Hearing Date and Time: February 1, 2016 at 10:00 a.m. (E.T.)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
RELATIVITY FASHION, LLC, *et al.*,[1]	Case No. 15-11989 (MEW)
Debtors.	(Jointly Administered)

SUPPLEMENT TO DEBTORS' (I) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THIRD AMENDED PLAN OF REORGANIZATION AND (II) OMNIBUS REPLY TO OBJECTIONS WITH RESPECT TO PLAN AND RELATED PROCEEDINGS

[1] The Debtors in these chapter 11 cases are as set forth on page (i).

The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Relativity Fashion, LLC (4571); Relativity Holdings LLC (7052); Relativity Media, LLC (0844); Relativity REAL, LLC (1653); RML Distribution Domestic, LLC (6528); RML Distribution International, LLC (6749); RMLDD Financing, LLC (9114); 21 & Over Productions, LLC (7796); 3 Days to Kill Productions, LLC (5747); A Perfect Getaway P.R., LLC (9252); A Perfect Getaway, LLC (3939); Armored Car Productions, LLC (2750); Best of Me Productions, LLC (1490); Black Or White Films, LLC (6718); Blackbird Productions, LLC (8037); Brant Point Productions, LLC (9994); Brick Mansions Acquisitions, LLC (3910); Brilliant Films, LLC (0448); Brothers Productions, LLC (9930); Brothers Servicing, LLC (5849); Catfish Productions, LLC (7728); Cine Productions, LLC (8359); CinePost, LLC (8440); Cisco Beach Media, LLC (8621); Cliff Road Media, LLC (7065); Den of Thieves Films, LLC (3046); Don Jon Acquisitions, LLC (7951); DR Productions, LLC (7803); Einstein Rentals, LLC (5861); English Breakfast Media, LLC (2240); Furnace Films, LLC (3558); Gotti Acquisitions, LLC (6562); Great Point Productions, LLC (5813); Guido Contini Films, LLC (1031); Hooper Farm Music, LLC (3773); Hooper Farm Publishing, LLC (3762); Hummock Pond Properties, LLC (9862); Hunter Killer La Productions, LLC (1939); Hunter Killer Productions, LLC (3130); In The Hat Productions, LLC (3140); J&J Project, LLC (1832); JGAG Acquisitions, LLC (9221); Left Behind Acquisitions, LLC (1367); Long Pond Media, LLC (7197); Madaket Publishing, LLC (9356); Madaket Road Music, LLC (9352); Madvine RM, LLC (0646); Malavita Productions, LLC (8636); MB Productions, LLC (4477); Merchant of Shanghai Productions, LLC (7002); Miacomet Media LLC (7371); Miracle Shot Productions, LLC (0015); Most Wonderful Time Productions, LLC (0426); Movie Productions, LLC (9860); One Life Acquisitions, LLC (9061); Orange Street Media, LLC (3089); Out Of This World Productions, LLC (2322); Paranoia Acquisitions, LLC (8747); Phantom Acquisitions, LLC (6381); Pocomo Productions, LLC (1069); Relative Motion Music, LLC (8016); Relative Velocity Music, LLC (7169); Relativity Development, LLC (5296); Relativity Film Finance II, LLC (9082); Relativity Film Finance III, LLC (8893); Relativity Film Finance, LLC (2127); Relativity Films, LLC (5464); Relativity Foreign, LLC (8993); Relativity India Holdings, LLC (8921); Relativity Jackson, LLC (6116); Relativity Media Distribution, LLC (0264); Relativity Media Films, LLC (1574); Relativity Music Group, LLC (9540); Relativity Production LLC (7891); Relativity Rogue, LLC (3333); Relativity Senator, LLC (9044); Relativity Sky Land Asia Holdings, LLC (9582); Relativity TV, LLC (0227); Reveler Productions, LLC (2191); RML Acquisitions I, LLC (9406); RML Acquisitions II, LLC (9810); RML Acquisitions III, LLC (9116); RML Acquisitions IV, LLC (4997); RML Acquisitions IX, LLC (4410); RML Acquisitions V, LLC (9532); RML Acquisitions VI, LLC (9640); RML Acquisitions VII, LLC (7747); RML Acquisitions VIII, LLC (7459); RML Acquisitions X, LLC (1009); RML Acquisitions XI, LLC (2651); RML Acquisitions XII, LLC (4226); RML Acquisitions XIII, LLC (9614); RML Acquisitions XIV, LLC (1910); RML Acquisitions XV, LLC (5518); RML Bronze Films, LLC (8636); RML Damascus Films, LLC (6024); RML Desert Films, LLC (4564); RML Documentaries, LLC (7991); RML DR Films, LLC (0022); RML Echo Films, LLC (4656); RML Escobar Films LLC (0123); RML Film Development, LLC (3567); RML Films PR, LLC (1662); RML Hector Films, LLC (6054); RML Hillsong Films, LLC (3539); RML IFWT Films, LLC (1255); RML International Assets, LLC (1910); RML Jackson, LLC (1081); RML Kidnap Films, LLC (2708); RML Lazarus Films, LLC (0107); RML Nina Films, LLC (0495); RML November Films, LLC (9701); RML Oculus Films, LLC (2596); RML Our Father Films, LLC (6485); RML Romeo and Juliet Films, LLC (9509); RML Scripture Films, LLC (7845); RML Solace Films, LLC (5125); RML Somnia Films, LLC (7195); RML Timeless Productions, LLC (1996); RML Turkeys Films, LLC (8898); RML Very Good Girls Films, LLC (3685); RML WIB Films, LLC (0102); Rogue Digital, LLC (5578); Rogue Games, LLC (4812); Roguelife LLC (3442); Safe Haven Productions, LLC (6550); Sanctum Films, LLC (7736); Santa Claus Productions, LLC (7398); Smith Point Productions, LLC (9118); Snow White Productions, LLC (3175); Spy Next Door, LLC (3043); Story Development, LLC (0677); Straight Wharf Productions, LLC (5858); Strangers II, LLC (6152); Stretch Armstrong Productions, LLC (0213); Studio Merchandise, LLC (5738); Summer Forever Productions, LLC (9211); The Crow Productions, LLC (6707); Totally Interns, LLC (9980); Tribes of Palos Verdes Production, LLC (6638); Tuckernuck Music, LLC (8713); Tuckernuck Publishing, LLC (3960); Wright Girls Films, LLC (9639); Yuma, Inc. (1669); Zero Point Enterprises, LLC (9558). The location of the Debtors' corporate headquarters is: 9242 Beverly Blvd., Suite 300, Beverly Hills, CA 90210.

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Relativity Fashion, LLC, and its affiliated debtors and debtors in possession in these chapter 11 cases (collectively, the "**Debtors**" and together with Ryan C. Kavanaugh and Joseph G. Nicholas, the "**Plan Proponents**") submit this Supplement to *Debtors' (I) Memorandum of Law in Support Of Confirmation Of Third Amended And Restated Plan And (II) Omnibus Reply to Objections With Respect To Plan And Related Proceedings* [Dkt. No. 1472] (the "**Confirmation Brief**") in order to respond to certain objections filed with respect to confirmation of the Plan or the assumption of certain executory contracts in connection therewith (the "**Objections**" and the parties that filed such Objections, the "**Objecting Parties**"). Infurther support of the Confirmation Brief and this Supplement thereto, the Debtors have filed the declarations of Dana Brunetti [Dkt. No. 1503] (the "**Brunetti Declaration**"), Joseph G. Nicholas [Dkt. No. 1504] (the "**Nicholas Declaration**"), Matthew R. Niemann [Dkt. 1505] (the "**Niemann Declaration**"), and Ronald E. Hohouser [Dkt. No. 1509] (the "**Hohouser Declaration**") concurrently herewith. The Plan Proponents respectfully request that the Court confirm the Plan for the reasons set forth herein and in the Confirmation Brief, and upon the record that will be presented at the upcoming hearing on confirmation (the "**Confirmation Hearing**").

Preliminary Statement

1. The Debtors submit this Supplement to the Confirmation Brief in order to respond to the following Objections that were not specifically addressed in the Confirmation Brief: (i) *Objection of CIT Bank, N.A. as Production Loan Agent and Lender* [Dkt. No. 1414] (the "**PL Agent Objection**"); (ii) *Objection to the Assumption of Unifi Contracts in Connection with the Plan of Reorganization and to the Associated Cure of Defaults* [Dkt. No. 1342] (the "**Unifi Objection**"); and (iii) *Limited Objection of the Colbeck Parties to Debtors' Proposed Rejection of Certain Contracts Listed on Exhibit E to the Plan Supplement* [Dkt. No. 1344] (the "**Colbeck Objection**"); (iv) QNO, LLC ("**QNO")** *Objections of QNO, LLC to Proposed*

Assumption of Executory Contracts Under Plan and Associated Cure of Defaults [Dkt. No. 1320] (the "**QNO Objection**").[1]

Responses to Specific Objections

2. In addition to the matters set forth in the Confirmation Brief, the Debtors provide the following responses to the specific issues raised in the PL Agent Objection, the Unifi Objection, and the Colbeck Objection.

I. The PL Agent Objection

3. The Plan Proponents have engaged in extensive discussions with CIT Bank, N.A. as Production Loan Agent and Lender (the "**PL Agent**") in the weeks leading up to the Confirmation Hearing. Based on those negotiations, the Plan Proponents agreed to extend the deadline for the PL Agent to file its Objection to January 26, 2016 at 1:00 p.m. (ET). Accordingly, the Plan Proponents did not receive the PL Agent Objection until that time. Since then, the parties have continued their negotiations, and the Plan Proponents remain hopeful that an agreement can be reached.

4. The Plan Proponents will therefore continue to actively negotiate with the PL Agent in an attempt to reach a Production Loan Settlement, as defined under the Plan. *See* Plan § I.A.122. If no Production Loan Settlement is reached, then the Plan Proponents will unilaterally make the following clarifications and/or enhancements to the Plan's treatment of the Production Loan Secured Claims, for the benefit of the PL Agent and the Production Lenders (collectively, the "**PL Plan Modifications**"), and will seek to confirm the Plan, as modified, over the PL Agent's objection:

[1] Capitalized but undefined terms used herein have the meanings given to them in the Confirmation Brief, the Plan, the PL Agent Objection, the Unifi Objection. the Colbeck Objection, or the QNO Objection, as the case may be.

(i) *Liens.* The PL Agent will retain its existing first priority liens on all of the Common Collateral (as defined under any existing intercreditor agreements, including with RKA, as Pre-Release Lender, with respect to *Masterminds* and *The Disappointments Room*), provided that, ***solely with respect to proceeds of the domestic distribution rights for Masterminds and The Disappointments Room and not with respect to any proceeds of the foreign distribution rights for such films***, such liens may be subordinated to the liens of the New P&A/Ultimates Facility, or such other print and advertising facility or Supplemental Funding which may be used to fund P&A for *Masterminds* and *The Disappointments Room,* on customary market terms, with caps as provided for in the Replacement P&A Notes;

(ii) *Term*. The term of the Replacement Production Loan Notes will be reduced from 3 years to 20 months (commencing February 1, 2016);

(iii) *Interest Rate.* Payment in kind (PIK) interest will accrue on the Replacement Production Loan Notes at the current, non-default contract rate instead of the proposed cramdown rate.

(iv) *Netflix Latin America Receivable For The Disappointments Room.* In addition to the existing collateral package, the PL Agent will receive a first priority security interest in payments from Netflix Latin America with respect to *The Disappointments Room*, the value of which will vary with the domestic box office earned by the film during its theatrical release.

(v) *Domestic Theatrical Release Dates For Masterminds and The Disappointments Room.* The Debtors will commit to release *Masterminds* for domestic theatrical release on or before September 30, 2016 and to release *The Disappointments Room* for domestic theatrical release on or before December 31, 2016.

5. The Debtors submit that the PL Plan Modifications and the existing plan treatment provisions are more than sufficient to provide adequate protection of the PL Agent's interest in the collateral securing the Production Loan Secured Claims. Nonetheless, the Plan Proponents are prepared to litigate the issues raised in the PL Agent Objection at the Confirmation Hearing if necessary. For the reasons discussed below, the PL Agent Objection should be overruled and the PL Plan Modifications should be implemented and approved.

A. The Best Interests Test Is Satisfied

6. The PL Agent first argues that the "best interests" test of section 1129(a)(7) is not satisfied because (i) the Disclosure Statement does not include a separate

liquidation analysis for each individual Debtor, including the two Borrower entities under the Production Loans; and (ii) the Production Lenders would fare better if the Borrower entities were liquidated under chapter 7 of the Bankruptcy Code than they would under the Plan. For the reasons discussed below, neither of these contentions has merit.

7. As an initial matter, as discussed in section I.F below, the Plan Proponents will demonstrate at the Confirmation Hearing that the claims of the PL Agent and the other Production Lenders are fully secured, and that the requirements for cramdown under section 1129(b)(2)(A)(i) and (iii) of the Bankruptcy Code are met. The PL Agent has put in no contrary evidence of value and has not asserted that the Production Loan Secured Claims are undersecured. As such, the PL Agent lacks standing to object to the Plan on the grounds that the best interests test is not satisfied. *In re New Midland Plaza Associates*, 247 B.R. 877, 895 (Bankr. S.D. Fla. 2000) ("a fully secured creditor does not have standing to assert the best interest of creditors test under § 1129(a)(7)"); *In re Patrician St. Joseph Partners Ltd. P'ship*, 169 B.R. 669, 680 (D. Ariz. 1994) (same); *In re Computer Optics, Inc.*, 126 B.R. 664, 666 (Bankr. D.N.H. 1991) (same).

8. To the extent that the PL Agent has standing to raise a best interests objection at all, there is no need for the Plan Proponents to provide a separate liquidation analysis for each of the Borrower entities, or for any other individual Debtors. The Plan provides that, "on the Effective Date, the Reorganized Debtors shall be deemed substantively consolidated for plan purposes only." Plan § II.C.10 . Such "deemed substantive consolidation" is appropriate and has been approved by other courts in this district where, as here, no affected creditor is harmed by such treatment. *See, e.g., In re Northeast Biofuels, LP*, 2011 Bankr. LEXIS 1856, at **81-82 (Bankr. N.D.N.Y. Feb. 11, 2011) (permitting debtors' estates to be

substantively consolidated solely for purposes of determining distributions under the plan); *In re Extended Stay Inc.*, 2010 Bankr. LEXIS 5411, **56-58 (Bankr. S.D.N.Y. July 20, 2010) (same); *In re Graphics Props. Holdings, Inc*., 2009 Bankr. LEXIS 5259, at **98-101 (Bankr. S.D.N.Y. Nov. 10, 2009) (same); *In re Bearingpoint, Inc.*, 2009 Bankr. LEXIS 5045, **41-42 (Bankr. S.D.N.Y. Dec. 22, 2009) (same).

9. Here, the only class of Claims whose treatment under the Plan is affected by the deemed substantive consolidation of the Debtors is Class J (General Unsecured Claims). Far from being disadvantaged by such treatment, the Debtors' general unsecured creditors are significantly better off under the Plan than they would be in a hypothetical chapter 7 liquidation. As set forth in the Liquidation Analysis attached to the Disclosure Statement, the Debtors' general unsecured creditors would recover nothing in a chapter 7 liquidation scenario, whereas under the Plan the general unsecured creditors are projected to receive a recovery of between 4% and 11.5%, plus their pro rata share of any recoveries by the Litigation Trust. Not surprisingly, therefore, none of the general unsecured creditors holding Class J Claims has objected to the Debtors being deemed substantively consolidated for Plan purposes, nor have they demanded a separate liquidation analysis for their particular Debtor entities. The reason for this is simple: due to the senior and junior secured lien claims that would receive all value in those entities, under their comprehensive security interests, and taking into account the administrative and priority claims of each Debtor in these chapter 11 cases and the expenses involved in a chapter 7 liquidation, each of the 145 separate liquidation analyses for each individual Debtor would show the same result: a recovery of $0 for general unsecured creditors. As such, no separate liquidation analysis is needed for the Borrower entities under the Production Loans or for any other Debtor.

10. Moreover, the PL Agent's assertion that it would recover more in a liquidation scenario than it would under the Plan is incorrect. Each of the Replacement Production Loan Notes provides for the Production Lenders to receive payment in full of their Claims. The Production Lenders could not possibly recover more than that in a liquidation scenario. Thus, to the extent that the best interests test even applies to the Production Lenders' fully secured Claims, there can be no dispute that the Production Lenders will receive under the Plan, in the form of the Replacement Production Loan Notes, "property of a value, as of the effective date of the [P]lan, that is not less than the amount that [the Production Lenders] would so receive or retain if the [Borrower entities] were liquidated under chapter 7 of [the Bankruptcy Code" on such date." 11 U.S.C. § 1129(a)(7)(A)(ii); *see In re DBSD N. Am., Inc.*, 419 B.R. 179, 216 n.160 (Bankr. S.D.N.Y. 2009) (characterizing first lien creditor's best interests objection as "academic" in light of court's finding that first lien debt would be paid in full and thus creditor would receive "no less than it would get in a liquidation"), *aff'd*, No. 09 CIV. 10156 (LAK), 2010 U.S. Dist. LEXIS 33253, 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010); *aff'd in part, rev'd in part on other grounds*, 627 F.3d 496 (2d Cir. 2010).

B. The Plan Is Feasible

11. The PL Agent also objects to confirmation of the Plan on the grounds that it is not feasible, but fails to offer any specific criticisms of the Debtors' business plan or projections other than to say that the financing for the Plan is "only speculative." PL Agent Objection at 17. In assessing feasibility of a plan, however, courts must undertake a fact intensive, case by case analysis, "using as a backdrop the relatively low parameters articulated in the statute." DBSD, 419 B.R. at 202 (quoting *In re Eddington Thread Mfg. Co*., 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995); *see also Computer Task Group, Inc. v. Brotby (In re Brotby)*, 303 B.R. 177, 191 (9th Cir. B.A.P. 2003) ("[A] relatively low threshold of proof will satisfy §

1129(a)(11), . . . so long as adequate evidence supports a finding of feasibility.") (internal citations omitted); *Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006) (same) (citing *In re Brotby*). The Court "does not need to know to a certainty or even a substantial probability, that the plan will succeed," it must only find that there is some reasonable likelihood that it will. *DBSD*, 419 B.R.at 201-02.

12. As fully discussed in the Confirmation Brief, the Debtors submit that they have comfortably met this "relatively low threshold." They have provided detailed financial projections prepared in cooperation with their financial advisors, which will be presented in greater depth at the Confirmation Hearing. Niemann Decl., Ex. A. The Plan Proponents will also offer the testimony of Joseph Nicholas, whose personal investment of $80 million in the Debtors over the past twelve (12) months speaks volumes with respect to the Debtors' prospective ability to raise the additional debt and equity financing that will be needed following their emergence from chapter 11. *See* Nicholas Decl. ¶ 4; *DBSD*, 419 B.R. at 203 (finding that debtors had demonstrated sufficient likelihood that they would be able to raise additional capital to meet a balloon payment coming due after four years where they had only obtained sufficient funding to survive for approximately two years).

13. As set forth in the Niemann declaration, the Debtors will benefit from a significantly deleveraged balance sheet upon emergence from bankruptcy, Niemann Decl. ¶ 18, making them far more attractive to potential lenders and investors. Indeed, as set forth in the Nicholas Declaration, the Debtors have already identified numerous potential sources of debt and equity financing, and will be far better positioned to take advantage of those financing opportunities once they are able to emerge from bankruptcy and begin releasing films again. Nicholas Decl. ¶ 5 ("I have personally worked with multiple funding sources and have met on

multiple occasions with Relativity's management and advisors with respect to fund raising, in advance of, and for the exit from, chapter 11. Based upon those meetings and interactions, I am aware of a number of funding sources, both in terms of debt (trade and otherwise) and equity, comprising at least $150 million, which I believe Relativity will be able to rely upon in order to emerge from chapter 11.").

14. The addition of Kevin Spacey and Dana Brunetti to lead the Debtors' film and scripted television production efforts also cannot be emphasized enough as a positive future factor. Given their track record of creative and box office success, *see* Brunetti Decl. ¶¶ 1-5, their addition immeasurably strengthens the Debtors ability to attract future projects and financing. In short, the Plan Proponents will present evidence of feasibility that is more than sufficient to satisfy the "low threshold" of proof required to meet the requirements of section 1129(a)(11).

C. The Plan Proponents Have Complied With Section 1129(a)(2)

15. The PL Agent next argues that section 1129(a)(2) of the Bankruptcy Code is not satisfied because the Plan Proponents have not complied with the disclosure and solicitation requirements set forth in sections 1125 and 1126 of the Bankruptcy Code. PL Agent Objection at 19. In particular, the PL Agent contends that the Plan Proponents have violated applicable disclosure and solicitation requirements by "issu[ing] unsubstantiated press releases as the voting deadline approached, relating to events that are critical to the feasibility of the Debtors going forward." *Id.* at 19-20. The PL Agent fundamentally misconstrues the law with respect to Plan solicitation and disclosure requirements, however.

16. The intent of section 1125 of the Bankruptcy Code is not to *limit* the information that a creditor may receive, but rather to ensure that, before voting on the plan, creditors are provided with a minimally sufficient amount of information to inform their votes.

Century Glove, Inc. v. First Am. Bank of New York, 860 F.2d 94, 100 (3d Cir. 1988) ("Rather than limiting the information available to a creditor, § 1125 seeks to guarantee a minimum amount of information to the creditor asked for its vote"). Thus, so long as information transmitted to creditors outside of the disclosure statement does not contradict the disclosure statement, or contain mischaracterizations or misstatements of material fact that might unfairly influence solicitees, a plan proponent or third party may transmit additional materials to creditors and other interested parties to induce their votes. *In re Kellogg Square P'ship*, 160 B.R. 336, 341 (Bankr. D. Minn. 1993); *In re Dow Corning Corp.*, 227 B.R. 111, 118 (Bankr. E.D. Mich. 1998), *as amended* (Dec. 28, 1998), *as amended* (Jan. 25, 1999). Courts in this District have therefore repeatedly approved communications issued after the disclosure statement. *In re Residential Capital, LLC*, No. 12-12020, 2013 WL 3286198, at *19 (Bankr. S.D.N.Y. June 27, 2013).

17. Here, the communications in question were not even directed to creditors voting on the Plan, but rather, to the media and to the public at large. The PL Agent has cited no case in which such broad and widely disseminated communications were deemed to violate the disclosure and solicitation requirements of section 1125. As such, the Plan Proponents have fully complied with section 1129(a)(2).

D. Except As Otherwise Disclosed Prior To The Effective Date Of The Plan, The Debtors' Existing Management Will Remain In Place

18. The PL Agent also objects to the Plan on the grounds that the Debtors have "announced a number of post-confirmation officers only in press releases." PL Agent Objection at 21. For the avoidance of doubt, as previously stated in the Confirmation Brief, the Plan contemplates that the Debtors' existing officers will remain in place following the Debtors' emergence from chapter 11. In addition, as described in the Brunetti declaration, Messrs. Spacey and Brunetti will join the Debtor's creative and management teams.

E. The Plan Complies With All Applicable Sections Of The Bankruptcy Code

19. The PL Agent also contends that the Plan does not satisfy section 1129(a)(1), pointing to a laundry list of Bankruptcy Code provisions that it alleges have been violated—namely, sections 1125, 1127, 365, 524, and 510(a). As creative as some of the PL Agent's arguments may be, they are incorrect.

20. *First*, the Plan fully complies with sections 1125 and 1127. As noted in the Confirmation Brief, this Court approved the Disclosure Statement as containing adequate information, and the Plan Proponents proceeded with solicitation of the Plan based upon that approval. The press releases referenced by the PL Agent were in no way intended, nor were they presented, as "modifications" to the Plan under section 1127. To the extent that the Plan Proponents seek to modify the Plan, they have, and will continue to, file amended versions of the Plan and any relevant exhibits with the Court and serve them on interested parties in accordance with applicable rules.

21. *Second*, the PL Agent's argument with respect to section 365 is baffling. According to the PL Agent, the Debtors are "clearly attempting to modify the terms of numerous executory contracts that they would purport to assume." PL Agent Objection at 23. The PL Agent is vague, however, as to which contracts are supposedly being impermissibly modified, stating only that "the definition of 'Loan Documents' under the LSAs is expansive, and includes, among other agreements, a number of executory contracts," and that, the Debtors "cannot assume Loan Documents that are executory contracts, but prohibit the Lenders from enforcing the terms of any of those agreements. *Id.*. To be clear, the Debtors are *not* assuming either of the underlying Loan and Security Agreements ("**LSAs**") with respect to the Production Loans. Instead, the LSAs will be replaced with the Replacement Production Loan Notes which, admittedly, do modify the existing rights of the PL Agent to some extent. But such modification

is the very essence of cramdown under section 1129(b) and, as explained below, it is entirely appropriate here.

22. *Third*, the Third Party Release provided for under the Plan does not violate section 524 of the Bankruptcy Code. The PL Agent apparently believes that it is a "Releasing Party" under the Plan. However, unless the PL Agent "affirmatively elect[ed] to provide releases by checking the appropriate box on the ballot form," *see* Plan § I.A.130, then that is not the case. Here, the PL Agent voted to reject the Plan, and was clearly not a Releasing Party under the Plan (not surprisingly, the PL Agent did not check the box on the ballot to opt-in to the release). As discussed below, the Third Party Release is completely consistent with applicable law in this Circuit and with other "consensual" third party release provisions that have been approved by this Court, and should be approved.

23. The seminal case in evaluating third party debtor releases is *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005). In *Metromedia*, the Second Circuit affirmed third party releases—which limited lawsuits against former officers and directors—ruling that the releases were "unquestionably an essential element" of the plan, as they allowed current suits to be settled without fear of future suits. *Id.* In the wake of *Metromedia*, courts have regularly approved "consensual" third party releases under a plan. *See, e.g.*, *In re MPM Silicones, LLC*, 2014 Bankr. LEXIS 3926, 99-100 (Bankr. S.D.N.Y. Sept. 9, 2014) ("While it is true that third-party releases and related injunctions in Chapter 11 plans and confirmation orders are, under the law of the Second Circuit, proper only in rare cases, if they are consensual or are not objected to after proper notice, courts generally approve them unless they are truly overreaching on their face.") (internal citations omitted); *In re Chemtura Corp.*, 439 B.R.

561, 611 (Bankr. S.D.N.Y. 2010) (finding releases permissible based on creditor consent); *In re Calpine Corp.*, 2007 WL 4565223, at *10 (same).

24. A release will be considered consensual when "adequate notice" of the release has been provided to creditors. *MPM Silicones*, 2014 Bankr. LEXIS 3926, at *100. Notice is adequate when, for example, the third party release is bolded in the plan and disclosure statement or language on the ballot explains that by voting to accept the plan or abstaining without opting out of the release, the creditor consents to the release. *In re DBSD N. Am., Inc.*, 419 B.R. 179, 218–9 (Bankr. S.D.N.Y. 2009) aff'd, No. 09 CIV. 10156 (LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010) *aff'd in part, rev'd in part*, 627 F.3d 496 (2d Cir. 2010); *MPM Silicones*, 2014 WL 4436335, at *32 (citing *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233).

25. In *In re Chassix Holdings*, 533 B.R. 64, 77 (Bankr. S.D.N.Y. 2015), this Court approved certain third party consensual releases given under a chapter 11 plan where: (i) those who voted for the plan were deemed to have given the release, without the need to check a box on the ballot in order to specifically "opt in"; (ii) those who voted against the plan were deemed not to have consented to the release, but could check a box on the ballot indicating their desire to opt in to the release notwithstanding their vote to reject the plan; (iii) creditors who were entitled to vote, but who chose to take no action at all were deemed not to have consented to the proposed release; and (iv) creditors and interest holders who were deemed to reject the Plan (and therefore were given no opportunity to vote or to "opt in" to the releases) were deemed not to have consented to releases, as it would "defy common sense to conclude that such parties had given their consent." *Id.*

26. Here, the Third Party Release set forth in Section X.F of the Plan is structured in the same manner as this Court opined would be acceptable in Chassix, and should be approved. In addition, notice of the Third Party Release was adequate because (i) it is set forth in bolded text in the Disclosure Statement, *see* Disclosure Statement at 61-62; (ii) it is set forth in bolded text and "ALLCAPS" in the Plan, *see* Plan § X.F; and (iii) the first page of the Disclosure Statement contains, under the heading "IMPORTANT INFORMATION FOR YOU TO READ," the following statement:

> **PLEASE BE ADVISED THAT ARTICLE X OF THE PLAN CONTAINS RELEASE, EXCULPATION, AND INJUNCTION PROVISIONS. YOU SHOULD REVIEW AND CONSIDER THE PLAN CAREFULLY BECAUSE YOUR RIGHTS MAY BE AFFECTED THEREUNDER.**

27. For these reasons, the Third Party Release is consistent with applicable provisions of the Bankruptcy Code as required by section 1123(b)(6) and should be approved.

28. Finally, the Plan does not run afoul of section 510(a) of the Bankruptcy Code., which provides for the enforcement of subordination agreements in bankruptcy to the same extent that such agreements are enforceable under applicable nonbankruptcy law. 11 U.S.C. § 510(a). Notably, section 1129(b)(1), which provides the mechanism for cramdown of a nonconsensual plan with respect to an impaired, dissenting class of creditors, begins with the phrase "[n]otwithstanding section 510(a) of this title. . . ." 11 U.S.C. § 1129(b)(1). As one court observed, "[t]he only logical reading of the term 'notwithstanding' in section 1129(b)(1) seems to be: 'Even though section 510(a) requires the enforceability of subordination agreement in a bankruptcy case to the same extent that the agreement is enforceable under nonbankruptcy law, if a nonconsensual plan meets all of the § 1129(a) and (b) requirements, the court 'shall confirm the plan.'" *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 141 (Bankr. D.N.J. 2010). Thus, "[t]he phrase '[n]otwithstanding section 510(a) of this title' removes section 510(a) from the scope of

1129(a)(1), which requires compliance with "the applicable provisions of this title." *Id.* (internal citations and quotations omitted); *see also In re Croatan Surf Club, LLC*, 2011 Bankr. LEXIS 4517, *4 (Bankr. E.D.N.C. Oct. 25, 2011) ("§ 510(a) was not intended to give parties carte blanche to override other provisions of the Bankruptcy Code."). It is therefore irrelevant whether the Plan complies with section 510(a) to the extent that the requirements of section 1129 (a) and (b) are otherwise met.

F. The Plan Is Fair and Equitable With Respect To The Production Loan Secured Claims

29. As discussed in the Confirmation Brief, section 1129(b) of the Bankruptcy Code permits cramdown of the Production Loan Secured Claims, provided that the Plan does not discriminate unfairly, and is fair and equitable, with respect to such Claims. 11 U.S.C. § 1129(b). The PL Agent apparently does not dispute that the Plan does not unfairly discriminate with respect to the Production Loan Secured Claims, and thus the only issue under section 1129(b) is whether it is fair and equitable.

30. The treatment of secured creditors in a cramdown situation is governed by section 1129(b)(2)(A) of the Bankruptcy Code, which outlines three alternative scenarios that will satisfy the "fair and equitable" requirement with respect to a dissenting class of secured creditors. A plan must provide either:

> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A). Here, the fair and equitable requirement is independently satisfied under two of the above three prongs—sections 1129(b)(2)(A)(i) and (iii). Specifically, section 1129(b)(2)(A)(i) is satisfied because under the PL Plan Modifications, the Production Lenders will their retain their liens *and* will receive deferred cash payments having a present value equal to the amount of their claims. Section 1129(b)(2)(A)(iii) is also satisfied, because the Replacement Production Loan Notes will provide the Production Lenders with the "indubitable equivalent" of their claims.

1. The Plan Is Fair And Equitable With Respect To the Production Lenders Because They Will Retain Their Liens And Will Receive The Present Value Of The Allowed Production Loan Secured Claims

31. Under section 1129(b)(2)(A)(i), "a fully secured creditor is treated fairly and equitably if it retains the lien securing its claim and receives deferred cash payments which have a present value equal to the amount of its claim." *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 937 (Bankr. S.D.N.Y. 1994).

32. As explained in the Hohouser Declaration, as of the Petition Date, the PL Agent was owed approximately $21.6 million of principal and approximately $130,000 of accrued interest on a production loan related to the film *Masterminds* (the "**MM Loan**").[2]

[2] These amounts are estimated by the Debtors and are subject to confirmation by the PL Agent. On January 11, 2016, the Debtors authorized the PL Agent to apply certain tax credits worth approximately $5.7 million to repay a portion of the MM Loan. As a result, the Debtors estimate that the principal balance of the MM Loan was reduced to approximately $15.9 million, supported by at least $19.1 million of total collateral.

Hohouser Decl. ¶ 19. As of the petition date, the MM Loan was secured by a first-priority lien against a collateral package having a total value well in excess of $24.8 million, of which approximately $15.4 million relates to foreign distribution rights for the film, $3.7 million relates to domestic distribution rights (Netflix only), $5.7 million relates to "soft money" tax credits, and an unknown amount relates to receivables from Netflix Latin America, the value of which will vary with the domestic box office earned by the film during its theatrical release. *Id.* The MM Loan was additionally secured by a first-priority lien (which under certain circumstances would be subordinated to a P&A lender) in proceeds from exploitation of the film in the U.S. market.

33. The PL Agent was also owed approximately $12.3 million of principal and approximately $43,000 of accrued interest on a production loan related to the film *The Disappointments Room* (the "**DR Loan**") as of the Petition Date.[3] The DR Loan was secured by a first-priority lien against a collateral package having a total value of approximately $15.3 million as of that date, of which approximately $8.8 million relates to foreign distribution rights for the film, $3.7 million relates to domestic distribution rights (Netflix only), and $2.7 million relates to "soft money" tax credits. The DR loan was additionally secured by a first-priority lien (which under certain circumstances would be subordinated to a P&A lender) in proceeds from exploitation in the U.S. market. As such, the both the MM Loan and the DR Loan were fully secured as of the Petition Date, with a significant equity cushion.

34. As noted above, under the anticipated PL Plan Modifications, the PL Agent would retain its first priority liens with respect to the collateral securing the MM Loan and the DR Loan, provided that *solely with respect to proceeds of the domestic distribution rights for*

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[3] The Debtors also authorized the PL Agent to apply tax credits worth approximately $2.7 million to repay a portion of the DR Loan. As a result, the Debtors estimate that the principal balance of the DR Loan was reduced to approximately $9.6 million, supported by approximately $12.6 million of total collateral.

each of those films, and not with respect to any proceeds of the foreign distribution rights for such films, the liens of the PL Agent would be subordinated to the liens securing the New P&A/Ultimates Facility. The Debtors submit that, given the significant equity cushion of the PL Agent with respect to both films, this proposed treatment will allow the PL Agent to "retain the lien securing its claim" within the meaning of section 1129(b)(2)(A)(i).

35. As to the second prong of section 1129(b)(2)(A)(i), the legislative history indicates that the phrase "of a value, as of the effective date of the plan" requires a court to determine the present value equal to the amount of the claim. *See* 124 Cong. Rec. 32, 407 (1978) (statement of Rep. Edwards); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 377 (1988) (noting that the phrase "value, as of the effective date of the plan" under section 1129(b)(2)(A)(i)(II) requires a present value analysis). The Supreme Court has confirmed that this is the proper standard. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, the Court ruled that where senior lienholders receive deferred cash payments they are entitled to interest payments "to ensure that, over time, [they] receive[ ] disbursements whose total present value equals or exceeds that of the allowed claim." *Id.* at 469; *see also Rake v. Wade*, 508 U.S. 464 (1993) ("When a claim is paid off pursuant to a stream of future payments, a creditor receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments.").

36. Here, the Replacement Production Loan Notes would utilize the existing contract interest rate, which is considerably higher than the a typical cramdown rate calculated in accordance with the "prime-plus" formula adopted by the Supreme Court in *Till*, or the Treasury Bill plus 1- 3% rate that was recently approved by the court in *In re MPM Silicones, LLC*, No. 14-22503-

RDD, 2014 WL 4436335, at *24 (Bankr. S.D.N.Y. Sept. 9, 2014) *aff'd,* 531 B.R. 321 (S.D.N.Y. 2015). Thus, there can be no dispute that the Production Lenders would receive property "of a value, as of the effective date of the [P]lan" of at least the amount of such holders' allowed claims.

37. For the foregoing reasons, both requirements under section 1129(b)(2)(A)(i) are satisfied, and the treatment of the Production Loan Secured Claims is fair and equitable.

2. The Plan Is Fair And Equitable With Respect To the Production Lenders Because They Will Receive The "Indubitable Equivalent" Of Their Claims

38. Alternatively, the fair and equitable requirement can be met by a showing that secured creditors will realize the "indubitable equivalent" of their claims under the proposed plan. Although "indubitable equivalent" is not defined in the Bankruptcy Code, "courts generally will find the requirement satisfied where a plan both protects the creditor's principal and provides for the present value of the creditor's claim." *DBSD*, 419 B.R. at 207 (citing *In re Sparks*, 171 B.R. 860, 866 (Bankr. N.D. Ill. 1994)). In making this assessment, "courts focus on the value of the collateral relative to the secured claim, and the proposed interest rate of the facility providing the indubitable equivalent." *Id.*

39. Here, as discussed above, the value of the PL Agent's collateral is significantly higher than the amount of the Production Loan Secured Claims, particularly when the value of the PL Agent's lien in proceeds from exploitation of the films in the U.S. market is factored in (although the PL Agent would not be senior to the lien of the New P&A/Ultimates lender with respect to such collateral).

40. More importantly, however, the PL Plan Modifications provide significant enhancements to the PL Agent's existing collateral package that make up for any dilution that might occur as a result of the New P&A/Ultimates Facility receiving a first priority lien in the

proceeds of the films' domestic distribution rights. First, as noted above, the PL Plan Modifications will provide for the PL Agent to receive a first priority lien in the Netflix Latin America payments on *The Disappointments Room*, which is not currently part of the PL Agent's collateral package.

41. Another crucial benefit to the PL Agent under the Plan is the ability to realize upon the full value of the domestic collateral without the dilution that would almost certainly occur if the PL Agent were forced to liquidate the collateral. Although the existing security interests of the PL Agent would allow the PL Agent to deliver the films to the foreign distributors and Netflix and attempt to collect amounts that would become due from those parties, collection would be significantly more difficult, and it is possible that the PL Agent would be unable to collect a significant percentage of the payments from foreign distributors and would need to find a domestic distributor to release the films in the U.S. market in order to realize a full recovery on its claims. Hohauser Decl. ¶ 24. In that case, the PL Agent would be required to subordinate repayment of its loan to the distributor's distribution fee (which is generally in the range of 10 to 20 percent of all domestic distribution proceeds) and recoupment of distribution expenses (including P&A). *Id.*

42. In other words, as a practical matter, the PL Agent's interest in the domestic distribution rights is inherently subordinate to payment of the P&A and distribution costs that would be required to realize upon the film's value in the U.S. market, so the PL Agent is not made any worse off by the proposed Plan treatment. In fact, the PL Agent is far better off under the Plan because the Debtor has agreed not to charge a distribution fee for its distribution services in the U.S. market until both the Production Loans and the Pre-Release P&A Loans are repaid. Alternatively, the PL Agent could attempt to sell the U.S. distribution rights to the films,

which would likely occur at a discount. The PL Agent might also attempt to sell the loans themselves on the secondary loan market, which would almost certainly result in impairment to the PL Agent. Hohouser Decl. ¶ 24.

43. For the above reasons, the Plan's treatment of the Production Loan Secured Claims is fair and equitable, and the Plan may therefore be confirmed over the objection of the PL Agent pursuant to section 1129(b)(1) of the Bankruptcy Code.

II. The Unifi Objection

44. On January 21, 2016, Unifi Completion Guaranty Insurance Solutions, Inc., as agent and attorney-in-fact for Homeland Insurance Company of New York ("**Unifi**") filed the Unifi Objection.

45. The Unifi Objection is closely related to the CIT Objection, discussed above. In fact, the Debtors respectfully submit that the resolution of the CIT Objection (either through settlement or cramdown), would in turn resolve all but a few minor, monetary, arguments contained in the Unifi Objection. The Debtors propose to adjourn such monetary issues until the Omnibus Hearing scheduled on February 17, 2016.

46. Any nonmonetary default will be cured upon modification of the obligations to the Production Lenders. Unifi's role as completion guarantor is for the benefit of the Production Lenders. The Debtors obligations to the Production Lenders are going to be restructured under the Plan if the Plan is confirmed either by consent or by cramdown. Under either result, it is anticipated that the release of the films *Masterminds* and *The Disappointments Room* will go forward and will be subject to new release dates. Upon modification of that obligation as between the Debtors and the Production Lenders, any purported default as between the Debtors and Unifi as to the outside release date will be cured.

47. In response to Unifi's contention that the Hunter Killer agreements are not assumable, the Debtor is not seeking to assume any agreement associated with Hunter Killer.

48. The Debtors dispute that any communication sent by counsel referred to in the objection constitutes a default under the completion guarantee or related agreements. These letters are premised upon the existence of an automatic stay. Upon confirmation of the plan, the automatic stay will terminate. 11 U.S.C. § 362(c)(2)(C). Accordingly, there is no need for the Debtors to rescind or withdraw the letters.

49. Finally, the outside delivery dates are feasible. As part of the confirmation plan and treatment of the Production Lender's claims, the Debtor will be assuming all foreign distribution agreements. To the extent that any of these agreements have outside delivery dates, they are all in June 2016 or later, and therefore delivery is possible, and there is no default.

50. Any monetary default is unsubstantiated by the Objection, and can be addressed at the February 17, 2016 hearing. Unifi has failed to substantiate its stated cure amount with any evidence. To the extent that there are out of pocket monetary cures to be established or agreed upon, the Debtors suggest that the monetary cure quantification issue be continued until the February 17, 2016 hearing. As to any recoverable completion sums associated with deliveries and distributors, the Debtors request itemization of Unifi's expenses. Upon confirmation, the Debtors will cure any valid recoverable completion sum.

III. The Colbeck Objection

51. The Colbeck parties object to the rejection of certain agreements on the grounds that they are not executory contracts capable of assumption or rejection under section 365 of the Bankruptcy Code. The Colbeck Objection does not argue against the rejection of the agreements in the event they are determined to be executory contracts.

52. The Debtors are only seeking to reject such agreements to the extent they are executory contracts. Colbeck, in turn, seeks a ruling as to whether each of the subject agreements is an executory contract. Such legal determinations are not critical or pressing items to the Debtors' emergence from bankruptcy. The Debtors have requested that this legal issue be addressed at a subsequent hearing. Colbeck has insisted on going forward with the Colbeck Objection at the Confirmation Hearing. The Debtors respectfully request that the Colbeck Objection be adjourned until the Omnibus Hearing currently scheduled for February 17, 2016. Alternatively, the Debtors will further address the Colbeck Objection at the Confirmation Hearing.

IV. The QNO Objection

53. QNO Objects to the assumption of that certain Somnia-U.S. Territory Distribution License Agreement dated March 19, 2014 (the "**QNO Contract**") on the grounds that the Debtors' proposed monetary cure is inadequate, and because QNO claims that, for various reasons, the Debtors are not permitted to assume the relevant contracts.[4]

54. The QNO Objection contains five main arguments. See QNO Objection, 4. First, QNO disputes the cure amount that the Debtors have proposed. In support of their contention, QNO has proffered no evidence or testimony. Instead, the Objection relies on declaratory statements with no support. Therefore, this portion of the QNO objection should be overruled, or adjourned until February 17, 2017.

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[4] The Debtors have requested that the issues raised in the QNO Objection be addressed at a subsequent hearing. As of January 29, 2016, after the Debtors had filed the Confirmation Brief, the Debtors believed that an agreement to adjourn had been reached. Therefore, in Exhibit 1 to the Confirmation Brief, the QNO Objection is listed as adjourned. However, due a no-fault miscommunication between QNO and the Debtors, the agreement was never finalized. QNO has insisted on going forward with the QNO Objection at the Confirmation Hearing.

55. Second, the QNO Objection states that the Debtors "defaulted in various ways on nonmonetary obligations that are historical fact and cannot be cured at this time." See QNO Objection, 4(b). It appears that this argument relates to the "RKA encumbrance" because there are no other breaches alleged in the QNO Objection that QNO alleges are a incurable. Id., at 4(c). This argument misreads the Plan. Under the Plan, RKA only has a security interest in assets of the Debtors. RKA does not have any claim or entitlement to any monies due, paid or payable to or for the benefit of QNO under the QNO Distribution Contract. Therefore, this portion of the QNO Objection should be overruled.

56. Third, QNO Objects to the assumption of the QNO Agreement because of the "onerous obligations" that must be incurred by the Debtors under the "Distribution Contract." The Debtors submit that this objection is actually an objection to the feasibility of the Plan, which the Debtors have fully briefed in the Confirmation Brief and will addressed at the Confirmation Hearing.

57. Fourth, the QNO Objects to the assumption of the QNO Agreement to the extent that the Debtors do not intend to assume the entire contract. The Debtors do not intend to assume anything other than the full QNO contract.

58. Finally, QNO Objects because it argues that the QNO Contract is a "personal services contract" and therefore cannot be assumed without QNO's consent. The Bankruptcy Court for the Southern District of New York has held that "whether a contract is for personal services depends upon the *sui generis* attributes of the intended performance. *In re Noonan*, 17 B.R. 793, 798 (Bankr. S.D.N.Y. 1982). "In order to be considered a personal service contract, there must be a special relationship between the parties or the party to perform must possess special knowledge or a unique skill, such that no performance save that of the contracting party

could meet the obligations of the contract. *In re Rooster, Inc.*, 100 B.R. 228 (Bankr. E.D. Pa. 1989); *accord Collier on Bankruptcy* ¶ 365.07 (16th ed. 2015) ("When an executory contract is based upon the provision of personal services or skills, or upon personal trust or confidence, or otherwise requires the debtor's performance rather than any substitute performance, the trustee has traditionally been unable to assume or assign the rights of the debtor in such contract."). The QNO Agreement is a distribution agreement for film rights. Despite QNO's attempts to characterize as otherwise, this is simply not the type of contract that is so personal in nature, assignment would change the fundamental bargain struck between the, parties. *See e.g. Headquarters Dodge, Inc. v. Leonard*, 13 F.3d 674, 684 (3d Cir. 1994) ("[w]hether a contract is personal in nature depends 'upon the nature of the subject of the contract, the circumstances of the case and the intent of the parties' ").

59. In light of the foregoing, all of QNO's objections to the assumption of the QNO Contract fail, and the QNO Objection should be denied.

Conclusion

60. For all of the above reasons, the Debtors respectfully request that the Court overrule the Objections and enter an order confirming the Plan, and such other or further relief as is just and proper under the circumstances.

Dated: January 31, 2016
New York, New York

JONES DAY

By: */s/* _____

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