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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	Chapter 11
TOYS "R" US, INC., et al.,	:	Case No. 17-34665 (KLP) (Jointly Administered)
Debtors.		

MATTEL, INC.'S STATEMENT (I) IN SUPPORT OF THE DEBTORS' 9019 MOTION (II) ALTERNATIVELY FOR ALLOWANCE AND REIMBURSEMENT OF REASONABLE COMPENSATION PURSUANT TO SECTIONS 503(B)(3) AND (4) OF THE BANKRUPTCY CODE AND (III) IN REPLY TO THE OBJECTION OF UNITED STATES TRUSTEE

Mattel, Inc. ("**Mattel**") submits this statement (the "**Statement**") (i) in support of the *Debtors' Motion For Entry Of An Order (I) Approving (A) The Settlement Agreement, (B) Opt-Out Procedures Applicable To The Settlement Agreement, and (C) A Substantial Contribution*

Claim Under Section 503(B)(3)(D) Of The Bankruptcy Code; and (II) Granting Related Relief, filed on July 17, 2018 [Docket No. 3814] (the "**Motion**")[1]; (ii) alternatively for allowance and reimbursement of reasonable compensation pursuant to Sections 503(b)(3) and (4) of the Title 11 of the United States Code (the "**Bankruptcy Code**"); and (iii) in reply to the Objection to the Motion [Docket No. 3979] (the "**Objection**") filed by the Office of the United States Trustee (the "**U.S. Trustee**") and respectfully states as follows:

PRELIMINARY STATEMENT

1. Mattel submits this Statement and the attached Declaration of Richard L. Wynne (the "**Wynne Declaration**") in support of the Motion to provide the Court with further information regarding several subjects, specifically (i) Mattel's views on and support for the Settlement Agreement, (ii) the negotiations leading to the interrelated compromises comprising the global Settlement Agreement, (iii) the potential causes of action and claims held by trade vendors and the rationale for settling those claims as part of the Settlement Agreement, and (iv) the specific and important role Mattel and certain other administrative trade vendors (collectively, the "**Administrative Vendor Group**") played in achieving the overall Settlement Agreement, and why those efforts entitle the participating vendors to recover part of their legal fees and expenses (the "**Vendor Fees**") from the substantial contribution pool.

2. The attached Wynne Declaration, as well as other pleadings filed in support of the Motion, address points (i) through (iii) above, and thus will not be addressed in this Statement. As such, this Statement will address only the final point: the significant role the Vendor Administrative Group—and in particular, Mattel—played in reaching the critical Settlement Agreement now before the Court.

[1] Hereinafter, capitalized terms shall have the same meaning as ascribed to them in the Motion unless otherwise defined herein.

JURISDICTION

3. This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

4. Mattel is one of the Debtors' most significant unsecured and administrative trade vendors. When the Debtors filed this proceeding, the Debtors owed Mattel approximately $140 million on account of unpaid trade receivables, which includes $27.5 million entitled to priority under 11 U.S.C. §503(b)(9). Mattel has now also filed administrative proofs of claim against the Debtors exceeding $90 million on account of unpaid post-petition goods shipped to the Debtors during the Chapter 11 case.

5. Additional factual and procedural background relevant to this Statement is set forth in the Wynne Declaration submitted herewith and incorporated herein by reference.

I. BASIS FOR RELIEF WITH RESPECT TO THE PAYMENT OF PROFESSIONAL FEES TO THE ADMINISTRATIVE VENDOR GROUP

A. Payment is Part of a Consensual Agreement.

6. The Court should approve the Settlement Agreement—including the Vendor Fee reimbursement provisions agreed to therein—so long as the Settlement Agreement meets the reasonableness standard of Rule 9019. In determining whether a settlement is reasonable, a court is not required to decide the merits of each claim or hold a "mini trial", but must have enough information to evaluate the reasonableness of the proposed settlement. (Motion ¶ 50). In the Motion, the Debtors submit that the parties' agreement to pay the Vendor Fees, as one component of the consensual Settlement Agreement, is reasonable because the Administrative Claim Vendors' efforts are sufficient to satisfy the substantial contribution

requirements under Section 503(b) of the Bankruptcy Code. (*See, e.g.*, Motion ¶¶ 46-47, 55-64). The Declaration provides the Court with further information regarding the nature and impact of Mattel's (and all of the Administrative Vendor Group's) efforts. If the Court agrees, based on the extensive record now before it, that the Debtors' decision to enter into the Settlement Agreement is reasonable, then the payment of Vendor Fees under the Settlement Agreement is permissible and no separate application for or showing of substantial contribution is required. *See, e.g.*, *In re Adelphia Commc'ns Corp*., 441 B.R. 6 (Bankr. S.D.N.Y. 2010).

7. In *Adelphia,* the Bankruptcy Court for the Southern District of New York thoughtfully addressed the issue of whether a consensual agreement between creditors and the debtor for payment of reasonable fees to the creditor as part of a chapter 11 plan pursuant to Section 1129(a)(4) was permissible without a separate showing of substantial contribution under Section 503(b). *Id*. at 12.

8. The court held that the showing of a substantial contribution was not required because Section 503(b) is not consensual in nature but rather provides a creditor with an affirmative right to a claim whether or not a debtor agrees to such a payment, provided that the creditor meets the standards set forth therein. *See id*. The court noted that "importantly, [S]ection 503(b) does not provide in words or substance, that it is the only way in which fees of this character may be absorbed by an estate." *Id*. at 12-13.

9. Here, as in *Adelphia*, the creditors are seeking fees pursuant to a consensual agreement with the Debtors in the proposed Settlement Agreement. This provision, therefore, is but one of the provisions the Court should review under the standard set forth in Rule 9019. (*See* Motion at ¶¶ 48-54).

10. For the reasons set forth in the Motion, the fee provision and the Settlement Agreement as a whole are in the best interests of the Debtors' estates and Mattel is entitled to the requested fees.

B. Mattel Made a Substantial Contribution in These Chapter 11 Cases and Reimbursement is Appropriate.

11. To the extent the Court determines that the Administrative Vendor Group does have to demonstrate a substantial contribution to be entitled to fees, even those provided for consensually, Mattel meets that standard.

a. *Mattel Made a Substantial Contribution in These Cases*.

12. Section 503(b) provides that professional fees may be payable if "a creditor . . . [makes] a substantial contribution in a case under chapter . . . 11." 11 U.S.C. § 503(b)(3)(D). Courts have applied a number of factors in determining whether a party's efforts constituted a substantial contribution, including, among other things, whether (1) the "services substantially contributed to the proper allocation of Debtors' value among stakeholders"; (2) the applicants acted to the benefit of the class of "interest-holders of which class it was a member"; (3) the applicant would have acted without guarantee of payment from the estate; (4) the benefit conferred through the applicant's "substantial contribution" exceeds the cost the applicant seeks to assess against the estate; and (5) whether the applicant's efforts were duplicative of other parties participating in the proceeding. *See. e.g.*, *In re Mirant*, 354 B.R. 113, 132-34 (Bankr. N.D. Tex. 2006).

13. Section 503 of the Bankruptcy Code authorizes the bankruptcy court to award reimbursement to creditors for their legal and other expenses incurred in making a substantial contribution in a chapter 11 case. *E.g.*, *In re Primary Health Servs.*, 227 B.R. 479,

484 (Bankr. N.D. Ohio 1998); *In re Granite Partners, L.P.*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997). Section 503 provides, in relevant part:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> . . .
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> . . .
>
> (D) a creditor. . . or a committee representing creditors. . . other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
>
> [and]
>
> . . .
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph... (D) . . . of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant....

11 U.S.C. § 503(b).

14. Reimbursement based on substantial contribution is designed to promote meaningful participation in the bankruptcy process but, at the same time, discourage mushrooming administrative expenses. *In re DP Partners Ltd. P'ship*, 106 F.3d 667, 672 (5th Cir. 1997) (stating that services that confer a substantial benefit are those which "foster and enhance, rather than retard or interrupt the progress of reorganization"); *Matter of Baldwin-United Corp.*, 79 B.R. 321, 338 (Bankr. S.D. Ohio 1987) (same); *In re Encapsulation Int'l, Inc.*, No. 96-31762, 1998 WL 801898, at *3 (Bankr. W.D. Tenn. Nov. 9, 1998) ("'[S]ubstantial

contribution' encourages participation by creditors in the reorganization process, but does not encourage mushrooming administrative expenses") (alterations omitted); *see also Granite Partners*, 213 B.R. at 445; *In re Best Prods. Co., Inc.*, 173 B.R. 862, 865 (Bankr. S.D.N.Y. 1994); *In re Alert Holdings Inc.*, 157 B.R. 753, 757 (Bankr. S.D.N.Y. 1993); *In re U.S. Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989), *aff'd*, Nos. 90 Civ. 3823, 90 Civ. 4491, 1991 WL 67464 (S.D.N.Y. Apr. 22, 1991).

15. The term "substantial contribution" is not defined in the Bankruptcy Code. Instead, interpretation has been left to the discretion of the court on a case-by-case basis. Whether a creditor's conduct has made a substantial contribution in a case is a question of fact. *Encapsulations Int'l*, 1998 WL 801898 at *2 ("The Bankruptcy Court does not define 'substantial contribution' nor does it set forth criteria to evaluate the same; rather, whether an applicant has shown 'substantial contribution' is fact intensive, determined upon a case-by-case analysis"); *see also Trade Creditor Group v. L.J. Hooker Corp., Inc. (In re Hooker Invs., Inc.)*, 188 B.R. 117, 120 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 349 (2d Cir. 1996).

16. Despite the Debtors' chapter 11 estates being both large and complex, the Debtors and the Administrative Vendor Group (among others) were able to reach a Settlement Agreement providing a meaningful recovery for all of the Debtors' vendors which incurred administrative expense claims during the Chapter 11 Cases. This would certainly not have been the case if other strategies had been pursued. The Administrative Vendor Group recognized the value of settlement and the preservation of estate resources, which benefited the Debtors' estates as a whole. Moreover, the Debtors' estates were increased, and their costs decreased, by the Administrative Vendor Group's active participation in the settlement negotiations. Without the efforts of this small subset of administrative vendors, the resolution now before the Court would

not have been possible, and the benefits that will redound to the Debtors' estates and Administrative Creditors if the Settlement Agreement is approved could not be realized.

17. Mattel's actions, in particular, meet the highest possible standard. Mattel wore two hats in this case: one as co-chair to the Creditors' Committee, and the other as an individual vendor, unsecured creditor, and ultimately administrative creditor in these cases. To be clear, although Mattel's role as co-chair of the Creditors' Committee required a significant commitment of Mattel's time and resources throughout these cases (*see* Wynne Declaration ¶¶ 10-11), Mattel is not seeking to recover under the Settlement Agreement for any of the substantial fees and expenses it incurred for either (i) any ordinary Committee business it engaged in at any point in these cases (including after the liquidation) or (ii) any efforts it undertook on its own behalf before it became aware that the Debtors may be forced to liquidate. Instead, Mattel only seeks reimbursement for those fees and expenses it incurred advancing the interests of itself and similarly-situated administrative trade vendors after it learned (on March 2, 2018) of the potential liquidation, as the interests it advanced during this period were not necessarily aligned with those of the Committee at large or unsecured creditors generally.[2]

18. Specifically, Mattel seeks reimbursement for tasks such as leading the effort to have a group coalesced to negotiate with respect to issues arising from the liquidation, taking the lead role in researching and evaluating the claims that individual vendors might have with respect to the events surrounding liquidation, coordinating with the Committee and its professionals to combine efforts and work together with the Ad Hoc Vendor group to maximize

[2] Mattel first learned of the potential liquidation on or about March 2, 2018. At that time, Mattel was scheduled to receive $45 million in scheduled payments (including $13 million due by March 12, 2018), and was scheduled to ship approximately $16 million to the Debtors, during March. In fact, Mattel was scheduled to ship over $500,000 per day on each of March 5, 6, 7 and 8, 2018. Despite the fact that Mattel knew—due to the Debtors' impending liquidation—that it was unlikely to receive payment for any of the goods it was scheduled to ship, Mattel was nonetheless required to make those shipments under the terms of its Critical Vendor Agreement, as the Debtors had not yet formally defaulted on their payment obligations. (*See* Wynne Declaration ¶ 13).

recovery for both administrative and unsecured creditors, and negotiating with the Debtors, Committee, B4 Lenders and independent directors.

19. While the Settlement Agreement was the result of the constructive hard work of many participants, nobody can reasonably dispute that from the day that Mattel first learned of the possible liquidation, Mattel took a unique leadership role in raising issues of concern to all trade vendors, and ultimately played a key role in negotiating a successful resolution of the difficult issues that are now resolved in the Settlement Agreement. (*See generally*, the Wynne Declaration). Mattel's immediate and effective action benefited each and every administrative trade vendor in these cases.

20. Where a creditor directly and substantially improves the treatment provided for creditors, such creditor has made a substantial contribution in the case. *See, e.g.*, *Rail Pass Exp.*, 227 B.R. 136, 138 (S.D. Ohio 1998) ("The Court's concern is whether the actions of Rail Europe forced the debtor to come up with a deal whereby all creditors would be paid in full immediately or to face the prospect that its present ownership interest would not survive reorganization. The Court concludes that Rail Europe's actions did produce the beneficial effect. Without Rail Europe's actions, there would have been little incentive for the debtor to come up with a better plan even though subsequent events made it possible to do so"); *In re Serv. Merch. Co., Inc.*, 256 B.R. 738, 743 (Bankr. M.D. Tenn. 1999) ("The 'air of cooperation' in a case of this size is rare, and the administrative costs saved by the synergy of the parties is significant. Hotly litigated issues and scorched earth policies would have generated even larger professional fees and expenses. There is no question that the services provided by both of these professionals, as set forth above, constitutes a substantial contribution, and furthermore that the estate has been the fortunate beneficiary of these invaluable services"); *Milo Butterfinger's Inc. v. Two Down,*

Inc., No. 98-0507, 1998 WL 292371 (N.D. Tex. May 21, 1998); *Roberts v. Petroleum World, Inc. (In re Roberts)*, 93 B.R. 442, 445 (D.S.C. 1988) (awarding compensation to a creditor who made a substantial contribution by forcing a debtor to amend its plan to provide for payment of interest on unsecured claims).

21. As discussed in the Wynne Declaration, without Mattel's involvement, coupled with the cooperative work of the entire Administrative Vendor Group, the Debtors' estates would have been involved in one or more complex and lengthy litigations that would have greatly increased the estates' administrative expenses and decreased the resources available for distribution to creditors. Mattel's involvement in these chapter 11 cases was truly cooperative in nature and benefited all creditor groups.

22. Courts have particularly recognized that reimbursement for substantial contribution is appropriate where a creditors' voluntary cooperation resolves disputes and benefits the estates as a whole. *See Baldwin-United*, 79 B.R. at 338 (creditor was "instrumental" in mediating certain disputes"); *Encapsulation Int'l*, 1998 WL 801898 at *3 (holding that reimbursement was appropriate because creditor brought parties together for consensual resolution, when the plan could not have been confirmed otherwise); *Serv. Merch.*, 256 B.R. at 743.

23. Here, Mattel's efforts contributed substantially and uniquely to the culmination of the Settlement Agreement, which maximizes recoveries and provides substantial benefits to all parties; these efforts were not necessary for Mattel alone to resolve its claim, but inured to the benefit of all unsecured creditors. (*See generally,* the Wynne Declaration). Mattel's vigorous participation in the settlement negotiations satisfies all of the factors supporting a substantial contribution claim: (1) the resulting Settlement Agreement provides for payment to

holders of Administrative Claims; (2) Mattel acted to the benefit of the "interest-holders of which class it was a member" by achieving the settlement for all of the holders of Administrative Claims that do not opt-out of the Settlement Agreement; (3) as demonstrated by the fees it incurred and the potential that the Motion would be denied, Mattel acted without guarantee of payment from the estate; (4) the value paid to the holders of Administrative Claims in the Settlement Agreement far exceeds the value such holders would have received without the Settlement Agreement, and provides substantial value to the Debtors' estates by raising and resolving issues in these cases that affected all parties, thereby reducing litigation costs and uncertainty; and (5) Mattel's efforts were not duplicative of any other party.

24. As noted above, Mattel is seeking reimbursement of its legal fees and expenses only with respect to (i) the events surrounding the liquidation and U.S. Wind Down; (2) its investigation of the Vendor Claims, and (iii) the negotiation of the various orders, and agreements including the Settlement Agreement. Mattel is not seeking reimbursement for amounts owed to any accountants or other professionals. Further, Mattel's counsel charged Mattel its standard rates for similar matters, and applied all discounts to which Mattel would ordinarily be entitled.

25. Although courts have found reimbursement to be inappropriate where a creditor's actions were exclusively for the benefit of that creditor or the creditor was a member of the creditors' committee acting in that capacity (*see In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 296 (S.D.N.Y. 2014); *In re Ace Fin. Co.*, 69 B.R. 827, 831 (N.D. Ohio 1987); *In re Farm Bureau Servs., Inc.* 32 B.R. 69, 70-71 (Bankr. E.D. Mich. 1986), case law is clear that Committee members are not disqualified from making substantial contribution motions. *See In re Brendle's Stores, Inc.,* 164 B.R. 523, 526 (Bankr. M.D.N.C. 1994); *In re Aviation Technical*

Support, Inc., 72 B.R. 32, 34 (Bankr. W.D. Tex. 1987); *In re Toy and Sports Warehouse, Inc.*, 38 B.R. 646, 648 (Bankr. S.D.N.Y. 1984). As explained above, Mattel is not seeking to be reimbursed for ordinary actions as a committee member and therefore it is permitted to seek substantial contribution for its extraordinary efforts.

26. Under the foregoing circumstances, Mattel submits that a substantial contribution claim is justified and the Motion should be granted.

b. Mattel Is Entitled To Reimbursement For Reasonable Compensation For Services Rendered And Reimbursement Of Expenses Incurred In Making A Substantial Contribution In These Chapter 11 Cases.

27. Once a court determines a creditor made a substantial contribution in a chapter 11 case under Section 503(b)(3), the court must approve the creditor's request for reimbursement for reasonable fees under Section 503(b)(4). *See Rail Pass*, 227 B.R. at 138-39; *In re Texaco, Inc.*, 90 B.R. 622, 627, 630-32 (Bankr. S.D.N.Y. 1998).

28. During these chapter 11 cases, the Administrative Vendor Group expended a significant amount of time and effort in making a substantial contribution in these cases. (*See generally*, the Wynne Declaration). The services they provided were rendered in an efficient manner by attorneys and advisors who have achieved a high degree of expertise in the field of business reorganizations and restructurings. (*Id.*) The amounts the Motion seeks are commensurate with compensation allowances in cases of similar size and nature, considering the complexity, importance, and nature of the issues and tasks involved, as well as the compressed timeframe in which those services were provided. Moreover, neither Mattel nor other claimants are seeking reimbursement for all services rendered in these chapter 11 cases. (*See* Wynne Declaration, Ex. A-D.) Specifically, as previously discussed, Mattel is seeking reimbursement

only for (i) the events surrounding the liquidation and U.S. Wind Down; (2) its investigation of the Vendor Claims, and (iii) the negotiation of the Settlement Agreement.

29. The fees for which Mattel seeks reimbursement were determined in accordance with Hogan Lovell's existing billing rates and procedures in effect during the applicable compensation period. The rates for which reimbursement is sought are the same rates charged to Mattel for professional and paraprofessional services rendered in this case. Such fees are reasonable based on the customary compensation charged by comparably skilled practitioners in comparable non-bankruptcy cases in a competitive national market. Attached as Exhibits A-C to the Wynne Declaration are a series of charts showing all fees and expenses incurred with respect to this matter from March 1, 2018 through August 7, 2018, the portion related to the liquidation, U.S. Wind Down, vendor claim investigation and Settlement Agreement and a breakout of the attorneys who represented Mattel and their hourly rates.

30. Mattel is only seeking reimbursement of a portion of the total fees and expenses incurred since March 1, 2018, for the services described herein. The parties had originally estimated that the $2 million allocated for reimbursement of Vendor Fees would be sufficient to pay, in full, all of the Administrative Vendor Group's Vendor Fees. The negotiation and documentation of the Settlement Agreement, however, proved to be more time consuming and expensive than anticipated. Thus, two weeks ago, members of the Administrative Vendor Group updated their respective estimates, and found collectively they were seeking reimbursement of approximately $2.8 million; Mattel understands that number has continued to grow. The parties have thus agreed that the $2 million Vendor Fee amount shall be allocated to the Ad Hoc Vendor Group in the amount of $1.4 million, and to Mattel, Huffy and LEGO in the amount of $600,000.

31. Mattel, Huffy and LEGO had estimated their fees to be $740,000, $100,000 and $175,000 respectively. It is now likely that their actual fees and expenses incurred eligible for reimbursement will exceed those numbers. Mattel, Huffy and LEGO have nonetheless agreed that they will base their pro rata recovery on the estimates they previously provided. (*See* Wynne Declaration, Ex. D). The benefits received by all administrative trade creditors are far more substantial.

32. Finally, the U.S. Trustee's Objection is misplaced. The parties are entitled to settle their legitimate disputes by agreeing to substantial contribution payments. In *Lehman Brothers*, the court held that the broad language of Sections 1123(b)(6) and 1129(a)(4) allowed members of a creditors' committee to bargain to have their fees paid through a plan of reorganization without meeting the requirements of Section 503(b). *See* 487 B.R. at 193. Similarly, as discussed above, in *Adelphia*, the court held that creditors could be paid reasonable fees as part of a Chapter 11 plan pursuant to Section 1129(a)(4) without a showing of substantial contribution under Section 503(b). *See* 441 B.R. at 19.

CONCLUSION

33. Mattel has expended a significant amount of its time, effort and expense working with the Debtors, the Committee, the Ad Hoc Vendor Group, the Debtors' lenders and the Debtors' independent directors to reach the far-reaching Settlement Agreement now before the Court. Mattel's actions in this regard benefitted not only itself, but all administrative vendor creditors in these cases. As a result, Mattel requests that the Court (i) grant the Debtors' Motion, (ii) allow for reimbursement of reasonable compensation in an amount of $2,000,000 to the Administrative Vendor Group, for amounts paid or to be paid to the Administrative Vendor Group's professionals for services rendered during the period from March 1, 2018 through and

including August 7, 2018, and (iii) authorize and direct the Debtors to pay the foregoing amounts.

Richmond, Virginia
Dated: August 6, 2018

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