IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: Eletson Holdings Inc., *et al.*, [1] Debtors.	Chapter 11 Case No. 23-10322 (JPM) (Jointly Administered)

DEBTORS' POST CONFIRMATION HEARING BRIEF IN SUPPORT OF DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION OF DEBTORS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND RESOLUTION OF THE DEBTORS' OBJECTIONS TO THE PURPORTED CLAIMS OF ALLEGED CREDITORS OF THE DEBTORS' ESTATES

[1] The Debtors in these chapter 11 cases are: Eletson Holdings Inc. ("Holdings"), Eletson Finance (US) LLC, and Agathonissos Finance LLC.

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The above captioned debtors and debtors-in-possession (collectively, the "Debtors") by and through their undersigned counsel hereby submit this brief (the "Brief") in further support of (i) the confirmation of the Debtors' *Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code* [Dkt. 1111] (the "Plan"), and (ii) resolution of the Debtors' objections to the purported claims of certain alleged creditors.[2]

PRELIMINARY STATEMENT

1. At the Confirmation Hearing, Debtors provided testimony and evidence demonstrating that their Plan is confirmable. Debtors' Plan is supported by the votes of four accepting classes of creditors, is fair and equitable, and does not discriminate unfairly against the classes of creditors that voted to reject the Plan. The Confirmation Hearing also exposed the tangled relationship among the Committee, Exchange Note Trustee, competing plan proponent Pach Shemen, and their counsel, all acting in concert. The proof showed that the challenges to the Plan, and to the Debtors throughout these Chapter 11 Cases, were the product of coordinated efforts to stymie the Debtors' reorganization efforts and effect a bad faith "bankruptcy strategy." Blatant examples of this coordination include the Petitioning Creditors' and Committee's ("Objectors") objections to literally 100% of Debtors' professional's fees and the tag-team of Committee/Pach Shemen at the hearing. These and other bad faith tactics forced Debtors to spend not just on its own counsel but on Murchinson's counsel as well. The bad faith exacerbated prior illegal conduct and weaponized this very proceeding. This Court can and should remedy that now.

2. The Confirmation Hearing showed that the Plan provides Debtors' creditors, even Pach Shemen (in the event it is found to hold valid claims that are not subordinated), with $3-4

[2] Capitalized terms used herein but undefined have the meaning provided in the *Debtors' Memorandum of Law in Support of Entry of an Order Confirming the Second Amended Joint Plan of Reorganization of Debtors Under Chapter 11 of the United States Bankruptcy Code and Response to the Confirmation Objections of the Official Committee of Unsecured Creditors and the Petitioning Creditors* [Dkt. 1062] (the "Confirmation Brief").

million ***more*** than the $5.1 million provided to creditors under the PS Plan. The lion's share of the $53 million PS Plan "investment" in the Reorganized Debtor will line just line the pockets of itself, its affiliates, and the counsel hired by Murchinson in these cases. An additional $6.8 million purportedly being paid by Pach Shemen is to go directly to Pach Shemen's shareholders, round tripping the money while characterizing it as value provided to the Debtors' creditors. The purported "overwhelming support" of the PS Plan is also false and requires Pach Shemen (the PS Plan's sponsor and a party whose claims are the subject of pending objections) voting in favor of its own plan. When controlling for Pach Shemen, the PS Plan does not have the approval of all classes of creditors and cannot be approved pursuant to section 1129(b). More creditors by value voted for Debtors' Plan, and more creditors by value prefer Debtors' Plan.

3. Objectors' attempts to characterize the Eletson Members' investment in the Debtors' reorganization as only $37 million is equally erroneous. Not only will Debtors' Plan provide creditors more dollars on the Effective Date; further funds will flow into the Litigation Trust bolstering creditor recoveries, including over $10 million in future dollars plus an additional $40 million that the Debtors' shareholders are *guaranteeing* to escrow and then to pay to creditors in respect of the Levona arbitration award. Debtors' Plan is vastly superior for creditors.

4. Debtors' Plan is the only plan of reorganization supported by evidence of satisfaction of section 1129. Pach Shemen submitted no evidence in support of either of the Competing Plans and therefore has failed to satisfy its burden for confirmation of either Competing Plan. There was a total failure of proof.

5. Debtors' Plan is the only one that can be confirmed for another and supremely important reason. Debtors' Plan is the only one proposed in good faith with a legitimate purpose of reorganizing. The Plan and the voting tabulations are not extraordinary. What *is* extraordinary

is Murchinson's manipulating behind the scenes, represented by affiliates and controlled entities, who has insinuated itself in these proceedings by directing Wilmington and the Committee and their counsel to work for its benefit, not creditors. These bankruptcy proceedings are the continuation of a years' long effort to establish control over Debtors by whatever means necessary, including indicted bribery and proven deceit and fraud. These proceedings have always been a two-party dispute between Debtors and Murchinson (who refuses to appear here) and its pawns. These entities have knowingly acted in bad faith and taken actions designed to harm Debtors and their creditors, including by suppressing the value of the Notes, harming both the Noteholders from which PS claims to have purchased Notes at a fire-sale price, as well as other Noteholders who saw the value of their asset consequently diminished. Murchinson actively damaged the value of the Eletson enterprise to effectuate Murchinson's long-desired hostile takeover to liquidate Debtors and their affiliates. The Competing Plans—the final step in their illicit "bankruptcy strategy"—are a continuation of these bad faith efforts and will result in the destruction—and liquidation—of the Eletson enterprise, not its reorganization. Stunningly, Objectors did not adduce a single piece of evidence even attempting to refute their abject bad faith. Pach Shemen should be excluded from, and not rewarded with, obtaining equity in the Reorganized Debtors.

PLAN CONFIRMATION

6. The unrebutted testimony of Vassilis Kertsikoff ("VK") (DX-271) and Vasilis Hadjieleftheriadis ("VH") (DX-269) demonstrate that the Plan satisfies the requirements of section 1129, as do the arguments in the Confirmation Brief. Debtors here address only those provisions of section 1129(a) that parties have asserted are not satisfied by the Plan.

I. Debtors' Classification System is Permissible, Sections 1129(a)(1), 1122, and 1123.

7. "A plan proponent is afforded significant flexibility in classifying claims under § 1122(a) if there is a reasonable basis for the classification scheme and if all claims within a

particular class are substantially similar." *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992). The Plan designates classes of claims and interests based on the legal and factual differences for each Class. Further, all the Claims and Interests within the Classes established in the Plan are substantially similar to other Claims included in the same Class (9/4/24 VK Tr. at 74:8-24; 9/3/24 VH Tr. at 88:23-89:2; 9/12/24 Tr. 967:16-968:14).

8. Courts have held that a lack of similarity can be demonstrated by differences in "legal rights or bankruptcy priorities," as well as "business reasons relevant to the success of the reorganized debtor." *In re Bloomingdale Partners*, 170 B.R. 984, 997 (Bankr. N.D. Ill. 1994). The Objectors' arguments regarding the Plan's classifications system should be rejected. The Debtors have valid factual and legal justifications for the Plan classification, including the nature of the Debtors' business relationships with certain creditors (DX-271 ¶¶ 24-26, 28-34). The Committee's arguments that the Debtors have no ongoing relationship with the creditors in certain of these classes (*see* 9/11/24 Tr. at 589:5-19; 9/13/24 Tr. at 1507:13-18) is wrong, as Holdings continues to guarantee all of this debt (9/11/24 Tr. at 728:18-20). Even were it true, the assertion cannot override the Debtors' discretion in classifying their claims. There is no evidence of improper classification or manufacturing of an impaired voting class. The Plan's classifications are appropriate.

9. The Objectors' challenge regarding the treatment of Class 5 Claims is also meritless. Section 1123 provides that parties may choose less favorable treatment. *See* 11 U.S.C. § 1123. To the extent that any creditor in Class 5 receives a less favorable treatment on its claim in comparison to another creditor that has elected to be in Class 5, such an action was a knowing decision that was affirmatively made by the applicable creditor.

II. Debtors Proved that their Plan Satisfies Section 1129(a)(3)

10. The Plan was proposed in good faith as set forth in the VK and VH Declarations

(DX-271; DX-269). Notably, neither of the Objectors—manifestly working in concert—meaningfully crossed these witnesses on this issue. Of the plans of reorganization with committed financing, the Plan provides the largest recoveries to creditors on Day 1 and over time. In calculating what would be paid to creditors on Day 1, Petitioning Creditors omit Debtors' additional $7M (Petitioning Creditors Opening at slide 4). At the hearing, Debtors corrected the obvious omission of $7M of additional amounts, which leads to a greater Day 1 number: $10.88M as compared to $10.77M (9/12 Tr. at 984:20-985:22). Over time, creditors under the Debtors' Plan will earn vastly more than the "one and done" of the PS Plan. Those additional amounts to creditors under the Debtors' Plan include a new present value of an additional $8-10M (DX-322 at Ex. 3) plus an additional, guaranteed $40M that the shareholders commit on the arbitral award.

11. The Committee complains about Debtors' lack of engagement (9/11/24 Tr. at 594:16-597:9; 9/13/24 Tr. at 1509:2-25). Debtors did engage after Debtors' Plan was filed (DX-246), but are under no obligation to engage with parties pursuing a bad faith "bankruptcy strategy."

12. The Committee has revealed itself to be a wolf in sheep's clothing. The Committee, through its designee, admitted that it investigated no claims except those against the Debtors' insiders and did an arithmetic evaluation of what could be collected against Levona (Cordasco Tr. 190:8-191:12), took no action to support the Debtors' actions to prevent dissipation of estate assets by Levona (Cordasco Tr. at 104:19-22; 107:7-10; DX-245, Dkt. 747), permitted Pach Shemen's counsel to attend Committee meetings despite asserting independence from Pach Shemen (*see* Cordasco Tr. at 18:3-5), is represented by Murchinson's former counsel (*see* Dkt. 304), and incredibly permitted Dechert to be the deciding vote in the event of a split vote (*see* Cordasco Tr. 50:21-51:1). The Committee has done nothing beneficial to the Debtors' estates.

III. Debtors Proved that their Plan Satisfies Section 1129(a)(4)

13. Debtors' Plan complies with section 1129(a)(4). Despite the Committee's

assertions (*see* 9/13/24 Tr. at 1508:4-14), the Debtors have not engaged in any settlements with any creditors that have not been disclosed to the Court. Rather, as noted in the Disclosure Statement, non-Debtor Eletson Corporation ("Corp") has taken steps to reorganize its obligations, which benefits the Debtors by reducing the contingent liability of the Reorganized Debtor (*see* DX-267 at p. 22). Corp is not a debtor and is permitted to settle its obligations without oversight from the Bankruptcy Court. Further, settlements of claims and agreements to vote in favor of a plan of reorganization are not prohibited by the Bankruptcy Code. *In re GOL Linhas Aéreas Inteligentes S.A.*, 659 B.R. 641 (Bankr. S.D.N.Y. 2024) (explaining the common nature of plan support agreements); *see also In re CHC Grp. Ltd.*, 2017 Bankr. LEXIS 1016, *30-33 (Bankr. N.D. Tex. Mar. 3, 2017). Nevertheless, as VK and VH made clear, none of the bank settlements involved Holdings (9/11/24 Tr. at 764:6-8), and none of was conditioned in any way on voting in favor of the Debtors' Plan (9/11/24 Tr. at 681:17-683:8; 764:9-15). Thus, the votes of Classes 2 and 3 are valid votes in support of the Plan. Further, the willingness to settle issues and maintain relations with the Eletson enterprise is clearly indicative of a valid preference towards the Plan as these parties were free to engage in negotiations for settlement with Pach Shemen as well, and in fact, they did so (DX-326; DX-327; DX-328; DX-329; DX-332).

IV. Debtors Proved that the Plan Satisfies Section 1129(a)(11)

14. As set forth in the VK Declaration (DX-271), the testimony of VK, VH and Mr. Noletti, as well as the Supplement to Expert Report of David Nolletti ("Supp. Noletti Report") (DX-039), the Plan is sufficiently funded to ensure all Effective Date payments under the Plan are made and that sufficient cash remains to make payments to Creditors through the Litigation Trust (DX-039 at 6). Further, the Litigation Trust will be supplemented by tens of millions of dollars of additional cash to be provided to creditors (DX-322, Ex. 3).

15. The Plan provides for a $37 million Effective Date contribution of cash, a $7 million increase from the iteration of the Plan filed on July 5. This amount is backed by a binding Commitment Letter filed on September 8, 2024, supplemented on September 19 (DX-311; Dkt. 1092). No evidence was introduced rebutting the enforceability of the Commitment Letter. Pursuant to the terms of the Plan, the Voting Certification, Supp. Noletti Report, and the testimony of Mr. Noletti, on the Effective Date, Debtors will be required to make payments of approximately $28.9 million to provide for estate professional fees, allowed administrative expenses, DIP Claims, and Effective Date distributions under the Plan (DX-039 at 7). Even before the increase from $30 million to $37 million, the Plan was sufficiently funded. After the increased funding, there is no question that the Plan can address all payments required on the Effective Date.

16. With the SME Revenue, Debtors estimate a cash surplus of approximately $9.1 to $9.6 million dollars on the Effective Date (*see* DX-039; 9/12/24 Tr. at 1145:11-18). This is value that will be provided directly to the Litigation Trust for distribution to creditors in accordance with Article IV.M.9 of the Plan, assuming that the Litigation Trust Trustee does not amend the Litigation Trust Budget to hold back additional cash for recoveries. Debtors will have more than enough liquidity so make all Effective Date Distributions.

17. Debtors' Effective Date payments will be impacted by resolution of the Claim Objections discussed herein (*see infra*). The objected-to portions of the administrative claims of the Petitioning Creditors, Wilmington, and NAF total $5 million. Considering the surplus of $9-10 million, even if the Murchinson affiliated entities were to "run the table" against the Debtors, the Debtors would still have sufficient liquidity to make these payments.

18. Objectors resort to spurious arguments, through FTI, with which Dechert actively sought to exclude Debtors from the process (DX-238). ***First***, Article I.B.2 and I.B.4 provide that

the initial startup funding of the Litigation Trust shall be $200,000 (*see* Plan at Article I.B.2; I.B.4). The assertion that $3 million is needed is meaningless, as that is not what is provided for in the Plan, and the Committee and FTI do not have the authority to modify the terms of the Plan. FTI's inclusion of the $3 million startup cost is flawed and should be rejected. The Litigation Trust is a self-funding trust that will be funded with tens of millions of dollars through the Excess SME Proceeds, Collections Contribution, and Retained Causes of Action Contribution. The Litigation Trust Trustee has the authority to change the Litigation Trust Budget as necessary with consent of the Litigation Trust Oversight Committee (*see* Plan Article VI.N). The $3 million value, and the challenge to the purported feasibility of the Plan, is not based on any actual projections (9/13/24 Tr. at 1482:4-8 ("5.3 million ends up going to the trust, actually it is more than 5.3 but the trust, **we know the trustee, the trust is going to want to be adequately capitalized with 3 million**").

19. The Committee does not budget any amounts for actually investigating any Litigation Trust Causes of Action (Cordasco Report at 21) (budgeting $350,000 salary for Liquidating Trust Trustee, $100,000 for Litigation Trust Oversight Committee expenses, and remaining funds for liability insurance, accounting professionals, general expenses). Further, the Committee acknowledges that it has already spent approximately $2.5 million (83% of the asserted required Litigation Trust budget) investigating the Litigation Trust Causes of Action (9/12/24 Tr. at 1174:18-1175:19). After ten months of intensive investigations, no complaint has been filed, and only a single creditor other than Pach Shemen has elected to receive equity in the Reorganized Debtors and thus indirectly the proceeds of any actions taken against the Debtors' insiders (ECF 941 ("Lee Decl."). The phantom $3 million is trumped up to favor the Pach Shemen Plan.

20. ***Second***, the FTI analysis improperly includes a purported $6.8 substantial contribution claim in favor of Togut, attributable to the backstop fees that are payable only under

the PS Plan (9/13/24 Tr. at 1190:5-1192:2). No substantial contribution claim has been filed against the Debtors' estates (id. at 1194:2-10). FTI has nothing more than a suggestion—and a self-serving one at that. No sensitivities were undertaken for the allowance of the purported substantial contribution claim in a lesser amount, or the disallowance of the purported claim. (The backdoor attempt to cram all these unreasonable fees into the DIP financing agreement (CRX-185) fails; Debtors agreed only to DIP-related fees, which should be nominal.) "Backstop fees" are trumped up just to help Pach Shemen. *See In re Geriatrics Nursing Home*, 195 B.R. 34, 39-40 (Bankr. D.N.J. 1996) ("where creditor self-interest appears to dominate a creditor's actions" and "where it appears that the goal of the creditor has been acquisition of the debtor entity or its assets, courts have uniformly rejected administration expense claims for substantial contribution")

21. The appropriate standard for satisfaction of section 1129(a)(11) is that the plan has a reasonable likelihood for success. *Drexel Burnham*, 138 B.R. at 762 ("'It is not necessary that success be guaranteed, but only that the plan present a workable scheme of organization and operation from which there may be a reasonable expectation of success' . . . The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since guarantee of the future is not required." (emphasis and citations omitted)); *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986) ("Guaranteed success in the stiff winds of commerce without the protection of the Code is not the standard under § 1129(a)(11)."). The Cordasco Report is inherently flawed and does not accurately reflect the payments provided for and required under the Bankruptcy Code and the Plan. As set forth by Mr. Noletti and the Supp. Noletti Report, the Debtors have sufficient liquidity to address all payments required under the Plan even if all the Claim Objections fail (DX-039). Debtors have proved that the Plan is feasible by a preponderance of the evidence as required by section 1129(a)(11).

V. Debtors Proved that the Plan Satisfies Section 1129(b)

22. No evidence was offered to rebut the Debtors' evidence that the Plan is fair and equitable and does not unfairly discriminate. Whether a plan unfairly discriminates is evaluated on a case-by-case basis based on the totality of the circumstances present in the chapter 11 case. *See In re 203 N. LaSalle St. Ltd. P'ship,* 190 B.R. 567, 585 (Bankr. N.D. Ill. 1995), aff'd, 195 B.R. 692 (N.D. Ill. 1996), aff'd, 126 F.3d 955 (7th Cir. 1997), *rev'd on other grounds*, 526 U.S. 434 (1999). Unfair discrimination under section 1129(b) is meant to determine whether the *dissenting* classes are being provided with significantly lower recoveries or materially greater risk. *In re Sabine Oil & Gas Corp*., 555 B.R. 180 (Bankr. S.D.N.Y. 2016). Here, the dissenting classes are all receiving *greater* cash recoveries than the classes that have accepted the Plan. Two of these Classes (Class 4 and Class 5) are entitled to payment on the Effective Date. The remaining Class 6 will receive the largest Cash distribution of any Creditor Class.

23. To be fair and equitable, the Plan must satisfy the new value exception. *See In re RAMZ Real Estate Co., LLC*, 510 B.R. 712, 718 (Bankr. S.D.N.Y. 2014). The Shareholder New Value Contribution consists of at least $87 million originating outside of the Debtors' corporate structure, represents a contribution of 17.9% to 44.2% of the general unsecured claims to be discharged pursuant to the Plan, is money or money's worth, is necessary to the Debtors' reorganization and is reasonably equivalent to the Debtors' equity value and enterprise value.

24. After attempting to introduce uncertainty, Objectors assert that the Collections Contribution is not money or money's worth as it is not a payment made on or before the Effective Date (9/11/24 Tr. at 516:23-517:3; 582:22-25). The Collections Contribution, especially now with the $40 million *guarantee*, is the most substantial form of consideration among the three plans of reorganization. It cannot be discounted based on Objectors' false timing issue.

25. This case presents a unique set of facts that Debtors believe is a matter of first

impression in this bankruptcy context. The Arbitration Award is enforceable against Levona, an alter ego and affiliate of Pach Shemen. But for Levona's machinations, the Award would have already been turned into cash available to creditors. Pach Shemen, the affiliate who initiated these bankruptcy proceedings to assist Levona's efforts in the Arbitration, seeks to push through its Competing Plans for the benefit of Levona and Murchinson on the argument that the award against its affiliate is not valuable. This Court should reject that bad faith effort.

26. The Collections Contributions is "money or money's worth," derived from the value of a confirmed arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), to which 172 countries are a party. The Supreme Court has indicated that, to be "money or money's worth," a contribution should have a "place in the asset column of the balance sheet of the new [entity]." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 204 (1988). Evidence of this is that something can "be exchanged in any market for something of value to the creditors today." *Id*. The Arbitration Award satisfies the guideposts laid down by the Supreme Court.

27. The Arbitration Award is a "non-domestic" arbitral award. "Once a nondomestic arbitral award has been confirmed, it becomes a court judgment and is enforceable and entitled to full faith and credit in any other court in the United States." *CBF Industria de Gusa v. AMCI Holdings, Inc*., 850 F.3d 58, 74 (2d Cir. 2017). "Confirmation" is the operative event under the New York Convention that renders an arbitral award enforceable. "[R]eview of arbitral awards under the New York Convention is very limited." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005). And "courts can 'enforce [a] judgment'…while it is being appealed." *Zaks v. Mosdos Chofetz Chaim, Inc*., 2022 U.S. Dist. LEXIS 180742, at *17 (S.D.N.Y. Oct. 3, 2022).

28. It follows that the confirmed Award is a valuable asset. *See, e.g., SEC v. Fifth Ave. Coach Lines, Inc*., 289 F. Supp. 3, 36 (S.D.N.Y. 1968) ("a judgment is an asset, and it can be said to be an 'evidence of indebtedness'"). General accounting principles support this understanding. Accounting Standards Codification 860-10-55-10 states that "when [a] judgment becomes enforceable by a government or a court of law and is thereby contractually reduced to a fixed payment schedule, the judgment would be a financial asset." Corp's share of the Arbitration Award treats the recover as an asset; it appears on the Holdings general ledger as "other income" on the profit/loss statement and as a prepaid expense/other asset on the balance sheet (DX-341, Line 14070). Additionally, judgments are freely, and frequently tradable in the market, for value, and would be of interest to litigation funders. Here, the Convention focuses on "awards," not judgments, permitting enforcement actions without a judgment. *See, e.g.*, Convention Art. III ("Each Contracting State shall recognize arbitral awards as binding."). Dr. Furchtgott-Roth testified that, based on personal knowledge, litigation funders would be available to fund the Debtors' Litigation Trust. (*see e.g.*, 9/12/2024 Hr'g Tr. at 922:13-923:7).

29. Although the collection of the Final Award is not yet on a fixed pay schedule, three realities create a similar effect. *First*, both the Worldwide Freezing Order in the British Virgin Islands (DX-340) and the Lift-Stay Order (Dkt. 23) ensure that Levona's assets (in excess of $80 million, even after the unlawful Levona siphoning (9/11/24 Tr. at 684:12-685:16)) will not be dissipated or encumbered. *Second*, Pach Shemen, as an alter-ego of Levona, should be estopped from arguing that the Collections Contribution is not money or money's worth, whereas Levona is responsible for interfering with collection. And *third*, the fact that a binding commitment now exists to escrow an additional $40 million and pay it to creditors in the event the Award is not collected first is as clear an indication as one can get that the Award is money or money's worth.

30. To the extent the creditors use Judge Liman's most recent opinion (D. Ct. ECF 162) to call the confirmed Final Award into question, those concerns have little force. Judge Liman made no findings (*id*. at 1 n.1; Dkt. 1135; *id.*, Ex. A at 15:8-14). Levona will try other delay tactics after this one fails. That is no reason to ignore the strong public policy animating the Convention.

31. The Collections Contribution alone is estimated to provide an additional $50 million to the Debtors' estates (9/11/24 Tr. at 683:20-684:11), compared to the total $53 million investment provided for by the PS Plan. Yet even excluding the Collections Contribution, Debtors' Plan gives greater value to creditors than the $10.8 million under the PS Plan (DX-111; DX-322). It would be counterproductive to the maxims of maximizing creditor recoveries and equitable resolutions set forth in the Bankruptcy Code to allow a plan that provides a smaller recovery to creditors to go forward because the Debtors will not provide the largest source of creditor recovery on the Effective Date, and the inability to provide said recovery on the Effective Date is a direct result of the competing plan proponent and its affiliates.

32. The Shareholder New Value Contribution is also necessary. As set forth in *In re Coltex,* new value provided by a shareholder is necessary where the shareholder is "**willing to contribute more money than any other source** or it must be the lender of 'last resort.'" *BT/SAP Pool C Assocs., L.P. v. Coltex Loop Cent. Three Partners, L.P.*, 203 B.R. 527, 535 (S.D.N.Y. 1996) (emphasis added), *aff'd*, 138 F.3d 39 (2d Cir. 1998). There is no dispute that in terms of committed financing with a viable source of payment, the Plan provides the greatest monetary investment in or from the Reorganized Debtor, far more than double that of the PS Plan. Further, Pach Shemen's argument that a competing plan of reorganization precludes a new value plan, even if that plan provides greater value to creditors, is unsupported by case law. *See e.g., In re Walden Palms Condo. Ass'n*, 625 B.R. 543, 552 (Bankr. M.D. Fla. 2020); *accord In re Eletson Holdings*

Inc., 659 B.R. 426, 452 (Bankr. S.D.N.Y. 2024)("one of the methods for potentially confirming a 'new value plan' is through the competing plan process.") (citation omitted). Pach Shemen's interpretation of *Coltex* unsurprisingly lines up with Pach Shemen's distorted view of the world, whereby it should be allowed to purchase the equity of the Debtors at the expense of other creditors, and Debtors should not be permitted an opportunity to effectuate a reorganization for no reason other than Pach Shemen does not want them to. Debtors Plan is the only confirmable one.

33. Debtors' September 7, 2024 commitment letter, as supplemented with the escrowed guarantee of the additional $40 million on September 19, evidences that Debtors have the funds necessary for Debtors' Plan (DX-311). That should be sufficient. The Competing Plans cannot meet the standard that the Objectors attempt to apply to Debtors' Plan. For example, Pach Shemen has failed to provide any proof of funds for the additional $10 million recently added to the PS Plan (less than $2 million of which actually will go to creditors—perhaps much less). Pach Shemen's own September 10 commitment letter gives Pach Shemen discretion to back out of the commitment letter: (1) if the Confirmation Order is not entered "in form and substance satisfactory to the Backstop Party", (2) and if not closed by November 30, which it can control simply by appealing and not consummating the Rights Offering by November 30 (Dkt. 1109 at 2).

34. Petitioning Creditors want to mindlessly compare $53.5M to $37M. The proper comparison is how much is going to creditors. Of the PS Plan's recent $10M increase, for example, less than $2 million is actually going to creditors (see 9/12/24 Tr. at 986:20-987:11). As Dr. Furchtgott-Roth proved, $53.5M is not really $53.5M, and $37M is not really $37M. Dr. Furchtgott-Roth provided unrebutted analysis that the $53.5M of the PS Plan is closer to $41.2M if the Levona claim is included (as it should be absent a confirmed stipulation by Levona that it is withdrawing the claim as against *all* Plans) and once the backstop is taken out (DX-322 at Ex. 1;

9/12 Tr. at 915:6-19). Then, reducing by creditor claims, the net amount of the PS Plan is $**5.1M**. The net amount of the Debtors' Plan is $**8.1M** and likely higher (DX-322 at Ex. 2; 9/12 Tr. at 915:9-15; 921:3-18, adjusting for the recent Debtor Plan modification). Debtors' Plan provides more overall recovery to creditors than the PS Plans (9/12 Tr. at 974:16-975:21; DX-322 at Exs. 1-2).

35. Dr. Furchtgott-Roth's charts, and the data from Debtors' experts that he relies on, are the only reliable information before this Court. For the benefit of the Court, we set forth here the relevant information.

36. To begin, the updated information from Dr. Furchtgott-Roth concerning what Pach Shemen will deliver to creditors is as follows:

Exhibit 1

Modified FTI Schedule C.1—GUC Cash Option Distribution
(in millions)

	PC Plan	
Total GUC Cash Pool Claims		$270.8
(/) Total Claims in Class 3	$	486.0
(=) Claimants in GUC Cash Pool as % of Total Claims in Class 3		56%
(x) Maximum GUC cash Pool Amount	$	16.5
Total GUC Cash Option Distribution	$	9.2

Total Payout	$	9.2
Total Cash Pool Claims		$270.8
Percentage recovered under Pach Shemen Plan		3.4%

As Dr. Furchtgott-Roth demonstrated, with even just the amounts in the Litigation Trust excluding the arbitral award and excluding the guaranteed payments of $40 million in respect of the Award, creditors under the Debtor's Plan will reap far more than they will from the Pach Shemen Plan (9/12 Tr. at 974:16-975:21; DX-322 at Exs. 1-2).

37. Second, updating the prior information with the reversion of the Debtors' Class 5 payout to the $1.2 million payout described in the Riveron Rebuttal report, the numbers are as follows (DX-322 at Ex. 2, updated):

Exhibit 2

		PC Plan	Debtors' Plan
	Initial Cash	**$53.5**	**$37.0**
	Plan Proponent and Prof. Backstop Fees	**$6.8**	
	Net value of Plan before creditor claims	**$46.7**	**$37.0**
	Disputed claims	$ 6.4	$ 1.5
	Net value of Plan after disputed claims	$ 40.3	$ 35.5
a	U.S. Trustee Fees	0.3	0.3
a	Professional Fee Claims	9.2	9.2
a	Committee Professional Fees	7.9	7.9
a	DIP Claims	7	7
a	Litigation Trust Start up		0.2
a	Azure Guaranty Recovery		0.2
a	Corp Guaranty Recovery		1
b	Class 3 Claims, GUC Option	9.2	
b	Trade Creditor Recovery	1.6	0.4
a	Noteholder election distribution		1.2
	Total estimated Effective Date Distributions	35.2	27.4
	Net amount available on Day 1	$ 5.1	$ 8.1

a Riveron Supplemental Report, p. 5
b FTI Report, p. 16.

The Day 1 surplus is $5.1 million for the PS Plan (9/12 Tr. at 921:3-14). The $8.1 million for the Debtors' Plan is a lower bound because it does not include additional millions available from the Litigation Trust on Day 1 (DX-322 at Ex.2).

38. Finally, the Litigation Trust Fund numbers, which will deliver significant additional value to creditors only under Debtors' Plan, are as follows (DX-322 at Ex. 3, updated):

Exhibit 3

Litigation Trust Fund
Day 1 Value

Day 1 surplus	$	8.1
Litigation Trust startup	$	0.2
SME	$	1.0
Guarantee (escrow)	$	1.0
Total Day 1 value	$	10.3

The above numbers do not include the subsequent $5-10 million in SME payouts to creditors. Nor does it include anything other than the first million dollars of the guaranteed payment from the shareholder for the arbitration award. That guaranteed amount is $40 million, which will be escrowed for the benefit of creditors and will be paid unless larger amounts collected from Levona are recovered and paid to creditors first.

CREDITORS PREFER DEBTORS' PLAN

39. Dr. Furchtgott-Roth, through expert reports and examination, credibly demonstrated three major points that Pach Shemen and the Committee cannot dispute. *First*, when looked at from the only reasonable vantage point—value to creditors other than Pach Shemen and its coconspirators—the Plan delivers more value to those creditors than does either Pach Shemen plan (9/12 Tr. at 975:9-21). *Second*, after properly excluding Pach Shemen, Debtors' Plan receives

more votes by amount ***and*** by preference than the Competing Plans (DX-110 at Ex. 6; 9/12 Tr. 966:17-967:10, 973:14-974:16). *Finally*, after excluding Pach Shemen, Pach Shemen does not carry its own class even under its own plan (DX-110 at Ex. 4; 9/12 Tr. at 968:24-970:12).

40. Pach Shemen attacks Dr. Furchtgott-Roth's Exhibits 5 and 6 from his Rebuttal Report (DX-110 at Exs. 5-6) on the basis that they are based on "Preference Votes" for a Plan, rather than "Plan Acceptance" votes. In fact, when Pach Shemen is excluded, even looking at "Plan Acceptance," the accounts accepting the Debtors' Plan have greater value than the accounts accepting the PS Plan (DX-110 at Ex. 6; 9/12 Tr. 966:17-967:10, 972:5-973:13).

41. Pach Shemen's assertion that creditors "overwhelmingly" reject Debtors' Plan and "overwhelmingly" accept the PS Plan is false (*see* Pach Shemen Closing at Slides 9-24). Majority acceptance of the PS Plan disappears if the Pach Shemen votes are disallowed; nearly 90% of creditors (by value) prefer Debtors' Plan (DX-110 at Ex. 6).

42. There are only 85 total accounts that voted (DX-110 at Ex. 5; 9/12 Tr. 971:9-23 ("The total number that voted for anything would be 85."). If this were a matter of just "voting", then the total number of votes should not exceed 85. However, Pach Shemen's Closing Slides (like the Committee's), prepared by counsel, not experts, over and over again tally 116 "votes," (plus 4 for OCM), or a total of 120 votes. The excess is at least 31 votes, reflecting some, but not all, of the accounts that voted in favor of more than one plan. Pach Shemen is counting "preferences"—which is precisely what Dr. Furchtgott-Roth and Lee have done in their analyses (DX-110 at Ex. 6; DX-012 at Ex. A). The Court should credit Dr. Furchtgott-Roth and Lee's analysis rather than Pach Shemen's argument.

OBJECTORS' COMPETING PLANS CANNOT BE CONFIRMED

43. Debtors' Plan is the only plan of reorganization filed in these Chapter 11 Cases that should be found confirmable. The Competing Plans cannot be confirmed as there was no evidence

introduced that the Competing Plans satisfy the requirements of section 1129, and they fail to satisfy the requirements of section 1129(a)(3) as well because they are in abject bad faith.

44. "The proponent of the confirmation of a plan must prove by a preponderance of the evidence that it satisfies the relevant requirements of 11 U.S.C. § 1129(a), and if the plan is not fully consensual, 11 U.S.C. § 1129(b)." *In re Breitburn Energy Partners LP*, 582 B.R. 321, 349 (Bankr. S.D.N.Y. 2018). Opening and closing statements, and arguments by counsel are not evidence or admissible forms of evidence. *Bell v. Constr. & Gen. Bldg. Laborers' Local 79*, 2011 U.S. Dist. LEXIS 95956, at *9 (S.D.N.Y. Aug. 24, 2011) ("[S]tatements made during arguments are not evidence at all . . . ."); *United States v. Bright*, 2022 U.S. Dist. LEXIS 124228, at *3 (S.D.N.Y. July 13, 2022) ("attorney's opening statement--not evidence and hardly conclusive").

45. Arguments are all Pach Shemen has. Pach Shemen did not present *any* evidence that the Competing Plans satisfy the requirements of section 1129. Pach Shemen's single witness—Adam Spears—was presented through admission of a declaration (*see* Dkt. 1023 (the "Spears Declaration")), which did not present any evidence of the confirmability of either Competing Plan. In fact, this sole declarant explicitly refused to testify on the confirmability of the Competing Plans in his 30(b)(6) deposition, repeatedly asserting privilege (over 80 times), even to factual questions (*see e.g.,* 9/3/24 Spears Tr. at 99:9-100:25; 106:4-12). Further, none of the documentary evidence presented by Pach Shemen speaks to the confirmability of the Competing Plans. Nearly all of Pach Shemen's exhibits were aimed at discrediting Debtors' Plan. Pach Shemen had the affirmative burden to prove that the Competing Plans are confirmable. There is a complete failure of proof making a finding of confirmability impossible under section 1129.

46. Pach Shemen's bad faith additionally warrants rejection of the Competing Plans. *See In re Noll*, 172 B.R. 122, 124 (Bankr. M.D. Fla. 1994) ("The requirement of the Code that the

Plan must be proposed in good faith is mandatory and is a condition precedent to confirmation. § 1129(a)(3).”). The bankruptcy proceedings are the extension of a years-long two-party dispute, where Levona and by extension Pach Shemen (shell entities created by Murchinson), have engaged in fraud (DX-095 DX-075; DX-161), bribing an officer of the Debtors (DX-160; DX-179; DX-180; DX-181; DX-182), using the Debtors' law firm to work against the interests of its incumbent client (*see e.g.,* DX-183; DX-184, DX-001(I); DX-001(J); DX-002(R)), persuading financial institutions to arrest vessels (DX-184), engaging in commercial warfare for years to destroy a business for the purpose of buying its assets at fire sale prices (DX-075; DX-186; DX-189). These actions were taken with the intent ultimately of severely harming Debtors and their creditors by misusing the Bankruptcy process itself (DX-161; DX-186; DX-189; DX-190).

47. Murchinson and its proxies have initiated endless litigation against Holdings, its subsidiaries, and its principals across the globe. But these suits—as recognized by Justice Ariel Belen—all were part of a “game” Murchinson is playing (DX-002(O) at 73). Indeed, the Arbitration Award details the illegal conduct of Murchinson and its affiliates—including Pach Shemen—as they played out this game (*see id.* at 51-59). The Arbitration Award binds all those in privity with Levona. *Harris v. TD Ameritrade Clearing Inc.*, 2022 U.S. Dist. LEXIS 148390, *14-15 (S.D.N.Y., Aug. 18, 2022), *aff'd mem.*, 2023 U.S. App. LEXIS 11442 (2d Cir. May 10, 2023). It also binds Holdings and those entities that stand in its shoes. *SpecriteDesign v. Elli N.Y. Design Corp.*, 2017 U.S. Dist. LEXIS 113416, *10 (S.D.N.Y. July 20, 2017); *see also In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 546-47 (S.D.N.Y 2011).

48. Even without reference to the findings in the Arbitration Award, the evidence before this Court—a mountain of evidence that Objectors offered not a shred of evidence to rebut—proves that the Murchinson entities have long been dedicated to an illicit “bankruptcy

strategy", including the removal of Eletson's management and the takeover of the vessels including by a forced bankruptcy at the Gas level, even before Levona acquired an interest in the company (DX-001(I); DX-001(J); DX-002(R); DX-077; DX-080; DX-186; DX-325; DX-002(O) at 55, 58-60. When that plan did not work, Murchinson and Levona used the Arbitration as a vehicle (as consideration) improperly to purchase Notes issued by the Debtors to obtain the assets of Gas *through a bankruptcy strategy at the Holdings level* (DX-189; DX-191; DX-197; DX-192 (Murchinson negotiating "[s]pecified wording to allow us to negotiate any DIP and CH11 rights"); DX-002(U); DX-195 (Murchinson discussing appointment of trustee in November 2022); DX-096 (using the arbitration as consideration for "Levona II" to acquire the Notes); DX-199). Murchinson's plan was clear: "they want[ed] strategic influence on how *[H]oldings* is directed," "to dictate [the] future of *Eletson Group*" and to look for "any and all potential leverage points to make it go better on the [G]as side" (DX-002(U)). Even the selling noteholders understood that Murchinson was motivated by its dispute with Gas (8/2/2023 Fabiani Tr. at 58:2-20). Significantly, in an email, dated December 8, 2022, Spears confirmed the "mechanics" of the deal with the selling noteholders, including that he could not "wait for anything too extensive to be finalized to have the trade go through ***because I have the lawyers in motion on the bankruptcy strategy***" (DX-199) (emphasis added). (Those lawyers were Dechert.)

49. That bankruptcy strategy has played out before this Court for over a year, where the Murchinson controlled entities have used this Court to try to shut down the District Court Confirmation Proceedings ((DX-002(EE).0095-96 (Dechert drafting and revising motion to reinstate automatic stay while representing Murchinson and Pach Shemen and before Committee was formed); 9/10/24 Tr. at 351:12-14; 372:17-21 (confirming Wilmington did not authorize Dechert to draft the motion) and take over the Debtors' business through the appointment of a

Chapter 11 trustee—before the Debtors even proposed their Plan (*see* Dkt. 788 at 55). Ultimately, this bankruptcy strategy culminated with the proposal of two competing plans that will enable Murchinson, in bad faith, to take over and liquidate the Eletson enterprise. *See e.g., In re Allegheny Int'l, Inc.*, 118 B.R. 282, 285 (Bankr. W.D. Pa. 1990) (finding plan proponent engaged in a pervasive pattern of bad faith designed to control debtors and manipulate the bankruptcy process).

50. Notably, Pach Shemen amended its plan at the eleventh hour to exclude Levona's $262.5 million dollar claim from its plan (ECF 1070). This act of complicity unfairly promotes the PS Plan, attempting to highlight increased creditor recovery through an act stained in Murchinson's control of the bankruptcy. Mr. Cordasco excluded the Levona claim from his report "on the instruction of counsel" (9/12/2024 Tr. at 1213:21-1216-11), served on August 26, 2024. The PS Plan was amended to exclude the Levona claim *on September 5, 2024* (ECF 1070 at 2).

51. The involuntary cases were not commenced in good faith or for a proper purpose, *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 332 (3d Cir. 2015) (an involuntary petition that is filed "to gain an advantage in pending litigation" is filed in bad faith), and the Competing Plans were not filed for a valid reorganization purpose. *See In re Nat. Land Corp.*, 825 F.2d 296, 298 (11th Cir. 1987) ("It seems unquestionable to us that the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal; thus, any proposal submitted by a [creditor] who filed his petition in bad faith would fail to meet section 1129's good faith requirement."); *In re 652 W. 160th LLC*, 330 B.R. 455, 468 (Bankr. S.D.N.Y. 2005) (citing *In re Nat. Land Corp*.) ("bad faith is not cured by its subsequent filing of a reorganization plan."). The Competing Plans cannot be confirmed.

THE COURT SHOULD SUBORDINATE PETITIONING CREDITORS' CLAIMS

52. Pach Shemen's bad faith precludes confirmation of the Competing Plans. Additionally, the Court should equitably subordinate the claims of the Petitioning Creditors (as

defined in the Plan) and Levona. Equitable subordination is appropriate in the face of "some type of inequitable conduct" that "resulted in injury to other creditors or conferred an unfair advantage on the creditor to be subordinated". *Nisselson v. Softbank AM Corp. (In re MarketXT Holdings Corp.)*, 361 B.R. 369, 385 (Bankr. S.D.N.Y. 2007).

53. Pach Shemen is an alter ego of Levona. That was proved in this case without any evidence to the contrary by Pach Shemen. Courts in this District have found that entities may be alter egos given shared or similar directors and personnel and failure to adhere to corporate formalities. *See KYCool A.B. v. Pac. Int'l Servs.,* 2013 U.S. Dist. LEXIS 45941 (S.D.N.Y. March 29, 2013); *see also Trs. of the Mosaic & Terrazzo Welfare, Pension, Annuity & Vacation Funds v. High Performance Floors, Inc.,* 233 F. Supp. 3d 329 (E.D.N.Y. 2017) (finding that two entities were alter egos, as the two entities shared a common business purpose, had the same management and employees, shared assets, finances, and offices). Pach Shemen (initially to be named Levona II (DX-096)) is a mirror of Levona. Pach Shemen has the same shareholders, representatives, office and business purpose as Levona (DX-89.009; DX-124.0004; DX-129.0029; DX-131; DX-105; DX-176.1251; DX-189). Pach Shemen is a shell company with no assets other than its purported interests in the Notes (Lichtenstein Tr. 39:3-41:20). It has no employees, does not maintain separate files or records, and does not maintain its own email domain (Lichtenstein Tr. 41:21-22; 46:12-17). As Dr. Furchtgott-Roth explained in extraordinary detail, when viewed from a shared control perspective, Levona and Pach Shemen are interchangeable entities used by their common shareholders to avoid the Arbitration Award and to vanquish Debtors (DX-047).

54. The record is replete with the inequitable conduct undertaken by Pach Shemen and the Petitioning Creditors. Pach Shemen's corporate warfare against Eletson caused incalculable damages that ultimately suppressed the value of Holdings' Notes. The compensatory damages to

Eletson Gas under the LLCA alone were calculated in the Arbitration to be at least $44 million excluding the value of the Symi and Telendos (DX-002(O).99-101). That excludes the losses from the fraudulent activity of bribed Peter Kanelos, the loss of reputation among customers, vendors, and financial institutions caused by Murchinson, and the constant management distraction from dealing with Murchinson's misconduct (DX-002(O).97-99). The Arbitration Award exceeds $100 million. Levona has not paid a penny.

55. Petitioning Creditors and Levona's inequitable conduct extends to this Court, which is now being used as a vehicle to further Murchinson's machinations. It has become the chosen vehicle for the piling on of ever-escalating costs and the dissipation of creditor assets in direct conflict with the goals of the Bankruptcy Code. Only Murchinson benefits from this.

PETITIONING CREDITORS' CLAIMS SHOULD BE EXCLUDED, AS SHOULD THEIR PRIORITY ADMINISTRATIVE EXPENSE CLAIMS

56. Debtors do not assert that the value of notes should be extinguished (9/9/24 Tr. at 237:9-239:4). Debtors *do* assert that the votes of Pach Shemen and Alpine should be excluded because they are not and have never been creditors *and* because of their bad faith (¶¶ 43-47, 53). Bankruptcy courts are permitted to look behind the veil to uncover a creditor's intent in executing what ordinarily may be permissible actions. *Dish Network Corp. v. DBSD N. Am., Inc.* (*In re DBSD N. Am., Inc.*), 634 F.3d 79, 104 (2d Cir. 2010) (finding that a creditor's "own admissions in court, by its position as a competitor to [the debtor], by its willingness to overpay for the claims it bought, by its attempt to propose its own plan, and especially by its internal communications…showed a desire to 'to obtain a blocking position' and 'control the bankruptcy process for this potentially strategic asset,'" evincing bad faith); *In re* Allegheny, 118 B.R. at 290 (recognizing that where a creditor's "stated purpose was to take over the debtor," bad faith stained its actions in the bankruptcy).

57. These realities also preclude allowance of administrative claims under section 503(b)(3). The section applies only to "***a creditor*** that files a petition under section 303." 11 U.S.C. § 503(b)(3)(A) (emphasis added). Pach Shemen's and Alpine's administrative claims are thus predicated entirely on their status as a "creditor" with a "claim" based on its purported acquisition of the Notes *at the time the involuntary petitions were filed*. As set forth in the Debtors' Reply (Dkt. 982), *In re Tampa Chain Co.*, 35 B.R. 568, 578-579 (Bankr. S.D.N.Y. 1983) should control, as it is the only case on point. No "right of payment" existed because Pach Shemen's and Alpine's purported acquisition of the Notes were *void ab initio* under the Second RSA (DX-001(D) §§ 4, 7; 7/28/2023 Spears Tr. at 186:1-11, 192:4-193:9; 7/25/2023 Tarlowe Tr. at 47:13-19). The Petitioning Creditors have not offered any case to refute *In re Tampa*, and instead argue incorrectly that it does not control because the Bankruptcy Code changed. What did not change are the definitions of "creditor" and "claim" under the Bankruptcy Code. *Compare* 11 § 101(4)(A) (1983) *with* 11 § 101(5)(A) (2024). There is no "right of payment." This does not contradict even "the broadest available definition of claim." *Midland Funding, LLC v. Johnson*, 581 U.S. 224, 224 (2017) (addressing "unenforceable" claims, not void claims, which under the law do not exist). Pach Shemen and Alpine are not "creditors" under any interpretation of the Bankruptcy Code entitling them to priority administrative expenses under section 503(b)(3) and 503(b)(4).

58. That Pach Shemen entered into what it purports to be a "new, separate stand-alone agreement" (Dkt. 1053 ¶ 3) with the Selling Noteholders on July 22, 2024 (DX-172) does not save its claim. *First*, on its face, the "new" agreement does not prove that Pach Shemen owns any of the Notes; the agreement entirely fails to specify the entities who actually purport to own interests in the Notes and in what amounts (*id.*) (noting sale to Nomis Bay Ltd. ("Nomis Bay"), BPY Ltd. ("BPY") and Pach Shemen). *Second*, the agreement does not overcome the undisputed fact that

Pach Shemen was not a "creditor" with a "claim" ***at the time the involuntary petitions were filed***. *Third*, contrary to Pach Shemen's position, this Court has authority to consider whether the transfer of any interests in the Notes was void *ab initio*. *See* Dkt. 1053 ¶ 4 (citing cases). The Second RSA—to which the Debtors are parties—provides this Court with "exclusive jurisdiction of all matters arising out of or in connection with the [Second RSA]" (DX-001(D) § 23); *see also In re LATAM Airlines Grp. S.A.*, 2022 Bankr. LEXIS 2522, at *21 (Bankr. S.D.N.Y. Sep. 13, 2022) ("[T]he Court's role is limited to 'the adjudication of disputes regarding transfers of claims,' and if a timely objection is made, 'to determin[ing] whether a transfer has been made that is enforceable under nonbankruptcy law.'"); 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

59. Pach Shemen, Alpine, and VR Global seek "reimbursement" of their actual and necessary expenses, despite the uncontested fact that none of them paid, or have any obligation to pay, a single dollar in legal fees or expenses in connection with the involuntary petitions (Ortiz Tr. at 27:12-15; 28:5-8; 99:3-3-12). As the Petitioning Creditors point out, a creditor—which Pach Shemen and Alpine are not—must actually ***incur*** reasonable and necessary expenses related to the involuntary petition under sections 504(b)(3)(A) and 504(b)(4) (*see* Dkt. 1053 ¶¶ 10-11 (citing *In re Key Auto Liquidation Ctr., Inc.*, 384 B.R. 599 (Bankr. N.D. Fla. 2008)). However, the "definition of 'incurred' renders legal fees and expenses due when the client 'becomes liable' for them and 'has a legal obligation to pay them.'" *Ryu v. Hope Bancorp, Inc.*, 2018 U.S. Dist. LEXIS 148513, at *3 (S.D.N.Y. Aug. 29, 2018); *In re Dawes*, 652 F.3d 1236, 1239 (10th Cir. 2011) ("[w]hile at the margin there might be some distinctions" among definitions of incur, "they don't leave any room for debate on this proposition: one who has 'incurred' an expense is liable for it.").

60. Nomis Bay and BPY paid the professional costs and expenses claimed by

Petitioning Creditors (Ortiz Tr. at 95:14-19). Alpine and VR Global failed to adduce any evidence establishing that they have any obligation, contractual or otherwise, to reimburse Nomis Bay or BPY for the payments (Tarlow Tr. at 75:25-76:18; Nemser Tr. at 140:15-146:25; Ortiz Tr. at 100:24-102:6). For its part, Pach Shemen contends that Nomis Bay and BPY made a "loan" to Pach Shemen (Spears Declaration. ¶ 8). Pach Shemen's evidence of this debt, for which it contends it is liable, is non-existent: it is based on two emails suggesting that BPY or Nomis Bay will treat the payments as loans (DX-319; DX-320; DX-321; Ortiz Tr. at 32:22-25 (Pach Shemen's "obligation" to pay BPY and Nomis Bay "is not in writing"). This is a classic violation of the Statute of Frauds. *See* 6 Del. C. § 2714 (commitment to loan money exceeding $100,000 invalid unless reduced to a note or writing). Pach Shemen, Alpine, and VR Global have not adduced any proof establishing any of these entities have "a legal obligation to pay" the fees and expenses, *Ryu.*, 2018 U.S. Dist. LEXIS 148513, at *3.

WILMINGTON'S PRE-PETITION AND ADMINISTRATIVE PRIORITY CLAIMS

61. The overwhelming proof of Wilmington's bad faith—let alone negligence—establishes that Wilmington cannot and should not be entitled to recover certain fees, costs, and expenses under Section 7.07 of the Indenture. Wilmington has asserted over and over that its duties are defined by the indenture, yet it asks this Court to ignore its actions and the express language of the Indenture to reward its behavior at the expense of the Debtors' estates and legitimate creditors. The Indenture expressly excludes recovery of such fees, costs, and expenses to the extent "such loss, liability or expense may be attributable to the ***negligence, willful misconduct or bad faith***" of Wilmington (DX-001(F) § 7.07 (emphasis added); *see also id.* § 7.01(c) ("The Trustee may not be relieved from liabilities for its own negligent action, its own negligent failure to act, or its own willful misconduct . . ."); *id.* § 7.01(c)(3) (requiring the Trustee to act "in good faith" when taking direction from a majority in aggregate principal amount of the

then outstanding Notes under Section 6.05)). Further, Section 7.01(a) of the Indenture requires the Trustee to act as a prudent person in carrying out its obligations (*id.* § 7.01(a)).

62. The record is replete with Wilmington's bad faith, negligent, and/or imprudent conduct. Wilmington claims it did not know about the Second RSA until January 23, 2024 (Dkt. 993 ("Healy Decl.") ¶ 51), yet Wilmington's attorneys discussed and reviewed a "proposed new restructuring transaction" and "restructuring documents" in September 2019—*after* the First RSA was terminated (DX-107 at 133). While the Second RSA was being negotiated and after, Paul Weiss (who represented the Consenting Noteholders), Perkins Coie (who represented Wilmington) and Skadden (who represented the Debtors) regularly communicated on issues directly related to the Notes and the Indenture (9/9/24 Tr. at 266:15-267:13). The Debtors then pointed Wilmington to the existence of "the two RSA agreements" in April 2020 (DX-002(DD)). This went unquestioned by Wilmington (*id.*). But even assuming Wilmington did not know about the Second RSA before January 2023, its actions before and after demonstrate its bad faith, including by acting in active concert with Murchinson and its counsel.

63. Significantly, it was Murchinson that paid Wilmington's fees (DX-002(EE); 8/29/24 Healy Tr. at 68:12-17; 9/10/24 Tr. at 339:15-24). As late as December 2022, Wilmington was in communication with Dechert, ***as counsel to Murchinson***, in December 2022, before receiving any direction from Pach Shemen to commence the bondholder litigation (DX-107 at 143). Wilmington and its counsel reviewed and revised draft direction letters and draft bondholder complaints (DX-107 at 143). These communications took place before Pach Shemen purports to have acquired the Notes (*see* DX-128). Taking Wilmington's at its word, it took direction from an entity that did not hold any Notes (9/10/24 Tr. at 335:8-10) (Wilmington "negotiating with an entity that [it] believe[d] was the holder" of the Notes). In Wilmington's own words: "We were

not aware when [Pach Shemen] acquired at the time, ***nor did we care***" (9/10/24 Tr. at 333:15-17).

64. Nor did Wilmington "care" about the Second RSA (9/10/24 Tr. at 356:8-11). Upon learning of it, Wilmington took no action, including actually reviewing the Second RSA, investigating Pach Shemen's purported holdings or withdrawing the bondholder litigation (9/10/24 Tr. at 356:8-357:20). This despite the fact that, if Pach Shemen's holdings were invalid—which they were—the direction letter would have no force and effect. Instead of acting as a prudent trustee, Wilmington pressed forward with the bondholder litigation and communicated with Murchinson on litigation and bankruptcy strategy long before Wilmington received direction to join the involuntary proceedings on June 8, 2024 (9/10/24 Tr. at 344:2-347:12, 348:6-349:350:10, 359:7-23); DX-002(EE) at 7-8, 10-11, 26, 48, 51, 96; DX-107 at 157. The June direction letter is itself a signal indictment, which directed Wilmington to cooperate with, and rely on any direction given by, Dechert, who represented Murchinson and Pach Shemen at the time (DX-002(CC)). Wilmington went far beyond a passive trustee doing administrative things. It's umph was needed to beef up the wholly unlawful involuntary bankruptcy. It was needed to pile on. And so it did, once it was fully indemnified and directed to take its cues from Murchinson's counsel. Wilmington's behavior was opprobrious. It was a full participant in the bad faith "bankruptcy strategy". It should be entirely precluded from collecting anything from anyone but Murchinson.

65. That Wilmington maintains that it could instead take this action on its own is a red herring. Wilmington did not take any action between February 2019 through December 2022 to collect on the defaulted notes, even though it was purportedly entitled to do so, because it had no direction from Noteholders and no indemnity (7/27/23 Healy Tr. at 35:8-23). Wilmington admits that each action it undertook was the result of direction and indemnity by Pach Shemen (Dkt. 639 ¶¶ 27, 36-38), and that it would not have done so absent indemnification (7/27/23 Healy Tr. at

35:8-23). Wilmington actions are textbook bad faith and far from prudence.

66. Wilmington maintains that certain of its pre-petition claims should be allowed as priority administrative expense claims. Wilmington's actions demonstrated that all fees and expenses incurred in connection with the involuntary petitions are far from reasonable and necessary and must be disallowed (accord Dkt. 982). Wilmington furthered Murchinson's bad faith scheme to take control of the Debtors, and Wilmington's fees and expenses should not and cannot be borne by the Debtors and their creditors (*see e.g.*, DX-107; DX-002(EE) (incurring fees for a period of ***three month***s before Wilmington joined the involuntary petitions).

CONCLUSION

This Court should confirm Debtors' Plan, disallow, exclude, expunge, or subordinate Petitioning Creditors' claims and Notes, exclude Pach Shemen equity in Holdings, and disallow and expunge Wilmington's pre-petition and administrative claims.

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