To: ISDA Credit Derivatives Determinations Committee (EMEA)

Date: September 20, 2019

Re: Thomas Cook Group Plc Failure to Pay Credit Event

Has a Failure to Pay Credit Event occurred with respect to Thomas Cook Group PLC?

Capitalized terms used but not otherwise defined herein shall have the meanings assigned to them in the 2014 Credit Derivatives Definitions (the "**Definitions**").

Introduction

Under Section 4.5 of the Definitions, a Failure to Pay Credit Event occurs on:

> "*…the failure by the Reference Entity to make, when and where due, any payments in an aggregate amount of not less than the Payment Requirement*[1] *under one of more Obligations, in accordance with the terms of such Obligations at the time of such failure.*"

Thomas Cook Group PLC (the Reference Entity), has failed to pay, when due, the principal and unpaid interest pursuant to the €750,000,000 aggregate principal amount 6.25% guaranteed senior unsecured notes due to mature on 15 June 2022 (the "**2022 Notes**") and the €400,000,000 aggregate principal amount 3.875% guaranteed senior unsecured notes due to mature on 15 July 2023 (the "**2023 Notes**") (the 2022 Notes and the 2023 Notes are together the "**Notes**"),[2] both qualifying Obligations under Section 3.1 of the Definitions, which have been automatically accelerated as a result of an Event of Default (as defined in the Notes).

As discussed below, this constitutes a Failure to Pay Credit Event under Section 4.5 of the Definitions.

The terms of the Notes[3]

Both the 2022 Notes and the 2023 Notes, which are governed by New York, law have as "Events of Default" (at clause 6.01(7) of the 2022 Notes, and clause 6.01(5) of the 2023 Notes):

The Reference Entity:

> "*(A) commences a voluntary case under any applicable Bankruptcy Law or any other case to be adjudicated bankrupt or insolvency [sic], or files for or has been granted a*

[1] "Payment Requirement" means the amount specified as such in the related Confirmation or its equivalent in the relevant Obligation Currency (or, if no such amount is specified, USD 1,000,000 or its equivalent in the relevant Obligation Currency) in either case as of the occurrence of the relevant Failure to Pay or Potential Failure to Pay, as applicable. Section 4.9(d) of the Definitions.

[2] The combined accelerated principal of €1.15 billion is plainly in excess of the Payment Requirement of "$1,000,000 or its equivalent in the Obligation Currency".

[3] A copy of the Notes is included in the Thomas Cook Group plc Explanatory Statement in Relation to Schemes of Arrangement. (https://www.thomascookgroup.com/investors/insight_external_assest/ThomasCook-ExplanatoryStatement-August2019.pdf) (the "**Explanatory Statement**")

moratorium on payment of its debts, or files for bankruptcy or is declared bankrupt;

…

"*(F) files a petition or answer or consent seeking reorganization for relief (other than a solvent reorganization for purposes of transferring assets among the Issuer and its Restricted Subsidiaries)*"

Further, pursuant to Section 6.02 of the indentures governing the Notes "*If an Event of Default [as set out above] occurs and is continuing, the principal of and accrued but unpaid interest on all the Notes will become immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.*"

Background[4]

The Reference Entity is proposing a reorganization of its liabilities (the "**Reorganization**"). The Reorganization comprises, *inter alia*, the conversion of £1.67 billion of the Reference Entity's debt to equity (the "**Debt-for-Equity Swap**").[5] The Reorganization was proposed to be effected through various English law schemes of arrangement (the "**Schemes**") and recognition proceedings pursuant to chapter 15 of the Bankruptcy Code (the "**Chapter 15 Proceedings**"). Upon being sanctioned by the courts of England and Wales, the Schemes would amend the relevant finance documentation – including documentation governing the Notes – to insert terms necessary to permit the Reorganization. The Chapter 15 Proceedings would seek relief from the bankruptcy courts of the United States so as to prevent any dissenting creditor from seeking to exercise their un-amended rights under the Notes.

On August 30, 2019, an application was made in the High Court of Justice in England and Wales to convene meetings of those creditors whose rights were proposed to be compromised by the Schemes. The High Court granted the application and made an order convening creditors' meetings on September 27, 2019.[6]

On September 16, 2019, petitions were presented to the United States Bankruptcy Court for the Southern District of New York pursuant to chapter 15 of the Bankruptcy Code seeking recognition of the Schemes so as to implement and enforce the Reorganization of the New York law-governed debt against dissenting creditors.[7]

An Event of Default has occurred

As prefaced above, an Event of Default occurs if:

A. The Reference Entity "*commences a voluntary case under any applicable Bankruptcy Law or any other case to be adjudicated bankrupt or insolvency, or files for or has been granted a*

[4] For a more thorough discussion of the relevant facts, please see the verified petition ("**Verified Petition**") filed by the Reference Entity in support of recognition of its Chapter 15 Proceedings. *In re Thomas Cook Group plc,*. Case No. 19-12984-mg (Bankr. S.D.N.Y. 2019), Docket No. 3.
[5] Verified Petition ¶ 26.
[6] Verified Petition fn. 6.
[7] Verified Petition ¶¶58, 59.

moratorium on payment of its debts, or files for bankruptcy or is declared bankrupt"; or

F. The Reference Entity "*files a petition or answer or consent seeking reorganization for relief.*"

A. The Reference Entity commenced a voluntary case under any applicable Bankruptcy Law.

An Event of Default occurred under the 2022 Notes and the 2023 Notes with respect to the Reference Entity when it voluntarily commenced a Chapter 15 case.

An Event of Default occurs if the Reference Entity (1) commences a voluntary case, (2) under any applicable Bankruptcy Law.

Both the 2022 Notes and 2023 Notes define Bankruptcy Law to include Title 11 of the U.S. Code (the "**U.S. Bankruptcy Code**"). Chapter 15 was enacted under Title 11 of the U.S. Code. *See* 11 U.S.C. § 1501 *et seq.*[8]

Section 1504 of the U.S. Bankruptcy Code provides that "[a] case under this chapter is commenced by filing a petition for recognition of a foreign proceeding under section 1515." 11 U.S.C. § 1504.[9] The Reference Entity did so, and it did so voluntarily.[10]

Nothing more is required. Based on a plain reading of the Event of Default, the applicable "voluntary case under any applicable Bankruptcy Law", triggering the Event of Default need not result in an adjudication of bankruptcy or insolvency. Indeed, the phrase "to be adjudicated bankrupt or insolvency [sic]" modifies only the phrase "other case" and not the phrase "voluntary case under any applicable Bankruptcy Law." That interpretation is consistent with a long line of United States Supreme Court and other jurisprudence applying the well-settled canon of statutory and contract interpretation of the Rule of the Last Antecedent. That canon provides that a limiting clause or phrase (here, "to be adjudicated bankrupt or insolvency [sic]" ordinarily modifies the clause or phrase that it immediately follows (here, "other case").[11]

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[8] *See also In re British Am. Ins. Co., Ltd.*, 488 B.R. 205, 221-22 (Bankr. S.D. Fla. 2013) ("The Court has jurisdiction over the above-captioned Chapter 15 case as it is a case 'under title 11' within the meaning of 28 U.S.C. § 1334(a)."); *In re Gold & Honey, Ltd.*, 410 B.R. 357, 359, n.1 (Bankr. E.D.N.Y. 2009) ("Chapter 15 is found under Title 11 of the United States Code").

[9] *See also* 11 U.S.C. § 1509(a) ("a foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515"); *In re Grant Forest Prods. Inc.*, Case No. 10-11132, 2012 WL 3017090, at *1 (Bankr. D. Del. Apr. 11, 2012) (stating that the court-appointed monitor "commenced these chapter 15 cases by filing petitions pursuant to sections 1504 and 1515 of the Bankruptcy Code."); *In re Ernst & Young, Inc.*, 383 B.R. 773, 776 (Bankr. D. Col. 2008) ("Pursuant to § 1504, a case under Chapter 15 is commenced by a foreign representative filing a petition for recognition of a foreign proceeding under § 1515.").

[10] *See* Chapter 15 Petition, *In re Thomas Cook Group plc*,. Case No. 19-12984-mg (Bankr. S.D.N.Y. 2019), Docket No. 1 and Item 6 attached thereto at ¶ 21 (the "**Chapter 15 Petition**").

[11] *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 26-28 (2003) (holding that the rule of the last antecedent applied, despite the use of the word "other" in the Social Security statute)*; FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-91 (1959) (recognizing that the use of the word "other" in a limiting clause did not cause the limiting clause to modify anything other than the last antecedent); *JPMorgan Chase Bank N.A. v. Baupost Grp., LLC (In re Enron Creditors Recovery Corp.)*, 380 B.R. 307, 322 (S.D.N.Y. 2008) (applying Rule of Last Antecedent to indenture governed by New York law).

Accordingly, the commencement of the Chapter 15 Proceedings resulted in an automatic Event of Default under both the 2022 and 2023 Notes.

F. The Reference Entity filed a petition, answer or consent seeking a reorganization for relief.

An Event of Default occurred under the 2022 Notes and the 2023 Notes with respect to the Reference Entity when it filed its Chapter 15 petition.

An Event of Default occurs if the Reference Entity "has filed a petition, answer or consent seeking a reorganization for relief."

Here, the Reference Entity has filed "a petition" in the form of a Chapter 15 petition. *See* Chapter 15 Petition.

That Chapter 15 Petition, seeks a "reorganization" as relief in both form and substance.

In form, the Chapter 15 Petition requests the United States Bankruptcy Court to recognize and give effect to the UK Proceedings and the Schemes and enforce them against dissenting creditors.[12] In order to even obtain recognition under Chapter 15, the UK Proceedings must be proceedings "for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23). The Reference Entity acknowledges as much and admits that the UK Proceedings are for the purpose of reorganization.[13] Accordingly, the Chapter 15 Petition, on its face, is a "petition" that seeks to implement a "reorganization."

In substance, the Chapter 15 Proceedings are a necessary component to the Reorganization.[14] Without recognition pursuant to Chapter 15 of the Bankruptcy Code, the Schemes will not be effective in compromising the rights of creditors holding the New York law governed debt. The Reference Entity has accepted that the Chapter 15 Proceedings are a condition precedent to the implementation of the Schemes.[15] Were the Reference Entity not seeking to implement the Reorganization, it would not be necessary to apply for the court sanction of the Schemes or the recognition of the Schemes in the Chapter 15 Proceedings. The Chapter 15 Proceedings shall, therefore, have the substantive effect of making enforceable in the United States the Schemes which will alter the rights of creditors (both consenting and dissenting) for the purpose of implementing the Reorganization.

Accordingly, by filing the Chapter 15 Petition, the Reference Entity "has filed a petition . . . seeking reorganization for relief" and has therefore created an automatic Event of Default under the 2022 Notes and the 2023 Notes.

Acceleration

Under the 2022 Notes and the 2023 Notes the occurrence of these Events of Default caused the principal and unpaid interest on the Notes to become automatically due and payable without any

[12] *See, e.g.*, Verified Petition Exhibit A-1 at (B) and (D).
[13] Verified Petition ¶ 73 (The UK Proceedings are pending in a foreign country . . . for the purpose of reorganization.")
[14] *In re Thomas Cook Group plc,*. Case No. 19-12984-mg (Bankr. S.D.N.Y. 2019), Docket No. 11. ¶ 4.
[15] Verified Petition ¶¶ 7, 41.

action required by the trustee or holders. *See* § 6.02 of the indentures governing each of the Notes ("If an Event of Default [as set out above] occurs and is continuing, the principal of and accrued but unpaid interest on all the Notes will become immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.").

Failure to Pay Credit Event

A Failure to Pay Credit Event occurs when, after the expiration of any applicable Grace Period, the Reference Entity has not made, when and where due, payments in excess of the Payment Requirement under the Notes, in accordance with their terms.

The Chapter 15 Proceedings were filed on September 16, 2019. This was an Event of Default, automatically triggering an obligation to pay debts in excess of €1.15 billion. These sums have not been paid.[16] There is no Grace Period in the Notes, and therefore a Grace Period of three days is deemed to apply.[17] That Grace Period has now expired.

Conclusion

The Reference Entity is seeking to enter into a Reorganization, and has voluntarily instigated US bankruptcy proceedings to support this. In those circumstances, the Notes become immediately due payable and have not been paid. A Failure to Pay Credit Event has therefore occurred.

Were the Schemes to be sanctioned, and the Debt-for-Equity-Swap follow shortly thereafter, this would imperil the orderly functioning of the CDS auction by restricting the availability of Deliverable Obligations. In the circumstances, time is short and we respectfully seek the timely determination of this matter by the Determinations Committee.

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We confirm that a copy of this statement may be provided to the members of any Credit Derivatives Determinations Committee convened under the DC Rules in connection with the General Interest Question to consider the issues discussed herein, and that it may be made publicly available on the ISDA Credit Derivatives Determinations Committee website. We accept no responsibility or legal liability in relation to its contents.

[16] Given the widely publicized liquidity issues at the Reference Entity and general market awareness that the full face amount of the bonds remains outstanding (*e.g.* on the basis that the Debt-for-Equity Swap is for the full outstanding face amount), we do not think additional Publicly Available Information is necessary here. It is also worth noting that the DC members will also perform their own diligence and they should therefore independently confirm that the notes are indeed still outstanding.

[17] Section 1.46 of the Definitions.