2014 WL 2446181, at *9 (B.A.P. 9th Cir. May 30, 2014). A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the allegations in the complaint. Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001); Student Loan Mktg. Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998). "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)).

In resolving a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, and accept all well-pled factual allegations as true. Johnson, 534 F.3d at 1122; Knox v. Davis, 260 F.3d 1009, 1012 (9th Cir. 2001). The Court, however, is not bound by conclusory statements, statements of law, and

³ The Complaint defines the: 1) "Delivered Financed Leases" as the lease financing transactions involving Aircraft 9764, 9716, and 9740; and 2) the "Undelivered Financed Lease" as the lease financing transaction that was intended to result in the manufacturing and delivery of Aircraft 9788. Complaint ¶ 2. The "Financed Leases" are defined as the "Delivered Financed Leases" and the "Undelivered Financed Lease." Id.

⁴ The "Refund" is \$30 million (\$30 Million PDP or PDP) paid to Bombardier to manufacture Aircraft 9788 pursuant to the "Aircraft Purchase Agreement" (APA). Complaint ¶ 1, Ex. A.

unwarranted inferences cast as factual allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (citations omitted). A complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.” Id. at 562 (emphasis in original) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).

In Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), the Supreme Court elaborated on the Twombly standard:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

The allegations of a complaint, along with other materials properly before the court on a motion to dismiss, can establish an absolute bar to recovery. See Weisbuch v. Cty. of L.A., 119 F.3d 778, 783 n.1 (9th Cir. 1997) (“If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.”). Generally, when ruling on a Rule 12(b)(6) motion to dismiss, courts cannot consider material outside the pleadings. Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (9th Cir. 2018); Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir. 2001). If matters outside of the pleadings are “presented to and not excluded by the court,” the motion to dismiss is converted to a motion for summary judgment under Rule 56 and all parties must be given a “reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). There are, however, two exceptions to this rule: 1) matters that the Court can take judicial notice of under Rule 201 of the Federal Rules of Evidence; and 2) the “incorporation-by-reference doctrine.” Khoja, 899 F.3d at 998. The incorporation-by reference doctrine treats certain documents as if they were “part of the complaint itself.” Id. at 1002.

The party seeking dismissal under Rule 12(b)(6) has the burden of proof. In re Reed, 532 B.R. 82, 88 (Bankr. N.D. Ill. 2015); In re Enron Corp., 316 B.R. 434, 449 (Bankr. S.D.N.Y. 2004).

III. Argument and Analysis

a. Count I

1. Motion

i. Recharacterization

CAVIC argues that the Trustee has the burden of proof regarding recharacterization. Motion at 17 (citing Hitchin Post Steak Co. v. General Electric Capital Corp. (In re HP Distribution, LLP), 436 B.R. 679, 682 (Bankr. D. Kan. 2010); In re Pillowtex, 349 F.3d 711, 716 (3d Cir. 2003)). It highlights that there is a rebuttable presumption that a transaction documented as a lease is a lease agreement rather than a security agreement, and the party seeking recharacterization has the burden of rebutting that presumption by proving the elements of Uniform Commercial Code (UCC) § 1-204(b)⁵ or establishing that the economic realities of the transaction created a security agreement. Id. (citing Mason v. Heller Fin. Leasing (In re JII Liquidating, Inc.), 341 B.R. 256, 259 (Bankr. N.D. Ill. 2006); Royal T Energy v. ENGS Com. Fin. Co. (In re Royal T Energy), 596 B.R. 525, 530 (Bankr. E.D. Tex. 2019)). According to CAVIC, California law applies UCC § 1-203, which enumerates six factors that do not create a security interest merely because of their presence. Id. at 18 (citing Cal. Com. Code § 1203; WorldCom Inc. v. Gen. Elec. Global Asset Mgmt. Servs. (In re WorldCom, Inc.), 339 B.R. 56, 71 (Bankr. S.D.N.Y. 2006)).

A. Aircraft 9788

CAVIC argues that Aircraft 9788's "lease" cannot be recharacterized because: 1) the aircraft was never delivered to the lessor; 2) the "Lease Term" did not begin until delivery of the aircraft, so "Zetta Jet" did not have a valid lease; and 3) a precondition to the "Lessor's" obligations to lease the aircraft to Zetta USA was delivery of the aircraft to the "Owner," ZJ6000-4 Statutory Trust. Motion at 18 (citing Complaint ¶¶ 2; Ex. M; Ex. V). CAVIC argues that the unsigned "Leasing proposals for 2 Bombardier's [sic] Global 6000 jets" dated 11/17/16 (Term Sheet), Ex. D, is irrelevant to Aircraft 9788 because there was no lease for that aircraft. Id. at 19. According to CAVIC, UCC § 1-203 and "applicable case law" provide for recharacterization only of a transaction in the form of a lease, and whether the "lease" for Aircraft 9788 is a true lease or a disguised financing is moot because without a valid agreement there is nothing to recharacterize. Id. at 18.

B. Aircraft 9716, 9740, and 9764

CAVIC asserts that the Complaint does not plead facts showing that the re-characterization claim regarding Aircraft 9716, 9740, and 9764 is plausible because the Trustee provides no information regarding the Financed Leases for those aircraft. Motion at 19. According to CAVIC, the Complaint includes the Term Sheet between AVIC International Leasing Co. Ltd. (AVIC) and Zetta Singapore to support its

⁵ CAVIC cites UCC § 1-204(b), which addresses "value" and does not contain a subsection (b).

recharacterization claims, and the Complaint indicates that the Term Sheet applies “*only to the financing arrangements for Aircraft 9764 and 9788.*” *Id.* (emphasis in original) (citing Complaint ¶¶ 70). CAVIC contends that the Term Sheet provides no support for recharacterizing *any* leases for Aircraft 9716 and 9740, which were executed on 5/24/16 and 9/16/16, respectively. *Id.* (emphasis in original).

CAVIC argues that the Term Sheet does not establish a plausible claim for recharacterization of Aircraft 9764’s lease because: 1) the Term Sheet is unsigned; 2) there are no allegations that the Term Sheet was negotiated for the benefit of CAVIC; 3) AVIC, which is a party to the Term Sheet, is not a party to the Complaint; 4) the Term Sheet is a non-binding letter of intent, which may or may not have been accepted, amended, or superseded and is irrelevant in light of integration clauses in later agreements; 5) the Term Sheet cannot substitute for “Aircraft 9764 Leasing Transaction documents”⁶ that are neither described nor identified; and 6) the Term Sheet is governed by English law, which does not permit recharacterization of agreements like the aircraft leases at issue here. *Id.* CAVIC asserts that without facts alleging *which* leasing transactions for Aircraft 9716, 9740, and 9764 the Complaint is seeking to recharacterize, Count I must be dismissed because it does not satisfy the Twombly and Iqbal requirements. *Id.* at 19-20 (emphasis in original).

ii. Applicable Law

CAVIC argues that the Complaint is premised on the false assumption that U.S. law regarding recharacterizing contracts will be applied to the “Aircraft Leases,”⁷ but all of the relevant documents—the “Aircraft Head Leases,”⁸ all of the “Aircraft Subleases,” and a majority of key agreements, including: 1) the “Facility Agreement for Pre-Delivery Payments . . .” (PDP Facility Agreement) between Export Development Canada (EDC) and CAVIC (Ex. F); 2) the “Facility Agreement in Respect of Two (2) Bombardier Inc. Model BD-700-1A10 Aircraft with Manufacturer’s Serial Numbers 9764 and 9788” (3/16/17 Facility Agreement) between EDC and ZJ6000-4 Statutory Trust and TVPX ARS Inc. (TVPX) (Ex. O); 3) the Sublease between TVPX and Zetta USA (Ex. M); 4) the “Deed of Guarantee and Indemnity” (Head Lease Guarantee) regarding Aircraft 9788 between ZJ6000-4 Statutory Trust and the Debtors (Ex. J); and 5) the “Deed of Guarantee and Indemnity” (FPA Guarantee) between CAVIC and the Debtors (Ex. L) regarding the “Forward Purchase Agreement” (FPA) for Aircraft 9764 and 9788 (Ex.

⁶ Neither the Complaint nor the Motion defines the “Aircraft 9764 Leasing Transaction,” or “Leasing Transactions.”

⁷ Neither the Complaint nor the Motion defines the “Aircraft Leases.”

⁸ The Complaint attaches: 1) an “Aircraft Lease Agreement” regarding Aircraft 9788 (Head Lease), Ex. I; and 2) an “Aircraft Sub-Lease Agreement” regarding Aircraft 9788 (Sublease), Ex. M. The Motion indicates that the “Head Leases” and “Sub-Leases” for Aircraft 9716, 9740, and 9764 are attached to the Proofs of Claims (POCs) filed by the ZJ6000-1 Statutory Trust (POC #163), ZJ6000-2 Statutory Trust (POC #164), and ZJ6000-3 Statutory Trust (POC #166). Motion at 11 n.2.

K)⁹—mandate that English law applies. Motion at 20-21 (citing LT Leasing, Inc. v. NHA Hamburger Assekuranz-Agentur GmbH, 2015 WL 1622846 (E.D. Cal. 2015); Hatfield v. Halifax PLC, 564 F.3d 1177, 1183 (C.D. Cal. 2009); Pannell Kerr Forster Intern. Ass'n Ltd. v. Quek, 5 Fed. Appx. 574 (9th Cir. 2001); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998)).

CAVIC claims that under English law, “there is no risk of recharacterization of an aircraft lease as a security agreement.” Id. at 21 (quoting Thomas A. Zimmer & Neil Poland, Aircraft Operating Leases – New York Law or English Law?, Aviation Finance and Leasing (<https://www.vedderprice.com/-/media/files/vedder-thinking/publications/2018/08/afl2018aircraft-operating-leases.pdf>)). It contends that English and U.S. law diverge on whether an owner retains title and ownership in property that is the subject of a lease agreement. Id. (citing Gerard McCormack, Secured Credit Under English and American Law 52-53 (2004); HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681, 688 (D.N.J. 2010)). According to CAVIC, under English law, there is a clear, formalistic distinction between a sale and a hire purchase or lease: a hire purchase agreement is viewed as a “lease with an option to purchase provided at the end of the term of the lease, and unless the option is exercised, the lessor retains ownership of the goods.” Id. (citing HFGL Ltd., 700 F.Supp. at 688). CAVIC claims that the U.K.’s approach “sharply distinguishes the grant of security from the retention of title under conditional sale, hire-purchase and leasing agreements,” because “the buyer, hirer or lessee has merely a possessory interest, subject to which the seller, owner or lessor continues to enjoy absolute ownership by virtue of the agreement between the parties.” Id. (citing Goode, R. and Gullifer, L. (2017), Goode and Gullifer on Legal Problems of Credit and Security (6th Ed.), London, Sweet & Maxwell, at ¶ 1-04).

CAVIC asserts that under English law, a lessor retains ownership and a lease may not be recharacterized unless and until the lessee exercises a purchase option. Id. Applying English law to the “Aircraft Leases,” absolute ownership of each aircraft remained with the “Aircraft Trusts”¹⁰ until the purchase option was exercised, which never occurred, and Count I must be dismissed. Id. at 21-22. CAVIC claims that Zetta USA did not hold a valid lease to Aircraft 9788 because Bombardier never manufactured and delivered that aircraft to the owner, ZJ6000-4 Statutory Trust. Id. at 22. CAVIC concludes that for Aircraft 9788, there was no sublease that could be recharacterized as a disguised financing, and the Trustee’s claim under Count I collapses entirely. Id.

⁹ It is unclear which documents the Trustee wants to recharacterize in Count I, which seeks a declaratory judgment that the Financed Leases are actually financing agreements and not true leases. Complaint ¶ 133. In the Opposition, the Trustee does not allege that CAVIC incorrectly identifies the documents that he seeks to recharacterize.

¹⁰ The “Aircraft Trusts” are ZJ6000-1 Statutory Trust, ZJ 6000-2 Statutory Trust, ZJ6000-3 Statutory Trust, and ZJ6000-4 Statutory Trust. Motion at 13 n.4, 14; Complaint at ¶¶ 29, 32, 35, 38. According to the Complaint, each of these statutory trusts was a special purpose vehicle (SPV) established by CAVIC and all decisions regarding these trusts were under CAVIC’s control. Complaint ¶¶ 29, 32, 35, 38.

2. Opposition

i. Recharacterization

The Trustee argues that Count I states a claim for recharacterization. Opposition at 17. He argues that Bankruptcy Code § 365 does not define a “lease” but in In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988), the Ninth Circuit held that an agreement that otherwise qualified as a lease under California law based on “surface formalities” would be subject to recharacterization under § 365 as a disguised financing if the “economic realities so dictated.” Id. The Trustee highlights that in Moreggia, the lease required fixed monthly payments over 40 years, which would end when the underlying bond debt was repaid, and because the rent payments were calculated based on debt service, the payments did not relate to the value of the possessory right and no true landlord/tenant relationship was created. Id. The Trustee claims that the same is true here: the Complaint alleges that the “lease payments” were calculated based on CAVIC’s debt service obligations to EDC, and once all the payments were made, and the EDC debt was extinguished, the Debtors could buy the aircraft for █████ each. Id. at 17-18.

The Trustee contends that even if the Court applies California law, CAVIC will still not prevail.¹¹ Id. at 18. He argues that state law will be consulted to the extent that it uses factors to glean the economic substance of the transaction. Id. (citing United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 615 (7th Cir. 2005)). The Trustee contends that California’s version of UCC § 1-203, contained in Cal. Com. Code § 1203, sets forth a bright-line test, under which a transaction in the form of a lease *per se* creates a security interest if: 1) the consideration the lessee pays to the lessor for the right to possess and use the goods is an obligation for the term of the lease and is not subject to termination by the lessee; and 2) one of the following four factors is met: i) the original term of the lease is equal to or greater than the remaining economic life of the goods; ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods; iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or iv) the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement. Id. (citing UCC § 1-203; Blackstone Equip. Fin., L.P. v. Bernhard, 2011 WL 13227750, at *2 (C.D. Cal. May 5, 2011); In re WorldCom, Inc., 339 B.R. 56, 65 (Bankr. S.D.N.Y. 2006)).

¹¹ The Trustee argues that courts uniformly agree that the economic substance of a transaction prevails over its form, but he acknowledges that courts disagree regarding whether state or federal law governs if a transaction is a “true lease” or a “disguised” financing. Id. at 18 n. 6 (citing In re PCH Assocs., 804 F.2d 193, 198-200 (2d Cir. 1983); Moreggia, 852 F.2d at 1182-84; United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 615 (7th Cir. 2005), cert. denied 126 S.Ct. 1465 (Mar. 6, 2006); In re Pillowtex, Inc., 349 F.3d 711, 716 (3d Cir. 2003); In re Continental Airlines, Inc., 932 F.2d 282 (3d Cir. 1991)).

According to the Trustee, Count I contains facts demonstrating that each element is met: 1) it alleges that Zetta Singapore's obligation to make payments is for the term of the Financed Leases and is not subject to termination by the Debtors; 2) it pleads that after all payments were made under the Financed Leases, the Debtors had the option to buy the aircraft for the nominal amount of [REDACTED]; and 3) the arrangement involving Aircraft 9788 was nearly identical to each of the Financed Leases for Aircraft 9764, 9740, and 9716. Id. at 18-19 (citing Complaint ¶¶ 74, 87, 90; Ex. I § 24.1). The Trustee concludes that each of the Financed Lease transactions is subject to recharacterization as security interests under UCC § 1-203(b)(4). Id. at 19.

The Trustee contends that even if an agreement is not a *per se* disguised financing, courts examine the "facts of each case," also known as utilizing the "economic realities test." Id. (citing UCC § 1-203(a); In re Pac. Exp., Inc., 780 F.2d 1482 (9th Cir. 1986)). The Trustee claims that when analyzing a transaction, most courts agree that a security interest is created when at the end of the lease term, the lessor retains no meaningful reversionary interest in the goods. Id. (citing WorldCom, 339 B.R. at 70-72; In re Phoenix Equip. Co., Inc., 2009 WL 3188684, at *10 (Bankr. D. Ari. Sept. 30, 2009)). The Trustee elaborates that ordinarily, a meaningful reversionary interest means that: 1) at the outset of the lease the parties expect the goods to retain some significant residual value at the end of the lease term; and 2) the lessor retains some entrepreneurial stake (either the possibility of gain or the risk of loss) in the value of the goods at the end of the lease term. Id. (citing In re Grubbs Const. Co., 319 B.R. 698, 711 (Bankr. M.D. Fla. 2005)). He argues that California courts focus on two aspects of a lease when evaluating whether there is a meaningful reversionary interest: 1) an option to purchase; and 2) a provision for the lessee's acquisition of equity in the goods. Id. at 19-20 (citing Addison v. Burnett, 41 Cal. App. 4th 1288, 1296 (1996)).

The Trustee asserts that Count I pleads facts showing that the "economic realities of the transactions indicate that the arrangements between the parties were not true leases, but rather disguised financings." Id. at 20 (citing Complaint ¶¶ 9, 88). The Trustee contends that CAVIC had no reversionary interest in the aircraft at the end of the lease term because of the [REDACTED] purchase option for the aircraft. Id. (citing Complaint ¶¶ 87, 90). The Trustee claims that CAVIC had no interest in owning the aircraft but only in receiving principal and interest payments from the Debtors. Id. (citing Complaint ¶¶ 130-31). According to the Trustee, CAVIC concedes that if he can show the elements of the UCC bright-line test or establish that the economic realities of the transaction created a security agreement, Count I states a claim. Id.

The Trustee argues that the Complaint clearly identifies the Financed Leases that should be recharacterized: the Delivered Financed Leases and the Undelivered Financed Lease. Id. (citing Complaint ¶ 2).

In response to CAVIC's argument that the transaction for Aircraft 9788 cannot be recharacterized because the aircraft was not manufactured and delivered, the Trustee highlights that UCC § 1-203 governs a "transaction in the form of a lease," which, according to the Trustee, "is precisely what this was." Id. The Trustee notes that

CAVIC provides no support for its argument that the Undelivered Financed Lease transaction cannot be recharacterized simply because the aircraft was not delivered. Id.

The Trustee indicates that a recharacterization finding will bolster the legal conclusion that the “Assignment of Rights Under the Aircraft Purchase Agreement . . .” (APA Assignment) (Ex. R) was a security assignment and not an absolute assignment. Id. at 20-21. He claims that the parties never intended CAVIC to own Aircraft 9788, but instead, they intended that the Debtors would own the plane subject to CAVIC’s rights as a lender under a disguised financing structure. Id. at 21.

Regarding the Term Sheet, the Trustee argues that CAVIC ignores “vast swathes” of the Complaint that sufficiently allege key portions of the Delivered Financed Leases, including incorporating by reference the detailed discussion of the Undelivered Financed Lease that was attached to the Complaint. Id. (citing Complaint ¶¶ 70-88, 90-91). The Trustee claims that he is not required to attach to the Complaint all of the master leases and subleases for the Delivered Financed Leases to meet Fed. R. Bankr. P. 7008’s requirements. Id. (citing U.S. ex rel. Chabot v. MLU Servs., Inc., 544 F.Supp.2d 1326, 1329 (M.D. Fla. 2008)).

The Trustee argues that CAVIC focuses on the Term Sheet instead of addressing the Complaint’s allegations, including: 1) the majority of the terms in the Term Sheet are identified in each relevant lease document attached to the Complaint, Complaint ¶¶ 71-73; and 2) after all lease payments were made, the Financed Leases contain the same purchase option, Complaint ¶¶ 71-73, 87, 90. Id. at 21-22. The Trustee contends that the Term Sheet, at a minimum, provides conclusive parol evidence that the parties intended the aircraft transactions to be disguised financings. Id. at 22. He asserts that CAVIC discounts the Term Sheet by focusing on the unsigned version attached to the Complaint. Id. But, the Trustee argues that the lack of signatures is irrelevant for purposes of a motion to dismiss because all factual allegations—including the provisions in the unsigned Term Sheet and those terms that are probative of the intent of the parties—are assumed to be true. Id.

Finally, the Trustee highlights that the Complaint indicates that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases for CAVIC. Id. (citing Complaint ¶¶ 26, 46). He notes that under the Head Lease and Sublease. Id. (citing Ex. I at § 30.1.4; Ex. M at § 27.1). The Trustee contends that CAVIC ignores the extensive analysis that shows the provisions of the Term Sheet are contained in the “transaction documents,”¹² and CAVIC’s argument is meritless that there are no allegations demonstrating that the Term Sheet was intended for its benefit. Id. (citing Complaint ¶¶ 71-73).

ii. Applicable Law

¹² Neither the Complaint nor the Opposition defines the “transaction documents.”

The Trustee contends that CAVIC’s argument regarding English law fails. Opposition at 22. According to the Trustee, the contractual choice of law clauses should be disregarded because English law has no reasonable relationship to the parties or the transaction. Id. at 23. He claims that Cal. Com. Code § 1301 requires that a contractual choice of law clause must bear a “reasonable relation” to the transaction. Id. (citing Cal. Com. Code §§ 1301(a)-(b)). The Trustee contends that English law bears no relationship to the parties or the transaction because: 1) Zetta Singapore is a Singaporean corporation; 2) CAVIC is an Irish corporation; 3) AVIC is a Chinese corporation; 4) the corporate trusts acting as lessors or lessees are U.S.-based; 5) EDC is a Canadian corporation; 6) the aircraft were to be operated by Zetta USA, a California corporation; and 7) the aircraft were to be registered in the United States. Id. (citing Complaint ¶¶ 22, 25-30, 32-39, 48(h), Exs. I at 87 and M at 84).

Next, the Trustee asserts that the Cal. Com. Code does not recognize a contractual choice of law clause for Article 9 issues, including recharacterization of a lease. Id. He contends that read together, Cal. Com. Code §§ 1301, 9301, and 1203 displace an extraterritorial contractual choice of law clause regarding recharacterization of a lease under Article 9 of the UCC. Id. He highlights that in In re Eagle Enters., Inc., 223 B.R. 290, 293 (Bankr. E.D. Pa. 1998), the court applied identical Pennsylvania UCC provisions and determined that a German choice of law clause should be disregarded and the lease recharacterized as a disguised financing. Id. at 24. He claims that under the Eagle Enterprises analysis, Cal. Com. Code §§ 1301, 9301, 1201, and 1203 are appropriately read together to require application of California law to determine recharacterization. Id. (citing Eagle Enters., 223 B.R. at 294).

The Trustee argues that a choice of law provision in a contract cannot affect the rights of third parties. Id. at 24 (citing In re Eagle Enters., Inc., 223 B.R. 290, 293-94 (Bankr. E.D. Pa. 1998); Carlson v. Tandy Comput. Leasing, 803 F.2d 391, 394 (8th Cir. 1986); In re Morse Tool, Inc., 108 B.R. 384, 386 (Bankr. D. Mass. 1989)). And, because he is a third-party representative of all creditors, he has the power of a judgment lien creditor. Id. at 25.

According to the Trustee, even if English law would otherwise be applicable, the Court should disregard CAVIC’s “caricature” of it as being contrary to the Bankruptcy Code. Id. He claims that under CAVIC’s view, English law prohibits recharacterization in all instances and does not allow a court to review the economic substance of the transaction. Id. He contends that CAVIC fails to cite any English or American case to support this assertion and relies solely on a law firm publication that fails to cite any authority. Id. at 25 n.13. The Trustee argues that prohibiting recharacterization is not permitted under § 365, and the Court should apply either California law or federal bankruptcy law, or both, to determine that the Financed Leases are disguised financings and not true leases. Id. at 25.

3. Reply

i. Recharacterization

CAVIC argues that the Complaint fails to state a claim for recharacterization because it merely contains “labels, conclusions, and formulaic recitation[s] of a cause of action’s elements.” Reply at 11 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007)). According to CAVIC, In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988), did not involve or address the adequacy of pleadings necessary to state a plausible recharacterization claim. Id. Instead, Moreggia concerned a dispute regarding whether a real property lease fell within the scope of § 365, and it addressed only whether a “*sui generis* property interest embodied in a ‘Lease’” was subject to § 365(d)(4). Id. (quoting Moreggia, 852 F.2d at 1184, 1186). CAVIC argues that nothing in Moreggia demonstrates that the Complaint establishes a plausible claim for recharacterization. Id.

CAVIC asserts that the Trustee’s reliance on United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 615 (7th Cir. 2005), to show that Count I is adequately pled is misplaced. Id. According to CAVIC, United Airlines concerned a dispute over whether real property transactions, “*for the purposes of Code § 365*,” constituted a secured transaction or a lease of real property. Id. (emphasis in original) (citing United Airlines, 416 F.3d at 618). CAVIC indicates that United Airlines confirmed that such analysis required review of an entire transaction, but it argues that United Airlines does not concern pleading standards required by Twombly and Iqbal and does not show that Count I contains sufficient facts to establish a plausible cause of action. Id.

CAVIC quotes the following passage from United Airlines, 416 F.3d at 617, alleging that it supports dismissal of Count I:

We do not doubt that many financing devices are true leases; the lessor owns the property and thus finances its acquisition, relieving the lessee of the need to raise funds itself, and net leases may measure rent by the lessor’s financial commitments. United acquired many of its airplanes that way.

Id. CAVIC argues that the Trustee’s pleading burden is “particularly heavy” because he seeks not just to recharacterize the “Aircraft Head Leases and Subleases,” but also the dozens of additional financing, purchasing, and leasing agreements that comprise the Financed Leases under the Complaint. Id. at 12. CAVIC reiterates that the Trustee does not describe or identify the Financed Leases or the related documents for Aircraft 9716, 9740, and 9764. Id.

CAVIC contends that the Complaint’s “sole description” of the Financed Leases for Aircraft 9716 and 9740 is conclusory: alleging that the “arrangement” for Aircraft 9788 “is nearly identical to the Financed Leases” of Aircraft 9716, 9740 and 9764.” Id. (quoting Complaint ¶¶ 90). CAVIC asserts that while the “Head Leases and Subleases” may contain similar language, there is no dispute that Aircraft 9716 and 9740 “*did not involve Forward Purchase Agreements*” or assignments of a Bombardier purchase agreement, and the PDP Facility Agreement “*does not apply to the Financed Leases for*

Aircraft 9716 and 9740.” Id. (emphasis in original). CAVIC claims that these are only a few of the many differences among the four Financed Leases, and without more specific pleading, Count I does not adequately describe the Financed Lease transactions the Trustee seeks to recharacterize and should be dismissed. Id.

CAVIC argues that Count I, which seeks relief no different than that requested in Count III regarding Aircraft 9788, is a request for an advisory opinion because an unenforceable and ineffective lease cannot be resurrected as an enforceable security interest. Id. (citing Peterson v. Hotel Emp. & Rest. Emp. Int’l Union Welfare Fund, 288 F. Supp. 2d 1145, 1150 (D. Nev. 2003); Suni-Citrus Prod. Co. v. Vincent, 170 F.2d 850, 853 (5th Cir. 1948)). CAVIC claims that the relevant instrument here—the Undelivered Financed Lease—will never become effective. Id. at 13.

ii. Applicable Law

CAVIC argues that English law requires dismissal of Count I, highlighting that in the Motion, it cited HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, 700 F. Supp. 2d 681, 688 (D.N.J. 2010), which examined the distinction between English and American law regarding ownership of property and equipment leases. Id. at 13. It argues that HFGL discusses at length the difference regarding a financed sale and a lease under English and U.S. law and the fact that, under English law, the lessor retains ownership of the property. Id. CAVIC contends that articles cited in HFGL and in the Motion show that English law does not permit recharacterization of leases, and the Trustee offers no authority to rebut this analysis. Id.

CAVIC asserts that the Trustee fails to acknowledge controlling Ninth Circuit precedent, which compels use of federal choice of law rules to determine whether to apply English law, as selected by the parties, and the Trustee erroneously treats Article 9 of the Cal. Com. Code as a choice of law provision. Id. CAVIC describes Eagle Enterprises as an out of circuit, inapposite case that is contrary to Ninth Circuit authority, which follows the Restatement (Second) of Conflict of Laws. Id. (citing In re Sterba, 852 F.3d 1175, 1179 (9th Cir. 2017)). According to CAVIC, a bankruptcy court applies federal common law choice-of-law rules to determine the enforceability of contractual choice-of-law provisions, even when resolution of the underlying dispute turns on state law. Id. (citing Mandalay Resort Grp. v. Miller, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003)).

CAVIC claims that when a dispute does not concern the formation of an agreement, the law chosen by the parties need not have any reasonable relationship to the place of creation or performance of the contract. Id. at 13-14 (citing In re CMR Mortg. Fund, LLC, 416 B.R. 720, 729 (Bankr. N.D. Cal. 2009)). CAVIC asserts that there is no dispute that the “Aircraft Leases”¹³ were binding, executed contracts, and the parties were sophisticated, well-represented entities who expressly contracted to have English law apply to the “Aircraft Leases” and many of the key “Financed Transaction

¹³ Neither the Complaint nor Reply defines the “Aircraft Leases.”

agreements.”¹⁴ Id. at 14. According to CAVIC, the inquiry under federal common law ends here, and the Court should apply the law chosen by the parties to the agreements. Id.

Additionally, CAVIC argues that English law has a substantial relationship to the parties and the transaction because: 1) Zetta Singapore is a Singaporean corporation, and Singapore law is rooted in English common law; 2) until Singapore’s Court of Appeal was established, Singaporean cases were appealed to England’s Judicial Committee of the Privy Council; and 3) although English courts no longer have jurisdiction over Singaporean appeals, Singapore enacted the Application of English Law Act to ensure that English common law continues to serve as applicable precedent. Id. at 14 & n.3 (citing Tzi Yong Sam Sim, A Guide to the Singapore Legal System and Legal Research (url omitted); The University of Melbourne, Southeast Asian Legal Research Guide: Introduction to Singapore and Its Legal System (url omitted); The Statutes of the Republic of Singapore, the Application of English Law Act (Chap 7A, 1994 Rev Ed)). CAVIC contends that English law is used extensively in aircraft transactions involving parties located around the globe. Id. at 14 (citing Thomas A. Zimmer & Neil Poland, Aircraft Operating Leases – New York Law or English Law?, Aviation Finance and Leasing (url omitted)).

CAVIC highlights that the Trustee argues that English law should be disregarded if it prohibits recharacterization and does not permit a court to review the economic substance of the transaction. Id. CAVIC describes the Trustee’s argument as an “implicit plea” to adopt the reasoning of Eagle Enterprises, which CAVIC claims was “explicitly rejected” in In re Zukerkorn, 484 B.R. 182 (9th Cir. 2012). Id. CAVIC acknowledges that the Zukerkorn court found a “narrow, public policy exception” to the Restatement choice of law rules where California law would apply if the foreign law was offensive to California public policy. Id. at 14-15 (citing Zukerkorn, 484 B.R. at 192-93). But, CAVIC argues that nothing in the Opposition demonstrates that applying English law is offensive to California public policy. Id. at 15. CAVIC notes that the Trustee is not asserting a fraudulent conveyance or other claim that would otherwise belong to the creditors, but rather seeks a declaration characterizing the parties’ agreement. Id. According to CAVIC, the Zukerkorn court specifically held that choice of law clauses apply in the latter circumstances, and creditors’ interests are not relevant. Id. CAVIC concludes that to hold otherwise is to adopt the reasoning of Eagle Enterprises, which is contrary to Ninth Circuit authority. Id.

4. Analysis

CAVIC and the Trustee disagree regarding numerous issues including: 1) what choice of law rules apply; 2) based on the applicable choice of law rules, which law applies; 3) whether the Trustee can be bound by a choice of law provision; and 4) what the recharacterization requirements are under the applicable law.

¹⁴ Neither the Complaint nor Reply defines the “Financed Transactions” or the “Financed Transaction agreements.”

i. What Choice of Law Rule Applies?

In the Motion, CAVIC does not address what choice of law rule applies. The Trustee argues in the Opposition that English law should be ignored because it bears no relationship to the parties or the transaction, and Cal. Com. Code § 1301, which addresses when parties may agree regarding the law governing their rights and duties, disregards choice of law provisions when considering issues arising under Article 9 of the UCC. Opposition at 23. CAVIC replies that controlling Ninth Circuit precedent compels the use of federal choice of law rules, which are governed by the Restatement (Second) of Conflict of Laws § 187. Reply at 13. According to CAVIC, the Trustee erroneously treats Article 9 of the Cal. Com. Code as a choice of law provision. Id.

“In the Ninth Circuit, federal common law choice of law rules apply in bankruptcy cases.” Mandalay Resort Grp. v. Miller, 292 B.R. 409, 413 (B.A.P. 9th Cir. 2003). Federal choice-of-law rules in the Ninth Circuit follow the Restatement (Second) of Conflict of Laws as a “source of general choice-of-law principles,” and an “appropriate starting point for applying federal common law”. In re Sterba, 852 F.3d 1175, 1179 (9th Cir. 2017); see also Mandalay Resort, 292 B.R. at 413 (“Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws.”); In re Merced Falls Ranch, LLC, 2012 WL 8255520, at *5 n.13 (Bankr. E.D. Cal. Oct. 16, 2012) (stating that bankruptcy courts apply federal choice of law rules, and federal choice of law rules follow the Restatement (Second) of Conflict of Laws).

Federal common law applies § 187 of the Restatement (Second) of Conflict of Laws to determine the enforceability of contractual choice of law provisions. In re CMR Mortg. Fund, LLC, 416 B.R. 720, 728 (Bankr. N.D. Cal. 2009). The Restatement (Second) of Conflict of Laws § 187(1) provides: “The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”

Under Restatement (Second) of Conflict of Laws § 187(1), parties may agree to apply the law of a forum to decide all questions regarding the construction and performance of an agreement, but not questions regarding capacity to contract, or “other contract-formation issues.” CMR Mortg. Fund, 416 B.R. at 729 (citing Restatement (Second) of Conflict of Laws § 187 cmts. c, d). Where the making of a contract is not in dispute, the law chosen by the parties need not have any reasonable relationship to the creation or performance of the contract. Id. Such a relationship is necessary under Restatement § 187 *only* when the parties seek to specify choice of law governing issues concerning formation or validity of the contract. Id. (emphasis added).

ii. Based on the Applicable Choice of Law Rule, Which Law Applies?

CAVIC argues that that English law applies because the parties selected English law to govern all of the “Aircraft Head Leases” and “Aircraft Subleases,” and a majority of key agreements. Motion at 20-21. The Trustee responds that California law applies based on Cal. Com. Code §§ 1301, 9301, 1201, and 1203 and In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998). Opposition at 24. CAVIC replies that Eagle Enterprises is contrary to the Restatement (Second)’s rule, that when a dispute does not concern the formation of the agreement, the law chosen by the parties need not have any reasonable relationship to the place of creation or performance of the contract. Reply at 13-14.

Here, it is undisputed that the parties selected English law to govern the Head Lease and Sublease regarding Aircraft 9788, as well as the PDP Facility Agreement, the 3/16/17 Facility Agreement, the Head Lease Guarantee, and the FPA Guarantee. Ex. F § 36, Ex. I § 32.1, Ex. J § 18, Ex. M § 29.1, Ex. O § 43. Further, the parties who executed the relevant documents were sophisticated and well-represented; there are no allegations that any party lacked the capacity to contract or that a binding contract was not formed. In re CMR Mortg. Fund, LLC, 416 B.R. 720, 729 (Bankr. N.D. Cal. 2009) (enforcing a New York choice of law clause where there were sophisticated and well-represented parties and no allegations that any party lacked capacity or that a binding contract was not formed). Because the making of these agreements is not in dispute, English law, which was agreed to by the parties, must be applied.

The Trustee’s reliance on In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998), to support his position that Cal. Com. Code §§ 1301, 9301, and 1203 displace extraterritorial choice of law clauses regarding recharacterization of a lease under UCC Article 9, is misplaced. Opposition at 23-24. In Eagle Enters., 223 B.R. at 292, the parties agreed that Pennsylvania choice of law rules governed, whereas here, the relevant documents in this case contain no indication of which choice of law rules govern, and the applicable choice of law rule is the Restatement (Second), which requires application of English law.

iii. Do Choice of Law Provisions Apply to the Trustee?

In the Motion, CAVIC does not address whether choice of law provisions apply to the Trustee. The Trustee argues that cases are “fairly uniform in holding that contractual choice of law provisions are not binding on third parties or otherwise capable of effecting the reclassification of security agreements into leases,” and he claims that he is a third party representative of all creditors, who has the power of a judgment lien creditor. Opposition at 24-25 (citing In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998); Carlson v. Tandy Comput. Leasing, 803 F.2d 391 (8th Cir. 1986); In re Morse Tool, Inc., 108 B.R. 384 (Bankr. D. Mass. 1989)).

CAVIC replies that the Trustee is not asserting a fraudulent conveyance or other claim that would belong to the creditors, but rather he seeks a declaration characterizing the nature of the parties’ agreement. Reply at 15. According to CAVIC, the court in In re

Zukerkorn, 484 B.R. 182 (9th Cir. 2012), held that contractual choice of law clauses apply in the latter circumstances, and creditors’ interests are irrelevant. Id.

In Eagle Enterprises, the court highlighted that § 1105(a) of the Pennsylvania UCC allowed contracting parties to choose the law applicable to *their* relationship, and based on fundamental principles of contract law, that statute did not let contracting parties make choice of law decisions that affected the rights of third parties. In re Eagle Enters., Inc., 223 B.R. 290, 293 (Bankr. E.D. Pa. 1998) (emphasis in original). The court stated that the chapter 7 trustee stood in the role of a third party as a representative of all creditors and he was not bound by a German choice of law provision. Id. (citing 3 Collier on Bankruptcy ¶ 323.02[1] (15th ed. 1998)).

In Carlson v. Tandy Comput. Leasing, 803 F.2d 391 (8th Cir. 1986), Larry Gene Brock (Brock) executed an agreement to lease computer equipment from Tandy Computer Leasing (Tandy). Id. at 392. After Brock filed bankruptcy, Thomas Carlson (Carlson) was appointed as the trustee, and he filed an adversary proceeding seeking the computer equipment. Id. at 392-93. Tandy countered that the agreement was a lease and it had a right to repossess. Id. at 393. The bankruptcy court applied Missouri law and concluded that Tandy held an unperfected security interest in the computer equipment. Id. The district court reversed, concluding that the agreement provided that it would be governed by Texas law under which the agreement was a lease. Id. Brock appealed and the Eighth Circuit examined the Missouri choice of law rules contained in its UCC to determine the applicable law and noted that under Missouri law contracting parties may generally agree that the contract would be governed by the law of a particular state. Id. But, the court noted that the Missouri UCC had a policy of prohibiting choice of law agreements when the rights of third parties are at stake. Id. at 394. Because the dispute implicated the rights of third-party creditors, the Eighth Circuit concluded that Missouri law applied. Id. at 393.

In In re Morse Tool, Inc., 108 B.R. 384 (Bankr. D. Mass. 1989), Barclays Business Credit, Inc. (Barclays) and Morse Tool, Inc. (Morse Tool) entered into a “General Loan and Security Agreement,” which contained a Connecticut choice of law clause. Id. at 386. After Morse Tool filed bankruptcy, David Ferrari (Ferrari) was appointed as trustee and he filed a complaint against Barclays to avoid transfers and obligations that were voidable under “applicable law.” Id. at 384-85. Ferrari and Barclays filed cross-motions for summary judgment: Ferrari claimed that the “applicable law” was Massachusetts and Barclays claimed that it was Connecticut. Id.

The court applied the Restatement (Second) of Conflict of Laws choice of law analysis and determined that the Connecticut choice of law clause carried little weight in the context of the adversary proceeding because:

The parties to a contract can specify which forum’s law will govern their contract, and courts often follow their choice because both parties to the contract, and therefore to the suit on the contract, have agreed upon the choice. But this is a fraudulent conveyance action, not a contract action.

And one of the parties to this suit—the Trustee, who stands in the shoes of the creditors—was not a party to the contract. The parties to a contractual conveyance cannot in their contract make a choice-of-law that binds creditors who allege that they were defrauded by the conveyance. The choice-of-law binds only parties to the contract, not the Trustee or the creditors.

Id. at 186.

In contrast to Eagle Enterprises, Carlson, and Morse Tool, in In re Zukerkorn, 484 B.R. 182 (B.A.P. 9th Cir. 2012), the Ninth Circuit Bankruptcy Appellate Panel (BAP) enforced a trust settlor’s choice of law provision against a bankruptcy trustee. Sally Zukerkorn (Sally) established a revocable trust (Trust), which contained a spendthrift provision¹⁵ and a Hawaii choice of law clause. Id. at 186. After Sally died, her son, Herbert Zukerkorn (Herbert) became the trustee. Id. When Herbert and his wife filed a chapter 7 bankruptcy petition in California, Linda Green (Green) was appointed as trustee. Id. Shortly thereafter, Green filed a motion to compel turnover of 25% of the distributions paid to Herbert under the Trust, contending that California law applied, and 25% of the distributions was property of the estate pursuant to Cal. Prob. Code § 15306.5. Id. at 186-87. Later, Green filed an amended motion, seeking turnover of: 1) the entire principal and all income from the Trust; and, alternatively, 2) Herbert’s postpetition income distributions. Id. at 187. On cross-motions for summary judgment, the bankruptcy court concluded that the Trust was governed by Sally’s choice of Hawaii law, and neither the principal nor interest paid or payable to Herbert under the Trust was property of the estate because the spendthrift provisions were enforceable under Hawaii law. Id.

Green appealed, claiming that the bankruptcy court erred in upholding Sally’s choice of Hawaii law. Id. at 187-88. The BAP noted that federal courts in the Ninth Circuit utilize the Restatement (Second) of Conflict of Laws for choice of law rules, and it applied Restatement § 187(2). Id. at 189-90. According to the BAP, “the Restatement reflects a strong policy favoring enforcement of choice of law provisions,” and Sally’s choice of Hawaii law would be upheld if Hawaii had a substantial relation to the Trust. Id. at 192. Because there was “little question” that Hawaii had a substantial relationship to the Trust—Sally was domiciled in Hawaii when she created it, her assets were in Hawaii, Herbert was domiciled in Hawaii and was a citizen there for more than 70 years, and the Trust was administered by a Hawaii corporate trustee—and a reasonable basis otherwise existed for the choice of law, the BAP held that Sally’s choice of Hawaii law would be enforced unless Green could establish that: 1) the chosen law was contrary to a fundamental policy of California; and 2) California had a materially greater interest in the determination of the particular issue. Id. Because Green was unable to establish

¹⁵ The spendthrift clause provided that: “No interest under this instrument shall be transferable or assignable by any beneficiary, or be subject during said beneficiary’s life to the claims of said beneficiary’s creditors.” Id.

either, the BAP agreed with the bankruptcy court that Sally’s choice of Hawaii law applied to the Trust. Id. at 194.

The Trustee’s argument, that he is not bound by the parties’ English choice of law provisions because he represents third-party creditors who did not agree to those provisions, Opposition at 24-25, is unpersuasive in light of Zukerkorn, where the BAP, applying the Restatement’s choice of law rules, enforced Sally’s choice of Hawaii law even though provisions in her Trust affected the rights of third party creditors represented by the chapter 7 trustee.¹⁶ Eagle Enterprises and Carlson are inapposite because they were decided under Pennsylvania and Missouri choice of law rules, respectively and Morse Tool is distinguishable because there, the court refused to enforce a choice of law clause in an allegedly fraudulent agreement, whereas here, there are no allegations of any fraudulent conduct.

iv. Recharacterization Requirements Under English Law

CAVIC argues that under English law, there is no risk of recharacterization of an aircraft lease as a security agreement. Motion at 21 (citations omitted). It argues that English law contains a “clear, formalistic distinction” between a sale and a hire purchase or lease. Id. The Trustee counters that even assuming English law applied, the Court should disregard CAVIC’s “caricature” of it as prohibiting recharacterization in all instances. Opposition 25. The Trustee asserts that CAVIC fails to cite any English or American case to support its assertion that there is no recharacterization risk under English law. Id. at 25 n.13. CAVIC replies that it cited HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681

¹⁶ The Court believes that Restatement § 187(1) applies, but even if the Court were to apply Restatement § 187(2) as the court did in Zukerkorn, the result would be the same. Restatement § 187(2) provides:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue

The § 187(2)(a) “reasonable basis” standard is a minimal standard and rarely, if ever, will parties choose a law without good reason. Zavec v. Yield Dynamics, Inc., 179 F. Appx. 116, 121-22 (3d Cir. 2006). Here, there was a reasonable basis for the choice of English law because the parties to the transactions are from all around the world. Complaint ¶¶ 22-30, 32-39. Further, international aircraft financing and leasing contracts are often governed by English law. Carlos Sierra, Ten Years of the Cape Town Convention and the Aircraft Protocol in Mexico, AIR & SPACE LAW. 11, 11 (2018) (indicating that international aircraft financing and leasing contracts are generally governed by New York or English law). And, the Trustee has not argued that application of English law would be contrary to any other state’s policy.

(D.N.J. 2010), which examined the distinction between English and U.S. law regarding ownership of property and equipment leases and demonstrates that English law does not permit recharacterization of leases. Reply at 13.

The laws of England and the United States “diverge on whether an owner retains title and ownership in property that is the subject of a hire purchase agreement.” HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681, 688 (D.N.J. 2010). Under English law, “there is a clear, formalistic distinction between a sale and a hire purchase or lease A hire purchase agreement is viewed as a ‘lease with an option to purchase provided at the end of the term of the lease.’” Id. (internal citations omitted); see also Hire Purchase, Black’s Law Dictionary (11th ed. 2019) (defining “hire purchase” as the British terminology for an “installment plan”). Unless the option is exercised, the lessor retains ownership of the goods. HFGL, 700 F.Supp.2d at 688. The English formal approach, “sharply distinguishes the grant of security from the retention of title under conditional sale, hire-purchase and leasing agreements, on the basis that the buyer, hirer or lessee has merely a possessory interest, subject to which the seller, owner or lessor continues to enjoy absolute ownership by virtue of the agreement between the parties.” Goode, R. and Gullifer, L. (2017), Goode and Gullifer on Legal Problems of Credit and Security (6th Ed.), London, Sweet & Maxwell, at ¶ 1-04. In contrast, the American “functional” approach to recharacterization under the UCC is to conduct a fact-intensive inquiry to determine whether an agreement in the form of a lease should properly be considered a security interest or installment contract. HFGL, 700 F.Supp.2d at 688.

In HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681 (D.N.J. 2010), cited by CAVIC and not addressed by the Trustee, HFGL Ltd. (HFGL) and CNH Capital Europe Ltd. (CNH) executed approximately 50 hire purchase agreements with Thornycroft 1862 Co. Ltd. and its affiliated companies (Thornycroft) that contained English choice of law provisions. Id. at 683-84. Thornycroft transported equipment from England to the United States, and Alex Lyon & Son Sales Managers & Auctioneers, Inc. (ALS) sold it at auction in the U.S. Id. at 684-85. After Thornycroft went into administration—the English law equivalent of bankruptcy—HFGL and CNH discovered that Thornycroft had smuggled the equipment and they filed suit against ALS for conversion and unjust enrichment. Id. at 682, 686. HFGL and CNH moved for summary judgment, arguing that under English law, they owned the equipment pursuant to the hire purchase agreements. Id. at 687. ALS challenged HFGL and CNH’s claim of ownership and asserted that the agreements should be interpreted under American law. Id.

The court noted that it was deciding a diversity case, and because New Jersey was the forum state, its choice of law rules governed and required the court to first determine whether there was a conflict between the potentially applicable laws. Id. The court determined that there was a true conflict between American and English law regarding whether an owner retains title and ownership of property that is the subject of a hire purchase agreement. Id. at 688. According to the court, English law formally distinguishes between a sale and a hire purchase, whereas American law conducts a

fact-intensive inquiry to determine whether to recharacterize an agreement in the form of a lease. *Id.* The court honored the English choice of law clauses finding that England bore a substantial relationship to the parties and applying English law would not violate a fundamental policy of an American state with a materially greater interest in the matter than England. *Id.* at 688-89. But, the court denied the summary judgment motion based on ALS’s allegations, that the hire purchase agreements “did not reflect the reality of how the goods came into Thornycroft’s possession.” *Id.* at 689, 691-92.

Here, the Trustee indicated in the Complaint and Opposition that the transactions regarding the Four Aircraft were structured as leases with options to purchase at the end of the leases. *See* Complaint ¶¶ 87 (indicating that after completing the “lease terms,” which was repaying the amount owed plus interest over twenty-eight quarterly installments, TVPX, at the direction of Zetta Singapore, had an option to purchase Aircraft 9788 for █████ (citing Ex. I at 45)), ¶ 90 (alleging that in each of the leases for the Four Aircraft, the SPV established by CAVIC for the transaction would lease the respective aircraft to TVPX under a head lease with a █████ purchase option at the end of the “lease” and TVPX would then sub-lease the respective aircraft to Zetta USA); Ex. I § 22.1 (providing that TVPX would have the option to purchase Aircraft 9788 for █████ on the last day of the lease term provided that no default had occurred and TVPX had paid all amounts due to ZJ6000-4 Statutory Trust); Opposition at 17-18 (“The Complaint alleges that the ‘lease payments’ were calculated on CAVIC’s debt service obligations to EDC. Once all of the payments were made, and the EDC debt extinguished, the Debtors had the ability to purchase the aircraft for █████ each.”); Opposition at 19 (alleging after all payments were made under the Aircraft 9788 lease, the Debtors had the option to buy the plane for █████, and the “arrangement” involving Aircraft 9788 was “nearly identical” to each of the Delivered Financed Leases).

Under English law, a hire purchase agreement is viewed as a lease with an option to purchase at the end of the term. HFGL Ltd. & CNH Cap. Europe Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 700 F.Supp.2d 681, 688 (D.N.J. 2010). Based on the Trustee’s description of the relevant documents in the Complaint and Opposition, the Court concludes that the transactions at issue were hire purchase agreements and it is undisputed that options to purchase the Four Aircraft were not exercised. Therefore, the transactions are leases under English law and cannot be recharacterized as urged by the Trustee. *See HFGL*, 700 F.Supp.2d at 688 (noting that under English law a lessor retains ownership of goods unless a hire purchase agreement option to purchase is exercised).¹⁷

b. Counts III-VI

¹⁷ The Trustee’s contention, that under the Federal Aviation Administration Regulations (FARs), the Debtors are treated as the true “owners” of the Four Aircraft and the Financed Leases are considered “contracts of conditional sales” rather than true leases, is unavailing. Opposition at 26 (citing 14 C.F.R. §§ 47.5(b) and (d); Complaint ¶¶ 71, 74, 87, 90). The Trustee asserts only that the FARs govern the operation and registration of aircraft in the United States, not recharacterization or financing. And the FARs define “owner” to include “a buyer in possession . . . or a lessee of an aircraft under a contract of conditional sale. . .” 14 C.F.R. § 47.5(d) (emphasis added).

1. Motion

CAVIC argues that the Trustee fails to allege sufficient facts to show that he holds a plausible claim to the \$30 Million PDP under non-bankruptcy law. Motion at 22. According to CAVIC, for the Trustee to prevail on his 11 U.S.C. § 544(a) claim (Count IV), he must allege facts showing that: 1) Zetta Singapore had a legal or equitable interest in the \$30 Million PDP on the Petition Date, 9/15/17; and 2) a creditor holding a judgment lien under applicable state law would be able to attach the Debtors' rights in and to the PDP. Id. at 24. CAVIC contends that the Complaint contains no such facts. Id.

CAVIC highlights that § 544(a) provides that a trustee may avoid “any transfer of *property of the debtor* . . . that is voidable by . . . a creditor that . . . obtains . . . a judicial lien on *all property on which a creditor on a simple contract could have obtained a judicial lien*, whether or not such a creditor exists.” Id. at 23 (emphasis added by CAVIC). CAVIC argues that a trustee's rights in a debtor's property during bankruptcy are no greater than the debtor's rights outside of bankruptcy, and the estate does not possess anything more than the debtor did before filing bankruptcy. Id. at 22-23 (citing Mission Prod. Holdings Inc. v. Tempnology LLC (In re Tempnology), 139 S.Ct. 1652, 1663 (2019); Long Term Disability Plan Hoffman-La Roche, Inc. v. Hiler (In re Hiler), 99 B.R. 238, 244 (Bankr. D.N.J. 1989)). CAVIC asserts that whether a debtor has a legal or equitable interest in property so that it becomes “property of the estate” under § 541 is determined by applicable state law. Id. at 23-24 (citing Musso v. Ostashko, 468 F.3d 99, 105 (2d Cir. 2006); Robinson v. Howard Bank (In re Kors, Inc.), 819 F.2d 19, 22-23 (2d Cir. 1987); Ford v. Fed. Home Loan Mortg. Corp. (In re Bishop), 2009 WL 2231197, at *2 (Bankr. D.N.H. July 24, 2009)). CAVIC claims that if its alleged security interest under § 544(a)(1) were avoided, the Trustee would be in the position of an ideal lien creditor, armed with a judgment and with the power that state law confers on such a creditor. Id. at 23 (citing Musso, 468 F.3d at 104). CAVIC alleges that nothing in the Complaint “connects the dots” to show that a judicial lien creditor would have a plausible claim to assert a lien on the PDP because it never belonged to the Debtors. Id. at 22.

CAVIC characterizes the Trustee's claim to the \$30 Million PDP as resting entirely on the theory that, on termination of the APA, the “Buyer” is entitled to a return of “all advanced payments” received by Bombardier for the undelivered Aircraft 9788. Id. at 24 (citing Complaint ¶ 4). CAVIC contends that it was assigned the APA on 3/31/17, Complaint ¶ 51, Ex. R, and as Buyer, it was a party to:

- 1) the PDP Facility Agreement, Complaint ¶ 48(a), Ex. F;
- 2) the “Security Agreement” with EDC (Security Agreement), and other “Aircraft 9788 Leasing Transaction Agreements,”¹⁸ Complaint ¶ 48(i), Ex. N;
- 3) the “Trust Agreement”, with TVPX (CAVIC-TVPX Trust Agreement), Complaint ¶ 48(c), Ex. H;
- 4) the Head Lease, Complaint ¶ 48(d), Ex. I;

¹⁸ Neither the Complaint nor the Motion defines the “Aircraft 9788 Leasing Transaction Agreements.”

- 5) the FPA Guarantee (Ex. L), regarding the FPA, Complaint ¶¶48(f), Ex. K; and
- 6) the Bombardier Consent (Bombardier Consent), Complaint ¶ 53, Ex. T.

Id.

According to CAVIC, it executed all of these agreements as *Buyer of Aircraft 9788*, and it was directly obligated, as borrower, to repay the \$30 million recourse loan to EDC. Id. (emphasis in original). CAVIC contends that the Debtors were not parties to any of these agreements governing the construction, financing, acquisition and delivery of Aircraft 9788, and pursuant to the plain language of the APA Assignment, CAVIC became the buyer of Aircraft 9788 and all parties looked to CAVIC, *not the Debtors*, to perform the obligations of the buyer until delivery of the aircraft. Id. (emphasis in original). CAVIC claims that this structure is used in the airline industry to allow airlines to lease up-to-date aircraft at an affordable cost. Id. CAVIC contends: “**At no time did the Debtors borrow, hold, transfer or have a legal claim to the \$30 Million PDP.**” Id. (emphasis in original).

CAVIC asserts that there are a number of flaws to Count V, pursuant to which the Trustee seeks to avoid the APA Assignment as a disguised security interest and then step into CAVIC’s right to recover the \$30 Million PDP. Id. at 25. It argues that the APA Assignment, by itself, was not a lease which can be “avoided” as a disguised financing. Id. CAVIC contends that the APA Assignment was a transfer by Zetta Singapore of its right to acquire Aircraft 9788 and to shed its obligation to pay for that aircraft. Id. CAVIC asserts that the Complaint states no theory under which that transaction can be recharacterized, avoided, or otherwise affected. Id.

CAVIC argues that the PDP Facility Agreement with EDC was separate and distinct from the proposed purchase, lease, and sublease of Aircraft 9788. Id. CAVIC asserts that there is no basis under state law for recharacterizing transactions between nondebtors. Id. And, CAVIC contends that the proposed purchase, lease, and sublease of Aircraft 9788 was a “busted deal”: Bombardier did not manufacture the aircraft, deliver it to the relevant “Aircraft Trust,” lease it to a “sublessor Trust,” or sublease it to the Debtors. Id. (citing Complaint ¶ 61).

Regarding Count VI, which asserts a claim under 11 U.S.C. § 542(a), CAVIC argues that the right of an estate to “property” is defined by state law, and the Complaint provides no facts from which a plausible state law claim to the entire \$30 Million PDP can be inferred.¹⁹ Id. (citing *Travelers Cas. & Surety Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449-55 (2007)). CAVIC asserts that when Zetta Singapore assigned the APA to it, it took on the obligation to pay for Aircraft 9788. Id. As a result, CAVIC, and not the Debtors, borrowed the money from EDC to fund the \$30 Million PDP, which was paid to Bombardier. Id. at 25-26. CAVIC asserts that neither Debtor borrowed that money, paid that money, or touched that money. Id. at 26.

¹⁹ Count VI is brought against Bombardier. But, CAVIC seeks dismissal of Count VI, and the Trustee responds to CAVIC’s arguments regarding Count VI and does not address the fact that CAVIC was not named as a defendant in that count.

CAVIC argues that even if the Trustee were to step into its shoes, his claim to the \$30 Million PDP is belied by the plain language of the Bombardier Consent, which provides that, in case of default by Bombardier “or for any other reason,” the \$30 Million PDP would be paid to EDC, not to the buyer under the APA—be it CAVIC or the Debtors. Id.

CAVIC claims that the APA Assignment and Bombardier Consent are governed by New York law, which requires contracts to be construed in accordance with the parties’ intent and is generally discerned from the four corners of a document itself. Id. (citing MHR Cap. Partners, 12 N.Y.3d 640, 645 (2009); Ellington v. EMI Music, Inc., 24 N.Y.3d 239, 244 (2014); Legum v. Russo, 133 A.D.3d 638, 640 (2015)). CAVIC notes that in the Bombardier Consent, EDC agreed that in exercising any rights under the APA, or in making any claim regarding the assigned rights, the APA’s terms and conditions would apply to and be binding on EDC to the same extent as if EDC had been the original “Buyer” thereunder. Id. at 26-27 (quoting Ex. T ¶ 7).

CAVIC emphasizes that Zetta Singapore did not sign the Bombardier Consent and acknowledges that the APA Assignment was an absolute assignment. Id. at 27. According to CAVIC, if the APA Assignment were anything *other than* an absolute assignment, Bombardier and EDC would have required Zetta Singapore to sign the Bombardier Consent given Zetta Singapore’s possible residual rights in and to the \$30 Million PDP. Id. (emphasis in original). CAVIC contends that Zetta Singapore’s approval was unnecessary because the terms of the APA Assignment and the Bombardier Consent were clear, as was the parties’ intent that EDC—not Zetta Singapore—would receive the \$30 Million PDP if Bombardier defaulted or “for any other reason.” Id. CAVIC concludes that although the APA indicated that the “Buyer” had a right to return of the \$30 Million PDP, that was superseded by the Bombardier Consent. Id. CAVIC argues that even if the Debtors could substitute themselves as a party to the Bombardier Consent, it would not change that the \$30 Million PDP was to be repaid to EDC. Id.

2. Opposition

The Trustee responds that the Complaint states a claim that the \$30 Million PDP is property of the estate. Opposition at 26. He asserts that the plain meaning of the APA and the APA Assignment indicate that the APA Assignment was not an absolute assignment, but rather a security assignment of Zetta Singapore’s right to the \$30 Million PDP. Id. The Trustee contends that neither CAVIC nor Bombardier challenge Count II, which seeks a declaration that the APA was terminated, nor do they contest that Bombardier received the \$30 Million PDP pursuant to the APA. Id. at 28. The Trustee notes that: 1) Count III seeks a declaratory judgment that CAVIC did not perfect its security interest, which CAVIC does not dispute; 2) Count IV seeks to avoid CAVIC’s unperfected security interest in the \$30 Million PDP under § 544 (and once CAVIC’s security interest is avoided, so too is everything that comes afterwards, including EDC’s perfected security interest in CAVIC’s avoided rights under the APA Assignment); 3)

Count V seeks to recover the \$30 Million PDP under § 550; and 4) Count VI seeks turnover of the \$30 Million PDP from Bombardier under § 542. Id. at 26.

The Trustee argues that under § 544(a)(1), he may avoid unperfected security interests in property of the estate. Id. at 27 (citing In re Pac. Exp., Inc., 780 F.2d 1482, 1485-86 (9th Cir. 1986); In re Bonner, 2014 WL 890477, at *4 (B.A.P. 9th Cir. Mar. 6, 2014); In re Peregrine Entm't, Ltd., 116 B.R. 194, 207 (C.D. Cal. 1990)). The Trustee highlights that § 541(a) describes property of the estate as “all legal or equitable interests of the debtor in property as of the commencement of the case . . . wherever located and by whomever held,” and the scope of § 541(a) is “broad and ubiquitous” and includes all proceeds or profits of or derived from property of the estate. Id. (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 204 n.9 (1983); In re Allegheny Label, Inc., 128 B.R. 947, 952 (Bankr. W.D. Pa. 1991); § 541(a)(6)).

The Trustee contends that a debtor’s contract right is property of the estate. Id. (citing In re Nat’l Envtl. Waste Corp., 191 B.R. 832, 834 (Bankr. C.D. Cal. 1996), subsequently aff’d, 129 F.3d 1052 (9th Cir. 1997)). He argues that the Complaint alleges that pursuant to the APA, Zetta Singapore was the “Buyer” and Bombardier was the “Seller.” Id. (citing Complaint ¶¶ 4, 41). He argues that under Article 9.2 of the APA, if the APA was terminated, Zetta Singapore was entitled to all advanced payments less liquidated damages: “If before Delivery Time: . . . (b) Buyer terminates this Agreement . . . then

[REDACTED]

[REDACTED] Id. at 27-28 (citing Complaint ¶ 66, Ex. A). He claims that as the “Buyer” Zetta Singapore has a contractual right to the \$30 Million PDP, and the Complaint sufficiently pleads that the money is property of the estate. Id. at 28. The Trustee argues that the APA Assignment—a security assignment—does not alter this result because it is avoidable under § 544 for lack of perfection. Id.

The Trustee asserts that CAVIC completely disregards the Complaint, which plausibly alleges that the APA Assignment only resulted in CAVIC holding a security interest in the \$30 Million PDP, which it failed to perfect. Id. (citing Complaint ¶¶ 92-110, 143-44). The Trustee argues that an assignment may transfer a security interest rather than absolute ownership if the parties intended to create a security interest. Id. (citing In re Evergreen Valley Resort, Inc., 23 B.R. 659, 661 (Bankr. D. Me. 1982)). According to the Trustee, whether an assignment is absolute or a security transaction is left to the courts, and a document which on its face is seemingly an absolute assignment may still be treated as a security agreement in certain instances. Id. (citing Evergreen Valley, 23 B.R. at 661; In re Matter of Candy Lane Corp., 38 B.R. 571, 574-75 (Bankr. S.D.N.Y. 1984)). The Trustee claims that instead of looking at the language of the purported assignment, courts examine the nature of the transaction and analyze the parties’ intent. Id. (citing Evergreen Valley, 23 B.R. at 661; Candy Lane, 38 B.R. at 574-75). And, if an assignment’s language is ambiguous, courts have considered parol evidence to determine the nature and intent of the transaction. Id. at 28-29 (citing Candy Lane, 38 B.R. at 576; Evergreen Valley, 23 B.R. at 661).

The Trustee argues that the Complaint plausibly pleads that the parties intended the APA Assignment to be a security interest rather than an absolute assignment. Id. at 29. He acknowledges that the APA Assignment uses the term “absolute” assignment in Article 1, but he claims that its other provisions clearly indicate that it was not an absolute assignment of all rights and obligations. Id. The Trustee asserts that:

- 1) Zetta Singapore did not assign the APA itself, but only certain rights and obligations under the APA to CAVIC, and it was expressly subject to the assignment restrictions in Article 10.1 of the APA, Complaint ¶¶ 51, 94;
- 2) the Complaint alleges numerous additional facts to show that the parties intended the APA Assignment to act as security for the repayment of the \$30 Million PDP, and the APA Assignment is listed on the Term Sheet as one of the “securities” for the \$30 Million PDP, Complaint ¶¶ 92-97; and
- 3) Bombardier and the Debtors treated the APA as an executory contract in the Cases, and CAVIC’s POC indicated that its claim was secured, Complaint ¶¶ 96-97.

Id.

The Trustee argues that the following additional factors confirm the parties’ intent:

- 1) the assignment did not reduce Zetta Singapore’s obligations because it remained jointly and severally liable with CAVIC for the performance of all the APA obligations and CAVIC retained a right of deficiency, Complaint ¶¶ 98-99, 108;
- 2) the timing of the APA Assignment, within one day of the \$30 Million PDP, suggests that it was for security, Complaint ¶ 100;
- 3) the payments made on the Undelivered Financed Lease would be applied to reduce the amount of the PDP after it was rolled into the “Financed Amount,”²⁰ Complaint ¶¶ 101-04;
- 4) in the event of a loss of the aircraft, CAVIC was required to pay any amounts recovered in excess of the remaining amount due under the lease to Zetta Singapore, Complaint ¶¶ 105-06;
- 5) the parties intended that the APA Assignment would give CAVIC an extra source of payment for the loan, Complaint ¶ 107; and
- 6) TVPX, at the direction of the Debtors, had the right to pay off the debt in full, which would extinguish CAVIC’s rights to the assigned property, Complaint ¶ 109.

Id. at 29-30 (citing Levin v. City Trust Co., 482 F.2d 937, 938 (2d Cir. 1973); Evergreen Valley Resort, 23 B.R. at 662; Candy Lane, 38 B.R. at 576; In re Voboril, 568 B.R. 797, 799 (Bankr. E.D. Wis. 2017)).

The Trustee argues that rather than address any of these facts, CAVIC blithely states that his claim to the PDP rests entirely on the “theory” that, upon the APA’s termination,

²⁰ The “Financed Amount” was [REDACTED] of the “Undelivered Aircraft Price.” Complaint ¶ 72(f).

the “Buyer” was entitled to return of all “advanced payments” received by Bombardier. Id. at 30 (citing Motion at 24). He asserts that his claim is not based on “theory,” but instead on specific factual allegations and a plain reading of the APA and ancillary documents. Id.

The Trustee claims that none of the documents that CAVIC cites describe it as the “Buyer.” Id. (citing Motion at 24; Complaint Exs. F, H, I, K, N, T). According to the Trustee, the Bombardier Consent clearly defined and referred to Zetta Singapore as the “Buyer,” including a provision that enforcement of EDC’s rights would not trigger a change in control of “Buyer,” and CAVIC was defined as the “Assignor.” Id. at 30-31 (citing Ex. T at 1, 4, § 14). He claims that CAVIC cannot create alternative facts or draw alternative inferences, CAVIC’s factual allegations are irrelevant to the Motion, and the Court may not simply disbelieve his allegations in favor of its competing inferences. Id. at 31 (citing In re Know Weigh, 576 B.R. 189, 213 (Bankr. C.D. Cal. 2017); Zochlinski v. Regents of the Univ. of Cal., 578 F. App’x 636, 638 (9th Cir. 2014)).²¹ The Trustee highlights that Zetta Singapore was not a party to the Bombardier Consent and did not sign it. Id. at 11. He claims that the Bombardier Consent cannot be deemed to modify or amend the fully integrated APA, which requires that any amendment be contained in a writing signed by the *parties* to the APA. Id. (emphasis in original).

The Trustee contends that the Complaint adequately pleads that he is entitled to avoid CAVIC’s security interest in the \$30 Million PDP. Id. at 31. The Trustee highlights CAVIC’s arguments, that—1) the APA Assignment is not a lease that can be avoided as a disguised financing; 2) the Debtors were not parties to certain operative documents regarding Aircraft 9788; and 3) the Undelivered Financed Lease was a “busted deal” and no precedent exists to recharacterize it—and he argues that CAVIC conflates the recharacterization of the lease transaction with a finding that the APA Assignment was a security assignment subject to avoidance. Id. According to the Trustee, he is not asserting that the APA Assignment is a lease and the Court’s determination of whether the Undelivered Financed Lease constitutes, or could have constituted, a disguised financing is relevant, but not dispositive regarding whether the APA Assignment constitutes a security assignment. Id. at 31-32.

In response to CAVIC’s argument that the Complaint asserts no plausible state law claim to the \$30 Million PDP, the Trustee contends that this rehashes the arguments about whether the \$30 Million PDP is Zetta Singapore’s property. Id. at 32. The Trustee describes as “simply false” the allegation that when Zetta Singapore assigned the APA to CAVIC, CAVIC took on the obligation to pay for Aircraft 9788, and as a result, CAVIC and not the Debtors borrowed the money for the \$30 Million PDP. Id. The Trustee highlights that Zetta Singapore remained jointly and severally liable with

²¹ The Trustee describes CAVIC’s statement, that Zetta Singapore acknowledges that the APA Assignment was “an absolute assignment,” as “bizarre.” Id. at 31 n.16 (citing Motion at 27). According to the Trustee, the Complaint states repeatedly that the APA Assignment was not absolute. Id. (citing Complaint ¶¶ 7, 92, 110, 142). The Trustee also argues that if CAVIC is relying on language in ¶ 1, terminology can be disregarded if a court determines that the substance of the transaction indicates that it was an assignment for security. Id.

CAVIC for the performance of all of Zetta Singapore's obligations under the APA to the same extent as if the APA Assignment had not been executed. Id. (citing Ex. R). And, the Trustee notes that Zetta Singapore was on the hook directly to CAVIC for all funds advanced by CAVIC under the Head Lease Guarantee and the FPA Guarantee. Id. According to the Trustee, this demonstrates the parties' intent that the APA Assignment was security to ensure that Zetta Singapore repaid the PDP amount to CAVIC, which is exactly why the APA Assignment is listed as one of the "securities" on the Term Sheet. Id. (citing Complaint ¶¶ 92-93, 99, 108).

The Trustee challenges CAVIC's argument, that the plain language of the Bombardier Consent reflects Bombardier's and EDC's intent that the APA Assignment was an absolute assignment, because neither Bombardier nor EDC were parties to the APA Assignment, and their intent is irrelevant (if it could be determined on a motion to dismiss when a complaint pleads otherwise). Id. at 32 (citing Know Weigh, 586 B.R. at 213). The Trustee argues that nothing in the Bombardier Consent, or whatever intent implied between the parties to that document, affects Zetta Singapore and the fully integrated APA and APA Assignment. Id. at 32-33. He contends that it would be strange if the Court ignored all of the facts plead in the Complaint in favor of a document to which Zetta Singapore was not a party to infer Zetta Singapore's intent. Id. at 33 (citing Cutler v. Rancher Energy Corp., 2014 WL 12599602, at *1 (C.D. Cal. June 2, 2014)).

Finally, the Trustee asserts that he does not need to avoid the entire transaction or the Bombardier Consent to recover. Id. Rather, he claims that he has sufficiently pled that CAVIC has an unperfected security interest in the PDP, which he can avoid using his strong-arm powers under § 544(a)(1). Id. at 33 (citing Complaint ¶¶ 7-8, 148-49).

3. Reply

CAVIC replies that the \$30 Million PDP is not property of the estate. Reply at 15. It contends that assuming, *arguendo*, that a debtor's contract right is property of the estate, Zetta Singapore's right to the \$30 Million PDP is simply "too contingent in nature and speculative to create a present or future property interest." Id. (quoting Diamond v. Hogan Lovells US LLP, 2020 WL 717809, at *5 (D.C. Cir. Feb. 13, 2020)). CAVIC argues that viewing one document in isolation does not tell the whole story, and the Trustee "conveniently fails" to add crucial context to his argument regarding Article 9.2 of the APA. Id. at 15-16.

CAVIC contends that it received a \$30 million loan from EDC to fulfill its obligation to purchase Aircraft 9788 and those funds were paid to Bombardier on its, and not the Debtors', behalf. Id. at 16. CAVIC claims that assuming that the APA Assignment is avoided, the "contract right" that the Trustee alleges is property of the estate imposes significant obligations on CAVIC, not merely rights. Id.

CAVIC argues that without the APA Assignment, the Debtors would have merely held a contract "right" to arrange for financing and payment of the \$30 Million PDP to

Bombardier. Id. According to CAVIC, § 550 is designed to restore the estate to the financial condition that would have existed had the transfer never occurred. Id. (citing Bakst v. Wetzel (In re Kingsley), 518 F.3d 874, 877 (11th Cir. 2008); Hirsch v. Gersten (In re Centennial Textiles), 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998)). CAVIC contends that a debtor's property does not shrink or expand by happenstance of bankruptcy. Id. (citing Motion at 22-23).

CAVIC claims that absent the APA Assignment, it had no obligation to borrow \$30 million from EDC to pay Bombardier, and it never would have done so. Id. CAVIC asserts that the expectation of any continued or future business is too contingent and speculative to create a present or future property interest, and even though property may be described as a "bundle of rights," the ability to terminate a relationship any time without penalty cannot support a finding that a transferrable property right existed. Id. (citing In re Thelen LLP, 24 N.Y. 16, 28 (N.Y. 2014)).

CAVIC argues that the Bombardier Consent is binding on the Trustee. Id. It claims that the Trustee admits in both the Complaint and the Opposition that Zetta Singapore controlled and directed TVPX, and Zetta Singapore was bound by the terms of the Bombardier Consent because TVPX, a party acting on its behalf and subject to its control, was a signatory to that document. Id. at 16-17. According to CAVIC, the plain language of the Bombardier Consent required Bombardier to return the \$30 Million PDP to EDC (and by extension to CAVIC as subrogee for EDC) upon receiving the requisite notice from EDC. Id. at 17. CAVIC contends that it does not matter whether Zetta Singapore signed the Bombardier Consent because Bombardier and EDC agreed to the disposition of the \$30 Million PDP, and Zetta Singapore raised no objection to that agreement. Id. CAVIC argues that if the Trustee wished to do so, he could have named EDC as a defendant in this AP. Id.

CAVIC asserts that the APA Assignment was an absolute assignment. Id. It argues that the cases cited by the Trustee are inapposite: 1) Evergreen Valley involved an assignment that, on its face, evidenced the parties' intent to create a security interest; 2) in Candy Lane, the assignor/debtor stated that the assignment was intended "as further security" for the repayment of a note that the assignor/debtor had issued to the assignee a few days earlier; 3) in Voboril, the assignment's title suggested that an absolute assignment was not contemplated by the parties, and the assignment indicated that the purpose was to provide "collateral security" for the repayment of the debts; and 4) in Kanner, the debtor obtained a bank loan and assigned to the bank its right to a reimbursement claim against a third party. Id. at 17-18. CAVIC contends that contrary to the facts in these cases, the \$30 Million PDP was never property of the Debtors: EDC loaned the funds to CAVIC, who paid the money to Bombardier. Id. at 18. CAVIC claims that at no time did the Debtors have a claim to, or an interest in, the funds. Id.

CAVIC argues that neither the title nor the contents of the APA Assignment provide any indication that its purpose was anything other than absolute, and, by accepting the APA Assignment, CAVIC received the benefits and took on the burdens of the APA and

agreed to perform all obligations under the APA “as if it were the original Buyer under the” APA. Id. (citing Ex. R). CAVIC asserts that at no time has it, as assignee, acted in any way other than as the absolute assignee and owner of the APA. Id. CAVIC argues that its POC has no relation to the APA Assignment and it was filed only as a prophylactic measure in response to the Trustee’s asserted ownership interest in the \$30 Million PDP. Id. at 18 n.4.

CAVIC contends that the documents attached to the Complaint belie the Trustee’s assertion that the parties intended the APA Assignment to be for security. Id. at 18. It highlights that before Zetta Singapore filed bankruptcy, there were six amendments to the APA (Exs. B, C, E, P, Q, U), with amendments one through five executed before the APA Assignment. Id. CAVIC stresses that in each of those five assignments, Bombardier and Zetta Singapore were the only signatories, but pursuant to the APA Assignment, CAVIC replaced Zetta Singapore as a party to the APA. Id. CAVIC notes that after the APA Assignment, Zetta Singapore lost its “party” status. Id. at 18-19. CAVIC highlights “Amendment No. 6” to the APA (Sixth Amendment) (Ex. U), and emphasizes that the first paragraph differs from the first paragraph of the five earlier amendments because Zetta Singapore is described as the “Original Buyer,” and it references two assignments: 1) the APA Assignment, which is described as an “assignment;” and 2) CAVIC’s assignment to EDC, which is described as a “security assignment.”²² Id. at 19. CAVIC asserts that all four parties were sophisticated and represented by knowledgeable and experienced counsel who distinguished between the description of these two assignments. Id.

CAVIC notes that the last page of the Sixth Amendment was executed by CAVIC and Bombardier as “parties,” with Zetta Singapore and EDC acknowledging and agreeing to its terms. Id. CAVIC claims that the Sixth Amendment was signed nearly three months after the 3/31/17 APA Assignment, which accurately described not only their intent, but also the structure of the transaction that the Trustee is trying to unwind. Id. at 19-20.

CAVIC argues that the Trustee has not alleged plausible facts that the APA Assignment was an assignment for security because it states clearly that it was an absolute assignment, and the Trustee ignores the integration clauses in the APA Assignment (Article 10) and the APA (Article 10.4) and New York law. Id. at 20. According to CAVIC, the Trustee’s only alleged ambiguity is his own incorrect interpretation of the meaning and use of APA Article 10.1, which is referenced in APA Assignment Article 4. Id. CAVIC notes that Bombardier and Zetta Singapore acknowledged and agreed in the

²² CAVIC indicates that the parties knew how to craft a limited assignment as distinguished from an absolute assignment of rights. Id. at 19 n.5 (citing Reply Ex. A). CAVIC claims that the Opposition invited it to attach portions of financed leases. Id. (citing Opposition at 21 n.9). The Opposition noted that CAVIC was free to attach relevant portions of the Financed Leases if it believed the terms of the agreements contradicted the Complaint’s allegations. Opposition at 21 n.9 (citing Kreipke v. Wayne State Univ., 807 F.3d 768, 774 (6th Cir. 2015)). The Court will not consider Reply Ex. A because it is not authenticated. Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (stating that documents must be authenticated before they can be admitted); Evans v. Bd. of Educ. Sw. City Sch. Dist., 2010 WL 1849273, at *3 (S.D. Ohio 2010) (indicating that unauthenticated documents are inadmissible under the Federal Rules of Evidence).

first sentence of APA Assignment Article 4, that, for the purposes of Article 10.1 of the APA, CAVIC was an entity established by a third-party financier in connection with Zetta Singapore's acquisition of Aircraft 9788 on the condition that Zetta Singapore remain jointly and severally liable with CAVIC. Id. CAVIC highlights Article 4's second sentence, which indicated that Bombardier and Zetta Singapore acknowledged and agreed that the assignment conformed with Article 10.1 of the APA. Id.

CAVIC notes that not only does the APA Assignment use the term "absolute" in Article 1—"Assignor hereby absolutely assigns, conveys and transfers, to Assignee all of Assignor's rights, title, interests, liabilities and obligations under the Agreement including . . ."—but also in the first "Whereas" clause to show intent—"Assignor desires to transfer and absolutely assign to Assignee all of Assignor's rights, interests, liabilities and obligations in connection with and arising out of the Agreement and the Assignee accepts such transfer and assignment." Id. at 21. CAVIC argues that this is hardly security assignment language and it is not in any way ambiguous. Id. CAVIC asserts that unlike intentional security assignments, Article 1 of the APA Assignment indicates that Zetta Singapore's assignment was of its "obligations to make all remaining payments under the Agreement" and CAVIC, as assignee, "accept[ed] such transfer and assignment." Id. CAVIC contends that APA Assignment Article 2 is even more clear because it states that CAVIC agreed to perform all of Zetta Singapore's obligations under the APA to the extent not already performed as if it were the "original Buyer" under the APA. Id.

CAVIC focuses on the factors that the Trustee contends indicate that the parties intended the APA Assignment to be for security and asserts that even if intent were an issue, the Complaint does not plausibly plead any of the factors. Id. In response to the Trustee's argument that the assignment was for security because Zetta Singapore remained jointly and severally liable for the performance of the APA's obligations, CAVIC highlights that Zetta Singapore's joint and several liability was a requirement of the APA, and immediately before the execution and delivery of the APA Assignment, it was still obligated to pay the \$30 Million PDP. Id. at 22. But, simultaneously with the execution and delivery of the APA Assignment, EDC paid \$30 million to Bombardier and Zetta Singapore's obligation to Bombardier was completely reduced. Id. CAVIC challenges the Trustee's contention that Zetta Singapore's joint and several liability provided CAVIC a right of deficiency, noting that "deficiency" is not the right word, and it had a right of contribution which, under New York law, would have been for at least half. Id. at 23.

CAVIC rebuts the Trustee's position that the timing of EDC's loan to CAVIC suggests that the assignment was for security. Id. at 22. CAVIC asserts that the loan from EDC was a fully recourse loan under the PDP Facility Agreement between it and EDC and Zetta Singapore was not a party to that transaction. Id. (citing Ex. F). CAVIC mentions that it was both recourse on that loan and recourse as the obligor and owner of the APA, and at the same time it had the obligation to pay the full price of Aircraft 9788 upon delivery. Id. CAVIC contends that the Security Assignment was made by it to EDC of its interest in the APA with full perfection by the UCC, and this Security

Assignment was consented to by Bombardier and TVPX. Id. CAVIC claims that all parties knew what a security assignment of a purchase agreement was and how it worked and the APA Assignment and the circumstances hardly “suggest” that it was for security. Id.

CAVIC focuses on the Trustee’s argument that later payments under the Undelivered Financed Lease would have applied to reduce its own loan from EDC. Id. at 22. CAVIC argues that this hypothetical does not somehow imply an intent that the APA Assignment was a security assignment. Id. CAVIC contends that the loan it received from EDC had nothing to do with Zetta Singapore. Id. at 22-23.

CAVIC addresses the Trustee’s argument that if, hypothetically, Aircraft 9788 had been delivered and there was an “event of loss,” CAVIC was required to pay any amounts received in excess of the amount due under the lease to Zetta Singapore. Id. at 23. CAVIC claims that that does not mean that the APA Assignment was a security assignment. Id.

In response to the Trustee’s argument that the APA Assignment was an extra source of payment for CAVIC’s exposure on its loan from EDC, CAVIC argues that if the aircraft had been delivered, it would have had to pay Bombardier and arrange to buy and sell Aircraft 9788 to another buyer or assign the APA to that buyer. Id. CAVIC argues, however, that it would not have been what could be described as a source of payment. Id.

CAVIC asserts that the Trustee relies on the FPA when arguing that TVPX, at the direction of the Debtors, had a right to pay off the debt, which would extinguish CAVIC’s rights to the assigned property. Id. CAVIC contends that the FPA does not state this. Id. Rather, according to CAVIC, the FPA is a “two way street” and meant to ensure that both CAVIC and TVPX and its guarantor Debtors would complete the lease transaction upon delivery. Id. at 23-24.

4. Analysis

Counts III, IV, V, and VI are inextricably intertwined. If the APA Assignment was for security and not absolute, then it would be avoidable as an unperfected security interest, and the \$30 Million PDP would be property of the estate. If, in contrast, the APA Assignment was absolute, then it did not need to be perfected, it is not avoidable, and the \$30 Million PDP would not be property of the estate. Whether Counts III, IV, V, and VI should be dismissed therefore turns on whether the assignment was absolute or for security.

i. Security v. Absolute Assignment in General

Title 11 U.S.C § 544(a) provides:

The trustee . . . as of the commencement of the case . . . may avoid any transfer of property of the debtor . . . that is voidable by . . . a creditor that . . . obtains . . . a judicial lien on all property on which a creditor on a simple contract could have obtained a judicial lien, whether or not such a creditor exists.

If property of a debtor is assigned prepetition, that property will be property of the estate subject to avoidance under § 544 only if the assignment was intended to be a security transaction as opposed to an absolute transfer. In re Evergreen Valley Resort, Inc., 23 B.R. 659, 660-61 (Bankr. D. Maine 1982) (noting that funds could be used as cash collateral only if the estate had an interest in the funds, which would occur if an assignment was intended to be a security transaction as opposed to an absolute transfer).

“To decipher a security agreement from an absolute assignment is often a difficult task.” Matter of Candy Lane Corp., 38 B.R. 571, 575. No particular “phraseology” is required to effect an assignment or a security interest. Id. All that an assignment requires “is that the property must be sufficiently identifiable and there must be an intent to assign a present right in the subject matter of the assignment, divesting the assignor of all control over that which is assigned.” Id. A security interest, by contrast, is “an interest in personal property or fixtures which secures payment or performance of an obligation.” Id. Determining whether an agreement is an absolute assignment or a security interest is based on examining the relevant documents in the context of the surrounding transaction. Id. at 576. A document which is seemingly an absolute assignment on its face may be treated as a security agreement in certain instances, and the intent of the parties governs whether a particular document or transaction creates a security interest. Id. at 575-76. Ultimately, this is a factual decision left to the courts. In re Evergreen Valley Resort, Inc., 23 B.R. 659, 661 (Bankr. D. Maine 1982). The party challenging the assignment has the burden of proof and must show by “clear and convincing proof” that only a security interest was intended. Candy Lane, 38 B.R. at 577.

Courts have used a number of factors to determine whether an assignment is absolute or for security:

- 1) the plain language of the agreement;
- 2) the timing of the assignment and the loan;
- 3) whether payments received under the assignment would be applied to reduce the amount of the loan;
- 4) whether the assignment will be a source of payment if the loan is not paid;
- 5) whether any excess paid on the loan will be returned to the assignor;
- 6) whether the assignee retains a right to deficiency if the assignment does not satisfy the amount of debt owed;
- 7) whether the assignee’s rights in the assigned property would be extinguished if the assignor paid the debt from another source; and
- 8) whether, before the complaint was filed, the assignee filed proofs of claims or other documents asserting that it was a secured party.

Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937 (2d Cir. 1973) (timing of the assignment and the loan; payments received under the assignment reduced the amount of the loan; excess payments returned to the assignor; assignment is a source of repayment if the loan is not paid); In re Voboril, 568 B.R. 797 (Bankr. E.D. Wis. 2017) (plain language; payments received under the assignment reduced the amount of the loan; if the assignor paid off the loan, the assignee's interest in the assigned property would terminate); Matter of Candy Lane Corp., 38 B.R. 571 (Bankr. S.D.N.Y. 1984) (plain language; timing of the assignment and the loan; right to deficiency; filings before the complaint); In re Evergreen Valley Resort, Inc., 23 B.R. 659 (Bankr. D. Maine 1982) (plain language; payments received under the assignment reduced the amount of the loan; excess returned to assignor; assignee's rights in the assigned property extinguished if the debt were paid from another source).

In Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937 (2d Cir. 1973), Joseph Kanner Hat Co., Inc. (KHC) received a \$25,000 loan from City Trust Co. (City Trust), evidenced by a promissory note endorsed by Ruth and Morton Kanner (Kanners). Id. at 937-38. In consideration for the loan, KHC "absolutely assigned, transferred and sold any and all right, title and interest it had, or may have, in and to all the moneys due it from the Norwalk Redevelopment Agency by virtue of a certain claim for reimbursement of compensable moving expenses." Id. at 938. The amount originally due from the Norwalk Redevelopment Agency (Agency) was \$25,000. Id. Sometime later, KHC filed bankruptcy, and Stuart Levin (Levin) was appointed as trustee. Id. By then, the amount due from the Agency had been reduced to \$16,500 and the Agency turned \$15,576 over to Levin. Id. at 938 & n.2. Likewise, the amount that the KHC owed City Trust had been reduced by \$6,258, to \$18,742. Id. at 938. City Trust filed a proof of claim in KHC's bankruptcy case and petitioned for the \$15,576, arguing that the assignment was a transfer of an "absolute right" to collect the sum due to KHC from the Agency. Id. at 937-38. Levin countered that the transaction created a security interest, which City Trust never perfected and it was therefore subordinate to his interest in the funds. Id. at 938.

A referee held that: 1) the assignment was an outright sale, which did not involve the creation of a security interest and it was exempt from any perfection requirement; and 2) Levin was directed to pay the \$15,576 to City Trust. Id. at 938-39. The district court denied a petition to review. Id. at 939. On appeal, the Second Circuit held that the evidence was "overwhelming" that the assignment was not an outright sale but instead was taken as security for the \$25,000 loan, noting that: 1) the assignment was delivered simultaneously with the \$25,000 loan evidenced by a promissory note with the Kanners' endorsements; and 2) a City Trust bank officer testified that i) payments received would be applied to reduce the amount of the loan; ii) if KHC or the Kanners made payments, any excess over the amount of the loan received for the assignment would have been returned to the KHC; and iii) if the Kanners did not pay the loan, the assignment was a source of payment. Id. at 940. The appellate court indicated that City Trust acted in conformance with what its officer stated. Id. Because \$25,000 was the maximum amount reimbursable by HUD for moving expenses, City Trust required the note to be

personally endorsed by the Kanners, and when less than the full \$25,000 was received, City Trust tried to realize on the note by attaching \$6,258, which was in Ruth Kanner's account. Id. According to the court, if Ruth Kanner had \$4,000 more in her account, City Trust would not have claimed all of the funds at issue, because City Trust was owed \$18,742, and the Agency paid Levin \$15,576. Id. at 940 & n.8. Finally, the court highlighted that despite the "absolute" assignment, City Trust did not protest when the Agency paid part of the \$25,000 to a mover and kept part for itself. Id. According to the Second Circuit, the assignment was an unperfected security interest, Levin's claim to the funds had priority over City Trust's claim and the district court was instructed to remand the case to the referee to enter an order denying City Trust's petition for the funds and declaring the funds were property of the bankruptcy estate. Id. at 941.

In In re Evergreen Valley Resort, Inc., 23 B.R. 659 (Bankr. D. Maine 1982), Evergreen Valley Resort, Inc. (Evergreen), a year-round resort facility, executed a \$1.2 million promissory note to the Maine Guarantee Authority (MGA), secured by a mortgage on Evergreen's real estate. Id. at 660. Approximately a year later, Evergreen entered into a financing arrangement with Casco Bank & Trust Co. (Casco Bank) with Casco Bank accepting notes in conjunction with Evergreen selling timeshare units. Id. As security for the notes, Casco Bank would keep 20% of the price of the timeshare units in a reserve account and twice a year, it would release the excess over the then-outstanding loan balances to Evergreen. Id. Evergreen wanted to market its timeshare units and it sought release of certain property (an inn and two acres of land) from the mortgage held by MGA. Id. Evergreen and MGA executed an agreement to release that property from MGA's mortgage in exchange for \$300,000 consisting of Evergreen: 1) paying \$100,000 in cash, and 2) assigning \$200,000 of the excess reserves in the Casco Bank account to MGA (5/8/78 Assignment). Id. The \$100,000 payment reduced the \$1.2 million promissory note as did approximately \$9,000 that MGA received from the excess reserves. Id. When Evergreen filed bankruptcy, the Casco Bank account held approximately \$21,500 in excess reserves. Id. at 660 & n.4.

Evergreen moved for authorization to use the \$21,500 as cash collateral, which MGA opposed, arguing that the 5/8/78 Assignment was an absolute transfer, and Evergreen could not use those funds because they were not property of the estate. Id. The court began by noting that it had to decide whether the "true nature of the transaction [was] such that the 'legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale.'" Id. at 661.

The court held that that the 5/8/78 Assignment created a security interest because: 1) if the excess reserves did not reach \$200,000, Evergreen had to pay the balance; 2) MGA acknowledged that its rights to the assigned property would be extinguished if Evergreen paid the debt in full from another source; 3) it did not immediately discharge the debt, but instead the balance of the promissory note was reduced only as funds became available to MGA; and 4) it provided that the "assignment made and security given herein is made as security . . ." Id. at 662. Because the evidence "clearly" indicated the parties' intent that the assignment created a security interest, the court

held that the excess reserves were property of the estate and cash collateral, and it granted Evergreen's motion. Id.

In Matter of Candy Lane Corp., 38 B.R. 571 (Bankr. S.D.N.Y. 1984), Seymour Newman (Newman) and Raymond Ducorsky (Ducorsky), who were the principals of the Candy Lane Corporation (Candy Lane), owned real property in Hudson, New York, where they conducted manufacturing operations. Id. at 573. Candy Lane rented a building from Newman and Ducorsky and it owned the building's trade fixtures. Id. After a New York state court entered a condemnation order vesting title to the property in the Hudson Urban Renewal Agency (HURA), Shirley Leff (Leff) made four loans to Candy Lane totaling \$131,000 and Candy Lane gave Leff a \$131,000 note. Id. Shortly thereafter, Ducorsky, Newman, and Candy Lane executed a document that was facially an absolute assignment. Id. at 573, 576. The document indicated that they "jointly and severally, sold, assigned, transferred" to Leff their "right, title and interest in and to any award" up to \$131,000 plus interest that they received for the taking of the property (3/21/78 Assignment). Id. at 573. Approximately a week later, Nathaniel Rubin (Rubin), Ducorsky's, Newman's and Candy Lane's attorney, wrote to Leff indicating that he was enclosing the original \$131,000 note and assignment of rents executed by Newman and Ducorsky, "as collateral security for said note, together with the Assignment of Condemnation Award in Hudson, *as further security* for the payment of said note." Id. at 574 (emphasis in original).

Candy Lane then filed a chapter 11 bankruptcy petition, and Lawrence Sarf (Sarf) was appointed as the trustee. Id. at 573. Sometime later, a judgment was entered in the condemnation proceeding awarding Newman and Ducorsky \$79,535.25 for the taking of their real property, and Candy Lane \$780,079 for the taking of its trade fixtures. Id. Sarf placed the \$780,078 in an escrow account. Id. Leff asserted an interest in the \$780,078, claiming that she received an unqualified assignment and the funds were not part of Candy Lane's bankruptcy estate. Id. at 574. Sarf filed a complaint, seeking to set aside Leff's interest in the condemnation award because he asserted that the assignment was intended to create only a security interest, which was not perfected by filing a financing statement. Id. at 572. Id. Leff moved to dismiss the complaint or alternatively, for summary judgment and an order that Sarf pay her \$131,000 from the condemnation award. Id. at 574.

The court indicated that the 3/21/78 Assignment contained certain characteristics of an absolute assignment, including: 1) it identified the property and showed an intent to assign a present interest; 2) it was "absolute on its face;" and 3) Ducorsky claimed that Leff (his sister) was to be repaid from the condemnation award as a primary source, and only if those funds were insufficient, then she would be paid from secondary sources including Candy Lane's principals' personal guarantees. Id. at 576-77. But, the Court also noted that an issue remained whether Candy Lane divested itself of all control over the \$131,000 of condemnation proceeds, and the 3/21/78 Assignment could still be found to be a security interest because: 1) on 8/9/82, Leff filed a proof of claim, indicating that she received an assignment of condemnation award as "security" for her loan, and that she had "a secured interest" in \$131,000; and 2) in an application to the

court shortly before Sarf filed the adversary proceeding, Leff sought an order declaring that her \$131,000 claim was secured by the condemnation award. Id. at 577. According to the court, the legal posture adopted by Leff, although “not dispositive of this issue,” tended to rebut the presumption that the assignment was absolute. Id. The court also highlighted Rubin’s letter that described the assignment “as further security” and noted that the amount of the assignment and the timing of the transfer (\$131,000 and 3/21/78) as compared to the loans made by Leff (between 1/13/77 and 3/15/78, totaling \$131,000) indicated that a security interest was created. Id. The court denied Leff’s motions to dismiss and for summary judgment, finding that there was a triable issue of fact whether the assignment was absolute or intended as security. Id.

In re Voboril, 568 B.R. 797 (Bankr. E.D. Wis. 2017), involved Stephen Voboril (Voboril), a retired insurance salesman. Id. at 799. During his career, Voboril received commissions for selling insurance policies and other financial products, and after retirement, he continued earning commissions when customers renewed their policies. Id. In June 2012, the First Bank Financial Centre (First Bank) made a loan to Voboril Financial, and Voboril personally guaranteed the loan and executed a “Collateral Assignment of Renewal Commissions” (Collateral Agreement). Id. The Collateral Agreement indicated that it was “made and accepted as collateral security for the repayment” of Voboril’s indebtedness to First Bank “existing or hereafter incurred.” Id. First Bank did not file a financing statement to perfect its security interest. Id. After Voboril filed bankruptcy, Bruce Lanser (Lanser) was appointed as the chapter 7 trustee and filed an avoidance action against First Bank to avoid liens that it held on the insurance renewal commissions and a promissory note payable Voboril. Id. Lanser moved for summary judgment, arguing that the renewal commissions were “accounts” as defined by the UCC Article 9, and First Bank’s failure to file a financing statement meant that it had an unperfected security interest that he could avoid under his “strong arm powers.” Id. at 798-99. First Bank countered that the Collateral Agreement was an assignment of a single account and it did not need to file a financing statement. Id. at 799.

Although the court acknowledged the Collateral Agreement’s language indicating that Voboril had assigned all right, title and interest in the commissions to First Bank, it held that the Collateral Agreement bore the hallmarks of a security agreement rather than an absolute assignment, including: 1) its complete title was a “Collateral Assignment of Renewal Commissions (For use where payment to Assignee is to commence only after default and delivery of written notice)” suggesting that the parties did not contemplate an absolute assignment; 2) it indicated that its purpose was to provide “collateral security” for the repayment of Voboril’s existing or future debts; 3) it did not state or imply that the assignment reduced or eliminated the debt; 4) Voboril, rather than First Bank, continued to receive the renewal commissions unless and until First Bank notified him and his employer of a default, and Voboril continued to receive the commissions as of the petition date; and 5) if Voboril paid off the loan, First Bank’s interest in the renewal commissions would terminate. Id. at 799-800. The court concluded that Article 9 of the UCC governed the Collateral Agreement, the assignment exception to Article 9 did not apply, and First Bank was required to file a financing statement to perfect its

security interest in the renewal commissions. Id. at 800. Because it had not done so, First Bank’s security interest in the commissions was avoidable by Lanser, and the court granted his motion for summary judgment. Id. at 800, 803.

There is no dispute that New York law governs the APA, the APA Assignment, and the Bombardier Consent. Motion at 26; Opposition at 14, 28 n.14. New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose be read together, even when they were “executed on different dates and were not all between the same parties.” This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998). In assessing the correct meaning of a contract comprised of more than one document, “it is good sense and good law that . . . closely integrated and nearly contemporaneous documents be construed together.” Gordon v. Vincent Youmans, Inc., 358 F.2d 261, 263 (2d Cir.1965). The Court must consider the contract “as a whole to ensure that undue emphasis is not placed upon particular words and phrases . . . and seek to give effect and meaning to every term of a contract.” In re AAGS Holdings LLC, 608 B.R. 373, 378 (Bankr. S.D.N.Y. 2019) (internal quotation marks omitted). The law requires courts to harmonize all contract terms. Spinelli v. Nat’l Football League, 903 F.3d 185, 200 (2d Cir. 2018).

Under New York law, if a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. Spinelli, 903 F.3d at 200. But, if the parties’ intent cannot be ascertained from the face of their agreement, the contract is ambiguous and its interpretation presents a question of fact. Id. A contract is ambiguous if it could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. AAGS Holdings, 608 B.R. at 378. A contract is unambiguous if it has a “definite and precise meaning.” Id. Unambiguous language does not become ambiguous because a party urges a different interpretation that strains the language beyond its ordinary meaning. Id.

ii. Relevant Documents

Here, the patchwork of relevant documents is as follows.

On 12/10/15, Zetta Singapore, as “Buyer” and Bombardier as “Seller” executed the APA, with Bombardier agreeing to manufacture, sell and deliver, and Zetta Singapore agreeing to take delivery of, and pay [REDACTED]. Ex. A §§ 1.1, 2.1.

Regarding “TERMINATION,” the APA provided that if, before delivery, Zetta Singapore:

terminates this Agreement pursuant to Article 9.1,²³ then [REDACTED]

²³ Article 9.1 stated:

[REDACTED]

Ex. A § 9.2.

The APA also contained the following limitation on assignments:

[REDACTED]

Ex. A § 10.1.

Between 2/25/16 and 11/10/16, Bombardier and Zetta Singapore amended the APA twice. Exs. B, C. As relevant to this dispute, “Amendment No. 1” (First Amendment), executed on 2/25/16 updated the payment schedule to make the second payment of [REDACTED], and “Amendment No. 2” (Second Amendment), executed on 11/10/16, changed the delivery date. Exs. B § 2, C § 2.

The unsigned Term Sheet, which indicates that it was a [REDACTED] and is dated 11/17/16, included two tables: a [REDACTED] and a [REDACTED] [REDACTED]²⁴ Ex. D. The [REDACTED] contains the following entries relevant to this Motion:

Either party may terminate this Agreement before Delivery Time . . . upon the occurrence of any of the following events: (i) the other party makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts; . . . (iii) proceedings under any law relating to bankruptcy, insolvency or the reorganization or relief of debtors are instituted by or against the other party . . .

Ex. A § 9.1.

²⁴ According to the Trustee, the “PDP Finance term sheet” governed the repayment of “the loan” from CAVIC before delivery of Aircraft 9788 and the “Long Term Finance Term Sheet” governed the repayment of “the loan” from CAVIC after delivery of Aircraft 9788. Complaint ¶ 71.

- 5) On 12/23/16, Zetta Singapore, Zetta USA, Asia Aviation Holdings Pte Ltd., and Geoffrey Cassidy as “Guarantors” and CAVIC as “Beneficiary” executed the FPA Guarantee, under which each “Guarantor” guaranteed TVPX’s performance of its obligations under the FPA. Ex. L §§ 1.1, 2.1.
- 6) On 12/23/16, TVPX, as “owner trustee” and “Lessor,” and Zetta USA, as “Lessee,” executed the Sublease under which TVPX leased Aircraft 9788 to Zetta USA. Ex. M.
- 7) On 12/23/16, CAVIC as “Borrower” and EDC as “Security Trustee” executed the Security Agreement, under which CAVIC granted EDC a security interest in the APA, the APA Assignment,²⁶ the FPA, and the FPA Guarantee. Ex. N § 2.1.

On 3/25/17, Zetta Singapore as “Buyer” and Bombardier as “Seller” executed two more amendments to the APA: “Amendment No. 4” (Fourth Amendment), acknowledging that Zetta Singapore had paid Bombardier [REDACTED], Ex. P; and “Amendment No. 5” (Fifth Amendment), amending the payment schedule so that the [REDACTED]. Ex. Q.

Exhibit R is the 3/31/17 APA Assignment among Bombardier as itself, Zetta Singapore as “Assignor,” and CAVIC as “Assignee,” which was executed approximately 15 months after the parties executed the 12/10/15 APA. Exs. A, R. The APA Assignment, which is one of the documents that is central to the dispute between the Trustee and CAVIC, provides in the “WHEREAS” provisions and Article 1 that:

[Zetta Singapore] desires to transfer and absolutely assign to [CAVIC] all of [Zetta Singapore]’s rights, interests, liabilities and obligations in connection with and arising out of the Agreement²⁷ and [CAVIC] accepts such transfer and assignment.

²⁶ The Court notes that the Security Agreement was executed approximately three months before the APA Assignment. Security Assignment § 2.1, however, provided that CAVIC granted EDC a continuing security interest in, among other things, “each Purchase Agreement Assignment,” and § 1.2 indicated that unless otherwise defined, terms had the meanings provided in the PDP Facility Agreement. Ex. N. The term “Purchase Agreement Assignment” was not defined in the Security Agreement and therefore the definitions in the PDP Facility Agreement control.

The PDP Facility Agreement defined the “Purchase Agreement Assignment” for Aircraft 9788 as an assignment agreement “entered into *or to be entered into, as the context may require,*” between Zetta Singapore as assignor, CAVIC as assignee, and Bombardier Inc. Ex. F Appx. A (emphasis added). Although the APA Assignment was executed by Bombardier (rather than Bombardier Inc.), Ex. R, the APA Assignment otherwise fits the definition of “Purchase Agreement Assignment” as used in the PDP Facility Agreement.

²⁷ The “Agreement” is defined as the APA and all: i) schedules, completion work and other specifications; ii) amendments (including the First through Fifth Amendments), supplements, exhibits and letter agreements relating thereto; and iii) any warranty “Bill of Sale” thereto. Ex. R.

...
[Zetta Singapore] hereby absolutely assigns, conveys and transfers to [CAVIC] all of [Zetta Singapore's] rights, title, interests, liabilities and obligations under the Agreement including, without limitation, i) the benefits of the advance payments already made by [Zetta Singapore] in respect of the Aircraft, ii) its obligation to make all remaining payments under the Agreement, iii) its right to accept Delivery of the Aircraft and take title to the Aircraft and be named as buyer in the bill of sale for the Aircraft provided all of [Zetta Singapore's] obligations are fulfilled pursuant to the terms thereof under the Agreement, and iv) any and all rights of [Zetta Singapore] to compel performance of the terms of the Agreement by Bombardier corresponding to the rights assigned under this clause in respect of the Aircraft, and [CAVIC] accepts such transfer and assignment.

Ex. R. And, Article 4 of the APA Assignment indicates that:

Bombardier and [Zetta Singapore] acknowledge and agree that, for the purposes of Article 10.1 of the Agreement, [CAVIC] is an entity that has been established by a third party financier in connection with [Zetta Singapore]'s acquisition of the Aircraft. Notwithstanding the provisions of Article 10.1 of the Agreement, Bombardier and Assignor individually and collectively acknowledge and agree that this Assignment is made in conformity with Article 10.1 of the Agreement.

Ex. R. The APA Assignment was executed by Zetta Singapore and CAVIC, and "[a]greed and consented to" by Bombardier. Ex. R.

On that same day, 3/31/17, Bombardier on behalf of itself, EDC as "Assignee," CAVIC as "Assignor," and TVPX as "owner trustee" and "Forward Purchaser," executed the Bombardier Consent, in which Bombardier: 1) acknowledged and consented to the Security Agreement and the FPA; and 2) confirmed that upon receipt of the \$30 Million PDP, it would have received advance payments totaling [REDACTED]. Ex. T §§ 1-2, 4; Complaint ¶ 53. Bombardier also agreed that if it defaulted under the APA or for any other reason, it would pay, directly to EDC and not to CAVIC, the \$30 Million PDP. Ex. T § 11.

Finally, on 6/21/17, Bombardier, as "Seller;" Zetta Singapore, as "Original Buyer;" CAVIC, as "Assignee;" and EDC, as "Security Assignee," executed the Sixth Amendment to the APA, which was signed by CAVIC and Bombardier as parties, and "Acknowledged and Agreed to by" EDC and Zetta Singapore. Ex. U.

iii. Was the Assignment Absolute or for Security?

Here, if the assignment from Zetta Singapore to CAVIC was absolute, then the Debtors had no interest in the \$30 Million PDP as of the commencement of the Cases, the PDP would not be property of the estate, and CAVIC’s interest in the PDP would not be subject to § 544 avoidance. In contrast, if the assignment from Zetta Singapore to CAVIC was for security, then the Debtors had an interest in the \$30 Million PDP as of the commencement of the Cases, the PDP would be property of the estate, and CAVIC’s interest in the PDP, which is unperfected, would be subject to § 544 avoidance. The determinative question is therefore whether the assignment was absolute or for security.

The Trustee relies on the Term Sheet, Article 4 of the APA Assignment, and Bombardier’s filings in the Cases to support his position that the APA Assignment was for security. CAVIC relies on the APA Assignment and the Bombardier Consent in support of its argument that the APA Assignment was absolute.

A. Term Sheet

In the Motion, CAVIC does not mention the Term Sheet in its arguments regarding Counts III, IV, V, and VI. But, in its analysis of Count I, CAVIC argues that the Trustee’s reliance on the Term Sheet is misplaced because: 1) the Term Sheet attached to the Complaint is unsigned; 2) AVIC, not CAVIC, is the party to the Term Sheet, there are no factual allegations demonstrating that the Term Sheet was negotiated for CAVIC’s benefit, and AVIC is not a party to the Complaint; and 3) the Term Sheet is a non-binding letter of intent which may or may not have been accepted, amended or superseded and is not relevant in light of integration clauses in subsequent agreements. Motion at 19.

In the Opposition, the Trustee highlights that the APA Assignment is listed on the Term Sheet as one of the “securities” for the PDP. Opposition at 29 (citing Complaint ¶¶ 95). He argues that it is irrelevant for purposes of a motion to dismiss that the Term Sheet is unsigned because all factual allegations, including the provisions in the unsigned Term Sheet, are assumed to be true. Opposition at 22. The Trustee also notes that: 1) the Complaint alleges that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases on behalf of CAVIC, Complaint ¶¶ 26, 46; 2) [REDACTED] under the Head Lease and Sublease, Exs. I at § 30.1.4, M § 27.1; and 3) the provisions of the Term Sheet “found their way into the transaction documents,” Complaint ¶¶ 71-73. Opposition at 21-22. CAVIC does not address the Term Sheet in the Reply.

The Complaint alleges on information and belief that AVIC is the ultimate parent corporation of CAVIC and was responsible for negotiating the terms of the Financed Leases on CAVIC’s behalf. Complaint ¶ 26. It also alleges that on 11/17/16, Zetta Singapore and AVIC, on behalf of CAVIC, memorialized the terms of the loan and financing agreement in the Term Sheet, which was a “letter of intent” and provided the “master framework” that governed the structure of the financing arrangement for Aircraft 9788 and all but a few of the Term Sheet’s terms are contained in the Financed Lease

documents. Complaint ¶¶ 46, 70-74. Despite these allegations, the Trustee’s reliance on the Term Sheet is misplaced because: 1) it is unsigned; 2) its title indicated that it included “Leasing proposals;” and 3) the [REDACTED] indicated that it was a [REDACTED] which was not legally binding except for provisions not relevant here, and provided that it would be valid for acceptance by 11/30/16. Ex. D (emphasis added). Further, the APA Assignment’s integration clause expressly indicated that the APA Assignment superseded and cancelled all prior oral and written agreements regarding Aircraft 9788, which would include the Term Sheet. Ex. R § 10.

As the Trustee argues, all factual allegations, including the provisions in the unsigned Term Sheet, are assumed to be true. Opposition at 22. And, the Term sheet indicates that it was not legally binding, was merely a letter of intent, and was valid for acceptance by 11/30/16 and the Trustee does not allege that it was accepted by that date. Further, the Term Sheet indicates that the [REDACTED] was from the [REDACTED] [REDACTED] and the terms of the loan would [REDACTED] [REDACTED] Ex. D. But, the Trustee has presented no argument or evidence that any “loan” documents were executed by ZJ6000-4 Statutory Trust and TVPX or Zetta Singapore. And, to the extent that the Trustee relies on provisions contained in the Long Term Finance Term Sheet, those provisions are irrelevant because the Complaint makes clear that it applied only after delivery of the aircraft. Complaint ¶ 71.

For these reasons, the Court finds that the Term Sheet, on its own, did not create a security agreement and does not bolster the Trustee’s position that the APA Assignment was for security.

B. APA Assignment Article 4

CAVIC contends that the Complaint misconstrues Article 4 of the APA Assignment, which, on its face, is an exception to Article 10.1 of the APA and is not evidence that the APA Assignment was a security agreement. Motion at 25 n.14. The Trustee responds that Zetta Singapore only assigned certain rights and obligations under the APA to CAVIC, and the assignment was subject to APA Article 10.1’s restrictions on assignments. Opposition at 29 (citing Complaint ¶¶ 51, 94). The Trustee highlights that the APA Assignment indicated that the assignment was made to CAVIC “as an entity that has been established by a third party financier in connection with [Zetta Singapore’s] acquisition of [Aircraft 9788].” *Id.* at 10 (emphasis added by the Trustee) (citing Complaint ¶¶ 94, 110).

CAVIC replies that the Trustee’s interpretation of APA Article 10.1, which is referenced in APA Assignment Article 4, is incorrect. Reply at 20. It claims that Bombardier and Zetta Singapore acknowledged and agreed in the first sentence of APA Assignment Article 4, that, for the purposes of APA Article 10.1, CAVIC was an entity established by a third-party financier in connection with Zetta Singapore’s acquisition of Aircraft 9788 on the condition that Zetta Singapore remained jointly and severally liable with CAVIC. *Id.* CAVIC argues that Article 4’s second sentence was Bombardier’s and Zetta

Singapore’s acknowledgement and agreement that the assignment conformed with Article 10.1 of the APA. Id.

The Trustee homes in on APA Assignment Article 4, and under New York law, the Court must consider the contract “as a whole to ensure that undue emphasis is not placed upon particular words and phrases and all writings that are “part of a single transaction” must be read together even if they are were “executed on different dates and were not all between the same parties.” In re AAGS Holdings LLC, 608 B.R. 373, 378 (Bankr. S.D.N.Y. 2019) (internal quotation marks omitted); This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998). It would therefore be improper for the Court to decide whether the assignment was absolute or for security based only on two sentences in the APA Assignment, especially when the APA Assignment stated explicitly that it was “absolute” and there are no words or phrases, as there were in the cases cited by the Trustee, indicating that it was intended as a security agreement.

The Trustee’s focus on APA Assignment Article 4 and its reference to APA Article 10.1, which [REDACTED] is unavailing. There is no evidence from which the Court could find that the “financing,” which the Trustee asserts was provided by CAVIC under the APA Assignment was secured.

C. Bombardier’s Filings During the Chapter 11 Cases

In the Motion, CAVIC does not address Bombardier’s filings in the Cases. The Trustee contends that Bombardier treated Zetta Singapore as the counterparty to the APA during the chapter 11 Cases, which weighs in favor of a security assignment. Opposition at 10-11 (citing Complaint ¶¶ 55-62). CAVIC does not reply to the Trustee’s argument.

Bombardier was not named as a defendant in Count III, which alleges that the APA Assignment was a security assignment and not an absolute assignment in favor of CAVIC, Complaint ¶ 142, and the Trustee does not explain how Bombardier’s filings in the Cases are relevant to Zetta Singapore’s and CAVIC’s intent in the APA Assignment. Bombardier was also not a party to Count IV, which alleged that CAVIC does not hold a valid, enforceable, perfected, and avoidable security interest in the APA, or Count V, which alleged that the Trustee is entitled to recover the right to the PDP for the benefit of the estate. Complaint ¶¶ 150, 153. And, although Bombardier was the named defendant in Count VI, which alleged that the \$30 Million PDP is property of the estate under § 542(a) and requested that Bombardier be ordered to turn it over to the Trustee, that count does not contain any allegation that the APA Assignment was for security.

Finally, the fact that Bombardier sought to compel Zetta Singapore to assume or reject the APA as an executory contract, Complaint ¶¶ 55-62, does not further the Trustee’s position. The motions filed by Bombardier: 1) for relief from the automatic stay under 11 U.S.C. § 362; and 2) for an order compelling the Debtors to assume or reject purchase

and service agreements, Zetta Singapore Docket #s 77-79²⁸—only addressed the APA and not the APA Assignment and all writings that are part of a transaction must be read together. This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998).

D. Bombardier Consent

CAVIC argues that in the Bombardier Consent, EDC agreed that the APA would bind it to the same extent as if it had been the original “Buyer” under the APA. Motion at 26-27 (quoting Ex. T § 7). CAVIC highlights that if the APA Assignment were anything *other than* an absolute assignment, Bombardier and EDC would have required Zetta Singapore to sign the Bombardier Consent given Zetta Singapore’s possible residual rights in and to the PDP. Id. at 27 (emphasis in original). CAVIC contends that Zetta Singapore’s approval was unnecessary because the APA Assignment and the Bombardier Consent were clear, as was the parties’ intent that EDC—not Zetta Singapore—would receive the \$30 Million PDP if Bombardier defaulted or “for any other reason.” Id.

The Trustee responds that neither Bombardier nor EDC—two of the parties to the Bombardier Consent—were parties to the APA Assignment, and their intent is irrelevant, if it could be determined on a motion to dismiss when a complaint pleads otherwise. Opposition at 32. The Trustee argues that the Bombardier Consent does not affect Zetta Singapore and the fully integrated APA and APA Assignment. Id. at 32-33. He contends that it would be strange if the Court ignored the Complaint’s allegations in favor of a document to which Zetta Singapore was not a party to infer Zetta Singapore’s intent. Id. at 33.

CAVIC replies that the Bombardier Consent binds the Trustee. Reply at 16. It claims that both the Complaint and the Opposition acknowledge that Zetta Singapore controlled and directed TVPX, and Zetta Singapore was bound by the terms of the Bombardier Consent because TVPX signed that document. Id. at 16-17. According to CAVIC, the plain language of the Bombardier Consent required Bombardier to return the \$30 Million PDP to EDC (and by extension to CAVIC as subrogee for EDC) upon receiving the requisite notice from EDC. Id. at 17. CAVIC contends that it does not matter whether Zetta Singapore signed the Bombardier Consent because Bombardier and EDC agreed to the disposition of the \$30 Million PDP, and Zetta Singapore did not object to that agreement. Id.

In the Bombardier Consent, EDC and TVPX agreed that APA was binding on them as if they had been the original “Buyer” under the APA. Ex. T § 7. And, Bombardier agreed that if it was required to reimburse any advance payment after it defaulted under the APA “or for any other reason,” it would repay the \$30 Million PDP directly to EDC. Ex. T § 11. The fact that Bombardier agreed to reimburse the PDP directly to EDC, as

²⁸ The Court may take judicial notice of its own docket. In re Tuma, 916 F.2d 488, 491 (9th Cir. 1990); In re Eckert, 485 B.R. 77, 81 (Bankr. M.D. Penn. 2013); In re Harmony Holdings, LLC, 393 B.R. 409, 413 (Bankr. D.S.C. 2008).

opposed to CAVIC (and not Zetta Singapore), suggests that the parties' intent was for the APA Assignment to be absolute.

Although the Trustee stresses that Zetta Singapore was not a party to the Bombardier Consent, and the APA required that any amendments to the APA be made in writing and executed by both parties, the APA Assignment's integration clauses explicitly stated that: 1) "[e]xcept as explicitly amended" by the APA Assignment, the APA Assignment did not alter or amend the APA; 2) if there was a conflict between the APA and the APA Assignment, the APA Assignment controlled; and 3) the APA Assignment and the APA constituted the entire understanding between the parties and superseded and cancelled all prior and contemporaneous understandings or agreement of the parties. Ex. R §§ 9, 10. Further, the Trustee's position that Zetta Singapore was not a party to the Bombardier Consent is only partial true; TVPX, which the Complaint alleges was the Debtors' trustee, signed the Bombardier Consent. Opposition at 11; Ex. A § 10.4; Complaint ¶¶ 9, 28.

For the reasons stated above, the Term Sheet, the APA Assignment, and Bombardier's filings in the Cases do not show that the assignment was for security, and the Bombardier Consent suggests that the assignment was absolute.

E. Factors

The Court will also analyze the factors that courts have utilized in the cases cited by the Trustee to determine whether an assignment is absolute or for security. As an initial matter, the Court notes that many of the factors in the cases address a "loan." Although the Complaint refers to the "PDP Loan" there are no facts to support that the \$30 Million PDP was a "loan" to Zetta Singapore to purchase Aircraft 9788 and there are no documents attached to or referred to in the Complaint that could be considered loan documents.²⁹

²⁹ During oral argument, the Trustee relied on Complaint ¶¶ 72-73 to establish the terms of the "PDP Loan," which the Complaint defines as the \$30 Million PDP. Complaint ¶ 76. Paragraph 72, however, lists relevant terms in the "Long Term Finance Term Sheet," which are contained in some of the "Financed Lease Documents." According to the Complaint, the "Long Term Finance Term Sheet" applied after delivery of Aircraft 9788 and it is undisputed that Aircraft 9788 was never delivered. Complaint ¶¶ 71-72. Further, the Trustee seeks to recover the \$30 Million PDP in Counts III-VI, and payment of the \$30 Million PDP was due to Bombardier predelivery, on [REDACTED]. Ex. Q.

Paragraph 73 cites the [REDACTED] which governed repayment of the [REDACTED] before delivery of Aircraft 9788, and the PDP Facility Agreement, the Head Lease, the Fifth Amendment, and the APA Assignment. Exs. D, F, I, Q, R. The Trustee highlighted that ZJ6000-4 Statutory Trust and TVPX are identified as Lessor/PDP Financier and Lessee/Borrower, respectively, in the Term Sheet and the Head Lease; the amount of the PDP, \$30 Million, is listed in the Term Sheet and the Fifth Amendment; the Term Sheet indicated that the loan was from the date the PDP was paid to the date of delivery and the terms would [REDACTED] the PDP loan between AVIC and EDC, which were contained in the PDP Facility Agreement; and the Term Sheet indicated that [REDACTED]. Exhibits F, I, and Q contain some terms outlined in the Term Sheet, which the Court must accept as true when ruling on a motion to dismiss, but that does not further the Trustee's position. As analyzed above, the Term Sheet indicates that it was merely a [REDACTED] was [REDACTED] and based on the

I. The Plain Language of the Documents

In the Motion, CAVIC argues that because the plain language of the APA Assignment indicates that it was “absolute”, it became the buyer of Aircraft 9788. Motion at 24. The Trustee counters that the APA Assignment’s use of the term “absolute” in § 1 does not demonstrate that the assignment was absolute. Opposition at 29. The Trustee highlights that the Bombardier Consent defines Zetta Singapore as the “Buyer.” Id. at 30-31. CAVIC replies that that First through Fifth Amendments were executed by Zetta Singapore as “Buyer” and Bombardier as “Seller.” Reply at 18. But, the Sixth Amendment, which was executed after the APA Assignment: 1) defined Zetta Singapore as the “Original Buyer;” 2) referred to the APA Assignment as an “assignment” and CAVIC’s assignment to EDC as a “security assignment;” and 3) was executed by CAVIC and Bombardier as parties and was acknowledged and agreed to by Zetta Singapore and EDC. Id. at 19-20.

The APA Assignment, which among other things, assigned the APA to CAVIC, described the assignment as “absolute”, and indicated that Zetta Singapore desired to transfer and “absolutely assign” to CAVIC all of Zetta Singapore’s rights, interests, liabilities and obligations under the APA, weighing in favor of it being an absolute assignment rather than for security. Ex. R; see Matter of Candy Lane Corp., 38 B.R. 571, 576 (Bankr. S.D.N.Y. 1984) (noting that an assignment being “absolute on its face” was a fact that weighed in favor of the assignment being absolute); In re Evergreen Valley Resort, Inc., 23 B.R. 659, 662 (Bankr. D. Maine 1982) (holding that an assignment was a security interest in part because the agreement provided that the “assignment made and security given herein is made as security . . .”).

The Trustee is correct that the language used by the parties is not determinative although it is certainly a fact that courts consider. See In re Voboril, 568 B.R. 797, 799-800 (Bankr. E.D. Wis. 2017) (holding that an assignment was for security even though the agreement stated that Voboril “assign[ed]” all right, title and interest in the commissions to First Bank); Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973) (holding that the assignment was for security despite the assignment stating that it was “absolute”). But, the other documents attached to the Complaint bolster the conclusion that the parties’ intent was for the assignment to be absolute. The APA and the First through the Fifth Amendments—all of which predated the APA Assignment—identified Zetta Singapore as the “Buyer” and Bombardier as the “Seller,” and each of those documents was executed by Zetta Singapore and Bombardier. Exs. A, B, C, E, P, Q. In contrast, the Sixth Amendment, executed on 6/21/17 (approximately three months after the APA Assignment), defined Bombardier as the “Seller,” CAVIC as the “Assignee,” Zetta Singapore as the “Original Buyer,” and EDC as the “Security Assignee.” Ex. U. The Sixth Amendment was executed by Bombardier and CAVIC but only “Acknowledged and Agreed to” by EDC and Zetta Singapore. Ex. U. Defining Zetta Singapore as the “Original Buyer” rather than the Buyer, as it was

authority cited by the Trustee, the Court finds that the APA Assignment from Zetta Singapore to CAVIC was not for security but was absolute.

defined in the First through Fifth Amendments and Zetta Singapore merely “acknowledging and agreeing” to the terms of the Sixth Amendment suggest that CAVIC had replaced Zetta Singapore as a party to the APA and the APA Assignment was absolute rather than a security assignment. Exs. A, B, C, E, P, Q, U. It is clear that the parties knew how to draft documents to differentiate between an absolute and security assignment: the Sixth Assignment refers to the APA as being assigned from CAVIC to EDC (“**Security Assignee**”) pursuant to a security assignment dated December 23, 2016” Ex. U (emphasis added).

Further, the language of the Bombardier Consent does not alter this analysis. While the Bombardier Consent, which was executed on the same day as the APA Assignment, defined Zetta Singapore as the “Buyer,” it indicated that the APA had been “assigned by Buyer, as assignor, to [CAVIC].” Ex. T §§ 1, 14.³⁰

II. The Timing of the Assignment and the Loan

In the Motion, CAVIC does not address the timing of the assignment and the PDP. The Trustee argues that the timing of the APA Assignment, within one day of the \$30 Million PDP, suggests that it was for security rather than an absolute assignment. Opposition at 30 (citing Complaint ¶ 100). CAVIC replies that the loan from EDC was a fully recourse loan under the PDP Facility Agreement, and Zetta Singapore was not a party to that transaction. Reply at 22 (citing Ex. F).

Pursuant to the PDP Facility Agreement, EDC transferred \$30 million to Bombardier the day that the APA Assignment was executed, 3/31/17. Complaint ¶ 100 (citing Ex. S); Ex. F. Some cases indicate that an assignment at the same time as a loan suggests that the assignment was for security. Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973); Matter of Candy Lane Corp., 38 B.R. 571, 577 (Bankr. S.D.N.Y. 1984). But, in each of those cases, a borrower made an assignment to its lender. Here, in contrast, CAVIC was the borrower under PDP Facility Agreement and EDC was the lender. Ex. F. And, Zetta Singapore—which was not a party to the PDP Facility Agreement between CAVIC and EDC—made the APA Assignment to CAVIC. Exs. F, R.

III. Whether Payments Received Under the Assignment Would Be Applied to Reduce the Amount of the Loan

CAVIC does not address this factor in the Motion. The Trustee contends that the payments made on the Undelivered Financed Lease would be applied to reduce the amount of the \$30 Million PDP after it was rolled into the Financed Amount (██████████). Opposition at 30 (citing Complaint ¶¶ 101-04). In the Reply, CAVIC

³⁰ CAVIC claims that “as Buyer,” it was a party to the PDP Facility Agreement, the Security Agreement, the CAVIC-TVPX Trust Agreement, the Bombardier Consent, the Head Lease, and the FPA Guarantee, and it executed these agreements “as Buyer of Aircraft 9788.” Motion at 24 (emphasis in original). None of these documents identify CAVIC as the “Buyer.” Exs. F, N, H, T, I, L.

argues that the loan it received from EDC had nothing to do with Zetta Singapore. Id. at 22-23.

The Trustee’s contention, that the payments made under the Undelivered Financed Lease would be applied to reduce the amount of the \$30 Million PDP after it was rolled into the Financed Amount, is based on the Term Sheet. Complaint ¶¶ 101-04. As discussed above, allegations and argument based on the Term Sheet are unavailing because the Term Sheet was a proposal, is unsigned, and indicates that it was not legally binding and the integration clause in the APA Assignment indicated that it superseded and cancelled all prior agreements of the parties, whether oral or written, which would include the Term Sheet. And, although the Trustee claims the Court cannot disbelieve the Complaint’s allegations, Opposition at 31 (citing In re Know Weigh, L.L.C., 576 B.R. 189, 213 (Bankr. C.D. Cal. 2017); Zochlinski v. Regents of the Univ. of Cal., 578 F. App’x 636, 638 (9th Cir. 2014)), where documents attached to the Complaint contradict the Complaint, the documents control. Nguyen v. Bank of Am., NA, 563 Fed. Appx. 558, 558 (9th Cir. 2014); Nishimatsu Const. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975).

IV. Whether the Assignment Will Be a Source of Payment If the Loan Is Not Paid

CAVIC does not address this factor in the Motion. In the Opposition, the Trustee contends that parties intended that the APA Assignment would give CAVIC an extra source of payment for the PDP. Opposition at 30 (citing Complaint ¶ 107). CAVIC replies that it had to pay Bombardier when an aircraft was ready to deliver, but because the Cases were filed, Aircraft 9788 was never delivered. Reply at 23. According to CAVIC, if the aircraft had been delivered, it would have had to pay Bombardier more and arrange to buy and sell the aircraft to another buyer or assign the APA to that buyer. Id. CAVIC claims that this arrangement is not a “source of payment.” Id.

In Kanner, the court held that an assignment from KHC to City Trust was for security in part because the assignment was a source of payment if KHC, the borrower under the note, did not pay make its loan payments to City Trust. Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973). The Opposition relies on Complaint ¶ 107, which alleges that by executing the APA Assignment, the parties intended to grant CAVIC the right to collect any amounts due to Zetta Singapore under the APA as one of the “securities” for repayment of the PDP. Complaint ¶ 107 (citing Ex. I at 37-41). This allegation is conclusory and not supported by the portions of the Head Lease cited in the Complaint, which address “EVENTS OF LOSS.” Ex. I § 19. And, unlike Kanner, where there was a note between KHC and City Trust, here, the Trustee provides no evidence of a note or loan from CAVIC to Zetta Singapore. Rather, the only evidence of a loan is from EDC to CAVIC.

V. Whether Any Excess Paid on the Loan Would Be Returned to the Assignor

In the Motion, CAVIC does not address this element. In the Opposition, the Trustee asserts that in the event of a loss of the aircraft, CAVIC was required to pay any amounts recovered in excess of the remaining amount due under the lease to Zetta Singapore. Opposition at 30 (citing Complaint ¶¶ 105-06). In the Reply, CAVIC notes that it had obligations under the Head Lease to make payments in the event of loss, but those obligations do not mean that the APA Assignment was for security. Reply at 23.

As the Trustee notes, if there were a [REDACTED] [REDACTED] Ex. I § 19. In Matter of Joseph Kanner Hat Co., Inc., 482 F.2d 937, 940 (2d Cir. 1973), the court held that an assignment was for security in part because if the assignor made payments to the assignee, any excess over the amount of the loan received for the assignment would have been returned to the assignor. Here, in contrast, it is not the excess proceeds from the assigned property—the APA—that would be paid to TVPX and Zetta Singapore in the event of a [REDACTED] Ex. I § 19.

VI. Whether the Assignee Retains a Right to Deficiency If the Assignment Does Not Satisfy the Amount of Debt Owed

CAVIC does not discuss any right of deficiency in the Motion. The Trustee contends that CAVIC retained a right of deficiency on the debt because Zetta Singapore was jointly and severally liable under the APA Assignment. Opposition at 30 (citing Complaint ¶¶ 98-99, 108). CAVIC replies that “deficiency” is not the right word, and it had a right of contribution which would have been for at least half under New York law. Reply at 23.

The APA indicated that if it were assigned, Zetta Singapore would “remain jointly and severally liable with the assignee for the fulfilment of all the obligations under this Agreement.” Ex. A § 10.1. And, the APA Assignment indicated that Zetta Singapore remained jointly and severally liable under the APA. Complaint ¶¶ 98-99, 108; Ex. R § 2. The fact that Zetta Singapore remained jointly and severally liable after the APA Assignment does not mean that CAVIC retained a right of deficiency. “Joint and several liability” is liability “that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary’s discretion.” Liability, Black’s Law Dictionary (11th ed. 2019). Each party is individually responsible for the entire obligation, and if one party pays the amount owed, that party may have a right of contribution or indemnity from the nonpaying parties. Id. A “deficiency” is a “lack, shortage, or insufficiency of something that is necessary.” Deficiency, Black’s Law Dictionary (11th ed. 2019). The Trustee’s claim, that CAVIC retained a right of deficiency, is an inaccurate description of Zetta Singapore’s joint and several liability.

Further, EDC transferred the \$30 Million PDP to Bombardier on 3/31/17, the same day that the APA Assignment was executed, Complaint ¶ 100 (citing Ex. S), resulting in

Zetta Singapore’s joint and several liability being extinguished almost immediately after executing the APA Assignment.

VII. Whether the Assignee’s Rights in the Assigned Property Would Be Extinguished If the Assignor Paid the Debt from Another Source

CAVIC does not address extinguishment of the debt in the Motion. Motion at 14. The Trustee argues that TVPX, at the Debtors’ direction, had the right to pay off the debt in full, which would extinguish CAVIC’s rights to Aircraft 9788 under the APA. Opposition at 11, 30 (citing Complaint ¶¶ 109-10). CAVIC replies that the Trustee misstates the FPA, claiming that it is a “two way street” meant to ensure that both CAVIC and TVPX and its guarantor Debtors would complete the lease transaction upon delivery of Aircraft 9788. Reply at 23-24.

The Complaint alleges that under the FPA, TVPX, at the direction of Zetta Singapore, could force CAVIC to sell its rights to Aircraft 9788 if TVPX paid the loan in full. Complaint ¶ 109 (citing Ex. K at 8). But, the FPA does not state that. Instead, it provides that CAVIC would have to sell its rights and obligations under the APA if: 1) it defaulted; or 2) TVPX required CAVIC to exercise its rights under the PDP Facility Agreement to voluntarily prepay the loan from EDC regarding Aircraft 9788. Ex. K §§ 2.1, 2.2. Where the documents attached to a complaint contradict allegations in a complaint, the documents control. Nguyen v. Bank of Am., NA, 563 Fed. Appx. 558, 558 (9th Cir. 2014); Nishimatsu Const. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975).

VIII. Whether, Before the Complaint Was Filed, the Assignee Filed Proofs of Claims or Other Documents Asserting that It Was a Secured Party

CAVIC does not mention its POC in the portion of the Motion addressing Counts III-VI. In the Opposition, the Trustee claims that Bombardier and the Debtors treated the APA as an executory contract in the Cases, and CAVIC’s POC indicated that it was secured. Opposition at 29 (citing Complaint ¶¶ 96-97). CAVIC, in the Reply, contends that its POC was filed prophylactically in response to the Trustee’s asserted interest in the PDP. Reply at 18 n.4.

On 4/24/18, CAVIC filed POC #162, which asserted a \$1,416,591.45 secured claim based on the APA Assignment. Ex. Y at 2, 6. CAVIC indicated in its POC that under the APA Assignment, Zetta Singapore absolutely assigned, conveyed and transferred all of its rights, titles, interests, liabilities and obligations under the APA to CAVIC. Ex. Y at 6. CAVIC expressly stated that it filed the POC prophylactically due to the upcoming bar date, and in response to statements made by the Trustee concerning his investigation of the transaction relating to the APA and the APA Assignment. Ex. Y at 9.

CAVIC asserted essentially the same legal theory in POC #162 as it does in this AP—namely, that the assignment was absolute—and the POC indicated that it was filed as a “prophylactic” measure due to the claims bar date. Ex. Y. This scenario is distinguishable from that in Matter of Candy Lane Corp., 38 B.R. 571, 577 (Bankr. S.D.N.Y. 1984), where the court inferred the parties’ intent that the assignment was for security based on the claimant’s proof of claim, which indicated that the claim was secured and only after the chapter 11 trustee challenged the claimant’s secured status did she begin to assert that the assignment was absolute. Id. In contrast, here, CAVIC has never wavered in arguing that the APA Assignment was absolute.

5. Conclusion

Because the Complaint does not sufficiently plead that the APA Assignment was for security rather than an absolute assignment, it is not avoidable as an unperfected security interest under § 544, and the \$30 Million PDP is not property of the estate.

c. Count VII

1. Motion

CAVIC argues that Count VII should be dismissed because courts require preference claims to allege more than just the statutory elements of a preference, and must identify “*the nature and amount of each antecedent debt.*” Motion at 27-28 (emphasis added by CAVIC) (citing Valley Media Inc. v. Borders, Inc. (In re Valley Media, Inc.), 288 B.R. 189, 192 (Bankr. D. Del. 2003); In re Doorman Prop. Maint., 2017 WL 90332, at *3 (Bankr. N.D. Cal. Jan. 10, 2017)). CAVIC acknowledges that the Complaint indicates that the Debtors paid it invoices, but it does not state the amounts due under each invoice or attach the relevant invoices. Id. at 28.

CAVIC claims that its preference defenses—subsequent new value and ordinary course of business—are valid regardless of whether it was a lessor or a long-term or short-term lender. Id. (citing Union Bank v. Wolas, 502 U.S. 151, 162 (1991); Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178, 1189 (11th Cir. 2018)).

CAVIC contends that a complaint may be subject to Rule 12(b)(6) dismissal when an affirmative defense appears on its face and presents an “insuperable barrier to recovery by the plaintiff.” Id. at 30 (quoting Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 212 B.R. 76, 84 (Bankr. E.D. Pa. 1997); citing Gellert v. Coltec Indus., Inc. (In re Crucible Materials Corp.), 2012 WL 5360945 (Bankr. D. Del. 2012); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127 (3d Cir. 1997); Burtch v. Revchem Composites, Inc. (In re Sierra Concrete Design, Inc.), 463 B.R. 302, 306 (Bankr. D. Del. 2012)).

CAVIC claims that the subsequent new value defense under § 547(c)(4) has two interrelated purposes: 1) to encourage trade creditors to continue dealing with troubled businesses; and 2) to treat creditors fairly who have replenished the estate after

receiving a preference. Id. at 33 (citing PMC Mktg. Corp. v. PDCM Assoc. (In re PMC Mktg. Corp.), 518 B.R. 150, 157 (B.A.P. 1st Cir. 2014); Wahoski v. Am. & Efrid, Inc. (In re Pillowtex Corp.), 416 B.R. 123, 130 (Bankr. D. Del. 2009)). According to CAVIC, the subsequent new value defense allows a preference defendant to offset an avoidable transfer by the amount of “new value” extended to the debtor after the transfer. Id.

CAVIC indicates that to establish this defense, it must show that: 1) it advanced new value to the Debtors after the preferential transfer; 2) the amount was unsecured; and 3) it did not receive payment for the new value. Id. (citing Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228, 231 (9th Cir. 1995)). CAVIC claims that new value is created where a debtor-lessee, like Zetta USA, retains possession and use of leased property. Id. (citing PMC Mktg., 518 B.R. at 158; Brown v. Morton, 201 B.R. 563, 567 (Bankr. W.D. Wash. 1999)).

CAVIC argues that the Complaint and the record in the Cases establish the applicability of the subsequent new value defense as a matter of law. Id. at 33. CAVIC indicates that the Complaint identifies: 1) each of the transfers that Zetta Singapore made to it on 6/27/17 (6/27/17 Transfers), including the amount and that the payments were made under the Financed Leases; 2) the Debtors continued to use the “Aircraft,” and CAVIC advanced subsequent new value to the Debtors in excess of the amount of the 6/27/17 Transfers; and 3) Debtors did not pay for these advances, which were unsecured. Id. at 30. CAVIC claims that the Debtors made: 1) no payments after 6/28/17; 2) experienced serious liquidity issues; and 3) missed a payment due on 6/24/17 to the ZJ6000-1 Statutory Trust. Id. 33. CAVIC highlights that the ZJ6000-1, ZJ6000-2, and ZJ6000-3 Statutory Trusts allowed the Debtors to continue using Aircraft 9716, 9740, and 9764 up to and after the Debtors’ bankruptcy filing. Id. CAVIC indicates that lease payments were made in arrears, so the 6/27/17 Transfers made by Zetta Singapore were not prepayments for using Aircraft 9716, 9740, and 9764 during July, August, and September. Id. at 33-34.

CAVIC asserts that the amount of “new value” it extended is not in dispute based on the schedule of prepetition quarterly payments due or accrued but not made:

- 1) \$1,899,215.45 for Aircraft 9716, based on an unpaid quarterly payment of \$1,533,359.99 due 8/24/17, plus \$365,855.46, a portion of the next quarterly payment of \$1,529,941.73 accrued before the Petition Date.
- 2) \$1,447,580 for Aircraft 9740, based on a portion of the next quarterly payment of \$1,556,793.36 accrued before the Petition Date.
- 3) \$1,291,087.34 for Aircraft 9764, based on a portion of the next quarterly payment of \$1,503,544.75, accrued before the Petition Date.

Id. at 34. CAVIC claims that this \$4,637,882.79 “new value” exceeds the \$1,519,806.61 it was owed for Aircraft 9716 and is approximately the amount of all transfers it received within the 90-day preference period. Id.

CAVIC also argues that the § 547(c)(2) ordinary course of business defense shelters it from liability regarding the 6/27/17 Transfers. Id. at 31. It asserts that the payments for Aircraft 9740 and 9764, totaling \$3,119,809.99, were made either on or within a few days of the scheduled lease payment date, which conclusively establishes that they were made in the “ordinary course of business.” Id. CAVIC claims that the Supreme Court and California bankruptcy courts recognize that the ordinary course of business defense should be broadly construed because it furthers the policy of preventing dismemberment of a debtor by enabling it to continue operating. Id. (citing McGranahan v. Harris Woolf Cal. Almonds (In re Cent. Valley Processing, Inc.), 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007)). CAVIC highlights that the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act amended § 547(c)(2) to increase the protection for creditors who provide goods and services to financially distressed debtors. Id. (citing Cent. Valley Processing, 2007 WL 2119002, at *3 n.4). According to CAVIC, the defense can be established by showing that the disputed transfer was consistent with either a “subjective test” or an “objective test.” Id.

CAVIC argues that under the “subjective test,” the Trustee’s claim to \$3,119,809 fails as a matter of law. Id. at 32. CAVIC indicates that factors courts consider in determining whether transfers are ordinary when compared with past practices under the subjective test are: 1) the length of time the parties were engaged in the transactions; 2) whether the amount or form of tender differed from past practices; 3) whether the debtor or creditor engaged in any unusual collection or payment activity; and 4) whether the creditor took advantage of the debtor’s deteriorating financial condition. Id. (citing In re Grand Chevrolet, Inc., 25 F.3d 728, 732 (9th Cir. 1994)). CAVIC contends that the Trustee relies on a single factor—unusual collection or payment activity—to challenge the “ordinary course” defense. Id. at 32. But, CAVIC claims that the allegations in the Complaint do not establish that there was any “unusual collection or payment activity” because to meet this threshold, the Trustee must allege that it engaged in some proscribed practice such as a work stoppage or legal action. Id. at 32 (citing Cent. Valley Processing, 2007 WL 2119002, at *6).

CAVIC asserts that here, there is no allegation that the 6/27/17 Transfers resulted from any prohibited practices. Id. It argues that the two emails that form the basis of the Trustee’s claims merely discuss issuing a default notice. Id. (citing Complaint ¶ 115). CAVIC argues that despite Zetta Singapore’s financial instability, which included missing an 8/24/17 payment for Aircraft 9716, the Trustee does not allege that the ZJ6000-1, ZJ6000-2, and ZJ6000-3 Statutory Trusts prevented the Debtors from continuing to use Aircraft 9716, 9740, and 9764 during the period up to and after the Petition Date. Id.

Regarding the “objective test,” CAVIC contends that there is no question that the quarterly lease payments for Aircraft 9740 and 9764 were according to “contract terms” between the parties and \$3,119,809 of the 6/27/17 Transfers are not recoverable by the Trustee as a matter of law. Id.

CAVIC argues that the “earmarking doctrine” which prevents avoidance of otherwise preferential payments if a lender loaned money to the debtor to pay particular creditors, dictates that the 6/27/17 Transfers are not avoidable transfers of the Debtors’ property. Id. at 34 (citing Anderson v. Adams (In re Superior Stamp & Coin Co.), 223 F.3d 1004, 1010 (9th Cir. 2000)). CAVIC asserts that the earmarking doctrine requires: 1) an agreement between a new lender and the debtor that new funds would be used to pay a specified antecedent debt; 2) performance of the agreement according to its terms; and 3) the transaction viewed as a whole does not result in diminution of the estate, like granting the lender additional security in the debtor’s assets, which otherwise would have been used to pay unsecured creditors. Id. at 35 (citing Anderson, 223 F.3d 1004).

CAVIC contends that the Complaint establishes a *prima facie* case to apply the earmarking doctrine because the purpose of the 6/26/17 \$15 million loan from one of the Debtors’ shareholders (Shareholder Loan) was to pay specific debts, including the 6/27/17 Transfers. Id. at 34-35 (citing Complaint ¶¶ 116-18). CAVIC asserts that the 6/27/17 Transfers were “earmarked,” were never property of the estate, and Count VII must be dismissed. Id. at 35.

2. Opposition

The Trustee responds that Count VII sufficiently pleads the nature and amount of each antecedent debt. Opposition at 33. The Trustee highlights that the Complaint provides that the 6/27/17 Transfers were made on account of amounts owed on the Delivered Financed Leases, and it identifies the specific payments Zetta Singapore made to CAVIC on account of each antecedent debt:

- 1) \$1,519,806.61 regarding Aircraft 9716;
- 2) \$1,568,638.06 regarding Aircraft 9740;
- 3) \$1,551,171.93 regarding Aircraft 9764; and
- 4) \$129,037.50 regarding Aircraft 9788.³¹

Id. at 33-34 (citing Complaint ¶¶ 119(a)-(d), 122, 167).

The Trustee argues that the subsequent new value and ordinary course of business defenses are irrelevant for purposes of a motion to dismiss.³² Id. at 34 (citing In re Gluth Bros. Const., Inc., 424 B.R. 379, 398 (Bankr. N.D. Ill. 2009); Tamayo v. Blagojevich, 526 F.3d 1074, 1090 (7th Cir. 2008)). According to the Trustee,

³¹ It is unclear whether the Trustee is seeking to avoid and recover the \$129,037.50 transfer regarding Aircraft 9788 in Count VII. The total amount of payments listed in Complaint ¶ 119 is \$4,768,654.10, but Complaint ¶ 1 defines the “Preference Payments” as \$4,768,654.10 in transfers to CAVIC for the financing of Aircraft 9764, 9716, and 9740, and Complaint ¶ 170 alleges that pursuant to §§ 547 and 550, the Trustee is entitled to avoid the transfer of the “Preference Payments” and recover the value thereof from CAVIC.

³² The Trustee also argues that the 6/27/17 Transfers did not constitute a “contemporaneous exchange for new value,” Opposition at 35, but CAVIC does not raise the § 547(c)(1) “contemporaneous new value” defense in the Motion or Reply.

notwithstanding an affirmative defense's likelihood of success, it cannot be the basis for dismissal of a complaint under Rule 12(b)(6). Id. (citing In re The Russ Co., Inc., 2013 WL 4028098, at *5 (Bankr. D.N.J. Aug. 6, 2013); In re Autobacs Strauss, Inc., 473 B.R. 525, 571 (Bankr. D. Del. 2012)).

The Trustee asserts that the defenses CAVIC raises involve numerous factual issues, making them inappropriate for decision at this time. Id. The Trustee contends that the subsequent new value defense is inapplicable because the Financed Leases were not true leases, but rather security agreements. Id. at 34-35. According to the Trustee, to establish a new value defense, a creditor must show: 1) it advanced new value to the debtor after the preferential transfer; 2) the advance of new value was unsecured; and 3) the advance of new value remains unpaid or, if paid, the payment must also be avoidable. Id. at 35 (citing In re Modtech Holdings, Inc., 503 B.R. 737, 745 (Bankr. C.D. Cal. 2013)).

The Trustee argues that CAVIC cannot meet its burden because missed "lease payments" to acquire a capital asset under a disguised financing arrangement do not provide new value to a debtor or its estate. Id. (citing United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 613 (7th Cir. 2005), cert. denied 126 S. Ct. 1465 (Mar. 6, 2006); In re Nucorp Energy, Inc., 116 B.R. 872 (B.A.P. 9th Cir. 1989)). He claims that the United Airlines court held that a debtor was not required to assume a disguised financing lease under § 365 and pay post-assumption "rent" for what were obligations incurred to acquire a capital asset. Id. (citing United Airlines, 416 F.3d at 617). The Trustee argues that the future obligation to pay "rent" under a disguised financing is no different from a debtor's obligation to pay prepetition principal and interest under an asset acquisition loan, which should be dealt with, along with other prepetition claims, in a plan of reorganization. Id. (citing United Airlines, 416 F.3d at 617). The Trustee asserts that the same rationale applies to negate CAVIC's subsequent new value theory. Id. He claims that CAVIC provided value to the Debtors by funding loans under the disguised financings at the inception of the Financed Leases, not when the Debtors missed debt service payments following the 6/27/17 Transfers. Id.

The Trustee contends that the ordinary course of business defense requires a "peculiarly factual analysis," and "unusual collections practices" like threats are viewed as not in the ordinary course of business. Id. at 36 (citing Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991); In re Bender Shipbuilding & Repair Co., Inc., 479 B.R. 899, 905 (Bankr. S.D. Ala. 2012)). The Trustee argues that the Complaint's allegations of threats and other unusual practices require a factual analysis. Id. (citing Complaint ¶¶ 115(a)-(b), 120).

The Trustee contends that the "earmarking doctrine," a judge-made exception to § 547, is construed against a defendant and is inapplicable here. Id. (citing In re BR Festivals, LLC, 2015 WL 1216836, at *2 (Bankr. N.D. Cal. Mar. 11, 2015)). According to the Trustee, it applies where the only change regarding the debt is the identity of the creditor. Id. (citing 5 Collier on Bankruptcy ¶ 547.03[2][a]).

The Trustee argues that CAVIC has demonstrated none of the “earmarking doctrine’s” elements: 1) an agreement between the new lender and the debtor that new funds will be used to pay a specified antecedent debt; 2) performance of that agreement according to its terms; and 3) the transaction viewed as a whole does not result in any diminution of the estate. Id. (citing In re Straightline Invs., Inc., 525 F.3d 870, 881-82 (9th Cir. 2002)).

The Trustee contends that the “lender” was a shareholder and pre-existing lender of the Debtors and the “earmarking doctrine” typically applies when “a *new creditor is substituted for an old creditor.*” Id. at 36-37 (emphasis added by the Trustee) (citing In re Interior Wood Prods. Co., 986 F.2d 228, 231 (8th Cir. 1993)). The Trustee asserts the Complaint does not allege that the Shareholder Loan agreement required the Debtors to use the proceeds of the loan to pay any specific debt. Id. at 37. Finally, the Trustee argues that the 6/27/17 Transfers diminished the Debtors’ estates because without the transfers to CAVIC, the money from the Shareholder Loan could have been used to pay other creditors. Id. (citing In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988)).

3. Reply

CAVIC replies that Count VII contains all material facts necessary to establish its §§ 547(c)(2) and (4) defenses and must be dismissed. Reply at 24. CAVIC asserts that the Trustee ignores the precedent it cited holding that where the facts of the complaint establish a subsequent new value or ordinary course of business defense as they do here, a claim should be dismissed. Id. (citing Tatung Co., Ltd. v. Shu Tze Hsu, 43 F.Supp.3d 1036, 1057 (C.D. Cal. 2014); ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 860 (3d Cir. 1994)).

CAVIC contends that Zetta Singapore’s continued use of Aircraft 9716, 9740, and 9764 constitutes “subsequent new value” in excess of the alleged preferential payments. Id. CAVIC indicates that the Trustee’s argument presumes that the Court will ignore the parties’ choice of English law, which prohibits recharacterization. Id. at 24-25. CAVIC asserts that the Opposition provided no authority holding that continued use of the aircraft cannot constitute “subsequent new value” because it is a financing. Id. at 25. CAVIC argues that based on the undisputed schedule of unpaid prepetition quarterly payments due or accrued for Aircraft 9716, 9740, and 9764, the amount of “subsequent new value” extended by CAVIC is \$4,637,882.79, which is approximately the same amount as the alleged preferential transfers. Id. (citing In re PMC Mktg. Corp., 518 B.R. 150, 153 (1st Cir. 2014)).

CAVIC asserts that the Complaint establishes that the “ordinary course of business” defense creates a barrier to the Trustee’s recovery under § 547. Id. CAVIC highlights that the 6/27/17 Transfers regarding Aircraft 9740 and 9764, totaling \$3,119,809, were made on or within a few days of their scheduled lease payment due dates and were made per the exact terms of the parties’ original agreements. Id. (citing In re Globe Mfg. Corp., 567 F.3d 1291, 1298 (11th Cir. 2009)). In response to the Trustee’s

contention regarding “unusual collection practices,” CAVIC claims that the two emails are not “unusual collection activity” as a matter of law. Id. CAVIC highlights that it requested repayment after learning of Zetta Singapore’s financial difficulties. Id. at 25-26 (citing Complaint ¶¶ 112, 115(a)-(b)). CAVIC argues that in the Ninth Circuit, a request for payment is not “unusual collection activity.” Id. at 26 (citing In re Comark, 145 B.R. 47 (B.A.P. 9th Cir. 1992)).

CAVIC notes that the Trustee cites In re Bender Shipbuilding & Repair Co., Inc., 479 B.R. 899 (Bankr. S.D. Ala. 2012), in support of his argument that “unusual collections practices” such as threats are not in the ordinary course of business. Id. CAVIC argues that unlike Bender, here, there were no late payments, no allegations of threats of revoking a critical vendor service, and no 20-year relationship. Id. CAVIC claims that there were only timely payments made pursuant to the parties’ express agreement. Id.

CAVIC maintains that the “earmarking doctrine” applies because the Debtors’ transfer of the Shareholder Loan proceeds was not a transfer of an interest they had in property. Id. CAVIC highlights that a shareholder loaned the Debtors \$15 million, and one day later, \$14.5 million was used to pay creditors, including the \$4,768,654.10 6/27/17 Transfers. Id. (citing Complaint ¶¶ 116-18).

CAVIC notes that in evaluating whether the earmarking doctrine applies, courts examine the entire transaction. Id. at 26-27 (citing In re TriGem Am. Corp., 431 B.R. 855 (Bankr. C.D. Cal. 2010)). CAVIC contends that it is readily apparent from the Complaint that the purpose of the Shareholder Loan was to pay it and other creditors. Id. at 27. According to CAVIC, this payment resulted in no diminution to the Debtors’ estates, there was no transfer of an interest of the Debtors in property, and the Trustee’s preference claims must be dismissed. Id.

4. Analysis

The parties raise a number of issues, which the Court will address in the following order: 1) whether the Complaint alleges the nature and amount of the antecedent debt; 2) raising affirmative defenses at the motion to dismiss stage; 3) the ordinary course of business defense; 4) the subsequent new value defense; and 5) the earmarking doctrine.

i. Allegations Regarding the Nature and Amount of the Antecedent Debt

CAVIC contends that the Complaint does not explain the nature and amount of the debt on account of which the 6/27/17 Transfers were made, as it was required to do. Motion at 28. The Trustee responds that the Complaint sufficiently pleads the nature and amount of each antecedent debt, arguing that the 6/27/17 Transfers were made on account of amounts owed on the Delivered Financed Leases and the Complaint identifies, by aircraft, the payments made on account of each antecedent debt. Id. at

33-34 (citing Complaint ¶¶ 119(a)-(d), 122, 167). In the Reply, CAVIC does not address this element.

To survive a motion to dismiss, a claim to avoid preferential transfers must identify: 1) the nature and amount of each antecedent debt; and 2) each alleged preference transfer by i) date, ii) name of debtor/transferor, iii) name of transferee, and iv) amount of the transfer. In re Valley Media, Inc., 288 B.R. 189, 192 (Bankr. D. Del. 2003); In re Doorman Prop. Maint., 2017 WL 90332, at *3 (Bankr. N.D. Cal. Jan. 10, 2017). “A debt is ‘antecedent’ if it is incurred before the transfer: the debt must have preceded the transfer.” 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy § 547.03[4] (16th ed. 2013); see In re Bullion Reserve of N. Am., 836 F.2d 1214, 1218-19 (9th Cir. 1988); In re Pfankuch, 393 B.R. 18, 25 (Bankr. D. Idaho 2008).

Here, the Complaint alleges that the 6/27/17 Transfers from Zetta Singapore to CAVIC included:

- 1) \$1,519,806.61 regarding Aircraft 9716;
- 2) \$1,568,638.06 regarding Aircraft 9740;
- 3) \$1,551,171.93 regarding Aircraft 9764; and
- 4) \$129,037.50 regarding Aircraft 9788.

Complaint ¶ 119(a)-(d). It also alleges that these 6/27/17 Transfers were made on account of debts owed to CAVIC pursuant to the Financed Leases, which were executed before the transfers. Complaint ¶ 167. The Complaint alleges that the amounts owed under the Delivered Financed Leases were at all times during the preference period “vastly undersecured,” making the undersecured portion a deficiency claim, which was a general unsecured claim. Complaint ¶ 122. According to the Complaint, it is highly likely that distributions to unsecured creditors will be significantly below the allowed amounts of such claims, and because of the 6/27/17 Transfers, CAVIC received more than it would have in these Cases if the 6/27/17 Transfers had not been made. Complaint ¶ 122.

Count VII contains sufficient allegations to withstand a motion to dismiss regarding the date, name of debtor/transferor, name of transferee, and amount of the transfer. It does not, however, sufficiently allege the nature or amount of each antecedent debt. Therefore, Count VII must be dismissed.

ii. Raising Affirmative Defenses at the Motion to Dismiss Stage

CAVIC claims that it is “well-established” that a Rule 12(b)(6) motion can be granted when an affirmative defense appears on the face of a complaint, which presents an “insuperable barrier to recovery by the plaintiff.” Motion at 30. The Trustee counters that affirmative defenses are irrelevant for purposes of a motion to dismiss. Opposition at 34. CAVIC replies that Rule 12(b)(6) motions can be granted where a complaint’s allegations establish an affirmative defense. Reply at 24.

CAVIC and the Trustee cite out of circuit and district court cases to support their positions that dismissal under Rule 12(b)(6) is or is not appropriate on the basis of affirmative defenses. Motion at 30 (citing Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 212 B.R. 76, 83 n.7 (Bankr. E.D. Pa. 1997) (noting that a complaint may be subject to Rule 12(b)(6) dismissal when an affirmative defense appears on its face and presents an insuperable barrier to recovery by the plaintiff); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127 (3d Cir. 1997) (same); Gellert v. Coltec Indus., Inc. (In re Crucible Materials Corp.), 2012 WL 5360945, at *4 (Bankr. D. Del. Oct. 31, 2012) (rejecting the trustee's argument, that affirmative defenses—particularly the ordinary course of business defense—cannot be considered in the context of a motion to dismiss, and indicating that when an affirmative defense appears on the face of the complaint and presents an insuperable barrier to recovery by the plaintiff, the court may dismiss the count)); Opposition at 34 (citing Tamayo v. Blagojevich, 526 F.3d 1074 (7th Cir. 2008) (refusing to consider the defendant's qualified immunity defense at the motion to dismiss stage because the defense looks to whether the officer's conduct violated a clearly established constitutional right, and the complaint sufficiently alleged a violation of a clearly established constitutional right); In re Gluth Bros. Const., Inc., 424 B.R. 379, 398 (Bankr. N.D. Ill. 2009) (indicating that the defendant's § 547(c)(2) ordinary course of business defense was irrelevant for purposes of a motion to dismiss, because the preference exceptions in § 547(c) are affirmative defenses); In re The Russ Co., Inc., 2013 WL 4028098, at *5 (Bankr. D.N.J. Aug. 6, 2013) (holding that affirmative defenses cannot be used to dismiss a plaintiff's complaint under Rule 12(b)(6)); In re Autobacs Strauss, Inc., 473 B.R. 525, 571 (Bankr. D. Del. 2012) (indicating that the subsequent new value defense was not appropriate to consider at the motion to dismiss stage); Adelphia Commc'ns Corp. v. Bank of Am., N.A., 365 B.R. 24, 79 (Bankr. S.D.N.Y. 2007) (indicating that if facts outside the complaint were true, the preference claims might not survive but denying a Rule 12(b)(6) motion because the ordinary course defense raised factual issues)); Reply at 24 (citing ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994) (noting that a complaint may be subject to dismissal under Rule 12(b)(6) when an affirmative defense like the statute of frauds appears on its face); Tatung Co., Ltd. v. Shu Tze Hsu, 43 F.Supp.3d 1036, 1057 (C.D. Cal. 2014) (holding that a motion to dismiss may be granted where the complaint's allegations, with all inferences drawn in the plaintiff's favor, nonetheless show that an affirmative defense is apparent on the face of the complaint)).

Neither party cites controlling Ninth Circuit authority, which holds that dismissal under Rule 12(b)(6) based on an affirmative defense is proper only if the defendant shows an obvious bar to securing relief on the face of the complaint. ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014). But if, from the allegations of the complaint and any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper. Id.

iii. Subsequent New Value Defense

CAVIC argues that the Complaint specifies the amount and date on which the 6/27/17 Transfers were made and the payments were made pursuant to the Financed Leases.

Motion at 30. CAVIC contends that because of the Debtors’ continued use of the “Aircraft,” it advanced subsequent new value for which the Debtors did not pay. Id. CAVIC asserts that it is entitled to assert its subsequent new value defense regardless of whether the agreements are true leases or financings. Id. at 28. The Trustee counters that CAVIC cannot meet its burden to establish a subsequent new value defense because, among other reasons, missed “lease payments” under a disguised financing arrangement do not provide any new value to a debtor or its estate. Opposition at 35 (citations omitted). CAVIC replies that Zetta Singapore’s continued use of Aircraft 9716, 9740, and 9764 constitutes “subsequent new value” in excess of the 6/27/17 Transfers. Reply at 24. CAVIC claims that the Trustee presumes that the Court will ignore the parties’ choice of English law, which prohibits recharacterization. Id. at 24-25.

Title 11 U.S.C. § 547(c)(4)—the subsequent new value defense—provides:

The trustee may not avoid under this section a transfer . . . to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

- (A) not secured by an otherwise avoidable security interest; and
- (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

To establish the subsequent new value defense, CAVIC must show that: 1) it advanced new value to the Debtors after the preferential transfer; 2) the advance was unsecured; and 3) it did not receive payment for the new value. Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228, 231 (9th Cir. 1995).

As analyzed above, the Financed Leases cannot be recharacterized as disguised financings rather than true leases. Further, the Trustee does not dispute: 1) that Zetta Singapore continued using Aircraft 9716, 9740, and 9764 after the 6/27/17 Transfers and before the Cases were filed on 9/15/17; 2) that a debtor’s continued use of leased property constitutes new value; or 3) CAVIC’s calculation of the amount of new value that the Debtors’ received for their continued use of Aircraft 9716, 9740, and 9764. Because the Financed Leases are governed by English law and are not properly recharacterized as secured financings, CAVIC’s advance of new value was unsecured. And, the Trustee does not allege that the Debtors transferred any money to CAVIC in exchange for the new value after the 6/27/17 Transfers. Therefore, CAVIC has shown that the subsequent new value defense is a basis for Rule 12(b)(6) dismissal.

iv. Ordinary Course of Business Defense

CAVIC argues that the payments for Aircraft 9740 and 9764, totaling \$3,119,809.99, were made either on or within a few days of the scheduled lease payment date, which conclusively establishes that they were made in the “ordinary course of business.”

Motion at 31. CAVIC contends that the Trustee’s claims to recover the \$3,119,809 fail under the “subjective test” because the Complaint’s allegations do not establish that there was any “unusual collection or payment activity” as a matter of law. Id. at 32. Alternatively, CAVIC asserts that there is no question that the “objective test” is met because quarterly lease payments for Aircraft 9740 and 9764 were made according to contract terms. Id.

The Trustee responds that the ordinary course of business defense requires a factual analysis, and “unusual collections practices” like threats are viewed as not in the ordinary course of business. Opposition at 36. CAVIC replies that the 6/27/17 Transfers for Aircraft 9740 and 9764 were made on or within a few days of their scheduled lease payment due dates. Reply at 25. And, CAVIC claims that the two emails that the Trustee relies on cannot be “unusual collection activity” because CAVIC requested repayment after learning of Zetta Singapore’s financial difficulties. Id. at 25-26.

The § 547(c)(2) “ordinary course of business defense” provides:

The trustee may not avoid under this section a transfer . . . to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

- (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
- (B) made according to ordinary business terms.

The ordinary course of business defense deters a “race to the courthouse” and enables struggling debtors to continue operating their business. Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197 (9th Cir. 2003). It is construed broadly because it furthers the policy of preventing dismemberment of a debtor during its slide into bankruptcy by enabling the struggling debtor to continue operating its business. In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007). The ordinary course of business defense involves a “peculiarly factual analysis,” and examines whether: 1) the debt and its payment were “ordinary” regarding past practices between the debtor and the creditor (Subjective Test); or 2) the payment was “ordinary” in relation to prevailing business standards (Objective Test).³³ Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991); Cent. Valley Processing, 2007 WL 2119002, at *3 & n.4.

³³ Under the Bankruptcy Abuse and Consumer Protection Act of 2005, the ordinary course of business defense can be established by a showing that the disputed transfer of property was consistent with either the Subjective Test or the Objective Test. In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 n.4 (Bankr. E.D. Cal. July 19, 2007).

A. The Subjective Test

The Subjective Test cannot be reduced to a “bright line.” In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *5 (Bankr. E.D. Cal. July 19, 2007) (citing In re Grand Chevrolet, Inc., 25 F.3d 728 (9th Cir. 1994)). The Ninth Circuit has announced four nonexclusive factors to consider regarding the Subjective Test:

- 1) The length of time the parties were engaged in the transactions;
- 2) Whether the amount or form of tender differed from past practices;
- 3) Whether the debtor or creditor engaged in any unusual collection or payment activity; and
- 4) Whether the creditor took advantage of the debtor’s deteriorating financial condition.

Id. (citing Grand Chevrolet, 25 F.3d at 732).

Here, the parties only address the third factor and dispute whether CAVIC engaged in unusual collection activity involving two emails:

- 1) On 6/14/17, a CAVIC representative emailed Geoffrey Cassidy (Cassidy),³⁴ stating that things were reaching a “critic[al] point” and EDC would not provide further financing in the future, and threatening to tell EDC about “unpaid overdue rents.” The CAVIC representative added that he was “not bluffing” (6/14/17 Email).
- 2) On 6/23/17, in response to a CAVIC representative forwarding an email from EDC in which EDC noted that it was considering issuing a default notice to Zetta Singapore, Cassidy asked to be given until 6/27/17 to make all payments or they could get him “from all angles!” The CAVIC representative replied that it needed “to be solved today not Monday or Tuesday” (6/23/17 Email).

Complaint ¶ 115 (citing Ex. AA).

CAVIC cites In re Comark, 145 B.R. 47 (B.A.P. 9th Cir. 1992), in support of its argument that the 6/14/17 Email and 6/23/17 Email cannot be considered “unusual collection activity” because it requested repayment after learning about Zetta Singapore’s financial difficulties. Reply at 25-26. In Comark, the BAP held that a creditor’s request for repayment after it learned of the debtor’s financial difficulties did not compel a conclusion that the payment was outside the ordinary course of business because that conduct was consistent with prior dealings between the parties and industry practices that occurred during the debtor’s downward slide into bankruptcy. Comark, 145 B.R. at 56. Here, in contrast, CAVIC highlights no evidence regarding its past dealings with Zetta Singapore, and in fact, the Complaint alleges that the 6/27/17 Transfers were extraordinary because they “were over \$2.4 million more than the Debtors had ever paid to CAVIC on a single day.” Complaint ¶ 120.

³⁴ Cassidy was the managing director of the Debtors. Complaint ¶ 115(a).

CAVIC also claims that to show unusual collection activity, the Complaint must allege that it engaged in some proscribed practice such as evidence of work stoppage or legal action. Motion at 32 (citing In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *6 (Bankr. E.D. Cal. July 19, 2007)). In Central Valley Processing, Central Valley Processing, Inc. (CVP) transferred \$246,400 to Harris Woolf California Almonds (Harris Woolf), and within 90 days of the transfer filed chapter 11 bankruptcy. Cent. Valley Processing, 2007 WL 2119002, at *1. The case was converted to chapter 7 and Michael McGranahan (McGranahan) was appointed as trustee. Id. McGranahan filed an adversary proceeding to avoid and recover the \$246,400 as a preferential transfer under § 547(b). Id. Harris Woolf countered by asserting the § 547(c)(2) ordinary course of business defense. Id. The parties stipulated that Harris Woolf did not engage in any unusual collection or payment activity. Id. at *5.

The court in Central Valley Processing mentioned that in NorthPoint Commc'ns Grp., Inc., 361 B.R. 149 (Bankr. N.D. Cal. 2007), the court found the Subjective Test factors insufficient and considered whether the payment resulted from “proscribed practices,” such as threats of work stoppage or legal action. Id. at *6. The Central Valley Processing court found no “indicia of extraordinariness” regarding the \$246,400 transfer in light of the CVP’s and Harris Woolf’s transaction history. Id. After determining that all four Subjective Test factors weighed in Harris Woolf’s favor, the court held that the ordinary course of business defense applied and it entered judgment for Harris Woolf. Id. at *5, 7. CAVIC’s citation to Central Valley Processing is unavailing because the parties in that case stipulated that there were no unusual collection activities and NorthPoint’s reference to “proscribed practices” merely recognized that the Subjective Test factors are not exclusive.

The Court instead finds In re Bender Shipbuilding & Repair Co., Inc., 479 B.R. 899 (Bankr. S.D. Ala. 2012), informative. In Bender, Bender Shipbuilding & Repair Co., Inc. (Bender) was a major customer of Oil Recovery Company Inc. (ORC), and in 2009, Bender paid \$123,837 to ORC. Id. at 901. An involuntary chapter 7 petition was filed against Bender within 90 days after the transfers and the case was converted to chapter 11. Id. at 900-01. Scouler & Company (S&C) was appointed as the plan administrator and filed an adversary proceeding against ORC for avoidance and recovery of the \$123,837 as a preferential transfer. Id. at 900. Bender moved for summary judgment, and ORC filed a cross-motion for summary judgment asserting an ordinary course of business defense. Id. at 900. After determining that Bender met its burden of showing that ORC had received \$123,837 of preferential transfers under § 547(b), the court concluded that the payments from Bender to ORC resulted from unusual debt collection or payment practices because: 1) in 2008, Bender’s payments to ORC were made later and later until, in early 2009, ORC stopped performing services for Bender; 2) the parties entered into an agreement in January 2009 establishing a “new normal” payment structure as a result of ORC’s indication that it would stop providing services, which was an “unusual debt collection practice between the parties;” and 3) ORC presented no evidence indicating that the parties executed such an agreement during their 20-year business relationship. Id. at 904, 905. Here, as in Bender, CAVIC has provided no evidence regarding past debt collection practices between it and Zetta

Singapore, and as noted above, the Complaint indicates that the 6/27/17 Transfers were extraordinary.

B. The Objective Test

CAVIC summarily argues that based on the Complaint's allegations, there is no question that the quarterly lease payments for Aircraft 9740 and 9764 were according to contract terms. Motion at 32. CAVIC, however, does not address "prevailing business standards," and the Court finds that the Objective Test is not a basis for dismissal. See In re Cent. Valley Processing, Inc., 2007 WL 2119002, at *3 (Bankr. E.D. Cal. July 19, 2007) (indicating that the Objective Test looks to whether the payment was "ordinary" in relation to prevailing business standards).

v. Earmarking Doctrine

CAVIC argues that the funds used for the 6/27/17 Transfers were "earmarked." Motion at 34-35. The Trustee counters that the earmarking doctrine does not apply because the funds used for the 6/27/17 Transfers were not earmarked to go to CAVIC. Opposition at 36-37. CAVIC replies that the purpose of the Shareholder Loan was to pay it and other creditors, and the earmarking doctrine is a basis for dismissal of Count VII. Reply at 27.

The earmarking doctrine applies when a third party lends money to a debtor for the specific purpose of paying a selected creditor. In re Straightline Invs., Inc., 525 F.3d 870, 881-82 (9th Cir. 2008). It requires:

- 1) an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt;
- 2) performance of that agreement according to its terms; and
- 3) the transaction viewed as a whole does not result in any diminution of the estate.

Anderson v. Adams (In re Superior Stamp & Coin Co., Inc.), 223 F.3d 1004, 1008 (9th Cir. 2000). Because the earmarking doctrine is a judicially created exception to § 547, it is narrowly construed. 5 Collier on Bankruptcy ¶ 547.03 (2020). As long as a trustee demonstrates that the debtor had an interest in property, the burden shifts to the defendant to prove earmarking. In re FBI Wind Down, Inc., 581 B.R. 116, 133 (Bankr. D. Del. 2018).

Here, CAVIC relies on the Debtors receiving the \$15 million Shareholder Loan and making the 6/27/17 Transfers to CAVIC the next day to infer that there was an agreement between the Debtors and the shareholder for CAVIC to be paid. Motion at 34-35; Complaint ¶¶ 116-18. CAVIC, however, provides no evidence that such an agreement existed. Because there is no evidence that the Shareholder Loan proceeds were to be used to pay a debt to CAVIC, the second element is not met. And, when funds could have been used to pay other creditors, "it presumptively constitutes

property of the debtor's estate.” In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988). Here, all indications are that the 6/27/17 Transfers could have been paid to other creditors, and when the funds were paid to CAVIC, the Debtors’ estates were diminished. Because CAVIC has not shown that any of the elements of the earmarking doctrine are satisfied, this defense is not a basis for dismissal of Count VII.

5. Conclusion

For the reasons stated above, Count VII, which seeks avoidance and recovery of the 6/27/17 Transfers as preferential transfers, is dismissed.

d. Leave to Amend

In the Motion, CAVIC summarily argues that Counts I, III, IV, V, VI, and VII should be dismissed without leave to amend. Motion at 2. The Trustee argues that in the event of dismissal, he should be granted leave to amend. Opposition at 37 (citing Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc); Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 983 (9th Cir. 2000)). CAVIC does not address leave to amend in the Reply.

Federal Rule of Bankruptcy Procedure 7015 provides that Rule 15 of the FRCP applies to supplemental and amended pleadings in bankruptcy cases. Rule 15(a)(2) indicates that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”

Courts have the discretion to grant or deny leave to amend a complaint. Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996). “In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). Consequently, the policy to grant leave to amend is applied with “extreme liberality.” Id.

Parties seeking leave to amend have the initial burden to show a legitimate reason for seeking amendment. See Foman v. Davis, 371 U.S. 178, 182 (1962); Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 989 F. Supp. 1237, 1241 (N.D. Cal. 1997). Assuming the movant meets that burden, the burden then shifts to the party opposing amendment to show that leave to amend is not warranted. Advanced Cardiovascular Sys., 989 F. Supp. at 1241 (“Once a party seeking leave to amend has given a legitimate reason for amendment, the burden shifts to the party opposing amendment to demonstrate why leave to amend should not be granted.”) (citing Genentech, Inc. v. Abbott Labs., 127 F.R.D. 529, 530-31 (N.D. Cal. 1989)). The party opposing amendment must demonstrate that the following factors warrant denial of leave to amend:

1. Bad faith;
2. Undue delay;

3. Prejudice to the opposing party; and
4. Futility of amendment.

Ditto v. McCurdy, 510 F.3d 1070, 1079 (9th Cir. 2007) (internal citations omitted); Smith v. Chrysler Corp., 938 F. Supp. 1406, 1412 (S.D. Ind. 1996) (“Defendants have the burden of showing that the amendment is sought in bad faith, that it is futile, or that it would cause substantial prejudice, undue delay or injustice.”) (internal citations omitted).

Of the factors courts analyze when adjudicating motions for leave to amend, the potential for prejudice to the opposing party “carries the greatest weight.” Reed v. Dynamic Pet Prods., 2016 WL 4491597, at *1 (S.D. Cal. Jan. 5, 2016). The opposing party has the burden of establishing prejudice. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir.1987). Absent prejudice or a strong showing of any of the remaining factors, “there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis in original). “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.” Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). “For an amendment to be futile, it must appear on its face that it is not actionable.” Coble v. Derosia, 2011 WL 444961, at *4 (E.D. Cal. Feb. 8, 2011).

Because of the policy to grant leave to amend with “extreme liberality,” and there have been no previous amendments, the Court finds that it is appropriate to grant the Trustee leave to amend Counts I, III, IV, V, VI, and VII.

IV. Conclusion

For the reasons stated above, Counts I, III, IV, V, VI, and VII are dismissed with leave to amend. Pursuant to LBR 9021-1(b)(1)(B), CAVIC must serve and lodge a proposed order via LOU within 7 days of the filing of this memorandum of decision.

EXHIBIT J

Planned Parenthood Federation of America, Inc. v. Center for Medical Progress

United States District Court, N.D. California. | December 22, 2020 | Slip Copy | 2020 WL 7626410

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Outline

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[All Citations](#) (p.10)

2020 WL 7626410
United States District Court, N.D. California.

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC., et al., Plaintiffs,

v.

CENTER FOR MEDICAL
PROGRESS, et al., Defendants.

Case No. 16-cv-00236-WHO

|
Signed 12/22/2020

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ORDER ON MOTION FOR ATTORNEY FEES AND COSTS

Re: Dkt. No. 1131

William H. Orrick, United States District Judge

*1 Plaintiffs move for an award of attorney fees and non-statutory costs after winning a significant verdict and securing injunctive relief under claims that provide for an award of attorney fees. There is no dispute that they are entitled to fees and costs—the issue is, how much?

Plaintiffs' request represents a substantial reduction from their lodestar. That said, it remains indisputably large—\$14,816.034.70, including costs. The amount is not surprising in light of more than four years of very active litigation that led to a six-week trial. I know how hotly contested each phase—discovery, motion practice, hearings, trial, and post-trial proceedings—of the litigation was. The numerous attorneys on both sides represented their clients with tenacity and skill. Plaintiffs have exhibited good billing judgment in this application for fees, although in this Order I will reduce the amount further. With the reductions I describe below, plaintiffs' motion for attorney fees and non-statutory costs is GRANTED.

DISCUSSION

More than 130 attorneys worked on the case for plaintiffs and 22 of them billed more than 250 hours each. Declaration

of Amy L. Bomse (Dkt. No. 1131-1), ¶ 10. Plaintiffs seek an award of fees covering the time billed by only twelve of those attorneys as well as two paralegals. Those individuals seek compensation for a total of 21,200.25 hours; at current rates, that represents \$18,373,755 in attorney fees. Reply Declaration of Diana K. Sterk (Dkt. No. 1148-2, Ex. A). To account for potential inefficiency or duplication of efforts, plaintiffs reduced that amount by 25% and seek an award of \$13,780,317.00 in attorney fees. *Id.*; *see also* Bomse Decl. ¶12. Plaintiffs also seek \$1,035,717.68 in non-statutory costs. Reply Declaration of Meghan C. Martin (Dkt. No. 1148-1).

In support of their motion, plaintiffs did not submit their underlying contemporaneous timesheets. Instead, each billing attorney provided a detailed declaration breaking down the tasks that attorney completed in each of the nine specifically identified phases of this litigation. *See* Declaration Amy Bomse (Dkt. No. 1131-1); Declaration Steven Mayer (Dkt. No. 1131-2); Declaration Meghan Martin (Dkt. No. 1131-3); Declaration Matthew Diton (Dkt. No. 1131-4); Declaration Arielle Feldshon (Dkt. No. 1131-5); Declaration Jeremy Kamras (Dkt. No. 1131-6); Declaration Sharon Mayo (Dkt. No. 1131-7); Declaration Beth Parker (Dkt. No. 1131-8); Declaration Oscar Ramallo (Dkt. No. 1131-9); Declaration Maithreyi Ratakonda (Dkt. No. 1131-10); Declaration Diana Sterk (Dkt. No. 1131-11); Declaration Rhonda Trotter (Dkt. No. 1131-12).¹ Plaintiffs then identified the precise hours for which they seek compensation for each biller in each of the nine phases in one chart. Dkt. Nos. 1131-1, Ex. A. & 1148-2, Ex. A (revised, collectively "Chart").

¹ The two billing paralegals have not submitted declarations, but the scope and extent of their work is detailed in the Martin Declaration (Dkt. No. 1131-3,) and their hours for each phase detailed in the Chart. Dkt. Nos. 1131-1, Ex. A & 1148-2, Ex. A; *see also* Bomse Decl. ¶ 91.

*2 Defendants object to the rates charged by the billing attorneys and paralegals, to the amount of attorney fees sought as compared to their view of the limited success of plaintiffs, to the availability of fees for in-house counsel, to the reasonableness of the hours claimed by plaintiffs (as unsubstantiated by actual timesheets), and to the costs sought (as unsupported by evidence that these costs are typically reimbursed in this District and given plaintiffs' failure to provide invoices of the expenses). I will analyze those objections below.

I. DEFENDANTS' EXPERT DECLARATION

As an initial matter, I address defendants' submission of an "expert report" by Andre E. Jardini in support of their opposition. Jardini's declaration was attached as an exhibit to the Declaration of Jeffrey M. Trissell, but is not discussed in substance *anywhere* in defendants' opposition. The only mention of Jardini's declaration is on the last page of defendants' 23-page brief where, in 17 lines of text and bullet points, defendants simply identify the topics Jardini addresses in his declaration. That is improper. While declarations regarding prevailing rates are routinely considered in connection with attorney fee motions, those declarations should be discussed as part of the motion or opposition. That was not done here.

Moreover, the Jardini declaration goes beyond the question of prevailing rates in this district for similarly complex litigation and raises arguments never discussed in defendants' opposition. For example, Jardini's conjecture regarding review and transmission of invoices (or the lack thereof) in cases of *pro bono* representation was never mentioned, let alone supported by any case citation or authority, in defendants' opposition. Similarly, Jardini purports to contest the reasonableness of time charged and hours spent by specific billers identified in plaintiffs' billing summaries, but those challenges were not identified in the opposition brief or otherwise discussed by defense counsel.²

² For example, Jardini argues for reductions because the summaries provided by the billing paralegals are not supported by a declaration, the paralegals may have billed for overhead and administrative tasks, and that Feldshon was never admitted to practice in California nor admitted *pro hac vice* and therefore her time should be compensated at a "non-attorney rate." Dkt. No. 1146-2 ¶¶ 28, 37, 38. These are legal arguments improperly raised in Jardini's declaration and/or never mentioned in the opposition or otherwise by defense counsel.

Defendants' failure to discuss the contents or theoretical support Jardini's declaration might provide for the arguments they do make in their opposition brief was not for lack of space. Given the size of plaintiffs' fee and cost request as well as the many stages and long duration of this case, I granted the parties' mutual request for longer briefs to address all of the issues. I gave defendants 30 pages to oppose plaintiffs' motion. Dkt. No. 1144. They chose not to use the extra pages they requested and submitted a 23-page opposition.

Jardini's declaration suffers from numerous other deficiencies. It contains unsupported and inadmissible legal opinions and miscalculations. Given defendants' failure to incorporate Jardini's opinions in their opposition, his impermissible legal conclusions, and the errors in his analysis, it would be appropriate to strike Jardini's declaration.³ I will nonetheless consider Jardini's opinions in connection with the arguments actually made by defendants in their opposition.

³ See, e.g., *Stathakos v. Columbia Sportswear Co.*, 15-CV-04543-YGR, 2018 WL 1710075, at *5 (N.D. Cal. Apr. 9, 2018) (striking multiple paragraphs of Jardini's declaration "on the ground that these paragraphs contain improper legal opinions which either interpret or merely quote case law, the American Bar Associate Code of Professional Responsibility, the State Bar of California Professional Code, and the U.S. Attorney Offices' Attorney Fee Matrix"); *Lira v. Cate*, C00-0905 SI, 2010 WL 727979, at *4 & n.5 (N.D. Cal. Feb. 26, 2010) (striking two-thirds of Jardini's declaration as improper legal opinion).

II. RATES

*3 Defendants first challenge the rates sought for the 12 billing attorneys (partners and associates) and the two billing paralegals, arguing that the rates sought are "inflated."⁴ I find that the rates are reasonable given the scope and complexity of this case, as well as in light of rates approved in this District for partners, associates, and paralegals for similarly experienced counsel and staff at similar firms. The rates, while high, are supported by the authority cited by plaintiffs in their Motion. Dkt. No. 1131 at 20-21. They are rates paid by the clients of the billing attorneys in other matters.

⁴ Plaintiffs seek an award based upon the current (not historical) rates for the following billers: Mayer (\$1,280/hour); Trotter (\$1,150/hour); Parker (\$1,115/hour); Mayo (\$1,085/hour); Kamras (\$1,015/hour); Bomse (\$925/hour); Ratakonda (\$910/hour); Ramallo (\$910/hour); Sterk (\$910); Diton (\$815/hour); Feldshon (\$675); Martin (\$545/hour), and the two paralegals Ferrer (\$405) and Yee (\$390/hour).

Defendants do not challenge the use of current as opposed to historical rates, except for two attorneys; associates Feldshon

and Diton whose rates increased from 2016 to 2020 by 50% and 60% respectively. Opposition (Dkt. No. 1146) at 4. Defendants contend that these two attorneys should not be awarded such unexplained “rapidly-increasing” rates. Plaintiffs do not address or otherwise provide a justification for such large increases in Feldshon or Diton's rates in their motion, reply, or supporting declarations. Therefore, Feldshon and Diton's time will only be awarded at the rate they initially billed plus 25%, which is a rate of increase consistent with other plaintiff counsel.

Otherwise, plaintiffs have justified the rates sought by the other attorneys and paralegals sought here.⁵

⁵ Jardini characterizes the rates sought as at the “upper end of those that would be typically charged by firms in cases of this size and complexity.” Dkt. No. 1146-2, ¶ 30. Jardini does not say the rates are beyond or in excess of rates charged and approved in this District, nor do defendants offer any opinions from this or similar districts rejecting these rates for similarly sized firms and similarly experienced billers. Instead, Jardini suggests rates that are more “reasonable” in his view based on his firm's audit of “comparable firms,” that are not, in fact, comparable to similarly sized firms billing in the Bay Area. In the end, Jardini suggests reductions only for the rates of Kamras, Diton, Sterk, and the two paralegals. Jardini's proposed “Rate Adjustment” to those five billers is not justified. In their opposition brief, defendants primarily attack the partner rates (Oppo. at 2-3), but opinions from this District and evidence (including the Valeo database, the 2017 NLJ Survey, and Jardini's own opinion) supports awarding the partner rates sought.

III. DEGREE OF SUCCESS

Plaintiffs claim they are entitled to fees given their success on: (i) their RICO claims; (ii) the federal, Florida, and Maryland recording claims; and (iii) the PPCG NDA claim under Texas law. Mot. at 14-15. Defendants do not dispute that under these statutes attorney fees may be awarded, and for the RICO claims must be awarded. Instead, defendants argue that plaintiffs' limited success requires rejection of plaintiffs' fee request as not proportional to plaintiffs' success.

Defendants contend that plaintiffs recovered only 3% of the damages they originally sought,⁶ that their request for injunctive relief was significantly narrowed, that they were forced to drop claims in light of adverse rulings, and that some plaintiffs did not recover any damages. None of these arguments counsels reducing plaintiffs' requested fees.

⁶ Oppo. at 11-12. Defendants' calculation is based on plaintiffs' recovery of \$366,000 in compensatory damages and ignores plaintiffs' award of treble RICO damages, statutory damages, and punitive damages.

*4 Numerous courts have recognized that the “fee shifting provisions serve the [] purpose of encouraging private citizens to enforce the objectives of the RICO statute” and held that Congress did not intend “that attorneys' fees should be awarded only in some proportion to the plaintiff's damages.” *N.E. Women's Ctr. v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989); see also *Rosario v. Livaditis*, 963 F.2d 1013, 1019 (7th Cir. 1992) (“we do not believe that *Hensley* nor our own opinions following *Hensley* require a trial court to grant attorney's fees to a prevailing plaintiff in direct proportion to the overall relief obtained.”). Plaintiffs were successful on their RICO claims, even if the amount of damages at stake was significantly reduced during the course of the litigation. If I were required to address proportionality, it would not change my analysis because plaintiffs were likewise successful on their federal, Florida, and Maryland recording claims and the Texas breach claim, further supporting a robust fee award. Finally, the injunctive relief, secured in part under the federal and Florida recording statutes, also weighs in favor of the fee award even though the scope of injunctive relief awarded was narrower than requested by plaintiffs.

The claims that plaintiffs successfully pursued through trial – especially but not limited to their substantive and conspiracy RICO claims and the recording claims – were broad. All or very nearly all of the discovery sought and defended against was relevant to those claims, considering the elements of and defenses to those particular claims. The legal theories and evidence relevant to the claims providing for attorney fees broadly overlapped with the legal theories and evidence relevant to the claims on which plaintiffs were successful but do not independently provide for fees.⁷

⁷ Defendants make a number of arguments as to why plaintiffs should not recover for time

researching, briefing, or arguing claims that do not independently provide a right to attorney fees. *See e.g.*, Oppo. 9-10 & fns.10, 12 (arguing plaintiffs are not entitled to fees for work on UCL and trespass claims or the [California Penal Code § 633.5](#) defense). But those legal claims significantly overlap with the legal theories (and facts) underlying the RICO and recording claims generally.

Plaintiffs were arguably forced to drop a significant portion of their compensatory damage request, either because discovery did not establish a direct-enough connection between events and these defendants (*e.g.*, no evidence that defendants participated in or incited others to hack plaintiffs' system or vandalize plaintiffs' clinics) or because of adverse rulings from me (*e.g.*, cutting out publication damages). That does not mean that the time and effort to secure that discovery or brief those issues on summary judgment or *in limine* should be uncompensated. The disputed evidence about defendants' intent, conduct and the impact of that conduct on plaintiffs constituted the majority of the evidence introduced at trial. That "common core" of evidence and the related legal theories were directly relevant to the successful RICO and recording claims, as well as the scope of injunctive relief awarded.⁸ *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (where "plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories" ... "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1141 (9th Cir. 1986) ("Thus, the test is whether relief sought on the unsuccessful claim 'is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.'") (quoting *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1279 (7th Cir. 1983)).

⁸ Relatedly, defendants argue that plaintiffs should not be compensated for time spent on tasks that were only necessitated because of – in defendants' views – plaintiffs' unreasonable positions taken in the litigation. In particular, defendants identify time spent negotiating and making arguments to Judge Ryu and myself regarding the Protective Order

and the use of Doe identifiers. Oppo. at 6-7 & fns. 6, 8. Plaintiffs retort that it was defendants' unreasonable litigation conduct that drove up their hours. In particular, defendants filed dozens of motions to compel discovery, the vast majority of which were appealed to me and affirmed. All of these arguments simply evidence how hard fought this uniquely contentious case was. In the end, the negotiated Protective Order and use of Doe identifiers were approved by Judge Ryu and myself.

^{*5} Defendants do not attempt to argue, much less show, that the facts supporting any particular claim that plaintiffs dropped were unrelated to the facts underlying the claims on which plaintiffs were successful. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) ("We read *Hensley* as establishing the general rule that plaintiffs are to be compensated for attorney's fees incurred for services that contribute to the ultimate victory in the lawsuit. Thus, even if a specific claim fails, the time spent on that claim may be compensable, in full or in part, if it contributes to the success of other claims."). Accordingly, I will make no deductions because plaintiffs were unsuccessful on discrete claims or because some claims do not independently provide for attorney fees.

IV. IN-HOUSE COUNSEL

Defendants object to plaintiffs' request for \$1,432,659 in fees for 1,329.15 hours of work performed by in-house counsel Beth Parker and Maithreyi Ratakonda. Defendants contend that plaintiffs cannot recover for this time because the declarations of counsel show that they were either: (i) performing work typically performed by in-house counsel that is not compensable (*e.g.*, acting as a client liaison, providing client direction or general strategy oversight); or (ii) performing work that was duplicative of outside counsel that should not be compensated. *See, e.g., BladeRoom Group Ltd. v. Emerson Electric Co.*, 5:15-CV-01370-EJD, 2020 WL 1677328, at *6 (N.D. Cal. Apr. 6, 2020) (reducing in-house counsel's fees by 55% "because his work was primarily that of a traditional in-house counsel, and in other respects, appears to have been duplicative of work performed by the Farella attorneys"); *see also Milgard Tempering, Inc. v. Selas Corp. of Am.*, 761 F.2d 553, 558 (9th Cir. 1985) ("Of course, if in-house counsel are not actively participating (*e.g.*, acting only as liaison), fees should not be awarded."); *Scripps Clinic and Research Found., Inc. v. Baxter Travenol Laboratories, Inc.*, CIV. A. 87-140-CMW, 1990 WL 146385, at *1 (D. Del. July

31, 1990 (“time spent by in-house counsel in the role of a client, such as time spent keeping abreast of the progress of the litigation and advising outside counsel of the client's views as to litigation strategy, is not compensable in a fee award.”).

I agree in large part with defendants. Reviewing the Parker declaration, it appears that a significant portion of the time she spent was advising affiliates about the status and strategy of the litigation, seeking guidance for and making strategic decisions for her clients, performing initial factual investigation, and then reviewing and revising pleadings and motions. *See, e.g.*, Dkt. No. 1131-8, ¶¶ 12-14, 17. Those are typical in-house counsel tasks: acting as the point person for client communication, supervising outside counsel and revising their work, and making strategic decisions. That time is not compensable.

However, Parker also spent significant time performing actual litigation tasks including coordinating document collection and production, reviewing document productions to make redactions, gathering documents in advance of depositions, drafting fact declarations, and performing legal research in areas where Parker has particular expertise. *Id.* ¶¶ 14, 15, 16. That work would otherwise have been performed by outside counsel and is compensable. That said, it is unclear how much of that core litigation work was conducted solely or primarily by Parker (some clearly was) and how much was duplicative of the work also being conducted by outside counsel (some apparently was). In light of these facts, I will reduce the time sought by Parker by 70% to capture only the time she performed litigation tasks that were not duplicative of efforts of outside counsel.

*6 Turning to Ratakonda, her “review” of the PPFA document production and redactions (Dkt. No. 1131-10, ¶ 9), “contributing” to and “helping” with witness preparation and outlines for deposition (*id.* ¶¶ 10, 13), reviewing briefs (*id.* ¶ 11) and participating in strategy sessions (*id.* ¶ 12), appear to be duplicative of the work of outside counsel or work typically expected of in-house counsel. That work is not compensable. However, Ratakonda's work locating documents for production in advance of depositions (*id.* ¶ 10) and preparing PPFA-specific witnesses for depositions or trials on PPFA-specific topics (*id.* ¶¶ 10, 13) is compensable. This non-duplicative litigation time appears to be a small fraction of the work Ratakonda billed. I will reduce the time she seeks by 90% to account for the more significant traditional in-house counsel tasks and tasks that were duplicative of outside counsel that she performed.⁹

9 The primacy of Parker and Ratakonda's performance of typical in-house counsel functions is confirmed by the Bomse declaration which states that Parker and Ratakonda were “instrumental in securing outside counsel and interfacing between outside counsel and the California affiliates.” Bomse Decl. ¶ 9. Those are typical in-house counsel tasks.

V. REASONABLENESS OF HOURS

Defendants argue that plaintiffs cannot meet their burden of demonstrating the reasonableness of the hours billed or exercise of billing judgment because they failed to produce underlying timesheets. They contend that plaintiffs' summary attestations regarding tasks performed and hours billed are inconsistent and unreliable, and that the tasks performed are themselves insufficiently detailed.

I addressed the issue of production of timesheets in denying defendants' motion to compel the production of plaintiffs' timesheets. Dkt. No. 1139. As noted there, plaintiffs objected to producing contemporaneous timesheets because of the undue burden of having to redact hundreds of pages of timesheets for privileged and otherwise protected information (*e.g.*, references to individuals whose identities had not been disclosed at trial and work product/attorney client information). Plaintiffs also argued that production of timesheets with those necessary redactions would undermine their utility to defendants.

In rejecting defendants' motion to compel, I noted that plaintiffs supported their fee and cost motion with their detailed declarations and Chart. Dkt. No. 1131-1, Ex. A, and as revised, Dkt. No. 1148-2, Ex. A. After reviewing each side's caselaw, I concluded that plaintiffs' highly detailed declarations and Chart provided sufficient information to allow me to determine and defendants to contest the reasonableness of plaintiffs' fee request. I explained:

Given the very detailed nature of the declarations and chart, there is only limited potential utility in providing the defendants access to the underlying time sheets. That limited potential utility does not merit requiring plaintiffs to undertake the time-intensive effort to redact

attorney-client information from their over 700 pages of time sheets. I do not preclude defendants from identifying particular tasks (or parts of the phases as broken down by plaintiffs) about which they believe they or the Court do not have sufficiently detailed information when they oppose the motion for fees. They may explain at that time why there is insufficient information to test the reasonableness of the fees claimed by plaintiffs for those tasks. If necessary, I can then continue the hearing on the motion for fees and require plaintiffs to produce some subset of redacted time sheets. But given my inclination at this juncture, I advise defendants to also make their best arguments based on the information provided.

Dkt. No. 1139 at 2.

Defendants did not take my advice to heart. Their opposition mainly repeats the rejected argument that due process requires the production of the underlying timesheets despite the highly detailed declarations and the Chart. **Defendants submitted no evidence from their counsel to support an argument that plaintiffs engaged in unnecessary duplication of effort at any stage of this litigation for which plaintiffs seek compensation—not on any particular motion, in any deposition, in any hearing or case management conference, or during trial.** Numerous defense counsel were present at every step of this case, yet defense counsel did not identify from their readily available personal knowledge any reason why plaintiffs' hours should be cut as unreasonable or duplicative. Nor did they identify (as I suggested) any particular phase or segment of this litigation for which they could not make those sorts of targeted challenges to plaintiffs' hours without underlying billing records.¹⁰ Defendants instead apparently rest on the Jardini declaration. But there is no evidence that the Jardini declaration was informed by a comparison to defense counsels' hours billed or the personal knowledge of defense counsel.¹¹

¹⁰ Had defense counsel attested that there was serious duplication of effort or unnecessary hours spent by

plaintiffs' counsel in specific phases, as I indicated in my October Order, I could have ordered plaintiffs to produce timesheets for that specific phase or part of a phase. For example, defense counsel could have argued that in specifically identified meet and confers regarding identified discovery, plaintiffs' staffing was unreasonable. They could have argued, based on that personal knowledge, that similar over-staffing or otherwise unreasonable staffing extended to an identified percentage of discovery disputes. That sort of evidence-based showing has not been attempted much less made. *But see Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1160 (9th Cir. 2018) (“In a contested case, a district court ordinarily can rely on the losing party to aid the court in its duty by vigorously disputing any seemingly excessive fee requests.”).

¹¹ In his declaration, Jardini proposes a reduced number of hours that he believes is more reasonable for various tasks; specifically the work on the complaints in Phase 1, the summary judgment motions in Phase 5, and the post-trial work in Phase 8. *See, e.g., Jardini Decl.*, ¶¶ 60-67. Similar to the conclusions of other district court judges, I find that Jardini's assertions are wholly unsupported, do not account for all of the research and pleadings actually drafted by plaintiffs during the phases he purports to address, and do not support a particularized deduction in hours for any specific task or phase. *See, e.g., Stathakos v. Columbia Sportswear Co.*, 15-CV-04543-YGR, 2018 WL 1710075, at *5 (N.D. Cal. Apr. 9, 2018) (“Mr. Jardini fails to offer any factual support for or articulate the principles or methods used to derive his opinions regarding the “reasonable” amount of time spent on these projects. Accordingly, plaintiffs' motion to strike paragraphs 42–44, 52–57, 62–64, 78–80, and the Outline of Services Performed of Mr. Jardini's declaration pursuant to Fed. R. Evid. 702(b)–(d) is GRANTED and these paragraphs are hereby STRICKEN.”).

*7 Viewing the ample evidence plaintiffs submit regarding the time they spent on the categories of tasks in each phase of this highly contested litigation, and relying on my own knowledge and understanding of the unusually significant time required to develop and try this case, I have a sufficient basis to conclude that the hours plaintiffs seek are reasonable.

I note that general concerns regarding duplication of effort among the significant number of attorneys who billed on this case has been addressed in the first instance by two measures. First, plaintiffs only seek compensation for hours of the twelve attorneys identified, despite the fact that more than 130 attorneys worked on the case and 22 attorneys spent more than 250 hours on the case. Bomse Decl. ¶ 10. Second, from that subset of still-significant time, plaintiffs take a 25% deduction to account for potential duplication of effort and inefficiencies. *Id.* ¶ 12.¹²

¹² Both of these deductions adequately address Jardini's allegation that the litigation of this case was "top heavy" and that plaintiffs did not staff this case in a reasonable manner. *See* Jardini Decl. ¶ 47. In addition, given the complexity of the legal issues raised as well as the highly sensitive nature of much of the information sought and used by defendants regarding plaintiffs' operations, the presence of actively involved senior counsel on *both* sides was eminently reasonable. If there was a practice by plaintiffs of having senior counsel handle low-level issues, defendants could have relied on their personal knowledge to point that out. That have not.

Defendants argue that they cannot test the separate "billing judgment" determinations – where counsel voluntarily did not charge time for various phases or tasks before totaling the time they seek in the Chart (Ex. A and revised Ex. A) – without being able to see the underlying timesheets. *Oppo.* at 18. That may be true for billing judgment determinations made prior to totaling the time sought in plaintiffs' Chart. However, the 25% cut taken *after* the time had been totaled is transparent. That significant reduction – given the descriptions of the tasks undertaken by each biller, my informed view of the amount of work that was required by both sides to litigate and defend this case, and defense counsels' failure to identify any significant duplications of effort or unnecessary time based on their own personal knowledge – adequately accounts for potential duplication and inefficiencies.

It bears emphasis that I am not simply taking "at face value" the word of the plaintiffs regarding the number of hours expended on this case and the reasonableness of those hours. *See Gates v. Deukmejian*, 987 F.2d 1392, 1398–99 (9th Cir. 1993). I have looked closely at the detailed declarations and the Chart. A review of the docket in this case and my intimate knowledge of the complexity of the issues raised

to Magistrate Judge Ryu and me in the different stages of litigation further support my conclusion that the hours sought – after the 25% discount – were reasonably incurred. Absent *any* evidence from defendants identifying specific unreasonableness in terms of subject matter or duplication of effort, I have an ample basis to conclude the hours sought are reasonable without requiring plaintiffs to produce underlying timesheets.¹³

¹³ Defendants identify a few discrepancies between the Chart and the declarations submitted. *Oppo.* at 19. Those discrepancies are explained and accounted for in the Reply and supporting declarations, and resulted from rounding or discounting, discrete errors, or errors in defendants' expert's own calculations. *See* Reply at 15; *see also* Dkt. Nos. 1148-1 through 1148-4.

The hours sought for the tasks identified in the phases outlined by plaintiffs, after the 25% reduction, are reasonable and should be compensated.

VI. COSTS

Plaintiffs seek recovery of \$1,035,717.68 in non-compensatory costs. Declaration of Martin Decl. ¶ 7; Martin Reply Decl. ¶ 8. They seek reimbursement for: a court reporter to transcribe video clips for use at trial (\$18,921.60); attorney travel for depositions, hearings, and trial (\$85,200.37); deposition costs not included in the Bill of Costs (\$49,792); E-discovery costs from plaintiffs' E-discovery vendor not included in the Bill of Costs (\$223,543.56); contract attorney costs for document review and redaction during written discovery (\$18,101.25)¹⁴; trial technical services and support from On the Record (\$168,632.08); jury consulting services from JuryScope (\$54,000); travel costs for plaintiffs' witnesses for trial and depositions (\$28,488.36); hotel costs for out-of-town trial team and witnesses during the trial (\$176,609.10); executive protection services for witnesses to, from, and at the courthouse during trial (\$37,598.51); and expert witness fees and travel expenses (\$174,830.85). Martin Reply Decl. ¶ 8.¹⁵

¹⁴ Jardini complains that he did not know how many hours the contract attorneys billed (Jardini Decl. ¶¶ 55, 83), but plaintiffs disclose that the contract attorneys billed over 412 hours at the document

review and redaction stage. Bomse Decl. ¶ 41; Martin Decl. ¶ 6.

15 Defendants point out a discrepancy between the amount of costs stated in plaintiffs’ motion and the amount itemized in the Martin Declaration. Oppo. at 22. Martin explains the discrepancy and clarifies the total amount sought in her Reply declaration. Martin Reply Decl. ¶ 8.

*8 Defendants do not dispute that non-statutory costs could be awarded in connection with the award of attorney fees. They argue generally that plaintiffs are not entitled to the non-statutory costs they seek because plaintiffs failed to submit evidence showing that each category of non-statutory costs they seek here are the types of costs counsel in this District typically seek from clients separate from their attorney fees and because plaintiffs do not provide the underlying invoices.

Martin declares that all of these costs were “billed to this case, all of which was passed along to PPFA for payment, along with all supporting invoices and documentation.” Martin Decl. ¶ 7. In her Reply declaration, Trotter declares that the majority of these costs (attorney travel-related costs, consultant and expert fees, document review and document production related fees, and trial technical consultant costs) are typically passed onto and billed to clients in California generally and San Francisco specifically. Dkt. No. 1148-3 ¶¶ 2-4; see also *Trustees of Const. Indus. and Laborers Health and Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (noting “reasonable attorney’s fees” include litigation expenses when it is the “prevailing practice” in the community for lawyers to bill those costs separately from their hourly rates). That evidence is sufficient to support an award of the non-statutory costs to plaintiffs.

Defendants made one specific challenge to the costs plaintiffs seek. They objected to the personal security costs plaintiffs incurred to provide security to testifying witnesses travelling to and from court. The issue of witness security was raised with me during trial after a disturbing incident. I concluded there was insufficient evidence of witness intimidation or harassment to justify assigning a United States Marshal to provide witness escorts to the courtroom. Trial Tr. 1397:20-24. There was no evidence that defendants themselves had been responsible for the incident. Because there is no evidence that these sorts of security costs are typically incurred and compensated in this District, even in a highly charged case, it is not appropriate to require defendants to foot the security bill. ¹⁶

16 Defendants identify only this particular cost as objectionable, and argue the costs seem unreasonably high given the number of hours involved. Oppo. at 22. That particularized objection is well-taken and not addressed in plaintiffs’ Reply or declarations. Plaintiffs’ failure to address it, for example by identifying the number of hours of security provided and for how many witnesses, further supports excluding this one category of non-statutory costs from the award.

As to the exact costs themselves, plaintiffs did not submit the underlying invoices and instead submitted a description of the 11 categories of costs they seek with a total for each. Martin Reply Decl. ¶ 8. While not particularly fulsome, the declarations provide a sufficient description of the costs. The major costs (not surprisingly) are for e-discovery, trial technical support, hotel rooms, and expert witnesses. *Id.* ¹⁷ Those costs are typically billed separately from attorney time and charged to clients in this District. Trotter Reply Decl. ¶¶ 2-4. No category of costs – other than the personal security costs – is specifically challenged by defendants. ¹⁸

17 Defendants’ reliance on *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326 (N.D. Cal. 2014) is misplaced. There, the only information provided by counsel seeking recovery of expenses was the “dollar amount spent by each class counsel firm. For example, Morgan & Morgan Complex Litigation Group’s only documentation for costs is as follows: ‘Expenses \$46,309.84.’ ” *Id.* at 334 n.3. That was clearly inadequate and different from the detailed list of each type of cost sought here.

18 Jardini asserts – without any explanation or evidence – that the hotel, contract attorney, and some of the e-discovery expenses are “high” and may “possibly” be inappropriate. He does not explain the basis for his assertions. Jardini Decl. ¶¶ 83-84. For example, Jardini does not analyze the typical cost of a hotel room in San Francisco along with an estimate of the number of trial days/nights to support his assertion that the hotel expenses are “possibly” inappropriate. Without any evidentiary basis in support, Jardini’s assertions are rejected.

*9 Plaintiffs are awarded the non-statutory costs they seek, except for the \$37,598.51 in “executive security” costs.

CONCLUSION

Within fourteen days of the date of this order, plaintiffs' counsel shall submit a revised Proposed Order Awarding Fees and Costs, along with a declaration explaining the deductions and recalculations required by this Order. Any objection to

that revised Proposed Order shall be submitted no later than five days thereafter.

IT IS SO ORDERED.

All Citations

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EXHIBIT K

Willcox v. Lloyds TSB Bank, plc

United States District Court, D. Hawai'i. | December 14, 2016 | Not Reported in Fed. Supp. | 2016
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Outline

[Attorneys and Law
Firms \(p.1\)](#)
[ORDER
PRELIMINARILY
APPROVING
DEFENDANT'S
OFFER OF
COMPROMISE,
PRELIMINARILY
APPROVING
PLAINTIFFS'
MOTION TO
APPROVE AND
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PRELIMINARILY
APPROVING
PLAINTIFFS'
REQUEST FOR
INCENTIVE
AWARD FOR CLASS
REPRESENTATIVE](#)
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2016 WL 7238799

Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

Bradley WILLCOX, Frank Dominick,
and Michele Sherie Dominick, Plaintiffs,

v.

LLOYDS TSB BANK, PLC
and Does 1-15, Defendants.

Civ. No. 13-00508 ACK-RLP

Signed 12/14/2016

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**ORDER PRELIMINARILY APPROVING
DEFENDANT'S OFFER OF COMPROMISE,
PRELIMINARILY APPROVING PLAINTIFFS'
MOTION TO APPROVE AND ENTER JUDGMENT,
PRELIMINARILY APPROVING PLAINTIFFS'
REQUEST FOR ATTORNEYS' FEES AND
COSTS, AND PRELIMINARILY APPROVING
PLAINTIFFS' REQUEST FOR INCENTIVE
AWARD FOR CLASS REPRESENTATIVE**

Alan C. Kay Sr., United States District Judge

*1 For the reasons set forth below, the Court preliminarily APPROVES the Offer of Compromise by Defendant Lloyds TSB Bank plc, now known as Lloyds Bank plc, Pursuant to [Federal Rule of Civil Procedure 68](#) (“Offer of Judgment”). ECF No. 539-2. Accordingly, the Court preliminarily APPROVES Plaintiffs' Motion to Approve and Enter Judgment (“Motion”). ECF No. 547. The Court further preliminarily APPROVES Plaintiffs' request for \$800,000.00

as an award of attorneys' fees and costs, as described in Plaintiffs' Petition in Support of Distribution of Fees and Expenses, ECF No. 556; and preliminarily APPROVES Plaintiffs' request for \$10,000.00 as an award for Dr. Bradley Willcox for his role as class representative in this action, ECF No. 558.

BACKGROUND

The instant case involves the issuance by Defendant Lloyds TSB Bank plc, now known as Lloyds Bank plc (“Lloyds”), of certain dual currency loans, also referred to as International Mortgage System (“IMS”) loans.¹ The Court and the parties are familiar with the extensive factual and procedural history of this case, and the Court will not repeat it here except as necessary.

¹ The Court notes that several other class actions have been filed against Lloyds that involved Lloyds' IMS loan product. The Dugan litigation was a consolidated action in the Northern District of California comprised of both Dugan, et al. v. Lloyds TSB Bank, plc, Case No. 3:12-cv-02549-WHA (N.D. Cal.), and another case that had been filed in the Northern District of California, Osmena, et al. v. Lloyds TSB Bank, plc, et al., Case No. 3:12-cv-02937-WHA (N.D. Cal.). The parties in Dugan ultimately settled. Another related action, Washington Land Development, LLC v. Lloyds TSB Bank, plc, Case No. 2:14-cv-00179-JCC (W.D. Wash.), was filed in the Western District of Washington and ultimately voluntarily dismissed. Various factors in those cases distinguish them from the instant action.

On March 27, 2015, Plaintiffs filed the operative Third Amended Complaint (“TAC”). ECF No. 100. The TAC names Frank Dominick, Michele Sherie Dominick, and Bradley Willcox (collectively, “Plaintiffs”) as class representatives and brings claims against Lloyds for Breach of Contract (Count I) and Breach of an Implied Term Limiting Lloyds' Discretion to Change the Interest Rate (Count II). Id. ¶¶ 6-8, 55-72.

I. Class Certification

On July 15, 2015, Plaintiffs filed a Motion for Class Certification pursuant to [Federal Rule of Civil Procedure](#)

(“Rule”) 23. ECF No. 156. After briefing and oral argument from the parties, Magistrate Judge Puglisi issued his Findings and Recommendation to Grant in Part and Deny in Part Plaintiffs' Motion for Class Certification (“F&R”) on November 12, 2015. ECF No. 317. The F&R recommended: (1) certifying the instant case as a class action; (2) appointing Dr. Willcox (but not the Dominicks) as class representative; (3) appointing Alston Hunt Floyd & Ing and Steptoe & Johnson LLP as class counsel; (4) directing the parties to meet and confer regarding notice to class members; (5) denying any remaining relief requested in Plaintiffs' class certification motion; and (6) defining the certified class as:

*2 All persons and entities who entered prior to August 2009 into an IMS loan with Lloyds that contained a Hong Kong choice-of-law provision and an interest rate provision based upon Cost of Funds and who are, or were at any time during entering into such an IMS loan, residents or citizens of the State of Hawaii, or owners of property in Hawaii that was mortgaged to secure any such IMS loan.

Id. at 31-32. Lloyds filed Objections to the F&R on November 25, 2015, ECF No. 332, to which Plaintiffs filed a Response on December 9, 2015, ECF No. 335. The parties also submitted supplemental Reply and Sur-Reply briefs on December 17, 2015 and December 28, 2015, respectively. ECF Nos. 337, 340.

On January 8, 2016, the Court issued an Order Adopting in Part, Rejecting in Part, and Modifying in Part the Findings and Recommendations to Grant in Part and Deny in Part Plaintiffs' Motion for Class Certification (“Class Certification Order”). ECF No. 366. For the reasons explained therein, the Court adopted the F&R over Lloyds' objections, except as to the class definition, which the Court modified to include only plaintiffs of United States and Canadian citizenship.

On January 22, 2016, pursuant to [Rule 23\(f\)](#), Lloyds filed with the Ninth Circuit a Petition for Permission to Appeal the Class Certification Order (“[Rule 23\(f\)](#) Petition”). ECF No. 397. The Ninth Circuit issued its Order denying the [Rule 23\(f\)](#) Petition on May 16, 2016. ECF No. 430.

On July 15, 2016, the Court instructed the parties to submit for the Court's approval a proposed form of class notice informing potential class members of this lawsuit. ECF No. 446. Plaintiffs submitted a proposed notice on July 19, 2016, ECF No. 448-2, and the Court provided its comments on the proposed notice on July 21, 2016, ECF No. 449. After the Court provided Plaintiffs with one more round of comments on the proposed notice, a third party settlement administrator mailed the final Class Notice to the borrowers of 130 IMS loans that fit the class definition on August 5, 2016, and to the borrowers of two additional IMS loans on August 10, 2016. See ECF Nos. 453, 458, 554-3. The Class Notice informed potential class members that they could opt out of the class if they postmarked an “Exclusion Request” to the third party settlement administrator by September 30, 2016. See ECF No. 554-2 at 5. The administrator received one opt-out request on August 19, 2016. ECF No. 554-3.

II. Summary Judgment

Earlier, on October 16, 2015, Plaintiffs and Lloyds filed cross-motions for summary judgment. Lloyds moved for summary judgment as to both of Plaintiffs' Counts I and II. ECF No. 249. Plaintiffs moved for summary judgment only as to their Count I and requested “immediate declaratory relief” as to that claim. ECF No. 251.

The Court held a two-day hearing regarding the cross-motions for summary judgment on January 19-20, 2016. On February 11, 2016, the Court issued an Order Denying Plaintiffs' Motion for Partial Summary Judgment on Their and the Putative Class's Claim for Breach of Contract on Count I, Denying Plaintiffs' Request for Declaratory Relief, Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, and *Sua Sponte* Granting Partial Summary Judgment to Plaintiffs on Count II (“Summary Judgment Order”). ECF No. 419.

In its Summary Judgment Order, the Court made several findings as a matter of law with respect to Count I: (1) that the Cost of Funds provision is not ambiguous; (2) that the facility agreements do not prescribe a specific methodology for calculating the Cost of Funds component of the IMS loans' interest rate; do not specifically require the Cost of Funds component to track 3-month LIBOR; and do not specifically require Lloyds to fund Plaintiffs' loans with short-term money; (3) that the LTP charge was clearly an actual cost to Lloyds imposed on it by its parent company, Lloyds Banking Group plc (“LBG”); (4) that the Cost of Funds provision allows Lloyds to include in its Cost of Funds

calculation both liquidity costs and liquidity requirements, and does not specifically restrict Lloyds from altering the manner in which it calculates cost for purposes of determining the interest rate on the loans; and (5) that Lloyds has some degree of discretion with respect to the foregoing findings. Summary Judgment Order at 24, 36-37.

*3 However, the Court noted that several issues of material fact remained, including (1) whether, prior to 2009, Lloyds was itself funding Plaintiffs' IMS loans with 90-day money, and if so, whether it should have continued utilizing such short-term funding; (2) if Lloyds was funding the IMS loans itself prior to 2009, whether it was appropriate to change the funding to LBG's centralized funding model; (3) whether, prior to 2009, Plaintiffs' loans were funded through LBG's centralized funding model, and if so, whether the LTP charge added in 2009 was simply a different methodology appropriately applied to the computation of the Cost of Funds; (4) whether Lloyds appropriately acted pursuant to regulatory requirements or recommendations; (5) whether it was appropriate to pass the LTP charge on to Plaintiffs as an actual cost of funding the IMS loans; and (6) how the LTP charge was computed. *Id.* at 35-36.

With respect to Count II, the Court found that an implied term in the facility agreements limits Lloyds' exercise of the discretion afforded it by the Cost of Funds provision. *Id.* at 41. While Lloyds argued that no implied term should be read into the facility agreements in the first place, both parties agreed that the case *Nash, et al. v. Paragon Fin. PLC*, [2001] EWCA Civ. 1466 (15 Oct. 2001), was instructive regarding the breach of any implied term found to exist in the facility agreements. *See* ECF No. 249 at 24, 29-31; ECF No. 347 at 36; Transcript of Hearing at 118, Jan. 19, 2016, ECF No. 403; Transcript of Hearing at 34, Jan. 20, 2016, ECF No. 404. The Court therefore distilled a standard from that case to govern the exercise of a lender's discretion under the implied term. Summary Judgment Order at 43-45. The Court found that, "when exercising its discretion to change interest rates, Lloyds must do so in a manner that comports with 'purely commercial considerations,' including whether it 'is in financial difficulty because it is obliged to pay higher rates on interest to the money market'; however, Lloyds must refrain from acting 'dishonestly, for an improper purpose, capriciously, or arbitrarily,' or in a manner so unreasonable that no reasonable lender would do the same." *Id.* at 45 (citing *Nash*, [2001] EWCA Civ. 1466). For ease of reference, the Court referred to this standard as the "*Nash* standard."

The Court concluded that, as with Count I, various questions of material fact remained as to Count II that precluded the Court from determining whether Lloyds had breached an implied term limiting its discretion to adjust interest rates, as determined by the *Nash* standard. *Id.* at 46-47.

III. Rule 68 Offer of Judgment and Distribution of Judgment Amount

On September 11, 2016, Lloyds signed and delivered to Plaintiffs' counsel the Offer of Judgment. Decl. of Glenn T. Melchinger ¶ 3, ECF No. 539-1. Plaintiffs' counsel signed the Offer of Judgment and delivered it upon the Court on September 22, 2016. ECF No. 539. Accordingly, the Court stayed all pretrial proceedings and vacated the October 18, 2016 trial date. ECF No. 544.

Pursuant to the Offer of Judgment, Plaintiffs and Lloyds agree as follows: (1) judgment shall be entered in favor of Plaintiffs and each borrower that has not opted out of the certified class as of September 25, 2016 (the "Judgment Class"); (2) Lloyds shall pay \$2,000,000.00 in full and final satisfaction of all relief sought in the TAC, with payment to be apportioned among the Judgment Class, the class representative, and class counsel in a manner to be determined by class counsel and the class representative;² (3) nothing in the Offer of Judgment shall be deemed an admission by Lloyds of any fact or allegation relating to its alleged liability; and (4) the Offer of Judgment is conditioned on acceptance by the entire Judgment Class.

² The class representative in the instant action is Dr. Willcox.

As noted, the Offer of Judgment purports to bind the named plaintiffs to this suit, as well as "each borrower on each loan that has not opted out of the certified class as of September 25, 2016." Offer of Judgment at 2. While the initial Class Notice mailed to members provided an opt-out deadline of September 30, 2016, no member opted out of the class between September 25 and September 30, obviating any potential problems that could arise as a result of the conflict between the two deadlines. Indeed, the only individual to opt out of the class mailed his Exclusion Request to the settlement administrator in August. Accordingly, by the terms of the Offer of Judgment, the borrowers of 131 IMS loans will be bound by the Judgment.

*4 With respect to the distribution of the Judgment, on October 3, 2016, Plaintiffs submitted a Petition in Support

of Distribution of Fees and Expenses (“Petition”), requesting that \$800,000.00 of the Judgment amount be apportioned to class counsel as an award for attorneys' fees and costs. ECF No. 556. On October 6, 2016, Plaintiffs filed a Supplemental Brief in Support of a Compensation Award for Class Representative (“Supplemental Brief”), requesting that Dr. Willcox be granted a compensation award of \$10,000.00 for his role as class representative. ECF No. 558.

The Court held a hearing on December 7, 2016 to determine whether the Offer of Judgment is “fair, reasonable, and adequate,” in accordance with [Rule 23\(e\)\(2\)](#).³ During the hearing the Court also heard arguments regarding Plaintiffs' Motion and the distribution of the Judgment amount.

³ In two prior Minute Orders dated September 22, 2016, ECF No. 544, and September 28, 2016, ECF No. 548, the Court recognized that a potential conflict exists between [Rule 23\(e\)\(2\)](#), which requires the Court to hold a hearing to determine whether any settlement, voluntary dismissal, or compromise that would bind class members is “fair, reasonable, and adequate,” and [Rule 68\(a\)](#), which directs the clerk to enter judgment upon a party's acceptance of an offer of judgment.

While several courts, including the Supreme Court, have likewise acknowledged this conflict, neither the Court nor the parties were able to locate any binding authority regarding how to reconcile the two rules. See [Marek v. Chesny](#), 473 U.S. 1, 33 n.49 (1985) (noting that [Rule 68](#) does “not mesh with [[Rule 23\(e\)](#)]'s careful supervision” and that “[Rule 68](#) sets a nondiscretionary 10-day limit on the plaintiff's power of acceptance—a virtually impossible amount of time in many cases to consider the likely merits of complex claims of relief, give notice to class members, and secure the court's approval”); [Gay v. Waiters' and Dairy Lunchmen's Union Local No. 30](#), 86 F.R.D. 500, 503 n.8, 504 (N.D. Cal. 1980) (noting that “[Rule 68](#) may ... conflict with the policies and principles underlying [Rule 23](#),” and that a “conflict between the rules would occur where the court under 23(e) disapproves the [Rule 68](#) offer as a basis for settlement although acceptable to the class representative and the plaintiff class ultimately obtains a less favorable judgment”).

Observing that at least one other court has required a [Rule 23\(e\)\(2\)](#) fairness hearing when presented

with a [Rule 68](#) offer of judgment, the Court determined that a fairness hearing was appropriate here. See [Carducci v. Aetna U.S. Healthcare, No. CIV.A. 01-4675\(JBS\)](#), 2003 WL 22207204, at *5 (D.N.J. Apr. 16, 2003) (“[W]hen an offer of judgment is made in a class action, the court must hold a [Rule 23\(e\)](#) fairness hearing to approve the judgment *before judgment is entered* according to the offer.”) (emphasis added); see also Wright and Miller, [12 Federal Practice & Procedure Civil 2d § 3005](#) (“Once a [Rule 68](#) offer is accepted, either party may file the offer and acceptance, and the clerk must then enter judgment. In general, it is said that the court has no choice about entering the agreed judgment. But this general statement is too broad to encompass all instances in which [Rule 68](#) offers are made ... [I]n class actions the court has an independent duty under [[R](#)]ule 23(e) to decide whether a settlement is acceptable, and [Rule 68](#) cannot remove that authority and duty.”).

STANDARD

Under [Rule 23\(e\)](#), “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.” “The purpose of [Rule 23\(e\)](#) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights.” [In re Syncor ERISA Litig.](#), 516 F.3d 1095, 1100 (9th Cir. 2008). Before it may approve a class-action settlement that will bind class members, the Court must hold a hearing to determine whether the settlement is “fair, reasonable, and adequate.” [Fed. R. Civ. P. 23\(e\)\(2\)](#); [Lane v. Facebook, Inc.](#), 696 F.3d 811, 818 (9th Cir. 2012). “[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is ‘exposed to the litigants, and their strategies, positions and proof.’ ” [Hanlon v. Chrysler Corp.](#), 150 F.3d 1011, 1026 (9th Cir. 1998) (quoting [Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of S.F.](#), 688 F.2d 615, 626 (9th Cir. 1982)). Importantly, the Court must consider the fairness of the settlement agreement as a whole, rather than assessing its component parts. *Id.* The Court may not “delete, modify or substitute certain provisions” of the settlement agreement; “[t]he settlement must stand or fall in its entirety.” *Id.* (citation omitted).

*5 Furthermore, “the question whether a settlement is fundamentally fair within the meaning of [Rule 23\(e\)](#) is different from the question whether the settlement is perfect

in the estimation of the reviewing court.” [Lane](#), 696 F.3d at 819. The Court’s “only role in reviewing the substance of that settlement is to ensure that it is ‘fair, adequate, and free from collusion.’ ” [Id.](#) (quoting [Hanlon](#), 150 F.3d at 1027); see also [Officers for Justice](#), 688 F.2d at 625 (“[T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”). The fact that a settlement “could have been better” does not mean that the settlement is not fair, accurate, or reasonable. [Hanlon](#), 150 F.3d at 1027 (recognizing that “[s]ettlement is the offspring of compromise”).

The Court considers a number of factors in determining whether a settlement agreement is fair, accurate, and reasonable:

[T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

[Id.](#) at 1026 (hereinafter the “[Hanlon](#) factors”). “The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.” [Officers for Justice](#), 688 F.2d at 625.

DISCUSSION

I. Notice

[Rule 23\(e\)](#) requires that notice of a proposed settlement, voluntary dismissal, or compromise be directed “in a

reasonable manner to all class members who would be bound by the proposal.” [Fed. R. Civ. P. 23\(e\)\(1\)](#). “Adequate notice is critical to court approval of a class settlement under [Rule 23\(e\)](#).” [Hanlon](#), 150 F.3d at 1025 (finding that notice provided to the class met the requirements of [Rule 23\(e\)](#)). For classes certified under [Rule 23\(b\)\(3\)](#), as here, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#). “Notice provided pursuant to [Rule 23\(e\)](#) must ‘generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.’ ” [Lane](#), 696 F.3d at 826 (quoting [Rodriguez v. W. Publ’g Corp.](#), 563 F.3d 948, 962 (9th Cir. 2009)). However, this standard “does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class’s claims, and it does not require an estimate of the potential value of those claims.” [Id.](#)

In a Minute Order dated September 22, 2016, the Court directed Plaintiffs to submit to the Court a proposed form of notice of the Offer of Judgment to all class members who will be bound by the Judgment. ECF No. 544. Plaintiffs submitted a proposed form of notice on September 26, 2016, ECF No. 547-2, and the Court provided comments on the proposed notice on September 28, 2016, ECF No. 548. The Court and Plaintiffs then engaged in several exchanges regarding the substance and timing of the proposed notice and the deadlines contained therein, before the Court approved the final Notice of the Offer of Judgment (“Notice”) and directed that it be mailed to class members by a third party settlement administrator. [See](#) ECF Nos. 549, 550, 559, 561, 562, 564, 565.

*6 The Notice provided a brief description of the lawsuit; the class definition; a brief description of the Offer of Judgment; details regarding the fairness hearing on December 7, 2016; the amount class counsel has requested for attorneys’ fees and costs, as well as for a compensation award for Dr. Willcox for his role as class representative; and the estimated portion of the Judgment amount each member will receive, along with information regarding how each portion is calculated. [See](#) Notice, ECF No. 564-2. The Notice also informed members that if they wished to object to the Offer of Judgment, they could do so by mailing their written objection to the third party settlement administrator with a postmark date no later than November 14, 2016. [See](#) Notice at 1, 3-4; [see also](#) ECF No. 565.

On October 19, 2016, the third party administrator mailed the Notice via first class mail to the borrowers of the 131 IMS loans who will be bound by the Judgment. *Aff. of Kelly Kratz* ¶¶ 4, 6. In order to ensure it had the most accurate information for the class members, the administrator cross-checked members' last known addresses with the National Change of Address database maintained by the United States Postal Service. *Id.* ¶ 5. Of the 131 Notices mailed, four were returned as undeliverable and sent to a professional address search firm for tracing. *Id.* ¶ 7. The firm was unable to locate updated addresses for the four class members, and therefore these Notices were not re-mailed. *Id.* On November 29, 2016, Plaintiffs notified the Court that the administrator did not receive any objections to the Offer of Judgment or to the proposed distribution of the Judgment amount outlined in the Notice. ECF No. 567.

The Court finds that the Notice complied with the requirements of [Rule 23\(c\)\(2\)](#) and [Rule 23\(e\)\(1\)](#). The Notice provided the best notice of the Offer of Judgment practicable under the circumstances, and provided individual notice to all members who could be identified through reasonable effort. See [Rule 23\(c\)\(2\)\(B\)](#). In fact, on July 13, 2016, Plaintiffs brought a Motion to Compel Defendant to Certify Completeness of Class Mailing List, requesting that Lloyds be required to “certify that the class mailing list includes all class members and loans satisfying the class criteria.” ECF No. 445 at 1. The purpose of that motion was to “redouble ... efforts to identify the universe of all potential IMS borrowers with loans secured by Hawaii property who could be class members,” and “require Defendant ... to explain what efforts have been taken to ensure that all class members have been identified and certify that the class mailing list is complete—that everyone who should be included has been.” *Id.* Plaintiffs' motion resulted in an order from the Magistrate Judge requiring Lloyds to conduct a search for additional borrowers (after a list of potential class members had already been identified) and to file a declaration confirming the process it used to identify these individuals. See ECF No. 463.

Serious efforts were made to identify the complete universe of potential class members, and additional Notices were mailed out after the settlement administrator had mailed out the initial round of Notices. The relatively small size of the class also allowed the parties to more accurately identify borrowers whose loans fit the relevant criteria, and all but four members successfully received Notice. The Notice itself included information to sufficiently apprise class members of the nature of the lawsuit, the class definition,

the Offer of Judgment, and class members' rights; indeed, the Court reviewed multiple versions of the Notice and provided several rounds of comments before permitting the settlement administrator to mail it to class members—a factor which further reinforces the Court's finding that the Notice was sufficient.

*7 For all of the foregoing reasons, the Court finds that the Notice of the Offer of Judgment was proper and complied with [Rule 23\(c\)\(2\)](#) and [Rule 23\(e\)\(1\)](#).

II. The Hanlon Factors

As noted above, the Court must evaluate and approve the proposed settlement as a whole, rather than on the basis of its component parts. In assessing the Offer of Judgment, the Court considers each of the Hanlon factors in turn.

a. Strength of the Plaintiffs' Case

“This factor considers both the likelihood of success on the merits and the range of possible recovery.” [In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.](#), No. 8:10ML 02151 JVS (FMOx), 2013 WL 3224585, at *7 (C.D. Cal. June 17, 2013) (citing [Rodriguez](#), 563 F.3d at 964-65). However, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits.” [Officers for Justice](#), 688 F.2d at 625. The Court should not “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Id.* The Offer of Judgment “is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators”; rather the Court's “determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” *Id.* (citation and quotation marks omitted).

The Summary Judgment Order considerably narrowed the issues in this case. Significantly, the Court granted partial summary judgment in favor of Lloyds on Count I, making several findings as a matter of law with respect to the Cost of Funds provision that allowed Lloyds a degree of discretion in changing the way it calculated interest rates for the IMS loans. These findings made judgment in favor of Plaintiffs on Count I quite unlikely. However, the Court also *sua sponte* granted

partial summary judgment in favor of Plaintiffs on Count II, finding that an implied term in the facility agreements limited Lloyds' exercise of the discretion afforded to it by the Cost of Funds provision. In order to succeed on Count II, Plaintiffs would have to convince a jury that Lloyds', in changing interest rates, had acted "dishonestly, for an improper purpose, capriciously, or arbitrarily," or in a manner so unreasonable that no reasonable lender would do the same. Summary Judgment Order at 45 (citing Nash, [2001] EWCA Civ. 1466, at ¶¶ 32, 36, 41-42, 46-47). Thus, judgment in favor of Plaintiffs on Count II was likewise uncertain.

In reviewing the terms of the Offer of Judgment, the Court finds that the Offer of Judgment properly strikes a balance between the strengths of Plaintiffs' case, as well as the risks of continued litigation before a jury. The terms of the Offer of Judgment provide Plaintiffs with a fair and meaningful resolution of their claims, and this factor therefore weighs in favor of approving the Offer of Judgment.

b. Risk, Expense, Complexity, and Likely Duration of Further Litigation

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." National Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citation omitted); see also Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) ("It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense.").

*8 The parties have been litigating this case for over three years. During that time, the Court has heard multiple motions to dismiss; a motion for class certification; lengthy and complex motions for summary judgment that necessitated a two-day hearing before the Court; and various other motions. The parties have exchanged over 700,000 pages of documents and brought multiple discovery disputes before the Magistrate Judge. Motion at 7-8. Trial was projected to last approximately three to four weeks, which, in the Court's view, was a conservative estimate; additionally, trial was set to take place in at least two phases.⁴

4 On August 15, 2016, the Court bifurcated "all issues and defenses common to all class members, insofar as they relate to Plaintiffs' claims for breach of contract and breach of an implied contractual term," and "any claims or defenses involving individual class members that are not common to the class, including the 'unique defenses' Lloyds intend[ed] to raise against the Dominicks." ECF No. 472. The Court noted that claims and defenses falling into the latter category would be adjudicated at a subsequent trial in the event Plaintiffs prevailed in the class action trial. Id.

Furthermore, the Offer of Judgment was accepted on the eve of the hearing regarding the parties' Daubert motions, which was expected to last several days and would have required multiple expert witnesses to fly to Honolulu from London, England and Cambridge, Massachusetts. In addition to the Daubert motions it filed, Lloyds also filed a motion for exclusionary sanctions, seeking to exclude the opinions and calculations of Plaintiffs' damages expert. Uncertainty with respect to whether either party could present expert testimony, and whether Plaintiffs could offer proof of their damages, further underscores the risk of continuing to litigate this case. Even if the Court did allow each of the parties' experts to testify, this likely would have been an incredibly difficult case for a jury to comprehend, involving complex loan products and topics such as foreign currency markets, benchmark index rates, and lending practices that are unfamiliar to the average layperson. Moreover, as the Court identified in its Summary Judgment Order, there remain outstanding questions regarding how the loans at issue were funded, which could only have been answered, if at all, by Lloyds' parent company, which is not a party to this lawsuit. See Summary Judgment Order at 36 n.16.

As Plaintiffs recognize, there is no guarantee that if this case were to go to trial Plaintiffs would recover anything. The Offer of Judgment, on the other hand, assures that Plaintiffs will receive some award of damages. The only thing that continued litigation would ensure is the accrual of further costs and attorneys' fees; it is also likely that any judgment would have led to a lengthy, expensive appeal.

All of these factors weigh in favor of approving the Offer of Judgment.

c. Risk of Maintaining Class Action Status

The Court issued its Class Certification Order on January 8, 2016, certifying the case as a class action. Lloyds attempted to appeal the Class Certification Order by filing a [Rule 23\(f\)](#) Petition, which the Ninth Circuit ultimately denied. For the reasons discussed in its Class Certification Order, as well as its Order Denying Defendant's Motion to Compel Plaintiffs to Present a Trial Plan ("Trial Plan Order"), the Court feels that it is highly unlikely that the class would have been decertified at any point. See Trial Plan Order at 7 ("The Court has also found that the 'key legal issue'—whether Lloyds permissibly passed on the 'liquidity transfer pricing' ('LTP') charge to borrowers by including it in the Cost of Funds—is common to all class members.... Thus, the Court can identify no problems with individualized proof that would require a trial plan at this stage in the litigation."), ECF No. 471.

*9 Nevertheless, the Court notes that an order granting class certification can be amended at any time before final judgment. [Fed. R. Civ. P. 23\(c\)\(1\)\(C\)](#). The Offer of Judgment mitigates any risk that the Plaintiff class would be decertified.

d. Amount Offered in Settlement

In assessing the settlement amount, the Court must again bear in mind that "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." [Officers for Justice](#), 688 F.2d at 625; see also [Lane](#), 696 F.3d at 823 ("[W]e reject Objectors' argument insofar as it stands for the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award."). Furthermore, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." [Linney v. Cellular Alaska P'ship](#), 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting [City of Detroit v. Grinnell Corp.](#), 495 F.2d 448, 455 (2d Cir. 1974)). The ultimate inquiry with which the Court is faced is whether the Offer of Judgment is "fair, adequate, and free from collusion." [Lane](#), 696 F.3d at 826 (citation omitted).

Here, the parties participated in arm's length settlement discussions in 2015; exchanged settlement communications

in July 2016; attended a settlement conference before the Magistrate Judge on July 27, 2016; and further discussed settlement both prior to and following the final pretrial conference before the Magistrate Judge. Motion at 12-13; Response at 5-6. Plaintiffs' damages expert, Mr. Petley, calculated approximately \$7.5 million in alleged overcharges. Response at 13. However, Plaintiffs contend that "Lloyds' settlement position initially was less than zero." Motion at 2, 13 (describing Lloyds' initial settlement position as "similar to [that] reached in the Washington Land Development case filed in Washington state, which was 'dismissed after a settlement payment was made by the plaintiff to Lloyds Bank.'").

In agreeing to the \$2,000,000.00 proposed by the Offer of Judgment, the parties appear to have made serious, good faith efforts to settle, with both ceding ground on their initial positions.⁵ The Offer of Judgment was made after multiple negotiations conducted at arm's length and after multiple attempts at settlement had failed. Furthermore, under the proposed Judgment distribution each borrower will receive a proportionate share of the Judgment based on the calculated interest overcharges on their loan(s). Notice at 3. Additionally, under the proposed distribution, named Plaintiff Dr. Willcox stands to recover less than other unnamed class members, even when taking into consideration the \$10,000.00 award Plaintiffs have requested that he receive for his role as class representative. The fact that members who allegedly suffered greater harm will receive greater compensation indicates that the proposed distribution is fair. See [Hendricks v. StarKist Co.](#), Case No. 13-cv-00729-HSG, 2015 WL 4498083, at *7 (N.D. Cal. July 23, 2015) ("A plan for allocation of a settlement fund is governed by the same legal standards that apply to the approval of a settlement: the plan must be fair, reasonable, and adequate.... This means that, to the extent feasible, the plan should provide class members who suffered greater harm and who have stronger claims a larger share of the distributable settlement amount."). Equally as important is that, as noted above, the Offer of Judgment provides certainty to class members that they will recover some amount of money, a benefit that cannot be overstated in this complex case.

⁵ In addition to the \$7.5 million Plaintiffs claimed for past damages, the TAC also requested a permanent injunction restraining and enjoining Lloyds from breaching the IMS loan agreements; attorneys' fees and costs; pre-judgment and post-judgment interest; an order declaring the formula

for the interest rate calculation and that Lloyds had breached the loan agreements by charging a higher interest rate than that agreed to by the parties; and a “judicial declaration made in accordance with findings in Plaintiffs' favor so that Plaintiffs and the Class may ascertain their rights and duties under the Loans.” TAC at 19-20. The Offer of Judgment does not provide the additional relief Plaintiffs seek in the TAC, nor will such relief be granted; however, Plaintiffs do not appear to seek such further relief, beyond what is proposed by the Offer of Judgment.

*10 For all of these reasons, the Court finds that this factor weighs in favor of approval of the Offer of Judgment.

e. Extent of Discovery Completed and Stage of Proceedings

“Consideration of the extent of discovery and the current stage of the litigation allows the Court to evaluate whether the parties are able to make decisions about their claims based on information received during the discovery process.” *In re Toyota*, 2013 WL 3224585, at *10 (citing *Linney*, 151 F.3d at 1239). “Where a settlement occurs in an advanced stage of the proceedings, this fact supports a finding that the parties had the opportunity to investigate their claims before resolving them.” *Id.*; see also *National Rural*, 221 F.R.D. at 527 (“If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement.”) (citation omitted).

Discovery was completed in this case over a year ago. See Fifth Am. Rule 16 Scheduling Order ¶ 12 (listing discovery deadline as October 30, 2015). As stated above, the parties have exchanged over 700,000 pages of documents and litigated multiple discovery disputes before the Magistrate Judge. Motion at 7-8. Plaintiffs and Lloyds both retained two experts who submitted various expert reports and who were deposed. *Id.* at 8. Additionally, the parties took six other depositions and consented to the use of multiple depositions from previous lawsuits involving Lloyds' IMS loans. *Id.* Furthermore, this case has undergone multiple motions to dismiss, full briefing on *Daubert* motions, and exchange of trial exhibits. A lengthy summary judgment order significantly narrowed the issues in this action, and the Offer of Judgment was made and accepted less than a month before trial.

Given these factors, the Court finds that the parties had a full opportunity to evaluate the strengths and weaknesses of their respective cases, and that Lloyds was in a position to make, and Plaintiffs were in a position to accept, a meaningful Offer of Judgment. This factor weighs in favor of approving the Offer of Judgment.

f. Experience and Views of Counsel

“ ‘Great weight’ is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.” *National Rural*, 221 F.R.D. at 528 (citation omitted); see also *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.”). “This is because ‘[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.’ ” *National Rural*, 221 F.R.D. at 528 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, Plaintiffs are represented by both mainland and local counsel. Plaintiffs' mainland counsel, Steptoe & Johnson LLP, has extensive experience in financial services class action litigation, including experience in two prior actions involving Lloyds' IMS loan product. Decl. of Stephen Fennell in Supp. of Pls.' Mot. for Class Certification ¶ 4, ECF No. 156-57; Motion at 22. Plaintiffs' local counsel, Alston Hunt Floyd & Ing, likewise has extensive experience litigating class actions. Decl. of Paul Alston ¶¶ 3-4, ECF No. 156-58. Given the history of this case, as well as the experience of class counsel, it is clear to the Court that Plaintiffs' attorneys are well-versed in the relevant issues and strengths and weaknesses of their case. It is class counsel's view that the Offer of Judgment is fair, adequate, and reasonable, and the Court therefore finds that this factor weighs in favor of approving the Offer of Judgment.

g. Presence of a Governmental Participant

*11 Because no governmental actor participated in the instant litigation, this factor is irrelevant to the Court's analysis.

h. Reaction of the Class Members to the Proposed Settlement

Notice of the Offer of Judgment was sent to all class members on October 19, 2016. Aff. of Kelly Kratz ¶ 6. The Notice informed members that if they wished to object to the Offer of Judgment, they could do so by mailing their written objection to the third party settlement administrator with a postmark date no later than November 14, 2016. See Notice at 1, 3-4; see also ECF No. 565. On November 29, 2016, Plaintiffs notified the Court that, as of November 28, 2016, the administrator had not received any objections to the Offer of Judgment or the proposed distribution of the Judgment amount outlined in the Notice. ECF No. 567. The absence of any objections weighs in favor of the Court's approval of the Offer of Judgment. See [National Rural](#), 221 F.R.D. at 529 (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”).

An assessment of the [Hanlon](#) factors leads the Court to conclude that the Offer of Judgment is fair, adequate, and reasonable. The Court therefore preliminarily APPROVES the Offer of Judgment and preliminarily APPROVES Plaintiffs' Motion to Approve and Enter Judgment.

III. Attorneys' Fees and Costs

[Rule 23\(h\)](#) provides, “In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.” “A federal court sitting in diversity must apply state law with regard to the allowance or disallowance of attorneys' fees.... The applicable state law also includes state choice of law rules.” [DeRoburt v. Gannett Co., Inc.](#), 558 F. Supp. 1223, 1226 (D. Haw. 1983). “In the absence of any specific state directives, a choice of law determination regarding a claim for attorneys' fees should be guided by the applicable substantive law of a case.” [Id.](#)

The Court has been unable to locate any authority speaking to how Hawaii courts specifically treat attorneys' fees in a choice of law analysis. Helpfully, however, this Court has previously determined that Hong Kong law governs this dispute. See ECF No. 49. Hong Kong follows the “English Rule,” which provides that “the prevailing party is generally entitled to an attorney's fees award.” See [Alaska Rent-A-Car, Inc. v.](#)

[Avis Budget Grp., Inc.](#), 738 F.3d 960, 972 (9th Cir. 2013); Petition at 3 (“Hong Kong follows the ‘English Rule’”). Under Hong Kong law, “the costs of and incidental to all proceedings ... shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.” Hong Kong High Court Ordinance (CAP. 4) § 52A(1), ECF No. 545-1. “This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice, and the judge ought not to exercise it against the successful party except for some reason connected with the case.” [Halsbury's Laws of Hong Kong—Commentary](#) § 90.1281, ECF No. 545-2.

*12 Because the Court appears to have a great deal of discretion in awarding fees and costs under Hong Kong law, in exercising that discretion it will look to Ninth Circuit law as a guidepost for what constitutes a reasonable award. “Under federal law, reasonable attorneys' fees are generally based on the traditional ‘lodestar’ calculation set forth in [Hensley v. Eckerhart](#), 461 U.S. 424, 433 (1983).” [Howerton v. Cargill, Inc.](#), Civ. Nos. 13–00336 LEK–BMK, 13–00685 LEK–BMK, 14–00218 LEK–BMK, 2014 WL 6976041, at *4 (D. Haw. Dec. 8, 2014) (citing [Fischer v. SJB-P.D. Inc.](#), 214 F.3d 1115, 1119 (9th Cir. 2000)). The lodestar amount is determined by “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” [Hensley](#), 461 U.S. at 433. Subsumed in the lodestar calculation are the following factors: “(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, ... (4) the results obtained ... and (5) the contingent nature of the fee agreement.” [Morales v. City of San Rafael](#), 96 F.3d 359, 364 n.9 (9th Cir. 1996) (internal citations and quotation marks omitted).

Once calculated, the lodestar amount is presumed reasonable. [City of Burlington v. Dague](#), 505 U.S. 557, 562 (1992); [Fischer](#), 214 F.3d at 1119 n.4. However, in “rare and exceptional circumstances” a court may adjust the lodestar amount based on those factors articulated in [Kerr v. Screen Extras Guild, Inc.](#), 526 F.2d 67, 70 (9th Cir. 1975), that are not subsumed in the court's initial lodestar calculation. [Fischer](#), 214 F.3d at 1119 n.4; [Morales](#), 96 F.3d at 363-64. These factors are: the time and labor required for the case, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee, time limitations imposed by the client or the circumstances, the “undesirability” of the case, the nature and length of the

professional relationship with the client, and awards in similar cases. [Kerr](#), 526 F.2d at 70.

With respect to the number of hours reasonably expended, “a party seeking attorneys’ fees bears the burden of proving that the fees and costs taxed are associated with the relief requested and are reasonably necessary to achieve the results obtained.” [Howerton](#), 2014 WL 6976041, at *6. Thus, in calculating the lodestar figure, a “district court ... should exclude from [the] initial fee calculation hours that were not ‘reasonably expended.’” [Hensley](#), 461 U.S. at 434. Hours are not “reasonably expended” if they are “excessive, redundant, or otherwise unnecessary.” *Id.* “In determining reasonable fees the court also must assess the extent to which fees and costs could have been avoided or were self-imposed.” [Tirona v. State Farm Mut. Auto. Ins. Co.](#), 821 F. Supp. 632, 637 (D. Haw. 1993).

In setting the reasonable hourly rate for purposes of the lodestar calculation, courts will look to the “prevailing market rates in the relevant community.” [Gonzalez v. City of Maywood](#), 729 F.3d 1196, 1205 (9th Cir. 2013). “Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.” *Id.* (quoting [Prison Legal News v. Schwarzenegger](#), 608 F.3d 446, 454 (9th Cir. 2010)). In making its determination, a court will consider the experience, skill, and reputation of the attorney. *Id.* at 1205-06.

Because the Court uses the lodestar analysis simply as a guide in determining the reasonableness of Plaintiffs’ requested attorneys’ fees and costs, the Court will not endeavor to conduct an in-depth analysis into the hourly rates and reasonable hours billed by class counsel. The Court will also use the hourly calculations supplied by class counsel.

The Court first notes that of the \$800,000.00 Plaintiffs have requested for attorneys’ fees and costs, approximately \$700,000.00 is comprised of litigation expenses. *See* ECF Nos. 556-2, 556-5. Such expenses include costs for services of the third party settlement administrator; expert fees; travel expenses; transcript fees; and court filing fees. The Court finds that such costs are largely reasonable and that Plaintiffs’ counsel is entitled to reimbursement for such. *See* [Alberto v. GMRI, Inc.](#), No. CIV. 07-1895 WBS DAD, 2008 WL 4891201, at *12 (E.D. Cal. Nov. 12, 2008) (“There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.”).

*13 Focusing solely on the hours incurred by Plaintiffs’ local counsel over the past three and a half years, the Court notes that counsel spent a total of 2,486.8 hours on this case. *See* Decl. of Glenn T. Melchinger ¶ 8, ECF No. 556-3; ECF No. 556-4. A review of these hours indicates that the time spent was largely reasonable. Multiplying these hours by the corresponding hourly rates, which are mostly within the relevant lodestar range, results in a total fee calculation of \$783,498.11. *See* Decl. of Glenn T. Melchinger ¶ 8. Per agreement, mainland counsel has paid all of local counsel’s fees and expenses out of pocket. Petition at 6 n.5.

Class counsel has not provided a detailed accounting of the hours expended by mainland counsel, but provides the hourly rates its attorneys usually command (which are not necessarily within the local lodestar range), multiplied by the hours the attorneys spent on this litigation in order to provide further context for the reasonableness of the requested attorneys’ fees amount. *See* ECF No. 556-1. Counsel represents that as of October 3, 2016, mainland counsel has accrued approximately \$3,257,163.00 in fees for certain named attorneys. *See id.* Additional attorneys and staff also accrued fees for work spent on various projects during the three-year litigation, which fees mainland counsel does not specifically delineate for the Court. *See id.* ¶ 13. Plaintiffs represent that, in total, class counsel has incurred in excess of \$5 million in attorneys’ fees. Petition at 4-5.

It is clear to the Court that, even taking into consideration the possibility that certain attorneys’ rates may exceed the permissible lodestar range and that certain hours spent might be unreasonable, the combined attorneys’ fees for Plaintiffs’ local and mainland counsel, for which mainland counsel has been entirely responsible, far exceed the amount Plaintiffs have requested for attorneys’ fees.

As an alternative basis to determine the reasonableness of the award, the Court considers the “percentage-of-recovery method.” *See* [Alberto](#), 2008 WL 4891201, at *11 (quoting [In re Rite Aid Corp. Sec. Litig.](#), 396 F.3d 294, 300 (3d Cir. 2005)) (“To determine attorneys’ fees, courts ‘typically apply either the percentage-of-recovery method or the lodestar method’ The percentage-of-recovery method is favored in common-fund cases because it ‘allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.’ ”). In the Ninth Circuit, “such fee awards range from 20 percent to 30 percent of the fund created.” [Paul, Johnson, Alston & Hunt v. Graulty](#),

886 F.2d 268, 272 (9th Cir. 1989). The Ninth Circuit has also “note[d] with approval” one court’s conclusion that “the ‘bench mark’ percentage for the fee award should be 25 percent.” *Id.* Since 25 percent of the Judgment award is \$500,000, Plaintiffs’ request for a fee award of approximately \$100,000 is reasonable.

Finally—and significantly—the Court did not receive any objections from any class members regarding the requested amount for class counsel’s attorneys’ fees and costs.

For all of the foregoing reasons, the Court is satisfied that the \$800,000.00 Plaintiffs have requested be set aside from the Judgment amount for attorneys’ fees and costs is both fair and reasonable. The Court preliminarily APPROVES Plaintiffs’ request for attorneys’ fees and costs.

IV. Compensation Award for Class Representative

“Incentive awards are fairly typical in class action cases.” *Rodriguez*, 563 F.3d at 958 (emphasis omitted). Such incentive, or compensation, awards are discretionary and “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Id.* at 958-59; see also *Alberto*, 2008 WL 4891201, at *12 (“[A] class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action.”) (citation omitted). The Court must assess these awards individually, “using ‘relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation.’” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Such awards “must be reasonable in light of applicable circumstances, and not ‘unfair’ to other class members.” *Alberto*, 2008 WL 4891201, at *12 (citation omitted).

*14 Dr. Willcox has played an important and involved role in the instant litigation over the past three years. He has responded to fifteen interrogatories and 39 requests for production; was deposed for a full day; attended the summary judgment hearing and one of the settlement hearings; and “has spent many hours with Counsel conferring on or approving major strategic decisions for both himself and the

Class, as well as reviewing pleadings and other documents.” Supplemental Brief at 2.

Here, an incentive award of \$10,000.00 for Dr. Willcox will have minimal impact on the amount of Judgment funds available to the rest of the class members. Such an award represents approximately one half of one percent of the total Judgment amount of \$2,000,000.00, and less than one percent of the amount to be distributed to the class after fees and costs. *Id.* at 4. Furthermore, as noted above, the total distribution Dr. Willcox will receive, including his compensation award, is less than what other unnamed class members will recover, indicating that such an award is reasonable. Importantly, the Court did not receive any objections from class members opposing the incentive award.

For all of the foregoing reasons, the Court finds that an incentive award of \$10,000.00 for Dr. Willcox to compensate him for his role as class representative is both fair and reasonable and preliminarily APPROVES Plaintiffs’ request for the same.

CONCLUSION

For the foregoing reasons, the Court preliminarily APPROVES the Offer of Judgment and preliminarily APPROVES Plaintiffs’ Motion to Approve and Enter Judgment. The Court further preliminarily APPROVES Plaintiffs’ request for \$800,000.00 as an award of attorneys’ fees and costs, as described in Plaintiffs’ Petition in Support of Distribution of Fees and Expenses, and preliminarily APPROVES Plaintiffs’ request for \$10,000.00 as an award for Dr. Bradley Willcox for his role as class representative in this action.⁶

⁶ During the fairness hearing Plaintiffs’ counsel proposed a *cy pres* remedy to address the undisbursed funds meant for the four borrowers the third party administrator was unable to locate. Plaintiffs’ counsel agreed to submit a memorandum to the court regarding the *cy pres* remedy. Because the Court has not yet received Plaintiffs’ memorandum, the Court will address the *cy pres* remedy by separate order.

The Court ORDERS Lloyds to serve the Class Action Fairness Act (“CAFA”) notice required by 28 U.S.C. § 1715(b) within ten days of the entry of this Order, and

then to file a declaration certifying compliance with the CAFA notice requirement. The Court ORDERS Plaintiffs to provide Lloyds with a list of the 131 loans by Class ID, along with the specific amount of the Judgment to be paid to each borrower on each loan. If no objections are received from the appropriate federal or state officials within the 90-day statutory period, see 28 U.S.C. § 1715(d), the Court will enter judgment in favor of Plaintiffs and issue an order granting final approval of the Offer of Judgment. Lloyds shall then have two weeks from the entry of the final order and judgment to issue payments to class members,

Plaintiffs' counsel, and the class representative in accordance with Plaintiffs' proposed distribution, after which Lloyds must file with the Court a notice certifying that such payments have been made and a final class list setting forth (by name and city) the class members bound by the Judgment.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7238799

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **APPENDIX OF UNPUBLISHED OPINIONS CITED IN DEFENDANTS UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED AND TRULY GREAT GLOBAL LIMITED'S MOTION FOR ATTORNEY'S FEES** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) September 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On (*date*) September 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) September 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

09/03/2021
Date

Vicky Apodaca
Printed Name

/s/ Vicky Apodaca
Signature

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

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Jonathan D. King as Chapter 7 Trustee	john.lyons@us.dlapiper.com
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