Debtors' Responses to Confirmation Objections

Objecting Party	Docket No.	Nature of Objection	Response
Official Committee of Unsecured Creditors (Hawaiian Telcom addressed all other Committee issues in its opening brief and the body of this Reply)	1336	1. The cap on unsecured creditors' cash recovery inappropriately limits the extent to which unsecured creditors can share in the Debtors' unencumbered value.	**Moot.** The holders of General Unsecured Claims (Classes 7–14) have voted to accept the Plan. See McGuire Declaration. Therefore, unfair discrimination does not apply to the Classes of General Unsecured Claims.
		2. The distribution of warrants to the Senior Noteholders is not fair and equitable because it requires the Senior Noteholders to pay in order to exercise the warrants.	**Moot.** As set forth in the New Warrant Agreement, the warrants to be distributed to holders of Allowed Class 5 Senior Notes Claims are "cashless" and require no payment in order to be exercised.
		3. Payments on account of postpetition interest should be deducted from the Secured Parties' secured claim.	**Contested.** Even if the Committee is correct that the adequate protection payments should be recharacterized, as set forth in amended paragraph 9(c) of the Cash Collateral Order, adequate protection payments can only be recharacterized "as payments in satisfaction of principal amounts due under the Prepetition Financing Documents" and NOT as payments made on account of the Secured Parties' secured claims. That is the agreement reached by the parties prior to entry of the cash collateral order and is the law of the case. If the adequate protection payments are recharacterized as principal, however, the Plan still provides the requisite amount of value to the Senior Noteholders. Specifically, recharacterization of all adequate protection payments will reduce the Secured Parties' deficiency claim by approximately $30 million (as estimated by the Committee), leaving the Senior Noteholders with a legal entitlement under a strict waterfall analysis to $10.6 million, which is less than the value they are receiving under the Plan.

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U.S. Trustee	1341	1. The U.S. Trustee opposes the exculpation provision in Article XI.C of the Plan since it constitutes a permanent release by third parties against non-debtor entities.	**Contested**. The exculpation provisions in the Plan comport with applicable law as they are the product of negotiation amongst interested parties in these chapter 11 cases, including the Debtors and the Senior Secured Parties. See In re WCI Cable, 282 B.R. 457, 479 (Bankr. D. Or. 2002) (noting that indemnification and exculpation clauses for debtors, officers, directors, employees and professionals are appropriate and reasonable provisions in a chapter 11 plan of reorganization provided they are the products of negotiation among interested parties). Moreover, the exculpation provisions are appropriate under the circumstances of this case. The releasees have all made substantial contributions to the estate; the provisions are limited to the correct standard of liability for each individual releasee; and the provisions are necessary to the successful reorganization of the Debtors' businesses, especially in light of the ongoing dispute between the Senior Secured Parties and the Committee. See In re Genesis Health Ventures, Inc., 266 B.R., 591, 604-609 (Bankr. D. Del. 2001). Furthermore, the exculpation provision is narrowly tailored to only apply to conduct in connection with the Debtors' chapter 11 cases; see also Nystrom Declaration, Yeaman Declaration, Reich Declaration. In an effort to resolve the objection, the Debtors are working with the U.S. Trustee toward acceptable language.

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		2. The U.S. Trustee opposes the permanent injunction in Article XI.D of the Plan as it is tantamount to a third party release against non-debtor entities.	**Contested**. The Debtors will revise the Plan to make clear that the injunction only gives effect to the Releases and Exculpation set forth in Articles XI.B and XI.C of the Plan. In an effort to resolve the objection, the Debtors are working with the U.S. Trustee toward acceptable language.
U.S. Bank National Association (Senior Notes Indenture Trustee)	1332	1. The Plan requires "additional representations" regarding the New Warrants and New Common Stock distributed to holders of Class 5 Claims: (a) the New Common Stock must be freely transferable without restriction; (b) the Senior Noteholders need information that would otherwise be disclosed in SEC filings;	(a) **Moot.** The New Warrant Agreement makes clear that the New Warrants are freely transferable. Section 2.04(a) states that transfers of beneficial interests are to be made via The Depository Trust Company. (b) **Contested.** Reorganized Hawaiian Telcom will comply with applicable securities laws and provide such information to equity security holders that may be required pursuant to such laws.

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		(c) additional explanation regarding how sufficient common stock will be available on exercise of the warrants given that 10,000,000 shares have been allocated to class 3 claims, the rights offering and management under the equity incentive plan; and (d) waiver of jury trial to resolve disputes regarding issuance of the warrants is inappropriate.	(c) **Moot.** The Plan makes clear that the common stock purchased in the Rights Offering will be issued as of the Effective Date. Reorganized Hawaiian Telcom will not issue any stock on the Effective Date in connection with the New Warrants. Section 4.01 of the Amended Certificate of Incorporation authorizes 245,000,000 shares, which cannot be reduced below the number of shares outstanding as of the Effective Date, plus shares issuable upon exercise of options, warrants, etc. Section 3.05 of the New Warrant Agreement requires Reorganized Hawaiian Telcom to reserve at all times the maximum number of shares that would be delivered upon the exercise of all outstanding warrants. (d) **Contested.** Pursuant to Article XIII of the Plan, the Bankruptcy Court will retain jurisdiction with respect to all matters related to the chapter 11 cases. Accordingly, the Court retains jurisdiction to resolve disputes regarding the issuance of the warrants and the waiver of jury trial provision of the New Warrants Agreement.
		2. The New Warrant Agreement must be subject to the charging lien.	**Moot.** The New Warrants Agreement states that that warrants will be issued pursuant to the Plan. Article VII.3.B.d preserves the Senior Notes Indenture Trustee's right to assert a charging lien against distributions to holders of the Senior Notes Claims.
		3. The Plan unfairly discriminates against holders of the Senior Notes.	**Contested.** The Debtors have provided written direct testimony that demonstrates the New Warrants have intrinsic

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			value and are "in the money." See Mandava Declaration. In addition, there are valid business reasons for the separate treatment of the Senior Noteholders and holders of General Unsecured Claims and, as such, there is no unfair discrimination against the Senior Noteholders. See Nystrom Declaration.
		4. The fees and expenses of the Senior Notes Indenture Trustee are entitled to administrative priority and must be paid in cash on the Effective Date.	**Contested.** U.S. Bank and the Subordinated Notes Indenture Trustee, Deutsche Bank National Trust ("Deutsche Bank" and collectively with U.S. Bank, the "Indenture Trustees"), argue that the Plan is not feasible because it does not account for payment of all administrative expenses. See U.S. Bank Objection at 14–20; Deutsche Bank Objection at 17–19. The Plan does, in fact, account for payment of all administrative expenses. See Plan Art. II.A. The fees and expenses of the Indenture Trustees simply do not qualify as administrative expenses. To obtain reimbursement of its fees and expenses, U.S. Bank and Deutsche Bank must each prove that they have made a substantial contribution to the chapter 11 case. See Lebron v. Mechem Fin. Inc., 27 F.3d 937, 944 (3d Cir. 1994) "Each applicant has the burden to show it is entitled to reimbursement under section 503(b) by a preponderance of the evidence."); see 11 U.S.C. § 503(b)(3)(D); 11 U.S.C. § 503(b)(4) (allowing reasonable compensation for professional services rendered by an attorney whose expense is allowable under, inter alia, 11 U.S.C. § 503(b)(3)(D)). Section 503 of the Bankruptcy Code "should be strictly

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			construed to keep administrative expenses at a minimum . . . " In re Columbia Gas Sys., Inc., 224 B.R. 540, 548 (Bankr. D. Del. 1998).
			Applying these principles, U.S. Bank and Deutsche Bank cannot satisfy their burden under section 503(b) and the standard annunciated in Lebron. Neither objection describes the services rendered during the chapter 11 cases nor how those services relate to and contribute to the Debtors' reorganization. Instead, the Indenture Trustees would have this Court hold that an indenture trustee's fees and expenses are per se administrative expenses if the issuer (here, the Debtors) is subject to the Trust Indenture Act. However, the Indenture Trustees service, even if mandated by federal law, does not in and of itself amount to a substantial contribution to the chapter 11 cases or an administrative expense generally. The arguments advanced by the Indenture Trustees have been previously considered in other jurisdictions and soundly rejected. See In re PWS Holding Corp., 2002 WL 232332066 (Bankr. D. Del. 2002). In PWS, the court held that the Trust Indenture Act's requirement that a debtor have an indenture trustee does not mean that the Debtor "should be required to pay the costs of its services under the Indenture" as an administrative expense. Id. In addition, court rejected the argument that an indenture trustee's service pursuant to the Trust Indenture Act "is so important that the costs of fulfilling such duties should be accorded administrative priority." Id. at *2.

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			U.S. Bank tries to sidestep the PWS decision by stating that the Indenture Trustees, unlike the indenture trustee in PWS, are relying on section 959 of Title 28 of the United States Code ("Section 959") in support of its argument for administrative expenses. See U.S. Bank Objection at 17–20. However, Section 959 has no bearing on the type of relief requested by U.S. Bank. First, Section 959(b) states that a debtor-in-possession "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated." U.S. Bank has not cited a single case which has held that the Trust Indenture Act comes within the scope or purpose of Section 959. The truth, of course, is that the Debtor is complying with Trust Indenture Act—the real issue is whether the fees and expenses of U.S. Bank qualify as an administrative expense or are merely a general unsecured claim. See In re Bradlees Stores, Inc., 2003 WL 76990, *3 (Bankr. S.D.N.Y. 2003) ("a simple breach of contract is not cognizable under § 959(b) since any damages flowing from such a rejection are deemed to have occurred immediately prior to the filing of the debtor's petition in bankruptcy, and thus are treated as a pre-petition claim against the property of the debtor's estate"). Second, section 959(a) is also irrelevant, as it subjects a debtor in possession to suit without leave of court, but it does not alter a debtor's substantive right or obligations. The Debtors have not disclaimed their obligations to comply with the Trust Indenture Act nor have they asserted that they could not be sued for violations thereof.

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			In any event, to the extent that this court finds that any of the Indenture Trustees' fees and expenses qualify as administrative expenses, the Indenture Trustees have not proven the reasonableness of such fees and expenses. Nowhere in their respective objections do the Indenture Trustees describe the services they have rendered or address their reasonableness. Accordingly, the Debtors should at the very least be afforded the opportunity to review the Indenture Trustees' fees and expenses and object if necessary. For all the foregoing reasons, the Indenture Trustees' objections should be overruled.
		5. U.S. Bank is not the Subordinated Notes Indenture Trustee and should not be identified as such in the Plan.	**Resolved.** The Debtors will modify the Plan to identify Deutsche Bank National Trust Company as the Subordinated Notes Indenture Trustee.
Deutsche Bank National Trust (Indenture Trustee for the Senior Subordinated Notes)	1330	1. The Plan does not properly implement the subordination provisions in the Subordinated Notes Indenture. Rather, the Plan should provide a distribution to Deutsche Bank as Subordinated Notes Indenture Trustee and Deutsche Bank will then turn over such amounts to the Senior Noteholders after exercising its charging lien.	**Contested.** This argument shows the true purpose of Deutsche Bank's objection—it concedes that no distribution will be provided to the Class 6 Claims. Deutsche Bank merely wants to exercise its charging lien so that it can be paid its fees. These arguments are without merit because they directly contradict the language of the Subordinated Notes Indenture. Specifically, pursuant to Section 10.01 of the Subordinated Notes Indenture—the subordination provisions are not just a private agreement between the Holders of the Senior Notes and the Subordinated Notes ("[t]he Company agrees, and each Holder by accepting a Security agrees, that the Indebtedness evidenced by the Securities is subordinated in rights of payment, to the extent and in the manner provided in this Article 10, to the prior payment in full of all existing

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			and future Senior Indebtedness of the Company and that the subordination is for the benefit of an and enforceable by the holders of such Senior Indebtedness."). In addition, Section 10.02 of the Subordinated Notes Indenture provides that, in a bankruptcy, holders of Senior Indebtedness must be paid in full before holders of the Subordinated Notes are entitled to "receive" anything and that until holders of Senior Indebtedness are paid in full, "any payment or distribution" to which holders of the Subordinated Notes would be entitled shall be made to holders of the Senior Indebtedness (emphasis added).[1] Simply put, pursuant to the Subordinated Notes Indenture, the Holders of Subordinated Notes Claims (Class 6) are not entitled to receive a penny of distribution until the Holders of the Senior Notes Claims (Class 5) are paid in full. Pursuant to section 510(a) of the Bankruptcy Code, this type of contractual subordination is enforceable in bankruptcy to the

[1] The full text of Section 10.02 is provided below:

Upon any payment or distribution of the assets of the Company to its creditors upon a total or partial liquidation or a total or partial dissolution of the Company or in a bankruptcy, reorganization, insolvency, receivership or similar proceeding relating to the Company or its property:

(a) holders of Senior Indebtedness of the Company shall be entitled to receive payment in full or such Senior Indebtedness before Holders shall be entitled to receive any payment of principal of or interest on the Securities; and

(b) until such Senior Indebtedness is paid in full any payment or distribution to which Holders would be entitled but for this Article 10 shall be made to holders of such Senior Indebtedness as their interests may appear, except that the Holders may receive and retain Permitted Junior Securities.

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			same extent that such agreement is enforceable under applicable non-bankruptcy law. Since the Plan does not provide for payment in full of the Senior Notes Claims, enforcement of the subordination agreement rightfully requires that the Plan provide no recovery to Holders of Subordinated Notes Claims. See In re PWS Holding Corp., 228 F.3d 224, 243–45 (3d Cir. 2000).
		2. The Plan unfairly discriminates against Subordinated Notes Claims by providing no recovery to Class 6 Subordinated Notes Claims.	**Contested.** The argument again reveals that Deutsche Bank is seeking nothing more than getting its fees paid. Deutsche Bank does not dispute that the Subordinated Notes Claims (Class 6) are subordinated in right of payment to the Senior Notes Claims (Class 5). Deutsche Bank simply wants the Class 6 Subordinated Noteholders to receive a recovery so it can exercise its charging lien. Deutsche Bank's contrived distribution mechanic, however, violates the express provisions of the Subordinated Notes Indenture and Section 510(b) of the Bankruptcy Code. As the court in In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 226 (Bankr. D.N.J 2000) noted, "[a] contractual subordination agreement is enforceable in bankruptcy to the same extent that such agreement is enforceable under applicable non-bankruptcy law. Enforcement of the subordination agreement in the context of the [plan] mandates that the proposed distribution on account of the [Class 5 Subordinated] Intercompany Notes be added to the distribution to be received by Class 2 Old Noteholders."

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		3. The Plan is not confirmable because it fails to pay Deutsche Bank's fees as an administrative expense.	**Contested.** See response to U.S. Bank, as Senior Notes Indenture Trustee, above.
		4. The Plan fails to follow the precedent of a few chapter 11 plans selected by Deutsche Bank.	**Contested.** The settlements reached in other cases are irrelevant to the facts of these chapter 11 cases. For example, the plan in In re Ion Media Networks, Inc. is premised on a global settlement, which does not exist here.
		5. The Plan cannot be confirmed because the fees and expenses of the Subordinated Notes Indenture Trustee are not subordinated claims.	**Contested.** The fees and expenses of the Subordinated Notes Indenture Trustee are not subordinated under the Plan. Instead, the fees are general unsecured claims and are treated as such in the Plan.
		6. Holders of the Subordinated Notes Claims are entitled to vote on the Plan.	**Contested.** Section 1126(g) of the Bankruptcy Code states that "a class is deemed not to have accept a plan if such plan provides that the claims…of such class do not entitle the holders of such claims …to receive or retain any property under the plan on account of such claims…" 11 U.S.C. §1126(g). Because the Plan enforces the subordination provisions of the Subordinated Notes Indenture in accordance with section 510(a) of the Bankruptcy Code, holders of Subordinated Notes Claims are deemed to reject the Plan. Deutsche Bank made this same argument at the hearing to approve the Debtors' disclosure statement, attempting to cause the Debtors to solicit a deemed rejecting class that is not receiving or retaining a distribution and the Court overruled this objection. See Disclosure Statement Hearing Transcript at 46.

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		7. The Plan fails to identify Deutsche Bank National Trust Company as Subordinated Notes Indenture Trustee.	**Resolved.** The Debtors will modify the Plan to identify Deutsche Bank National Trust Company as the Subordinated Notes Indenture Trustee.
State of Hawaii	1339	The State of Hawaii seeks recognition of the general and plenary jurisdiction of the Hawaiian Public Utilities Commission to review and approve the Reorganized Debtor and the confirmed plan, in a regular HPUC docket to be opened after confirmation of the plan.	**Resolved.** Article X.A of the Plan provides that a condition precedent to the Effective Date is approval of the Plan by the Hawaii Public Utilities Commission.
State of Hawaii Department of Transportation	1340	The State of Hawaii, on behalf of the State of Hawaii Department of Transportation, requests a hearing regarding the rejection of certain executory contracts pursuant to the Plan.	**Resolved.** The Debtors have added language to the Confirmation Order to resolve this objection. See proposed Confirmation Order at ¶ 65.
Pacific Lightnet Inc.	1331	Pacific Lightnet Inc. requests a hearing regarding the rejection of its interconnection agreement pursuant to the Plan.	**Resolved.** The Debtors have added language to the Confirmation Order to resolve this objection. See proposed Confirmation Order at ¶ 64.
AT&T Corp.	1374	AT&T objects to the cure amounts set forth in the notice of assumption of certain executory contracts.	**Resolved.** This is not a confirmation issue. Pursuant to the Confirmation Order, if the Debtors and AT&T cannot agree on the cure amount, the Court will hear the dispute at a later date. See proposed Confirmation Order at ¶ 63.
Verizon Business Global LLC	1404	Verizon objects to the cure amounts set forth in the notice of assumption of certain executory contracts.	**Resolved.** This is not a confirmation issue. Pursuant to the Confirmation Order, if the Debtors and Verizon cannot agree on the cure amount, the Court will hear the dispute at a later date. See proposed Confirmation Order at ¶ 63.

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Cisco Systems, Inc	1409	Cisco Systems requests that the Debtors provide more detailed information relative to each of the agreements that are being assumed or actual copies of such agreements to determine which agreements are being assumed.	**Resolved.** This is not a confirmation issue. Pursuant to the Confirmation Order, if the Debtors and Cisco Systems' cannot agree on the cure amount, the Court will hear the dispute at a later date. See proposed Confirmation Order at ¶ 63. In addition, the Debtors will provide more detailed information regarding the contracts to be assumed per Cisco Systems' request.
Nortel Networks Inc.	1416	Nortel requests that the Debtors provide more detailed information relative to each of the agreements that are being assumed and to the cure amounts related thereto.	**Resolved.** This is not a confirmation issue. Pursuant to the Confirmation Order, if the Debtors and Nortel Networks cannot agree on the cure amount, the Court will hear the dispute at a later date. See proposed Confirmation Order at ¶ 63. In addition, the Debtors will provide more detailed information regarding the contracts to be assumed per Nortel Networks' request.