

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

HSF HOLDING, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-\_\_\_\_\_ (     )

Jointly Administered

**AFFIDAVIT OF C. ALEXANDER HARMAN IN SUPPORT  
OF CHAPTER 11 PETITIONS AND FIRST DAY MOTIONS**

C. Alexander Harman, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury:

1. On the date hereof (the “Petition Date”), each of the above-captioned debtors and debtors in possession (the “Debtors”) filed a voluntary petition for relief under chapter 11 of Bankruptcy Code. The Debtors are continuing to operate their business and manage their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. I am the Secretary of HSF Holding, Inc. (“HSF”) and Hawaii Superferry, Inc. (“Superferry”) (collectively, the “Debtors”) and am generally familiar with the operations, financial affairs and books and records of the Debtors. I have held the position of Secretary since December 2005.

3. I submit this affidavit (the “Affidavit”) concurrently with each of the Debtors’ chapter 11 petitions (i) to assist the Court and other parties-in-interest in understanding the circumstances that compelled the commencement of these chapter 11 cases and (ii) in support of the petitions and various motions (“First Day Motions”) and applications of the Debtors filed contemporaneously herewith. A copy of the resolutions of the Boards of Directors, or such other

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<sup>1</sup> The Debtors are the following entities: (i) HSF Holding, Inc., a Delaware corporation and (ii) Hawaii Superferry, Inc., a Hawaii corporation.

resolutions or authorizations as are appropriate, authorizing the filing of each of the Debtors' petitions is annexed to each Debtor's respective petition. Except as otherwise indicated, all facts set forth in this Affidavit are based upon my personal knowledge, upon information supplied to me by others at the Debtors, upon my review of relevant documents, or upon my opinion based upon my experience, knowledge, and information concerning the Debtors' operations and financial affairs. If I were called upon to testify, I could and would testify competently to the facts set forth in this Affidavit. I am authorized to submit this Affidavit on behalf of the Debtors.

4. This Affidavit is divided into two parts. Part I describes the Debtors' business, capital structure and the circumstances that led to the filing of these chapter 11 cases. Part II sets forth relevant facts in support of each of the First Day Motions.

## **PART I**

### **BACKGROUND**

#### **A. Company Organization and Structure**

5. HSF is the parent corporation and direct owner of 100% of the voting equity in Superferry. HSF is a Delaware corporation. Superferry is a Hawaii corporation through which the Debtors conduct their business.

6. Superferry was formed in 2002 to develop a Jones Act maritime franchise providing daily high-speed passenger and vehicle ferry service between the four principal Hawaiian Islands – Oahu, Maui, Hawaii and Kauai (collectively, the "Islands").

7. In April 2004, Superferry entered into shipbuilding contracts with Austal USA LLC, currently a wholly owned subsidiary of Austal Ships ("Austal"), an Australian company that specializes in the design and construction of aluminum vessels, to build two high-speed aluminum-hulled catamarans with drive-on/drive-off vehicle capability for fast ferry service. Both vessels are high-speed aluminum catamarans capable of carrying up to 866

passengers and 282 cars or 25 trucks/buses and 60 cars, with one measuring 107-meters in length, the other 113-meters in length.

8. The first ship, the “*Alakai*”, arrived in Honolulu Harbor from Austal’s shipyard in Mobile, Alabama on June 30, 2007 and began transporting passengers and vehicles between the Islands in August, 2007.

9. A second, nearly identical ship herein referred to as “*Hull 616*” or the “*Huakai*”, was just recently constructed by Austal at its Mobile, Alabama shipyard. The Debtors accepted delivery of *Hull 616* on or about April 21, 2009.

**B. The Debtors’ Capital and Equity Structure**

10. Pursuant to that certain Commitment to Guarantee Obligations by the United States of America, Accepted by Hawaii Superferry, Inc., dated October 28, 2005, by and among Superferry and the U.S. Department of Transportation, Maritime Administration (“MARAD”), MARAD agreed to provide guarantees for the construction and term financing of the ferries. On April 27, 2006, Superferry refinanced its initial MARAD guaranteed financing facility provided by ABN AMRO Bank, N.V. through the issuance of two series of 20-year bonds designated the United States Government Guaranteed Ship Financing Obligations, 2006 Series A, in the principal amount of \$68,717,064 (the “2006 Series A Bonds”) and the United States Government Guaranteed Ship Financing Obligations, 2006 Series B, in the principal amount of \$71,013,936 (the “2006 Series B Bonds” and collectively with the 2006 Series A Bonds, the “2006 Bonds”) to Superferry in order to finance construction of the ferries.

11. The 2006 Series A Bonds accrue interest at 5.73% per annum and are set to mature on May 30, 2027. A principal and interest payment of approximately \$2.9 million is due and owing under the 2006 Series A Bonds on May 30, 2009. The 2006 Series B Bonds

accrue interest at 5.80% per annum and are set to mature on the 20<sup>th</sup> anniversary of the delivery of *Hull 616* to the Debtors (*to wit*, April 21, 2029). As of the Petition Date, the principal amount outstanding on the 2006 Bonds is approximately \$135,774,872. The 2006 Bonds are secured by preferred ship mortgages recorded against the ferries in favor of MARAD.

12. Additionally, pursuant to that certain Subordinated Loan Agreement, dated April 9, 2004, by and among Superferry and Austal, Austal agreed to provide Superferry with a \$10,351,643 term loan to fund construction of the *Alakai* and a \$10,290,523 term loan to fund construction of *Hull 616* (collectively, the “Austal Term Loans”). The Austal Term Loans accrue interest at 10% per annum, and each term loan is set to mature on the fifth anniversary of the delivery date of the related ferry, subject to certain terms and conditions associated with the 2006 Bonds. As of the Petition Date, the principal amount outstanding on the Austal Term Loans is approximately \$22,958,902.19 in the aggregate. The Austal Term Loans are secured by ship mortgages recorded against the ferries in favor of Austal, but which are fully subordinate to the ship mortgages granted to MARAD. Further, due to limited available liquidity at the time of delivery of the *Huakai*, Austal agreed to defer \$1,622,109 of the final payment due at delivery. This obligation is evidenced by a note executed by Debtors bearing interest at 8% per annum and secured by a priority lien on a spare main engine.

13. Moreover, on September 7, 2005, Superferry entered into an Operating Agreement (the “Harbors Operating Agreement”) with the Harbors Division of the State of Hawaii Department of Transportation (“DOT”). The Harbors Operating Agreement provides for the use by Superferry of specific pier areas at the Honolulu, Nawiliwili, Kahului, and Kawaihae Harbors and the use of certain equipment to be provided by DOT, funded by approximately \$40 million of State appropriations, consisting primarily of vehicle ramps and the barges on which

the ramps would be placed to allow vehicle access between the ferry and the pier. The term of the Operating Agreement is twenty-two years from commencement of service of the *Alakai*. In addition to the published dockage fees, Superferry is required under the terms of the Harbors Operating Agreement to pay fees to DOT based on the number of passengers and vehicles and a percentage of gross receipts, subject to a minimum annual guaranteed amount. As a result of the Second Circuit Court (Maui)'s October 9, 2007 ruling that the Harbors Operating Agreement is void as it relates to the Kahului Harbor (discussed below) and the Hawaii Supreme Court's March 16, 2009 decision holding that a state law allowing the Debtors to operate without completing an environmental impact study was unconstitutional (discussed below), the Debtors submit that no amounts are due and owing DOT pursuant to the Harbors Operating Agreement. The Debtors' alleged obligations under the Harbors Operating Agreement are secured by a third mortgage on each of the vessels and a \$833,000 letter of credit in favor of DOT. The third mortgages are fully subordinate to the mortgages granted in favor of MARAD and Austal.

14. Furthermore, on August 17, 2007, HSF executed a senior secured note (the "Note") in favor of Guggenheim Funding, LLC ("Guggenheim") in the amount of \$47,750,000 (the "Note Amount"). Approximately \$12,750,000 of the Note Amount was placed in an escrow by HSF to pay cash interest due on the Note. As of the Petition Date, there is an approximate \$7,500,000 balance remaining in the escrow account. The principal amount due under the Note as of the Petition Date is \$51,752,288.12. Interest on the Note accrues at 12% per annum, 7% of which is paid in cash and 5% paid in kind. The Note matures on August 17, 2015. The Note is secured by a pledge of HSF's voting equity in Superferry. The cash interest portion of the interest payments is funded through 2011 by the aforementioned escrow account. On November 11, 2008, Guggenheim provided written notice to HSF that a default under the terms of the Note

had ripened and reserved all of its rights with respect to such default. Guggenheim did not accelerate the Note. As of the date hereof, the default remains outstanding.

15. As of the Petition Date, the Debtors have approximately \$1,084,218.38 million in unrestricted cash. In addition, the Debtors have several escrow accounts in connection with pre-petition transactions as follows:

| <b>Party Escrow Account Maintained For</b> | <b>Amount in Escrow Account as of Petition Date</b> | <b>Nature of Escrow Account</b>                                          |
|--------------------------------------------|-----------------------------------------------------|--------------------------------------------------------------------------|
| Guggenheim                                 | \$7,500,000                                         | Funds set aside in connection with the Note                              |
| State of Hawaii                            | \$833,000                                           | Payments pursuant to the Harbors Operating Agreement                     |
| Chase Paymentech                           | \$136,000                                           | Customer credit card payments                                            |
| U.S. Maritime Administration               | \$215,000                                           | Funds set aside to pay Austal in connection with construction of ferries |

16. Prior to the Petition Date, HSF issued three classes of preferred stock on three separate occasions. The three classes of preferred stock include: (i) Series A Convertible Preferred Stock ("Series A Preferred"); (ii) Series B Convertible Preferred Stock ("Series B Preferred") and (iii) Series C Convertible Preferred Stock ("Series C Preferred") (collectively, the "Preferred Stock"). Series C Preferred is the most senior of the three tranches of preferred stock. The total capital contributed to HSF with respect to the Preferred Stock issuance was \$92,900,000. Of this amount, approximately \$85,200,000 was invested by J.F. Lehman & Co. and its affiliates (hereafter, "JFL"), a private equity firm specializing in executing control investments in maritime, aerospace and defense companies.

17. The Series A Preferred and Series B Preferred were issued to various venture capital investors and the proceeds of such investments were used to fund, among other things, market studies concerning the viability of starting a high-speed ferry service in the Hawaiian archipelago. Among the investors in the Series B Preferred was JFL, who made an approximately \$1,400,000 equity investment on or about April 13, 2005. JFL did not invest in the Series A Preferred.

18. On October 25, 2005 and March 31, 2006, JFL made equity investments in HSF of \$78,800,000 and \$5,000,000, respectively. In return for its investment, it received Series C Preferred securities. The funds from the Series C Preferred offering were used to fund a portion of the construction of the ferries and to significantly expand the Debtors' infrastructure and fund operations in preparation for the launch of service as well as fund the start-up operations of the service.

19. As a result of the Series C Preferred offering, JFL obtained a majority equity stake in HSF, which currently equates to approximately 69% of the outstanding equity on a fully-diluted basis, which includes issued warrants and options. Guggenheim holds warrants that, if exercised, would result in them acquiring approximately 7% of the outstanding equity on a fully diluted basis in HSF, with the remaining 24% of HSF equity on a fully diluted basis held by approximately 80 other investors.

20. As of the Petition Date, JFL holds seven of the ten seats on each of the Debtor's boards of directors, including that of Thomas Fargo, who serves as President and CEO of HSF, and is a managing director at JFL. Below is a list of the members of the Debtors' boards of directors:

Directors affiliated with JFL:

1. John F. Lehman – Chairman and Founding Partner of JFL
2. Tig H. Krekel – Vice Chairman of JFL
3. Louis N. Mintz – Partner at JFL
4. C. Alexander Harman – Partner at JFL
5. George A. Sawyer – Operating Executive Board of JFL
6. John W. Shirley – Operating Executive Board of JFL
7. Thomas B. Fargo – Operating Executive Board and Managing Director at JFL, President and CEO & director of HSF

Directors not affiliated with JFL:

8. Jeff Arce
9. David Cole
10. Warren Haruki

21. JFL has a financial interest in the Debtors' success based on its equity holdings in HSF.

**C. The Agreement and Fee Agreement**

22. JFL, HSF and Superferry are party to that Consultancy Agreement (the "Agreement") dated September 19, 2005. Pursuant to the Agreement, JFL agreed to provide strategic, organizational, business, management, technical and financial advisory services to Superferry including (i) assisting with the raising of debt and equity capital from time to time for Superferry; (ii) handling investor relations for Superferry; (iii) pursuing strategic alliances with companies, governmental departments and agencies; (iv) assisting Superferry in its long-term strategic planning generally; (v) assisting Superferry in the management and organization of the business generally; (vi) providing technical and financial services generally and (vii) providing such other consulting and advisory services as the board of directors of Superferry may reasonably request. In consideration for such services, JFL received \$2.5 million on the closing of the Series C Preferred offering. Additionally, JFL received a \$500,000 annual consulting fee

until August 2007, when the *Alakai* began transporting passengers between the Islands, and thereafter a \$1 million annual consulting fee pursuant to the terms of the Agreement. No consulting fee to JFL has been paid since November 2008 when HSF defaulted under the terms of the Note with Guggenheim.

23. Pursuant to the Agreement, HSF and Superferry have agreed to jointly and severally indemnify JFL for any losses relating to (i) the performance by JFL of the services contemplated by the Agreement; (ii) JFL's services as a director, officer or agent of HSF, Superferry or any direct or indirect subsidiary of HSF or Superferry; (iii) the inaccuracy of any representation or warranty or breach of or default under any covenant or agreement of HSF or Superferry in any document prepared, executed or delivered in connection with issuance of the Series C Preferred or the Austal Term Loans; (iv) any violation of applicable securities or other laws in connection with any part of the issuance of the Series C Preferred or the Austal Term Loans, unless in any case it is finally judicially determined by a court of competent jurisdiction that such losses resulted from the gross negligence or willful misconduct of JFL. The Agreement remains in effect until it is terminated by mutual written agreement by JFL, Superferry and HSF or by thirty (30) days written notice from Superferry to JFL at any time after the aggregate amount of common stock of HSF or securities convertible into or exercisable for common stock of HSF held by JFL constitutes less than 25% of the common stock of HSF on a fully-diluted basis. The Agreement is governed by the laws of the state of New York.

24. Additionally, JFL and HSF are party to that Consultancy Fee Support Agreement (the "Fee Agreement") dated October 28, 2005. Pursuant to the Fee Agreement, HSF agreed that if at any time Superferry is prohibited by its debt financing agreements or otherwise

from making any payment due to JFL under the Agreement, HSF shall pay the amount due thereunder. The Fee Agreement is governed by the laws of the State of New York.

**D. Events Leading to Chapter 11**

25. A number of events significantly impacted the Debtors' operations and directly led to the decision to file for Chapter 11 protection.

**Adverse Court Ruling**

26. On March 16, 2009, the Supreme Court of Hawaii issued a significant decision holding that a state law allowing the Debtors to operate without completing an environmental impact study was unconstitutional. The Debtors were immediately forced to cease operations in the Hawaiian Islands as a result of this adverse judicial decision.

27. By way of background, on February 23, 2005, DOT concluded that the harbor improvements related to the Debtors' ferry operations were exempt from an environmental review pursuant to Chapter 343 of the Hawaii Revised Statutes ("Chapter 343").

28. On March 21, 2005, special interest plaintiffs filed a lawsuit in the Second Circuit Court (Maui) challenging DOT's decision. The special interest plaintiffs maintained that a Chapter 343 study was required because of alleged concerns regarding the operation of the ferry service among the Islands, including potential collisions with whales, and the transfer of alien plant and animal species among the Islands. The Second Circuit ruled on July 12, 2007 that DOT had complied with the letter of the law and that an environmental study was not required. Thereafter, in August, 2007, the *Alakai* began transporting passengers and vehicles between the Islands. The special interest plaintiffs appealed the matter to the Hawaii Supreme Court, which, in its August 31, 2007 decision, held that DOT erred in holding that the DOT improvements were exempt from the requirements of Chapter 343. On October 9, 2007, the

Second Circuit Court, on remand, enjoined the Debtors' operations until DOT completed an environmental assessment. The Second Circuit Court also ordered that the Harbors Operating Agreement was void as it related to Kahului Harbor because it was not preceded by the requisite environmental assessment.

29. Thereafter, the Governor of the State of Hawaii called the Legislature into session through executive proclamation. After much debate and extensive testimony, the Legislature passed "A Bill for an Act Relating to Transportation" known as Act 2. Act 2 amended the law to permit operation of a large capacity ferry vessel company while an environmental study was undertaken. Act 2 was signed into law in Hawaii on November 2, 2007.

30. On November 14, 2007, in compliance with Act 2, the Second Circuit Court lifted the injunction and allowed the Debtors to resume service while an environmental assessment was conducted. Additionally, the Second Circuit Court vacated its October 9, 2007 order as it related to the Harbors Operating Agreement. The special interest plaintiffs appealed the Second Circuit Court's decision to lift the injunction, arguing that Act 2 violated the Hawaii state constitution.

31. The Supreme Court of Hawaii ruled in favor of the special interest plaintiffs, finding on March 16, 2009 that Act 2 was an unconstitutional special law in violation of Article XI, Section 5 of the Hawaii state constitution claiming that it was crafted specifically to benefit the Debtors and allowed the Debtors to operate before an environmental study was completed, as required under state law. As a result of this decision, Superferry was forced to permanently cease operations and relocate the *Alakai* to Mobile, Alabama.

32. On May 13, 2009, the Supreme Court of Hawaii denied the State of Hawaii's motion for reconsideration of the March 16, 2009 order.

33. As of this writing, both the *Alakai* and *Huakai* are docked in Mobile, Alabama.

#### **Other External Factors**

34. In addition to the adverse ruling by the Hawaii Supreme Court, other factors significantly impacted the Debtors' operations and directly led to the Debtors' decision to file for Chapter 11 protection.

35. First, the challenging economic conditions during 2008 and the first quarter of 2009 resulted in lower than expected revenues. The weak economy resulted in a decline in tourism to the state of Hawaii and thus, a reduced demand by tourists for ferry service between the Islands. Additionally, the negative economic conditions resulted in Hawaii residents, who made up the largest component of the Debtors' ridership and who often rely, directly or indirectly, on Hawaii's tourism industry as the source of their livelihood, traveling less between the Islands.

36. Second, an unprecedented spike in fuel prices occurred during the summer of 2008, peaking at over \$4.30/gallon and resulting in significantly increased operating expenses. The unprecedented fuel prices strained the Debtors' financial situation since fuel is one of the Debtors' largest vessel operating expenses. The Debtors were not able to fully pass this large cost increase on to their customers in order to remain competitive with various airlines who offered inter-Island flights. At the same time, the Debtors were forced to lower their prices due to an ongoing price war between two of the local airlines.

37. Finally, the Debtors' lost certain customers, and associated revenue, as a result of several interruptions to its service. First, the August 31, 2007 and October 9, 2007 decisions of the Second Circuit Court to halt the Debtors' operations until DOT completed an environmental assessment further eroded the public's confidence in the Debtors' reliability, which directly impacted ridership. Thereafter, following the lifting of the injunction by the Second Circuit Court on November 14, 2007, the Debtors experienced delays in their ability to resume service as a result of structural damage to the State's harbor facilities in Kahului, Maui. The Debtors were not able to resume ferry service until December 13, 2007. The Debtors' inability to promptly commence services following the passage of Act 2 caused a significant doubt in the public of the Debtors' service. Then, during a regular dry-docking of the *Alakai* in February 2008, the vessel sustained damage at the fault of the maintenance company performing the services. Although the service provider paid for the damages, the Debtors suffered a loss of revenue and damage to their perceived reliability by the public since they were unable to provide ferry service during that time. From April 2008, when the Debtors' re-launched the *Alakai* into service, until the Hawaii Supreme Court's March 16, 2009 order, the Debtors demonstrated outstanding reliability. However, by then, the damage to the Debtors' reputation had already been inflicted.

**E. Debtors' Intentions in Chapter 11**

38. The Debtors have commenced these chapter 11 cases to facilitate their orderly liquidation and to wind up their business. The Debtors believe that their current efforts will maximize recovery to all creditors and other parties-in-interest. Through an ongoing analysis with their advisors and negotiations with their key constituents, the Debtors fully intend to develop and implement an appropriate plan of liquidation in an expeditious fashion. The

Debtors believe that significant benefits will be realized through a consensual process and, in this regard, they anticipate continuing the liquidation dialogue with their principal constituencies to achieve this end.

## **PART II**

39. This section will set forth, in summary fashion, the factual background and support for each of the First Day Motions.<sup>2</sup> In general, I believe that the approval of the Debtors' First Day Motions is critical and necessary to the success of the Debtors' Chapter 11 Cases.

### **A. Motion for Order Directing Joint Administration of Chapter 11 Cases**

40. The Debtors seek the joint administration of these chapter 11 cases for **procedural purposes only** pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for this District (the "Local Rules").

41. There are a total of two debtors covered by these chapter 11 cases, therefore, joint administration is appropriate because it will ease the administrative burden of the Court and parties-in-interest. It is anticipated that that each of these chapter 11 cases will proceed on the same timetable and that most of the notices, applications, motions and other pleadings filed and orders entered in these cases will affect both of the Debtors. Joint administration will allow the Clerk of the Court to use a single docket for these cases rather than maintaining two different dockets. Similarly, joint administration will eliminate the need for duplicative notices, applications, motions and orders, thereby allowing the Debtors and other

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<sup>2</sup> The summary in Part II that follows is qualified in its entirety by reference to the each of the specific First Day Motions. To the extent of any inconsistency between this Part II of the Affidavit and the First Day Motions, the First Day Motions govern. Further, capitalized terms used but not defined in this section will have the meanings ascribed to them in such respective First Day Motion.

parties-in-interest to (a) file one pleading in a consolidated case rather than separate pleadings in each chapter 11 case, (b) combine and streamline the service of pleadings and notices on creditors and other parties-in-interest and (c) monitor these chapter 11 cases by reviewing only one docket.

42. Finally, the rights of the Debtors' creditors will not be adversely affected by the proposed procedural joint administration of these chapter 11 cases. Joint administration is for procedural purposes only and each creditor and party-in-interest will maintain whatever claims or rights it has against the particular Debtors' estate in which it allegedly has a claim or right.

43. Based on the foregoing, I believe that joint administration of these chapter 11 cases is in the best interests of the Debtors, their creditors, and all parties-in-interest, and should be granted in all respects.

**B. Motion Regarding Cash Management, Bank Accounts and Business Forms**

44. The Debtors seek the entry of an order that authorizes the Debtors: (i) to continue their existing cash management system; (ii) to maintain their existing bank accounts; and (iii) to continue to use their existing business forms.

**Summary of Cash Management System**

45. Before the commencement of these chapter 11 cases, the Debtors, in the ordinary course of their business, used an automated, centralized cash management system to collect, transfer and disburse funds generated by their operations and to accurately record all such transactions as they were made (the "Cash Management System").

46. With respect to the Cash Management System maintained by Hawaii Superferry, Inc. ("Superferry"), the Business Cash Advantage Checking Account (Account No.

0002-146223) is the main operating account. Funds are swept to and from this account from the Money Market Mutual Fund Account (Account No. 151462231). Funds from the Business Cash Advance Checking Account (Account No. 0002-146223) are then swept to and from the Analyzed Business Checking Bank Account- ACH (Account No. 0005-010357) and the Analyzed Business Checking Bank Account- Depository (Account No. 0005-010349). Funds are transferred at the request of Superferry from the Investment Bank Account (Account No. 135188001) to the Business Cash Advance Checking Bank Account (Account No. 0002-146223). Superferry also maintains an escrow account for the benefit of the U.S. Department of Transportation, Maritime Administration (“MARAD”). Funds in this account are swept to the Business Cash Advance Checking Account (Account No. 0002-146223) in connection with payments to MARAD.

47. With respect to the Cash Management System maintained by HSF Holding, Inc. (“HSF”), the Checking Account (Account No. 3231135) is the main operating account. HSF also maintains two investment accounts. No funds are transferred between Superferry and HSF.

48. The cash management procedures employed by the Debtors constitute ordinary, usual, and essential business practices and are similar to those used by other major corporate enterprises. The Cash Management System provides significant benefits to the Debtors, including the ability to control corporate funds centrally and to ensure the availability of funds when necessary. Compelling the Debtors to adopt a new, segmented cash management system during their stay in chapter 11 would be expensive and would create unnecessary administrative problems. Any disruption of the Cash Management System would have a severe

and adverse effect upon the Debtors' ability to orderly liquidate their assets and windup their business.

49. Based on the foregoing, I believe that maintenance of the Cash Management System is in the best interests of the Debtors, their creditors, and all parties-in-interest, and should be granted in all respects.

#### **Existing Bank Accounts**

50. The Cash Management System comprises nine bank accounts, a list of which is attached to the underlying motion (collectively, the "Bank Accounts"). Seven of the Bank Accounts are maintained at the Bank of Hawaii, one Bank Account is maintained at Fifth Third Bank and one Bank Account is maintained at the U.S. Maritime Administration (collectively, the "Banks"). Six of the Bank Accounts are held in the name of Superferry, while the remaining Bank Accounts are held in the name of HSF.

51. I am advised that it is necessary for the Debtors to seek a waiver of the U.S. Trustee's requirement that the existing accounts be closed and that new postpetition accounts be opened. The existing accounts are a part of the carefully-constructed cash management system and allow for the Debtors to fund operations in a streamlined and cost-efficient manner. In order to avoid delays in payments to administrative creditors and to ensure minimal disruption to operations and a smooth transition into chapter 11, it is critical that the Debtors be permitted to maintain their existing bank accounts and, if circumstances require, add new accounts.

52. Based on the foregoing, I believe that maintenance of the Bank Accounts is in the best interests of the Debtors, their creditors, and all parties-in-interest, and should be granted in all respects.

### **Continued Use of Existing Business Forms**

53. To minimize expenses to their estates, the Debtors also request authorization to continue using all correspondence and business forms (including, but not limited to, letterheads, purchase orders, and invoices) existing immediately prior to the Petition Date without reference to the Debtors' status as debtors in possession. The Debtors will obtain new check stock and update their electronic check stock reflecting their status as debtors-in-possession.

54. It is anticipated that parties doing business with the Debtors will be aware of their status as debtors-in-possession. A requirement that the Debtors change their business forms would be expensive and burdensome to the Debtors' estates and extremely disruptive to operations. In light of the above, the costs and potential disruption are not justified.

55. Based on the foregoing, I believe that continued use of the existing business forms is in the best interests of the Debtors, their creditors, and all parties-in-interest, and should be granted in all respects.

### **C. Utility Motion**

56. In the normal conduct of their business operations, the Debtors receive service from many utility companies and other providers (collectively, the "Utility Companies") for the provision of water, waste, electric, telephone, cellular, cable, technology infrastructure and other similar utility services (the "Utility Services").

57. The Debtors' access to uninterrupted Utility Services is essential to operations. Should a Utility Company refuse or discontinue service, even for a brief period, the Debtors' operations could be severely disrupted, which would cause immediate and irreparable harm to the business. It is therefore critical that the Utility Services continue uninterrupted.

58. The Debtors estimate that for the period April 2008 through March 2009 they paid approximately \$33,705.00 in aggregate monthly payments, on average, to the Utility Companies for Utility Services rendered. However, the Debtors have significantly reduced business operations as of March, 2009 including terminating all but a few key employees. Moreover, as of April 30, 2009, the Debtors vacated the office space located at Building 1 Waterfront Plaza, Suite 300, 500 Ala Moanan Boulevard, Honolulu, Hawaii (the “Premises”) and, in the next few days will be filing a motion to reject the Premises. For these reasons, the landscape of average monthly payments for Utility Services has likewise been significantly diminished.

59. The Debtors propose to provide each Utility Company with fifty percent (50%) of the Debtors’ May 2009 payment to such Utility Company for Utility Services (a “Utility Deposit”) to provide adequate assurance of payment for future services. The total amount of the Utility Deposits paid to the Utility Companies pursuant to the underlying motion will be approximately \$3,250. The Debtors submit that the foregoing protections provide adequate assurance to the Utility Companies of payment for postpetition utility services.

60. Based on the foregoing, I believe that the relief sought in the Motion is necessary, appropriate and in the best interests of the Debtors, their creditors, and all parties-in-interest, and therefore should be granted in all respects.

**D. Motion to Pay Prepetition Taxes and Fees**

61. In the ordinary course of business, the Debtors incur certain taxes and fees (collectively, the “Taxes”; individually a “Tax”) that are payable directly to various state and local taxing authorities (collectively, the “Taxing Authorities”) as such payments become due.

62. Although the Debtors' records reflect that they are current on all Taxes that have become due as of the Petition Date, there is typically a lag between the time when the Debtors incur an obligation to pay the Taxes and the date such Taxes become due. Various Taxing Authorities may therefore have claims against the Debtors for Taxes that accrued prepetition but remain unpaid as of the Petition Date.

63. The Debtors estimate the total amount of prepetition Taxes owing to the various Taxing Authorities will not exceed \$57,215.26. Any amounts that are actually due, but have not yet been paid to the Taxing Authorities because of the bankruptcy filings, represent a small fraction of the Debtors' total assets. Moreover, some of these outstanding tax liabilities are for trust fund taxes the Debtors have collected and hold in trust for the benefit of the Taxing Authorities. Such funds do not constitute property of the estate and could not otherwise be used by the estates.

64. The Debtors' failure to pay the prepetition Taxes could have a material adverse effect on the Debtors' ability to operate in the ordinary course of business. I am advised that some, if not all, of the Taxing Authorities may initiate audits of the Debtors if the Taxes are not timely paid, which would divert the Debtors' attention from the liquidation process. In addition, if the Debtors do not pay the prepetition Taxes in a timely manner, the Taxing Authorities may attempt to suspend the Debtors' operations, file liens, seek to lift the automatic stay, and pursue other remedies harmful to the Debtors' estates.

65. I have also been advised that, to the extent the Debtors incurred "trust fund" taxes prior to the Petition Date that remain unpaid, the Taxing Authorities could subject the Debtors' directors and officers to lawsuits or criminal prosecution during the pendency of the Debtors' chapter 11 cases. The threat of a lawsuit or a criminal prosecution, and any ensuing

liability, would distract these personnel from the Debtors' liquidation to the detriment of all parties-in-interest. The dedicated and active participation of the Debtors' directors and officers is integral to the Debtors' orderly administration of these chapter 11 cases.

66. The Debtors have determined, in the exercise of their business judgment, that paying the prepetition Taxes is in the best interests of their estates, their creditors, and all parties-in-interest. Failure to pay the prepetition Taxes could have a material adverse effect on the Debtors' operations as Taxing Authorities may take actions against the Debtors for such non-payment, resulting in significant administrative problems for the estates which would consume Debtors' valuable time and resources. Prompt and regular payment of the prepetition Taxes would avoid those unnecessary and distracting governmental actions and also would avoid actions against directors and officers, who might otherwise be held personally liable for the non-payment of "trust fund" taxes.

67. Based on the foregoing, I believe the relief requested in the Motion is necessary, appropriate and in the best interests of the Debtors' estates, creditors, and other parties-in-interest.

**E. Wage Motion**

68. The Debtors seek an order authorizing, but not directing, the Debtors to (i) pay prepetition claims of current employees (each an "Employee" and collectively, the "Employees"), including, but not limited to, claims for prepetition wages, salaries, benefits, vacation, sick leave, paid holidays, and certain costs and disbursements related to the foregoing (collectively, the "Employee Compensation"), up to the statutory maximum of \$10,950 for each employee; (ii) continue post-petition employee benefit plans and programs in effect immediately prior to the filing of these cases; (iii) pay certain former employee pre-petition COBRA benefits;

(iv) pay prepetition federal, state and local withholding obligations; (v) pay certain prepetition claims of independent contractors; (vi) reimburse employees and independent contractors for prepetition expenses; and (vii) direct all banks and financial institutions to honor prepetition checks for payment of employee obligations.

### **Employee Compensation**

69. As of the Petition Date, the Debtors' workforce consists of approximately eight (8) full-time employees (the "Employees"). Employees are paid weekly in arrears for work performed from Saturday through Friday. The Debtors' average two-week gross payroll for all Employees is approximately \$40,000. Since the filing of these chapter 11 cases occurred at the start of a pay period, there are no known outstanding payroll amounts due and owing Employees. However, the Debtors reserve the right to pay any outstanding prepetition payroll amounts if, and when, they become known.

70. All Employees are eligible to accrue paid vacation time ("Vacation Time") pursuant to the Debtors' policies. Employees accrue Vacation Time for each month worked, at rates that vary depending on seniority and contract terms. Vacation Time carries over from one year to the next on a limited basis; Employees may accumulate one (1) week per year with a maximum of five (5) weeks total. The Debtors anticipate that Employees will utilize Vacation Time in the ordinary course. As of the Petition Date, the Debtors estimate that the aggregate value of accrued but unused Employee Vacation Time is approximately \$52,000, of which a significant portion is owed to one or two senior Employees.

71. The Debtors' Employees are eligible to accrue paid sick time ("Sick Time") pursuant to the Debtors' policies. Employees are allotted three (3) weeks per year of Sick Time that carries over year-to-year up to an accrued limit of twelve (12) weeks of Sick

Time. Employees are not paid for any unused Sick Time upon retirement, resignation or termination. The Debtors anticipate that many of their Employees will utilize Sick Time in the ordinary course of business. The Debtors are not seeking authority at this time to pay any prepetition amounts under any outstanding severance packages.

72. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) continue to pay Employee pre-petition wages in the ordinary course, (ii) permit Employees to utilize Vacation Time in the ordinary course and to pay Employees on account of unused Vacation Time and (iii) allow Employees to utilize Sick Time in the ordinary course of business and to pay Employees for Sick Time in the ordinary course, provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950.

#### **Employee Benefit Plans**

73. In the ordinary course of their business, the Debtors offer Employees many standard employee benefits (the “Employee Benefits”) under their employee benefit plans and programs (collectively, the “Employee Benefit Plans”). Employees are eligible to receive medical insurance that includes dental and vision coverage and complimentary alternative health coverage through the UHA 600 Preferred Provider Plan (the “Health Plan”). In general, Employees and their eligible dependents are eligible for coverage under the Health Plan on the first day of the month coinciding with, or following, their date of hire. The Debtors’ aggregate contributions to the Health Plan per month are approximately \$2,400. Payment on account of the Health Plan is made in advance, such that liability for June, 2009 medical benefits accrued in May, 2009. As of the Petition Date, such payment has not yet been processed.

74. In addition, the Debtors provide Employees with basic life insurance (“Basic Life Program”) through Prudential Insurance Company of America. This program is fully insured and is administered by PruValue Insurance Benefits Trust. For May 2009, the Debtors paid \$61.00 for the Basic Life Program, including administration and claims processing fees. The Debtors estimate that, as of the Petition Date, they owe \$30.00 on account of obligations related to the Basic Life Program.

75. The Debtors provide Employees with a retirement plan through which Employees can accumulate savings for their future. The Debtors offer a 401(k) plan (the “401(k) Plan”) to their Employees who have completed three (3) months of service. Participants in the 401(k) Plan may contribute up to the maximum federally-permitted amount of their eligible compensation. The Debtors provide a matching contribution up to three percent (3%) of the Employee’s pay. Employees may select from several mutual funds available under the 401(k) Plan to invest their contributions and the matching contribution from the Debtors. Prior to the Petition Date, the Debtor provided notice to their 401(k) Plan provider of their intent to terminate the 401(k) Plan effective July 31, 2009. The Debtors estimate that, as of the Petition Date, they owe \$7,500 on account of obligations related to the 401(k) Plan.

76. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the Health Plan, the Basic Life Program and the 401(k) Plans, provided, however, that the aggregate amount paid to each Employee on account of prepetition wages, salaries, and benefits does not exceed the statutory cap of \$10,950; and (ii) continue to administer the Health Plan post-petition in the ordinary course.

#### **COBRA Obligations**

77. The Debtors have COBRA responsibilities (the “COBRA Obligations”) with respect to existing COBRA qualified participants. The Debtors currently have approximately twelve (12) terminated employees participating in a COBRA benefits plan. The Debtors’ aggregate monthly premium costs for COBRA Obligations is approximately \$7,500 per month for medical and dental coverage. However, because a qualified participant may elect to receive COBRA benefits in the future for past months, the monthly COBRA Obligations may increase. The Debtors estimate that, as of the Petition Date, they owe \$13,100 on account of COBRA Obligations. By this Motion, the Debtors seek, *inter alia*, authority, but not direction, to (i) honor all obligations, including claims incurred prior to the Petition Date and certain monthly maintenance and/or administrative fees, relating to the COBRA Obligations; provided, however, that the aggregate amount paid to each former employee on account of prepetition COBRA Obligations does not exceed the statutory cap of \$10,950; and (ii) continue to administer the COBRA Obligations post-petition in the ordinary course.

#### **Prepetition Withholding Obligations**

78. As part of the foregoing relief, the Debtors also seek authorization to pay all Employee federal and state withholding and payroll-related taxes relating to the prepetition period including, but not limited to, all withholding taxes, social security taxes, unemployment taxes, medicare taxes and garnishments, as well as all other withholdings such as contributions to savings, retirement or pension plans, insurance contributions and charitable contributions, if any (collectively, the “Withholding Obligations”).

79. The Debtors routinely withhold from Employee paychecks the Withholding Obligations, and are required to transmit these amounts to third parties. The Debtors believe that such withheld funds, to the extent that they remain in the Debtors’

possession, constitute monies held in trust and therefore are not property of the Debtors' estates. Thus, whether or not such funds are prepetition amounts, the Debtors believe that directing such funds to the appropriate parties does not require Court approval. Nevertheless, out of an abundance of caution, the Debtors are seeking Court authority to pay any outstanding amounts owed by the Debtors for Withholding Obligations, in the ordinary course of business, including those incurred prior to the Petition Date. The Debtors' average weekly combined Withholding Obligations is approximately \$15,000.

#### **Independent Contractors**

80. The Debtors utilize two independent contractors (collectively, the "Independent Contractors") in order to provide IT systems assistance in the ordinary course of business. Independent Contractors are hired on an as needed basis. The Independent Contractors have knowledge regarding (i) the reservation system required to continue reporting and data retrieval for processing of refunds to customers; (ii) the interface from the reservation system to the general ledger and (iii) the various IT processes required for monthly reconciliations. The Debtors estimate that, as of the Petition Date, they owe approximately \$5,000 on account of Independent Contractor obligations (the "Independent Contractor Claims"). Accordingly, by this Motion, the Debtors seek authority, but not direction, to pay prepetition amounts due on account of Independent Contractor Claims in the ordinary course of business, provided, however, that payments to Independent Contractors on account of Independent Contract Claims shall not exceed the amounts afforded priority status by any applicable provision of section 507 of the Bankruptcy Code.

#### **Reimbursable Expenses**

81. The Debtors have policies whereby their Employees and Independent Contractors seek reimbursement of various business-related expenses (the “Reimbursable Expenses”). The Reimbursable Expenses are incurred by Employees and Independent Contractors in the ordinary course of business in the performance of their job functions. The Reimbursable Expenses include, but are not limited to, air travel, hotel, automobile, meals, cellular telephones and other business-related expenses. It is difficult to estimate the amount outstanding as of the Petition Date but, on average, the Debtors spend approximately \$5,000.00 per month on Reimbursable Expenses. Accordingly, by this Motion, the Debtors seek, *inter alia*, discretion to pay Reimbursable Expenses incurred prior to the Petition Date.

#### **Direction to Banks**

82. The Debtors also seek the entry of an order authorizing and directing all banks and financial institutions to receive, process, honor, and pay any and all checks or electronic transfers drawn on the Debtors’ payroll and general disbursement accounts related to ordinary course Employee Compensation, including wages, salaries, incentives, and other compensation, COBRA Obligations, Employee Benefits, Employee Benefit Plans, Sick Time, Reimbursable Expenses, and Independent Contract or Claims, whether presented before or after the Petition Date, and without further order of Court, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

83. Based on the foregoing, I believe that the relief requested in the wage motion is necessary, appropriate and is in the best interests of the Debtors’ estates, creditors, and other parties-in-interest.

#### **F. Insurance Motion**

84. The Debtors request authority, pursuant to sections 105(a), 363(b)(1), and 503(b) of the Bankruptcy Code, to continue their Insurance Policy (defined below) programs uninterrupted, pay associated Insurance Policy premiums and related expenses, and honor their undisputed prepetition obligations thereunder, to the extent that the Debtors determine in their discretion that such payment is necessary or appropriate to avoid cancellation, default, alteration, assignment, attachment, lapse, or any form of impairment to the coverage, benefits, or proceeds provided under the Insurance Policies.

85. In the ordinary course of the Debtors' business, the Debtors maintain a number of insurance policies, including (i) marine (which includes, but is not limited, to hull and machinery coverage, increased value coverage, and war risks); (ii) protection and indemnity; (iii) marine general liability; (iv) bumbershoot liability; (v) certificates of financial responsibility; (vi) property insurance; (vii) workers compensation; (viii) business automotive insurance; and (ix) directors' and officers' liability and employment practices liability insurance (collectively, the "Insurance Policies").

86. The Debtors estimate that the aggregate monthly payment to Insurance Companies on account of insurance premiums is approximately \$120,000. The Insurance Policies are essential to the preservation of the Debtors' business, property, and assets, and, in many cases, such coverages are required by the various regulations, laws, and contracts that govern the Debtors' commercial activity.

87. On information and belief, the Debtors' are current as of the Petition Date with respect to their pre-petition premium obligations except (i) where the Debtors have not received the applicable invoice or (ii) where the Debtors currently dispute the applicable invoice. However, payments may come due in the future and failure to make these premiums when due

will cause harm to the Debtors' estates in several ways. If the Debtors fail to make their payments, the insurers will be permitted to terminate the Insurance Policies to recoup their losses. The Debtors would then be required to obtain replacement insurance on an expedited basis. This replacement insurance likely would require not only that the Debtors pay a lump-sum premium for the insurance policy in advance, but would likely involve a higher overall cost than the premium the Debtors currently pay. Even if the insurers were not permitted to terminate the Insurance Policies, any interruption of payment would have a severe and adverse impact on the Debtors' ability, in the ordinary course of business, to renew any Insurance Policies that expire post-petition.

88. Based on the foregoing, I believe the relief requested in the insurance motion is necessary, appropriate and is in the best interests of the Debtors' estates, creditors, and other parties-in-interest.

**G. Claims Agent Retention Application**

89. The Debtors propose to retain Donlin, Recano & Company, Inc. ("Donlin") as claims, noticing and balloting agent *nunc pro tunc* to the Petition Date in these chapter 11 cases. The Debtors anticipate that there will be hundreds of entities or individuals that will need to be served with various notices, pleadings, and other documents filed in these chapter 11 cases. In consideration of the number of anticipated claimants and parties-in-interest and the nature of the Debtors' business, I believe that the appointment of Donlin will expedite the distribution of notices and relieve the Clerk of the administrative burden of processing such notices.

90. Donlin is a data processing firm that specializes in processing, noticing, balloting, disbursement and other administrative tasks in chapter 11 cases. The Debtors seek to

engage Donlin to send out certain designated notices and maintain claims files and a claims register, assist with schedule preparation and, when the time comes, to act as solicitation and voting agent in these chapter 11 cases. The Debtors believe that such assistance will expedite service of Bankruptcy Rule 2002 notices, streamline the claims administration process, and permit the Debtors to focus their attention on their liquidation efforts.

91. Based on the foregoing, I believe that the retention of Donlin in connection with these chapter 11 cases is in the best interests of the Debtors' estates and especially creditors and should be granted in all respects.

#### **H. Motion to Extend Time to File Schedules and SOFAs**

92. The Debtors seek to extend the time period to file their schedules of assets and liabilities and statements of financial affairs (collectively, the "Schedules") through and including July 14, 2009 (the "Extension"). Pursuant to Bankruptcy Rules 1007(a)(4) and (c) and Local Rule 1007-1(b), this Court is authorized to grant the Debtors additional time to file their Schedules for cause beyond the automatic thirty (30) day extension provided under Local Rule 1007-1(b).

93. Although the Schedules were not filed with the Debtors' petitions, annexed to the petitions are lists containing the names and addresses of each of the Debtors' 30 largest unsecured creditors. In addition, the Debtors have prepared a creditor matrix containing all the names and addresses of the Debtors' known creditors and other parties-in-interest in these cases as required by Bankruptcy Rule 1007(a).

94. The Debtors have been unable to complete their Schedules because of: (a) the level of sophistication of their capital structure and their financial affairs; (b) the limited staffing available to perform the required internal review of the Debtors' books and records and

accounts and affairs; (c) the diversion of resources necessary to attend to numerous issues in connection with the prosecution of these cases; and (d) the accelerated pace at which the Debtors' time-sensitive bankruptcy efforts have proceeded, including drafting petitions and first day pleadings. Because these factors will prevent the Debtors from assembling the information necessary to complete and file their Schedules prior to June 29, 2009, sufficient cause exists to grant the Extension.

95. Based on the foregoing, I believe that extending the deadline for the Debtors to complete and file their Schedules through July 14, 2009 is in the best interests of the Debtors, their creditors, and all parties-in-interest, and should be granted in all respects.

**I. Motion for Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals**

96. With respect to professionals whose retention has been approved by this Court in these chapter 11 cases (other than the "ordinary course professionals" addressed in the next section), the Debtors seek to establish procedures for the interim compensation and reimbursement of fees and expenses for such professionals ("Professionals") on a monthly basis and in a manner consistent with those established in other large chapter 11 cases in this District. The requested compensation procedures, as outlined in the motion filed contemporaneously herewith, will permit the Debtors, the Court, the U.S. Trustee and all other parties-in-interest to monitor the professional fees incurred in these chapter 11 cases more effectively.

97. In general, Professionals will file monthly fee notices and, if there is no objection, shall be paid 80% of fees and 100% of expenses. Every ninety (90) days, Professionals will file applications seeking interim approval of the amounts already paid, as well as any amounts held back. Finally, at the conclusion of these chapter 11 cases, Professionals will

file an application seeking final approval of all interim amounts paid, plus any outstanding amounts.

98. Based upon the foregoing, I believe that establishment of the requested compensation procedures is in the best interests of the Debtors, their creditors, and all other parties-in-interest, and request that this motion be granted in all respects after notice and a hearing to be subsequently scheduled.

**J. Motion for Order Authorizing Employment and Retention of Ordinary Course Professionals**

99. The Debtors request authority to employ and retain certain professionals (“Ordinary Course Professionals” or “OCP”) they utilize in the ordinary course of their business, effective *nunc pro tunc* as of the Petition Date, or at a later date if additional OCPs are needed. The OCPs provide services to the Debtors in a variety of discrete matters including, among other things, general corporate, employment, insurance, maritime and litigation matters.

100. In light of the costs associated with the preparation of employment applications for professionals who will receive relatively small fees, it is impractical and costly and inefficient for the Debtors to submit individual applications and proposed retention orders for each of the Ordinary Course Professionals. Accordingly, the Debtors seek discretion to employ and retain the Ordinary Course Professionals, in the ordinary course of business, without the necessity of a separate formal retention application approved by this Court, and to compensate the Ordinary Course Professionals for postpetition services rendered, subject to the limits set forth in the underlying motion, without the need for further approval by the Court.

101. Based upon the foregoing, I believe that retention of the Ordinary Course Professionals is in the best interests of the Debtors, their creditors, and all other parties-in-

interest, and should be granted in all respects after notice and a hearing to be subsequently scheduled.

102. **[Intentionally Deleted]**

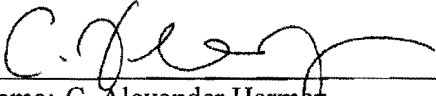
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### CONCLUSION

103. In summary, I believe that the relief requested in these First Day Motions is in the best interests of the Debtors, creditors, and all parties-in-interest, and should be granted in all respects.

104. I declare, subject to section 3 hereof, under penalty of perjury that the foregoing is true and correct.

Executed On: May 30 2009

  
\_\_\_\_\_  
Name: C. Alexander Harman  
Title: Secretary and Director of the Debtors