

Procedures for Resolution of Third Party Liens Against Customer Vessels. In Support of the Motion, the Debtors respectfully represent as follows:

BACKGROUND

1. On November 13, 2014 (the "Petition Date"), the Debtors each commenced a voluntary case under chapter 11 of Title 11, United States Code (the "Bankruptcy Code"). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory creditors' committee has been appointed in these chapter 11 cases.

2. Information regarding the Debtors' business, capital structure, and the circumstances leading to the commencement of these chapter 11 cases is set forth in the Tolson Declaration (the "Tolson Dec.") which has been filed with the Court in support of this Motion as well as other first day motions.

A. The Debtors' Business Relationship with O.W. Bunker Trading and Supply A/S, a Danish Company ("OWBTS")

3. As set forth in the Tolson Dec., the Debtors and OWBTS jointly operate to, among other things facilitate the Debtors' purchase and sale of maritime bunker fuel oil ("Fuel Oil") commonly used by vessels engaged in the shipping and cruise industries.

4. The Debtors Fuel Oil is sold for consumption by vessels in transit, or to customers who place it on vessels as cargo for resale.

5. In either case, the Debtors contract with suppliers to purchase quantities of Fuel Oil on open credit. In the case of a vessel requiring Fuel Oil for its own consumption, a supplier is directed to fill the vessels' bunkers with Fuel Oil on account of the Debtors, with Fuel Oil purchased by the Debtors and sold to the customer. If the Fuel Oil is for resale it is either stored

by the Debtors until it finds a buyer or, if it has located a buyer it is placed in a vessel's cargo hold for delivery to the buyer. The Debtors receive invoices from their suppliers for these purchases with payment generally due within a specified number of days of their receipt of an invoice.

6. In accordance with procedures established between the Debtors and their parent, OWBTS, headquartered in Denmark, to ensure prompt payment of supplier invoices, the Debtors review, approve and submit them to OWBTS for payment. OWBTS has access to funds and/or a Credit Facility (described below) and normally pays the suppliers for the Fuel Oil by wire transfer. Title to the Fuel Oil remains with the Debtors until sold and delivered to its customers.

B. The Debtors' Sales and Pledge of Receivables to ING

7. After making Fuel Oil purchases, the Debtors then sell quantities directly (in some instances to a related entity O.W. Bunker Panama ("OWBP") who in turn sells it to third parties on account of the Debtors) or broker sales to vessels in need of Fuel Oil. These sales create receivables in favor of the Debtors that are part of a Credit Facility and controlled by the Debtors' Danish parent OWBTS and its lenders.

8. Pursuant to that certain English Omnibus Security Agreement, dated December 13, 2013 (the "Security Agreement"), two of the Debtors, O.W. Bunker North America, Inc. ("North America") and O.W. Bunker USA, Inc. ("OWB-USA") are each designated as a "Chargor" and have pledged their supply contract receivables to ING Bank, N.V. as Security Agent ("ING") to partially secure a USD \$700,000,000 multicurrency revolving borrowing base facility between multiple O.W. Bunker entities throughout the world (including OTBTS, North America and OWB-USA, ING and other lender participants (the "Credit Facility"). ING purportedly perfected a security interest in the North America and OWBUS A receivables by

filing a UCC-1 with the Connecticut and Texas Secretaries of State (where they are respectively located) on or about November 6, 2014.

C. Diversion of Receivables Payments to ING and the Impact on the Debtors

9. Pursuant to the Credit Facility, OWBTS, has directed that purchasers of its OWBNA and OWBUSA Fuel Oil make payment directly into designated collection accounts or a blocked, lock box account (collectively, the “Designated Accounts”) for the benefit of ING as a purported secured creditor in the Debtors’ receivables and as the security agent under the Credit Facility. The Debtors therefore currently have no access to the proceeds generated from sales of their Fuel Oil.

10. In the normal course of business among the Debtors and OWBTS, suppliers of Fuel Oil to the Debtors would have been paid by OWBTS. Recently, OWBTS has entered into its own insolvency proceedings in Denmark. Since its filing for insolvency, OWBTS’ payments to the Debtors’ suppliers have ceased. At the insistence of ING all payments from third party purchasers of the Debtors’ Fuel Oil continue to be directed to the Designated Accounts for the benefit of ING. This has caused tremendous disruption to the Debtors’ operations.

11. Certain suppliers of Fuel Oil sold by the Debtors to customer vessels using it to run their own engines have been the subject of supplier demands for payment and liens on the Fuel Oil in their bunkers under the Maritime Lien Act, Title 46, United States Code. These customers may have made payment to the Designated Accounts or may still owe payment constituting a receivable in favor of the Debtors. The Debtors are entitled to payment on these receivables to satisfy their suppliers for Fuel Oil they purchased for resale. Multiple suppliers have also served the Debtors with reclamation demands for return Fuel Oil they delivered. Thus, the Debtors’ inability to make payments to their suppliers has stifled their operations and caused

harm to its customers as well, all because payments on the Debtors' receivables are being diverted to ING, who may very well not be entitled to receive them as a secured creditor.

D. ING's Security Interest is Subject to Avoidance as a Preferential Transfer

12. One week prior to the Petition Date ING filed UCC-1 financing statements in with Connecticut and Texas on November 6, 2014 in an effort to perfect its interests in the Debtors' receivables. Under Bankruptcy Code §§ 547 and 550 the Debtors' submit these are preferential transfers of the Debtors' interests in the receivables and subject to avoidance, which would result in the receivables being unencumbered and subject to recovery for the Debtors' estates. Accordingly, after commencement of these chapter 11 cases, the Debtors will file an adversary proceeding against ING (the "Adversary Proceeding") to avoid the purported lien of ING. Under these circumstances, the Debtors further submit that neither ING nor OWBTS may continue to direct customer payments on these receivables to the Designated Accounts. Rather, they should be preserved for the Debtors and their estates, pending disposition of the Adversary Proceeding.

E. Immediate Segregation of Payments on Receivables is Necessary to Avoid Further Harm to the Debtors, their Estates and their Customers

13. To prevent the continued disposition of potential estate assets and to preserve their receivables, the Debtors submit that all customer payments that are currently being directed to the Designated Accounts be placed in a segregated debtor in possession account (the "Segregated Account") pending resolution of the Adversary Proceeding. Additionally, to avoid further disruption of its business, the Debtors submit that customers whose vessels have had liens placed upon them by suppliers (or are threatened with supplier liens) due to non-payment should be afforded the opportunity to resolve these liens by making payment to this Segregated Account with the supplier liens attaching to this account until such time as they are paid or otherwise

resolved through the procedures outlined in this Motion. Doing so will prevent any further harm or prejudice to the Debtors, their estates and their customers.

JURISDICTION, VENUE AND STATUTORY PREDICATES FOR RELIEF

14. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Debtors' Chapter 11 cases and this Motion are proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

15. The statutory predicates for the relief requested herein are Bankruptcy Code §§ 105(a), 362 and 1107.

RELIEF REQUESTED

16. By this Motion, the Debtors seek entry of an order directing that all customer payments on all current, future and outstanding customer invoices as well as any receivables generated from the sale of the Debtors' Fuel Oil be deposited into the Segregated Account so that the funds are preserved until such time as the Court issues a ruling in the Adversary Proceeding. With respect to liens asserted by suppliers on customer vessels (each a "Supplier Lien"), upon payment by a customer into the Segregated Account, the Debtors submit that any such liens attach to the Segregated Account until such time as they are paid or otherwise resolved pursuant to procedures outlined as follows (the "Supplier Lien Procedures"):

- (a) Upon receiving notice of a Supplier Lien from a customer, supplier or otherwise, with respect to an existing or potential Supplier Lien, the Debtors shall serve a copy of the order authorizing and establishing the Supplier Lien Procedures on the supplier and the customer, directing that any payment to be made by a customer or received by a supplier to release a Supplier Lien (each a "Customer Payment") be sent to the Debtors for deposit into the Segregated Account.
- (b) Upon receipt of a Customer Payment the Debtors shall deposit it into the Segregated Account. The Debtors shall immediately notify the supplier asserting a Supplier Lien as well as the customer that they have received the Customer Payment and the Supplier Lien shall be transferred from the customer vessel to the Segregated Account in the amount of the Customer Payment (the "Lien").

Transfer Notice”) and the vessel shall be free and clear of the Supplier Lien upon receipt of the Lien transfer Notice. The supplier asserting the Supplier Lien shall take all necessary steps to release the Supplier Lien immediately upon receipt of the Lien Transfer Notice.

- (c) Within fourteen (14) days of receipt of the Lien Transfer Notice, the supplier asserting a Supplier Lien shall submit documentation supporting its lien (the “Lien Documentation”).
- (d) Within fourteen days of receipt of the Lien Documentation, the Debtors shall submit a reply (“Reply”) either recognizing the Supplier Lien as valid or contesting the Supplier Lien. If the Supplier Lien is not contested in the Reply, or if the Debtors and a supplier so otherwise stipulate (at any time after the Customer Payment is deposited into the Segregated Account) the Debtors shall make payment to the supplier asserting the Supplier Lien in the amount of the Customer Payment that corresponds to the Supplier Lien without further order of the Court. If the Supplier Lien is contested, in the Reply the Debtors shall set forth the basis for their position and provide any supporting documentation.
- (e) Should the parties be unable to resolve any dispute concerning a Supplier Lien within fourteen days of the supplier’s receipt of the Reply, they will ask the Court to conduct an evidentiary hearing to resolve any such dispute.
- (f) In the event that a supplier asserting a Supplier Lien collects or obtains all or a portion of any Customer Payment amount and the funds are transferred to the Debtors and deposited into the Segregated Account, the Debtors agree that said collection efforts shall be instituted on their behalf and all such efforts shall not be considered a violation of the Bankruptcy Code including 11 U.S.C. § 362, provided however, that if said funds related to the Customer Payment are not transferred to the Debtors for deposit into the Segregated Account, the Debtors reserve all rights to pursue and recover all such funds, including without limitation asserting claims for willful violations of the automatic stay under Bankruptcy Code § 362, and to seek payment for any and all damages they may incur as a result any such violations. Disbursement of any amounts collected on behalf of the Debtors under this subsection (f) shall be made in accordance with the Supplier Lien Procedures outlined above and authorized by the Court.

BASIS AND AUTHORITY FOR RELIEF

17. The Debtors may have contractual obligations to suppliers for Fuel Oil purchases. Prior to OWBTS’ insolvency proceeding in Denmark, upon submission of approved invoices by the Debtors, such obligations were, for the most part timely satisfied by OWBTS. In exchange for these payments the Debtors agreed to participate in a payment system in which the invoices

for these sales of Fuel Oil directed the purchaser to remit payment to the Designated Accounts. Once OWBTS filed for protection under the Danish insolvency laws, supplier payments ceased. Customer payments on account of the sale of the Debtors' Fuel Oil nevertheless continue to be directed to the Designated Accounts for ING's benefit, even though its purported security interests in the Debtors' receivables is highly questionable. The Debtors currently have no regular source of income from sales to pay suppliers and fund a plan. It is essential, therefore, that the Debtors establish the Segregated Account and that payments for the sale of Fuel Oil be directed into this account for preservation until such time as the Court rules on the validity of ING's security interests and supplier liens on customer vessels are paid or resolved. Without this relief, the Debtors will be left with no means to operate and formulate a plan to satisfy creditors.

18. This Court may enter an appropriate order directing payments into a segregated debtor in possession account for these purposes. As described herein, this relief is in the best interests of the Debtors, their estates, creditors and other interest holders. Without it, the Debtors will have no cash flow, and their customers' vessels may be subject to liens and/or be arrested under the Maritime Lien Act.

19. Bankruptcy Code section 105(a) contains a grant of broad authority for the Court to enforce its provisions at equitable common law:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

20. The paramount goal of chapter 11 is to rehabilitate the debtor. *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989). All other bankruptcy policies are

subordinate to this goal. *Id.* Although section 105 does not itself create a private right of action, a court may invoke it if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Bankruptcy Code *In re Kalikow*, 602 F.3d 82, 96-97 (2d Cir. 2010). Preference actions involve rights and remedies that are provided for under Bankruptcy Code § 547. Bankruptcy Code § 105 may be invoked to preserve these rights and the remedies afforded to a debtor under the Bankruptcy Code in order to facilitate a debtor's rehabilitation. *See i.e. In re Lyondell Chemical Company* 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (enjoining creditor actions against non-debtor parent entity for a limited time to preserve debtors' ability to reorganize and to prevent a series of disorderly collection proceedings in various countries).

21. Further, Bankruptcy Code § 362(a) provides the Debtors with a breathing spell in order to allow them to develop and implement a plan to maximize value and recovery for all constituencies. In order to accomplish this, the Debtors must preserve the revenues from the sale of their Fuel Oil. Continued control and use of the funds generated by sales of the Debtors' Fuel Oil for the benefit of ING (whose rights as a secured creditor are in doubt) will severely prejudice the Debtors, their estates and creditors as there are few other sources of funds available to the Debtors. Accordingly, the payments for these sales should be directed to the Segregated Account for preservation until such time as the Court rules on ING's lien perfection status in the Adversary Proceeding. Additionally, establishing the Supplier Lien Procedures will implement a process to resolve Supplier Liens while preserving all parties' rights in order to allow the Debtors business operations to restart. Without this relief, the Debtors will ultimately fail to achieve any significant value for their estates and their creditors. The requested relief is therefore crucial to avoid this irreparable harm.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached authorizing and directing customer payments into a segregated Debtor in possession account; (b) authorizing and establishing the Supplier Lien Procedures and (c) granting the Debtors such other and further relief as is just and proper.

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Respectfully submitted,

/s/ Michael R. Enright

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