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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
NII Holdings, Inc., et al.,	:	Case No. 14-12611 (SCC)
Debtors.[1]	:	(Jointly Administered)

STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF THE FIRST AMENDED JOINT PLAN OF REORGANIZATION PROPOSED BY THE PLAN DEBTORS AND DEBTORS IN POSSESSION AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

[1] The Debtors in the jointly administered bankruptcy cases are comprised of the following thirteen entities (the last four digits of their respective U.S. taxpayer identification numbers follow in parentheses): NII Holdings, Inc. (1412); Nextel International (Services), Ltd. (6566); NII Capital Corp. (6843); NII Aviation, Inc. (6551); NII Funding Corp. (6265); NII Global Holdings, Inc. (1283); NII International Telecom S.C.A. (7498); NII International Holdings S.à r.l. (N/A); NII International Services S.à r.l. (6081); Airfone Holdings, LLC (1746); McCaw International (Brazil), LLC (1850); NII Mercosur, LLC (4079); and NIU Holdings LLC (5902). The location of the Debtors' corporate headquarters and the Debtors' service address is: 1875 Explorer Street, Suite 800, Reston, VA 20190.

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The Official Committee of Unsecured Creditors (the "**Committee**") of the above-referenced captioned debtors and debtors in possession (collectively, the "**Debtors**") hereby files this statement (the "**Statement**") in support of the *First Amended Joint Plan of Reorganization Proposed by the Plan Debtors and Debtors In Possession and the Official Committee of Unsecured Creditors* [Docket No. 664, Ex. 1] (the "**Plan**"), and in response to (i) the Revised Objection of the Ad Hoc Group of NII Capital 2021 Noteholders (the "**Ad Hoc Group**") to Confirmation of the First Amended Plan of Reorganization [Docket No. 760], and (ii) *Objection of the United States Trustee to Plan Support Agreement and First Amended Joint Plan of Reorganization* [Docket No. 743] (the "**U.S. Trustee Objection**").[2] In support of this Statement, the Committee respectfully submits as follows:

PRELIMINARY STATEMENT

1. The Plan before the Court reflects the chapter 11 process functioning at its best – providing the structure to bring together the many stakeholders of a complex enterprise to negotiate a series of interlocking compromises that leaves no party totally happy but maximizes value for all. The Plan resolves an array of complex and hotly contested disputes that otherwise would lead to an almost certain, value-destroying litigation morass. Viewed in this light, the Plan is a truly remarkable achievement.

2. The Committee supports confirmation of the Plan, and has signed on as its co-proponent, because it concluded, based on its own objective review of each component of the settlement and the settlement as a whole, that the Plan is in the best interests of the estates and of

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or in the *Debtors (I) Memorandum of Law in Support of Confirmation of First Amended Joint Plan of Reorganization Proposed by the Plan Debtors and Debtors in Possession and the Official Committee of Unsecured Creditors and (II) Consolidated Reply to Objections to Confirmation of First Amended Joint Plan of Reorganization* (the "**Confirmation Brief**"), filed contemporaneously herewith.

each of their major constituencies – including the CapCo 2021 Noteholders. Indeed, the CapCo 2021 Noteholders are a beneficiary of the overall settlement.

3. Not surprisingly, the Plan has overwhelming creditor support. Approximately 94% of creditors (in number) overall voted to accept the Plan, and the Plan is backed by every creditor fiduciary in the cases. Holders of General Unsecured Claims against each Debtor have *unanimously* voted to accept the Plan. Even the CapCo 2021 Noteholders, on whose behalf the Ad Hoc Group seeks to up-end the Plan, voted 95% in number and over 78% in amount in favor of confirmation. The Ad Hoc Group thus seeks to thwart the outcome desired by an overwhelming majority of the very constituency for which they are purportedly advocating.[3]

4. The Ad Hoc Group's objection – the only significant one interposed against confirmation – solely attacks the relatively modest 21% settlement of the Transferred Guarantor Claims. Not one of the numerous other Plan settlements is challenged. The Ad Hoc Group has thus assumed a role familiar to veterans of all-but-fully-consensual confirmation hearings: the last hold-outs – the parties who seek to take advantage of every gain negotiated on their behalf and then hold the entire process hostage in an attempt to extract even more. The Ad Hoc Group purports to want to roll the dice by forcing litigation of the Transferred Guarantor Claims, exposing the LuxCo Noteholders to significant downside risk and the remaining 78% of CapCo 2021 Noteholders (in amount) who support the Plan to value-destructive and unnecessary costs and the possibility of a de minimis recovery. The Court should reject this gambit and approve the Plan and the settlements contained therein.

[3] Among other things, this unambiguous endorsement obviates the Ad Hoc Group's objections to classification.

5. The attempt to cherry-pick the one issue the Ad Hoc Group wishes to litigate is misguided because settling the Transferred Guarantor Claims at 21% (which presumes a 79% chance of success for the Debtors) is reasonable on its own terms given the benefits of the Plan, the strengths and weaknesses of the claims, and the significant downside risk to all creditors. And the settlement can be fairly evaluated only as an integrated whole that *strongly benefits the CapCo 2021 Noteholders* in two distinct ways: First, it is only through the series of mutually dependent compromises baked into the Plan that the CapCo 2021 Noteholders are treated as favorably as they are, and second, the very fact of a global settlement protects those holders from risks and harms flowing from delay and the possibility of protracted and uncertain litigation. Indeed, the CapCo 2021 Noteholders are uniquely exposed to those risks because they sit at the top of the organizational structure and thus by operation of law lose the most if the value of the estates is consumed by litigation or less favorable settlements with structurally senior creditors.

6. The Ad Hoc Group claims it was excluded from negotiations over this settlement, but the interests of the CapCo 2021 Noteholders were well-represented by the Committee and its members (who include not only the indenture trustee for the CapCo 2021 Notes, but also holders of over 53% of those notes). In fact, the Amended PSA embodied in the Plan represents a *47% improvement* in the treatment of the CapCo 2021 Noteholders over the Original PSA – an increase in recoveries from 19.9% to 29.1% of their prepetition claims. That increase was made possible only by the interaction of several other CapCo friendly compromises, including most prominently, the following:

- The LuxCo Noteholders agreed to waive claims for upwards of $130 million[4] in postpetition interest, which redounds to the benefit of all CapCo creditors, approximately 52.5%[5] of which are holders of the CapCo 2021 Notes.
- The distributions under the Plan are based on an agreed Plan Distributable Value of $2.813 billion, which (i) is substantially *higher* than under the Original PSA, based, in part, on the Mexico sale, which only became possible as a result of the Original PSA, and (ii) reflects a higher value for the Brazil business than originally insisted on by the LuxCo Noteholders.
- The value distributed to the LuxCo Noteholders under the Plan is premised on a closing of the Mexico sale by April 30, 2015; while the Mexico sale did close timely, in the event it was delayed (which was a serious risk at the time the Plan was negotiated and was specifically contemplated under the asset purchase agreement), the LuxCo Noteholders agreed to bear the risk that the delayed closing would negatively affect Plan Distributable Value.
- Contrary to the assertions of the Ad Hoc Group, distributions of cash under the Plan are being skewed in CapCo's favor to provide all CapCo Noteholders with more cash as a percentage of their recovery than they otherwise would be entitled based on the location of the cash in the Debtors' capital structure.
- The settlements of the Fraudulent Conveyance Claims and the Recharacterization Claims remained at 25%.
- And most directly relevant here, the parties negotiated a *reduction* of the percentage settlement paid on the Transferred Guarantor Claims from 27.5% to 21% – exclusively benefiting the CapCo 2021 Noteholders.

7. Significantly, *each of the constituencies agreed to these concessions as part of a package deal.* The Ad Hoc Group's proposal to keep the benefits of these compromises but blow up or re-trade the *one* element it doesn't like is unrealistic to say the least. Given the sophistication of the parties involved, it cannot be considered a good faith position. Among other things, it simply ignores the negative consequences to all creditor constituencies if the Plan fails. Under such a scenario, General Unsecured Creditors stand to suffer dire consequences and near zero recoveries, as most General Unsecured Claims are concentrated at structurally

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[4] Assuming an emergence date of June 30, 2015 and that postpetition interest accrues at the contract rate with no default interest. Accrued interest at the default rate would be approximately $145.7 million.

[5] Based on Petition Date claim amounts of $1,357.8 million by the CapCo 2016/2019 Notes and $1,500.4 million by the CapCo 2021 Notes.

subordinated entities. Likewise, there is substantial downside for holders of the CapCo 2021 Notes if the Transferred Guarantor Claims succeed, litigation consumes substantial value, or a less favorable settlement emerges during litigation. In fact, if the Plan collapses and the Transferred Guarantor Claims succeed, the recoveries of the CapCo 2021 Notes could plummet dramatically from the 29.1% recovery projected under the Plan to as low as 4.9% before taking into account the overall value deterioration that would result from increased administrative costs and the harm to the business.

8. The Court's consideration of the settlements embodied in the Plan is guided, of course, by the familiar *Iridium* factors, which in this case should focus on two principal inquiries: Is settlement in the best interests of creditors in light of the likely burdens of a litigation alternative; and do the benefits of the settlement outweigh the likelihood of success of the settled claims in litigation? Both factors cut strongly in favor of approving the settlement, and the Court's confidence on both points can rest in part on the rigorous process undertaken by the Committee – and described in detail below – to study the factual and legal issues implicated by every major dispute in these cases; foster, guide, and support extensive, arms'-length negotiations involving all major constituencies; and come to a fully reasoned conclusion that settlement on the terms proposed is in the best interests of the estates and all of their stakeholders.[6]

9. On the first point – the best interests of creditors in settling rather than litigating – the Debtors and the Committee have both concluded that, based on information well known to the Court, settlement is overwhelmingly the better course. The alternative would be open-ended, expensive litigation that would drain the estates and expose the Debtors to business

[6] Other *Iridium* factors, such as the qualifications of counsel, the existence of arms'-length negotiations, and the broad support of the settlement by other creditors, are not substantially in dispute, but likewise weigh in favor of the settlement embodied in the Plan.

harms associated with delay in emerging from bankruptcy. Among other things, in the absence of settlement, the Court would have to consider appointing fiduciaries for several distinct constituencies who would prosecute or defend the litigations, which would lead to multiplying costs and diminishing returns for creditors.

10. On the second point – the likelihood of success if the claims proceeded to litigation – the Committee reasonably concluded that the claims were hotly contested, with serious arguments on both sides of virtually every issue, and faced a highly uncertain outcome that further reinforced the wisdom of settlement. The Ad Hoc Group focuses its objection on this point, offering purported "magic bullet" arguments that it suggests can cut through the litigation morass and defeat the Transferred Guarantor Claims as a matter of law, thus rendering even the relatively modest 21% settlement unreasonably high. But the Ad Hoc Group's arguments rest on a misleading and over-simplified presentation of the issues involved in those claims.

11. At the outset, the Ad Hoc Group repeatedly emphasizes the Debtors' prior statements that the Transferred Guarantor Claims lack merit. But it is wholly unremarkable for the defendant in litigation to take such a position – and adhere to it right up until the moment it settles. This is particularly true where, as here, the claims are based on a complex series of transactions (defined below as the "2009 Transfers") through which the Debtors, without clear public disclosure, apparently intended to release the guarantees that benefitted the CapCo 2016/2019 Notes immediately after the notes were sold. It is therefore hardly surprising to see the Debtors taking a hard line in defending their conduct. That is among the reasons the Committee was in the unique position to objectively assess these claims and pass judgment on a reasonable settlement.

12. The Transferred Guarantor Claims implicate a series of legal and factual issues that, as discussed in detail below, can be grouped roughly into three categories:

13. *First*, the facial claims for existence of a breach allege that the 2009 Transfers violated section 10.04 of the governing indentures by divesting various entities of substantially all of their assets other than in a transaction that complies with section 4.10 of the indentures, which governs Asset Sales. This in turn gives rise to complex interpretative questions over the meaning of section 4.10 and whether, if it applies, the 2009 Transfers complied with its requirements. There is also a separate claim for breach of sections 5.01(a) and 5.01(d) of the indentures that is not dependent on the interpretation of section 4.10.

14. *Second,* the question of appropriate remedies for any breach would require the Court to determine whether the relevant guarantees remain in effect or were eliminated, and if not in effect, whether they should be re-instated. These issues involve disputed questions of both law *and* fact, potentially including an assessment of factually complex equitable questions, the potential application of the doctrine of laches to bar the claims, and the impact of the Trust Indenture Act on the claims.

15. *Finally,* the Ad Hoc Group attempts to short-circuit the complicated legal and factual litigation issues governing the Transferred Guarantor Claims by suggesting that the claims can be cut off at the outset based on the fact that CapCo noteholders accepted Exchange Notes as part of a routine A/B exchange in 2010. These arguments are rendered irrelevant if the guarantees remain in effect, since under the governing indentures the guarantees remain enforceable by holders of the Exchange Notes. Moreover, the CapCo Notes Indenture provides that the Original Notes and the Exchange Notes are treated as a “single class” under the indentures, so there will be a dispute over whether they share the same material terms. But even

as applied to purportedly cut off the right of noteholders to seek reinstatement of the guarantees based on breach of the indentures, the Ad Hoc Group's arguments will face significant challenges. A/B exchanges are understood by the marketplace to be a routine or ministerial transaction undertaken simply to make notes tradable without affecting their underlying rights and liabilities. There certainly was none of the negotiation, diligence, and documentation that would be expected in connection with a transaction intended to waive or release existing claims. These facts will be cited to inform the reasonable construction of any language purporting to release or assign any rights or claims or the application of statutory provisions that the Ad Hoc Group purports to apply to the Exchange. The Ad Hoc Group's argument – that any rights or claims possessed by noteholders were released through form letters of transmittal – could upset longstanding expectations by participants in the bond market and by requiring parties to engage in massive due diligence and even litigation before effectuating a routine exchange.

16. The Ad Hoc Group's novel arguments at most give rise to issues that would be vigorously contested, with little likelihood that they would resolve the entire litigation at the threshold. Their aggressive creativity, however, only underscores the degree to which any litigation would be complex and hard-fought at both the trial and appellate levels.

17. In assessing the settlement, the Committee neither did, nor was required to, come to a firm conclusion about the precise anticipated outcome of every issue presented. But the Committee's careful and rigorous process did provide it with plenty of information to conclude that the Transferred Guarantor Claims (and the other categories of claims as to which the settlements are not challenged, described below) would give rise to tough, expensive litigation of uncertain outcome, imposing costs and risks on all parties. In that context, a relatively low settlement at 21%, which assigns a 79% likelihood to the possibility that the

claims will be completely defeated, is eminently reasonable. This compromise should be approved along with all the others inextricably imbedded in the settlement embodied in the Plan.

RELEVANT FACTS

A. Background on The Initial Landscape of the Case

18. Since March of 2014, the Debtors have been engaged in intensive pre- and postpetition negotiations with Aurelius, Capital Research and Management Company ("**CapRe**"), and certain other LuxCo and CapCo noteholders to develop a framework to restructure over $4 billion of balance sheet debt and either litigate or settle a number of inter-debtor and intercreditor claims. The prepetition negotiations primarily involved disputes over claims arising out of a series of historical transactions undertaken by the Debtors in connection with the issuance of the CapCo Notes and LuxCo Notes, as well as disputes regarding the value of the Debtors' businesses and the allocation of that value as between Nextel Brazil and Nextel Mexico (each as defined below).

19. More specifically, pursuant to letters (i) to the Debtors on March 4, 2014 (the "**First Aurelius Letter**") and (ii) to interested holders of the CapCo Notes on September 5, 2014 (the "**Second Aurelius Letter**"), Aurelius identified the following claims arising out of these historical transactions:

- Transferred Guarantor Claims. Certain claims for breach of the indentures governing the CapCo 2016/2019 Notes (the "**CapCo 2016/2019 Notes Indenture**" or the "**Indenture**") arising out of a series of transactions undertaken in late 2009 and early 2010, whereby three entities (NIU Holdings, LLC, Airfone Holdings, LLC, and McCaw International (Brazil) LLC (collectively, the "**Transferred Guarantors**")) that were guarantors of the CapCo Notes were transferred by NII Holdings, Inc. ("**Holdings**") down the corporate structure to NII Global Holdings LLC ("**NII Global**"), and then to Nextel International Holdings S.a.r.l. ("**NIHS**") and ultimately to LuxCo. Specifically, the Transferred Guarantor Claims allege that the guarantees by the Transferred Guarantors were not properly released by the transfer of these entities from NII Global to NIHS, and/or that any such release resulted in a breach of the terms of the CapCo 2016/2019 Notes Indentures.

- Fraudulent Conveyance Claims. Potential avoidance actions and fraudulent conveyance claims arising out of a series of transactions undertaken by the Company in early 2013 in connection with the issuance of the LuxCo Notes, including: (i) Holdings' guarantee of the LuxCo Notes, (ii) CapCo's agreement to subordinate its $644 million loan receivable from LuxCo (the "**CapCo Intercompany Note**") to the LuxCo Notes, (iii) the release or transfer of intercompany receivables or obligations (the "**2013 Intercompany Claims**") by various Debtors, including approximately (a) $614 million of receivables owed to Holdings by NII Brazil and transferred to LuxCo in February 2013 and (b) $48 million owed to Holdings, NIS and NII Funding Corp. from McCaw International (Brazil), LLC, and (iv) the release or transfer in April 2013 by NIS and Holdings of approximately $93 million in intercompany receivables owed to them by Nextel del Peru S.A. (the "**Nextel Peru Claims**").

- Intercompany Recharacterization Claims. Claims to recharacterize as equity the intercompany obligations existing between a Debtor and another Debtor or between a non-Debtor subsidiary of Holdings and a Debtor outstanding as of the Petition Date (collectively with the Transferred Guarantor Claims and the Fraudulent Conveyance Claims, the "**Disputed Claims**").

20. Because it was clear that the Company must substantially reduce the debt on its balance sheet to remain viable, the parties to the prepetition negotiations – including the Company, Aurelius, CapRe, and other noteholders – considered a number of alternatives for dealing with the Disputed Claims in connection with a balance sheet restructuring. Among the options considered were (i) restructuring the Company's balance sheet through a chapter 11 plan and setting aside a reserve pending the outcome of post-bankruptcy litigation of the Disputed Claims, (ii) settling the Disputed Claims through a chapter 11 plan, (iii) litigating some or all of the Disputed Claims during the course of a bankruptcy proceeding; and (iv) a combination of any of these potential structures.

21. To add to the complications, the valuation of the Company was also hotly contested in prepetition negotiations, as was the proper split of value among the Debtors' operating subsidiaries in Mexico and Brazil. The Company's operations in both of these countries had been and continued to be in early stages of development, requiring the investment

of significant capital to generate the growth necessary to achieve future profitability. At such an early stage, the valuations of these businesses were dependent upon long term projections and were highly subjective. During prepetition negotiations, the valuations proposed by Aurelius and CapRe (as part of a larger group of noteholders) differed by nearly $700 million – with valuations ranging from approximately $3.8 billion, on the low end, to $4.5 billion on the high end prior to the Petition Date. *See* Rothschild Board of Directors Update Materials (September 11, 2014). The ultimate valuation of the Company would have a significant impact on the recoveries of LuxCo and CapCo creditors.

22. Ultimately, the parties were unable to agree on the structure for such a restructuring. There was general consensus, however, that litigation of all Disputed Claims during a bankruptcy case and prior to the balance sheet restructuring was the least beneficial option, as that litigation could have a destabilizing impact on the Company, and in particular its operations in Brazil and Mexico where there was local funded debt, destroying value for all creditor constituencies.

23. Beyond the negotiations, the Company was also facing significant business constraints in the fall of 2014: (i) its lenders under the Operating Credit Facilities were pressuring the Company to complete a restructuring, (ii) it was facing the prospect of continued covenant non-compliance under those facilities, and (iii) it was forecasting liquidity issues that would result in limited cash availability by the second quarter of 2015. Faced with these constraints and with no settlement prospects in sight, the Company was forced to file these Chapter 11 Cases.

B. Appointment of the Committee

24. On September 15, 2014 (the "**Petition Date**"), certain of the Debtors (the "**Original Debtors**") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**").[7]

25. On September 29, 2014, the United States Trustee for the Southern District of New York (the "**U.S. Trustee**"), pursuant to sections 1102(a) and (b) of the Bankruptcy Code, appointed the Creditors' Committee. The U.S. Trustee supplemented the Committee by adding two members on November 5, 2014. The Committee is co-chaired by CapRe (the largest individual holder of the LuxCo and CapCo Notes), and Aurelius Investment, LLC (a large holder of the CapCo Notes). The Committee members also include the three trustees for all issuances of the notes, including (a) Wilmington Trust, National Association; (b) Wilmington Savings Fund Society, FSB; and (c) U.S. Bank, National Association. In total, the Committee members hold 84% of the CapCo Notes due 2016 and 2019, 53% of the CapCo Notes due 2021, and 39% of the LuxCo Notes. In addition, unsecured creditors American Tower do Brasil - Cessao de Infraestruturas Ltda. and Motorola Mobility LLC, both important contract creditors of the Debtors, also serve as Committee members.

26. Upon its formation, the Committee retained Kramer Levin Naftalis & Frankel LLP ("**Kramer Levin**") as counsel and FTI Consulting, Inc. ("**FTI**") as financial advisor (together, the "**Committee Professionals**"). Each member of the Committee has also retained its own individual counsel and certain members have engaged separate individual financial advisors: (a) Wilmington Trust, National Association is represented by Schulte Roth & Zabel LLP; (b) Capital Research and Management Company is represented by Paul, Weiss,

[7] On October 8, 2014, four of the Original Debtors' affiliates also filed chapter 11 bankruptcy petitions in this District.

Rifkind, Wharton & Garrison LLP and Houlihan Lokey; (c) Aurelius Investment, LLC is represented by Akin Gump Strauss Hauer & Feld LLP and The Blackstone Group; (d) Wilmington Savings Fund Society, FSB is represented by Andrews Kurth LLP; (e) American Tower do Brasil - Cessao de Infraestruturas Ltda. is represented by Hughes Hubbard & Reed LLP; (f) Motorola Mobility LLC is represented by Locke Lord LLP; and (g) U.S. Bank, National Association is represented by Shipman & Goodwin LLP.

C. The Committee's Investigation of the Disputed Claims

27. Immediately upon the Committee's appointment, the Committee members and the Debtors asked the Committee Professionals to undertake an investigation of the Disputed Claims with a view toward advising the Committee members on the strengths and weaknesses of the Disputed Claims and assisting the parties in achieving a resolution of the numerous disputes in the case, either through a comprehensive settlement or the implementation of a process for the adjudication of the claims that would not wreak havoc on the business. The Committee Professionals began by scheduling and attending a series of meetings with the parties involved in the prepetition restructuring negotiations, including the Debtors, Aurelius, CapRe, and the ad hoc group of holders of the LuxCo Notes (the "**LuxCo Group**"), to understand the complexities of the Disputed Claims, the intricacies of the arguments surrounding those claims, and the parties' differing views on the merits of the claims. These initial meetings were held with the Debtors and their professionals on September 30, 2014, with CapRe and its professionals on October 3, 2014, with the professionals for the LuxCo Group on October 6, 2014, and with Aurelius and its professionals on October 7, 2014.

28. At these initial meetings, the Committee learned that simultaneously with their efforts to negotiate a confirmable chapter 11 plan, the Debtors would be pursuing strategic alternatives for the sale of all or part of the Debtors' businesses in the event a confirmable

chapter 11 plan could not be achieved. The Debtors informed the Committee that due to approaching liquidity issues, they would need to either sell all or part of the business or obtain hundreds of millions of dollars in postpetition financing at the end of the first quarter of 2015.

29. With the views and arguments expressed by the various parties-in-interest at these initial meetings, the Committee Professionals began their investigation of the Disputed Claims. To expedite the investigation, Kramer Levin served an informal document request on the Debtors on October 9, 2014, which sought all documents in the Debtors' control related to the Disputed Claims. As a result of this request, the Committee Professionals ultimately reviewed more than 13,000 documents (in addition to numerous non-public documents in the Debtors' confidential data room) and employed extensive corporate, financial, economic, tax, and other expertise to inform its understanding and analysis of the Disputed Claims.

30. In addition, following the initial meetings with the various parties to the prepetition negotiations, the Committee Professionals had countless informal phone calls and meetings with each of these parties and held formal meetings or calls with (i) CapRe on October 29, 2014; (ii) Aurelius on October 28, 2014; and (iii) the LuxCo Group on November 18, 2014. At these meetings, the Committee Professionals discussed the legal and factual issues surrounding the Disputed Claims and the arguments and counterarguments with respect to various aspects of the claims. During this time, the Committee Professionals spoke with the Debtors on a regular basis to review similar issues. The Committee Professionals also conducted extensive research in connection with their investigation and prepared numerous and substantial internal memoranda regarding their analysis of the Disputed Claims.

31. As the investigation proceeded, the Committee Professionals made presentations to the Committee on their analyses of the Disputed Claims and related legal and

factual issues. Specifically, on October 24, 2014 the Committee Professionals gave the Committee an overview presentation on the Disputed Claims, which included a detailed summary of the transactions at issue, and the numerous legal and factual issues being investigated. This presentation also involved a detailed factual description of the 2009 Transfers, the potential Fraudulent Conveyance Claims and the Intercompany Claims.

32. On November 12, 2014, the Committee Professionals provided the Committee with a comprehensive presentation on their investigation, which included an analysis of the strengths, weaknesses, and risks associated with each of the Disputed Claims.[8]

33. While the Ad Hoc Group goes to great lengths to portray the 2009 Transfers as unremarkable and the Exchange (defined below) as clearly eliminating the right to pursue the Transferred Guarantor Claims, the Committee's investigation revealed a different story: the 2009 Transfers and their aftermath give rise to complexities and disclosure issues ignored by the Ad Hoc Group, and issues surrounding the Exchange may not provide an easy way of disposing of claims relating to the guarantees. As set forth below, the Committee's investigation uncovered a number of factual *and* legal issues surrounding *all* of the Disputed Claims, each of which required careful analysis to assess the pros and cons of settlement.

1. Transferred Guarantor Claims

34. In late 2009, the Company issued $1.3 billion in notes, in two series: in August 2009, CapCo issued $800 million in aggregate principal amount of notes due 2016 (the "**CapCo 2016 Notes**"), and on December 15, 2009, CapCo issued another $500 million in aggregate principal amount of notes due 2019 (the "**CapCo 2019 Notes**" and, together with the

[8] These presentations were ultimately prepared in written form and presented to the Independent Manager in connection with his investigation of the Disputed Claims, as discussed below.

CapCo 2016 Notes, the "**CapCo 2016/2019 Notes**").[9] The principal credit support for the CapCo 2016/2019 Notes was guarantees from the Company's most valuable domestic subsidiaries, namely (i) Nextel International (Uruguay) ("**NIU**") – which after December 2009 held Comunicaciones Nextel de Mexico, the indirect owner of operating subsidiaries that conduct the Company's operation in Mexico, (ii) McCaw International (Brazil) ("**McCaw**"), the indirect owner of operating subsidiaries that conduct the Company's operations in Brazil, and (iii) Airfone Holdings LLC (Delaware), a subsidiary of McCaw International (Brazil).

35. The documentation underlying the issuance of the CapCo 2016/2019 Notes did not disclose that the Company intended to execute a complex internal reorganization to eliminate certain of the guarantees contemplated by the indentures governing those notes.[10] Nor did the Company seek or obtain consent of the CapCo 2016/2019 Noteholders to the release of the guarantees. Beginning prior to the issuance of the CapCo 2019 Notes and continuing over a period of 15 days subsequent to the issuance, the Company began a multi-step intercompany reorganization that included: (i) the transfer of equity interests in NIU from Holdings to CapCo on December 15, 2009, (ii) the transfer of equity interests in Nextel Mexico from CapCo to NIU at or around December 15, 2009, (iii) the contribution of NIU and its subsidiaries (including Nextel Mexico) from CapCo to NII Global on December 19, 2009, (iv) the contribution of McCaw and its subsidiaries from Holdings to CapCo on December 21, 2009, (v) the contribution

[9] In the interim period between issuances, NII Global was formed as a subsidiary of CapCo, and in connection with the issuance of the CapCo 2019 Notes, NII Global was identified as a guarantor of both the CapCo 2016 Notes and the CapCo 2019 Notes.

[10] During the course of discovery taken by the Ad Hoc Group in connection with confirmation, principals of the Debtors testified that they were aware that the Company was planning to undertake the transactions giving rise to the Transferred Guarantor Claims at the time that the CapCo 2016/2019 Notes were issued, and drafted the CapCo Notes Indentures to allow for the release of the just-issued guarantees through those transactions. Yet no disclosures were made publicly or to the holders at the time of the issuance. While the offering statements described the general terms by which a guarantor could transfer substantially all of its assets, the offering documents gave no indication that the Company intended to immediately reorganize in a way intended to release the guarantees by NIU and/or McCaw.

of McCaw and its subsidiaries from CapCo to NII Global on December 23, 2009, and (vi) the transfer of the equity interests in NIU (including Nextel Mexico) and McCaw and its subsidiaries from NII Global to NIHS on December 30, 2009. As a result of these transfers, NIU and McCaw were held by NIHS, a Foreign Restricted Subsidiary (as defined in the Indenture) that was not a guarantor of the CapCo 2016/2019 Notes. Attached as **Annex 1** hereto is an illustration of the 2009 Transfers.

36. On March 8, 2010, CapCo executed two supplemental indentures (the "**Supplemental Indentures**"). Those Supplemental Indentures provided that, in accordance with the terms of the Indentures, the Company had sought and received an officers' certificate and opinion of counsel that the transactions consummated as part of the 2009 Transfers "complied with all applicable provisions and conditions of Sections 4.10, l0.04(a)(i) and l0.04(a)(ii)(B) of the Indenture." The Supplemental Indentures concluded that "pursuant to Section l0.05(a)(v) of the Indenture, all of the conditions precedent to the release of the obligations of each Released Guarantor from its respective obligations under its respective Note Guarantee have been complied with." As a result, it was the Company's position that the guarantees of the CapCo 2016/2019 Notes by the Transferred Guarantors had been released as a result of the 2009 Transfers and that prior notice and noteholder consent was not required.

37. These Supplemental Indentures were not filed publicly with the SEC at that time. As a result, the holders of the CapCo 2016/2019 Notes were not advised that the Company had (i) executed a corporate reorganization through the 2009 Transfers or (ii) based on those transactions, purported to release the very credit support it had just granted pursuant to the Indentures.

38. In April 2010, CapCo consummated an A/B exchange offer (the "**Exchange**"), pursuant to which CapCo offered to exchange restricted CapCo 2016/2019 Notes (the "**Original Notes**") for unrestricted notes (the "**Exchange Notes**") pursuant to a prospectus dated April 5, 2010.[11] The Exchange was made in accordance with registration rights agreements that were executed by CapCo at the time each of the CapCo 2016 Notes and CapCo 2019 Notes were issued. Neither the registration rights agreements nor the prospectus used for the Exchange provided that the holders of the CapCo 2016/2019 Notes would be relinquishing any rights in connection with the Exchange nor did they disclose that the Debtors had completed the 2009 Transfers or, on that basis, purported to release the guarantees by the Transferred Guarantors. The Exchange was not a separately negotiated transaction or restructuring and the company never disclosed or suggested that it was intending to use the Exchange to alter legal or contractual rights held by noteholders. Instead, the Exchange implemented a registration that was contemplated when the Original Notes were issued, and the only intended effect was to make the Exchange Notes freely tradeable.

39. The tenders of the Original Notes in the Exchange were evidenced by letters of transmittal. The letters of transmittal, however, were not actually executed by the tendering noteholders (i.e., the holders of the Original Notes). As is customary, the tenders were made electronically through the Depository Trust Company information system, and the tendering noteholders were deemed to abide by their tenders.

40. A year later, in March and December 2011, CapCo issued $1.45 billion in aggregate principal amount of notes due 2021 (the "**CapCo 2021 Notes**"). The registration

[11] "A/B exchange offers," also known as "*Exxon Capital* exchange offers" are registered exchange offers pursuant to which "the issuer registers an exchange offering of new registered notes with terms identical to the original notes to holders of the original restricted notes." *See* Latham & Watkins Client Alert No. 669, *The Future of Registration Rights in Private Offerings of Debt Securities*, 6 (Jan. 22, 2008).

statement and the prospectus for the CapCo 2021 Notes do not identify the Transferred Guarantors as guarantors of the CapCo 2021 Notes.

41. During the almost four years following the time the CapCo 2016/2019 Notes were issued, the Company filed seven 10-K and 10-K/A statements, and thirteen 10-Q and 10-Q/A statements with the SEC. None of these filings evidence the execution of the Supplemental Indentures.

42. On March 4, 2014, Aurelius sent the First Aurelius Letter to the Company. Six days later, on March 10, 2014, Holdings filed the Supplemental Indentures – which were dated in 2010 – publicly with the SEC.

43. Based on these facts, the Committee identified a number of questions about the 2009 Transfers that were the subject of its investigation, including: (i) the Company's rationale for consummating the 2009 Transfers, (ii) the interrelatedness of the various steps underlying the 2009 Transfers, (iii) the Company's rationale or explanation for the dearth of disclosure regarding the 2009 Transfers at the time of the issuance of the CapCo 2016/2019 Notes – particularly since the Company acknowledged that it was aware that it was going to undertake the 2009 Transfers at the time of the issuance of the notes, and (iv) the rationale or explanation for the Company's failure to file or disclose the Supplemental Indentures for four years after their execution and the explanation for filing the Supplemental Indentures in March 2014. The Committee's investigation into each of these issues was influenced by the questions surrounding the integrity of the 2009 Transfers and a recognition that the facts gathered could be relevant to the Committee's (and ultimately the Court's) analysis of the intended meaning of certain provisions of the Indenture and any remedies that might be available to the parties seeking to enforce the guarantees.

44. In addition to the factual analysis of the 2009 Transfers, the Committee analyzed the terms of the indentures governing the CapCo 2016/2019 Notes, and the documentation governing the exchange of those notes in 2010. Among other issues, the Committee considered:

- Whether the 2009 Transfers violated Section 10.04 of the Indentures restricting transfers by Subsidiary Guarantors of substantially all of their assets.
- Whether the 2009 Transfers violated Section 5.01(a) of the Indentures restricting transfers by Holdings of substantially all of its assets.
- Whether the 2009 Transfers violated Section 5.01(d) of the Indentures restricting transfers by CapCo of substantially all of its assets.
- Whether the holders of the CapCo 2016/2019 Notes were foreclosed from asserting violations of the Indentures by accepting the Exchange Notes in the Exchange.
- Whether the holders of the CapCo 2016/2019 Notes should be precluded from asserting a violation of the Indentures under the doctrine of laches.
- Whether the step transaction doctrine, whereby the intermediate steps of the 2009 Transfers would be ignored, would obviate any violation of Section 10.04.
- Whether a violation of the Indentures precluded the release of the guarantees by the Transferred Guarantors.
- Whether the Transferred Guarantors were released, and if so, whether a court should reinstate those guarantees or provide some other remedy as a matter of equity.

45. Based on this analysis, the Committee determined that the Transferred Guarantor Claims did not turn merely on straightforward legal issues, but would necessarily involve significant legal and factual analysis, possible expert testimony, and complex indenture analysis that would have broader implications in the marketplace. Moreover, as discussed in further detail below, the Committee's analysis revealed that, while the Debtors were contesting these claims, there were credible arguments that could be made to support the Transferred

Guarantor Claims. These credible arguments highlighted the risks to the Debtors and other parties in interest in litigating these claims, which undoubtedly would be lengthy and expensive.

2. Fraudulent Conveyance Claims

46. The Fraudulent Conveyance Claims asserted in the First and Second Aurelius Letters primarily involved a series of transactions undertaken by the Company from January through May 2013 in connection with the issuance of the LuxCo Notes. The Fraudulent Conveyance Claims can generally be divided into two categories: (i) transfers made by Holdings, and (ii) transfers made by CapCo. The transfers include:

- The transfer by Holdings to LuxCo of $437 million in principal amount of receivables against Nextel Brazil (which, together with interest, totaled approximately $614 million) in exchange for a $614 million promissory note that was then transferred back down the corporate chain to LuxCo, cancelled, and disregarded for tax purposes.

- A guarantee by Holdings of the LuxCo Notes.

- A series of nineteen transactions by which Holdings and certain of its subsidiaries entered into agreements to forgive certain outstanding intercompany balances. In total, Holdings and its subsidiaries forgave over $668 million in intercompany balances (not including accrued and unpaid interest) and, when offset against mutual outstanding obligations, forgave a net amount of over $177 million. Individually, Holdings forgave approximately $280 million of the gross intercompany balances and approximately $129 million of the net balances.

- A series of transactions with the net effect of Holdings transferring two receivables against Nextel Peru in the aggregate amount of $93.6 million to Nextel Peru (effectively cancelling the receivable) in exchange for a total of 241 shares to NII Mercosur Telecom and NII Mercosur Moviles (direct subsidiaries of LuxCo). Nextel Peru was subsequently sold in August 2013 for $405.5 million.

- CapCo's subordination of the CapCo Intercompany Note it held against LuxCo to the obligations due under the LuxCo Notes.[12]

[12] The CapCo Intercompany Note arose out of the corporate restructuring undertaken by the Company in 2009 and 2010. Specifically, in May 2010, CapCo (originally the owner of 100% equity interests in NII Mercosur, LLC) agreed to transfer all of its equity interests in its subsidiary, NII Mercosur, to LuxCo in exchange for a promissory note equal to the fair market value of those equity interests (*i.e.*, the CapCo Intercompany Note).

47. Through its investigation, the Committee sought information on the facts of each of these transactions as well as information regarding the Company's actual and projected financial results prior to, during, and after each of the transfers in question. Because the legal analysis of the claims necessarily required an analysis of the solvency of Holdings, CapCo, and LuxCo at the time of the transfers, the Committee Professionals also engaged in significant factual and financial analysis of the Company's capitalization and solvency in late 2012 and early 2013. Among other things, the Committee's Professionals tested the solvency of Holdings, CapCo, and LuxCo under numerous methodologies to determine whether, in any circumstances, any of these entities could be found to be insolvent. The solvency analysis also included discovery concerning the Company's financial projections prior to and at the time of the transfers and management's views on the Company's financial prospects following the consummation of the transactions and the issuance of the LuxCo Notes. As discussed in further detail below, the Committee's analysis revealed that these claims had potentially significant risks to the Debtors and other parties in interest if they were litigated and determined that any such litigation would be highly fact-based, prolonged, and expensive.

3. Intercompany Recharacterization Claims

48. On the Petition Date, the Company had a number of outstanding intercompany balances on its balance sheet, including: (i) $657 million owing by Nextel Brazil to LuxCo (transferred by Holdings in 2013) (the "**Brazil Receivables**");[13] (ii) $939.9 million owing by Nextel Brazil to LuxCo (post-2013); (iii) $3.06 billion owing by Holdings to CapCo; (iv) $709 million owing by LuxCo to CapCo; (v) $788 million owing by NIS to Holdings; (vi) $214 million owing by NII Funding to Holdings; (vii) $19.6 million owing by Nextel Brazil to

[13] All amounts owed are as of the Petition Date.

Holdings and NIS; (viii) $151.8 million owing by NII Mexico to Holdings, NIS, and NII Funding Corp.; and (ix) $16.4 million owing by NII Argentina to Holdings, NIS, and NIS Funding Corp., among others, including the intercompany claims arising out of the transactions giving rise to the potential Fraudulent Conveyance Claims. Attached as **Annex 2** hereto is a chart illustrating the outstanding intercompany balances as of the Petition Date.

49. The intercompany balances were generally documented under three forms of "intercompany notes." The majority of the intercompany balances (both in number and outstanding balances) were documented by either "Form Note 1" or "Form Note 2" – each of which had fixed maturity dates and interest rates, as well as choice of law provisions. "Form Note 3" was used to document the CapCo Intercompany Note, and also has a fixed maturity date, interest rates, and choice of law provisions.

50. Through the Committee's investigation, it was revealed that the Company had previously taken the position with the IRS that the Brazil Receivables, which were based on "Form Note 1," should be treated as equity for tax purposes. In response to an IRS inquiry, on February 11, 2013, the Company submitted a letter to the IRS explaining that it was the Company's position that the Brazil Receivables were intended to be treated as equity. [redacted]

REDACTED

[redacted]

[redacted]

[redacted]. REDACTED

51. As discussed in further detail below, the Committee's analysis of these intercompany balances revealed that a recharacterization litigation would be highly fact-based, with attendant costs and delays, and had potentially significant risks to the Debtors and other parties in interest.

D. Financial Analysis of Litigation Scenarios

52. In addition to the legal and factual analyses discussed above, the Committee's advisors also discussed with the Committee, on multiple occasions, the various outcomes under various scenarios of settlement or litigation of one or all of the Disputed Claims.

53. As an initial matter, under a "full reserve" plan, where a reserve for all Disputed Claims would be set aside pending the outcome of post-bankruptcy litigation, over half of the total equity value could be tied up in a reserve pending the outcome of the litigation. In October 2014, based on an assumption of $4.134 billion in distributable value (which was by no means an agreed-upon number), the Committee Professionals estimated that, after taking into account the estimated balances due on account of local debt at Mexico and Brazil, approximately $1.4 billion, or 58% of the reorganized equity would need to be held in reserve to litigate all of the Disputed Claims. Reserving this amount, however, would create significant uncertainty in creditors' recoveries, as their ultimate recoveries could vary starkly depending on the outcome of the litigation of each claim.

54. To discuss these issues with the Committee, the Committee Professionals modeled a wide variety of outcomes of each of the Disputed Claims, including "best case" and "worst case" scenarios for the litigation of each, and to account for its analysis of the strengths

and weaknesses of each claim. The various scenarios the Committee Professionals analyzed, included, among others:

- The "best case" scenario for the LuxCo Notes and the "worst case" scenario for the CapCo 2016/2019 Notes: a ruling upholding the Recharacterization Claims but denying each of the Transferred Guarantor Claims and Fraudulent Conveyance Claims;
- The "worst case" scenario for the LuxCo Notes and a "best case" scenario for the CapCo 2016/2019 Notes: a ruling upholding each of the Transferred Guarantor Claims and Fraudulent Conveyance Claims, but denying the Recharacterization Claims;
- The "best case" scenario for the CapCo 2021 Notes: a ruling denying each of the Transferred Guarantor Claims and Recharacterization Claims, but upholding the Fraudulent Conveyance Claims;
- The "worst case" scenario for the CapCo 2021 Notes and another "best case" scenario for the CapCo 2016/2019 Notes: a ruling upholding each of the Transferred Guarantor Claims and Recharacterization Claims, but denying the Fraudulent Conveyance Claims; and
- Numerous combinations of each of these and other scenarios for the various outcomes of the Disputed Claims, including scenarios that were sensitized by the strengths and weaknesses of various aspects of the claims.

55. Based on this analysis, each creditor constituency faced significant risk if the Disputed Claims were litigated and determined in accordance with their "worst case" scenario; for the Plan Distributable Value assumed under the Amended PSA, the CapCo 2016/2019 Noteholders' recoveries could vary from 100.0% to 34.5% on account of their prepetition claims, the CapCo 2021 Noteholders' recoveries could vary from 49.6% to 4.9%, and the LuxCo Noteholders' recoveries could vary from 107.9% to 48.1%.

56. In reviewing proposed settlements of the Disputed Claims during the course of the Committee's investigation, the Committee Professionals utilized these models, among others, to compare the recoveries under the proposed settlements to those under each

constituencies "best" and "worst" case scenarios, and evaluate whether the proposed settlements were reasonable under the circumstances.

E. Events Leading to the Original PSA and Amended PSA

1. The Original PSA

57. Over the course of the Committee's investigation in the fall of 2014, the Debtors were dual-tracking negotiations over potential plan structures with Aurelius, CapRe, and the LuxCo Group. These negotiations included the exchange of multiple plan term sheets and settlement proposals. The Committee Professionals analyzed each of the settlement proposals, discussed them with Committee members, and identified potential issues for Committee consideration. The Committee Professionals also acted as facilitators in settlement negotiations, including discussing potential alternative means by which to settle the issues in dispute.

58. Approximately two months into the Chapter 11 Cases, the negotiations bore fruit. At a meeting in Reston, Virginia on November 14, 2014, the Debtors, Aurelius, and CapRe reached an agreement in principle on the terms of a chapter 11 plan. Following lengthy and active negotiations among each of these parties and the Committee, this agreement was memorialized in a plan support agreement and related plan term sheet (the "**Original PSA**"). On November 20, 2014, the Committee Professionals delivered a written presentation of the proposed settlement to the Committee, and at Committee meetings held on November 20 and 24, 2014, the Committee Professionals discussed the detailed terms of the proposed settlement with the Committee members.

59. Among other things, the Original PSA provided for an integrated settlement of all Disputed Claims, as well as an agreed plan equity value of $2.421 billion. Specifically, the Original PSA provided that recoveries to unsecured creditors would be calculated as if: (i) 25% of the alleged Fraudulent Conveyances were avoided, (ii) 25% of the

intercompany balances among the Debtors and their non-Debtor subsidiaries were recharacterized as equity (other than the CapCo Intercompany Note); and (iii) 27.5% of the asserted Transferred Guarantor Claims were allowed. The Original PSA also contemplated a $250 million rights offering and $250 million in exit financing.

60. In evaluating the proposed settlement under the Original PSA, the Committee believed that the settlement as a whole was reasonable and in the best interest of creditors, presented a clear and stable path forward for the Chapter 11 Cases, and was the best way to maximize the value of the Debtors' estates. In addition, the Committee believed that the various components of the settlement were likewise reasonable; the proposed settlements of the Disputed Claims were in line with the Committee's views of the risks of those claims in litigation and appropriately settled those claims. Moreover, the Committee appreciated that the settlement avoided significant potential downsides to all creditors and would undoubtedly spare the Company from the significant risk, uncertainty, and delay associated with litigation. In particular, when considered in the context of their potential downside, the Original PSA provided the CapCo 2016/2019 Noteholders and the CapCo 2021 Noteholders with premiums of 82% and 287%, respectively, over their worst case scenarios. For all of these reasons, at the November 24, 2014 meeting, the Committee voted to approve the Original PSA and serve as a co-proponent of the chapter 11 plan it contemplated. Later that day, the Debtors, the Committee, Aurelius, CapRe, and American Tower entered into the Original PSA, and it was filed with the Court.[14]

[14] As contemplated by the Original PSA, the parties thereto negotiated the terms of a chapter 11 plan, disclosure statement, and related exhibits that were filed with the Court on December 22 and 23, 2014 [Docket Nos. 322, 323, 326]. Also on December 22, 2014, the Debtors filed a motion seeking Court authority to enter into the Original PSA [Docket No. 320].

2. The Amended PSA

61. Although negotiations had been ongoing with the LuxCo Group since the outset of the Chapter 11 Cases, the LuxCo Group was not a party to the Original PSA. The Original PSA did, however, provide for the appointment of an independent representative for NIHS, the sole manager of LuxCo, who was tasked with evaluating the Original PSA and plan settlements within a specified time period. Based on its investigation, the independent representative would make a recommendation to the NIHS board of managers as to whether LuxCo should join or oppose the proposed settlement in the Original PSA. In accordance with this provision, on December 11, 2014, Scott Winn of Zolfo Cooper was appointed as the independent manager for NIHS (the "**Independent Manager**") and selected Quinn Emmanuel as counsel and Zolfo Cooper as financial advisor.

62. The Independent Manager thereafter conducted his own comprehensive investigation into the Disputed Claims to evaluate, from his own perspective, the reasonableness of the settlement of those claims in the Original PSA. To aid this investigation, the Committee Professionals met with the Independent Manager and his professionals on numerous occasions, including at least three formal meetings, to discuss the issues presented by those claims, and provided the Independent Manager with detailed written analyses of each of the Disputed Claims and various settlement scenarios or litigation outcomes previously considered by the Committee, including five comprehensive presentations totaling over 150 pages.

63. During this time, the stability provided by the Original PSA produced substantial benefits for the estates. As noted earlier, since the filing of the Debtors' bankruptcy cases, the Debtors had simultaneously been pursuing a sale process for some or all of its businesses as a backstop to the plan process. Potential bidders, however, were hesitant to engage with the Debtors on a sale process because of the risk of getting mired in the Debtors' inter-

creditor disputes. The Original PSA changed this dynamic and just weeks after its execution, affiliates of AT&T ("**AT&T**") submitted an offer to buy the Debtors' Mexican operations ("**Nextel Mexico**") for $1.875 billion – a purchase price that would provide approximately $400 million in incremental distributable value to the Debtors' estates.

64. The agreement to sell Nextel Mexico for approximately $400 million more than its valuation under the Original PSA materially changed a key assumption underlying the Original PSA and the economic bargain it reflected. Accordingly, on the same day that the Debtors publicly announced the agreement to sell Nextel Mexico to AT&T, the Debtors elected to terminate the Original PSA and announced their intent to continue negotiations on an amended plan with their key creditor constituencies. *See* NII Holdings, Inc., Form 8-K (Jan. 26, 2015).

65. By February 20, 2015, less than a month after the announcement of the sale of Nextel Mexico, the Debtors, CapRe, Aurelius, and the LuxCo Group were able to reach an agreement in principle on the terms of a new plan support agreement and term sheet (the "**Amended PSA**"). The Independent Manager likewise supported and recommended that the NIHS board of managers enter into the Amended PSA.

66. As with the Original PSA, the Amended PSA reflected significant concessions from all parties-in-interest. Specifically, the Amended PSA provided for (i) a plan equity value of $2.813 billion (an increase of approximately $400 million over the Original PSA); (ii) a negotiated split of distributions in the form of either cash or equity in the reorganized Company to each issuance of the CapCo Notes and the LuxCo Notes; (iii) a settlement of the Disputed Claims under which unsecured creditor recoveries would be calculated as if (a) 25% of the alleged fraudulent conveyances were avoided, (b) 25% of the intercompany balances (other than the CapCo Intercompany Note) were recharacterized as equity; and (c) 21% of the asserted

Transferred Guarantor Claims were allowed; (iv) a waiver by the LuxCo Noteholders of approximately $130 million in postpetition interest;[15] and (v) a $350 million debtor-in-possession financing loan to be provided by the LuxCo Group, Aurelius, and CapRe.

67. To evaluate the Amended PSA, the Committee Professionals prepared detailed analyses for the Committee's review – including comparisons to the Original PSA and certain other potential alternatives that had been discussed during the course of negotiations. The analysis showed that the Amended PSA materially increased recoveries for each creditor constituency as compared to the prior plan, with the holders of the CapCo 2021 Notes receiving the largest increase in recoveries. Recoveries for holders of the CapCo 2021 Notes increased from 19.9% of their prepetition claim amount under the Original PSA to 29.1% under the Amended PSA (a 47% increase), recoveries for holders of the CapCo 2016 and 2019 Notes increased by 10% (from 45.5% to 50.2% of their prepetition claim amount), and recoveries for the LuxCo Notes increased by 14% (from 87.9% to 100% of their prepetition claim amount).[16] Moreover, only the CapCo 2021 Notes benefitted from reducing the settlement of the Transferred Guarantor Claims from 27.5% under the Original PSA to 21% under the Amended PSA (in the amount of $46 million). Set forth below is a chart illustrating the incremental distributable value and corresponding improvements in recoveries:

Incremental Distributable Value from Original PSA ($)				Incremental Recovery from Original PSA (%)			Improvement from Original PSA (%)		
CapCo 16/19s	CapCo 21s	LuxCo	Total	CapCo 16/19s	CapCo 21s	LuxCo	CapCo 16/19s	CapCo 21s	LuxCo
$ 63	$ 139	$ 205	$ 407	4.61%	9.30%	12.08%	10.12%	46.84%	13.74%

[15] Assumes postpetition interest accrues at the contract rate, with a June 30, 2015 emergence.

[16] All recovery amounts under the Original PSA are provided on a post-rights offering basis. Utilizing pre-rights offering recovery amounts under the Original PSA would demonstrate an even greater increase in recoveries for the CapCo 2021 Notes under the Amended PSA.

68. At Committee meetings held on February 25, 2015 and March 3, 2015, the Committee discussed and considered the Amended PSA. At the conclusion of the March 3, 2015 meeting, the Committee unanimously determined to support the Amended PSA and serve as a co-proponent of the Plan with the Debtors. The Committee's support for the Amended PSA was based on its determination that the amended settlements would result in an overwhelmingly favorable outcome for *all creditor constituencies* and a successful outcome for the Chapter 11 Cases. Based on the Committee's investigation and analysis of each of the Disputed Claims, the Committee again determined that the settlements under the Plan were reasonable, fell well within the appropriate settlement range based on its understanding of the risks associated with the claims, and in the best interest of the estates and creditors – both on an individual and global basis, when coupled with the settlement of other disputed issues (including postpetition interest, valuation, and cash and equity allocation). In particular, the Committee considered the fact that the reduced settlement of the Transferred Guarantor Claims under the Amended PSA resulted in a significant benefit that flowed solely to the holders of the CapCo 2021 Notes. In addition, the Committee considered that the Amended PSA would pave the way for a successful and expeditious emergence from bankruptcy that would maximize the Company's value for all creditors.

69. On March 5, 2015, the Amended PSA was executed by the Debtors, Committee, CapRe, Aurelius, and the LuxCo Group, and was filed with the Court.

F. The Ad Hoc Group

70. Following the Debtors' announcement of the Mexico sale, the Ad Hoc Group made its first appearance in these Chapter 11 Cases. In early February 2015, counsel for the Ad Hoc Group reached out to counsel for the Debtors and the Committee to identify themselves and indicate an interest in becoming more involved in the chapter 11 cases. This was

followed on February 12, 2015 by a formal letter to the Debtors and the Committee, requesting that the Ad Hoc Group be included in the plan negotiations that were underway. According to the letter, the Ad Hoc Group represented approximately 7% of the CapCo 2021 Notes at that time. At this time, however, negotiations on the Amended PSA were already substantially advanced with the economics largely agreed and the parties exerting substantial efforts to resolve the remaining open issues.

71. On February 23, 2015 (three days after the parties reached an agreement in principle on the terms of the Amended PSA), the Ad Hoc Group sent its second letter to the Debtors and other key constituents in these Chapter 11 Cases. This letter again requested the opportunity to participate in plan negotiations. By this time, the Ad Hoc Group represented approximately 18% of the CapCo 2021 Notes, or 9% of all CapCo Notes.

72. On March 9, 2015 (four days after the Amended PSA was filed), one member of the Ad Hoc Group, Mohawk Capital, sent a letter to the U.S. Trustee requesting the appointment of a separate official committee of holders of the CapCo 2021 Notes. By letter, the Committee objected to this request and outlined for the U.S. Trustee how the Committee was already adequately representing the holders of the CapCo 2021 Notes throughout the Chapter 11 Cases, including in the negotiations of both the Original PSA and the Amended PSA.[17] Among other things, the Committee identified that: (i) it has been actively and effectively exercising its fiduciary duties on behalf of all creditor constituencies throughout the Chapter 11 Cases, (ii) the holders of the CapCo 2021 Notes are well represented on the Committee, with both the indenture trustee for the CapCo 2021 Notes and the largest individual holder of the CapCo 2021 Notes serving as members of the Committee, (iii) together with the other Committee co-chair

[17] The Debtors likewise opposed the appointment of a separate official committee of holders of the CapCo 2021 Notes.

(Aurelius), the Committee members collectively held approximately 53% of the CapCo 2021 Notes. The U.S. Trustee agreed with the Committee and on March 19, 2015 denied Mohawk's request. The U.S. Trustee explained that she denied the request because she "believes [the Committee] adequately represents all creditor constituencies." *See* Letter from U.S. Trustee to Edward E. Neiger, Esq. re: Request for Separate Statutory Committee of 2021 CapCo Noteholders (Mar. 19, 2015).

73. As the U.S. Trustee was deliberating on Mohawk's request for the appointment of an official Committee of CapCo 2021 Noteholders, the Ad Hoc Group filed a motion seeking to compel the Debtors to mediate with the Ad Hoc Group regarding the terms of a chapter 11 plan (the "**Mediation Motion**"), which raised many of the arguments already raised by Mohawk Capital in its request to the U.S. Trustee. Prior to the hearing on the Mediation Motion, counsel for the Debtors and the Committee met with counsel to the Ad Hoc Group to discuss their concerns with the Amended PSA. Following this meeting, the Ad Hoc Group made a proposal that was considered, analyzed, and ultimately rejected by the parties to the Amended PSA. At the hearing on the Mediation Motion, the Court denied the Ad Hoc Group's request, finding that "the best thing for this case is to keep marching towards confirmation." 3/31/15 Hr'g Tr. 63:19-20 (March 31, 2015).

74. During this time, the Ad Hoc Group also expressed concerns with respect to the Debtors' proposed $350 million debtor-in-possession financing (**"DIP"**) contemplated by the Amended PSA, both in letters to the Debtors and the Committee, and in a preliminary objection filed with the Court [Docket No. 523]. Among other things, the Ad Hoc Group alleged that its members had "substantial DIP financing capacity" and complained that they were not solicited to provide that financing during the marketing process for the DIP. The Debtors,

however, never received a proposal for alternative debtor-in-possession financing from the Ad Hoc Group. At the March 25, 2015 hearing on the DIP, the Debtors established that the DIP was appropriately solicited and on market terms. Hr'g Tr. at 8:20-9:14 (Bankr. S.D.N.Y. Mar. 25, 2015). At the conclusion of the hearing, the Court overruled the Ad Hoc Group's limited preliminary objection and approved the Debtors' entry into the DIP.

75. On May 5, 2015, nearly a month into confirmation discovery, the Ad Hoc Group tried to circumvent the Plan process by filing objections to the Transferred Guarantor Claims (the "**Claims Objections**"), strategically attempting to schedule a hearing on those objections for the same day as confirmation. These claims objections were met with significant opposition by the Debtors and the Committee, among others. At a hearing held on May 18, 2015, the Court declined to schedule the Claims Objections for the same day as confirmation and stayed the Claims Objections pending further order of the Court.

G. The Plan

76. Following execution of the Amended PSA, the Debtors and the Committee negotiated and filed the *First Amended Joint Plan of Reorganization Proposed by Debtors and Debtors in Possession and Official Committee of Unsecured Creditors* [Docket No. 527, Exh. 1], and related Disclosure Statement [Docket No 527].

77. No party in interest objected to the Disclosure Statement. At the request of the Ad Hoc Group, among other parties, the Plan Proponents made certain modifications to the disclosures contained in the proposed Disclosure Statement, and filed a revised version with the Court on April 9, 2015. At the hearing held on April 20, 2015, the Court found that the Disclosure Statement complied with the requirements of section 1125 of the Bankruptcy Code and approved the Disclosure Statement. Following approval of the Disclosure Statement, the Debtors began soliciting votes on the Plan.

78. The results of the solicitation process were overwhelmingly favorable. Aside from the members of the Ad Hoc Group, there was tremendous support for the Plan from the Debtors' creditors. General Unsecured Creditors at every single Debtor voted *unanimously* in support of the Plan. All other classes of creditors entitled to vote likewise showed substantial support for the Plan. Even within the different issuances of notes at LuxCo and CapCo, *each issuance individually voted to accept the Plan*:

Class	**LuxCo 7.875% Notes**	**LuxCo 11.375% Notes**	**CapCo 2021 Notes**	**CapCo 2019 Notes**	**CapCo 2016 Notes**
Accepting (Number)	83.72%	84.44%	95.46%	99.88%	99.08%
Accepting (Amount)	92.08%	95.96%	78.64%	99.99%	99.86%

79. Thus, even if one were to create a separate class for CapCo 2021 Notes – as the Ad Hoc Group suggests – that class *also* overwhelmingly supported the Plan, with 78.64% in amount and 95.46% in number voting to accept the Plan. These voting results indicate that nearly every single holder of CapCo 2021 Notes in amount and number other than the Ad Hoc Group is in favor of the Settlement.

<u>ARGUMENT</u>

I. THE PLAN SETTLEMENTS, INCLUDING THE SETTLEMENT OF THE TRANSFERRED GUARANTOR CLAIMS, ARE FAIR AND REASONABLE

80. The Ad Hoc Group's objection – in an attempt to cast aspersions on the Plan process and participants – misrepresents or mischaracterizes much of the discovery to date. None of this changes the central reality that these Chapter 11 cases cry out for a global settlement because all of the issues settled under the Plan – especially the Transferred Guarantor Claims – are complex and subject to different legal and factual interpretations that would

engender lengthy and expensive litigation. But we briefly reiterate some central points obscured in the Ad Hoc Group's objection:

- The Committee's analysis of the Transferred Guarantor Claims was thorough, comprehensive, and included a full analysis of issues related to the Exchange to determine whether the proposed settlement of the Transferred Guarantor Claims was reasonable.

- The Committee and the Debtors' interests in seeking confirmation of the Plan are aligned, as co-plan proponents, but this does *not* mean that the Committee and the Debtors have identical views with respect to the merits of the Disputed Claims.

- Separate and apart from the Debtors, the Committee evaluated each component of the settlement, as well as the settlement as a whole, before determining to support the settlement and enter into the Original PSA and Amended PSA.

- At no point has the Committee expressed a view that the Transferred Guarantor Claims – or any of the Disputed Claims – were wholly without merit. In fact, after a searching, independent analysis, the Committee determined that credible arguments exist on both sides of the claims.

- The Committee adequately and adamantly represented the interests of all unsecured creditors throughout plan negotiations and in its determination to support the Original PSA and Amended PSA.

- Holders of over 50% of the CapCo 2021 Notes were actively involved in negotiations, and certain of these holders were strenuously negotiating on behalf of all CapCo 2021 Notes.[18]

- One creditor's view that the Debtors were pressured to get to any deal regardless of the issues or merits does *not* reflect the views of creditors as a whole or of the Committee as a fiduciary for all creditors.

- The relevance of the Letters of Transmittal and the provisions of the NY General Obligations Law cited by the Ad Hoc Group are *but one subcomponent of one component* of the issues relevant to the Transferred Guarantor Claims that would need to be litigated if those claims were adjudicated at trial.

[18] *See* Gropper Dep. Tr., 264:15-25 ("Q: Of those four entities, Aurelius, CapRe, LuxCo and Mr. Winn, was there any of those four whose sole interest was in maximizing the returns of the 2021s? A: Again, as I mentioned to you, Mr. Daigle made the point on many occasions that he is a fiduciary separately to different funds and he had more than one of his funds that only owned 2021 bonds. Thus he felt it important to advocate solely on behalf of the funds who owned the 2021 position.").

- The net effect of the settlement of the Transferred Guarantor Claims on the CapCo 2021 Notes is not $285 million as the Ad Hoc Group misleadingly suggests. The impact of the settlement on the CapCo 2021 Notes is *$150 million*; an amount that assumes the Debtors have a 79% chance of success of defeating those claims – *i.e.*, that the Debtors are likely to prevail if those claims were litigated. This ignores, however, the financial benefits *gained* by the CapCo 2021 Notes as a result of the settlement of claims by the LuxCo Noteholders for over $130 million in postpetition interest.

- The holders of the CapCo 2021 Notes will be exposed to massive downside risk if the Transferred Guarantor Claims are litigated and succeed (*i.e.*, a potential reduction in recoveries from 29.1% under the current Plan to as low as 4.9% if the Transferred Guarantor Claims are successful and the CapCo 2021 Notes lose the other Disputed Claims); the settlements in the Plan avoid this downside risk as well as the cost, delay, and damage to the business that would result if the claims were litigated.

- The Plan, including all settlements therein, has massive support from *all creditor constituencies*, including the holders of the CapCo 2021 Notes.

81. Despite its critical tone, the Ad Hoc Group's objection does not take issue with *any of the other settlements embodied in the Plan*. That is likely because it recognizes that many of the other compromises embedded in the Plan – including the waiver of postpetition interest and agreement to a higher plan equity value – are highly *favorable* for holders of the CapCo 2021 Notes. The Ad Hoc Group's attempt to cherry-pick one issue on which it wishes to improve its deal necessarily must fail. The settlements agreed to in the Amended PSA, and strongly embraced by all categories of creditors, are all inextricably linked; each settlement was entered into in exchange for the parties' agreement to every other compromise on every other issue. This approach was the only way to achieve the overall resolution of the complex and hotly contested intercreditor and interdebtor disputes settled under the Plan. Thus, while each portion of the Settlement individually satisfies the standards for approval under applicable bankruptcy law, the settlements embodied in the Plan must be viewed as an integrated whole. Not only would disapproval of any individual settlement unravel all others and, consequently, prevent

consummation of the Plan, but fairness to a particular constituency – here, the CapCo 2021 Noteholders – can only be assessed in the context of *all* the trade-offs that determined their treatment under the Plan.

82. When compared with the alternative – the unwinding of the comprehensive settlements in the Plan and the litigation of the individual issues it resolves – the Settlement embodied in the Plan is eminently reasonable and, in fact, could be more beneficial to the CapCo 2021 Notes in terms of recoveries even if the Transferred Guarantor Claims are *defeated*. For example, if the CapCo 2021 Notes successfully prosecute their objections to the Transferred Guarantor Claims (and, therefore, no value is ascribed to them), but the LuxCo Noteholders' claim for post-petition interest is allowed at the contract rate, and there is a 10% decrease in plan equity value, due to, among other things a valuation fight, challenging macroeconomic conditions, stress to the business, or increased administrative costs, and holding all other assumptions in the Plan the same, the projected recoveries to the CapCo 2021 Notes would fall to 26%, (approximately 3% worse than the 29% projected recovery in the Plan).[19] This would occur despite a 100% victory on the very issue upon which the Ad Hoc Group is basing its objection.

83. "Settlements and compromises are favored in bankruptcy as they minimize costly litigation and further parties' interests in expediting the administration of the bankruptcy estate." *In re MF Global Inc.*, No. 11-2790, 2012 WL 3242533, at * 5 (Bankr. S.D.N.Y. Aug. 10, 2012); *HSBC Bank USA, Nat'l Ass'n v. Fane (In re MF Global Inc.)*, 466 B.R. 244, 247 (Bankr. S.D.N.Y. 2012). The decision to approve a particular settlement lies within the sound discretion of the bankruptcy court. *See Nellis v. Shugrue*, 165 B.R. 115, 122-23

[19] This assumes emergence would be delayed to September 30, 2015 – potentially as a result of ongoing litigation – and therefore postpetition interest on account of the LuxCo Notes would increase to approximately $174 million.

(S.D.N.Y. 1994). Bankruptcy courts, however, should consider and factor in the debtor's exercise of its business judgment when reviewing a proposed settlement and may rely on the opinion of the debtor, parties to the settlement, and professionals. *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 641 (Bankr. S.D.N.Y. 2012); *MF Global*, 466 B.R. at 247.

84. Section 1123 of the Bankruptcy Code states that a chapter 11 plan may (i) provide for the settlement of any claim belonging to the debtor or to its estate and (ii) include any other appropriate provision not inconsistent with the Bankruptcy Code. 11 U.S.C. § 1123(b)(3)(A) and (b)(6). When evaluating plan settlements under section 1123(b), courts consider the standards used to evaluate settlements under Bankruptcy Rule 9019 outside of the Plan context. *See, e.g., Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 177 B.R. 791, 794 n.4 (S.D.N.Y. 1995) ("Irrespective of whether a claim is settled as part of a plan pursuant to section 1123(b)(3)(A) of the Bankruptcy Code or pursuant to a separate motion under Bankruptcy Rule 9019, the standards applied by the Bankruptcy Court for approval are the same.").

85. Rule 9019 empowers bankruptcy courts to approve a settlement agreement where "it is supported by adequate consideration, is 'fair and equitable,' and is in the best interests of the estate." *Air Line Pilots Ass'n, Int'l v. Am. Nat'l Bank & Trust Co. (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 426 (S.D.N.Y. 1993) (citation omitted); *In re Dewey & LeBoeuf LLP*, 478 B.R. at 640. As this Court is well aware, the settlement analysis is not a mechanical process, but rather contemplates a "range of reasonableness . . . which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

86. Equally familiar is the standard that the court "need not conduct a mini-trial" or decide the numerous issues of law and fact raised by the settlement. *Dewey*, 478 B.R. at 640-41 (internal quotations omitted). Rather, a court should "canvass the issues and see whether the settlements 'fall[] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983); *Dewey*, 478 B.R. at 640 (same). "Although a judge must consider the fairness of the settlement to the estate and its creditors, the judge is not required to assess the minutia of each and every claim." *Nellis*, 165 B.R. at 123.

A. <u>The Settlements Embodied in the Plan are "Fair and Equitable"</u>

87. In arguing that the settlement of the Transferred Guarantee Claims is not "fair and equitable," the Ad Hoc Group stresses prior statements by the Debtors that the claims are "meritless" and suggests that the settlement therefore unfairly "provides substantially different treatment to claims of equal dignity without any valid justification" (Obj. at 51) – as if every noteholder were entitled to an identical recovery notwithstanding its position in a company's capital structure or the nature of its claims. These arguments fail to rebut the overwhelming evidence that the settlements embodied in the Plan, including the settlement of the Transferred Guarantor Claims, are fair and equitable.

88. *First*, as evidenced by the overwhelming support for the Plan in both number (95%) and amount (78%) by the Ad Hoc Group's constituency – the holders of the CapCo 2021 Notes – the holders of those notes themselves *agree* that the Plan settlements are fair and equitable.

89. *Second*, it is entirely unremarkable that the Debtors have, in prior public statements, called the Transferred Guarantor Claims "meritless." As discussed above, the *Debtors* would be the defendants in any litigation over the Transferred Guarantor Claims. It should not be surprising that defendants routinely assert that the claims against them lack merit

right up until the time they settle them, nor should it have any impact on the reasonableness of the settlement. *See In re Texaco*, 84 B.R. 893, 898 (Bankr. S.D.N.Y. 1988) ("Texaco states that the Pennzoil complaint was without merit and should not have been sustained. However, Texaco believes that the catastrophic results for Texaco's shareholders that will result if the case is not settled and if the Supreme Court does not grant *certiorari* fully justify the settlement."); *see also Morton Grove Pharms., Inc. v. Par Pharm. Cos.*, 2006 U.S. Dist. LEXIS 13779 (N.D. Ill. Mar. 28, 2006) ("Parties may settle a litigation for a variety of reasons independent of the merits of the claims."). That is why the Committee's role in these cases – as a neutral fiduciary with no investment in any particular outcome on the settled claims – was so crucial. Whatever the Debtors' public position, the Committee conducted a comprehensive, independent analysis of the Transferred Guarantor Claims (among the other Disputed Claims) and determined that credible arguments exist on both sides of the litigation, ultimately favoring a settlement of those claims – which was achieved at a level that gave the plaintiffs only a 21% chance of prevailing.

90. *Third*, the Ad Hoc Group's claim of unfair, unequal treatment confuses two distinct types of claims held by the holders of the CapCo 2016/2019 Notes: claims against CapCo, and claims against the Transferred Guarantors. There is no disagreement that the claims held by the holders of the CapCo 2016/2019 Notes *as against CapCo* should be – and are – treated *pari passu* with the claims held by the CapCo 2021 Noteholders against CapCo. But neither the indenture trustee for the CapCo 2021 Notes, nor any of the members of the Ad Hoc Group, filed proofs of claim against the Transferred Guarantors. Only the CapCo 2016/2019 Notes asserted claims (and filed proofs of claim) against the Transferred Guarantors. Settling those claims at a reasonable level and providing the CapCo 2016/2019 Notes with a separate recovery on account of these claims does not create disparity in treatment among noteholders,

since creditors with claims against additional debtors routinely receive additional recoveries under a plan. Accordingly, the Plan appropriately *classifies* and treats the claims of the CapCo 2021 Noteholders, and the settlement of the Transferred Guarantor Claims is fair and equitable and should be approved as part of the global settlement embodied in the Plan.

B. The Plan Satisfies the *Iridium* Factors

91. In deciding whether a particular settlement falls within the "range of reasonableness," courts consider the so-called *Iridium* factors: (a) the balance between the litigation's possibility of success and the settlement's future benefits; (b) the likelihood of complex and protracted litigation, "with its attendant expense, inconvenience, and delay"; (c) the paramount interests of creditors; (d) whether other parties in interest support the settlement; (e) the nature and breadth of releases to be obtained by officers and directors; (f) the "competency and experience of counsel" supporting, and "[t]he experience and knowledge of the bankruptcy court judge" reviewing, the settlement; and (g) "*the extent* to which the settlement is the product of arms'-length bargaining." *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir. 2007) (internal citations and quotations omitted).

92. Here, an analysis of each of the *Iridium* factors demonstrates that the settlements embodied in the Plan are well within the range of reasonableness, are fair and in the best interests of the Debtors' estates and all parties in interest.

1. The Plan Settlements are in the Interests of Creditors and Overwhelmingly Supported by Creditors and Other Parties-In-Interest

93. The settlements embodied in the Plan are clearly in the interests of creditors. Through the Plan, the major constituencies have resolved the most significant claims against the Debtors' estates and settled the remaining disputed intercreditor and interdebtor

issues in the Chapter 11 Cases. As a result, the Plan provides certainty as to distributions for each creditor group and a framework for the Debtors' expeditious emergence from bankruptcy.

94. Because of the interdependent nature of the settlements embodied in the Plan, the only likely alternative to the present Plan structure if one major aspect of the settlement were rejected would be the full and costly litigation of each of the Disputed Claims, as well as litigation over postpetition interest, plan valuation, allocation of equity, and other issues now resolved comprehensively under the Plan. Not only would this destroy the significant progress and consensus achieved by the parties through negotiations, but in those circumstances, overall creditor recoveries would most certainly decrease as the Debtors' estates would continue to be burdened with significant legal expenses, and individual creditor recoveries would be highly uncertain and dependent on the outcome of complex and hotly contested litigation (discussed in more detail below). Furthermore, distributions to creditors would be delayed pending adjudication of the Disputed Claims – both at the trial and appellate court levels. At the very least, the parties would be forced back to the drawing board on a chapter 11 plan that would be certain to result in significant additional litigation and massive cost and delay before a new plan could even be proposed much less confirmed.

95. Moreover, the Plan has substantial creditor support, as evidenced by the fact that *all classes of creditors voted overwhelmingly to accept the Plan*. This includes the holders of the CapCo 2021 Notes individually, of which 95% in number, and 78% in amount voted to accept the Plan.[20] Perhaps recognizing the failure of their arguments on this point, the Ad Hoc Group urges the Court not to engage in a "counting exercise" of votes. But this is not a close call. Creditor support for the Plan is overwhelming.

[20] Interestingly, while the Ad Hoc Group represents approximately $294.6 million in CapCo 2021 Notes, only approximately $274 million in CapCo 2021 Notes voted to reject the Plan.

96. To sidestep this support, the Ad Hoc Group appears to suggest that the negotiation process was somehow tainted by the Debtors' purported desire to achieve a settlement "at any cost" and their supposed delegation of negotiations to the parties-in-interest. Moreover, the Ad Hoc Group argues that the parties were allegedly "forced" to settle because of Aurelius's purported threats to "mire the cases in extensive litigation unless it obtained an acceptable premium through settlement of the Transferred Guarantor Claims." (Objection at 12).

97. As an initial matter, the Ad Hoc Group's characterization of the Debtors' role in the negotiations is distorted and inaccurate. As set forth in detail in the Confirmation Brief, the Debtors worked tirelessly with the creditor constituencies and the Committee throughout the negotiation process in an effort to facilitate a comprehensive settlement of all outstanding issues. The settlement now embodied in the Plan is the result of these efforts.

98. Additionally, the Creditors Committee, as an independent fiduciary for all creditor constituencies, thoroughly reviewed each settlement and the settlements as a whole and determined that they are reasonable and in the best interests of all creditors. *See In re Ambac Fin. Grp., Inc.*, No. 10-B-15973 SCC, 2011 WL 6844533, at *6 (S.D.N.Y. Dec. 29, 2011) (District Court affirming settlement, noting that "[t]he Bankruptcy Court was therefore justified in placing significant weight on the Creditors Committee's support for the 9019 Order"), *aff'd*, 487 F. App'x 663 (2d Cir. 2012). This clearly and strongly weighs in favor of approving the settlement.

99. Finally, with respect to alleged unfair tactics by Aurelius to extract a "premium", the Debtors' CEO had a different view. Specifically, the Debtors' CEO described Aurelius as an "extremely professional" firm that "do[es its] homework and come[s] to the negotiating table with a, you know, earnest effort to reach an agreement." Schinder Dep. Tr.,

130:18-21; *see also id*. 130:22-131:2 ("Q: So putting aside the merits of their claims, you have found them in negotiations to be professional and reasonable? A: I have.").

2. The Settling Parties Were Counseled by Experienced and Skilled Advisors

100. It is beyond question that all of the parties to the Plan were represented by highly experienced and skilled counsel and advisors throughout settlement negotiations. Set forth below is a chart detailing the representatives engaged by each constituency in these Chapter 11 Cases:

Party	Representative(s)
Debtors	Jones Day Togut Segal Rothschild Alvarez & Marsal McKinsey
Creditors' Committee	Kramer Levin FTI Consulting
LuxCo Independent Manager	Quinn Emanuel Zolfo Cooper
Aurelius	Akin Gump Blackstone
CapRe	Paul Weiss Houlihan Lokey
LuxCo Group	Kirkland & Ellis Millstein

101. In addition, each member of the Committee was advised by skilled and sophisticated advisors in their individual capacity as Committee members.

102. The Ad Hoc Group argues that this factor is irrelevant because the Debtors supposedly did not participate in the negotiations over settlement of the Transferred Guarantor Claims. But as discussed above, the Debtors were, in fact, actively involved in negotiations and worked diligently to facilitate the settlements before the Court. The Ad Hoc Group further suggests that if the Debtors had competent counsel when they previously concluded that the claims were "without merit" then that means the settlement is unreasonable. This argument is a

complete non sequitur – this factor goes to the competency of counsel in advising the parties in connection with *settling* the claims. In any event, as demonstrated above, it may be reasonable to settle claims that a defendant believes are without merit. Moreover, the Ad Hoc Group wholly ignores that numerous *other* parties, including the Committee as a fiduciary for all unsecured creditors, and the Independent Manager for LuxCo, were represented by capable professionals who conducted a full and independent evaluation of the settlements and determined that they were reasonable. Finally, the creditors who ultimately executed the Amended PSA were, themselves, represented by competent and experienced counsel. Thus, this factor clearly weighs in favor of approval of the settlement and Plan.

3. <u>The Plan Settlements are the Product of Arms'-Length Bargaining</u>

103. It is not disputed that the Plan and the settlements reflected in it are the product of good faith arms'-length negotiations. The settlement of the Disputed Claims was the direct product of active, lengthy, and often contentious negotiations beginning prepetition and continuing for months postpetition. That the parties were able to settle all other disputed issues together with the settlements of the Disputed Claims only underscores the robust, good faith nature of the negotiations. And these negotiations occurred not once, but twice over the course of the Chapter 11 Cases, resulting in materially higher recoveries for all parties in the Plan before the Court.

104. In addition, the Committee, as an independent fiduciary for all creditors, determined to support the settlements in the Plan after conducting its own investigation into the merits of the Disputed Claims. Likewise, the Independent Manager for LuxCo also conducted an independent investigation into the merits of the Disputed Claims and determined that the settlements embodied in the Plan were reasonable. No party in interest has contested the good faith nature of any of the negotiations that formed the basis for the settlements in the Plan.

4. The Litigation's Possibility of Success <u>is Outweighed by the Settlement's Future Benefits</u>.

105. Whether considered individually or holistically, an analysis of the possibility of success on the merits versus the benefits of the settlements weighs in favor of this Court's approval of each settlement in the Plan.

i. The Settlement of the Disputed Claims

106. The Disputed Claims were settled as the result of extensive, multi-party negotiations over many months based on extensive analysis of the complex transactions involved. The settlement provides certainty as to the distribution of the Debtors' assets, the majority of which would otherwise be tied up indefinitely (and rapidly deteriorating as a result of costly litigation) pending a final resolution of the Disputed Claims. Each constituency carefully balanced the probability of its position's success against the benefits to be realized through settlement, and carefully considered the likelihood of costly and protracted litigation, before concluding that settlement on the agreed terms was in its best interest. The Committee, in conducting its own independent investigation of these claims, conducted a similar evaluation and determined that the Plan is the most effective way to maximize value for all creditors and the settlements it contains fall well within the range of reasonableness. The benefits provided by settlement of the Disputed Claims clearly outweigh the potential upside of further litigation, in view of the costs and risks of litigation and significant uncertainties with respect to the merits of each category of claims. The settlement of the Disputed Claims likewise benefits all creditors by avoiding the potential significant downside to their recoveries from adverse rulings on the Disputed Claims.

1. Transferred Guarantor Claims

107. A critical component of the Plan is the resolution of the Transferred Guarantor Claims. As discussed above, these claims primarily assert that the 2009 Transfers resulted in a breach of the CapCo 2016/2019 Notes Indentures and that the purported release of the guarantees of the CapCo 2016/2019 Notes by the Transferred Guarantors was ineffective or, in the alternative, that the guarantees should be reinstated. If the parties were forced to litigate these claims, the outcome would be highly uncertain. While the holders of the Transferred Guarantor Claims arguably have multiple avenues for establishing the claims, opponents of those claims would likely lodge certain defenses that would need to be overcome.

108. The Ad Hoc Group concedes that the Court need not engage in a mini trial to approve the settlements in the Plan. Nevertheless, the Ad Hoc Group asks the Court to do just that, as any determination on the purported "threshold" issues they argue defeat the claims necessarily involves an analysis and determination of the merits of the claims themselves. The suggestion that these issues are straightforward and easily decided is simply incorrect. The complexities they introduce only underscore the wisdom of a global settlement that avoids costly and protracted litigation.

109. As noted above, the Committee considered a wide array of arguments both in favor of and against the Transferred Guarantor Claims and ultimately determined that the settlement of those claims under the Plan was reasonable. The issues affecting these claims can be grouped into three broad categories: issues regarding the breach of contract claims; issues regarding remedies and related equitable considerations; and issues related to the Exchange that the Ad Hoc Group suggests can short-circuit a full litigation of the claims.

110. *Existence of a Breach.* There is significant disagreement over the scope and proper interpretation of many of the provisions of the CapCo 2016/2019 Notes Indentures and whether those provisions were breached as a result of the 2009 Transfers.

111. The proponents of the Transferred Guarantor Claims assert that the transfer of the Transferred Guarantor entities from NII Global to NIHS violated section 10.04 of the CapCo 2016/2019 Notes Indenture. Section 10.04 provides that a Subsidiary Guarantor (*i.e.*, NII Global) "may not sell or otherwise dispose of all or substantially all of its assets to . . . another Person, *other than the Parent, the Company or another Subsidiary Guarantor*, unless . . . such sale or other disposition . . . *complies with section 4.10 hereof*." CapCo 2016/2019 Notes Indenture § 10.04 (emphasis added). NIHS is not a "Subsidiary Guarantor" as defined in the indenture and is not a U.S. entity that assumed the guarantee obligations under the notes. All parties agree, therefore, that, to be permitted under the CapCo 2016/2019 Notes Indenture, the 2009 Transfers must have "compl[ied] with section 4.10" of the Indentures. The meaning of the phrase "complies with," however, is subject to starkly different interpretations.

112. Section 4.10 of the Indentures is the Asset Sale covenant. It provides that "The Parent shall not, and shall not permit any of its Restricted Subsidiaries to, *consummate an Asset Sale* unless" (i) it receives consideration at the time of the Asset Sale equal to fair market value of the assets disposed or sold, and (ii) 75% of that consideration consists of Cash, Cash Equivalents, or "Replacement Assets," each as defined under the Indentures. *See* CapCo 2016/2019 Notes Indenture § 4.10.

113. In turn, the term Asset Sales is specifically defined under the CapCo 2016/2019 Notes Indentures and excludes certain transactions from its scope. Among those excluded transactions are "*transactions governed by . . . Section 5.01* [of the Indenture]" and "*a*

transfer of assets or Equity Interests between or *among the Parent and its Restricted Subsidiaries." Id.* NIHS, the transferee of the Transferred Guarantors in the 2009 Transfers, is a Restricted Subsidiary. Therefore, any transfer by NII Global to NIHS is excluded from the definition of "Asset Sales" under the indentures.

114. Thus, a determination as to whether the 2009 Transfers "complied with section 4.10" raises a complex question of indenture interpretation: whether "complies with" means (i) that the transfers do not violate section 4.10, in which case section 4.10 is inapplicable and the transfer is valid under section 10.04, or (ii) that, to "comply with" section 4.10, the substantive requirements of that provision must be met, in which case section 4.10 may not be satisfied and the transfer may not be valid under section 10.04. Obviously, opponents of the Transferred Guarantor Claims would argue the former (*i.e.*, that "complies with" means "does not violate" the provision), and proponents of the Transferred Guarantor Claims would argue the latter (*i.e.*, that "complies with" means it must actually comply with the provision). The former interpretation, however, would arguably render a number of other provisions of the Indentures meaningless. These include the introduction to section 10.04, which excepts only transfers to the Parent (Holdings), the Company (CapCo), and other Subsidiary Guarantors from the scope of that section. If the transfer to NIHS, a Restricted Subsidiary, "complies with" section 4.10 because it is not an "Asset Sale," then the introduction to section 10.04 is both superfluous, given that the transfers described in the introduction are also not "Asset Sales," and curiously limited, given that it does not include Restricted Subsidiaries.

115. Likewise, the argument that non-Asset Sale transfers can comply with 10.04 because 4.10 is not applicable (and therefore not violated) would need to be reconciled with the language of section 5.01(d)(iii)(B), which uses the identical language "complies with

section 4.10." Section 5.01(d) prohibits transfers of all or substantially all the assets of CapCo and its Restricted Subsidiaries, unless, among other things, the transfer "complies with section 4.10." Transfers of assets governed by section 5.01, however, are all excluded from the definition of "Asset Sale," so that, once again, a provision of the Indentures would be rendered meaningless if "complies with" is interpreted as "does not violate." The proponents of the Transferred Guarantor Claims would argue that, such an interpretation would imply that CapCo could sell all or substantially all of its assets for no consideration. Nonetheless, a court could choose to distinguish between the usage of the term "complies with" in section 10.04 and section 5.01(d)(iii)(B), and find that it was the intention of section 10.04 to exclude transfers to Restricted Subsidiaries, as advocated by the opponents of the Transferred Guarantor Claims.

116. Under the latter interpretation of "complies with" – meaning that to comply with section 4.10, the transfer in question must satisfy the substantive requirements of section 4.10 – a court would need to determine whether the 2009 Transfers did, in fact, satisfy these requirements. There is no dispute that NII Global did not receive Cash or Cash Equivalents in exchange for the Transferred Guarantors. Thus, this analysis would require a determination of whether the single share of NIHS stock received by NII Global in exchange for the Transferred Guarantors (out of 20,000 preexisting shares) equaled the Fair Market Value of the Transferred Guarantors, and constituted "Replacement Assets" as that term is defined in the Indentures. Credible arguments exist that NII Global did not receive Fair Market Value of the Transferred Guarantors or Replacement Assets, such that the 2009 Transfers did not comply with section 4.10.

117. In a series of potential arguments ignored by the Ad Hoc Group, holders of the Transferred Guarantor Claims would also argue that the transfers by Holdings down the

corporate chain violated section 5.01(a) and 5.01(d) of the CapCo 2016/2019 Notes Indentures. Section 5.01(a) governs transfers of all or substantially all of the assets held by Holdings, and section 5.01(d) governs transfers of all or substantially all of the assets held by CapCo. Among other things, these sections prohibit transfers of all or substantially all of the assets of either entity unless the transferee assumes the obligations of the transferor under the Indentures and each guarantor re-confirms its guarantees of the CapCo Notes or, in certain instances, the transfer "complies with section 4.10." In evaluating this issue, a court would need to assess whether section 5.01(a) and section 5.01(d) should apply to transfers to or among subsidiaries of Holdings, like the 2009 Transfers. There is support for the proposition that this generally should not be the case. However, certain provisions of the CapCo 2016/2019 Notes Indentures would seem to indicate otherwise. For example, section 5.01(a)(iv), which conditions compliance with section 5.01(a) on a re-confirmation from each guarantor of its guarantee unless the transferee is a Subsidiary Guarantor, implies that section 5.01(a) extends to transfers to and among subsidiaries, by exempting from its scope the guarantor that is the recipient of the transfer to the extent that the transaction at issue and governed under section 5.01 is one between the parent and that subsidiary. Likewise, section 5.01(c), which provides that the debt/leverage ratio tests of section 5.01(a)(iii) do not apply to transfers between Holdings and its Restricted Subsidiaries, is to the same effect. The argument would follow that, if the opponents of the Transferred Guarantor Claims were correct in their interpretation of "complies with" under the Indenture, this would lead to an absurd result, essentially permitting a transfer of all or substantially all of an entity's assets to a third party without consideration. In short, there are a number of arguments and factors that the Court would need to weigh to determine whether the transfers violated the terms of the CapCo 2016/2019 Notes Indentures, which would involve novel questions of contractual construction.

118. Any determination that the transfers violated the terms of the CapCo 2016/2019 Notes Indenture would also have to grapple with arguments that the so-called "step-transaction" doctrine – whereby the intermediate steps of the 2009 Transfers that caused the alleged violation of the Indentures would be collapsed into one single transaction from either Holdings or CapCo to NIHS – obviates any alleged violations of section 10.04 of the indentures. This is because, if the 2009 Transfers were considered a single transfer from either Holdings or CapCo to NIHS, the transfer from NII Global to NIHS would cease to exist, and section 10.04 (which applies solely to transfers by Subsidiary Guarantors, like NII Global), would no longer apply. To apply the step-transaction doctrine, however, certain formulaic requirements must be met, and whether those requirements were satisfied in the circumstances is unclear. The Court also would need to consider whether the company that structured the step transaction should be permitted to avail itself of an equitable doctrine that ignores the individual steps of the transaction, when the Company intentionally designed the transaction to be consummated in those steps. Additionally, even if the step-transaction doctrine were to apply to the alleged violations of section 10.04, the doctrine would not cure the alleged violations under section 5.01.

119. *Remedies*. To the extent there was a violation of the CapCo 2016/2019 Notes Indenture, the issue that follows is whether the guarantees were or were not released. If they were not released, the holders of the Transferred Guarantor Claims would still have claims for the guarantees at each of the Transferred Guarantor entities; if they were released, the issue then becomes whether those guarantees could or should be reinstated.

120. Section 10.05 provides that, "Any Subsidiary Guarantor shall be released and relieved of any obligations under its Note Guarantee . . . (v) if such Subsidiary Guarantor becomes a Foreign Restricted Subsidiary by merger, consolidation or otherwise, *unless* such Foreign Restricted Subsidiary (i) is a First Tier Restricted Subsidiary or (ii) is required to Guarantee the Notes and be a Subsidiary Guarantor pursuant to Section 4.18(b)." CapCo 2016/2019 Notes Indenture § 10.05(v). It appears to be undisputed that, by virtue of their transfer to NIHS by NII Global, the Transferred Guarantors ceased to be "First Tier Restricted Subsidiaries" under the terms of the indentures.

121. Section 10.05(a)(v) does not expressly state that the guarantees are not released where the transaction that would otherwise give rise to the release breached the indenture. The general rule under New York law is that a court must read a contract in accordance with its unambiguous language, even where the result is harsh or unexpected. *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876 (N.Y. 2004). This general rule supports the argument that the guarantees were released notwithstanding a breach that may have occurred in consummating the 2009 Transfers. Nevertheless, courts have found certain provisions going to the heart of a contractual bargain to be read into contracts by implication. *See Rowe v. Great Atl. & Pac. Tea Co., Inc.*, 46 N.Y.2d 62 (1978) (New York courts may read covenants into contract that will prevent party from stripping fruits of agreement away from counter-party); *id.* ("the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included") (citing 5 Williston, Contracts (rev. ed., 1937), § 1293, p. 3682); *Bank of China v. Chan,* 937 F.2d 780 (2d Cir. 1991) (agreement at issue necessarily contemplated – but did not

explicitly provide – that counterparty would take no action to deliberately destroy company's commercial viability, which was necessary to effectuate the purposes of the contract).

122. Here, proponents of the Transferred Guarantor Claims would argue that the Court should imply a provision in the CapCo Indentures prohibiting the release of the guarantees if such release was consummated by a breach of the indenture, as the credit support for the CapCo 2016/2019 Notes provided by the guarantees was a fundamental benefit of the noteholders' bargain. This argument, which is based in equity, may require the Court to engage in a complex, holistic assessment of the terms of the CapCo 2016/2019 Notes Indentures. Adding to the complexities of this argument is the acknowledgement that the Debtors drafted the indentures with the intention of consummating the 2009 Transactions shortly after issuing the CapCo 2016/2019 Notes – which had the purported effect of releasing the guarantees of those notes, without notice or noteholder consent, almost immediately after the notes' issuance.

123. Guarantee stripping, in particular, is often a hotly contested issue, as evidenced by the recent litigation in the Southern District of New York in *Meehancombs Global Credit Opportunities Funds, L.P., et al. v. Caesars Entertainment Corp., et al.*, No. 14 Civ. 7091 (SAS), -- F. Supp. 3d -- (S.D.N.Y. Jan. 15, 2015). In *Caesars*, the District Court is faced with litigation over the enforceability of a prepetition termination of a guarantee accomplished without notice to or consent of the noteholders but in reliance on the technical provisions of the indenture. The plaintiff noteholders alleged that the transaction represented an out of court restructuring designed to deprive the noteholders of the ability to recover on their bonds in violation of Section 316(b) of the Trust Indenture Act. In denying a motion to dismiss these claims, the District Court found that the stripping of a guarantee claim against a solvent guarantor was "exactly what [Trust Indenture Act] section 316(b) is designed to prevent," and

that any efforts to remove the guarantees would require the consent of all bondholders. *Caesars*, slip op. at 18. It is likely that the District Court's analysis in *Caesars* would need to be carefully considered by this Court if the Transferred Guarantor Claims were litigated rather than settled.

124. The Ad Hoc Group appears to argue that, pursuant to section 10.05(b), the execution of the Supplemental Indentures effectuated the release of the guarantees irrespective of whether such release was otherwise improper under the Indenture. Section 10.05(b) provides that "Upon delivery by the Company to the Trustee of an Officers' Certificate and an Opinion of Counsel to the effect that one of the foregoing requirements has been satisfied and the conditions to the release of a Guarantor under this Section 10.05 have been met, the Trustee shall execute any documents reasonably required *in order to evidence the release* of such Subsidiary Guarantor from its obligations under its Note Guarantee." CapCo 2016/2019 Notes Indenture § 10.05(b). It may be credibly argued, therefore, that the effect of the Supplemental Indenture was only to *evidence* the release of guarantees that was otherwise valid. Moreover, the proponents of the Transferred Guarantor Claims would argue that the guarantees could not be released in violation of the indenture because if that was the case, the Company could release the guarantees at any time whether or not such release complied with the indenture, eviscerating the noteholders rights to the guarantees under the indenture.

125. If the guarantees by the Transferred Guarantors were released, another issue the Court would have to consider is whether those guarantees should be reinstated as a matter of equity. Here, a number of competing legal and factual considerations would need to be weighed by the court. Those include the apparent lack of disclosure by the Company of (i) the intent to effectuate the 2009 Transfers shortly after the issuance of the CapCo 2016/2019 Notes, (ii) the effect of that transfer on the guarantees, and (iii) the Supplemental Indentures evidencing

the purported release of those guarantees. The nearly four-year delay in actually disclosing this information could, likewise, bear on a court's evaluation of the equities and whether the guarantees should be reinstated. This would need to be balanced against the prejudice reinstatement would impose on intervening good faith creditors.

126. Thus, determinations on any of these issues would require a thorough analysis of the indenture, the intent of the language of multiple provisions of the indenture and how those provisions are reconciled, as well as an analysis of New York law and equitable considerations regarding the release and/or reinstatement of the guarantees.

127. *Laches*. The Transferred Guarantor Claims are also subject to the defense that the holders of those claims are barred from asserting those claims due to the four-year lapse from the time of the transfer to the time that the claims were initially asserted in March 2014. This argument must be balanced against certain facts surrounding the disclosures of the release of the guarantees, including that the supplemental indentures providing for the release were purportedly executed in 2010 but were not filed publicly with the SEC until March 2014. Issues regarding the disclosures made by the Company in each of the prospectuses, offering materials, registration rights agreements, and other documentation would also need to be considered, as would issues of prejudice to holders of each issuance of the CapCo Notes. A court would also need to consider the terms of the CapCo 2016/2019 Notes Indenture itself, which provides that "A delay or omission by the Trustee or any Holder of a Note in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default." *See* CapCo 2016/2019 Notes Indentures § 6.03. Case law also suggests that courts are generally reluctant to invoke the doctrine of laches to bar relief. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1965 (2014) ("Both before and

after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief" (citing *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)).

128. *Exchange*. In an attempt to avoid the complex legal and factual issues involved with the adjudication of the merits of the Transferred Guarantor Claims and the validity of the release of the guarantees, the Ad Hoc Group asserts that the claims can be disposed of on "straightforward" legal grounds (allegedly overlooked in the Plan negotiations) based on the theory that noteholders surrendered their Transferred Guarantor Claims by accepting Exchange Notes in the Exchange. There are numerous problems with the Ad Hoc Group's arguments in this regard. *First*, contrary to the Ad Hoc Group's allegations that the effect of the transmittal letters was not considered by the Committee, the Committee Professionals did evaluate the Exchange and underlying documentation evidencing the Exchange as part of its investigation and analysis of the Transferred Guarantor Claims. The specific arguments raised by Ad Hoc Group are simply variations on the issues regarding the Exchange considered and addressed by the Committee Professionals, and if anything only introduce additional complexity and uncertainty. *Second*, the Ad Hoc Group's arguments that the substantial legal and contractual rights of bondholders could be altered through Exchange documentation – in particular, form letters of transmittal and the application of the New York General Obligations Law – does not appear to have significant support in law, nor does it appear to be in line with the marketplace's understanding of A/B exchanges. *Third*, consideration of these issues will be far from "straightforward" as the Ad Hoc Group suggests, and at the very least will involve complex legal issues can that will involve lengthy litigation and appeals. *Finally*, the issues presented by the Exchange are not limited to an isolated legal analysis and will overlap with the legal and factual

issues underlying the other issues presented by the Transferred Guarantor claims, discussed above.

129. The linchpin of the Ad Hoc Group's arguments relating to the Exchange is that the holders of the Original Notes released "all right, title and interest in and to" the original 2016/2019 CapCo Notes, including any claims for breach of the indentures that predated the Exchange, by executing Letters of Transmittal at the time of the Exchange. Also, the Indentures are governed by New York law, and section 13-107 of the N.Y. General Obligations Law provides "[u]nless expressly reserved in writing, a transfer of any bond shall vest in the transferee, whether or not such claims or demands are known to exist, (a) for damages or rescission against the obligor on such bond." As a result, the argument goes, holders of the Exchange Notes should be foreclosed from asserting violations of the CapCo Notes Indentures because all claims arising under the Original Notes prior to the Exchange were effectively transferred to CapCo in the Exchange.

130. The argument of the Ad Hoc Group presupposes that rights and claims of the holders of the Exchange Notes are derivative of the Original Notes. The proponents of the Transferred Guarantor Claims will argue that this is not the case. The Indentures each provide that the Original Notes and the Exchange Notes "shall be treated as a single class for all purposes under this Indenture." CapCo Notes Indenture § 2.07(f). Similarly, section 1 of the Registration Rights Agreements, pursuant which the Exchange was effected, defines "Exchange Securities" as "debt securities of the Company and the related guarantees of the Guarantors as provided for in the Indenture identical in all material respects to the Securities (except that the Additional Interest provisions and transfer restrictions shall be eliminated) to be issued under the Indenture." NII Holdings, Inc., Current Report (Form 8-K) (Aug. 18, 2009), Ex. 4.2 at 2 (emphasis added).

The proponents of the Transferred Guarantor Claims would therefore likely take the position that the rights under the Original Notes independently attach to the Exchange Notes, so that even if holders assigned to CapCo their rights under the Original Notes, they would have identical rights by virtue of their ownership of the Exchange Notes.

131. To the extent a court were to find that the guarantees by the Transferred Guarantors were not actually released under section 10.05, this may render the Exchange irrelevant, as the proponents of the Transferred Guarantor Claims would argue that the Exchange Notes independently benefitted from those guarantees.

132. Assuming, on the other hand, that the guarantees by the Transferred Guarantors were released, the proponents of the Transferred Guarantor Claims would likely advance the same argument. In their view, the claim for breach independently inured to the Exchange Notes, notwithstanding that it arose prior to the Exchanges.

133. Were the Court to find that the Letters of Transmittal did transfer claims or rights to CapCo, the Court would need to consider whether or not the transfer was enforceable. Proponents of the Transferred Guarantor Claims would likely argue that it was not, as there was no additional consideration given for the purported "release" of rights and claims. A similar issue was recently addressed in *Cigna Health and Life Insurance Company v. Audax Health Solutions*, 107 A.3d 1082 (Del. Ch. 2014), where the Court found that a buyer under a merger agreement could not require the execution of letters of transmittal that included a material release not provided for under the merger agreement. The Court reasoned that, if the letters of transmittal could provide for such a release, "then buyers could impose almost any post-closing condition or obligation on the target company's stockholders after the fact by including it as a requirement in the letter of transmittal." *Id.* at 1091. Because no additional consideration was

given for the release provided for in the letters of transmittal, the Court found that the release obligation was "unenforceable." *Id.*

134. Proponents of the Transferred Guarantor Claims would argue that, because the Registration Rights Agreements do not provide for the transfer of claims to CapCo, the inclusion of such a compulsory transfer in the Letters of Transmittal is likewise unenforceable. Either way, the Court would need to undertake a full analysis of the documentation governing the Exchange, including the Indentures, the Registrations Rights Agreements and the exchange offer prospectus.

135. The Court would also have to address the applicability of section 13-107 of the N.Y. General Obligations Law to the types of claims being raised by the proponents of the Transferred Guarantor Claims. By its terms, section 13-107 applies only to "claims or demands of the transferrer . . . for damages or rescission against the obligor." *See, e.g., 1 No. 29 Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 97 N.Y.2d 456 (2002) (claim for damages under section 13-107 against a trustee). The proponents of the claims here would point out that they are not arguing for damages or rescission, but rather that the guarantees have not actually been released or, in the alternative, that they should be reinstated. With limited New York case law interpreting section 13-107, such an exercise would likely take the Court into uncharted legal waters.

136. The Ad Hoc Group's creative attempt to imbue the letters of transmittal component of the Exchange and section 13-107 of the N.Y. General Obligations Law with substantive effect also implicates serious policy issues that would require careful consideration as well. This analysis would be informed by the context of how A/B exchange offers are generally consummated. Proponents of the Transferred Guarantor Claims would argue that it is

well understood by investors that an A/B exchange offer allows an issuer to "register[] securities for an exchange offering in which the holders of its unregistered bonds may exchange their bonds for *identical* publicly registered bonds." *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 975 (N.D. Cal. 2007) (*citing In re Refco, Inc. Sec. Litig.,* 503 F. Supp. 2d 611, 619 (S.D.N.Y. 2007) ("In particular, based on the nature of the transactions—a Rule 144A exempt transaction followed by an *Exxon Capital* exchange—the unregistered bondholders were essentially given the opportunity to exchange their unregistered bonds for bonds that are *identical in all respects except that they are freely tradeable*.")). Thus, they would argue, in an A/B Exchange, it is generally recognized that the exchange notes issued to noteholders are *materially identical* to those previously issued. *See* Edward F. Greene, Alan L. Beller, Edward J. Rosen, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber and Nicolas Grabar, U.S. Regulation of the International Securities and Derivatives Markets, §7.03 (10th ed. 2014) ("[A]n 'A/B' exchange offer or an '*Exxon Capital'* exchange offer (after a leading no-action letter) – in which, following the private placement, the issuer offers securities that are materially identical to those initially issued but that, having been sold in a registered exchange offer, can be freely resold."); Mark B. Tresnowski & Gerald T. Nowak, *The High Yield Offering: An Issuers Perspective* 59 (2004) (describing an A/B exchange offer as one where a company "offer[s] to exchange a series of pre-existing securities for an identical series of new securities in the second step of what is ultimately a two-step transaction").

137. The assertion that the letters of transmittal in the Exchange and the application of section 13-107 of the N.Y. General Obligations Law actually had the effect of eliminating all legal and contractual rights of the holders of the Exchange Notes to assert pre-Exchange violations of the CapCo Notes Indentures may upend long-established assumptions

and expectations within the debt markets. A determination that a standard form letter of transmittal or the application of section 13-107 could effect a release of potentially valuable claims would impose a huge burden on investors to conduct investigative diligence before accepting exchange notes or executing letters of transmittal in a standard exchange. The real-world impact of the Ad Hoc Group's novel theory would necessarily inform the Court's analysis of the arguments raised by the Ad Hoc Group.

138. All of the legal and factual issues discussed above would be hotly contested by all parties involved. Parties would also have the opportunity to exercise their appellate rights, only further delaying the resolution of these claims. Settling the Transferred Guarantor Claims on the terms set forth in the Plan avoids those costs and risks, while providing the Debtors and creditors with (i) certainty with respect to distributions on account of the Transferred Guarantor Claims and (ii) substantial savings on the probable costs of professional fees and experts needed to litigate those claims. In addition to these benefits, the settlement of the Transferred Guarantor Claims assisted in facilitating the comprehensive settlement of *all* Disputed Claims, without which the Debtors' estates would be faced with significant delay and uncertainty in resolving these cases, and the attendant costs would be staggering. This is an additional, powerful reason why the benefits of the settlement of the Transferred Guarantor Claims outweigh any upside that could be achieved through the protracted litigation that would ensue if the Plan is not confirmed.

2. Fraudulent Conveyance Claims

139. As one component of the Plan, and in full satisfaction of all potential avoidance actions that may be asserted against any of the Debtors by any other Debtor or against any non-Debtor subsidiary of the Debtors by any of the Debtors, the Plan provides that recoveries to unsecured creditors will be calculated as if 25% of the Fraudulent Conveyance

Claims were avoided. Each of these Fraudulent Conveyance Claims presents complex legal and factual issues that would be the subject of significant debate were they litigated to judgment.

140. As discussed above, the Fraudulent Conveyance Claims can generally be divided into two categories: (i) transfers made by Holdings, and (ii) transfers made by CapCo, each taking place between January and May of 2013 in connection with the issuance of the LuxCo Notes. Under section 548 of the Bankruptcy Code, to establish a constructive fraudulent conveyance claim, a proponent would be required to prove that a debtor (1) either (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation, (ii) intended to incur or believed that it would incur debts that would be beyond its ability to pay as they matured, or (iii) was undercapitalized or rendered undercapitalized as a result of the transfer or obligation, *and* (2) received less than "reasonably equivalent value" in exchange for the transfer or obligation. 11 U.S.C. § 548.

141. Constructive fraudulent conveyance claims arising out of the transfers by Holdings would be premised upon the allegation that Holdings, while undercapitalized and insolvent, received less than fair value in connection with each of the transfers undertaken in connection with the issuance of the LuxCo Notes. These claims would face several factual challenges, and litigating their merits would be complex, costly, and time-consuming.

142. On the solvency issue, proponents of the Fraudulent Conveyance Claims would argue that Holdings' financial projections at the time of the transfers were unreliable and would point to the widespread knowledge that the Company would be adversely impacted by the upcoming shutdown of the Sprint iDEN network in the summer of 2013, as well as the Company's actual EBITDA falling far short of the projected performance at the time of the transactions. Indeed, the Company's projections were continuously revised downward

throughout 2013. Once the shortfalls in the Company's performance were known by the public, the market price for the Company's stock and bonds began to drop, arguably evidencing the unreliability of the projections that were provided at the time of the transactions and the issuance of the LuxCo Notes.

143. In response, opponents of the Fraudulent Conveyance Claims would argue that market data should be used to determine the solvency of Holdings at the time of the transactions. *See In re Iridium Operating LLC*, 373 B.R. 283 (Bankr. S.D.N.Y. 2007) ("Absent some reason to distrust it, the market price is 'a more reliable measure of the stock's value than the subjective estimates of one or two expert witnesses.'"); *VFB v. Campbell Soup Co.*, 482 F.3d 624 (3d Cir. 2007) (same). In early 2013, Holdings' market capitalization was approximately $1 billion, increasing to $1.5 billion by May 2013, and analysts were projecting a positive equity value for the Company until late 2013. Determining the reliability of management's projections and market data would certainly involve significant factual and financial analysis, as well as additional discovery of the Company from the time of the transactions and expert testimony on both sides as to Holdings' solvency or undercapitalization at the time of the transfers.

144. Assuming that Holdings was insolvent at the time of the transfers, opponents of the Fraudulent Conveyance Claims would further argue that *LuxCo* was solvent at the time of the transfers, triggering a rebuttable presumption that a transfer to a solvent subsidiary is made for reasonably equivalent value. *See Branch v. Federal Deposit Insurance Corp.*, 825 F. Supp. 384, 399-400 (D. Mass. 1993); *Rubin v. Manufacturing Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *Tourtellot v. The Huntington Bank (In re Renegade Holdings, Inc.)*, 457 B.R. 441, 444 (Bankr. M.D.N.C. 2011). Issues as to LuxCo's solvency at the time of the

transfers would again involve significant legal, factual, and financial analyses and expert testimony on methods for determining solvency.

145. Proponents of the Fraudulent Conveyance Claims would also point to the fact that *no* value was received in return for any of the transfers made by Holdings. And even if LuxCo were found to be solvent (thereby potentially triggering the presumption of reasonably equivalent value), those proponents would argue that the existence of an intermediate insolvent subsidiary in the Company's capital structure – namely, CapCo – would render this presumption inapplicable or rebutted. The application of the presumption of reasonably equivalent value presumes that transfers to solvent subsidiaries will result in an incremental increase in the parent entity's equity value. *See In re Renegade Holdings, Inc.*, 457 B.R. at 444-45. Thus, the argument could be made that the existence of an intermediate insolvent entity between the parent-transferor and solvent subsidiary-transferee would undercut the presumption, as the value flowing from the transfer to the solvent subsidiary would never reach the parent-transferee. These arguments likely would be subject to much debate and require significant legal analysis and consideration by the Court. Again, determining the solvency of CapCo under this analysis would involve similar considerations to those involved in determining the solvency of Holdings and LuxCo.

146. If the presumption of reasonably equivalent value does not apply or is sufficiently rebutted for the reasons discussed above, the parties would be left with substantial debate over any *indirect* benefits flowing from the transfers made by Holdings. The opponents of the Fraudulent Conveyance Claims will have to establish that the indirect benefits were tangible, concrete, and benefitted the debtor-transferor (as opposed to the enterprise as a whole). *See In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009), *aff'd*, 680 F.3d 1298 (11th Cir.

2012). Any such indirect benefits would need to be quantified, and a Court would need to determine that, in total, they provided value reasonably equivalent to that transferred. Trials on indirect benefits would require substantial factual analysis and testimony and would undoubtedly be lengthy and complex. *See, e.g.*, *In re TOUSA*, 422 B.R. at 786; *In re Tronox*, 464 B.R. 606 (Bankr. S.D.N.Y. 2012).

147. Fraudulent conveyance claims based on transfers by CapCo will involve similar considerations of both CapCo's and LuxCo's solvency at the time of the transfers. However, the analysis of the transfers by CapCo will differ slightly, as there is no intermediate entity whose potential insolvency could render any presumption of reasonably equivalent value inapplicable. Thus, the focus of the Fraudulent Conveyance Claims based on transfers by CapCo would largely focus on the solvency of CapCo and LuxCo, as well as factual issues regarding reasonably equivalent value and any benefits flowing to CapCo as a result of the subordination of the CapCo Intercompany Note.

148. In light of the significant hurdles that would face both the proponents and opponents of the Fraudulent Conveyance Claims, their settlement at 25% under the Plan reasonably resolves these claims. As with the settlement of the Transferred Guarantor Claims, the delay and uncertainty that the Debtors and their creditors would face if these issues were litigated is a strong reason why the benefits of this settlement far outweigh any upside that could be achieved through the protracted litigation that would likely ensue if the Plan is not confirmed.

3. Recharacterization Claims

149. Another key component of the settlement of the Disputed Claims was the agreement that all intercompany balances on the Debtors' balance sheet (the "**Intercompany Balances**") – with the exception of the CapCo Intercompany Note – would be treated as if 25% of those claims were recharacterized as equity. During the course of its investigation, the

Committee determined that the Intercompany Balances bore some indicia of true debt and enforceable claims, while other aspects of the Intercompany Balances favored recharacterization.

150. Consistent with the case law on the enforceability of intercompany claims, the Committee's analysis focused on the intent associated with each balance, including but not limited to consideration of the following factors: (i) the names given to the instruments, if any, evidencing the indebtedness; (ii) the presence or absence of a fixed maturity date and schedule of payments; (iii) the presence or absence of a rate of interest and interest payments; (iv) the source of repayments of the purported indebtedness; (v) the adequacy or inadequacy of the capitalization of the net receiver; (vi) the identity of interest between net receiver and the "lender"; (vii) the security, if any, for the putative debt; (viii) the ability of the net receiver to obtain financing from outside lenders; (ix) the extent to which the payments were subordinated to the claims of outside creditors; (x) the extent to which the advances were used to acquire capital assets; and (xi) the presence or absence of a sinking fund to provide repayments. *See, e.g.*, *Bayer Corp. v. Masotech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726 (6th Cir. 2001). The Committee also reviewed historical practices and other evidence as to whether there was any intent that Intercompany Balances would be enforced or repaid.

151. Many of the Intercompany Balances were well documented with promissory notes, intercompany notes, or financing documents that had fixed maturity dates and interest rates. *Cf. Cohen v. KB Mezzanine Fund II, L.P. (In re Submicron Sys. Corp.)*, 432 F.3d 448, 456 (3d Cir. 2006) ("easy" case for treatment of claim as debt is "a document titled a 'Note' calling for payments of sums certain at fixed intervals with market-rate interest and these obligations are secured and are partly performed"). In addition, the Intercompany Balances were treated as debt in the Company's financial statements.

152. However, these Intercompany Balances were not without risk of recharacterization. In particular, the Company had previously taken the position that certain of the Intercompany Balances on its balance sheet should be treated as equity solely for U.S. tax purposes, employing a similar analysis to that used in bankruptcy cases. Proponents of recharacterization would argue that this prior treatment of an intercompany balance as equity for tax purposes weighs in favor of its characterization as such in a bankruptcy case. *See In re Georgetown Bldg. Assocs. Ltd. P'ship*, 240 B.R. 124 (Bankr. D. D.C. 1999) (treatment of promissory notes as capital contributions on income tax returns weighed in favor of characterizing notes as equity contributions in bankruptcy case); *In re The Villas at Hacienda Del Sol, Inc.*, 364 B.R. 702, 708 (Bankr. D. Ariz. 2007) (evidence that alleged debt was originally treated on debtor's books as equity coupled with insider creditor's failure to document claim warranted characterization of claim as equity). The documentation evidencing certain other outstanding Intercompany Balances is similar to that evidencing the Intercompany Balances previously treated as equity for tax purposes.

153. None of these issues is determinative on its own, however, and a court would be required to supervise considerable discovery and undertake complex factual and legal analysis of each intercompany claim individually if these issues were litigated to judgment. Because the uncertainty and costs associated with litigating the validity of the Intercompany Balances could have negatively impacted all creditor recoveries, the parties determined that it was in the best interest of all parties to avoid the time-consuming and expensive litigation associated with recharacterization. In particular, the treatment of the CapCo Intercompany Note against LuxCo as 100% debt is very favorable for the CapCo creditors, including the CapCo 2021 Notes. Based on the risks associated with such litigation, the parties determined that

settling these claims (other than the CapCo Intercompany Note) as if 25% of the Intercompany Balances were treated as equity (with the remaining 75% treated as valid debt obligations) was reasonable and in the best interest of the estates and creditors.

ii. Other Settlements Embodied in the Plan

154. In addition to settling the hotly contested Disputed Claims, the Plan *also* resolves numerous other inter-creditor and inter-debtor issues that were the subject of significant dispute. These settled issues include: (i) the valuation of the Debtors, (ii) the allocation of the Debtors' value between Brazil and Mexico operations, (iii) currency of distributions (i.e., distributions of cash versus equity in the reorganized company), and (iv) entitlement to and payment of postpetition interest. The benefits of settling these disputes far outweigh any potential benefits that might be obtained through litigation.

155. *Valuation*. As part of the comprehensive and integrated settlement, the parties to the Amended PSA agreed that the distributions under the Plan would be based on a Plan Distributable Value of $2.813 billion. As discussed above, however, at the outset of these cases, the creditors held starkly opposing views as to the appropriate range of value for the Debtors. *First*, creditors of LuxCo argued for a lower valuation, and creditors of CapCo argued for a higher valuation. *Second*, there were also disputes on the valuation of the Debtors' operations in Brazil, Mexico and Argentina. *Third*, there were disputes on how to value the cash at certain Debtor entities given their funding obligations to other Debtors throughout the Chapter 11 Cases. Negotiations on the valuation issues were tied to the Debtors achieving their proposed business plan. However, this business plan was revised in October 2014 – in the midst of plan negotiations – which only fueled continued disagreement on these issues.[21]

[21] The business plan was revised again in December 2014.

156. The Committee Professionals conducted a thorough review of the Debtors' proposed valuation and assumptions, performed their own analysis of the Debtors' valuation, and considered the arguments by the various creditor constituencies favoring higher or lower valuations. Based on this analysis, the Committee Professionals believed that the agreed valuations contained in both the Original PSA and Amended PSA were well within the range of reasonableness. Tellingly, no party in interest objected to the agreed Plan valuation. This issue, if opened, would have a dramatic impact on projected recoveries for all creditor constituencies.

157. Moreover, settling the valuation disputes without the need for complex litigation had significant benefits for the Debtors' estates and all creditor constituencies. Establishing a potential range of value for a company may involve the use of varying methodologies, including a discounted cash flow analysis, trading multiples of comparable companies, and comparable transactions, among others depending on the industry. But the most appropriate method or combination of methods is highly dependent on the circumstances and varies from case to case. *See, e.g.*, *In re SGPA, Inc.*, No. 1-01-02609, 2001 Bankr. LEXIS 2291 at *36 (Bankr. M.D. Pa. Sept. 28, 2001) ("Bankruptcy Courts have been given broad discretion to determine the 'extent and method of inquiry necessary for a valuation . . . dependent on the facts of each case.'") (citation omitted); *Prudential Ins. Co. of Am. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Venture, LLC)*, 748 F.3d 393, 407 (1st Cir. 2014) (Case-by-case selection of valuation methods permits bankruptcy court to select fairest approach in the circumstances). And potential litigation would involve not just disputes over differing methodologies, but also the assumptions employed in *applying* those methodologies, including appropriate discount rates, growth rates, and sets of comparables. Indeed, this was the primary subject of dispute among the parties prior to reaching the settlement in these Chapter 11 Cases.

158. Thus, any litigation of valuation would necessarily require significant (and competing) expert analysis and testimony, as well as factual discovery and legal analysis. A litigation just on the Debtors' valuation could therefore have been intense and extremely costly, unnecessarily prolonging the bankruptcy cases and ultimately consuming value for all creditors. *See, e.g., CSC Trust Co. v. Energy Future Intermediate Holdings Co., LLC (In re Energy Future Holdings Corp.)*, 513 B.R. 651, 665 (Bank. D. Del. 2014) ("[T]he Court is cognizant that [valuation] discovery would be immensely time consuming and expensive and would significantly delay resolution of the adversary proceeding"); *Geltzer v. Original Soupman, Inc. (In re Soup Kitchen Int'l, Inc.)*, 506 B.R. 29, 41-43 (Bankr. E.D.N.Y. 2014) (where valuation would be a key issue, adversary proceeding presented a strong likelihood of complex, protracted, and expensive litigation, as "valuation of assets . . . is a complicated issue that is subject to interpretation.").

159. The Plan *also* settles disputes over the proper allocation of value between the Debtors' Mexico and Brazil operations – another issue contested in connection with the Original PSA. This issue, too, had the potential to bog down the estates with substantial and expensive litigation at both the bankruptcy and appellate court levels.

160. In these circumstances, the benefits of resolving disputes over valuation highly outweighed any potential benefits that could be gained from litigation. Critically, the settlement of valuation paved the way for the numerous other settlements embodied in the Plan, each of which inured to the benefit of the estates and all creditor constituencies.

161. *Postpetition Interest.* Under the Plan, the holders of the LuxCo Notes are not entitled to postpetition interest on account of the LuxCo Note Claims. This postpetition interest, if payable, could have totaled over $130 million assuming an emergence in June 2015,

which would directly impact distributions to CapCo creditors on a pro rata basis. If the Debtors' emergence from bankruptcy were delayed (for example, due to litigation over this issue), the potential postpetition interest claim would increase by approximately $14 million *for each month the Debtors remained in bankruptcy*. Moreover, if the postpetition interest issue is litigated, the holders of the LuxCo Note Claims would undoubtedly seek postpetition interest at the default rate; increasing the amount at issue as of June 2015 to $146 million, and raising the accrual rate for each month the Debtors delay confirmation to $15 million.

162. The holders of the LuxCo Notes argued that, based on the Mexico Sale, LuxCo was solvent and that, as unsecured creditors of a solvent debtor they were entitled to payment of postpetition interest on account of their unsecured note claims. *See, e.g.*, *In re Washington Mut., Inc.*, 442 B.R. 314, 356 (Bankr. D. Del. 2011) (citations omitted) ("The general rule is that unsecured creditors are not entitled to recover post-petition interest. There is an exception to the general rule, however, when the debtor is solvent."). However, LuxCo's solvency would likely be challenged by CapCo creditors, who would argue that LuxCo likely would be insolvent if either the Disputed Claims were resolved in CapCo's favor, or intercompany claims asserted against LuxCo by CapCo were fully taken into account. Additionally, a dispute would arise as to whether the LuxCo Notes could receive payment of postpetition interest before payment in full of CapCo's intercompany claims against LuxCo.

163. Even if a court were to determine that the LuxCo Notes were entitled to postpetition interest, however, there would be significant dispute over the applicable interest rate (*i.e.*, whether the federal judgment rate, contract rate, or some other rate should apply). This analysis is highly dependent on the circumstances of the chapter 11 case, and would certainly involve significant legal and factual disputes. *In re Loral Space & Commc'ns Ltd.*, No. 03-

41710 (Bankr. S.D.N.Y. July 25, 2005) ("[T]he court has a large amount of discretion in deciding what the appropriate rate of interest should be under a chapter 11 plan for a solvent debtor."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 346 (Bankr. D. Del. 2004) ("[T]he specific facts of each case will determine what rate of interest is 'fair and equitable.'").

164. Settling this issue as part of the comprehensive series of settlements embodied in the Plan avoids this complex, costly litigation, and the benefits of this settlement flow directly to the CapCo creditors. The delay and uncertainty caused by litigation for both the Debtors and their creditors clearly demonstrates that the benefits of this settlement far outweigh any upside that could be achieved through litigation.

165. *Currency Allocation.* Another disputed issue among the parties was how the Company's cash and equity would be allocated among creditor constituencies. Because the value of the Debtors' holding companies depends upon the value of the equity held in their subsidiaries, structurally senior creditors (*i.e.*, Transferred Guarantors and then LuxCo) had a basis to argue that they were entitled to receive distributions in cash ahead of structurally subordinated creditors (*i.e.*, CapCo). Any value flowing to CapCo creditors through CapCo's indirect ownership of LuxCo, they argued, should have been satisfied with equity in the Reorganized Company. If this argument were successful, creditors of CapCo would be entitled to receive virtually zero cash, and receive only distributions of equity in the Reorganized Company. Given the impact on CapCo creditors, this issue would have been the subject of significant debate.

166. Fortunately, as part of the comprehensive settlements embodied in the Plan, the LuxCo and Transferred Guarantor creditors agreed to reallocate cash and equity distributions, notwithstanding their arguable entitlement to all the cash distributions. This

allowed for greater cash distributions to holders of the CapCo Note Claims *and*, importantly, General Unsecured Claims. As a result, the benefits of this settlement directly flow to CapCo creditors (including the holders of the CapCo 2021 Notes) and General Unsecured Claims, far outweighing any purported benefits of litigating this issue.

5. <u>Protracted Litigation is Highly Likely if Any of the Settled Issues were Litigated to Judgment</u>

167. The Ad Hoc Group's argument that the Transferred Guarantor Claims could be adjudicated solely on the basis of contract interpretation ignores the complexity of the claims and how the arguments they raise bleed into others that will undoubtedly involve both a legal *and* factual analysis, as well as potential expert testimony. As discussed at length above, there are significant and questionable factual issues associated with the litigation of the Transferred Guarantor Claims, including the lack of disclosure both before and after the 2009 Transfers were consummated. This issue likely would be the subject of document discovery and depositions, and could impact how a Court would ultimately rule on some of the legal issues underlying the Transferred Guarantor Claims. Fortunately, though, the settlement of these claims avoids the need for this, and other, discovery, and avoids the lengthy trial and appeals that would follow.

168. The Ad Hoc Group also ignores the fact that the Transferred Guarantor Claims cannot be extracted from the Plan and litigated in isolation. Thus, any purported litigation of the Transferred Guarantor Claims would open up the estates to the litigation morass involved with litigating all of the other claims and issues settled under the Plan – each of which involve hotly disputed legal and factual questions that could take years to litigate. This would not only delay implementation of a chapter 11 plan, but would increase administrative expenses and tie up significant assets that would otherwise be available for distribution to creditors.

169. Litigation of all of these claims would entail, among other things: review of millions of pages of document discovery aimed at understanding and evaluating complex transactions; conducting numerous depositions or interviews of individuals involved in those transactions, many of whom have not worked for the Debtors for years; retaining multiple experts and resolving disputes over their credentials and methodologies; evaluating, in hindsight, business decisions made years ago by directors and officers; reviewing the substance of the underlying documentation evidencing each of the transactions; and evaluating differing valuation methodologies employed by expert witnesses in analyzing the Company's businesses. As this Court is well aware, the litigation of *one* issue can be extremely costly. *See, e.g., In re Nortel Networks, Inc.*, No. 09-10138, slip op. at 58 (Bankr. D. Del. May 12, 2015) (discussing exorbitant legal fees and 5-year delays that have "plagued" the estates due to allocation litigation). Thus, the litigation of *all* disputed issues (not just the Disputed Claims) would likely be astronomical.

170. Following eight months of focused investigation and negotiation, the Plan and the settlements it embodies provide the Debtors' estates with timely, decisive relief that resolves the most significant claims through a modified settlement offering materially improved recoveries for all constituencies. On the other hand, litigating and defending such claims – many of which are highly speculative and difficult to value, and all of which would require massive resources to put before a trier of fact – would consume time, and diminish value, to an extent that cannot now be estimated. These are precisely the concerns echoed by Judge Gerber when approving the settlement of interdebtor issues in *Adelphia*. *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 241-43 (Bankr. S.D.N.Y. 2007) (approving plan settlement of interdebtor issues where

litigation would be "extremely complex and expensive to litigate"). For these reasons, this factor tips decidedly in favor of approving the Plan.

6. <u>The Nature and Breadth of Releases</u>

171. The Plan contains various estate and third party releases that were integral parts of the Plan Settlements. As set forth in further detail in the Confirmation Brief, those releases are appropriate and consistent with the Second Circuit's standards for approving each type of releases.

172. In particular, the Third Party Releases provided in the Plan – whereby creditors and other third parties are providing releasing the Debtors and the other Released Parties of claims, liabilities, and causes of action – are fully consensual and therefore consistent with Second Circuit precedent on this issue. *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005) (stating that "[n]ondebtor releases may also be tolerated if the affected creditors consent") (citing *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (holding "releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code")). The *only* parties bound by the Third Party Releases are those creditors who voted in favor of the Plan. Moreover, those creditors were provided with sufficient notice, including in clear and conspicuous language in the Disclosure Statement, ballots, and other notices, that the vote in favor of the Plan would constitute consent to the releases provided in the Plan, including the Third Party Release. Thus, consistent with similar cases in this district, the releases provided in the Plan are reasonable, appropriate, and should be approved. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 251 (Bankr. S.D.N.Y. 2007), *appeal dismissed*, 371 B.R. 660 (S.D.N.Y. 2007), *aff'd*, 544 F.3d 420 (2d Cir. 2008) (applying consensual third party release to creditors that voted to support

plan); *In re Oldco M Corp. (f/k/a Metaldyne Corp.)*, No. 09-13412 (MG) (Bankr. S.D.N.Y. Feb. 23, 2010) (same).

* * *

173. For the foregoing reasons, the Plan Proponents submit that an analysis of the *Iridium* factors demonstrates that all of the settlements in the Plan fall well within the range of reasonableness, are fair, equitable, and in the best interests of the estates, and should be approved by the Court.

II. THE PLAN'S CLASSIFICATION SCHEME IS PROPER

174. The Ad Hoc Group asserts that the Plan cannot be confirmed because the claims of the CapCo 2021 Noteholders have been placed in the same class as the other holders of CapCo Claims. As an initial matter, holders of the CapCo 2021 Notes voted in favor of the Plan, demonstrating the support of the classification and treatment of the CapCo 2021 Note Claims. Thus, even if they were separately classified from the other CapCo Note Claims – which is neither necessary nor appropriate, as discussed below – the CapCo 2021 Notes voted separately to accept the Plan, rendering the Ad Hoc Group's objection on this ground moot.

175. In any event, claims arising out of all three issuance of the CapCo Notes may be placed in the same class. Courts have noted that, under section 1122(a) of the Bankruptcy Code, the "similarity of claims is not judged by comparing creditor claims inter se. Rather the question is whether the claims in a class have the same or similar legal status *in relation to the assets of the debtor*." *In re Frascella Enters., Inc.*, 360 B.R. 435, 442 (Bankr. E.D. Pa. 2007) (citing *In re Piece Goods Shops Co.*, 188 B.R. 778, 788 (Bankr. M.D.N.C. 1995). The Plan's classification has a rational basis here because it is based on the respective legal rights of each holder of a CapCo Note Claim *against CapCo*. As discussed above, each of the holders of the CapCo Note Claims have the same legal rights against CapCo – regardless of their legal

rights against the Transferred Guarantors – and therefore can be classified in the same class. Pursuant to section 1123(a)(4), all CapCo Notes are receiving the same treatment with respect to their claims against CapCo.

176. With respect to the claims held by certain creditors against the Transferred Guarantor entities, these claims are legally distinct from those against CapCo and therefore can be classified and treated separately. As discussed above, the holders of the CapCo 2021 Notes did not file any proofs of claim against the Transferred Guarantors and therefore have no legal rights against those entities. The Ad Hoc Group has not established any other basis for either their separate classification as against CapCo, or any similar classification as against the Transferred Guarantors. Nor has the Ad Hoc Group established any impact that the separate classification of the CapCo 2021 Notes would have on the Plan.

III. THE U.S. TRUSTEE'S OBJECTION SHOULD BE OVERRULED

177. Beyond the Ad Hoc Group, the only other substantive objection to confirmation is an objection lodged by the U.S. Trustee to one very narrow aspect of the Plan and Amended PSA: the payment of the fees and expenses of the Requisite Consenting Noteholders (as defined in the Amended PSA) (the "**RCN Fees**"). The Committee joins in the responses to the U.S. Trustee's objection set forth in the Confirmation Brief and in the joint response of the Requisite Consenting Noteholders.

178. Payment of the RCN Fees is an integral component of the comprehensive series of settlements embodied in the Amended PSA and Plan. Like all of the other mutual compromises embedded in the Plan, it can neither be viewed in isolation nor extracted from the Amended PSA or Plan without threatening the integrity of the overall settlement. In view of the massive benefits to all constituencies flowing from the Amended PSA and Plan, it was certainly an appropriate exercise of the Debtors' business judgment to agree to pay these fees. Tellingly,

the U.S. Trustee does not actually contest that the agreement to pay the RCN Fees was a sound exercise of the Debtors' business judgment. Rather, the U.S. Trustee argues that, as administrative expenses, the applicable standard for approving the payment of the RCN Fees is section 503(b), which would require a showing of "substantial contribution" by the professionals for the Requisite Consenting Noteholders. U.S. Trustee Obj. at 8 (citing *Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings, Inc.),* 508 B.R. 283 (S.D.N.Y. 2014)). While the Requisite Consenting Noteholders have undoubtedly made substantial contributions to these Chapter 11 Cases, including by facilitating the settlements embodied in the Plan before the Court, neither section 503 of the Bankruptcy Code nor *Lehman* is applicable here.

179. The appropriate standard for approval of the RCN Fees here is the business judgment standard provided by section 363(b) of the Bankruptcy Code. The issues presented here are strikingly similar to those in *In re Bethlehem Steel*, 2003 WL 21738964 (S.D.N.Y. Jul. 28, 2003). There, in granting the Debtors' request to reimburse the professional fees for the United Steel Workers Association (the "**USWA**"), the Court overruled an objection by the U.S. Trustee arguing (similar to the *Lehman* arguments) that section 503 was the exclusive avenue for the payment of administrative expenses. *Id*. at *6. Instead, the Court found that the debtors had appropriately exercised their business judgment under section 363 in agreeing to pay those professional fees, as the USWA's cooperation was integral to a successful emergence from chapter 11. *Id.*; *see also In re Enron Corp.,* 335 B.R. 22 (S.D.N.Y. 2005) (citing *Bethlehem Steel*, and stating that "authorization of certain types of payments under §363(b) is not prohibited simply because there is another section of the Bankruptcy Code related to the same type of payment"); *In re Asarco, LLC*, 441 B.R. 813 (S.D. Tex. 2010) (finding that section 363(b), not 503(b), was more applicable for approval of reimbursement of expenses for

bidders in asset sale, reasoning that "administrative expenses [under 503(b)] are for routine operational costs").

180. *Lehman Bros.*, in contrast, concerned a factually distinguishable situation and its holding is inapplicable here. *Lehman Bros.* involved an application under section 1129(b)(4) for reimbursement of expenses incurred by members of the Unsecured Creditors Committee in the hiring of their own professionals. The bankruptcy court approved these fees as part of the plan, but the District Court reversed, finding that in this specific instance, section 503(b) was the only appropriate avenue for the payment of administrative expenses. *In re Lehman Bros.*, 508 B.R. at 296. This decision turned on a series of case-specific factors, most notably that section 503 "glaringly exclude[s] [payment of] professional fee expenses for official committee members" in their capacity as committee members. *Id.* at 290. Importantly, here, while some of the Requisite Consenting Noteholders are members of the Committee, the RCN Fees are being paid *not* for representation in their Committee capacity, but for the *wholly separate* efforts in their individual capacity to negotiate a broad-based settlement intended to help the Debtors successfully emerge from chapter 11, thereby rendering *Lehman* inapplicable.

181. Accordingly, the circumstances of this case warrant application of the business judgment test under section 363(b) of the Bankruptcy Code. Because the agreement to pay the RCN Fees emerged as the result of an arms' length negotiation and is a key component of the Settlement, the Debtors appropriately exercised their business judgment in agreeing to pay these fees, and they should be approved.

CONCLUSION

182. For all of the foregoing reasons, the Committee submits that the Court should (a) approve the integrated Settlement because it satisfies the applicable requirements in this Circuit for approval, and (b) confirm the Plan because it fully satisfies all applicable requirements of the Bankruptcy Code.

Dated: May 29, 2015
New York, New York

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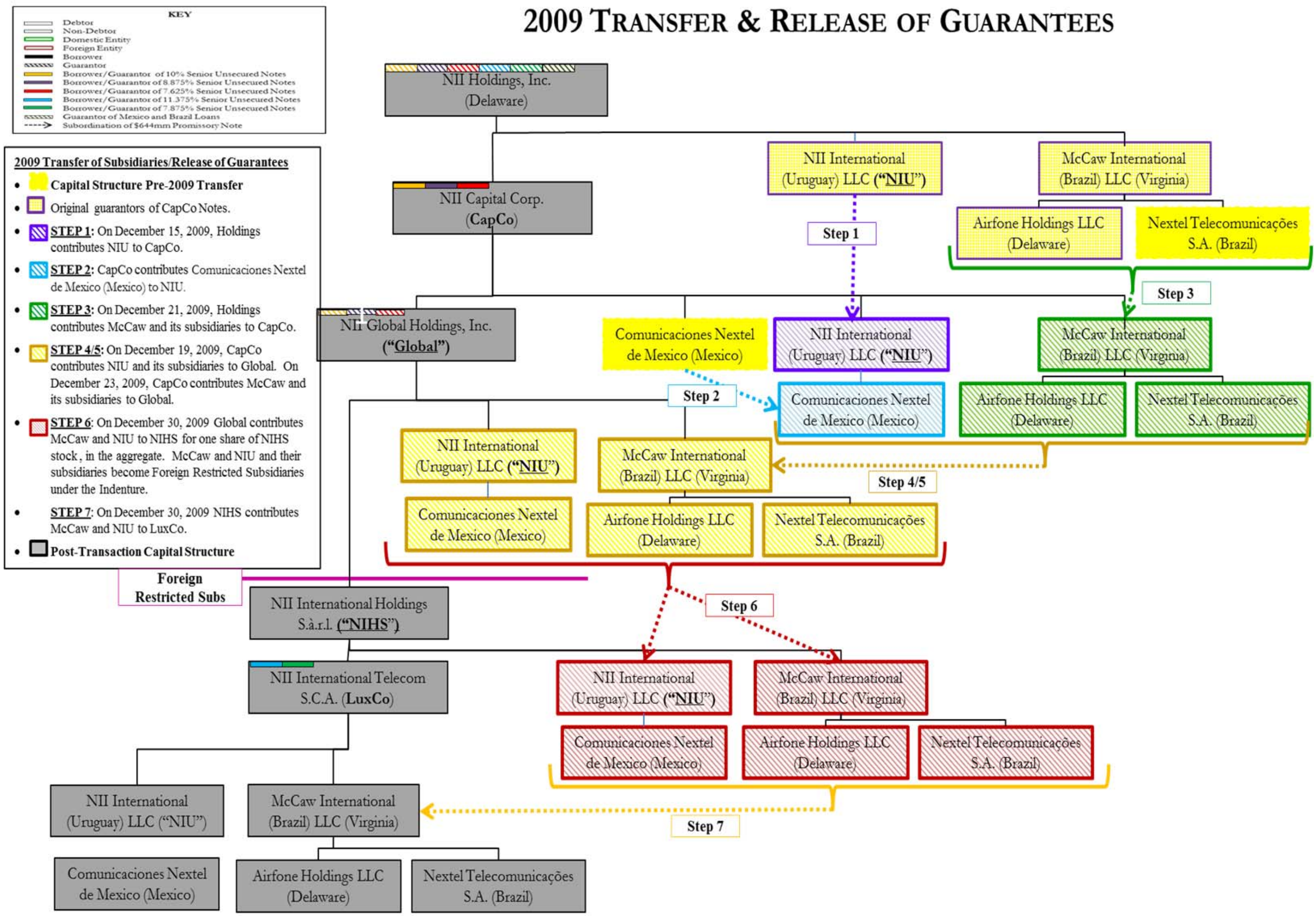
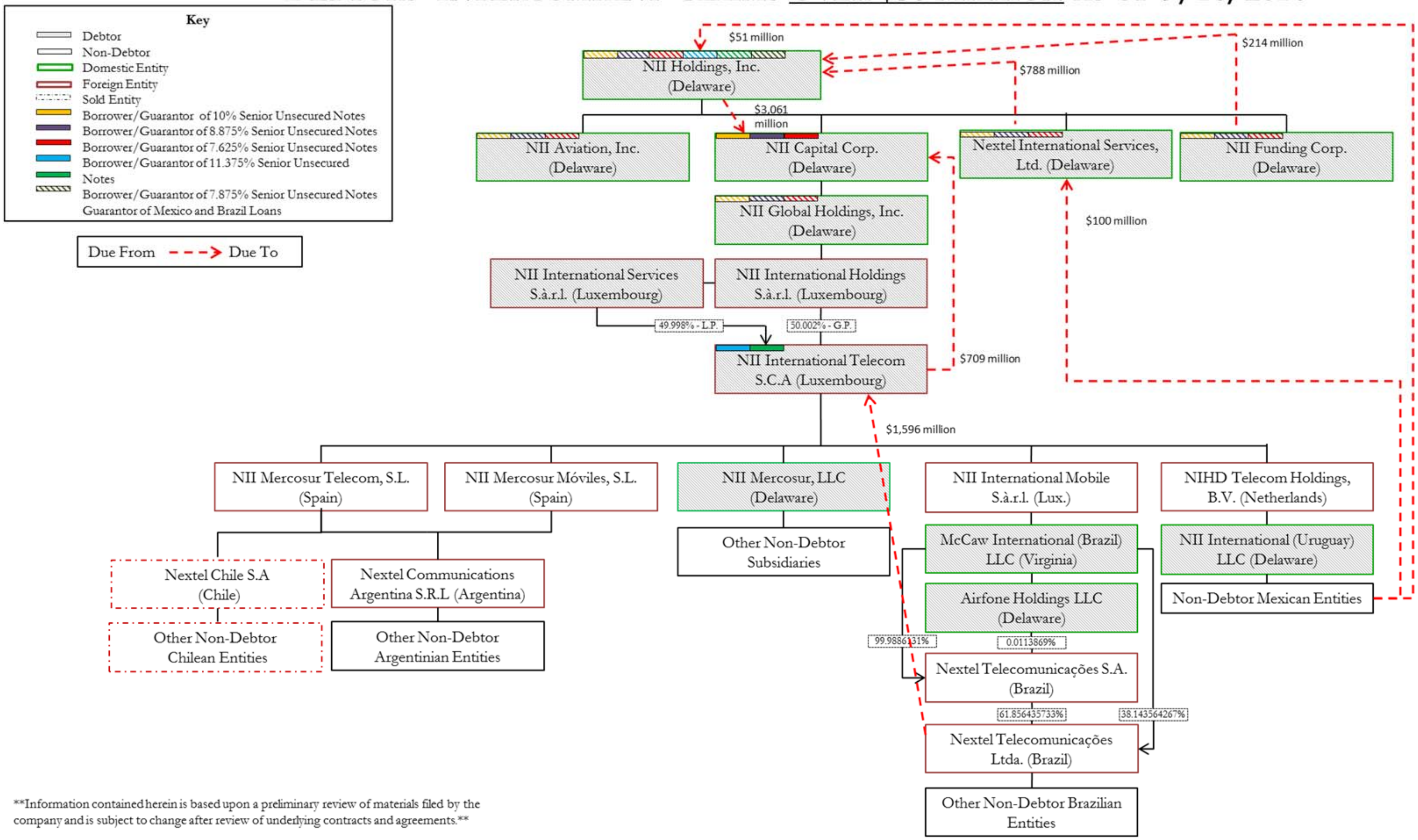
ANNEX 1


2009 TRANSFER & RELEASE OF GUARANTEES
KEY
Debtor
Non-Debtor
Domestic Entity
Foreign Entity
Borrower
Guarantor
Borrower/Guarantor of 10% Senior Unsecured Notes
Borrower/Guarantor of 8.875% Senior Unsecured Notes
Borrower/Guarantor of 7.625% Senior Unsecured Notes
Borrower/Guarantor of 11.375% Senior Unsecured Notes
Borrower/Guarantor of 7.875% Senior Unsecured Notes
Guarantor of Mexico and Brazil Loans
Subordination of $644mm Promissory Note
2009 Transfer of Subsidiaries/Release of Guarantees
Capital Structure Pre-2009 Transfer
Original guarantors of CapCo Notes.
STEP 1: On December 15, 2009, Holdings contributes NIU to CapCo.
STEP 2: CapCo contributes Comunicaciones Nextel de Mexico (Mexico) to NIU.
STEP 3: On December 21, 2009, Holdings contributes McCaw and its subsidiaries to CapCo.
STEP 4/5: On December 19, 2009, CapCo contributes NIU and its subsidiaries to Global. On December 23, 2009, CapCo contributes McCaw and its subsidiaries to Global.
STEP 6: On December 30, 2009 Global contributes McCaw and NIU to NIHS for one share of NIHS stock, in the aggregate. McCaw and NIU and their subsidiaries become Foreign Restricted Subsidiaries under the Indenture.
STEP 7: On December 30, 2009 NIHS contributes McCaw and NIU to LuxCo.
Post-Transaction Capital Structure
NII Holdings, Inc. (Delaware)
NII Capital Corp. (CapCo)
NII International (Uruguay) LLC ("NIU")
McCaw International (Brazil) LLC (Virginia)
Airfone Holdings LLC (Delaware)
Nextel Telecomunicações S.A. (Brazil)
Step 1
Step 3
NII Global Holdings, Inc. ("Global")
Comunicaciones Nextel de Mexico (Mexico)
NII International (Uruguay) LLC ("NIU")
McCaw International (Brazil) LLC (Virginia)
Step 2
Comunicaciones Nextel de Mexico (Mexico)
Airfone Holdings LLC (Delaware)
Nextel Telecomunicações S.A. (Brazil)
NII International (Uruguay) LLC ("NIU")
McCaw International (Brazil) LLC (Virginia)
Step 4/5
Comunicaciones Nextel de Mexico (Mexico)
Airfone Holdings LLC (Delaware)
Nextel Telecomunicações S.A. (Brazil)
Foreign Restricted Subs
NII International Holdings S.à.r.l. ("NIHS")
Step 6
NII International Telecom S.C.A. (LuxCo)
NII International (Uruguay) LLC ("NIU")
McCaw International (Brazil) LLC (Virginia)
Comunicaciones Nextel de Mexico (Mexico)
Airfone Holdings LLC (Delaware)
Nextel Telecomunicações S.A. (Brazil)
NII International (Uruguay) LLC ("NIU")
McCaw International (Brazil) LLC (Virginia)
Step 7
Comunicaciones Nextel de Mexico (Mexico)
Airfone Holdings LLC (Delaware)
Nextel Telecomunicações S.A. (Brazil)

ANNEX 2

DEBTORS' INTERCOMPANY CLAIMS OVER $50 MILLION AS OF 9/14/2014



Information contained herein is based upon a preliminary review of materials filed by the company and is subject to change after review of underlying contracts and agreements.