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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
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GRUPO AEROMÉXICO, S.A.B. de C.V., <i>et al.</i> ,	:	Case No. 20-11563(SCC)
	:	
Debtors.	:	(Jointly Administered)
	:	
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**RESPONSE OF MUSGRAVE PARK S.À R.L., AS CONTROLLING
COUNTERPARTY, OBJECTING TO DEBTORS'
MOTION FOR ENTRY OF AN ORDER AUTHORIZING DEBTORS TO
ASSUME THAT CERTAIN AIRCRAFT LEASE [Docket 1851]**

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TO THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATE BANKRUPTCY JUDGE:

Musgrave Park S.à r.l. (the “*Controlling Counterparty*”), as the controlling lender and on behalf of its Facility Agent and its Security Trustee (each as defined herein), by its undersigned counsel, hereby submits this response (this “*Response*”) objecting to the *Debtors’ Motion For Entry Of An Order Authorizing Debtors To Assume That Certain Aircraft Lease*, dated October 7, 2021 [Docket No. 1851] (the “*Assumption Motion*”), that was filed by *Grupo Aeroméxico, S.A.B. de C.V.* (“*Grupo Aeroméxico*”), *Aerovías de México, S.A. de C.V.* (the “*Debtor*” or the “*Lessee*”) and their affiliated debtors and debtors-in-possession (collectively, along with Grupo Aeroméxico and the Lessee, the “*Debtors*”) pursuant to which the Debtors are improperly seeking to assume the JOLCO Lease for the MSN 44427 Aircraft (each as defined hereto) in express violation of both the (i) Aircraft Stipulation & Order (as defined below) and (ii) the JOLCO Lease. In support of its Response, the Controlling Counterparty respectfully states as follows:

PRELIMINARY STATEMENT¹

1. The Debtors’ requested assumption of the JOLCO Lease is facially infirm for each of the following reasons:

- (a) ***Violates this Court’s Orders:*** As an Aircraft Return Demand has been issued under the Aircraft Stipulation & Order, the assumption of the JOLCO Lease that seeks to ignore the return rights under the Aircraft Stipulation & Order would undermine and breach the heavily-negotiated, court-ordered protections under which the Controlling Counterparty exercised its right to recover the JOLCO Aircraft. The terms of the Aircraft Stipulation & Order are clear – the Controlling Counterparty, through its Security Trustee, possesses the absolute right to require the return of the JOLCO Aircraft by issuing an Aircraft Return Demand. The issuance of the Aircraft Return Demand during the Stipulation Period mandates that the JOLCO Aircraft must be returned to the Counterparties (as defined in the Aircraft Stipulation, the “*Counterparties*”) in accordance with the return procedures set

¹ Capitalized terms used in this Preliminary Statement not previously defined in the above shall have the meanings ascribed to such terms in the Statement of Facts that immediately follows this Preliminary Statement.

forth in Paragraph 4 of the Aircraft Stipulation & Order – and regardless of whether the Debtors seek to assume the JOLCO Lease.

- (b) ***Filing of the Assumption Motion Does Not Countermand the Express Requirement for Return of Aircraft upon a Timely Issued Aircraft Return Demand:*** In an effort escape the express mandate of the Aircraft Stipulation & Order that requires the return of the JOLCO Aircraft upon an Aircraft Return Demand issued during the Stipulation Period, the Debtors wrongly graft extra-contractual limitations into the Aircraft Stipulation & Order, which does not limit the rights of the Counterparties to issue a demand for the return of the JOLCO Aircraft upon the Debtor's filing an assumption motion. Rather the limitation on the Counterparties' right to issue an Aircraft Return Demand arises *only after an assumption order is entered by this Court* (which entry of such order would thereby terminate the "Stipulation Period"). The parties knew how and did use the filing of motions to adjust rights under other provisions of the Aircraft Stipulation & Order. *See, e.g.,* Aircraft Stipulation & Order, decretal ¶ 7. In contrast, the parties' negotiated agreement to limit return rights exclusively upon the entry of an assumption order is controlling here.
- (c) ***Ignores the Express Contractual Obligations of JOLCO Lease that the Debtors Are Seeking to Assume, while Seeking to Understate Required Cure Costs by 88%:*** The Assumption Motion also ignores the unambiguous contractual obligations of the Debtors set forth in the JOLCO Lease, which mandate that the Debtors must pay \$106.1 million of cure costs. The Assumption Motion radically understates these cure costs and, instead, proposes that the Debtors be permitted to unwind the assumption if this Court agrees that the cure costs exceed the \$12,882,616 of cure costs listed in the Assumption Motion. The Debtors' understatement of 88% of the required cure costs is fatal defect to the Assumption Motion. Even if the terms of the Aircraft Stipulation & Order that require the rejection and return of the Aircraft can be ignored by the Debtors' *fiat*, Section 365 of the Bankruptcy Code does not allow for the Debtors to cherry pick which obligations they must honor under an assumed contract – all of the terms of the JOLCO Lease must be assumed and paid for by the Debtors.
- (d) ***Seeks to Force the Counterparties to Provide an Impermissible Financial Accommodation to the Debtors:*** In addition, the Assumption Motion improperly forces the Counterparties to provide financial accommodations to the Debtors in violation of the Bankruptcy Code. Importantly, the Debtors knew about the ramifications that would arise from an acceleration of the loan obligations related to the JOLCO Lease. Upon an acceleration of the debt between the Financing Parties and the Borrower, the JOLCO Lease unambiguously requires the Debtors to exercise their call option to purchase the JOLCO Aircraft. A failure by the Debtors to repay such amounts as required under the JOLCO Lease forces the Counterparties to provide a financial accommodations to the Debtors.
- (e) ***Debtors Seek Declaratory and Injunctive Relief that Impermissibly Seeks to Limit Counterparties Rights:*** The Debtors also are using the Assumption Motion, which

is a contested matter, to impermissibly obtain declaratory and injunctive relief against the Counterparties. *See* Assumption Motion, Exhibit A (Proposed Order), ¶¶ 3-4. Such relief, however, may only be obtained in an adversary proceeding. This Court should not permit the Debtors to bypass these due-process protections.

These infirmities will not come as a surprise to the Debtors. They are known to the Debtors.

2. Respectfully, this Court should not tolerate the Debtors' attempts to evade their consent order requirements for the return of the JOLCO Aircraft. Moreover, even if the Debtors are permitted to assume the JOLCO Lease despite their post-petition agreement (memorialized in the Aircraft Stipulation & Order), such assumption requires the payment of at least another \$106.1 million of cure obligations. For each of these reasons, the Controlling Counterparty respectfully requests that the Court (i) deny the Debtors' Assumption Motion and (ii) mandate the return of the JOLCO Aircraft to the Counterparties in accordance with the terms of the Aircraft Stipulation & Order and the Aircraft Return Demand delivered to the Debtors thereunder; or, in the alternative, in the event that the Bankruptcy Court permits the assumption of the JOLCO Lease, (iii) require that the Debtors fully pay all cure amounts as set forth in Schedule 1 hereto and (iv) modify the terms of the proposed order to delete paragraphs 3 and 4 of the Proposed Order.

STATEMENT OF FACTS

3. The following sets forth the facts relevant to this Response.

A. UNDERLYING JOLCO TRANSACTIONS; CONTROLLING COUNTERPARTY IS THE SOLE LENDER UNDER THE JOLCO TRANSACTIONS

4. FO Galaxy Leasing Ltd. and TLC Daffodil Ltd., as lessors (collectively, the "*JOLCO Lessor*"), and FO Galaxy Leasing Ltd., as representative lessor (the "*Representative Lessor*"), leased one Boeing model 787-9 airframe bearing manufacturer's serial number 44427 and Mexican registration mark XA-ADH, together with two (2) General Electric Company model GENX-1B74/75 engines respectively bearing manufacturer's serial numbers 958039 and 958044 (collectively, the "*JOLCO Aircraft*") to the Lessee pursuant to the Aircraft Lease referenced in the

Assumption Motion (the “*JOLCO Lease*”). A copy of the JOLCO Lease is annexed hereto as Exhibit A.

5. The JOLCO Lease is governed by English law. *See* Exhibit A, Clause 26.

6. The JOLCO Lease is a tax-driven operating lease that includes call options for the purchase of the JOLCO Aircraft. *See* Assumption Motion, ¶ 11. The transactions associated with the JOLCO Lease (the “*JOLCO Transactions*”) are highly leveraged with associated debt that forms an integral part of each transaction and JOLCO Lease (such types of transactions are generically referred to herein as “*JOLCOs*”, as they are known in the airline industry).

7. The Controlling Counterparty is currently the sole Lender under the Loan Agreement (each as defined herein), holding 100% of the loans and commitments for such loans under the Loan Agreement, and, accordingly, constitutes the “Majority Lenders” as defined in the Loan Agreement (the “*Majority Lenders*”).

8. **Bifurcated Lease and Loan Transactions.** On one side of the JOLCO Transactions is the primary lease transaction between the lessor (here, the JOLCO Lessor and the Representative Lessor) and the lessee (here, the Lessee). The sole rights of the Lessee to lease and use the JOLCO Aircraft is set forth in the JOLCO Lease. *See* Exhibit A (JOLCO Lease). In addition to the rights and leasing obligations, the JOLCO Lease contains purchase options (with corresponding terms, requirements and obligations) held by the Lessee at various times, including an option to purchase at the end of the JOLCO Lease. Importantly, upon an acceleration of the loans by the Financing Parties under the Loan Agreement (as defined below), the Lessee has the obligation to fully indemnify the Counterparties for the full amount of the accelerated debt owed by the JOLCO Lessor to the Financing Parties.

9. Separately, the JOLCO Lessor and Financing Parties (as defined in the Lease, the “Financing Parties”), who are comprised of the lenders (the “*Lenders*”), a security trustee (the “*Security Trustee*”) and a facility agent (the “*Facility Agent*”), entered into a loan agreement in connection with each of the JOLCO Transactions (to which the Lessee is not a party) (the “*Loan Agreement*”) pursuant to which the JOLCO Lessor, as borrower (in such capacity, the “*Borrower*”) obtained financing from the Financing Parties, which loans are subject to customary financing rights exercisable by the Financing Parties against the JOLCO Lessors if the JOLCO Lessors fail to make timely payments under the financing documents.

10. **JOLCO Transactions Reliant upon Existence and Maintenance of Tax Attribute Benefits and Below Market Leverage Benefits.** The JOLCO lessors under JOLCOs obtain favorable tax treatment and tax attributes that allow them, in turn, to provide below-market operating leasing rates to lessees by passing on the tax savings to the lessee (the “*Tax Attribute Benefits*”). Additionally, given the protective terms of these transactions, the lessors also obtain the benefit of low financing rates and high leveraging ratios from the Financing Parties that cannot be obtained under non-JOLCO aircraft financing arrangements (such benefits, the “*Below Market Leverage Benefits*”). As a result of these features, JOLCO transactions provide a low cost financing method for airlines to acquire the use of aircraft. Due to these features, the right of the lessee to continue to lease an aircraft in a JOLCO is expressly conditioned upon the continuation of the Tax Attribute Benefits and the continued availability of the Below Market Leverage Benefits. In the event of any disruption of these benefits, a JOLCO requires the lessee to exercise its call option for the purchase of the JOLCO aircraft if the lessee desires to continue using the aircraft. Similarly here, the JOLCO Transactions include these key features, which allowed the Debtor to attain uniquely-low lease rates so long as the Debtor honored the terms of the JOLCO

Transactions to maintain the continuation of the Tax Attribute Benefits and the Below Market Leverage Benefits.

11. In particular, the leasing arrangements for these JOLCO Transactions require the Debtor to exercise its purchase option if either the Tax Attribute Benefits or the Below Market Leverage Benefits are lost, all to the extent provided in Clause 8.1 of the JOLCO Lease. *See* Exhibit A (JOLCO Lease), Clause 8.1.

12. Additionally, in accordance with the indemnities provided under, *inter alia*, Clauses 23.1 and 23.7 of the Lease, the Lessee is responsible to repay the full debt owed by the Lessor to the Financing Parties upon the acceleration of the debt. *See* Exhibit A (the JOLCO Lease), Clauses 23.1 & 23.7. Upon any acceleration of the debt by the Financing Parties, and as set forth in the concurrent objection of the JOLCO Lessor, the Lessee becomes liable to repay the full accelerated debt amounts to the Counterparties.

13. The failure to repay any such accelerated amounts within the period set forth in Clause 18.1(a) of the JOLCO Lease also constitute a payment event of default, which would trigger (a) the right to terminate the JOLCO Lease and the leasing rights thereunder and (b) the requirement to pay the full Termination Value (as defined in the JOLCO Lease). *See* Exhibit A (the JOLCO Lease), Clauses 18(a), 19.1 & 19.3. Each of these provisions are fully binding and enforceable against the Lessee upon the assumption of the JOLCO Lease.

14. ***Controlling Counterparty Has Right to Require Facility Agent to Accelerate Obligations Owed by JOLCO Lessor under Loan Agreement and To Require Security Trustee to Force Security Trustee to Take Enforcement Actions.*** As the Majority Lender under the Loan Agreement, the Controlling Counterparty has the right to:

- (a) ***Direct and Cause Facility Agent to Accelerate the Loan and Other Secured Obligations under the Loan Agreement:*** Under the Loan Agreement, the Facility

Agent is required to accelerate the Loan and all other Secured Obligations due to the Financing Parties upon receipt of a direction from the Majority Lenders.

- (b) ***Direct and Cause Security Trustee to Take Enforcement Actions under the Operative Documents:*** Under the Loan Agreement, the Security Trustee is required to take any enforcement actions as directed by the Majority Lenders as the Majority Lenders “consider[] necessary or desirable to preserve, protect and enforce the rights of the Financing Parties under the Operative Documents.”

See Exhibit B (Loan Agreement), Clause 16.2 & 16.3.

15. ***Powers Granted to Security Trustee by JOLCO Lessor Includes Right to Recover Possession of the Aircraft after the Occurrence of an Enforcement Event.*** Among the numerous rights granted to the JOLCO Lessor under the various security documents, upon the occurrence of an “Enforcement Event” under the Loan Agreement, was the right to control the return and repossession of the JOLCO Aircraft from the Lessee. Such rights are set forth in numerous agreements entered into between the JOLCO Lessor and the Security Trustee, including, *inter alia*, the following rights held by the Security Trustee:

- (a) the rights “to terminate the leasing of the Aircraft under or pursuant to the Lease, and all rights to give and receive notices, reports, requests and consents, to make demands, to exercise discretions, options and elections in accordance with the terms of the Agreements and to take all other action thereunder, pursuant thereto or in connection therewith,” *see* Exhibit C (Security Assignment), definition of “Assigned Property”;
- (b) the rights to require the “non-consensual repossession . . . of the Aircraft, in any such circumstances only the Security Trustee may exercise” such right; *see* Exhibit C (Security Assignment), Clause 3.5.1(b); and
- (c) the rights “upon the occurrence of an Enforcement Event . . . take possession of the Mortgaged Property [which includes the Aircraft]” and “to require the Lessee to assemble the Aircraft and all Technical Records and to deliver them to a location selected by the Mortgagee” *See* Exhibit D (Aircraft Mortgage for JOLCO Aircraft), §§ 6.1(b) & (c).

During the occurrence of any Enforcement Event, the Security Trustee (and not the JOLCO Lessor) exclusively possesses all such rights. *See, e.g.*, Exhibits C (Security Assignment), Clause 3.5.1; & D (Aircraft Mortgage), 6.6. Under the Loan Agreement, an “Enforcement Event” includes

both (a) any Event of Default listed in the Loan Agreement, which includes any payment default thereunder (which, as set forth below, currently exists and is continuing) and any repudiation of disaffirmance of any Operative Document (which includes the JOLCO Lease, the Loan Agreement, the Security Assignment and the Aircraft Mortgage), and (b) the Loan becoming due and payable (which, as set forth below, currently also exists and is continuing). *See* Exhibit B (Loan Agreement), definition of “Enforcement Event”. Notably, the Lessee acknowledged and agreed not to challenge the rights assigned and delegated to the Security Trustee by the JOLCO Lessor. *See* Exhibit B (Security Assignment), at Exh. B, ¶¶ 1, 3.

16. Additionally, of the Financing Parties, the Security Trustee is the only party authorized to take the actions described in the prior paragraph. *See* Loan Agreement, Clause 21.1(b) (Security Trustee is authorized “to take such action on its behalf and to exercise such rights, remedies and powers as are specifically delegated to the Security Trustee by any Operative Document [including those outlined in the prior paragraph] together with such powers and rights as are reasonably incidental thereto”); *see also* Loan Agreement, Clause 21.1(c) (“No other Financing Party shall have any independent power to enforce any of the Security Documents, to exercise any rights and/or powers thereunder or to grant any consents or releases under or pursuant thereto or otherwise have direct recourse to the Collateral except through the Security Trustee”). In sum, among all of the Financing Parties, only the Security trustee has the right to seek the return of the JOLCO Aircraft.

17. Finally, the Loan Agreement also provides that, absent an express prohibition to the contrary, “any instructions given by the Majority Lenders will be binding on all Financing Parties.” *See* Exhibit B (Loan Agreement), Clause 19.6(b). Accordingly, if the Majority Lenders

issue a directions to either the Facility Agent or the Security Trustee, such instructions are binding upon all of the Financing Parties.

B. BANKRUPTCY FILING AND ENTRY OF THE AIRCRAFT STIPULATION & ORDER

1. DEBTORS COMMENCED BANKRUPTCY CASES

18. On June 30, 2020 (the “*Petition Date*”), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code (the “*Chapter 11 Cases*”). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

2. AIRCRAFT STIPULATION & ORDER

19. After the Petition Date, the JOLCO Lessor, the Financing Parties and the Debtors entered into negotiations to address the severe disruptions caused by the Covid-19 pandemic. Specifically, the Debtors and their Counterparties, including the JOLCO Lessor and the Financing Parties, negotiated to establish consensual arrangements that:

- delineated which obligations under the Debtors’ aircraft leases were entitled to administrative priority;
- governed the Debtors’ obligations regarding the use, maintenance, insurance, storage and return obligations of the Debtors;
- set forth a consensual adjustment of rights of the Counterparties under the Cape Town Treaties and under Section 365(d)(5) of the Bankruptcy Code; and
- granted each of the Debtors and their Counterparties the right to terminate the Stipulation Period.

These parties also entered into negotiations regarding power by the hour arrangements and interim arrangements for the use and return of the aircraft during the Bankruptcy Cases.

20. The Debtors and their numerous aircraft counterparties, including the JOLCO Lessor and the Financing Parties, extensively negotiated these interim arrangements and

exchanged approximately ten iterations of the stipulation before a proposed final form was mutually agreed. Ultimately, such negotiations led to the entry into of stipulations and orders between the Debtors and the Debtors' various aircraft counterparties primarily in September 2020, which stipulations were thereafter approved as orders of this Court later that month. With respect to the JOLCO Lease, the JOLCO Lessor, the Financing Parties and the Debtors entered into those certain *Stipulations and Order between Debtors and Counterparties Concerning Certain Equipment* for the JOLCO Aircraft on September 14, 2020 and approved by the Bankruptcy Court on September 21, 2020 (Docket Nos. 414) (the "*Aircraft Stipulation & Order*").² A copy of the Aircraft Stipulation & Order is annexed as Exhibit E.

(a) Express Right for Counterparties to Mandate Return of Aircraft

21. Among the heavily negotiated provisions included in the Aircraft Stipulation & Order was the inclusion of the right for the Counterparties to require the return of the JOLCO Aircraft. Specifically, in exchange for limitations of the amount of the Debtors' administrative expense obligations and other concessions granted to the Debtors, the parties agreed that the Counterparties possess the right to require the return of the JOLCO Aircraft. The Aircraft Stipulation & Order provides, in relevant part, that:

During the Stipulation Period . . . the Counterparties may notify the Debtors of the Counterparties' desire to terminate the Stipulation Period as to any Agreement and the Equipment related thereto at any time upon 60 days' prior written notice to the Debtors, whereupon the Debtors shall return the Equipment in accordance with procedures set forth in decretal paragraph 4 hereof.

See Exhibit D (Aircraft Stipulation & Order), Decretal ¶ 3(e). Notably, this right to demand the return of the Aircraft is not limited in any way by the Debtors filing a motion to assume the JOLCO

² The Debtors entered into substantially similar stipulations and orders for a vast majority of their aircraft.

Lease; rather, such right is solely limited by whether such right to demand the return of the Aircraft is made during the “Stipulation Period”.

22. Once this Court approved the Aircraft Stipulation & Order, such terms became a binding court order upon the Debtors. In exchange for providing the Debtors rental relief and other substantial interim concessions, this post-petition agreement and Court order granted the Counterparties an absolute right to require the return of the JOLCO Aircraft upon delivering a demand for the JOLCO Aircraft’s return issued during the Stipulation Period. *Id.* Relatedly, the Aircraft Stipulation & Order unambiguously waived the Debtors’ ability to keep the Aircraft after receipt of a timely delivered demand for the return of the JOLCO Aircraft under Decretal Paragraph 3(e) of the Aircraft Stipulation & Order. *Id.*

23. As detailed above, the Security Trustee possessed the exclusive right (to the exclusion, among others, of the JOLCO Lessor) to issue a demand for the return of the JOLCO Aircraft (as instructed by the Majority Lenders). *See supra* at ¶¶ 15-17.

(b) Term of Stipulation Period

24. As noted, the right of the Counterparties to demand the return of the JOLCO Aircraft from the Lessee exists for the full term of the Stipulation Period.

25. The Aircraft Stipulation & Order specifies that the term of the Stipulation Period (as defined therein, the “*Stipulation Period*”) during which the Counterparties possess the right to mandate the return of their aircraft “runs from July 1, 2020 through the earliest to occur of the following:

- (i) the date the Equipment is made available for return to the Counterparties as contemplated pursuant to [the terms of the Aircraft Stipulation and Order],

- (ii) with respect to any Agreement subject to assumption under section 365 of the Bankruptcy Code, *the date of the entry of an order of the Court approving the assumption of such Agreement*,³
- (iii) the effective date of a plan of reorganization for the Debtors that has been confirmed by the Court,
- (iv) the date of an order converting the Debtors' chapter 11 cases to cases under chapter 7 of the Bankruptcy Code,
- (v) the date that [the Lessee] announce(s) that it has permanently discontinued all scheduled passenger service,
- (vi) the date of substantial consummation of a sale of all or substantially all assets of the Debtors, and
- (vii) such other date as the Counterparties and the Debtors may agree in writing with respect to the Equipment."

See Exhibit D (Aircraft Stipulation & Order), decretal ¶ 1 (emphasis added). As none of these events have occurred to date, the Stipulation Period remains in effect under the Aircraft Stipulation & Order.

C. OCCURRENCE OF ENFORCEMENT EVENT

26. The JOLCO Lessor, as borrower under the Loan Agreement, has failed to pay principal and interest payments as they become due and payable to the Financing Parties under the Loan Agreement. As such, an Enforcement Event has occurred and is existing under the terms of the Loan Agreement. *See supra* at ¶ 15 (discussing definition of "Enforcement Event"); *see also* Exhibit B (Loan Agreement), at definition of "Enforcement Event".

27. Furthermore, as set forth below,⁴ the Loan and other Secured Obligations under the Loan Agreement were fully accelerated. These circumstances likewise constitute an Enforcement Event under the Loan Agreement. *Id.*

³ Notably, this clause (ii) does not provide that the Stipulation Period ends upon the mere filing of a motion for assumption but, critically, only upon entry of an order approving such assumption.

⁴ See *infra* at ¶¶35-38 (Loans have been accelerated)

D. DEBTORS FILE ASSUMPTION MOTION FOR THE JOLCO AIRCRAFT

28. On October 7, 2021, the Debtors filed the Assumption Motion. The sole relief requested therein is the assumption of the JOLCO Lease. *See* Assumption Motion, at 1 (Debtors “hereby file this motion . . . to assume the Aircraft Lease”); *see also* Assumption Motion, ¶¶ 3, 10, 11 & 18.

29. The Assumption Motion itself does not mention the Aircraft Stipulation & Order in any way. *See* Assumption Motion.

30. As is typical for motions to assume executory contracts and unexpired leases, the Debtors filed the Assumption Motion as a contested matter governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”). *See generally* Assumption Motion.

31. Notwithstanding that the Assumption Motion omits (intentionally or otherwise) reference to the Aircraft Stipulation & Order, numerous provisions of the proposed order address this post-petition agreement and order. *See* Assumption Motion, at Exhibit A (the “*Proposed Order*”). For example, Paragraph 3 of the Proposed Order provides for declaratory relief against the Counterparties relating to the respective rights and property interests created by the Aircraft Stipulation & Order. Furthermore, in paragraph 4 of the Proposed Order, the Debtors seek injunctive relief against the Counterparties relating to the Aircraft Stipulation & Order. Tellingly, these declaratory and injunctive provisions are being sought by the Debtors solely by including such provisions in the Proposed Order. The Debtors did not request such relief in the Assumption Motion. Nor did the Debtors seek such relief through an adversary proceeding, thereby bypassing the substantive and procedural safeguards required by the Bankruptcy Rules. *See* Bankruptcy Rule 7001(1), (7) & (9).

32. Compounding the infirmities in the Assumption Motion, the Debtors also state that they “intend to pay all outstanding monetary amounts due under the [JOLCO] Lease,” but caveat

such intention by seeking to cap their cure obligations to \$12,882,616. Such effort to cap the cure costs bears no semblance to the cure obligations currently owed by the Debtors under the terms of the JOLCO Lease that they are seeking to assume. Rather, as set forth below, the current cure amount owed under the JOLCO Lease exceeds \$106.1 million. *See* Schedule 1 hereto.

E. CONTROLLING COUNTERPARTY DETERMINES TO EXERCISE RIGHTS TO ACCELERATE DEBT AND TO EFFECT RETURN OF JOLCO AIRCRAFT UNDER THE TERMS OF THE AIRCRAFT STIPULATION & ORDER

33. Given the grave economic uncertainties imposed upon the Debtors' aircraft counterparties by the Covid-19 pandemic, while preserving the terms of their underlying transactions and in exchange for substantial, interim priority concessions afforded to the Debtors, the aircraft counterparties (including the Counterparties) negotiated to obtain the absolute right to require that their aircraft be returned provided that such demand for return was made during the Stipulation Period. Such right to terminate the leasing arrangements was of vital importance to the Debtors' aircraft counterparties to protect themselves from the changing economic circumstances and to enable such parties to have the flexibility to extricate themselves from leasing and financing arrangements with the Debtors if they determined it was in their best interests to do so. Such protections are unambiguously set forth in Section 3(e) of the Aircraft Stipulation & Order, which provision is substantively identical across every other aircraft stipulation entered into between the Debtors' and their other aircraft counterparties.

34. Based upon these contractual and court-mandated rights, the Controlling Counterparty determined to exercise its right to require the return of the JOLCO Aircraft. Accordingly, upon the express instructions from the Controlling Counterparty, which bound all of the Financing Parties (see *supra* at ¶ 17), and the Security Trustee, on October 15, 2021, the Security Trustee sent a notice to the Debtors in accordance with the terms of the Aircraft Stipulation & Order demanding that the Debtors effect the return of the Aircraft (such notice, the

“*Aircraft Return Demand*”), which triggered the Debtors’ obligation to return the JOLCO Aircraft to the Counterparties. A copy of the Aircraft Return Demand is annexed hereto as **Exhibit F**. Consistent with the Aircraft Stipulation & Order, the Aircraft Return Demand gave the Debtors sixty days’ notice.

35. On the same date, the Facility Agent, upon instructions from the Controlling Counterparty, exercised its right under the Loan Agreement to accelerate the Loan and Secured Obligations owed by the Borrower under the Loan Agreement. Such instructions issued by the Controlling Counterparty, as the Majority Lenders, bound all Financing Parties. *See supra* at ¶ 17. Specifically, on October 15, 2021, the Facility Agent began enforcing remedies under the Loan Agreement against the non-debtor Borrower and sent notice accelerating the outstanding loans and other obligations owed by the Borrower to the Financing Parties. Copies of such notice is annexed hereto as **Exhibit G** (such notice, the “*Acceleration Notice*”).

36. Pursuant to the Acceleration Notice, (i) all of the loan commitments made by the Financing Parties, as the lending parties, to the JOLCO Lessor, as the borrower, under the Loan Agreement were terminated, and (ii) the Financing Parties accelerated and declared all of the loan obligations owed by the JOLCO Lessor to be immediately due and payable under Clause 15 of the Loan Agreement. *Id.* The Facility Agent for the Financing Parties delivered the Acceleration Notice to the JOLCO Lessor, as the borrower, and concurrently sent a copy of the Acceleration Notice to the Debtors.

37. In addition to accelerating the loan and other Secured Obligations owed by the Borrower under the Loan Agreement, the Acceleration Notice stated that it was being delivered as part of an enforcement action taken by the Financing Parties against the JOLCO Lessor, as the

Borrower, and would not impact the rights of the Debtors under the JOLCO Lease.⁵ Specifically, the Acceleration Notice provided, in applicable part, that:

This [Acceleration N]otice solely impacts the rights and obligations of the Borrower and Representative Borrower *vis-à-vis* the Financing Parties under the Loan Agreement, and nothing herein shall be deemed to affect in any way the rights of, the amount and/or scope of obligations owed by, the leasehold or leasing rights of (or any leasing to) or property interests of the Lessee or any other Debtor arising under the other Operative Documents, applicable law or otherwise, including the right of the Lessee to continue leasing the Aircraft through the end of the Stipulation Period; rather, this notice combined with any (if any) payments required hereunder shall only affect the parties to whom certain obligations are owed.

See Exhibit G (Acceleration Notice), ¶6.

38. Like each of the Loan Agreements and the JOLCO Lease, the Acceleration Notice specified that they it is governed by English law. *Id.*, ¶7.

RESPONSE
OBJECTING TO PROPOSED
ASSUMPTION OF JOLCO LEASE

39. For each of the reasons set forth below, the Controlling Counterparty, on behalf of itself and its Facility Agent and its Security Trustee, hereby objects to the Assumption Motion.

I. DEBTORS' ASSUMPTION VIOLATES EXPRESS TERMS OF AIRCRAFT STIPULATION & ORDER

40. Through the Assumption Motion, the Debtors are seeking to avoid the Court-approved negotiated terms for the return of the JOLCO Aircraft as memorialized in the Aircraft Stipulation & Order. As an express condition for the JOLCO Lessor agreeing to the Debtors' continued use of the leased JOLCO Aircraft without incurring administrative obligations for the

⁵ Although such was true at the time that the Acceleration Notice was delivered by the Financing Parties, the Assumption Motion, if granted, would now require that the Debtors assume and comply with all of their contractual obligations under the JOLCO Lease that are owed to the JOLCO Lessor, including the purchase option for the JOLCO Aircraft.

full rent under the unexpired JOLCO Lease (among many other concessions), the Debtors stipulated that the Counterparties could require the Debtors to return the JOLCO Aircraft if the Counterparties issued an Aircraft Return Demand to the Debtors pursuant to Decretal Paragraph 3(e) of the Aircraft Stipulation & Order during the Stipulation Period. The Security Trustee, in fact, properly took such contractual, court-approved action on behalf of all of the Counterparties. The filing of the Assumption Motion has no impact on such action.

41. This Court should reject the Debtors' efforts to impermissibly avoid its court mandated return obligations emanating from the timely delivered Aircraft Return Demand. Denial of the Assumption Motion is, therefore, appropriate.

A. RULES FOR CONSTRUCTION OF CONTRACTS

42. At base, the terms governing the Counterparties' rights (acting through the Security Trustee) to require the return of the JOLCO Aircraft are set forth in Section 3(e) of the Aircraft Stipulation & Order. The Aircraft Stipulation & Order is a consent order, the terms of which were negotiated among the Counterparties, including the JOLCO Lessor, the Financing Parties and the Debtor, and specifically approved and adopted by this Court. As such, the Aircraft Stipulation & Order is both an agreement of the parties and an order of this Court. Where inter-party rights arise from a consent order, courts treat such consent orders as a contract. *See, e.g., U.S. v. ITT Continental Banking Co.*, 420 U.S. 223, 238 (1975) ("a consent decree or order is to be construed for enforcement purposes basically as a contract . . ."). Accordingly, the rules of contract construction should be used to review the terms and requirements of the applicable provisions of the Aircraft Stipulation & Order.

43. "A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990). "As a general

matter, the objective of contract interpretation is to give effect to the expressed intentions of the parties.” *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989); *see also Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124, 142 (1956) (“the cardinal rule in the interpretation of contracts is that the intention of the parties should be ascertained and enforced”); 22 *N.Y.Jur.2d, Contracts* §196 (same).

44. When interpreting a contract, the “plain meaning” of words and phrases should be given effect. *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996). Moreover, when the words are clear and unambiguous, the express language of the agreement is the only source of the parties’ intent. *See John Hancock Mut. Life Ins. Co. v. Amerford Int’l Corp.*, 22 F.3d 458, 461-62 (2d Cir. 1994) (where there is no ambiguity, there is “no reason to look outside the contract”); *see also Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, No. 03 Civ. 8259, 2007 WL 1988150, at *10 (S.D.N.Y., July 10, 2007) (same). Only when provisions are ambiguous may courts look to extrinsic factors. *See United Mine Workers v. LTV Steel Co. (In re Chateaugay Corp.)*, 891 F.2d 1034, 1038 (2d Cir. 1989).

45. Furthermore, contracts should be interpreted so as to give full meaning and effect to all of its provisions. *Trump-Equitable Fifth Ave. Co. v. H.R.H. Constr. Corp.*, 485 N.Y.S.2d 65, 67 (N.Y. App. Div. 1st Dep’t 1983), *aff’d*, 488 N.E.2d 115 (N.Y. 1985). In other words, contracts should be interpreted “in such a way that no language is rendered superfluous.” *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000). Finally, “[a] contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.” *Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170, 171, 766 N.Y.S.2d 561 (1st Dep’t 2003).

46. Under these principles, the Aircraft Stipulation & Order demonstrates that the Debtors are required to return the JOLCO Aircraft because the Security Trustee, as the party to which such rights were expressly delegated and assigned by all of the Counterparties,⁶ timely delivered the Aircraft Return Demand to the Debtors during the Stipulation Period.

B. THE AIRCRAFT STIPULATION & ORDER REQUIRES DEBTORS TO RETURN AIRCRAFT DESPITE DEBTORS FILING OF ASSUMPTION MOTION

47. Decretal Paragraph 3(e) of the Aircraft Stipulations & Order sets forth the right of the Counterparties to require the Debtors to return the JOLCO Aircraft. Such provision allows the Security Trustee, as Counterparty solely authorized to act on behalf of all Counterparties, to issue the Aircraft Return Demand during the Stipulation Period, which issuance requires the Debtors to return the JOLCO Aircraft to the Counterparties. Decretal Paragraph 3(e) provides, in applicable part, that:

During the Stipulation Period . . . *the Counterparties may notify the Debtors of the Counterparties’ desire to terminate the Stipulation Period as to any Agreement and the Equipment* related thereto at any time upon 60 days’ prior written notice to the Debtors, *whereupon the Debtors shall return the Equipment* in accordance with procedures set forth in decretal paragraph 4 hereof.

See Exhibit E (Aircraft Stipulation & Order), at decretal ¶3(e) (emphasis added).

48. The use of the term “shall” illustrates that the return of the JOLCO Aircraft is mandatory. See, e.g., *In re Barbieri*, 199 F.3d 616, 619-20 (2d Cir. 1999) (the term “shall” denotes a mandatory provision); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion.”); *Murphy v. Smith*, 138 S.Ct. 784, 787 (2018) (“the word ‘shall’ usually creates a mandate, not a liberty, . . .”). “[T]he word ‘shall’ is used to express a command . . .” *U.S. v.*

⁶ See supra at ¶¶ 15-17.

Maria, 186 F.3d 65, 70 (1999) (citing, *inter alia*, to *Black's Law Dictionary* 1375 (6th ed. 1990) (“As used in statutes, contracts, or the like, this word is generally imperative or mandatory. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.”)).

49. Moreover, Decretal Paragraph 3(e) of the Aircraft Stipulation & Order uses both the terms “may” and “shall” – which further indicates that “shall return” is a mandate when a Aircraft Return Demand is given during the Stipulation Period. When the same provision uses both the words “may” and “shall”, the “normal inference is that each is used in its usual sense – the one act being permissive, the other mandatory.” *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

50. Here, it cannot be disputed that:

- the Security Trustee properly delivered the Aircraft Return Demand for the JOLCO Lease on October 15, 2021 in accordance with the terms of the Aircraft Stipulation & Order; *see* Exhibit G (Aircraft Return Demand); and
- the Stipulation Period was in existence at the time of the issuance of the Aircraft Return Demand.

Accordingly, the Debtors are obligated to return the JOLCO Aircraft.

51. Furthermore, the Debtors cannot contend that the filing of the Assumption Motion somehow moots the Security Trustee’s right to require the return of the JOLCO Aircraft. Indeed, such a contention would violate a canon of contract construction that precludes courts from reading exclusions into contracts that could have easily been included but were not. *See Fix v. Quantum Industrial Partners LDC*, 374 F.3d 549, 553 (7th Cir. 2004) (in refusing to add additional exclusion to a change in control provision, court held that “[t]here is a strong presumption against reading into contracts provisions that easily could have been included but were not. Courts will not, absent circumstances not present here, insert a contract term when the agreement itself is silent.”); *see also Katz v. Feinberg*, 167 F. Supp.2d 556, 566-67 (S.D.N.Y. 2001) (court refused to add exclusion into contract for one contractual term where exclusions to other terms were expressly included in

contract; “an absence [of an exclusion proviso] is revealing because the parties clearly knew how to include limitations on or exceptions to the [provision at issue] when they intended to”). Here, the parties agreed that the entry of an assumption order relating to the JOLCO Lease (thereby terminating the Stipulation Period) – and not the mere filing of an assumption motion (which would not) – would terminate the rights of the Counterparties to mandate the return of the JOLCO Aircraft and/or would terminate the Debtors’ obligation to effect the return of the Aircraft. Such provisions in the Aircraft Stipulation & Order demonstrate that the parties knew how to, and did, impose express limitations upon those rights. The unambiguous language demonstrates that, where the parties wanted to limit the aircraft return mandate, the parties knew how to, and did, make such rights expressly subject to limitation. As a corollary, the Aircraft Stipulation & Order neither (a) preserved the Debtors’ right to assume the JOLCO Lease upon the receipt of the Aircraft Return Demand issued during the Stipulation Period nor (b) limited the Debtors’ obligation to return the JOLCO Aircraft upon the filing of an assumption motion. Accordingly, because the Aircraft Return Demand was delivered during the Stipulation Period, the Debtors are required to return the Aircraft to the Counterparties under the Aircraft Stipulation & Order.

C. DEBTORS CANNOT REVISE EXPRESS TERMS OF AIRCRAFT STIPULATION & ORDER THROUGH AN ASSUMPTION MOTION

52. Whether the Aircraft Stipulation & Order is viewed as a contract between the parties or an order of this Court, the Debtors also cannot unilaterally modify the express return requirements set forth therein.

53. As a stipulation entered into between the parties, any modification is required to be approved by both the Debtors and the Counterparties. *See* Exhibit E(Aircraft Stipulation & Order), Decretal ¶ N (“This Stipulation may be changed, modified, or otherwise altered in a writing executed by the parties to this Stipulation.”) Here, the Debtors’ assumption efforts are, at most, a

one-sided attempt by the Debtors to revise the stipulated return requirements agreed between the parties (and approved by this Court). As such, the proposed modification has no force or effect.

54. Furthermore, even if the bar against a unilateral modification of an agreement could be ignored, as an order of this Court, the terms of the Aircraft Stipulation & Order also cannot be unilaterally modified. Rather, the Aircraft Stipulation & Order may only be modified pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (“*Rule 60(b)*”), made applicable to these bankruptcy cases under Bankruptcy Rule 9024. Modification of the consent orders “would not be appropriate unless it was proper under Rule 60(b).” *See Delta Air Lines Corp. v. Pan Am Corp. (In re Pan Am Corp.)*, 162 B.R. 667, 671–72 (S.D.N.Y. 1993). “Relief under such rules is an extraordinary remedy only appropriate where rare circumstances are present.” *See, e.g., Plisco v. Union R.R. Co.*, 379 F.2d 15, 16 (3d Cir. 1967). “The framers of Rule 60(b) set a higher value on the social interest in the finality of litigation.” *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983). A movant “bears a heavy burden” in showing that relief is appropriate under Rule 60. *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991).

55. Not surprisingly, the Debtors did not even move under, let alone address, the requirements of Rule 60(b) and Bankruptcy Rule 9024. Nor could they support such request – as there is no basis for this Court to grant such an extraordinary remedy here.

II. DEBTORS CANNOT ASSUME THE JOLCO LEASE WITHOUT PAYING THE FULL ACCELERATED DEBT OR OTHER OBLIGATIONS

56. Even if the mandated return of the JOLCO Aircraft could be ignored -- which it cannot -- the Assumption Motion appears to be premised upon a selective reading of the JOLCO Lease that ignores 90% of the Debtors’ cure obligations required to be paid under the JOLCO Lease. The Debtors have no basis in fact or law to ignore their contractual cure obligations.

A. THE JOLCO LEASE MANDATES PAYMENT OF ALL OBLIGATIONS, INCLUDING ALL MISSED RENT AND FULL ACCELERATED DEBT

57. In Schedule 1 to the Proposed Order, the Debtors materially understate the amount of the proposed cure under Bankruptcy Code section 365(b)(1)(A) owed by the Debtors to the Counterparties. Such proposed cure amounts for the JOLCO Lease are grossly inaccurate incorrect and inadequate – amounting to approximately 12% of the current amounts owed to the Counterparties. Specifically, the Debtors have listed only **\$12,882,616** as the cure amount for the JOLCO Lease, whereas the actual cure costs exceed **\$106,109,978**. The proposed cure amounts fail to satisfy the Counterparties’ statutory entitlement under section 365(b)(1)(A) of the Bankruptcy Code and its contractual entitlement to payment of the full obligations due under the JOLCO Lease.

58. The main difference in cure amounts appears to be that the Debtors are ignoring their obligation to pay the full accelerated debt as an indemnified amount under the terms of the JOLCO Lease. Pursuant to Section 23.1 and 23.7 of the JOLCO Lease, upon the acceleration of the loans under the Loan Agreement, the Debtors, upon assumption of the JOLCO Lease, are required to pay in full (i) the accelerated debt as indemnified “Losses” under Clauses 23.1 and 23.7 of the JOLCO Lease, (ii) all past due basic rent, (iii) all other indemnified damage amounts and (iv) all other obligations arising under JOLCO Lease.

B. DEBTORS ARE REQUIRED TO ASSUME CONTRACTS CUM ONERE; DEBTORS CANNOT CHERRY PICK TERMS OF ASSUMED CONTRACT

59. The Debtors’ effort to avoid the terms of Section 23.1 and 23.7 of the JOLCO Lease also violates the requirements for contract assumption under the Bankruptcy Code. Specifically, if the Debtors want to assume the JOLCO Lease, the Debtors are required to comply with all of the obligations thereunder, including the obligation to pay the full accelerated debt under the indemnification provisions of the JOLCO Lease if the Financing Parties accelerate the obligations

under the Loan Agreement against the JOLCO Lessor, as borrower. Indeed, debtors “must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits.” 3 COLLIER ON BANKRUPTCY ¶365.03 (Alan N. Resnick & Henry J. Sommer eds. 16th Ed. 2017) (citations omitted); *see also In re MF Global Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012) (same). The Debtors cannot pick and choose which contractual obligations they must comply with under an assumed contract. Here, the Debtors must comply with all of the terms of the JOLCO Lease, which terms require the full payment of, *inter alia*, the full accelerated debt and other obligations owed to the Financing Parties, along with all other obligations under such agreements.

C. **DEBTORS APPARENT ARGUMENTS THAT ACCELERATED DEBT OWED BY JOLCO LESSOR UNDER THE LOAN AGREEMENT SHOULD NOT BE REPAID NOW WOULD RESULT IN AN IMPERMISSIBLE EXTENSION OF FINANCIAL ACCOMMODATIONS THAT CANNOT BE ASSUMED UNDER THE BANKRUPTCY CODE**

60. The Debtors appear to recognize the multiple infirmities of their Assumption Motion and have made an unsupported assertion to the Controlling Counterparties’ counsel that the holding in *48th St. Steakhouse, Inc. v. Rockefeller Grp. Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988), would somehow affect the rights of the Financing Parties, including the Controlling Counterparty, to issue the Acceleration Notice. In *48th Street Steakhouse*, the Second Circuit addressed whether the automatic stay could be used in an adversary proceeding against a head-lessor to enjoin its termination of the head lease that would destroy as a matter of law all of a debtor’s rights in a sublease. Further, in *48th Street Steakhouse*, the head-lessor was affiliated with the lessee/sublessor, the debtor-sublessee possessed reversionary right to the head lease and the adversary proceeding was brought against the head-lessor on the same day that it sought to terminate the head lease. In these circumstances,

the Second Circuit ruled that the head-lessor was enjoined from the head lease because it would destroy as a matter of law all rights held by the debtor as the sublessee under a sublease.

61. Such contention lacks any basis or support. Indeed, each of the following facts demonstrate that *48th Street Steakhouse* has no applicability here:

- (a) the Loan Agreement is between unaffiliated third parties governed by English law;
- (b) the acceleration was under a loan agreement between non-debtors;
- (c) the Financing Parties' acceleration did not create or destroy rights, but rather accelerated obligations that already existed;
- (d) unlike in *48th Street Steakhouse*, the Debtors here are seeking to assume the JOLCO Lease, which assumption mandates that the Debtors honor all of the terms of such agreements – the Debtors *cum onere* obligations;
- (e) unlike in *48th Street Steakhouse*, the acceleration did not destroy any property rights as a matter of law or otherwise, but merely affected the values and the timing of obligations already owed by the Debtors; and
- (f) rather than cause a default under the terms of the JOLCO Lease or effect a termination of the Debtors' rights under the JOLCO Lease, these current circumstances (namely the Financing Parties' acceleration of the debt against the JOLCO Lessor) are expressly contemplated and dealt with under the terms of the JOLCO Lease.

In contrast, the court in *48th Street Steakhouse*, addressed the impact of a termination of a head-lease upon sublease property rights that were being destroyed as a matter of law upon the termination of the head-lease, which is plainly distinguishable. Further, the *48th Street Steakhouse* debtor possessed a revisionary right in the headlease that also would have been destroyed by a termination. In contrast, (a) here no property rights are being destroyed as a matter of law and (b) rather than destroying the Debtor's property rights as a matter of law, the terms of the JOLCO Lease address this very circumstance regarding the Financing Parties' acceleration of the debt and provides the consequential, binding contractual terms upon such acceleration. *See supra* at ¶¶ 12 - 13. In sum, there is no similarity to the facts or holding of *48th St. Steakhouse*.

62. Furthermore, the Second Circuit has subsequently limited the reach of *48th St. Steakhouse* to apply only to actions between non-debtors that, *as a matter of legal certainty*, destroy property rights of a debtor. *See Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (2d Cir. 2014) (limiting reach of *48th St. Steakhouse* to apply only situations where “it is legally certain . . . to impact estate property.”). As noted by the Second Circuit in *In re Stillwater Asset Backed Offshore Fund Ltd.*:

In *Picard v. Fairfield Greenwich Limited*, we narrowed the reach of *48th Street Steakhouse* and “decline[d] to extend our holding ... to automatically stay actions taken against third parties that are only factually likely, as opposed to legally certain, to impact estate property.”

729 Fed.Appx. 69, 71 (2d Cir. 2018). Similarly, as another court noted in assessing the applicability of the *48th Street Steakhouse* decision on actions between non-debtors, the *Cardinal Industries* court held that where an action between one non-debtor against another non-debtors “only indirectly affect the value of a debtor’s contract rights or personal property interests[, such actions] are simply not within the scope of the [automatic stay].” *See In re Cardinal Indus., Inc.* 105 B.R. 834, 852 (*Bankr. S.D. Ohio* 1989); *see also Kreisler v. Goldberg*, 478 F.3d 209, 214-15 (4th Cir. 2007) (actions between non-debtors only stayed where such actions legally terminate debtor’s property rights; merely affecting value of such property rights does not implicate automatic stay). Here, the action between third parties does not terminate or destroy the Debtors’ leasehold or use rights under the JOLCO Lease; rather, the terms of the JOLCO Lease actually address these exact circumstances and provide for the terms, obligations and consequences arising from such an acceleration – which terms and obligations would be binding upon the Lessee upon the assumption of the JOLCO Lease.

63. In sum, applicable law as applied to the facts present here mandate that the Debtors be required to comply with all of their obligations under the JOLCO Lease upon assumption, including the requirements to pay the full Termination Values due thereunder.

64. Moreover, given the destruction of the Below Market Leverage Benefits and the express terms of the JOLCO Lease, any effort to assume the JOLCO Lease without requiring the Debtors to pay the Termination Values would constitute an impermissible effort to force the JOLCO Lessor to make an impermissible “financial accommodation” under Section 365(c)(2) of the Bankruptcy Code.

III. DEBTORS IMPROPERLY SEEKING TO OBTAIN DECLARATORY AND INJUNCTIVE RELIEF THAT THAT MAY ONLY BE GRANTED THROUGH AN ADVERSARY PROCEEDING

65. Although the Assumption Motion fails to make even one reference to the Aircraft Stipulation & Order, the Proposed Order impermissibly includes both declaratory and injunctive relief regarding such Aircraft Stipulation & Order. *See* Proposed Order, ¶¶ 3 (seeking declaratory relief) & 4 (seeking injunctive relief). Bankruptcy Rule 7001 provides, in relevant part, that:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

- (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
- (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
- (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing.

See Bankruptcy Rule 7001(1), (7) & (9).

66. In paragraph 3 of the Proposed Order, the Debtors seek declaratory relief that the Aircraft Stipulation & Order has “terminated” and is “no longer effective,” and the “Counterparties

repossession rights thereunder (e.g., paragraph 3(e) of the Stipulation) in connection with the Aircraft shall also terminate.” Such declaratory relief is facially defective as being violative of the adversary proceeding requirements under Bankruptcy Rules 7001(1) and (9). Absent the commencement of an adversary proceeding, courts cannot issue declaratory relief in connection with whether a contract can be assumed. *See, e.g., In re Harry C. Partridge*, 43 B.R. 669, 672 (Bankr. S.D.N.Y. 1984) (debtor coupling declaratory relief in a motion to assume a contract was improper; adversary proceeding needed to be initiated for declaratory relief); *see also In re Teligent, Inc.*, 459 B.R. 190, 195 (Bankr. S.D.N.Y. 2011) (“[A] party seeking a declaratory judgment must do so by commencing an adversary proceeding.”). Additionally, such terms of the Debtor’s Proposed Order contravene the terms of the Aircraft Stipulation & Order, which provides that “All rights of the Parties provided in this [Aircraft Stipulation & Order] shall survive the termination of the Stipulation.” *See* Exhibit E (Aircraft Stipulation & Order), decretal ¶ 8. As the Second Circuit has held, bankruptcy courts should not determine parties contractual and property rights in connection with an assumption motion. *In re Orion Pictures Corporation*, 4 F.3d 1095, 1098-99 (2d Cir. 1993). Rather, the Second Circuit determined that a motion to assume should be considered a summary proceeding facilitating the swift administration of the bankruptcy estate, not an occasion for a trial on disputed issues. *Id.* at 1098-99. Further, the rights of the Counterparties to require the return of the JOLCO Aircraft are unfettered under the terms of the Aircraft Stipulation & Order during the pendency of the Stipulation Period. In sum, the Debtors cannot seek to adjudicate the Counterparties express contractual rights under the Aircraft Stipulation & Order under the guise of the Assumption Motion, which is a contested matter. Accordingly, the Debtors request also would be an impermissible modification of the Aircraft

Stipulation & Order. *See supra*, at ¶¶ 52-55 (discussion that unilateral modification of contract and prior court order is not permissible).

67. Similarly, in paragraph 4 of the Proposed Order, the injunctive relief sought by the Debtor that limits the rights of the Counterparties under the Aircraft Stipulation & Order is improper in the absence of the commencement of an adversary proceeding. Accordingly, in addition to all of the other infirmities cited in this Response, the inclusion of both paragraphs 3 and 4 in the Proposed Order is improper and such proposed terms should be stricken.⁷

IV. RESERVATION OF RIGHTS

68. In accordance with this Court's Local Bankruptcy Rule 9014-2, the first scheduled hearing in a contested matter "will not be an evidentiary hearing at which witnesses may testify." As many of the disputes regarding the Assumption Motion raise factual issues that require evidentiary support (including the proper cure amounts and interpretation of English law documents and, to the extent of any ambiguity, the interpretation of the terms of the Aircraft Stipulation & Order), the Controlling Counterparty, on behalf of itself and its Facility Agent and Security Trustee, hereby reserve their rights to present such evidentiary matters at a further hearing.

⁷ The Debtors also cannot support seeking declaratory and injunctive relief through the unconnected reference in the Assumption Motion to the Bankruptcy Court's equitable powers under Bankruptcy Code §105(a). *See* Assumption Motion, ¶ 15. Although § 105(a) invests bankruptcy courts with broad equitable power in aid of a debtor's reorganization, that power can only be exercised in carrying out the provisions of the Bankruptcy Code, "rather than to further the purposes of the Code generally, or otherwise to do the right thing." *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 91-92 (2d Cir. 2003) (internal quotation marks and citations omitted). In *Norwest Bank Worthington v. Ahlers*, the Supreme Court rejected attempts to use equity to contravene the express dictates of the Bankruptcy Code: "The short answer to [arguments favoring allowing broader equity powers] is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." 485 U.S. 197, 206-07 (1988) (citations omitted). Here, given the fundamental limitations upon seeking adversarial proceeding relief in contested matters, the unexplained reference to Bankruptcy Code § 105(a) cannot support the Debtors' efforts to obtain declaratory and injunctive relief through the Assumption Motion.

69. The Controlling Counterparty is requesting that the Debtors stipulate to the facts set forth herein to avoid the need for discovery. Accordingly, the Controlling Counterparty is hopeful that a factual stipulation can be agreed upon to avoid the necessity for discovery. If, however, the Debtors are unwilling to so stipulate, and given that discovery has not yet commenced, the Controlling Counterparty fully reserves its rights to supplement this Response after any necessary discovery has been concluded.

70. Additionally, the Controlling Counterparty further expressly reserves its right to submit a post-discovery supplement to this response to ensure that the Controlling Counterparty has the ability to defend and preserve its claims and rights.

CONCLUSION

For the foregoing reasons, the Controlling Counterparty requests that this Court (i) deny the Assumption Motion, (ii) mandate the return of the JOLCO Aircraft to the Counterparties in accordance with the terms of the Aircraft Stipulation & Order or, in the alternative, (iii) in the event that the Bankruptcy Court permits the assumption of the JOLCO Lease, require that the Debtors fully pay all cure amounts as set forth in Schedule 1 hereto and as otherwise demonstrated by the Controlling Counterparty in their full stated amounts and (iv) grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 20, 2021

VEDDER PRICE P.C.

/s/ Michael J. Edelman

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TABLE OF SCHEDULES AND EXHIBITS

SCHEDULE 1	LIQUIDATED CURE COSTS
EXHIBIT A	THE JOLCO LEASE (EXCLUDING EXHIBITS AND SCHEDULES)
EXHIBIT B	THE LOAN AGREEMENT FOR THE JOLCO TRANSACTION RELATING TO THE JOLCO AIRCRAFT (EXCLUDING SCHEDULES)
EXHIBIT C	THE SECURITY ASSIGNMENT GRANTING COLLATERAL FOR THE LOAN AGREEMENT
EXHIBIT D	AIRCRAFT MORTGAGE FOR JOLCO AIRCRAFT
EXHIBIT E	THE AIRCRAFT STIPULATION & ORDER FOR THE JOLCO AIRCRAFT (PUBLICLY FILED VERSION) [DOCKET NO. 414]
EXHIBIT F	THE AIRCRAFT RETURN DEMAND ISSUED UNDER THE AIRCRAFT STIPULATIONS & ORDER
EXHIBIT G	THE ACCELERATION NOTICE ISSUED BY THE FACILITY AGENT

SCHEDULE 1

LIQUIDATED CURE COSTS

<u>CATEGORIES OF CURE COSTS</u>	<u>CURE COST AMOUNTS*</u>
(a) Termination Value A as of Oct. 15, 2021 (date of acceleration):	\$82,709,538
(b) Rent A Past Due that Remains Unpaid (including \$3,725,275 as rent for Rent A accruing for the portion of the current rental period through October 15, 2021):	\$22,943,515
(c) Rent B Past Due that Remains Unpaid (including \$3,489 as rent for Rent B accruing for the portion of the current rental period through October 15, 2021):	\$21,489
(d) Default Interest through October 22, 2021:	\$681,823
(e) Break Costs:	\$6,195,000
(f) Liquidated Indemnifiable Costs (including legal and professional fees and other amounts not included above): (from Lessor's Spreadsheet)	\$712,962
(g) Other Unliquidated Indemnifiable Amounts: Currently Unliquidated	
<i>Minus</i>	
(h) PBH Amounts (through September):	(\$7,154,349)
<u>Total Liquidated Amounts:</u>	<u>\$106,109,978⁸</u>

* Rounded to the nearest whole dollar.

⁸ This stated cure amount is presented solely to the extent that the Court overrules the rights to require a return of the JOLCO Aircraft under the Aircraft Stipulation & Order; and the Controlling Counterparty hereby reserves all rights with respect to such matters. Subject to such reservation of rights, upon an assumption, if the Debtors fail to timely pay such cure amount, the Debtors also would be required to pay, upon demand under the assumed JOLCO Lease, the Termination Value B in the amount of \$36,202,010.79 (in addition to the \$106,109,978 listed above).