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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
GRUPO AEROMÉXICO, S.A.B. de C.V., *et al.*,[1]	)	Case No. 20-11563 (SCC)
Debtors.	)	(Jointly Administered)

OBJECTION OF THE AD HOC GROUP OF OPCO CREDITORS TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE DEBT FINANCING COMMITMENT LETTER, (II) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE EQUITY COMMITMENT LETTER, (III) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE SUBSCRIPTION AGREEMENT AND (IV) AUTHORIZING INCURRENCE, PAYMENT, AND ALLOWANCE OF RELATED PREMIUMS, FEES, COSTS, AND EXPENSES AS SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS

[1] The Debtors in these chapter 11 cases, along with each Debtor's registration number in the applicable jurisdiction, are as follows: Grupo Aeroméxico, S.A.B. de C.V. 286676; Aerovías de México, S.A. de C.V. 108984; Aerolitoral, S.A. de C.V. 217315; and Aerovías Empresa de Cargo, S.A. de C.V. 437094-1. The Debtors' corporate headquarters is located at Paseo de la Reforma No. 243, piso 25 Colonia Cuauhtémoc, Mexico City, C.P. 06500.

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The Ad Hoc Group of OpCo Creditors[2] hereby files this supplemental objection (the "Objection")[3] to the *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors' Entry Into, and Performance Under, the Debt Financing Commitment Letter, (II) Authorizing the Debtors' Entry Into, and Performance Under, the Equity Commitment Letter, (III) Authorizing the Debtors' Entry Into, and Performance Under, the Subscription Agreement and (IV) Authorizing Incurrence, Payment, and Allowance of Related Premiums, Fees, Costs, and Expenses as Superpriority Administrative Expense Claims* [Docket No. 1860] (the "Motion"), and the revised terms set forth in the *Supplement to Debtors' Exit Financing Motion and Notice of Filing of Revised Equity and Debt Commitment Letters* [Docket No. 2168] (the "Supplement" and, together with the Motion, the "Exit Financing Motion," and the transactions contemplated therein, the "Exit Financing"),[4] and respectfully states as follows:

PRELIMINARY STATEMENT

1. To induce certain favored operating and financing partners to support the Debtors, the Exit Financing is structured as an impermissible private placement of estate assets among an exclusive club that includes corporate insiders, select creditors, and third-party investors without a claim in these cases. It is an extraordinary shift of significant value from impaired general unsecured creditors that is disguised as a "backstop," although it is fundamentally different.[5]

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[2] Members of the Ad Hoc Group of OpCo Creditors are identified in the *Verified Statement Pursuant To Bankruptcy Rule 2019* [Docket No. 2179].

[3] The Objection supplements the *Preliminary Objection of the Ad Hoc Group of OpCo Creditors to the Exit Financing Motion* [Docket No. 2178], which is incorporated herein in its entirety.

[4] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Grupo Aeroméxico, S.A.B. de C.V. and its Affiliated Debtors* [Docket No. 2186] (the "Disclosure Statement").

[5] As used herein, "general unsecured creditors" means holders of general unsecured claims against Aerovías, Aeroméxico Connect, or Aeroméxico Cargo.

2. Put simply, the Exit Financing is not the panacea the Debtors make it out to be. It is the result of a flawed process rife with conflicts of interest and, more fundamentally, is built on a structure that must be rejected as a matter of law. Nor must the Debtors obtain approval of the Exit Financing Motion now. The parties obtaining the highly favorable economic incentives are not being asked to backstop any future commitments, while the Debtors are being improperly locked in to unfavorable plan terms. Moreover, the Ad Hoc Group of OpCo Creditors have offered the Debtors a superior exit financing proposal that maximizes value to all general unsecured creditors rather than a select few conflicted insiders and lenders.

3. As discussed in further detail herein, the Exit Financing Motion should be denied for a number of reasons:

- ***First***, the Exit Financing is being offered exclusively to a select group of equity holders, creditors, and investors. This impermissibly locks in unequal treatment for unsecured creditors, as some would receive recoveries based on the opportunity to participate in the Exit Financing, while the vast majority would be excluded from that opportunity.

- ***Second***, the Exit Financing improperly provides for payment of extra compensation to certain parties in exchange for their commitment to vote for a plan, raising acute "vote buying" concerns that call the Debtors' good faith into question.

- ***Third***, the Exit Financing locks in equity allocations and a $108 million commitment premium regardless of whether the plan contemplated by the Exit Financing is ultimately confirmed, and confirmation will be heavily contested.

- ***Fourth***, the Exit Financing Motion cannot withstand the heightened scrutiny standard that is required to be applied in connection with insiders being provided an opportunity to participate in the Exit Financing.

4. The Exit Financing's principal component is the allocation of the ***exclusive*** and valuable opportunity to participate in an equity financing to certain select parties (the "Select Parties"), which would provide the reorganized Debtors with $720 million of new equity (the "Equity Placement"). This proposed Equity Placement impermissibly provides a small number

of creditors and insiders a preferential recovery, under the guise of a routine financing by a lone willing group of capital providers. The Debtors cite to a number of cases in which purportedly "similar motions" for "debt and equity commitment letters and backstop commitment agreements" were approved. Motion ¶ 41. But the proposed Equity Placement is not routine. Rather, it is an extraordinary, and impermissible, financing proposal employing a structure that Judge Wiles specifically rejected in *In re Pacific Drilling S.A., et al.*, No. 17-13193 (MEW) ("*Pacific Drilling*").

5. The proposed Equity Placement is not a "backstop" because there is no rights offering to be backstopped. In the commonplace rights offering structure, ***all*** creditors of a given class (usually the fulcrum class) are offered the ***same opportunity*** to purchase stock in the reorganized debtor in proportion to their claims.[6] In that type of structure, if the rights offering is not fully subscribed, the debtor can call upon a backstop commitment—typically from a small number of larger creditors—to obtain the financing necessary to bridge the gap between the exercised subscription rights and the debtor's needs.

6. That is not happening in this case. Here, the Debtors skip the critical step of offering all creditors an opportunity to participate in the stock purchase, and ask this Court to approve a special allocation of significant estate value to a small number of select parties. Unlike a backstop commitment in which specified creditors receive compensation for taking on risks that are incremental to their claims, here the Select Parties will receive additional value ***on account of*** their claims, which violates the Bankruptcy Code.

7. Incredibly, the Debtors cite *Pacific Drilling* as an example of a case in which a "similar" financing was approved. Motion ¶ 41. The Debtors cite to an Order entered by Judge

[6] *See, e.g.*, *In re Breitburn Energy Partners, LP*, 582 B.R. 321, 358 (Bankr. S.D.N.Y. 2018) (discussed in detail herein).

Wiles authorizing the debtors to proceed with certain first lien and second lien debt exit facilities, Motion ¶ 41 (citing *Pacific Drilling* [Docket No. 518]), but completely ignore that, ***in that very case***, Judge Wiles denied the same private placement of equity concept proposed here. Judge Wiles concluded that a private placement structure that gives a specific group of creditors the exclusive right to buy stock in the reorganized debtors has no legitimate justification and is, in substance, "a plum opportunity that's been given to a special group of large creditors who support [the debtor's] need for the plan but on a basis that's not equal to other similarly situated creditors." *Pac. Drilling*, Hr'g Tr. 88:18–22, Sept. 18, 2018. Following that decision, the "special group" of creditors "agreed that the private placement would be eliminated and that the shares that would have been covered by the private placement to the [special group] ***would instead be part of the rights offering for which all holders would be eligible***." *Pac. Drilling*, 2018 Bankr. LEXIS 3024, at *8 (emphasis added). The Court should insist on the same result here.

8. Even after the private placement concept was removed from the *Pacific Drilling* equity financing, Judge Wiles still expressed serious "misgivings" and only approved the financing—reluctantly—because not a single creditor objected. *Id.* at *1, *12. Judge Wiles expressed "hope that in the future when these structures are presented, the parties will explore in more detail the issues and concerns that I have raised," but concluded that, in the absence of creditor objection, *Pacific Drilling* was the "wrong case in which to make rulings." *Id.* at *16.

9. This is the right case to make such a ruling. The Debtors have proposed a similar structure to the one rejected in *Pacific Drilling*, with the glaring absence of a rights offering. And in this case, creditors do object to the proposed financing structure.

10. The Debtors assert that the Exit Financing has the "broadest creditor support." Disclosure Statement at 2. In fact, it is opposed by a significant percentage of general unsecured creditors as well as the Creditors' Committee. Support for the Exit Financing comes from

prepetition insider equity owners (last in line for recoveries under the Bankruptcy Code), the primary DIP lender, certain "double dip" noteholders that are slated to receive 100% recoveries, a handful of favored third party investors, and the small minority of unsecured creditors receiving a new money allocation. This is far from broad creditor support.

11. An independent reason to deny the Exit Financing is the offer of an economically superior, actionable alternative developed by the Ad Hoc Group of OpCo Creditors (the "<u>OpCo Creditor Proposal</u>").[7] The OpCo Creditor Proposal is not only economically superior—it also provides all general unsecured creditors an opportunity to participate in the equity financing. Although the Ad Hoc Group of OpCo Creditors has requested serious engagement from the Debtors, to date, the Debtors have given only cursory consideration to the OpCo Creditor Proposal. Since submitting the OpCo Creditor Proposal, the Ad Hoc Group of OpCo Creditors has engaged substantively with the Creditors' Committee, which has resulted in material improvements to the OpCo Creditor Proposal. <u>**Exhibit 1**</u> (attached hereto) highlights several key economic benefits of the OpCo Creditor Proposal, as revised based on feedback from the Creditors' Committee.

12. But the Exit Financing Motion need not be denied outright; it could be continued. The Debtors could implement formal procedures—with expedited deadlines—to bring the competitive bidding process to a quick and satisfying resolution that results in the highest and best offer. If the Debtors were to engage constructively with their key stakeholders in a ***brief*** continuation of the exit financing market-check process (ideally with a publicly-disclosed bidding timeline), they would achieve a solution that would be fair to—and significantly improve

[7] Because the key distinctions between the OpCo Creditor Proposal and the Exit Financing relate to the equity financing component, this Objection focuses on the Equity Placement. However, the Ad Hoc Group of OpCo Creditors reserves its rights to subsequently challenge and/or object to: (i) all aspects of the Exit Financing, including in connection with a hearing on confirmation of the Plan; and (ii) amendments to the DIP Credit Agreement.

the treatment of—general unsecured creditors in this case. Doing so would not materially alter the emergence timeline established by this Court, and could result in a substantially consensual confirmation hearing. Alternatively, the Exit Financing could be considered in connection with confirmation of a chapter 11 plan. For the reasons above, the Exit Financing Motion should be denied (or, alternatively, deferred).

RELEVANT FACTUAL BACKGROUND

A. Chapter 11 Cases, DIP Financing, and Equity Conversion Option

13. On June 30, 2020, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases").

14. On October 13, 2020, the Debtors obtained Court approval on a final basis for debtor-in-possession financing (the "DIP Financing") provided by Apollo Management Holdings, L.P. on behalf of one or more affiliates and/or funds or separate accounts managed by it and its affiliates (collectively, "Apollo"). The DIP Financing has two tranches: (i) the Tranche 1 Facility in an aggregate principal amount of $200 million, and (ii) the Tranche 2 Facility in an aggregate principal amount of $800 million. *See* Disclosure Statement at 55.

15. A significant portion of the Tranche 2 DIP Loans are held by Delta Air Lines, Inc. ("Delta"), a statutory insider of the Debtors.[8] On November 20, 2020, Delta entered into a Funding Agreement with Alpage Debt Holdings S.A.R.L., an affiliate of Apollo, pursuant to which Delta obtained the option to purchase $185 million (approximately 23%) of the Tranche 2

[8] As of the Petition Date, Delta held approximately 51.3% of the economic interests and 49% of the voting rights in the Debtors. Disclosure Statement at 14. In addition, Delta holds two seats on the Debtors' Board of Directors, including one held by Delta's chief executive officer, Edward H. Bastian. *Id*. at 20. A third seat on the Board is held by an individual who also serves on the board of directors of Delta. *Id*. at 21. Until October 2021, a Delta secondee served as the Debtors' Chief Commercial Officer and Executive Vice President. *See* Blackline Comparison of the Second Revised Disclosure Statement [Docket No. 2188, Ex. B] at 20.

DIP Loans.[9] This arrangement from November 2020 was not disclosed to the Debtors or the Court until June 30, 2021, well after the exit financing process was underway. *Id.*[10] Upon information and belief, the Debtors made no meaningful governance changes in response to Delta's disclosure of this extraordinary conflict of interest.

16. Tranche 2 DIP Lenders, including Apollo and Delta, among others, benefit from a "voluntary equity conversion" feature of the DIP Financing, which purportedly permits them to elect to convert the Tranche 2 DIP Loans into equity in the reorganized Debtors (the "Reorganized Equity") on a dollar-for-dollar basis plus a 10% conversion exit fee payable in Reorganized Equity, based on the Debtors' plan valuation, or any other ***lower*** valuation at which any party is permitted to subscribe for shares in the reorganized Debtors (the "Voluntary Equity Conversion"). *See* Disclosure Statement at 55 (emphasis added). As such, holders of Tranche 2 DIP Loans were in the proverbial "driver's seat" with respect to any exit financing, and in fact were in a position to benefit economically if any equity was issued at an artificially depressed valuation.

17. In addition to the remarkable economic influence inherent in the Voluntary Equity Conversion, the Tranche 2 DIP Lenders have significant control over the Chapter 11 Cases through milestones and agreements from the Debtors for certain prerequisites to filing a plan of reorganization. For example, the Debtors were required to provide the Tranche 2 DIP Lenders with the Debtors' valuation analysis, including valuation materials, a proposed pro forma capital structure, and a description of any capital increase contemplated. *See* Motion ¶ 19. As required,

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[9] *See* Letter from Delta to Javier Arrigunaga (June 30, 2021), Exhibit A to *Notice of Filing of Correspondence* [Docket No. 1375].

[10] Although the existence of the Funding Agreement has been disclosed, the actual terms of this agreement between a statutory insider and the principal DIP Lender remain confidential (despite possibly having a material economic impact on creditors).

the Debtors provided the Tranche 2 DIP Lenders with an initial valuation analysis on June 29, 2021 and a final valuation analysis on September 10, 2021. *See* Disclosure Statement at 55-56. The DIP Financing also obligated the Debtors to provide a certification by the Debtors' investment banker, Rothschild & Co, that all outstanding DIP loans can be repaid in full in cash (at par plus accrued interest and fees) upon the Debtors' emergence from chapter 11 through the issuance of debt or equity securities, evidenced by a fully underwritten, irrevocable and unconditional commitment. Motion ¶ 20.

18. As a result, Tranche 2 DIP Lenders, such as Apollo and Delta, have enjoyed extraordinary influence in the Chapter 11 Cases—including over the exit financing process[11]—and have economic incentives that do not necessarily align with the best interests of the Debtors' estates (*e.g.*, on valuation).

B. The Exit Financing Process

19. In May 2021, the Debtors began a process to solicit interest in an exit financing commitment. *See* Disclosure Statement at 88-89. As the process played out, two factions emerged as the lead competing bidders. On one hand was a proposal premised on the Voluntary Equity Conversion rights under the DIP Financing held by Delta and Apollo (among others), which was promulgated by Apollo. On the other hand was a consortium of bidders (the "Consortium"), comprising:

(i) certain investors referred to as "BSPO": The Baupost Group ($0 of disclosed claims against the Debtors); Oaktree Capital Management ($0 of

[11] *See* Deposition Transcript (Rough) of Homer Parkhill, November 30, 2021 ("Parkhill Tr.") at 98:24–100:4 ("[U]nless Apollo, the Mexican investors and Delta say this is a proposal that we're willing to support . . . that proposal is not operable."); *see also id.* at 55:20-56:7; 61:8-63:2; 65:17-66:19; 72:5-73:12; 89:23-91:3.

disclosed claims against the Debtors); and Silver Point Capital (holder of \$58.5 million of unsecured claims)[12];

(ii) the Ad Hoc Group of Senior Noteholders, which includes members that held general unsecured claims in the aggregate amount of approximately \$78.9 million and Tranche 2 DIP Loans in the aggregate amount of approximately \$101 million;[13] and

(iii) the Trade Claimants Group, which is comprised of three members that held general unsecured claims in the aggregate amount of approximately \$211.8 million.[14]

20. The Debtors received numerous exit financing proposals during the process, including various proposals ***from both factions of bidders*** that contemplated greater recoveries to the fulcrum general unsecured creditors than provided in the Exit Financing now before the Court. *See* Disclosure Statement 88–92.

21. On July 28, 2021, the Debtors' Board of Directors determined to proceed with an Apollo proposal. *See* Disclosure Statement at 92. However, as a result of various disputes relating to the Debtors' valuation analysis and the exit financing process, and concerns that all of the exit financing proposals had material deficiencies, the Debtors requested a chambers' conference to discuss mediation. *See id.* Following a chambers' conference on July 29, 2021, the Court entered the *Order Appointing the Honorable Sean H. Lane as Mediator* [Docket No. 1527] on August 6, 2021.[15] The Mediation's scope included, among other things, (i) the

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[12] *See Verified Statement Pursuant to Bankruptcy Rule 2019* [Docket No. 1995]. Invictus Global Management, LLC ("Invictus"), now a member of the Ad Hoc Group of OpCo Creditors, left the BSPO group on or about November 12, 2021.

[13] *See Third Amended Verified Statement of the Ad Hoc Group of Senior Noteholders Pursuant to Bankruptcy Rule 2019* [Docket No. 1731].

[14] *See First Amended Verified Statement of the Ad Hoc Group of Unsecured Claimholders Pursuant to Bankruptcy Rule 2019* [Docket No. 1733]. Invictus left the Trade Claimants Group on or about October 1, 2021. The Trade Claimants Group initially submitted a separate bid in July 2021, but subsequently joined in the Consortium proposals in August 2021.

[15] The mediation parties were: (a) the Debtors, (b) the Creditors' Committee, (c) Apollo, (d) Delta, (e) the members of the Consortium, and (f) certain of the Debtors' shareholders.

Debtors' obligations and the DIP Lenders' rights under the DIP Financing including, without limitation, concerning the delivery and contents of the Debtors' final valuation analysis, and (ii) any exit financing proposals.

22. Following extensive negotiations between the Debtors and the Consortium, the Debtors "changed horses" and, on October 8, 2021, filed the Motion seeking approval of an exit financing provided by the Consortium. *See* Disclosure Statement at 91–92. Notably, the Consortium proposal guaranteed Delta a $100 million allocation of the new equity commitments, and Delta committed to exercise its Voluntary Equity Conversion. Motion at 9-10, ¶ 29.

23. Thereafter, in October 2021, the Debtors and the Creditors' Committee continued to negotiate on behalf of the estates and the general unsecured creditors for improved economic terms from the Consortium, a dynamic fully endorsed by the creditors who subsequently formed the Ad Hoc Group of OpCo Creditors. On October 31, 2021, these negotiations resulted in an improved proposal from the Consortium, but the Creditors' Committee was not yet willing to support the Consortium proposal. Disclosure Statement at 92.

24. On November 11, 2021, the Debtors received a joint proposal that united the two previously competing bidder groups. Disclosure Statement at 92. Upon receiving this proposal, the Debtors abruptly shifted their efforts away from negotiating ***separately*** with each competing bidder—*i.e.*, the typical "honest broker" approach to generating the highest and best offer in a bankruptcy auction—and pivoted to a single discussion with the now-unified bidders. This non-competitive final stage of the process resulted in the Exit Financing now on the table.

25. Predictably, when the exit financing process shifted from a competitive auction to a joint effort—with nobody at the table to advocate for general unsecured creditors—the result was a group of insiders and select creditors dividing the pie amongst themselves, while leaving

crumbs for general unsecured creditors. The Exit Financing has the support of the parties who will receive exclusive economic benefits in the deal; namely, Apollo, Delta, the members of the Consortium, and four members of the Debtors' Board of Directors (the "Board Member Investors").[16]

26. At the end of the exit financing process, despite improving macroeconomic conditions and the Debtors far exceeding their business projections, the contemplated recoveries for general unsecured creditors ultimately fell through the floor. This is because general unsecured creditors, as the fulcrum claims in these Chapter 11 Cases, are heavily diluted by the Exit Financing proposal. In other words, the Exit Financing parties were able to "juice" their recoveries by capturing equity value that would otherwise flow to general unsecured creditors.

27. The terms of the Exit Financing were made public on November 19, 2021, when the Debtors filed the Supplement. The Debtors incorporated the terms and conditions of the Exit Financing into an updated disclosure statement and plan of reorganization over a 10-day period, such documents being filed on November 29, 2021. The Debtors subsequently provided seven days' notice of the disclosure statement hearing, and only three days to object to the disclosure statement.

C. Exclusive Economic Incentives for the Select Parties

28. In addition to other benefits for the Select Parties, the Exit Financing provides for the Equity Placement: the allocation of $720 million of valuable new equity capital commitments exclusively to the Select Parties.[17] As set forth in the chart below, the Select Parties, who

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[16] Seemingly to obfuscate that four members of their Board will receive exclusive special benefits in the Exit Financing, the Debtors refer to the Board Member Investors as the "Mexican Investors" in their filings.

[17] In addition, the Exit Financing provides for additional Reorganized Equity to be received by Delta and the Board Member Investors on account of other considerations, including, among other things, a joint cooperation agreement with Delta and a commitment of the Board Member Investors to serve on the board of the reorganized Debtors. *See*

collectively own a fraction of the outstanding general unsecured claims, receive an extraordinary windfall on account of their exclusive opportunity to participate in the Equity Placement.

Select Party	GUC Claims	Equity Placement
BSPO	$58.5 million	$305 million
Noteholder Investors	$78.9 million	$175 million
Claimholder Investors	$211.8 million	$100 million
Delta	Equity Owner	$100 million
Board Member Investors	Equity Owner	$20 million
Other Investors	Unknown	$20 million
Total	**$349.2 million**	**$720 million**

29. The Select Parties hold no more than approximately 15% of the general unsecured claims against the Debtors. The rest of the general unsecured creditors—who collectively hold approximately ***$2 billion*** in claims—are entirely excluded from participating in the valuable equity financing opportunity.

<u>OBJECTION</u>

A. The Exit Financing Does Not Benefit the Debtors' Estates and Violates the Bankruptcy Code

30. The Debtors claim that the sweetheart deal for the Select Parties will "resolve several other complex matters" and "allow the Debtors to continue towards a more consensual and expeditious Plan confirmation." Supplement ¶ 7. But as Judge Wiles correctly stated in *Pacific Drilling*: "The Bankruptcy Code does not permit the unequal treatment of creditors in the same class; it also does not permit the payment of extra compensation to large creditors in exchange for their commitment to vote for a plan." *See Pac. Drilling*, 2018 Bankr. LEXIS 3024, at *6. Accordingly, the Exit Financing Motion must be denied.

Disclosure Statement at 39. The Exit Financing also contemplates that Delta, Apollo, and other Tranche 2 DIP Lenders will convert their Tranche 2 DIP Loans into equity via the Voluntary Equity Conversion. *See id*. at 56.

i. The Equity Placement Results in Unequal Treatment of Creditors in the Same Class and Violates Bankruptcy Code Section 1123(a)(4)

31. Because the Exit Financing provides the Select Parties with ***exclusive special treatment*** on account of their claims—a "plum" opportunity to participate in equity financing that was not offered to all similarly situated creditors—it must be denied. If approved, the Equity Placement will inevitably result in a Plan that violates section 1123(a)(4) of the Bankruptcy Code by failing to "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4).

32. Although the Debtors may assert that the section 1123(a)(4) standard is an issue for confirmation, this matter must be adjudicated now because the Debtors have placed it squarely at issue. The Exit Financing is integral to the Plan, and the parties providing the Exit Financing—*i.e.*, the Select Parties—have committed to support and vote in favor of any Plan so long as it incorporates the Exit Financing.

a. **Section 1123(a)(4) Requires Equality of Opportunity**

33. Section 1123(a)(4) requires "equality of treatment," although not necessarily equality of result. *In re Breitburn Energy Partners, LP*, 582 B.R. 321, 358 (Bankr. S.D.N.Y. 2018). To satisfy this requirement, claimants in a class ***must*** have "the same ***opportunity*** for recovery." *Id*. (emphasis added) (citing *In re W.R. Grace & Co*., 729 F.3d 311, 327 (3d Cir. 2013); *Ad Hoc Committee of Personal Injury Asbestos Claimants v. Dana Corp., (In re Dana Corp.)*, 412 B.R. 53, 62 (S.D.N.Y. 2008)).

34. Here, the Equity Placement violates section 1123(a)(4) because only certain creditors have the opportunity to participate, while the rest of the creditors holding the same claims are excluded. The *Breitburn Energy* case is instructive, and demonstrates that two subsets of creditors receiving different value on account of their allowed claims in a class is acceptable

only if all creditors have the same opportunity available to them. In *Breitburn*, members of a class were eligible to participate in a rights offering to acquire a *pro rata* interest in the equity of the reorganized debtor. *Breitburn*, 582 B.R. at 329. The rights offering was backstopped by a group of bondholders, so that if an insufficient number of creditors in the class subscribed pursuant to the rights offering, the backstop parties would make up the difference. *Id*. The rights offering was limited to only those creditors that met certain eligibility requirements under federal securities laws. *Id*. Creditors that did not subscribe under the rights offering were to receive no distribution. *Id*. In considering whether that rights offering structure satisfied section 1123(a)(4), Judge Bernstein recognized that "the subscribers and non-subscribers will receive different value on account of their allowed claims." *Id*. at 358. Nevertheless, Judge Bernstein held that the plan satisfied section 1123(a)(4) because "all Class 5A members had the same opportunity to subscribe or not subscribe to the rights offering on the same terms." *Id*.

35. Limiting the opportunity to participate in the Equity Placement to only the Select Parties results in the rest of the general unsecured creditors receiving less value on their claims in at least three ways.

36. ***First,*** the opportunity to participate in the Equity Placement is valuable. There is no legitimate justification to provide that opportunity exclusively to members of the Select Parties and not to all general unsecured creditors ratably. As Judge Wiles observed in *Pacific Drilling*:

> The problem with special allocations in rights offerings, or with private placements that are limited to the bigger creditors who sat at the negotiating table, or big backstop fees that are paid to the bigger creditors who sat at the negotiating table but that are not even open to other creditors (and in particular to other creditors in the same class), is that it is far too easy for the people who sit at the negotiating table to use those tools primarily to take for themselves a bigger recovery than smaller creditors in the same

> classes will get. The Code allows for reasonable financing terms but they must be reasonable, and they cannot just be a disguised means of giving bigger creditors a preferential recovery.

Pac. Drilling, 2018 Bankr. LEXIS 3024, at *6. The problem identified by Judge Wiles is exactly what has happened here. A handful of general unsecured creditors will have an opportunity to take a bigger recovery than the rest of the general unsecured creditors. Unless all general unsecured creditors are offered the same opportunity to participate—as they are under the OpCo Creditor Proposal—the Exit Financing violates the Bankruptcy Code.

37. ***Second,*** because a significant portion of the proposed distribution to general unsecured creditors under the Plan is in the form of equity, the selective allocation of equity to the Select Parties will dilute the general unsecured creditors' plan distribution. In contrast, if all general unsecured creditors were given an opportunity to participate in the equity rights offering, they would control whether they were subject to dilution.

38. ***Third,*** the dilutive effect of the Equity Placement is exacerbated by the Exit Financing's locked-in plan valuation (which is locked in at a lower value than the OpCo Creditor Proposal). By striking the new money equity at an artificially depressed valuation, the Debtors are siphoning value out of the estates and into the hands of the Select Parties. A higher valuation would yield significant value for the Debtors' estates. Further, by locking in the plan valuation regardless of business performance (*e.g.*, excess cash on the balance sheet at emergence), the Debtors are ensuring that any upside will be captured by the Select Parties. The plan valuation should be adjusted for value that exceeds the Debtors' projections so that the success of the enterprise will benefit the fulcrum general unsecured creditors.

39. Cases in which an exit financing was approved and held not to be in violation of section 1123(a)(4) offer the Debtors no support. The unifying—and distinguishing—feature of those cases is that the opportunity to participate was offered to ***all*** creditors in a class, not just a

select few hand-picked creditors. *See, e.g.*, *Breitburn*, 582 B.R. at 329 (plan satisfies section 1123(a)(4) where ***all*** class members had the same opportunity to subscribe to rights offering on the same terms); *Pac. Drilling*, 2018 Bankr. LEXIS 3024, at *11 (approving rights offering in which "***all*** members of the three impaired secured classes will be entitled to participate") (emphasis added); *Ad Hoc Comm. of Non-Consenting Creditors v. Peabody Energy Corp. (In re Peabody Energy Corp.)*, 933 F.3d 918, 925–26 (8th Cir. 2019) (concluding that an equity financing, comprising a rights offering and a private placement/backstop for the rights offering, did not violate section 1123(a)(4) primarily because creditors were "not excluded from any opportunity" and ***all*** "could have participated in the Private Placement at any phase"); *In re TCI 2 Holdings LLC*, 428 B.R. 117, 133 (Bankr. D.N.J. 2010) (concluding that providing only certain creditors the opportunity to serve as backstop parties to a rights offering does not violate section 1123(a)(4), given that ***all*** creditors in the class received the same treatment on account of their claims in the form of the opportunity to subscribe to the rights offering).

40. There is no legitimate basis to exclude creditors from the opportunity to participate pro rata in the equity financing in this case. As a result of the Exit Financing structure, general unsecured creditors will receive only the leftover equity after severe dilution that siphons value to the Select Parties. The Exit Financing thus violates the Bankruptcy Code's prohibition on unequal treatment of creditors in a class, and must be denied.

b. The Exclusive Equity Placement Opportunity Constitutes Treatment for Claims Subject to the 1123(a)(4) Standard

41. The Exit Financing violates section 1123(a)(4) because the Select Parties' exclusive opportunity to participate in the Equity Placement is "treatment for" the Select Parties' claims. In *Bank of America Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, the Supreme Court held that "an exclusive option . . . to buy the equity in the reorganized entity" is a

"property interest extended 'on account of'"—meaning "because of"—the prepetition interest held by the party receiving the exclusive right. *See* 526 U.S. 434, 454–56 (1999).

42. This case is analogous to the situation addressed by the United States Supreme Court in *LaSalle*. In *LaSalle*, the debtor offered certain select parties (there, certain former equity owners) the exclusive right to invest new capital in exchange for equity in the reorganized enterprise, a structure intended to preserve significant tax benefits. *Id*. at 440. The fulcrum creditor objected on the basis that the exclusive investment right was property "on account of" a junior claim or interest, which violated the absolute priority rule because the fulcrum creditor was impaired. *Id*. at 442. In response, the debtor argued that the equity financing opportunity was not treatment "on account of" a claim or interest; rather, it was an opportunity "in exchange for" the new infusion of capital. *Id*. at 442–43.

43. The Supreme Court squarely rejected that argument, holding that "***the exclusiveness of the opportunity*** . . . renders the [select party's] right a property interest extended 'on account of' the [their interest]," and therefore subject to objection. *Id*. at 456 (emphasis added). The Supreme Court explained:

> Given that the opportunity [to invest] is property of some value, the question arises why [the select parties] alone should obtain it, not to mention at no cost whatever. The closest thing to an answer favorable to the Debtor is that the [select parties] would be given the opportunity in the expectation that in taking advantage of it they would add the stated purchase price to the estate. . . . ***But this just begs the question why the opportunity should be exclusive to the [select parties]***. If the price to be paid for the equity interest is the best obtainable, [the select parties] do[] not need the protection of exclusiveness (unless to trump an equal offer from someone else); if it is not the best, there is no apparent reason for giving [the select parties] a bargain. ***There is no reason, that is, unless the very purpose of the whole transaction is, at least in part, to do [the select parties] a favor. And that, of course, is to say that [the select parties] would obtain [their] opportunity,***

> ***and the resulting benefit, because of [the select parties'] prior interest*** . . . .

Id. (emphasis added)

44. Accordingly, Supreme Court precedent forecloses any argument by the Debtors that the Equity Placement is being offered to the Select Parties as anything other than treatment for their claims and interests.[18] Unlike a commitment ***fee*** that may be payable in exchange for the incremental risks being borne by stakeholders for the benefit of the estate, the ***exclusive right to participate*** in an equity financing for the reorganized debtor enterprise can only be, under Supreme Court precedent, a property right on account of prepetition claims or interests.

ii. The Payment of Extra Compensation to the Select Parties in Exchange for Supporting the Plan May Constitute Impermissible "Vote Buying"

45. Section 1129(a)(3) of the Bankruptcy Code requires, as a condition to confirmation, that the Plan "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The term "good faith" is generally interpreted to mean that there exists "a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Quigley Co., Inc*., 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010) (quoting *In re Madison Hotel Assocs*., 749 F.2d 410, 424-25 (7th Cir. 1984)). Section 1129(a)(3) addresses the plan development process more than the content of the plan itself, taking into account the totality of the circumstances surrounding development of the plan, including even the debtor's pre-filing conduct. *See Quigley*, 437 B.R. at 125.

46. Courts have applied section 1129(a)(3) as a prohibition of "vote buying" in chapter 11 cases. *See, e.g.*, *Quigley*, 437 B.R. at 126–29 (debtor's parent wrongfully

[18] The fact that two of the Select Parties are not holders of disclosed prepetition claims or interests does not change this conclusion. However, it does raise the question why the Debtors would give apparent outsiders a special investment opportunity at the expense of their unsecured creditors. The relationship between the Debtors and these entities warrants further exploration.

manipulated the voting process in bad faith by entering into settlement agreements with select parties to incentivize voting in favor of plan). In *Pacific Drilling*, Judge Wiles expressed his view with regard to vote buying specifically in the context of an equity financing, opining that "[t]he Bankruptcy Code . . . does not permit the payment of extra compensation to large creditors in exchange for their commitment to vote for a plan." *Pac. Drilling*, 2018 Bankr. LEXIS 3024, at *6.

47. Here, approval of the Exit Financing is a condition precedent to the Debtors' emergence from chapter 11, *see* Plan § 9.1(d)–(f), and the Select Parties have committed to use commercially reasonable efforts to support the restructuring and vote in favor of the Plan. Supplement at 9. Accordingly, if the Exit Financing is approved, it could be construed as vote buying, making it impossible for the Debtors to satisfy the "good faith" requirement of section 1129(a)(3).

48. The same concerns identified in *Pacific Drilling* regarding vote buying exist in connection with the Debtors' proposed Exit Financing. In exchange for their Exit Financing commitment and support of the resulting Plan, the Select Parties will receive, among other disproportionate benefits, the exclusive opportunity to participate in the Debtors' proposed Equity Placement, which has substantial value. In contrast, the OpCo Creditor Proposal eliminates any vote buying concerns because participation in the equity financing will be available to all general unsecured creditors.

49. In sum, the Debtors' proposed Exit Financing would divert substantial value to the Select Parties for no discernable purpose other than to obtain their consent to the Debtors'

Plan. This raises acute "vote buying" concerns calling into serious question the Debtors' ability to satisfy their burden of showing good faith under section 1129(a)(3).[19]

B. The Exit Financing Would Impermissibly "Lock in" Certain Terms of Any Plan of Reorganization

50. Approval of the Exit Financing and, in particular, the Equity Placement, would dictate certain key terms of any plan of reorganization to the detriment of fulcrum general unsecured creditors. In particular, as described above, the Equity Placement provides for special allocations of Reorganized Equity and a $108 million commitment premium, each of which would be "locked in" regardless of future events in the Chapter 11 Cases, resulting in severe dilution of the equity to be distributed to fulcrum general unsecured creditors under any chapter 11 plan.

51. In the analogous *Latam Airlines* case, Judge Garrity denied a DIP financing proposal with an equity conversion feature because, among other things, it "locked in arbitrary recoveries" to certain favored parties through an "exclusive right" to obtain equity in the reorganized enterprise. *See In re Latam Airlines Grp. S.A.*, 620 B.R. 722, 813 (Bankr. S.D.N.Y. 2020). Judge Garrity found that, even though the Debtors had demonstrated a proper business justification for the DIP facility, the Debtors were "asking the Court to approve a transaction that will fix now, some of the terms of a plan yet to be filed," most notably "the right to distribute equity in the reorganized Debtors" to certain parties, which would "not be subject to court review" in connection with confirmation. *Id.* at 819. Accordingly, Judge Garrity held that the proposed financing transaction "subvert[ed] the reorganization process" and constituted an

[19] Inequitable or collusive conduct of certain of the Select Parties in connection with the Exit Financing or the Plan (as to which the Ad Hoc Group of OpCo Creditors is seeking discovery concurrently with this Objection) may justify equitable remedies, including but not limited to designation of the votes on the Plan. *See Quigley*, 437 B.R. at 130-32; *see also In re Allegheny Int'l, Inc.*, 118 B.R. 282, 293, 316-17 (Bankr. W.D. Pa. 1990) (addressing inequitable conduct in context of plan confirmation by, among other things, voiding stock purchase agreements). The Ad Hoc Group of OpCo Creditors reserves all rights with respect to such arguments.

improper *sub rosa* plan by, among other things, "dictat[ing] key terms of an eventual plan of reorganization by ***prematurely allocating reorganization value***." *Id*. at 820 (emphasis added).

52. Here, as in *Latam Airlines*, the Exit Financing prematurely allocates reorganization value to certain favored parties. This has the practical effect of dictating the terms of any plan of reorganization, "short circuiting" the requirements of chapter 11 for confirmation of a plan. The equity allocation to the Select Parties, as well as the commitment premium, should not be approved outside of the Plan confirmation process (if at all). For that reason, the Exit Financing amounts to a *sub rosa* plan of reorganization and must be denied.

C. The Exit Financing Requires Heightened Scrutiny and, Moreover, is Not a Reasonable Exercise of the Debtors' Business Judgment

53. The Debtors seek approval of the Exit Financing based on the deferential business judgment standard. Motion ¶ 42. But the business judgment standard does not apply to the proposed Exit Financing. The Exit Financing provides for specific equity allocations to the Select Parties, some of which indisputably are insiders of the Debtors or otherwise have close relationships with the Debtors' fiduciaries. Specifically, the Exit Financing allocates rights to purchase Reorganized Equity to Delta ($100 million allocation)[20] and the Board Member Investors ($20 million allocation).[21] Supplement at 4, 9. In fact, the aggregate value that Delta would receive under the Exit Financing and the related Plan is estimated to be approximately ***$520 million***.[22] Delta and the Board Member Investors meet the statutory definition of "insiders." *See* 11 U.S.C. § 101(31) (defining insider to include, among other entities,

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[20] As of the Petition Date, Delta held 51.3% of the economic interests and 49% of the voting rights in the Debtors. Disclosure Statement at 13. In addition, at least three members of the Debtors' board of directors have close connections with Delta. *Id*. at 19–20.

[21] The Board Member Investors include four members of the Debtors' board of directors: Eduardo Tricio Haro, Antonio Cosío Pando, Valentín Diez Morodo, and Jorge Esteve Recolóns. Disclosure Statement at 18–22; Supplement at 2.

[22] *See, e.g.*, Parkhill Tr. at 76:10-77:10.

(i) directors of the debtor, and (ii) "affiliates" of the debtor, *i.e.*, an entity that holds 20 percent or more of the outstanding voting securities of the debtor). The presence of a director on both sides of a transaction suffices to rebut the business judgment rule. *See Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618, 638 (Del. Ch. 2013).[23]

54. Because the Exit Financing is a transaction that allocates Reorganized Equity to insiders, it must satisfy the entire fairness standard. *See In re Latam Airlines Grp. S.A*., 620 B.R. 722, 771 (Bankr. S.D.N.Y. 2020) (applying entire fairness standard in reviewing entire DIP financing holistically—not just the portion that was an insider transaction—because certain proposed lenders were shareholders with right to appoint board members); *In re Innkeepers USA Tr.*, 442 B.R. 227, 231-35 (Bankr. S.D.N.Y. 2010) (heightened scrutiny/entire fairness standard potentially applicable to decision to assume plan support agreement because, among other things, it was not a "disinterested business transaction" in that prepetition equity owner was intended to receive equity as part of the proposed transaction).[24] The special treatment of insiders in connection with the Exit Financing is not a hypothetical concern here: the Debtors' investment banker testified at his deposition that ***the support of those insiders was a principal determinant of viability for any exit financing proposal***.[25] The Board Member Investors and Delta's

[23] *See also Marciano v. Nakash*, 535 A.2d 400, 404 (Del. 1987) (applying entire fairness standard where interested directors provided debt financing to corporation); *cf. Rosenberg v. Oolie*, No. 11,134, 1989 WL 122084, *4–5 (Del. Ch. Oct. 16, 1989) (assuming that entire fairness standard applied where interested directors provided financing to corporation through a bridge loan with warrant coverage).

[24] *See also In re Wingspread Corp*., 92 B.R. 87, 93 (Bankr. S.D.N.Y. 1988) (transactions with insiders "are necessarily subjected to heightened scrutiny because they are rife with the possibility of abuse"); *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (actions of conflicted insider must "be subjected to a scrutiny even higher than that usually accorded the debtor's management"); *cf. Gross v. Russo (In re Russo)*, 762 F.2d 239, 242–43 (2d Cir. 1985) (reversing decision *per se* disqualifying former fiduciary from engaging in transaction with debtor, but remanding to bankruptcy court for further fact-finding to determine whether fiduciary took "unfair advantage").

[25] *See* Parkhill Tr. 98:24–100:4 ("[The OpCo Creditor Proposal assumes that the treatment for the Mexican shareholders, the Mexican investors and Delta Airlines is going to remain the same and that those parties will accept the same treatment, the same in terms of equity percentages, but different in terms of the value. Because . . . in this proposal, every percentage of equity is worth less. So even though Delta Airlines is being offered in this

representatives on the Debtors' Board actively and repeatedly made their positions on the various exit financing proposals known to the entire Board and to the Restructuring Committee,[26] and in fact negotiated for their own recoveries under the Exit Financing.[27]

55. The entire fairness standard involves two prongs—fair price and fair dealing—and ***it is the Debtors' burden to prove both***. *Latam*, 520 B.R. at 771. Fair dealing relates to questions of process and the conduct of corporate fiduciaries, including how the transaction was initiated, structured, and negotiated. *See id*. at 773–74 (quoting *Carlson v. Hallinan*, 925 A.2d 506, 531 (Del. Ch. 2006)). Fair price relates to the substantive "economic and financial considerations" involved in a fiduciary's decision to enter into a transaction, including any factors "that affect the intrinsic or inherent value of a company's stock." *Id*. at 790 (quoting *Weinberger v. UOP, Inc*., 457 A.2d 701, 711 (Del. 1983)).

56. In this case, the Debtors are unable to satisfy either prong of the entire fairness standard. Publicly-disclosed information raises serious concerns about fair dealing in the Exit Financing process, including how the proposed transaction was negotiated, the conduct of the Debtors' fiduciaries, and conflicts of interest. For example:

- Delta and the Board Member Investors, who are all insiders of the Debtors, had fundamental conflicts of interest in connection with the exit financing, and will receive special financial benefits if the transaction is consummated. Given the close relationships between those insiders and the Debtors' Board of Directors, the conflicts of interest could be imputed to the Debtors' entire Board of Directors, thereby tainting the entire exit financing process.

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hypothetical proposal and the alternative term sheet 20 percent it's not worth the same as it would be in the context of the agreement that's in front of the court. Similarly, the same with Mexican investors . . . . ***And so unless . . . the Mexican investors and Delta say this is a proposal that we're willing to support . . . that proposal is not operable***.") (emphasis added).

[26] *See, e.g.*, Parkhill Tr. at 55:20-56:7; 61:8-63:2; 65:17-66:19; 72:5-73:12; 89:23-91:3.

[27] *Id.* at 86:12-17 ("Q: Did the Mexican investors through their advisors or directly, did they negotiate for the 4.2 percent equity in the reorganized debtors that they're getting? A: they did.").

- Delta acquired a significant interest in the Tranche 2 DIP Loans in November 2020, putting Delta's economic interests in the exit financing directly adverse to those of the Debtors in certain key respects. But Delta did not disclose that parochial interest to the Debtors until June 2021, after the exit financing process had already begun. Upon information and belief, the Debtors made no meaningful governance changes after learning of this conflict of interest.

- The competitive bidding process collapsed—and the Debtors abruptly concluded the exit financing process—as soon as they had a proposal that was supported by the parties the Debtors viewed as necessary for a viable exit financing: Apollo, Delta, the Board Member Investors, and a smattering of creditors.

- Just as the exit financing process was nearing a successful outcome, the Debtors stopped negotiating separately with each competing bidder and pivoted to a joint negotiation, resulting in value-destruction for unsecured creditors. It is axiomatic that competitive bidding is desirable in seeking the highest value for the estate. It is therefore cause for concern when an estate fiduciary permits two groups that are aggressively bidding against each other to team up and allocate the value as they see fit, particularly when nobody present in that joint effort was looking out for unsecured creditors, *i.e.*, the group that was unknowingly funding the value necessary to satisfy both bidders.

57. Further, the Debtors have not obtained the highest and best economic result because the OpCo Creditor Proposal is better and cheaper than the Exit Financing. If bidding on the Exit Financing were to continue, the Debtors would very likely achieve an improved economic outcome for the estates. Accordingly, the Debtors cannot state that they have obtained a fair price.

58. Undoubtedly, full discovery pursuant to Bankruptcy Rule 2004, or otherwise in connection with a hearing on confirmation of the Plan, would provide deeper understanding of these issues, and could uncover additional process concerns. Regardless, it is not the objectors' burden to prove that the process was tainted; rather, it is the Debtors' burden to prove that the process was entirely fair. The Debtors cannot meet that burden, which is fatal to the Exit Financing.

59. Moreover, entering into the Exit Financing would not even be a reasonable exercise of the Debtors' business judgment because the Debtors have failed to meet their duty to maximize the value of the estate. *See Innkeepers USA*, 442 B.R. at 235 ("[I]t is 'Bankruptcy 101' that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate, and each of the estates in a multi-debtor case."). Indeed, the Debtors will not be able to present any evidence that their fiduciaries gave proper consideration to the OpCo Creditor Proposal.[28] After calculating that the OpCo Creditor Proposal would be marginally worse for Apollo, Delta, and the Board Member Investors—because, despite receiving the same percentage of equity, the equity will be struck at a higher plan value—the Debtors' advisors concluded that the proposal was not actionable and no further consideration was given, nor was there any discussion with the interested parties.[29] With their primary focus on the economics being allocated to the Select Parties, the Debtors lost sight of the fact that striking the equity at a higher plan value ***benefits unsecured creditors***.

60. As Judge Wiles pointed out in *Pacific Drilling*, in evaluating a proposed equity financing under the business judgment standard, courts should be mindful that an equity financing has "no practical effect on the Debtors themselves" and "the real effect is on other creditors, because the issue of the added shares dilutes the value of the shares that those other creditors will receive." *See Pacific Drilling*, 2018 Bankr. LEXIS 3024, at *14 (Bankr. S.D.N.Y. Oct. 1, 2018). Accordingly, the relevant consideration is the core bankruptcy principle of "equal

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[28] *See, e.g.*, Parkhill Tr. at 185:5-25 ("Q:…[I]s it fair to say that sitting here today, you can't testify that you know that the ad hoc group's proposal has been presented to the restructuring committee of the board? A:…I can't tell you definitively that it has. Q:…That's fine, I only want to know what you know. You don't know whether it has or it hasn't; is that fair? A: I don't know definitively whether it has or hasn't."); 188:5-7 (noting that the Debtors are "not moving away from the current [Exit Financing]").

[29] *See* Parkhill Tr. 102:1–4 ("I haven't reached out and asked specifically the Mexican investors or Delta Airlines whether or not they would support a proposal that doesn't work, no.").

treatment of similarly situated creditors, which is more a matter of bankruptcy philosophy than it is a matter of business judgment." *Id.* at *14. As set forth above, the Debtors' proposed Exit Financing fails that fundamental bankruptcy philosophy test.

61. A reasonable exercise of business judgment here would be to reopen the bidding on the Exit Financing—on a very expedited basis—to find the best possible solution for the Debtors' estates: one that provides all general unsecured creditors with an equal opportunity to participate. The Debtors have declined to do so, instead proceeding with an option that diverts value to a select few. The Debtors cannot justify the value exclusively provided to the Select Parties, and so the Exit Financing must be denied.

D. The OpCo Creditor Proposal is Objectively Better than the Exit Financing

62. The Court should deny the Exit Financing Motion for an additional reason: the alternative OpCo Creditor Proposal is less expensive and enhances recovery for the Debtors' general unsecured creditors. The Debtors cannot justify proceeding with the Exit Financing while a superior deal is on the table. *See In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551–54 (Bankr. S.D.N.Y. 1997) (denying motion to approve letter agreement that would "put into motion" anticipated transaction because of "insufficient record . . . to suggest that this transaction is in the best interests of the estate," noting debtor's failure to explore alternative offers "defies any explanation").

63. As set forth on **Exhibit 1**, the OpCo Creditor Proposal is objectively superior to the Exit Financing for at least the following reasons:

- ***First,*** the OpCo Creditor Proposal offers participation rights in the equity financing on a pro rata basis to all general unsecured creditors, not just the Select Parties.

- ***Second***, the OpCo Creditor Proposal strikes the new money equity at a higher plan enterprise value, thus yielding significantly more value for the fulcrum general unsecured creditors.

- ***Third***, the OpCo Creditor Proposal provides incremental value to general unsecured creditors by allocating to them any excess cash over $713 million (representing cash embedded in plan equity value of $2.564 billion plus $103 million of excess cash per Disclosure Statement).

- ***Fourth***, the OpCo Creditor Proposal will raise $20 million more through equity financing than the Debtors' Equity Placement.

- ***Fifth***, the OpCo Creditor Proposal reduces the commitment premium from 15% to 12%, and makes the commitment premium available to all general unsecured creditors that exercise their right to participate in the equity financing.

64. With all of these significant improvements, the OpCo Creditor Proposal will result in significantly greater recoveries for general unsecured creditors than would the Debtors' proposed Exit Financing. The Debtors' fiduciary obligations and the statutory requirements of the Bankruptcy Code require that the Debtors work to unlock value for the fulcrum general unsecured creditors. To do that, the Debtors must engage constructively on the OpCo Creditor Proposal. If the Exit Financing Motion is approved, it will lock in $108 million of commitment premiums that must be paid to the Select Parties, regardless of future developments in the Chapter 11 Cases, including a failure to consummate such Exit Financing, further hindering the ability to provide fair value to fulcrum general unsecured creditors on account of their claims.

CONCLUSION

65. For the foregoing reasons, the Ad Hoc Group of OpCo Creditors respectfully requests that the Court deny the Exit Financing Motion.

Dated: December 2, 2021
New York, New York

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EXHIBIT 1

Side by Side Comparison
Existing Proposal vs. OpCo Creditor Proposal

TERM	EXISTING PROPOSAL	OPCO CREDITOR PROPOSAL[1]	COMPARATIVE TERMS OF PROPOSALS
Excess Cash Treatment > $713 million[2]	*Flows through to post-reorg equity*	*Distributed to OpCo GUCs*	**~$90 million** *higher* to OpCo
Aerovias GUCs Claim Treatment (est.)[3]	17% recovery	26% (34%)[4] recovery	*Approximately 47% increase in recoveries exclusive of New Money rights allocation*
Aerolitoral GUCs Claim Treatment (est.)[3]	3% recovery	5% (6%)[4] recovery	*Approximately 60% increase in recoveries exclusive of New Money rights allocation*
Aerocargo GUCs Claim Treatment (est.)[3]	17% recovery	26% (33%)[4] recovery	*Approximately 60% increase in recoveries exclusive of New Money rights allocation*
Participation Rights[4]	N/A	1% - 8%[4] recovery	*Available to all OpCo GUCs*
Plan Total Enterprise Value[5]	$5.4 billion	$5.45 billion	**$50 million** *higher* TEV
New Money Equity Investment[5]	$720 million	$740 million	**$20 million** *increase* in New Money Equity Investment
Commitment Premium	*15.00%*	*12.00%*	*20% Commitment Premium reduction*
New Money Debt Investment	$762.5 million	Same	Same
Pro Forma Net Debt (est.)	~$2.7 billion	~$2.7 billion	Comparable
Double Dip Claim Treatment	$450 million cash + equity 100% recovery in cash and equity	Full par + accrued cash repayment 100% recovery in cash	Renders "double dip" claims unimpaired

[1] After discussions with the Creditors' Committee, the OpCo Creditor Proposal was enhanced to distribute to the OpCo general unsecured creditors in proportion to the recovery of Classes 3(c), 3(d) and 3(e) in the Plan, i.e. 95.7% to Class 3(c), 4.2% to Class 3(d), and 0.1% to Class 3(e): (i) any excess cash over $713 million (representing cash imbedded in Plan Equity Value of $2.564 billion plus $103 million of Excess Cash per Disclosure Statement), and (ii) participation rights in the New Money Equity Investment.[2] Plan Equity Value of $2.564 billion plus $103 million of disclosed Excess Cash per Disclosure Statement. For purposes of recoveries, both proposals assume $829 million cash available upon emergence.

[3] Represent Disclosure Statement's low-end claim values of (i) $1.79 billion at Aerovías, (ii) $419 million at Aeroméxico Connect (Aerolitoral), (iii) and $1.2 million at Aeroméxico Cargo.

[4] The recovery in bracket represents a recovery percentage that includes participation rights with the assumption that 50% of OpCo GUCs participate in the New Money Equity Investment. Participation rights would be offered to GUCs at Aerovías, Aeroméxico Connect (Aerolitoral), and Aeroméxico Cargo in proportion with the current recoveries under the Disclosure Statement.

[5] Enterprise values exclude consolidation impact of PLM loyalty program (2019 EBITDA ~$85 million). Both proposals include $375 million requested by Debtor to pre-fund acquisition of PLM minority stake; Debtor has a seven-year option to acquire minority stake at greater of $400 million or 7.5x EBITDA