KRAMER LEVIN NAFTALIS & FRANKEL LLP
Douglas H. Mannal
Anupama Yerramalli
Rachael L. Ringer
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

Counsel to the Official Committee of Unsecured Creditors

GARDERE WYNNE SEWELL LLP
Marcus A. Helt
Mark C. Moore
2021 McKinney Avenue
Suite 1600
Dallas, Texas 75201
Telephone: (214) 999-3000
Facsimile: (214) 999-4667

Local Counsel to the Official Committee of Unsecured Creditors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	:	**Chapter 11**
CHC GROUP LTD., *et al.*,	:	**Case No. 16-31854-bjh-11**
Debtors.	:	**(Jointly Administered)**

STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF THE THIRD AMENDED JOINT PLAN OF CHC GROUP LTD. AND ITS AFFILIATED DEBTORS AND REPLY TO OBJECTIONS

TO THE HONORABLE BARBARA J. HOUSER,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") hereby files this statement in support of, and response to Objections to (the "Reply"),[1] the *Third Amended Joint*

[1] The Committee responds to the following objections: (i) the *United States Trustee's (1) Objection to Second Amended Joint Chapter 11 Plan of CHC Group, Ltd. and its Affiliated Debtors and (2) Brief in Support of United States Trustee's Objection* [Docket No. 1592] (the "UST Objection"), (ii) the *ECN Capital (Aviation) Corp.'s* ("ECN") *Objection to the Second Amended Joint Chapter 11 Plan of CHC Group Ltd. and its Affiliated Debtors* [Docket No. 1605] ((the "ECN Objection"), (iii) the *Objection to Confirmation of Debtors' Second Amended Joint Chapter 11 Plan and Brief in Support Thereof* [Docket No. 1608] (the "KLS Objection" and together with the UST Objection and the ECN Objection, the "Objections") filed by KLS Diversified Asset Management ("KLS").

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Plan of CHC Group Ltd. and its Affiliated Debtors (the "Plan")[2]. In support of this Reply, the Committee respectfully submits as follows:

PRELIMINARY STATEMENT

1. The Plan should be confirmed. Having heard three full days of trial in connection with the Support Agreements, the Court is well-versed in the parties' extensive efforts to achieve the numerous global settlements on which the Plan is premised. Importantly, the Plan (i) provides recoveries for unsecured creditors well in excess of what they would likely have received in a liquidation, (ii) settles several litigations that would have delayed and potentially eroded creditor recoveries, and (iii) enables the Debtors to emerge from bankruptcy as an ongoing business.

2. While the Plan enjoys overwhelming support from the various creditor classes,[3] there remain three objections to confirmation. Each should be overruled.

3. *First*, ECN's request that the Plan establish a litigation trust for unsecured creditors to pursue various litigation claims, including claims against Airbus, ignores the fact that the amount and form of recoveries to unsecured creditors is one of the many settlements contained in the Plan. Rather than receiving an interest in a litigation trust with inherently speculative recoveries, unsecured creditors are to receive distributions valued at approximately $62 million in the form of equity and debt in the Reorganized Debtors. While more is always better, any attempt to reopen these negotiations would undoubtedly risk the recoveries provided for in the Plan that unsecured creditors have voted to accept.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan.

[3] *See generally Certification of Andres A. Estrada with respect to the Tabulation of Votes on the Second Amended Joint Chapter 11 Plan of CHC Group Ltd. And its Affiliated Debtors* [Docket No. 1630], *see also Memorandum of Law In Support of Confirmation of the Third Amended Joint Chapter 11 Plan of CHC Group Ltd. and Its Affiliated Debtors* [Docket No. 1634] (the "Debtors' Reply"), filed by the Debtors contemporaneously in connection herewith.

4. *Second*, the issue raised by the U.S. Trustee regarding the management incentive plan ("MIP") and KLS's allegations of unfair discrimination as a result of the Rights Offering have already been the subject of significant briefing and argument – and were essentially ruled on by this Court at the hearing on the Support Agreements. Neither the U.S. Trustee nor KLS has provided any additional evidence or arguments that would warrant a contrary determination in the context of Plan confirmation.

5. *Finally*, the release and exculpation provisions in the Plan are consensual, comply with Fifth Circuit precedent, and are appropriate under the circumstances. In fact, KLS – as the only creditor objecting to the releases – was aware of, but failed to exercise, its right to opt out of those releases. While KLS' decision not to take advantage of their opportunity to opt out calls into question their view on the importance of the releases, the Plan provisions are consistent with longstanding practice in this Court and should be approved.[4]

REPLY

I. The Plan Maximizes Value for Unsecured Creditors

6. ECN objects to the Plan because it fails to preserve certain prepetition claims against Airbus for unsecured creditors through the establishment of a litigation trust, instead of "transferring" such claims to the Reorganized Debtors. According to ECN, the Plan "disregard[s] a potentially meaningful source of recovery" for unsecured creditors, resulting in the Plan's failure to "maximize estate value." *See* ECN Objection ¶¶ 2, 13. This is false.[5]

7. Contrary to ECN's contentions, both the Committee and the Debtors spent significant time analyzing all potential unencumbered assets available for unsecured creditors,

[4] The Committee understands that the issues raised by the U.S. Trustee with respect to the governmental releases have been consensually resolved.

[5] ECN fails to provide any evidence to support its assertion that, because the Plan does not disclose the Airbus claims or include a litigation trust, the Plan was not proposed in good faith. These allegations therefore are entirely without merit and must be overruled.

including various pre-petition causes of action that could be asserted by the Debtors against Airbus relating to certain of their Aircraft, as well as the risks and costs attendant to the litigation of any such claims. Based on the Committee's analysis, the pursuit of claims relating to the Airbus Aircraft likely would have involved complex litigation, requiring significant up-front funding at the expense of unsecured creditors. Faced with the decision whether to negotiate a global settlement that provided tangible benefits to unsecured creditors in the form of equity and debt in the Reorganized Debtors, or rely on the speculative value of a litigation trust, the Committee determined that a comprehensive settlement allowing the Reorganized Debtors to retain such claims was in the best interest of unsecured creditors.[6] Further, the Committee negotiated for, among other things, a waiver by the secured bondholders of recoveries on account of their large deficiency claims as an integrated component of the global settlement, thereby enhancing the value for holders of non-deficiency unsecured claims.

8. Thus, while the alternative ECN proposes – if viewed in a vacuum – could potentially increase certain unsecured creditors' recoveries, this alternative is simply unavailable without reopening plan negotiations in their entirety and resoliciting a new chapter 11 plan, at significant cost to the Debtors' estates. Such a result could be potentially disastrous for unsecured creditors and for the Debtors' ability to reorganize. In this context, the fact that litigation trusts were established in other cases under different circumstances is wholly irrelevant to whether this Plan should be confirmed.

9. The ECN Objection also alleges that the Debtors have failed to adequately disclose the potential claims against Airbus and the Debtors' strategy for the pursuit of such

[6] Importantly, creditors of each of the Debtors that own or that would benefit from the ownership of the Aircraft identified by ECN – and therefore would likely be the beneficiaries of any litigation against Airbus in connection with the grounded Aircraft – voted unanimously in favor of the Plan, including the treatment for unsecured creditors contemplated therein.

claims. *See* ECN Objection ¶¶ 9,11, 14. In fact, both the Disclosure Statement and the restructuring agreement entered into with Airbus, make clear that the Debtors are *retaining* – not releasing – these claims. Any recoveries obtained by the Reorganized Debtors on account of the pursuit of these claims will therefore benefit all stakeholders, including unsecured creditors who are receiving equity and debt of the Reorganized Debtors under the Plan.

II. Objections Seeking to Re-Litigate Issues Similar to those Decided at the PSA Hearing must be Overruled

A. The MIP is Not Subject to Approval Under Section 503(c)

10. As set forth in further detail in the confirmation brief and reply filed by the Debtors contemporaneously herewith (the "Debtors' Reply"), the arguments in the UST Objection that the MIP should be approved by separate motion under section 503(c) of the Bankruptcy Code are nearly identical to those raised by the U.S. Trustee and overruled at the hearing on the Support Agreements. In this regard, the Committee joins in the Debtors' Reply, and submits that the UST Objection fails for the same reasons it did in the context of the Support Agreements. The Committee understands that the MIP is being provided to satisfy disclosure requirements of the Bankruptcy Code, but will not be implemented until after the Effective Date by the New Board. Therefore, section 503 is not implicated and this objection should be overruled.

B. The Plan Does not Discriminate Unfairly

11. After failing to timely assert their joinder to the objection to the Support Agreements asserted by certain secured noteholders earlier in the case (the "Noteholder PSA Objection"), KLS now essentially seeks to litigate their late-filed joinder by rehashing the unfair discrimination-based arguments set forth in the Noteholder PSA Objection. But the Court overruled the Noteholder PSA Objection to the Support Agreements, finding that "[o]n this

record, the credible evidence establishes that the fees are being paid to the Plan Sponsors for their commitment to backstop the Rights Offering under the CHC Plan and not for an impermissible purpose." *See Hr'g Tr.* Dec. 20, 2016 at 30:6-12 (noting that, "the Court disagrees" with the objecting noteholders' argument "that the Plan Sponsors' votes on the plan have been purchased by the payment of the fees"). KLS has not identified any contrary or new evidence that would indicate that the Backstop Parties are receiving the Put Option Premium on account of anything other than their backstop commitments under the Rights Offering.[7] Thus, because the KLS Objection continues to suffer from the same infirmities as the Noteholder PSA Objection, the KLS Objection must be overruled.

III. The Release and Exculpation Provisions are Appropriate

12. Both the U.S. Trustee and KLS take issue with the release and exculpation provisions of the Plan, citing the Fifth Circuit decision in *Pacific Lumber*. *See Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009). But the reliance on *Pacific Lumber*, which was concerned with "non-consensual non-debtor releases and permanent injunctions" – *see id*. at 251-52 – is misplaced in cases like these where the releases are *consensual* in nature. *See In re Wool Growers Central Storage Co.*, 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007) ("Most courts allow consensual nondebtor releases to be included in a plan."); *Long-Term Credit Bank of Japan, Ltd. v. Central States, Southeast and Southwest Areas Pension Fund (In re Appletree Markets, Inc.),* 1999 U.S. Dist. LEXIS 23374, *40 (S.D. Tex. Feb. 19, 1999) ("[A]ll courts approve consensual releases as permissible."). Creditors entitled to vote on the Plan were given clear and conspicuous notice of

[7] Contrary to the assertions in the KLS Objection that the final Rights Offering subscriptions "question the necessity for a backstop," the ultimate outcome of the Rights Offering is irrelevant to the appropriateness of the terms of the Backstop Agreement previously approved by the Court. The purpose of the Backstop Agreement was to provide certainty to these cases and to ensure that, regardless of the outcome, the Debtors would have sufficient funding to emerge as a going concern.

the releases in the Plan, Disclosure Statement, and Ballots, with such notice indicating that creditors could opt out of the releases by casting their Ballot on the Plan and indicating their desire to opt out. Notice in this manner is sufficient to infer consent to the releases.[8] As the releases at issue are consensual, *Pacific Lumber* does not proscribe such releases.[9]

13. Exculpations, on the other hand, are different from estate or third party releases, as they do not *excuse* plan participants from liability, but simply alter the applicable standard under which such liability is assessed. *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000) (exculpation "does not affect the liability of these [exculpated] parties, but rather states the standard of liability under the Code"). In that sense, exculpations have the practical effect of raising the *standard* of liability in any future litigation concerning exculpated matters to gross negligence or willful misconduct. *See id.*

14. The exculpation provisions were essential to reaching the consensus upon which the Plan is based. The exculpation provisions were negotiated in conjunction with all other terms of the global settlement, providing parties with the necessary, but limited, protection from future liability to encourage negotiations among the Debtors' constituencies and facilitate the critical compromises embodied in the Plan. In approving similar exculpation provisions, courts have found that, "where a debtor's plan requires the settlement of numerous, complex issues, protection of third parties against legal exposure may be a key component of such

[8] *See In re DBSD N. Am., Inc.*, 419 B.R. 179, 218 (Bankr. S.D.N.Y. 2009) ("[A]dequate notice [of the third party release] is provided in this case, as both the Plan and Disclosure Statement have the third party release provision set off in bold font, and the ballots set forth in both capitalized and bold text the effect of consenting to the Plan or abstaining without opting out of the release."), *aff'd*, No. 09-13061, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *rev'd on other grounds*, 627 F.3d 496 (2d Cir. 2010); *see also In re Movie Gallery, Inc.*, No. 10-30696, 2010 Bankr. LEXIS 5778, at *20-22 (Bankr. E.D. Va. Oct. 29, 2010) ("consensual" release approved for claimants that voted in favor of plan, abstained from voting, or otherwise consented).

[9] Remarkably, despite being aware of the terms of the releases, KLS failed to return a ballot on the Plan to opt out of such releases. Now, it seeks to leverage its failure to act in the form of an objection to the Plan. Such conduct should not be endorsed by this Court, especially where the releases are consistent with Fifth Circuit precedent.

settlement." *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. LEXIS 2549, *246 (Bankr. S.D.N.Y. July 15, 2004) (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992)); *see also In re DBSD N. Am. Inc.*, 419 B.R. at 218 (Bankr. S.D.N.Y. 2009) (exculpation provisions are permissible "where the provisions are important to a debtor's plan"). Accordingly, the objections to the release and exculpation provisions should be overruled.

CONCLUSION

WHEREFORE, the Committee requests that the Court overrule the Objections and confirm the Plan.

Dated: February 8, 2017

Respectfully submitted,

/s/ Marcus A. Helt

Marcus A. Helt (TX 4052187)
Mark C. Moore (TX 24074751)
GARDERE WYNNE SEWELL LLP
2021 McKinney Avenue
Suite 1600
Dallas, TX 75201-4761
Telephone: (214) 999-3000
Facsimile: (214) 999-4667
mhelt@gardere.com
mmoore@gardere.com

AND

Douglas H. Mannal (*pro hac vice*)
Anupama Yerramalli (*pro hac vice*)
Rachael L. Ringer (*pro hac vice*)
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000
dmannal@kramerlevin.com
ayerramalli@kramerlevin.com
rringer@kramerlevin.com

Counsel to the Official
Committee of Unsecured Creditors

Certificate Of Service

This is to certify that a true and correct copy of the foregoing was served electronically by the Court's PACER system on February 8, 2017, on those parties registered to receive such service.

/s/ Mark C. Moore
Mark C. Moore