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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	
ARCADIA GROUP (USA) LIMITED (in Administration),[1]	)	Chapter 15
	)	
Debtor in a Foreign Proceeding.	)	Case No. 19-11650 (JLG)
	)	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION OF THE FOREIGN REPRESENTATIVES FOR RECOGNITION OF FOREIGN MAIN PROCEEDING AND CERTAIN RELATED RELIEF

[1] The Foreign Debtor is incorporated and registered in England and Wales with Company Number 06404527. The Foreign Debtor's mailing address (and its registered office) is Colegrave House, 70 Berners Street, London, W1T 3NL, United Kingdom.

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Daniel Francis Butters and Ian Colin Wormleighton, in their capacity as the duly authorized joint foreign representatives (in such capacity, jointly, the "**Foreign Representatives**") of Arcadia Group (USA) Limited (in Administration) (the "**Foreign Debtor**" or the "**Company**") as a debtor in administration under English law, pursuant to the Insolvency Act 1986 (the "**UK Proceeding**" or the "**Administration**"), sealed and endorsed by High Court of Justice, the Business and Property Courts of England and Wales, Insolvency and Companies List (the "**English Court**"), through their undersigned counsel, respectfully submit this memorandum of law (the "**Memorandum of Law**") in support of the *Verified Petition of the Foreign Representatives for Recognition of Foreign Main Proceeding and Certain Related Relief* (the "**Verified Petition**") in connection with the Official Form 401 Petition (the "**Petition**," and together with the Verified Petition, the "**Chapter 15 Petition**") filed today, May 22, 2019 (the "**Petition Date**"). The Foreign Representatives incorporate by reference the *Declaration of Charles Richard Obank in Support of Verified Petition for Recognition of Foreign Main Proceeding and Certain Related Relief* (the "**Obank Declaration**"), as if fully set forth in this Memorandum of Law, and further respectfully state as follows:

I.
PRELIMINARY STATEMENT

1. The Foreign Debtor is a London-based operator of a number of retail stores throughout the United States, selling clothing and fashion accessories under the brand names Top Shop and Top Man. It is part of a highly integrated group (the "**Group**"), a privately owned retailer of "fast fashion" clothing and accessories, selling through numerous internationally recognized brands. On May 22, 2019, the directors of the Company resolved to appoint administrators pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986. Accordingly, a notice of intention to appoint administrators was filed at the English Court on

May 22, 2019, and served on, amongst others, those persons entitled to appoint an administrator under paragraph 14 of Schedule B1 to the Insolvency Act 1986 being Arcadia Group Limited ("**AGL**"). AGL confirmed its consent to the appointment of administrators and consequently a notice of appointment of administrators was sworn by one of the Company's directors and filed at the English Court on May 22, 2019. From the time the notice of appointment was filed at the English Court, an automatic moratorium on creditor actions was imposed, and Messrs. Butters and Wormleighton as joint Administrators of the Company, were authorized to commence this chapter 15 bankruptcy case under title 11 of the United States Code (the "**Bankruptcy Code**") in order to petition this Court for recognition of the UK Proceeding as a foreign main proceeding, and appointed the Administrators to serve as joint Foreign Representatives of the Foreign Debtor before this Court. (*See* Petition, Ex. A.) On the Petition Date, the duly authorized Foreign Representatives filed the Chapter 15 Petition for the Foreign Debtor, commencing this chapter 15 case, seeking recognition of the UK Proceeding as "foreign main proceeding" within the meaning of section 1502 of the Bankruptcy Code.

2. The recognition of the UK Proceeding is imperative to the success of the Administration, and the Group's reorganization as a whole, because it is aimed at protecting the Company and its assets within the territorial jurisdiction of the United States from creditor actions once such creditors learn of the Administration and the imposed moratorium within the United Kingdom ("**UK**"). Specifically, the sought recognition, if granted, will prevent the race to the courthouse and resulting piecemeal litigation by creditors over the assets of the Company within the United States and preclude the landlords from terminating their respective leases and locking out the Company from conducting its business in the United States, all for the benefit of all stakeholders of the Company. The recognition, if granted, will serve the exact purpose of

chapter 15 of the Bankruptcy Code for which it was enacted—to allow for centralized administration of the Company's assets by establishing a level of coordination between the English Court and this Court and leveling the playing field for the Company, its creditors, landlords and other interested parties in the United Kingdom and United States. Without this Court's recognition of the UK Proceeding, the Company's operations in the United States will likely cease due to the landlord and other creditor enforcement actions, which will have a devastating effect on the Company, its Administration and the Group as a whole, ultimately resulting in diminished recoveries to the creditors of the Company.

3. Indeed, the UK Proceeding has estopped creditor actions, including the landlords from taking steps to repossess their premises; yet, without the recognition, the parties may continue to take action against the Foreign Debtor in the United States despite the moratorium imposed in the UK Proceeding. Any litigation or enforcement actions against the Foreign Debtor's assets in the United States will further destabilize its orderly exit strategy from the United States, thwart the goals of the Administration and the Company's efforts to find a buyer for its US operations (thus, immediately jeopardizing the livelihood of 800 of the Company's employees) and interfere with the Company's inventory liquidation sales, ultimately resulting in lesser recoveries to the Company's creditors. Indeed, the Foreign Representatives estimate that the orderly liquidation of the stores' inventory, with the help of a professional liquidator, will likely generate close to 75% of return (after deducting cost) and likely less than 20% if the Foreign Representatives chose to sell the Company's inventory in bulk to a liquidator, or its orderly liquidation efforts are hindered.

4. As more fully discussed in the *Foreign Representatives' Motion for an Order Pursuant to Sections 105, 363, 1507, 1519, 1520, 1521, 1522, 1525 and 1527 of the Bankruptcy*

Code to Approve (I) the Consulting Agreement and (II) the Sale Guidelines (the "**Inventory Liquidation Motion**"), filed contemporaneously herewith, as part of this chapter 15 process, the Foreign Representatives seek authority to immediately commence inventory liquidation sales throughout the stores in the United States, utilizing Hilco Merchant Resources, LLC ("**Hilco**"). As an industry leader in similar liquidation sales, Hilco is best equipped to conduct the liquidation sales efficiently and in orderly manner, monetizing the inventory quickly and increasing the return to creditors. The immediate commencement of the inventory liquidation sales will allow the Administrators to more quickly address the operations of the US stores, and potentially eliminate the costs associated with the continued operations of these stores.

5. In brief, the recognition and relief sought by the Foreign Representatives in this chapter 15 case will ultimately ensure that this chapter 15 case and the Administration proceed in fair, efficient, uninterrupted and centralized manner with the goal of providing outmost protections and maximizing the value of the Company's assets for the benefit of all stakeholders. As analyzed below, the Chapter 15 Petition and the Obank Declaration demonstrate that the recognition of the UK Proceeding as a foreign main proceeding and related relief requested in the Verified Petition are warranted under the governing provisions of title 11 of the Bankruptcy Code. Thus, the Foreign Representative requests that the UK Proceeding be recognized as the foreign main proceeding.

II.
FACTUAL BACKGROUND

6. The detailed factual background regarding the Foreign Debtor, including its business operations, capital and debt structure and the events leading to the commencement of the Administration and the filing of this chapter 15 case, is set forth in the Verified Petition, which is incorporated in this Recognition Memorandum by reference as if fully set forth here.

III.
ARGUMENT AND AUTHORITY

7. The Foreign Representatives meet the Bankruptcy Code's definition of a "foreign representative," the UK Proceeding satisfies the Bankruptcy Code's definition of a "foreign proceeding," and because the Foreign Debtor's center of main interests is in the United Kingdom, the UK Proceeding is entitled to recognition as a "foreign main proceeding." Finally, the Petition complies with the requirements of section 1515 of the Bankruptcy Code. Accordingly, the Foreign Representatives respectfully submit that the UK Proceeding should be recognized by this Court under section 1517 of the Bankruptcy Code.

8. First, the Foreign Representatives are "person[s]," as contemplated in subsections 101(24) and 101(41) of the Bankruptcy Code, and were duly appointed by the Company's directors as administrators of the Company, which appointment was endorsed and sealed by the English Court as reflected in the notice of appointment (*see* Petition, Ex. A.). The court sealed notice of appointment serves to appoint the joint Administrators as the joint Foreign Representatives with respect to the Foreign Debtor for the purpose of representing the Foreign Debtor in this chapter 15 case and to carry out any actions on behalf of the Foreign Debtor that are deemed necessary or proper to obtain the desired relief from this Court.

9. Second, the UK Proceeding is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code because the UK Proceeding is a collective judicial proceeding conducted in the United Kingdom under the law related to insolvency or debt adjustment, and the assets and affairs of the Foreign Debtor are subject to supervision by the English Court for the purpose of reorganization or liquidation. Additionally, the UK Proceeding is a "main" proceeding because section 1516(c) of the Bankruptcy Code presumes that the Foreign Debtor's center of main interests is in the UK because the Foreign Debtor is an English

company with its registered office in the UK, where the English Court has taken jurisdiction over the UK Proceeding.

10. Lastly, the Petition meets the requirements of section 1515 of the Bankruptcy Code. Specifically, as required by section 1515(b) of the Bankruptcy Code, the Petition is accompanied by a certified copy of the court sealed appointment as endorsed by the English Court, effectuating the UK Proceeding. Additionally, in accordance with section 1515(c) of the Bankruptcy Code, the Foreign Representatives filed a statement with the Petition, identifying the UK Proceeding as the only proceeding with respect to the Foreign Debtor and stating that there are no other foreign proceedings known to the Foreign Representatives with respect to the Company pending. (*See* Petition, Ex. A.) Further, as required by section 1515(d) of the Bankruptcy Code, all documents provided pursuant to section 1515(b) of the Bankruptcy Code are in English. Finally, as required by Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), the Foreign Representatives have also filed a statement, identifying the parties to litigation with respect to the Foreign Debtor pending within the United States and the parties against which provisional relief is requested.

11. Thus, all of the conditions to the entry of an order recognizing the UK Proceeding as a foreign main proceeding under the Bankruptcy Code have been satisfied. Thus, the Foreign Debtor is entitled to have the UK Proceeding recognized as a "main" proceeding.

A. Chapter 15 of the Bankruptcy Code: Background and Purpose

12. Congress added chapter 15 to the Bankruptcy Code when it enacted title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *See* Pub. L. No. 109-8, § 801 (2005); *see also* 8 COLLIER ON BANKR. ¶ 1501.01 (16th ed.). Chapter 15 encourages "cooperation between the United States and foreign countries with respect to transnational insolvency cases." *Id.* Chapter 15 incorporates into United States bankruptcy law the Model

Law on Cross-Border Insolvency (the **"Model Law"**) promulgated by the United Nations Commission on International Trade Law (**"UNCITRAL"**) in 1997, following years of international consultation on how best to coordinate and assist cross-border insolvency cases. As a result, in interpreting chapter 15 of the Bankruptcy Code, the Court is required to "consider its international origin, and the need to promote an application of this chapter [15] that is consistent with the application of similar statutes adopted by foreign jurisdictions." *See* 11 U.S.C. § 1508. The Guide to Enactment and Interpretation of UNCITRAL's Model Law "provides historical and interpretive guidance to the meaning and purpose of the provisions . . . in chapter 15." *See generally* 8 COLLIER ON BANKR. ¶1501.01. Indeed, Congress has instructed that if the Court finds a provision of chapter 15 to be unclear or ambiguous, the Court may view the UNCITRAL Model Law and the Guide to Enactment with respect to the Model Law as legislative history. *See In re Loy*, 432 B.R. 551, 560 (E.D. Va. 2010) (citing *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010)). Courts have further suggested that it is also acceptable to consider interpretations of the Model Law rendered by foreign courts. *See, e.g.*, *In re Condor Ins. Ltd.*, 610 F.3d 319; *In re Loy*, 432 B.R. 551.

13. Chapter 15 of the Bankruptcy Code requires a bankruptcy court to recognize a foreign proceeding if the elements in section 1517 of the Bankruptcy Code are satisfied, which includes requirements that (i) the petition satisfies section 1515 of the Bankruptcy Code, generally a requirement that copies of the relevant filings made with the foreign court or foreign court orders be attached to the petition and translated into English, (ii) the foreign representative is a person or body, and (iii) the foreign proceeding is either a main proceeding or a foreign non-main proceeding. Beyond recognition, a chapter 15 case provides the duly authorized foreign representative of such proceeding with various forms of relief to ensure that assets and value of

multi-national and cross-border corporate insolvency proceedings are preserved, that the proceedings are coordinated and asset administration is centralized and to prevent disruption that otherwise could derail a foreign proceeding from achieving that which it is designed to achieve under the applicable local foreign law.

14. Consistent with these principles, the Foreign Representatives petition this Court to recognize the UK Proceeding and to grant all relief that may be necessary and just to aid the Foreign Debtor in pursuing its restructuring in the UK Proceeding. The Foreign Representatives anticipate that, through chapter 15 recognition, any commencement or continuation of litigation against the Foreign Debtor will be stayed in the United States as well as any other creditor enforcement action, including attempts by the Company's landlords to terminate their respective leases pursuant to *ipso facto* clauses or other lease provisions. At this juncture, it is critical that the value of the Foreign Debtor's assets is maximized for the benefit of the Foreign Debtor, its creditors and other stakeholders and that the UK Proceeding, along with this chapter 15 case, provide a stable platform for the Foreign Debtor (and its Group) to complete its portion of the cross-border reorganization. Importantly, the Foreign Representatives must be fully recognized and protected, so that they can be heard with respect to issues in this chapter 15 case that might impact the UK Proceeding or the Foreign Debtor's obligations under UK law.

B. The Foreign Debtor Is Eligible to Be a Debtor Under the Bankruptcy Code

15. As a threshold issue, although not all courts have agreed, courts in this district require that a foreign debtor have assets in the United States in order to qualify to be a debtor under chapter 15 of the Bankruptcy Code, not all courts have agreed. *Drawbridge Special Opp. Fund LP v. Barnett (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013). The *Drawbridge* court held that, in order to be a debtor in a chapter 15 case, a foreign debtor must be eligible to be a debtor under section 109(a) of the Bankruptcy Code. *See id.* at 247 ("Section 109 . . . applies 'in a case under

chapter 15.'"). Section 109(a) states, in relevant part, that "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title." 11 U.S.C. § 109(a). Decisions interpreting section 109(a) of the Bankruptcy Code as applied to foreign debtors unanimously hold that a debtor satisfies the section 109 requirement even when it only has a nominal amount of property in the United States. *See, e.g., In re B.C.I. Fins. Pty Ltd.*, No. 17-11266 (SHL), 2018 WL 1973723, at *4 (Bankr. S.D.N.Y. Apr. 24, 2018) (holding that courts that have construed the "property" requirement in section 109 with respect to foreign corporations and have "found the eligibility requirement satisfied by even a ***minimal amount*** of property located in the United States") (emphasis added); *GMAM Inv. Funds Tr. I v. Globo Comunicacoes e Partipacoes S.A. (In re Globo Comunicacoes e Partipacoes S.A.)*, 317 B.R. 235, 249 (S.D.N.Y. 2004) (stating that courts have repeatedly found that there is "'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings") (citing *In re Aerovias Nacionales de Colombia S.A. (In re Avianca)*, 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003)); *Maxwell Commc'n Corp. plc v. Societe Generale plc (In re Maxwell Commc'n Corp.)*, 186 B.R. 807, 818-19 (S.D.N.Y. 1995). As one court explained, section 109(a) "leave[s] the Court no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States." *In re McTague*, 198 B.R. 428, 432 (Bankr. W.D. N.Y. 1996). In short, if the debtor has *any* property in the United States, section 109(a) of the Bankruptcy Code is satisfied. Here, the Foreign Debtor is unequivocally eligible to be a debtor under section 109(a) of the Bankruptcy Code because, as described above and in the Verified Petition, it has sufficient operations and property in the United States, and particularly in this district, where it operates a flagship store, employs 309 individuals and maintains its US bank accounts.

C. The Foreign Representatives Qualify As a "Foreign Representative"

16. A "foreign representative" that has been duly appointed and authorized in a foreign proceeding to administer the reorganization is a proper applicant for recognition of a foreign proceeding and may commence a chapter 15 case by filing a petition for recognition of a foreign proceeding. *See* 11 U.S.C. §§ 1504 and 1515. Section 101(24) of the Bankruptcy Code defines the term "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24). As discussed above, the Foreign Representatives are "person[s]" within the meaning of section 101(41) of the Bankruptcy Code, appointed by the Company's directors, which appointment was endorsed and sealed by the English Court, empowering the Administrators to administer the Company's assets and affairs. (*See* Petition, Ex. A.) A foreign representative need not be appointed specifically for the purpose of acting in other proceedings, but may be a person appointed to administer the debtor's assets in that foreign proceeding. *See, e.g., In re Betcorp Ltd.,* 400 B.R. 266, 294 (Bankr. D. Nev. 2009) (holding that Australian liquidators, authorized to act on debtor's behalf and carry out appropriate duties, were "foreign representatives" within the definition of section 101(24)); *In re Tradex Swiss AG*, 384 B.R. 34, 37, 41 (Bankr. D. Mass. 2008). In fact, the US Bankruptcy Court for the Southern District of New York had previously recognized joint administrators appointed by the company's directors pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986 as "foreign representative[s]" within the meaning of the Bankruptcy Code. *See In re Karhoo USA Inc. (in administration),* Case No. 16-13546 (MKV) (Bankr. S.D.N.Y. Dec. 20, 2016). Thus, the Foreign Representatives fall squarely within the definition of section 101(24) of the Bankruptcy Code.

D. The UK Proceeding Is a Foreign Proceeding

17. Chapter 15 of the Bankruptcy Code permits recognition of a "foreign proceedings." As defined in section 101(23) of the Bankruptcy Code, a "foreign proceeding" means:

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23). In determining whether a specific proceeding is a "foreign proceeding" under section 101(23) of the Bankruptcy Code, courts look for: "(i) [the existence of] a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustments of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation." *In re Ashapura Minechem Ltd.*, 480 B.R. 129, 136 (S.D.N.Y. 2012).

18. The UK Proceeding is a "foreign proceeding" within the meaning of the Bankruptcy Code. As is evident from the Obank Declaration, the UK Proceeding is a proceeding in a foreign country – the United Kingdom – that is a collective judicial proceeding under the Insolvency Act, the law relating to insolvency regarding the adjustment of debts under the supervision of the English Court. (*See* Obank Decl. ¶ 14.) First, the UK Proceeding is "judicial," having been commenced and currently pending before the Insolvency and Companies List, which was previously known as the Companies Court, and is a specialist court within the Business and Property Courts of the High Court of Justice. (*See id.* at 3 n.3.) Second, the UK Proceeding is "collective" in nature, in that all affected creditors are allowed to participate. A collective proceeding is one that "considers the rights and obligations of all creditors." *In re*

ENNIA Caribe Holding N.V., 594 B.R. 631, 638 (Bankr. S.D.N.Y. 2018) (citing *Ashapura*, 480 B.R. at 140). A non-collective proceeding, by contrast, resembles a "receivership remedy instigated at the request, and for the benefit, of a single secured creditor." *In re Betcorp Ltd.*, 400 B.R. 266 at 277. Additionally, Regulation (EU) 2015/848 of the European Parliament and of the Council on Insolvency Proceedings (recast) (the "**EU Regulation**") defines "insolvency proceedings" by reference to a list of collective proceedings set out in Annex A to the EU Regulation. (*See* Obank Decl. ¶ 14.) In relation to the United Kingdom, Annex A expressly lists administration proceedings, including appointments made by filing prescribed documents with the English Court, as being collective insolvency proceedings for the purpose of the EU Regulation. (*Id*.) Under the EU Regulation, a collective proceeding means proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them. (*Id*.) Fourth, the English Court, which is a foreign court before which the UK Proceeding is pending, is located in the UK, which is a foreign country.

19. Fifth, the UK Proceeding was commenced according to the governing provisions of the Insolvency Act, the legislation for all matters relating to personal and corporate insolvency in the UK. Sixth, the Foreign Debtor's assets are subject to the supervision of the English Court, including regular reporting. Seventh, the English Court applies the Insolvency Act, which by its terms is a law related to insolvency or the adjustment of debts for the purpose of reorganization or liquidation. (*See generally id.*)

20. Accordingly, the Foreign Debtor, as the subject of the UK Proceeding pursuant to the Insolvency Act, is in a "foreign proceeding" within the meaning of section 101(23) of the

Bankruptcy Code. Thus, the UK Proceeding is a "foreign proceeding" for the purpose of recognition under chapter 15 of the Bankruptcy Code.

21. Courts in this and other districts routinely recognize foreign proceedings from common law jurisdictions as "foreign main proceedings" under chapter 15 of the Bankruptcy Code, including the administration proceedings commenced pursuant to paragraph 22 of Schedule B1 to the Insolvency Act. *See, e.g., In re Karhoo Inc.,* Case No. 16-13545 (MKV) [ECF No. 31] (Bankr. S.D.N.Y. Feb. 1, 2017) (recognizing a UK administration proceeding as a foreign main proceeding commenced pursuant to Schedule B1 to the Insolvency Act); *In re In re B. Endeavour Shipping Co. Ltd.*, Case No. 15-10246 (REG) [ECF No. 10] (Bankr. S.D.N.Y. Mar. 10, 2015) (same); *In re Privilege Wealth Plc,* Case No. 18-25493 (JKS) [ECF No. 11] (Bankr. D. N.J. Sept. 6, 2018) (same); *Harkand Gulf Contracting Ltd.*, Case No. 16-33091 (EVR) [ECF No. 58] (Bankr. S.D. Tex. July 25, 2016) (same).

E. The UK Proceeding Is a Foreign Main Proceeding

22. A bankruptcy court is obligated to enter an order recognizing a foreign proceeding after notice and a hearing if, among other conditions,[2] the foreign proceeding for which recognition is sought is either a "foreign main proceeding" or a "foreign nonmain proceeding." *See* 11 U.S.C. § 1517(a)(1). Section 1502(4) of the Bankruptcy Code provides that a "foreign main proceeding" means "a foreign proceeding pending in the country where the debtor has the center of its main interests." *Id.* § 1502(4). Section 1502(1) of the Bankruptcy Code provides that for purposes of chapter 15, the term "debtor" means "an entity that is the subject of a foreign proceeding." *Id.* § 1502(1). The term "center of main interests" or "COMI" is not defined in chapter 15 of the Bankruptcy Code. However, chapter 15 includes a presumption that, in the

[2] The other conditions are that the foreign representative applying for recognition is a person or body and the petition meets the requirements of section 1515 of the Bankruptcy Code. *See generally* 11 U.S.C. § 1517(a). These conditions are satisfied here as explained in the prior sections.

absence of evidence to the contrary, the foreign debtor's COMI is the place where the debtor's registered office is located. *Id.* § 1516(c).

23. The COMI concept in chapter 15 derives from Model Law and is also used in the EU Regulation. The Legislative Guide provides that the EU Regulation "indicates that the term should correspond to 'the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties.'" *See* UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (2004), Part 2(I)(A)(2)(a) ¶ 13. The Guide to Enactment of the Model Law indicated that it is "not advisable to include more than one criterion for qualifying a foreign proceeding as a main proceeding and provide that on the basis of any of these criteria a proceeding could be deemed a main proceeding" because such an approach "involving 'multiple criteria' would raise the risk of competing claims from foreign proceedings for recognition as a main proceeding." *See* UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), WITH GUIDE TO ENACTMENT AND INTERPRETATION (2013), Part 2(V)(D) ¶ 155.

24. While courts in this circuit recognize that chapter 15 provides a rebuttable presumption that a debtor's COMI is the place where it is registered, they also look to a non-exclusive list of factors, including "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *In re Inversora Eléctrica de Buenos Aires S.A.,* 560 B.R. 650, 654 (Bankr. S.D.N.Y. 2016) (*quoting Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.),* 714 F.3d 127, 137 (2d Cir. 2013)); *see also In re Gerova Fin. Grp., Ltd.,* 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012) (recognizing Bermuda proceedings as foreign main proceeding following a finding that Bermuda

was the debtor's COMI given the location of its registered officer and the satisfaction of the *Morning Mist* factors).

25. Additionally, as best demonstrated by Judge Lifland's discussion in *Fairfield Sentry*, what has come to be termed the "nerve center test" is a preferred test for determining COMI. The nerve center test looks at the ascertainable location of a chapter 15 debtor even if that means COMI shifted as a result of a liquidation and appointment of a foreign representative in the foreign proceeding so long as such shift does not reflect some type of mischief. *See In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010), *aff'd*, 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011).

26. As the Foreign Debtor's registered office is in the UK, the center of its main interests is presumed to be in the UK, where the UK Proceeding is pending. Furthermore, the analysis of the factors determining the center of main interests reinforces the presumption that the Foreign Debtor's COMI is the UK. Specifically:

i. The Company is a private limited liability company incorporated in England;

ii. The Company's headquarters is located in England;

iii. The Company's directors reside and work in England;

iv. The Company's physical board meetings are held at the Company's registered office in England;

v. The Company is operated from England;

vi. The Company's statutory accounts and annual return are filed with Companies House in the United Kingdom;

vii. The Company's human resources functions are provided by TSTML; TSTML's Head of HR is based in England;

viii. The Company's IT systems are mainly provided from England principally by AGL, which is also based in England, with some systems (such as the employee communication system) being supplied by TSTML;

ix. The corporate identity and branding of the Company, as part of its Group, was created in and is largely associated with the United Kingdom;

x. The Company's main financial creditor is TSTML, which is based in England;

xi. The Company's creditor holding the qualifying floating security is AGL, which is also based in England; and

xii. The Company, therefore, conducts the administration of its interests on a regular basis in England, and this is known to its key creditors and is ascertainable by other parties.

For all of these reasons, the Foreign Debtor's COMI is in the UK, and the Court should recognize the UK Proceeding as a foreign main proceeding.

F. This Chapter 15 Case Was Properly Commenced

27. This case was duly and properly commenced in accordance with sections 1504 and 1509(a) of the Bankruptcy Code by the filing of the Petition in compliance with section 1515(a) of the Bankruptcy Code, which was accompanied by all documents and information required by subsections 1515(b) and (c). *See In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603, 612 (Bankr. S.D.N.Y. 2018) ("a recognition order shall be entered if the foreign representative applying for recognition is a person or body, and [ ] the petition meets the requirements of section 1515). Section 1504 of the Bankruptcy Code provides that "a case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515." 11 U.S.C. § 1504. The Foreign Debtor satisfied the requirement of section 1515(a) of the Bankruptcy Code by filing the Petition with this Court. In satisfaction of section 1515(b), the Foreign Representatives have submitted with the Petition the certified copy, in English, of the Administration Order commencing the UK Proceeding and appointing the Foreign

Representatives. Further, in satisfaction of section 1515(c), the Foreign Representatives have filed, accompanying the Foreign Debtor's Petition, a statement identifying the UK Proceeding as the only foreign proceeding with respect to the Foreign Debtor that is known to the Foreign Representatives. In addition, in accordance with Bankruptcy Rule 1007(a)(4), the Foreign Representatives have filed a statement that, to the best of the Foreign Representative's knowledge, identifies parties to litigation with respect to the Foreign Debtor pending within the United States as well as the parties against which provisional relief is requested. Because the Foreign Representatives have satisfied the requirements set forth in section 1515 of the Bankruptcy Code and Bankruptcy Rule 1007(a)(4), this chapter 15 case has been properly commenced.

G. Recognition Would Not Be Manifestly Contrary to the Public Policy of the United States

28. The UK Proceeding should be recognized as a foreign main proceeding because doing so would not be "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. To the contrary, recognition will further the purposes of chapter 15 by providing for cooperation between this Court and the English Court in order to ensure that the Foreign Debtor's insolvency is handled in a fair, efficient, and centralized manner, to protect and maximize the value of the Foreign Debtor's assets, and to protect the interests of the Foreign Debtor's creditors in the UK Proceeding. *See generally* 11 U.S.C. § 1501 (discussing the purpose and scope of chapter 15). Furthermore, the narrow public policy exception in section 1506 of the Bankruptcy Code should only be invoked under exceptional circumstances not present here. *See In re Tri-Cont'l Exch., Ltd.*, 349 B.R. 627, 638 n.16 (Bankr. E.D. Cal. 2006) (noting that "Congress has indicated, with its use of the phrase 'manifestly contrary,' that this exception is to be narrowly construed," and, in accordance with the Guide to Enactment to the

UNCITRAL Model Law on Cross-Border Insolvency, the public policy exception is "only intended to be invoked under exceptional circumstances concerning matters of fundamental importance") (citing Guide to Enactment to the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess., U.N. Doc. A/CN.9/422 (1997)).

H. The Requested Relief Should Be Granted

29. The relief requested by the Foreign Representatives in the proposed form of order attached as Exhibit A to the Verified Petition is either required to be entered or may be entered in the Court's discretion. Specifically, because the Foreign Representatives have satisfied all the provisions of sections 1515 and 1517 of the Bankruptcy Code, recognition is mandatory. *See* 11 U.S.C. § 1517(a) (stating that "an order recognizing a foreign proceeding ***shall***" be entered if the requisite conditions are satisfied) (emphasis added). As set forth in this Memorandum of Law, the Foreign Representatives and the UK Proceeding satisfy the definitional and documentary provisions of the Bankruptcy Code. Similarly, where the foreign proceeding is pending in a country where the debtor has the center of its main interests, the court must recognize it as a foreign main proceeding. *See* 11 U.S.C. § 1517(b) (also using the "shall" construct for such recognition).

30. The proposed form of order mainly contains the relief that essentially is self-executing upon recognition. *See* 11 U.S.C. § 1520. The remaining provisions of the form of order rely on the discretionary relief available, such as entrusting the Foreign Debtor's assets to the Foreign Representatives, applying the section 365(e) protections with respect to the leases to which the Foreign Debtor is a party and granting the Foreign Representatives powers and relief available to a trustee. *See* 11 U.S.C. §§ 1520 & 1521.

31. With respect to the requested application of the section 365(e) protections in this case, section 1521 of the Bankruptcy Code provides, in relevant part, that the court may grant

"any appropriate relief," including "any relief that may be available to a trustee," subject to certain limitations (not applicable here) where necessary to effectuate the purposes of chapter 15 and to protect the debtor's assets and creditors' interests. 11 U.S.C. § 1521(a)(7). Section 365(e) provides that:

> Notwithstanding a provision in an unexpired lease . . . or in applicable law, an . . . unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such . . . lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such . . . lease that is conditioned on (A) the insolvency of financial condition of the debtor at any time before the closing of the case; [or] (B) the commencement of a case under this title . . . .

11 U.S.C. § 365(e). It is a fundamental provision under the Bankruptcy Code that enables a debtor to preserve valuable commercial relationships, including preventing counterparties from attempting to terminate their contracts or halt performance as a result of the debtor's insolvency. *See generally In re SunEdison, Inc.*, 577 B.R. 120, 130 n.13 (Bankr. S.D.N.Y. 2017) (acknowledging the "uncontroversial proposition" that "section 365(e)(1) of the Bankruptcy Code precludes the termination of an executory contract solely by operation of . . . a clause that terminates the contract automatically in the event of bankruptcy.") (quoting *Greene Techs. Inc. v. Atoma Int'l of Am. Inc.*, 745 N.Y.S.2d 242, 243 (2002)); *see also In re Kraus Carpet.*, Case No. 18-12057 (KG) [ECF No. 46] (Bankr. D. Del. Oct. 1, 2018). The application of the section 365(e) protections in this case is imperative to prevent interference by the Company's landlords with the Foreign Debtor's efforts to maximize the value of its assets by conducting the contemplated inventory liquidation sales. The Court's grant of this protection is especially warranted given the fact that the Foreign Debtor is (and will continue to be) current on its rent payments and, thus, the economic bargain reached by the landlords under the leases will remain unaltered. Moreover, the statutory moratorium under the Insolvency Act operates so as to

prevent a landlord from forfeiting a lease unless an administrator or the court permits it, upon a landlord's application. Accordingly, applying the section 365(e) protections in this chapter 15 case will merely equalize the rights in the UK Proceeding and this chapter 15 case. Without the section 365(e) protections, the Foreign Debtor is at a substantial risk of having its orderly wind down as part of its retail exit strategy from the United States compromised, if not thwarted; a lease termination will likely impose severe economic consequences on the Foreign Debtor's efforts in this chapter 15 case and Administration to maximize the value of its assets for the benefit of all stakeholders. The protections afforded by sections 362 and 365(e) of the Bankruptcy Code will provide the Administrators with a much needed breathing room to market the US operations to prospective buyers while orderly winding down the US operations.

32. Ultimately, without the Court's recognition, the Foreign Debtor's operations in the United States will likely cease immediately due to landlord and other creditor enforcement actions, having a devastating effect on the Company, this Administration and the Group as a whole. Thus, for the reasons set forth in this Memorandum of Law, the Petition, the Obank Declaration and other papers filed with this Court, the Foreign Representatives submit that such relief is necessary and proper and it would be just for the Court to use its discretion to grant this relief.

33. Finally, Bankruptcy Rule 1018 provides that unless the Court orders otherwise, the provisions of Bankruptcy Rule 7062, among others, applies to all proceedings "contesting . . . a chapter 15 petition for recognition . . . ." *See* FED. R. BANKR. P. 1018. Although the Foreign Representatives believe that it is unlikely that any party will contest this petition for recognition, the Foreign Representatives request that, if a contest is presented and is overruled, the Court direct that the stay provisions in Bankruptcy Rule 7062 do not apply and that any order on

recognition be immediately applicable and final, so as not to cause decentralization of the Foreign Debtor's reorganization and leave it vulnerable to piecemeal enforcement actions.

IV.
CONCLUSION

34. For the reasons stated in this Memorandum of Law, the Foreign Representatives respectfully request that the Court enter an order, substantially in the form attached as Exhibit A to the Verified Petition, recognizing the UK Proceeding as a foreign main proceeding, granting the relief in aid of the UK Proceeding as requested in the Verified Petition, and granting such other and further relief as the Court finds necessary and appropriate under the circumstances presented.

[*Signature Page Follows*]

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Respectfully submitted,

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