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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re: : Chapter 11
LATAM Airlines Group S.A., et al., : Case No. 20-11254 (JLG)
Debtors.¹ : (Jointly Administered)

x

**MOTION OF BANCO DEL ESTADO DE CHILE,
IN ITS CAPACITY AS INDENTURE TRUSTEE UNDER THE CHILEAN LOCAL
BONDS SERIES A THROUGH D AND SERIES E, FOR ENTRY OF AN ORDER
SUBSTANTIVELY CONSOLIDATING THE ESTATES OF LATAM AIRLINES GROUP
S.A., LATAM FINANCE LTD., AND PEUCO FINANCE LTD.**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014); Piquero Leasing Limited (N/A); TAM S.A. (N/A); TAM Linhas Aéreas S.A. (65-0773334); Aerolíneas Brasileiras S.A. (98-0177579); Prismah Fidelidade Ltda. (N/A); Fidelidade Viagens e Turismo S.A. (27-2563952); TP Franchising Ltda. (N/A); Holdco I S.A. (76-1530348) and Multiplus Corredora de Seguros Ltda. (N/A). For the purpose of these chapter 11 cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

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To the Honorable United States Bankruptcy Judge James L. Garrity Jr.:

Banco del Estado de Chile (“BancoEstado”), in its capacity as indenture trustee under the Chilean Local Bonds Series A through D and Series E issued by LATAM Airlines Group S.A. in the aggregate amount of \$490.5 million (the “Local Bonds”), hereby files this motion (the “Motion”), pursuant to section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”), respectfully requesting entry of an order, substantially in the form attached hereto as Exhibit A, substantively consolidating the estates of LATAM Airlines Group S.A. (“LATAM Parent”), LATAM Finance Ltd. (“LATAM Finance”), and Peuco Finance Ltd. (“Peuco”). In support of the Motion, BancoEstado respectfully states as follows:

PRELIMINARY STATEMENT¹

1. BancoEstado is the indenture trustee for \$490.5 million in Local Bonds issued by LATAM Parent. In addition to the Local Bonds, Debtor LATAM Finance issued approximately \$1.5 billion in International Bonds that are guaranteed by LATAM Parent. LATAM Finance is a special purpose shell company domiciled in the Cayman Islands that LATAM Parent created to minimize tax liabilities. LATAM Finance has no assets, no employees, no standalone operations, and no independent officers or directors. It takes direction from LATAM Parent in order to function. Peuco is an identical Cayman Islands shell company LATAM Parent controls that was created as part of the same tax-minimization strategy.

2. All parties in interest, including both the holders of the Local Bonds and the International Bonds, understood at all relevant times that it was LATAM Parent, and not LATAM Finance, whose credit and assets backed the International Bonds. The first page of the

¹ Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them in subsequent sections of the Motion.

Offering Memoranda² for the International Bonds made this clear by informing prospective purchasers that LATAM Finance “*is a finance subsidiary with no operations and, therefore, depends on the cash flow of [LATAM Parent] to meet its obligations, including its obligations on the notes.*”³ In other words, LATAM Finance nominally served as the primary obligor, but all creditors understood that payments on the International Bonds would be funded by LATAM Parent and ranked *pari passu* with its other obligations. This *pari passu* treatment (and bondholders’ expectations regarding the same) was reflected in the trading prices for the International Bonds, which until October 2020 traded at essentially the same price as the Local Bonds, and did not significantly deviate in price until January 2021.

3. Events transpiring *after* the commencement of the Debtors’ chapter 11 cases have, at least temporarily, skewed parties’ understanding surrounding the financial wherewithal of LATAM Finance. On September 8, 2020, LATAM Finance and Peuco disclosed in their Schedules of Assets and Liabilities that, contrary to the information contained in the Offering Memoranda, LATAM Finance did own an asset—specifically, an intercompany claim against Peuco. Peuco’s Schedules similarly disclosed that it owned intercompany claims totalling approximately \$1.3 billion against three Debtor operating companies that are direct and indirect subsidiaries of LATAM Parent. In October 2020, soon after the disclosure of these assets, trading prices of International Bonds increased for the first time relative to Local Bonds, though at first only slightly. Then, a January 12, 2021 article published in *Reorg* theorized that these

² The LATAM 2024 Bonds Offering Memoranda and that LATAM 2026 Bonds Offering Memoranda are attached as Exhibits A and B, respectively, to the *Declaration of Douglass E. Barron in Support of Motion of Banco del Estado de Chile, In Its Capacity as Indenture Trustee Under the Chilean Local Bonds Series A Through D and Series E, for Entry of an Order Substantively Consolidating the Estates Of LATAM Airlines Group S.A., LATAM Finance Ltd., and Peuco Finance Ltd.* (the “Barron Declaration”), filed contemporaneously herewith.

³ LATAM 2024 Bonds Offering Memorandum, front page (emphasis added); 2026 LATAM Bonds Offering Memorandum, front page (same).

assets, if valid, would represent a potential second source of recovery to holders of International Bonds previously unknown to the market. This led, for the first time, to a dramatic upswing in the trading prices of the International Bonds. Unsurprisingly, the holders of those bonds have since sought to validate the intercompany claims to capture a potential double recovery and windfall for themselves.

4.

5. The impact of these [REDACTED] on creditors of LATAM Parent is potentially significant. The current difference between the trading prices of the International Bonds compared to other unsecured claims against LATAM Parent suggest that hundreds of millions of dollars in value will be siphoned away from holders of the Local Bonds and LATAM Parent's other creditors if LATAM Finance and Peuco are permitted to be treated as separate and distinct legal entities from LATAM Parent. The result would be a windfall for the International

Bondholders. To avoid this inequitable result, BancoEstado seeks an order substantively consolidating the chapter 11 estates of LATAM Finance, Peuco, and LATAM Parent.

6. Substantive consolidation is appropriate in these cases and warranted under Second Circuit law. Substantive consolidation would produce an equitable outcome consistent with the expectations of creditors. As noted above, LATAM Parent's creditors, including the holders of the International Bonds, have always understood that LATAM Finance is a shell company with no assets that was formed to enable LATAM Parent to issue tax-favorable bonds. No creditor treated LATAM Finance or Peuco as a distinct economic unit or relied upon them to pay claims. And while LATAM Parent's creditors will benefit greatly, substantive consolidation will not prejudice the holders of the International Bonds. Consistent with their legitimate expectations, holders of the International Bonds will remain fully able to recover against the consolidated LATAM Parent estate.

7. Given the substantial impact substantive consolidation would have on the recoveries of LATAM Parent's creditors, BancoEstado believes it is a material, threshold issue that should be decided before such creditors are asked to vote on any plan of reorganization. Accordingly, prior to the filing of this motion, BancoEstado has filed a separate scheduling motion [Docket No. 2529] asking the Court to fix a litigation schedule that provides ample time for the parties and the Court to address the issues raised by this Motion prior to the Debtors' filing a proposed plan of reorganization and disclosure statement.

JURISDICTION AND VENUE

8. This Court has jurisdiction to consider this Application pursuant to 28 U.S.C. §§ 157 and 1134. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).

9. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

10. The statutory predicate for the relief requested herein is section 105(a) of the Bankruptcy Code.

BACKGROUND

I. LATAM Parent, LATAM Finance, and Peuco Finance

11. Debtor LATAM Parent, domiciled in Chile, is the 100% equity owner of numerous operating and non-operating entities, including two special purpose “finance” entities, Debtors LATAM Finance and Peuco, each domiciled in the Cayman Islands.

12. At all times relevant to this Motion, LATAM Finance and Peuco had no independent directors. The directors of LATAM Finance and Peuco were employees and/or officers and/or directors of LATAM Parent and/or TAM Linhas Aéreas S.A. (“TLA”), an entity 100% owned by LATAM Parent, and they took their directions from LATAM Parent.

13. Similarly, at all times LATAM Finance and Peuco had (i) no operations or employees, (ii) no material assets or liabilities other than LATAM Finance’s bond debt and the intercompany receivables and payables [REDACTED]

[REDACTED] and (iii) no contractual requirement to maintain separate accounts or refrain from commingling their funds or other assets (if any) with those of LATAM Parent or other LATAM entities.

II. Issuance of International Bonds

14. Pursuant to the indenture dated April 11, 2017, by and among LATAM Finance as issuer, LATAM Parent as guarantor, and the Bank of New York Mellon Corporation (“BNYM”) as Trustee, Registrar Transfer Agent and Paying Agent, LATAM Finance issued 6.875% senior, unsecured notes due April 2024 in a principal amount of \$700 million (the “LATAM 2024 Bonds”). The offering memo issued in connection with the LATAM 2024 Bonds (the “LATAM 2024 Bonds Offering Memo”) is dated April 6, 2017. As of May 26, 2020

(the “Petition Date”) the outstanding principal amount of the LATAM 2024 Bonds was approximately \$700 million. The LATAM 2024 Bonds were issued in order to provide proceeds to LATAM Parent and its consolidated subsidiaries for general corporate purposes.⁴

15. Pursuant to the indenture dated February 11, 2019, by and among LATAM Finance as issuer, LATAM Parent as guarantor and BNYM as Trustee Registrar, Transfer Agent and Paying Agent, LATAM Finance issued 7% senior, unsecured notes due March 2026 in a principal amount of \$800 million (the “LATAM 2026 Bonds” and, together with the LATAM 2024 Bonds, the “International Bonds”).⁵ The offering memo issued in connection with the LATAM 2026 Bonds (the “LATAM 2026 Bonds Offering Memo,” and, together with the LATAM 2024 Bonds Offering Memo, the “Offering Memoranda”) is dated February 4, 2019. As of the Petition Date the principal amount of the LATAM 2026 Bonds was approximately \$800 million. The LATAM 2026 Bonds were issued in order to provide proceeds to LATAM Parent and its consolidated subsidiaries for general corporate purposes.⁶

16. As explained in the Offering Memoranda, LATAM Finance was both a captive finance subsidiary without any operations of its own and dependent upon LATAM Parent, the guarantor, to provide the funding to repay the International Bonds. LATAM Finance was a shell entity formed to act as issuer to reduce the tax liabilities associated with the International Bonds. Because LATAM Finance is domiciled in the Cayman Islands, bondholders could receive payments of interest and principal under the International Bonds without bondholders or

⁴ LATAM 2024 Bonds Offering Memorandum, at 18 (“We intend to use the net proceeds for general corporate purposes.”).

⁵ In February 2019, LATAM Finance first issued \$600 million of the LATAM 2026 Bonds but then re-opened the issuance in June 2019 and issued an additional \$200 million of the LATAM 2026 Bonds.

⁶ See LATAM 2026 Bonds Offering Memorandum, at 27 (“We intend to use the net proceeds for general corporate purposes.”).

LATAM Parent paying Chilean withholding taxes thereon. Bondholders and LATAM Parent also were not subject to Chilean capital gains, income, or corporate taxation based on the disposal of the International Bonds.

17. The Offering Memoranda made clear that LATAM Finance has no operations or independent sources of revenue and that it would at all times rely on LATAM Parent to service the International Bonds. Among other things, the Offering Memoranda:

- stated at their very first page that LATAM Finance “is a finance subsidiary with no operations and, therefore, depends on the cash flow of [LATAM Parent] to meet its obligations, including its obligations on the notes”⁷;
- stated that all directors of LATAM Finance were employees and/or officers and/or directors of LATAM Parent and/or TLA, and that such individuals acted in accordance with the instructions of LATAM Parent as sole shareholder⁸;
- stated that bond proceeds will be used for the “general corporate purposes” of LATAM Parent and its consolidated subsidiaries⁹;
- lacked any non-consolidated financial reporting relating to LATAM Finance, Peuco, or any other subsidiaries of LATAM Parent;
- defined “change of control” as “the direct or indirect sale or transfer of all or substantially all the assets of [LATAM Parent] and its Subsidiaries” or a change in ownership with respect to “more than 50% of the total voting power of the Voting Stock of [LATAM Parent]”¹⁰;

⁷ LATAM 2024 Bonds Offering Memorandum, front page; LATAM 2026 Bonds Offering Memorandum, front page.

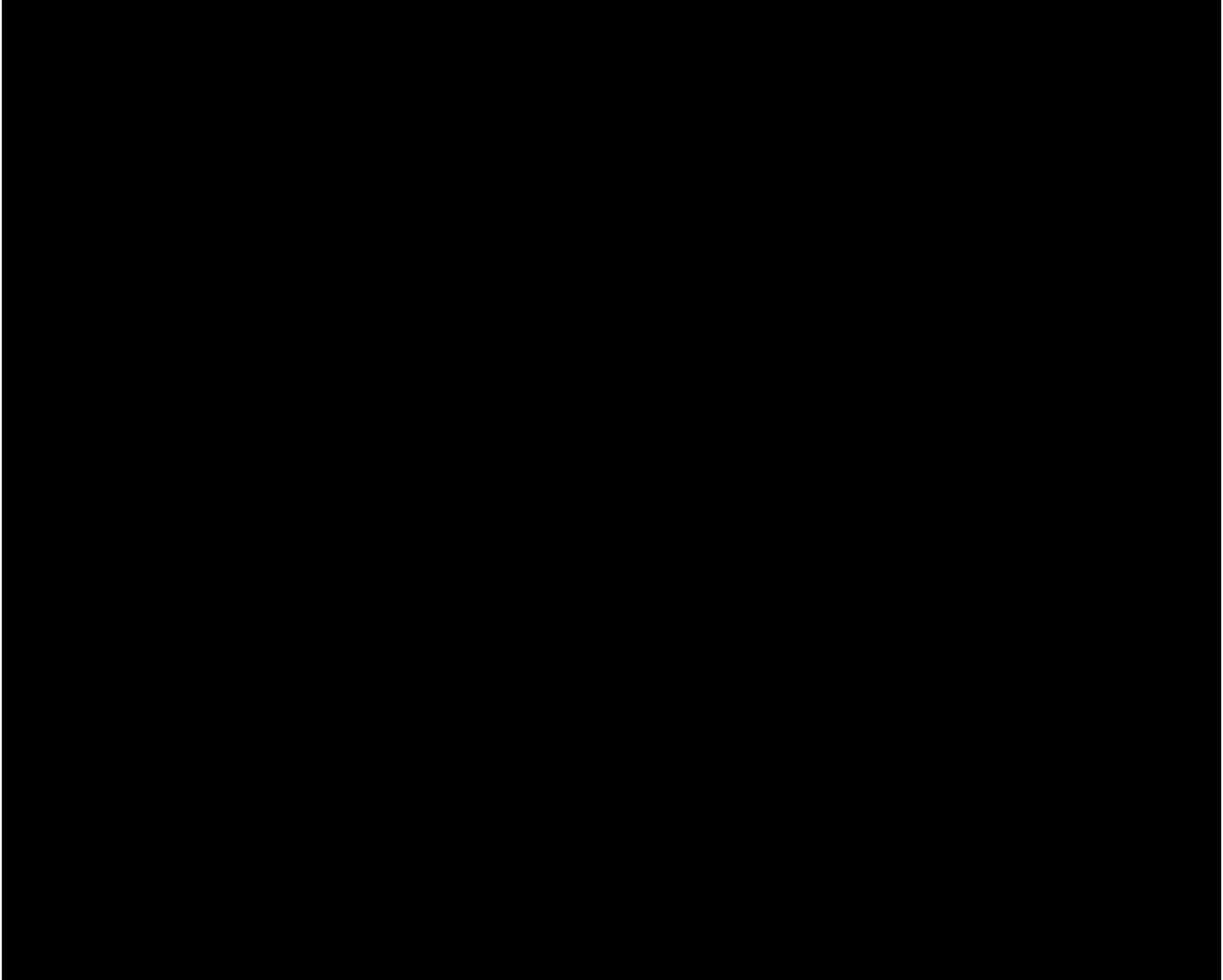
⁸ See LATAM 2024 Bonds Offering Memorandum, at 20 (“The directors of the Issuer are also employees and/or officers and/or directors of LATAM Airlines Group S.A. and/or TLA. As directors of the Issuer and subject to general provisions of Cayman Islands law, they act in accordance with our instructions, as we are its sole shareholder.”); LATAM 2026 Bonds Offering Memorandum, at 29 (same).

⁹ See LATAM 2024 Bonds Offering Memorandum, at 18; LATAM 2026 Bonds Offering Memorandum, at 27; (same).

¹⁰ See LATAM 2026 Bonds Offering Memorandum, at 49 (defining “Change of Control”); LATAM 2024 Bonds Offering Memorandum, at 41 (same).

- contained restrictive merger covenants only with respect to LATAM Parent¹¹ and required financial reporting from LATAM Parent, not LATAM Finance (or Peuco)¹²;

18. Moreover, the Offering Memoranda contained no mention of Peuco other than a solitary reference to Peuco's involvement in an unrelated transaction.¹³



¹¹ See LATAM 2026 Bonds Offering Memorandum, at 42 (“**The Guarantor** will not consolidate with or merge with or into, or sell, convey, transfer or dispose of, or lease all or substantially all of its assets as an entirety or substantially as an entirety, in one transaction or a series of related transactions, to, any person, unless”); LATAM 2024 Bonds Offering Memorandum, at 34 (same).

¹² See LATAM 2026 Bonds Offering Memorandum, at 43; LATAM 2024 Bonds Offering Memorandum, at 35.

¹³ See LATAM 2026 Bonds Offering Memorandum, at 9 (discussing intention of Peuco, “a finance subsidiary of [LATAM Parent]” to enter into a senior secured bridge facility, as borrower, with “LATAM Airlines Group S.A. and Tam Linhas Aereas S.A., as guarantors, and Tam S.A., as a guarantor and a pledgor”).

[REDACTED]

[REDACTED]

[REDACTED]

IV. Issuance of Local Bonds

26. LATAM Parent, as issuer, sold Chilean law-governed peso-denominated bonds on the Santiago Stock Exchange in an aggregate principal amount of approximately \$490.5 million (the “Local Bonds” and holders of same the “Local Bondholders”). The issuance of the Local Bonds occurred on August 17, 2017, with respect to \$311.5 million of the Local Bonds, and July 6, 2019, with respect to \$179 million of the Local Bonds. BancoEstado serves as indenture trustee in connection with the Local Bonds and is authorized under the respective indentures to act in the best interests of the Local Bondholders as the Local Bondholders may direct.

27. The Prospectuses published in connection with the issuance of the Local Bonds contained only consolidated financial information with respect to LATAM Parent and its subsidiaries, and did not mention LATAM Finance, Peuco, or the [REDACTED] Transactions.

V. Events In Chapter 11 Cases

A. Chapter 11 Filing

28. On May 26, 2020, LATAM Parent and certain of its affiliates, including LATAM Finance and Peuco commenced cases under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the “Court”).

B. Filing of Debtors’ Schedules

29. On September 8, 2020, as required by section 521(a)(1)(b)(i) of the Bankruptcy Code, LATAM Finance and Peuco filed their Schedules of Assets and Liabilities (the

“Schedules”). According to its Schedules, LATAM Finance had unsecured liabilities totalling \$1.5 billion (i.e., the principal amount of the International Bonds outstanding) and assets totalling approximately \$1.310 billion, of which \$1.307 billion consisted of an intercompany receivable owed to LATAM Finance by Peuco. Peuco’s Schedules, in turn, stated that Peuco had unsecured liabilities totalling approximately \$1.307 billion (consisting exclusively of Peuco’s debt to LATAM Finance) and assets consisting exclusively of the Intercompany Receivables owed to Peuco by the Operating Companies totalling approximately \$1.307 billion.

30. Notably, the Debtors’ Schedules contained a reservation of rights stating that nothing in the Schedules “shall constitute an admission or a waiver of rights with respect to these chapter 11 cases, including, but not limited to, any issues involving substantive consolidation for plan purposes.”¹⁴

C. Media Attention and Market Reaction

31. Prior to October 2020 and dating back to the issuances of the respective bonds, the prices of the International Bonds and Local Bonds had been essentially the same. In October 2020, after the filing of the Debtors’ schedules, prices of the International Bonds and Local Bonds began, for the first time, to diverge slightly.

32. In January 2021, LATAM Finance’s \$1.3 billion of Intercompany Claims and their possible impact on creditor recoveries became the subject of media attention for the first time. On January 12, 2021, the corporate restructuring news outlet *Reorg* published an article stating, among other things, that: “Holders of unsecured bonds issued by special purpose vehicle

¹⁴ See, e.g., *Global Notes and Statement of Limitations, Methodology, and Disclaimers Regarding the Debtors’ Schedules of Assets and Liabilities and Statements of Financial Affairs* [Docket No. 1015], at 3.

LATAM Finance could recover value from certain operating companies within the group as a result of \$1.3 billion of intercompany receivables due to the SPV issuer.”¹⁵

33. Once media attention focused on the issue in January 2021, the market price of International Bonds increased significantly relative to the market price of Local Bonds. Indeed, as of the date of the filing of this Motion, the current difference in trading prices between the International Bonds and the Local Bonds indicates a transfer of value in the hundreds of millions of dollars to the detriment of the Local Bonds and other LATAM Parent unsecured creditors.

RELIEF REQUESTED

34. BancoEstado respectfully requests entry of an order substantively consolidating the estates of LATAM Parent, LATAM Finance, and Peuco.

BASIS FOR REQUESTED RELIEF

35. The estates of Debtors LATAM Parent, LATAM Finance, and Peuco should be substantively consolidated because creditors dealt with these entities as a single economic unit and never relied on their separate identities to extend credit. Substantive consolidation, under the specific facts existing here, is consistent with the expectation of creditors and would generate an equitable result that does not prejudice the rights of holders of the International Bonds who, consistent with the Offering Memoranda for the International Bonds, would retain one claim against the consolidated LATAM Parent.

¹⁵ *LATAM Finance Creditors May Recover Value from Group OpCos Resulting From US\$1.3B Interco Receivable*, Reorg, (Jan. 12, 2021, 06:12 AM), https://app.reorg.com/file/376181/LATAM_Airlines_-2021-01-12_06_12_53_-LATAM_Finance_Creditors_May_Recover_Value_From_Group_OpCos_Resulting_From_1_3B_Interco_Receivable-19188-0.pdf.

I. Legal Standard

36. The Second Circuit has held “[t]he sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors,” *Union Sav. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.)* 860 F. 2d 515, 518 (2d Cir. 1988), and that “[o]nly through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors.” *FDIC v. Colonial Realty Co.*, 966 F. 2d 57, 61 (2nd Cir. 1992).

37. Courts have identified numerous factors that may be considered in determining whether entities should be consolidated, “including whether the entities share costs or obligations; fail to observe corporate formalities; or, in the case of a subsidiary and parent, fail to act independently.” *Windels Marx Lane & Mittendorf, LLP v. Source Enters., Inc. (In re Source Enters., Inc.)*, 392 B.R. 541, 552 (S.D.N.Y. 2008). As is typical with such an “all the factors” analysis, “a decision to substantively consolidate affiliated debtors need not be supported by the presence of all such factors.” *In re WorldCom, Inc.*, No. 02-13533(AJG), 2003 WL 23861928, at *35 (Bankr. S.D.N.Y. Oct. 31, 2003). At bottom, these factors were developed by courts with the same goal—to determine “whether equitable treatment will result from substantive consolidation,” *In re Augie/Restivo Baking Co.*, 860 F.2d at 518, “without any undue prejudice to any particular group.” *In re Food Fair, Inc.*, 10 B.R. 123, 127 (Bankr. S.D.N.Y. 1981).

38. Under the “*Augie/Restivo* test” or “*Augie/Restivo* prongs” the Second Circuit synthesized these factors, which it identified as “merely variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and ‘did not rely on their separate identity in extending credit; or (ii) whether the affairs of the debtors are so entangled consolidation will benefit all creditors.” *In re Augie/Restivo Baking Co.*, 860 F.2d at 518 (internal citations and quotation marks removed). This two-pronged test is “in the disjunctive

and the presence of either [prong] may justify . . . substantive consolidation.” *E.g. Official Comm. Of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp. (In re Verestar, Inc.)*, 343 B.R. 444, 463 (Bankr. S.D.N.Y. 2006).

39. The first *Augie/Restivo* prong, of particular importance here, is “applied from the creditors’ perspective.” *In re 599 Consumer Elecs., Inc.*, 195 B.R. 244, 249 (S.D.N.Y. 1996). “The inquiry is whether *creditors* treated the debtors as a single entity, not whether the managers of the debtors themselves, or consumers, viewed the [debtors] as one enterprise.” *Id.* (emphasis in original). As the Second Circuit stated in *Augie/Restivo*, the importance of this prong derives from courts’ concern for the reasonable expectations of creditors:

[C]reditors who make loans on the basis of the financial status of a separate entity expect to be able to look to the assets of their particular borrower for satisfaction of that loan. Such lenders structure their loans according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower’s assets. Such expectations create significant equities.

In re Augie/Restivo Baking Co., Ltd., 860 F.2d at 518-19. In sum, in the Second Circuit, substantive consolidation should be applied to match bankruptcy outcomes with creditors’ legitimate expectations upon which they relied in extending credit, consistent with the trend in the case law since the era of *Augie-Restivo* under which “substantive consolidation may be authorized whenever it will benefit the debtors’ estates without betraying legitimate expectations of the debtors and their respective creditors.” *In re Murray Indus., Inc.*, 119 B.R. 820, 829 (Bankr. M.D. Fla. 1990).

II. Substantive Consolidation is Warranted Under First *Augie/Restivo* Prong

40. Substantive consolidation of LATAM Parent, LATAM Finance, and Peuco is appropriate under the first *Augie/Restivo* prong because creditors dealt with these entities as a single economic unit and did not rely on their separate identity in extending credit. Creditors did

not (and, indeed, could not) (i) deal with LATAM Parent, LATAM Finance, and Peuco as separate economic units, (ii) rely on their separate existence in extending credit, or (iii) reasonably expect that they would be able to look to the separate assets of each of these entities in the case of insolvency. This is so for two interrelated reasons. First, LATAM Finance and Peuco were in fact mere shell companies, totally dependent on LATAM Parent, with no indicia of separateness that could distinguish them from LATAM Parent. Second, consistent with LATAM Finance and Peuco’s shell company status, the Offering Memoranda put creditors on notice that the real entity they would need to rely on in extending credit was LATAM Parent.

A. LATAM Finance and Peuco Were Shell Companies

41. Shell entities that are merely the instrumentalities of parent companies are prime candidates for substantive consolidation, even if such entities are formally separate, because creditors cannot reasonably rely on entities lacking any real existence of their own. *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 766 (9th Cir. 2000) (affirming substantive consolidation ordered by bankruptcy court under *Augie/Restivo* test where findings supported conclusion that entities were “but instrumentalities” with no separate existence (quoting *Soviero v. Franklin Nat’l Bank of Long Island*, 328 F.2d 446, 448 (2d Cir. 1964))).

42. The types of shell companies appropriate for substantive consolidation include those established to minimize tax liability. Shell entities formed to minimize taxes were the subject of the seminal case of *Soviero v. Franklin National Bank of Long Island*, where the court noted that entities had been established “primarily, if not solely, for the benefit of the tax gatherer.” 328 F.2d 446, 448 (2d Cir. 1964). The *Soviero* court affirmed the lower court’s decision that the entities were “but instrumentalities of the bankrupt with no separate existence of their own,” such that “there existed a unity of interest and ownership common to all

corporations” and “to adhere to the separate corporate entities theory would result in an injustice to the bankrupt’s creditors.” *Id.*

43. Given the above, the lists of factors supporting substantive consolidation set forth by courts include numerous factors pointing to a lack of the indicia of corporate separateness. In *In re Drexel Burnham Lambert Group, Inc.*, the court set forth a list of a list of seventeen factors used by courts to determine whether estates should be substantively consolidated, including among other things “the sharing of overhead, management, accounting, and other related expenses among the different corporate entities”; “the existence of intercompany guarantees on loans”; “the subsidiary having grossly inadequate capital”; “the presence of consolidated financial statements”; “the parent owning all or a majority of the capital stock of a subsidiary”; “the parent, its affiliates and the subsidiary having common directors or officers”; “the parent or its affiliates financing the subsidiary”; “the parent shifting people on and off the subsidiary’s board of directors”; “the subsidiary having substantially no business except that with the parent or its affiliates or no assets except those conveyed to it by the parent or an affiliate”; and “the directors of the subsidiary not acting independently in the interest of the subsidiary, but taking direction from the parent.” 138 B.R. 723, 764 (Bankr. S.D.N.Y. 1992).

44. Many of these factors are satisfied here, where LATAM Finance and Peuco were, at all times relevant to this motion, shell entities used to facilitate tax-favorable financing transactions, and thus were mere instrumentalities of LATAM Parent that lacked the typical indicia of corporate separateness. For example:

- LATAM Finance and Peuco were 100% owned by LATAM Parent.
- The directors of LATAM Finance and Peuco were officers and/or directors and/or employees of LATAM Parent (or 100% owned subsidiaries of LATAM Parent) who received their instructions from LATAM Parent; there were no independent directors at LATAM Finance or Peuco.

- LATAM Finance and Peuco had no operations or employees.
- LATAM Finance and Peuco held no material assets other than the intercompany receivables [REDACTED]
[REDACTED]
- LATAM Finance and Peuco were not contractually required to maintain separate accounts or refrain from the commingling of funds or other assets as between them and LATAM Parent or other LATAM entities.
- LATAM Finance's only material liability was the International Bond debt, and Peuco's only liability was its intercompany debt to LATAM Finance [REDACTED]
[REDACTED]
- LATAM Finance could only dispose of funds by issuing deb [REDACTED]
[REDACTED]
- LATAM Finance's liability under the International Bonds was guaranteed by LATAM Parent.

45. As noted, LATAM Parent guaranteed the International Bonds. Courts are divided over whether the existence of a guaranty is evidence that creditors were relying on the credit of the guarantor or evidence that creditors were looking to the guarantor's separate pool of assets.¹⁶ Here, holders of International Bonds did not obtain a LATAM Parent guarantee to access a separate pool of assets, but to ensure access to the only pool of assets available to repay their debt. Their issuer, LATAM Finance, was known by all to be a shell company without any

¹⁶ Compare. *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 766 (Bankr. S.D.N.Y. 1992) (noting "numerous and well known intercompany guarantees"); *In re Amereco Envtl. Servs., Inc.*, 125 B.R. 566, 568 (Bankr. W.D. Mo. 1991) ("The Court apprehends that **the fact of the guarantee alone would be sufficient to negate the theory of reliance on separate identity or credit.**"); *In re Snider Bros., Inc.*, 18 B.R. 230, 238 (Bankr. D. Mass. 1982) ("the taking of a corporate guarantee by a creditor may be used to show that said creditor knew of the consolidated nature of the debtors' business."); *In re Manzey Land & Cattle Co.*, 17 B.R. 332, 337 (Bankr. D.S.D. 1982) ("The requirement of a guarantee indicates Creditor Bank recognized Corporate Debtor was merely the alter-ego of Individual Debtors."), with *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515, 519 (2d Cir. 1988) ("MHTC also operated on the assumption that it was dealing with separate entities. MHTC thus sought and received a guarantee from Augie's of MHTC's loans to Augie/Restivo . . ."); *In re Owens Corning*, 419 F.3d 195, 212–13 (3d Cir. 2005) ("[O]btaining the guarantees of separate entities . . . entitles a lender, in bankruptcy or out, to look to any (or all) guarantor(s) for payment when the time comes.").

operations or assets of its own. LATAM Parent's guarantee, combined with LATAM Finance's lack of any independent ability to repay the International Bonds absent the support of LATAM Parent, shows by itself that creditors were not dealing with or relying on the separateness of LATAM Finance or any other entity, but only on LATAM Parent.

B. Offering Memoranda Effectively Disclaimed Separateness

46. Because the first prong of the *Augie/Restivo* test is chiefly concerned with the expectations of creditors, the Offering Memoranda for the International Bonds are critical because these were the documents with which LATAM communicated with creditors and established creditors' expectations regarding the International Bonds.

47. The Offering Memoranda effectively shouted from the rooftops that LATAM Finance did not matter, and that LATAM Parent would be the entity responsible for repaying the International Bonds. The Offering Memoranda for the International Bonds disclaimed the separateness of LATAM Finance in a number of different ways. For example:

- **The Offering Memoranda made clear that creditor recoveries would come from the resources of LATAM Parent, not LATAM Finance, which lacked resources of its own.** The Offering Memoranda stated at their very first page that LATAM Finance "*is a finance subsidiary with no operations and, therefore, depends on the cash flow of [LATAM Parent] to meet its obligations, including its obligations on the notes.*"¹⁷
- **The Offering Memoranda portrayed LATAM Finance as an entity completely controlled by LATAM Parent.** The Offering Memoranda disclosed that all directors of LATAM Finance were employees and/or officers and/or directors of LATAM Parent and/or TLA, and that such individuals acted in accordance with the instructions of LATAM Parent as sole shareholder.¹⁸

¹⁷ LATAM 2024 Bonds Offering Memorandum, front page (emphasis added); LATAM 2026 Bonds Offering Memorandum, front page (same).

¹⁸ See LATAM 2024 Bonds Offering Memorandum, at 20 ("The directors of the Issuer are also employees and/or officers and/or directors of LATAM Airlines Group S.A. and/or TLA. As directors of the Issuer and subject to general provisions of Cayman Islands law, they act in accordance with our instructions, as we are its sole shareholder."); LATAM 2026 Bonds Offering Memorandum, at 29 (same).

- **The Offering Memoranda portrayed LATAM Parent as the destination of bond proceeds.** The Offering Memoranda stated that bond proceeds will be used for the “general corporate purposes” of LATAM Parent and its consolidated subsidiaries, which could have only meant that the parent entity, guarantor LATAM Parent, would obtain use of the funds for distribution to other parts of the enterprise and that no funds would stay with LATAM Finance.¹⁹
- **The Offering Memoranda contained only consolidated financial information.** Potential bond purchasers could not have relied on the separate status of LATAM Finance (or Peuco or any other subsidiary) because there was no subsidiary-level data in the Offering Memoranda.
- **The Offering Memoranda did not disclose any requirements for LATAM Finance (or Peuco) to maintain separate accounting or prohibit commingling of funds as between these entities and LATAM Parent.** No creditor could count on the separate assets of these entities in the absence of such provisions.
- **The Offering Memoranda otherwise made clear that LATAM Parent was the entity to which creditors would look for repayment of the International Bonds.** For example, provisions on corporate control changes,²⁰ restrictive merger covenants,²¹ and reporting requirements²² are applicable to LATAM Parent or LATAM Parent and its consolidated subsidiaries, not LATAM Finance.

48. In addition, the Offering Memoranda contained no mention of Peuco at all other than a solitary reference to Peuco’s involvement in an unrelated transaction,²³ confirming that Peuco was irrelevant in the eyes of creditors and not a separate entity to be relied upon.

49. The facts here establish that no creditor could have reasonably relied on the separateness of LATAM Finance and Peuco, two mere shell companies with no independent financial wherewithal. In other words, while these two entities may technically possess a

¹⁹ See LATAM 2024 Bonds Offering Memorandum, at 18; LATAM 2026 Bonds Offering Memorandum, at 27.

²⁰ See LATAM 2024 Bonds Offering Memorandum, at 41 (defining “Change of Control” as “the direct or indirect sale or transfer of all or substantially all the assets of LATAM Airlines Group S.A. and its Subsidiaries” or a change in ownership with respect to “more than 50% of the total voting power of the Voting Stock of LATAM Airlines Group S.A.”); LATAM 2026 Bonds Offering Memorandum, at 49 (same).

²¹ See LATAM 2024 Bonds Offering Memorandum, at 34; LATAM 2026 Bonds Offering Memorandum, at 42;.

²² See LATAM 2024 Bonds Offering Memorandum, at 35; LATAM 2026 Bonds Offering Memorandum, at 43.

²³ See LATAM 2026 Bonds Offering Memorandum, at 9 (discussing intention of Peuco, “a finance subsidiary of [LATAM Parent]” to enter into a senior secured bridge facility, as borrower, with “LATAM Airlines Group S.A. and Tam Linhas Aereas S.A., as guarantors, and Tam S.A., as a guarantor and a pledgor”).

separate existence, both were economically irrelevant in connection with the decision to purchase the International Bonds or the credit risk associated with their repayment. All International Bondholders were expressly informed to look exclusively to LATAM Parent's balance sheet in extending credit. Thus, creditors did not and could not have dealt with LATAM Finance or Peuco as separate entities or relied on the separateness of these entities in connection with extending credit. To rely on a Cayman shell company issuer like LATAM Finance for the repayment of \$1.5 billion of International Bonds, when the Offering Memoranda so openly broadcast that LATAM Finance was a shell company that could only repay debts with LATAM Parent's assets, would have been economically irrational. This is exactly the situation where substantive consolidation is proper under the first prong of *Augie/Restivo*.

III. Equity Supports Substantive Consolidation

50. As noted above, “[t]he sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors.” *In re Augie/Restivo Baking Co.*, 860 F. 2d 515, 518 (2d Cir. 1988).

51. Here, substantive consolidation achieves the only equitable result—equal treatment of creditors. Absent substantive consolidation, International Bondholders (who are LATAM Finance's only creditors) will receive a windfall substantially greater than their agreed upon bargain—one recovery solely against LATAM Parent. As a result, International Bondholders will obtain significantly greater plan recoveries than LATAM Parent creditors absent substantive consolidation.

52. In stark contrast, all other LATAM Parent creditors would be severely prejudiced absent substantive consolidation. For instance, holders of the Local Bonds were provided with consolidated financial information that did not disclose that [REDACTED]

[REDACTED] and not available as a source of recovery to them, thus

resulting in the International Bonds enjoying a structural seniority wholly inconsistent with the expectations of holders of the Local Bonds. Substantive consolidation is therefore essential to avoid harm to LATAM Parent creditors who had no knowledge of, or reason to, expect it.

53. Making matters worse, the unexpected windfall for International Bondholders and unexpected prejudice to LATAM Parent creditors that would occur absent substantive consolidation would occur purely as a result of [REDACTED]

54. Finally, substantive consolidation will not result in prejudice to International Bondholders who would continue to have a claim against the real entity with whom they contracted—LATAM Parent. As explained above, International Bondholders did not have and should not have had any expectation of higher recoveries than Local Bondholders or other LATAM Parent creditors given that the International Bondholders' sole functional recovery was to come from LATAM Parent. The expectation by the bond markets and everyone else was that the recoveries of these two groups of creditors would be *pari passu*. In proposing to consolidate

²⁴ In this Motion, BancoEstado does not challenge the validity of any [REDACTED] Transactions or other transactions, and does not assert avoidance claims with respect thereto. Nevertheless, BancoEstado reserves its rights with respect to any such challenges or avoidance claims it may assert in the future.

LATAM Parent, LATAM Finance, and Peuco, BancoEstado seeks nothing more than a return to the *status quo* of equality among creditors who expected to be treated equally. Treating International Bondholders and LATAM Parent creditors equally would validate creditors' long-held expectations, and would not, by depriving the International Bondholders of a surprise windfall, cause them any prejudice.

CONCLUSION

55. For the foregoing reasons, BancoEstado respectfully requests that the Court enter an order substantially in the form attached hereto as **Exhibit A** substantively consolidating the estates of LATAM Airlines Group S.A., LATAM Finance Ltd., and Peuco.

WHEREFORE, BancoEstado respectfully requests that this Court enter orders substantially in the form attached hereto as Exhibit A, and granting BancoEstado such other relief as this Court deems just and proper.

Dated: June 18, 2021

New York, New York

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Chapter 11
LATAM Airlines Group S.A., et al., : Case No. 20-11254 (JLG)
Debtors.¹ : (Jointly Administered)
x-----

**ORDER GRANTING MOTION OF BANCO DEL ESTADO DE CHILE, IN ITS
CAPACITY AS INDENTURE TRUSTEE UNDER THE CHILEAN LOCAL BONDS
SERIES A THROUGH D AND SERIES E, FOR ENTRY OF AN ORDER
SUBSTANTIVELY CONSOLIDATING THE ESTATES OF LATAM AIRLINES GROUP
S.A., LATAM FINANCE LTD., AND PEUCO FINANCE LTD.**

Upon the *Motion of Banco del Estado de Chile, in Its Capacity as Indenture Trustee
Under the Chilean Local Bonds Series A Through D and Series E, for Entry of an Order
Substantively Consolidating the Estates of LATAM Airlines Group S.A., LATAM Finance
Ltd., and Peuco Finance Ltd.*, dated June 18, 2021 (the “Motion”); and this Court having
jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this Court having found that this is
a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014); Piquero Leasing Limited (N/A); TAM S.A. (N/A); TAM Linhas Aéreas S.A. (65-0773334); Aerolinhas Brasileiras S.A. (98-0177579); Prismah Fidelidade Ltda. (N/A); Fidelidade Viagens e Turismo S.A. (27-2563952); TP Franchising Ltda. (N/A); Holdco I S.A. (76-1530348) and Multiplus Corredora de Seguros Ltda. (N/A). For the purpose of these chapter 11 cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at any hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. LATAM Airlines Group S.A., LATAM Finance Ltd., and Peuco Finance Ltd. (each, a "Substantively Consolidated Debtor" and, collectively, the "Substantively Consolidated Debtors"), and their respective estates are substantively consolidated for all purposes in these chapter 11 cases.
3. The Substantively Consolidated Debtors' estates and cases will be consolidated under Case No. 20-11254 for all purposes in these chapter 11 cases.
4. All claims, if any, by, between, and among the Substantively Consolidated Debtors are hereby extinguished.
5. All assets and liabilities, respectively, of LATAM Finance Ltd., and Peuco Finance Ltd. are hereby merged (or treated as if they were merged) with the assets and liabilities of LATAM Airlines Group S.A.

6. Any obligation of a Substantively Consolidated Debtor and all guarantees of such obligations by one or more of the Substantively Consolidated Debtors are hereby deemed to be one obligation of LATAM Airlines Group S.A.

7. All claims based on guarantees of collection, payment, or performance made by a Substantively Consolidated Debtor as to the obligation of another Substantively Consolidated Debtor are hereby released and of no further force and effect.

8. Each claim filed or to be filed against any Substantively Consolidated Debtor is hereby deemed to be filed only against LATAM Airlines Group S.A. and is hereby deemed to be a single claim against LATAM Airlines Group S.A.

9. Duplicate claims filed by any creditor against multiple Substantively Consolidated Debtors may be consolidated in the official claims registry to reflect one claim filed against LATAM Airlines Group S.A. without the need for further order of this Court. The Debtors shall provide notice of such claim consolidated to any creditors whose duplicate claims are consolidated in accordance with this Order.

10. The Debtors are authorized and authorized and empowered to take all actions necessary to implement the relief granted in this Order.

11. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, _____
New York, New York

THE HONORABLE JAMES L. GARRITY JR.
UNITED STATES BANKRUPTCY JUDGE