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Crystal McDowell

DC-18-18371
CAUSE NO.__________

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| MARBLE RIDGE CAPITAL LP and MARBLE RIDGE MASTER FUND LP, | § | IN THE DISTRICT COURT |
| Plaintiffs, | § | |
| v. | § | F-116TH ___ JUDICIAL DISTRICT |
| NEIMAN MARCUS GROUP, INC., MARIPOSA INTERMEDIATE HOLDINGS LLC, NEIMAN MARCUS GROUP LTD LLC, THE NEIMAN MARCUS GROUP LLC, and NEIMAN MARCUS GROUP INTERNATIONAL LLC, | § | |
| Defendants. | § | DALLAS COUNTY, TEXAS |

**PLAINTIFFS' ORIGINAL PETITION**

Plaintiffs Marble Ridge Capital LP and Marble Ridge Master Fund LP by and through their undersigned counsel, hereby allege upon knowledge and/or upon information and belief, as follows:

## I. DISCOVERY CONTROL PLAN

1. For purposes of Rule 190.1, Plaintiffs allege that this matter is subject to Discovery Level 3 in accordance with Texas Rule of Civil Procedure 190.3.

## II. CLAIMS FOR RELIEF, JURISDICTION, AND VENUE

2. Plaintiffs seek monetary relief in excess of $1,000,000. TEX. R. CIV. P. 47(c). Plaintiffs demand judgment for all other relief to which Plaintiffs deem themselves entitled. TEX. R. CIV. P. 47(d). This Court has subject matter jurisdiction over the lawsuit because the amount in controversy exceeds the Court's minimum jurisdictional requirements. This Court has personal jurisdiction over the Defendants, *inter alia*, because each are either headquartered in Dallas County, Texas, conduct significant business in Dallas County, Texas, and/or are controlled directly

or indirectly by Defendants headquartered in Dallas County, Texas. At least one of the limited partners of the Plaintiffs is a Delaware corporation. Venue for this suit is proper in Dallas County as all or substantially all of the events or omissions giving rise to the claims occurred in Dallas County, Texas. Further, Dallas County is the location of several Defendants' principal offices in Texas.

## III. PARTIES

3. Plaintiff Marble Ridge Capital LP ("Marble Ridge Capital") is a Delaware limited partnership with executive offices located at 111 West 33rd Street, New York, New York 10120. Marble Ridge Capital is the advisor to Plaintiff Marble Ridge Master Fund LP ("Master Fund"), a Cayman Islands limited partnership. The Master Fund holds loans outstanding under the Credit Agreement (as defined below) as well as bonds issued by Defendant Neiman Marcus Group LTD LLC under the Indentures (as defined below). Marble Ridge Capital and the Master Fund are referred to collectively herein as "Marble Ridge" or "Plaintiffs."

4. Defendant Neiman Marcus Group, Inc. (the "Parent") is a Delaware corporation with its headquarters at 1618 Main Street, Dallas, Texas 75201.

5. Defendant Mariposa Intermediate Holdings LLC ("Holdings") is a Delaware limited liability company with its headquarters at 1618 Main Street, Dallas, Texas 75201. Upon information and belief, Holdings is the direct subsidiary of Parent.

6. Defendant Neiman Marcus Group LTD LLC (the "Company") is a Delaware limited liability company with its headquarters at 1618 Main Street, Dallas, Texas 75201. Upon information and belief, the Company is the direct subsidiary of Holdings.

7. The Neiman Marcus Group LLC ("Opco") is a Delaware limited liability company with its headquarters at 1618 Main Street, Dallas, Texas 75201. Upon information and belief, Opco is a direct subsidiary of Company.

8. Neiman Marcus Group International LLC ("International") is a Delaware limited liability company with its headquarters at 1618 Main Street, Dallas, Texas 75201. Upon information and belief, International is a direct or indirect, wholly-owned subsidiary of Opco.

## IV. NATURE OF ACTION

9. This fraudulent transfer and receiver action arise from an integrated two-step scheme (the "Scheme"), orchestrated by the Parent, to loot the Company and to hinder, delay and defraud the creditors of the Company by transferring assets representing approximately $1 billion of value to Parent **for no consideration**. This Scheme was perpetrated for the benefit of the indirect beneficial owners of the Company, Ares Management L.P. ("Ares") and the Canada Pension Plan Investment Board ("CPPIB"; Ares and CPPIB, collectively, the "LBO Sponsors").

10. The Company is a debtor under the fraudulent transfer law applicable to the Transfers (as hereinafter defined) by reason of its obligations to repay money under the Indentures, the Credit Agreement and other instruments and agreements. Marble Ridge is a statutory creditor of the Company.

11. The Company operates as a luxury department store and online retailer. The Company's brands include Neiman Marcus and Bergdorf Goodman. Until recently, the Company also owned and operated an internet brand, "myTheresa," targeting luxury European and other non-US markets.

12. The Company is highly leveraged as a result of two successive leveraged buy-outs. After the second of these leveraged transactions occurred in 2013, the Company was saddled with approximately $4.91 billion in funded debt. This debt includes term loans under the Credit Agreement, approximately $366.0 million of additional debt under a revolving credit facility, and approximately $1.62 billion of unsecured notes issued under the Indentures maturing in

2021.

13. Loans under the Credit Agreement mature in October 2020. If the Company is unable to repay or refinance the Credit Agreement three months prior to the October 2020 maturity, this will trigger a "springing maturity" that will cause the Company's revolver to mature early – in July 2020. A default under the revolver will set off a cascade of events leading to bankruptcy. Because the Company is insolvent, in a bankruptcy, unsecured creditors will recover only a small fraction of the par value of the Company obligations that they hold.

14. The purpose of the Scheme was to remove valuable assets from the Company, where they could have been used to satisfy the claims of the Company's creditors. Instead, as a result of the Scheme, these assets have been placed beyond the reach of the Company's creditors in order to hinder and delay creditor recovery.

15. As the first step in the Scheme, on March 10, 2017, the Company unilaterally removed certain controlled subsidiaries from the restrictions placed on the Company by its creditors. These subsidiaries included the entities that owned the myTheresa brand, with an estimated value of $1 billion, as well as US real estate that, according to the Company's own disclosures, is worth no less than $100 million.[1]

16. In September, 2018, the Company announced the second step of the Scheme – distributing the myTheresa assets indirectly to Parent for no consideration whatsoever.

17. Prior to execution of the Scheme, the Company owned, indirectly through its subsidiaries, the equity in the entities that owned myTheresa. Now that the Scheme has been

[1] As explained herein, each of these controlled entities was formerly a "Restricted Subsidiary" and, until redesignated by the Company as an "Unrestricted Subsidiary," was accordingly subject to covenants imposed under the operative indentures or credit agreements with regard to, among other matters, the incurrence of liabilities and liens and the transfer of value.

completed, the myTheresa brand and related assets are owned by the Parent or by entities owned or controlled by the Parent.

18. The Scheme was concocted against the backdrop of the Company's insolvency and in order to serve the interests of Parent. Prior to March 2017, when the first step in the Scheme was taken, the Company was already in financial trouble. Like other "brick and mortar" retailers, the Company's profitability was in sharp decline. Between fiscal years ended August 1, 2015 and July 28, 2018, the Company's EBITDA, a key metric of profitability, declined by nearly 33% from $711 million to $478 million. Another indicator, margin on sales, also declined from approximately 14% to less than 10%. The Company's financial distress has been reflected in the prices at which its debt instruments traded. During the pre-Scheme period, the Company's unsecured bonds traded at significantly depressed prices. Following the Scheme's implementation, the prices of these instruments fell even further to only slightly above 50% of their par value. As early as 2016, analysts noted the deterioration in the Company's outlook. *Debtwire*, a widely-read subscription publication that covers debt markets, published recovery estimates showing that the Company has been deeply insolvent since the Fall of 2016.

| | **Debtwire Credit Reports on Neiman Marcus Group** | | | | | | |
|---|---|---|---|---|---|---|---|
| | December 2, 2016 | March 20, 2017 | June 22, 2017 | October 24, 2017 | December 14, 2017 | March 6, 2018 | June 29, 2018 |
| Bondholder Recovery: | 64% | 20% | 2% | 11% | 6% | 33.10% | 43.70% |
| Result: | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent |

19. Until completion of the Scheme, the myTheresa brand was a bright spot in an otherwise bleak landscape of declining profitability for the Company. Targeted to younger luxury fashion consumers in Europe, Asia, and the Middle East, myTheresa is the Company's non-US online retail platform. MyTheresa has not only experienced rapid revenue growth, but its profits increased by nearly 40% in the last twelve months ended July 28, 2018.

20. The Scheme depleted an already struggling retail enterprise (*i.e.*, the Company and its subsidiaries) by significantly reducing its overall asset value and usurping the opportunities

being pursued by the Company through the myTheresa brand.

21. Since completion of the Scheme, the value of the Company's assets, at a fair valuation, have fallen even further below the amount of its funded debt liabilities. The market has taken note: *Debtwire* reduced its recovery estimate from 43.7% to 31.6% after the Scheme occurred and Goldman Sachs published recovery estimates on Company obligations of between 7% and 26% after the Scheme occurred, indicating that the Company was and continues to be deeply insolvent.

22. The Company is facing looming short term debt maturities and has insufficient assets to pay its debts as they become due. Additionally, the Company is inadequately capitalized.

23. Plaintiffs, by this action, seek to, *inter alia*, avoid the transfers made to the Parent and/or to subsequent transferees pursuant to the Scheme as an intentional or constructive fraudulent transfer under applicable fraudulent transfer law and to recover from the Parent or such subsequent transferees the assets transferred pursuant to the Scheme—or their value. Further, Plaintiffs seek immediate appointment of a receiver pursuant to Texas Business Organization Code § 11.410, for Holdings and the Company for the limited purposes set forth herein.

24. The Scheme was enabled by a corporate governance structure of Parent, Holdings and the Company engineered to avoid liability for breach of fiduciary duties and to attempt to insulate the LBO Sponsors from any responsibility for their misdeeds. The Company is a member-managed limited liability company. Instead of having a board of managers or other similar governing body, the sole managing member of the Company is Holdings. Holdings is an entity under the direct control of the Parent and hence, under the control of the board of directors of the Parent (the "Parent Board"), which is controlled by the LBO Sponsors. Although Holdings, in its capacity as sole manager, owes a duty of good faith and loyalty *to the Company*, it is inherently

incapable of discharging such duty and has in fact breached its fiduciary duties by causing the Company, advised by conflicted professionals, to distribute valuable assets for the benefit of the Parent *even though the Company was insolvent*. At the same time, this Board-level conflict has been magnified by the role of the legal professionals at Kirkland & Ellis LLP and Proskauer Rose LP, which stand on opposite sides of the same transaction through their representation of both the Parent **and** the Company at the same time throughout these transactions.

25. Normally, if a subsidiary becomes insolvent, a separate and independent governing body exists (or can be formed) that is capable of making independent decisions affecting the insolvent subsidiary, as such body's applicable legal duties require. By design, as a result of the corporate structure implemented by the LBO Sponsors, no such independent body exists here. The members of the Parent Board are the only natural persons with fiduciary duties even capable (were they so inclined) of exercising fiduciary duties owed to the Company. Yet, as fiduciaries of the Parent, each of them is inherently and deeply conflicted. Although Holdings owed a duty of good faith and loyalty to the Company, acting under the indirect control of Parent, it breached that duty by causing the Company to distribute valuable assets for the benefit of the Parent even though the Company was insolvent. The appointment of a receiver here would allow a neutral third party to address this misconduct, *inter alia*, by bringing claims with respect to the misconduct alleged herein.

## V. FACTUAL BACKGROUND

### A. The Company

26. Neiman Marcus is a storied retailer whose origins go back to the beginning of the twentieth century. It began as a family owned department store and later operated as a part of a public company. In 2005, Neiman Marcus was acquired by TPG Global, LLC and Warburg Pincus LLC and, in connection with that transaction, formed the Company. On October 25, 2013, the

Company was acquired by the LBO Sponsors. The LBO Sponsors are the indirect, beneficial owner of the Company and its subsidiaries.

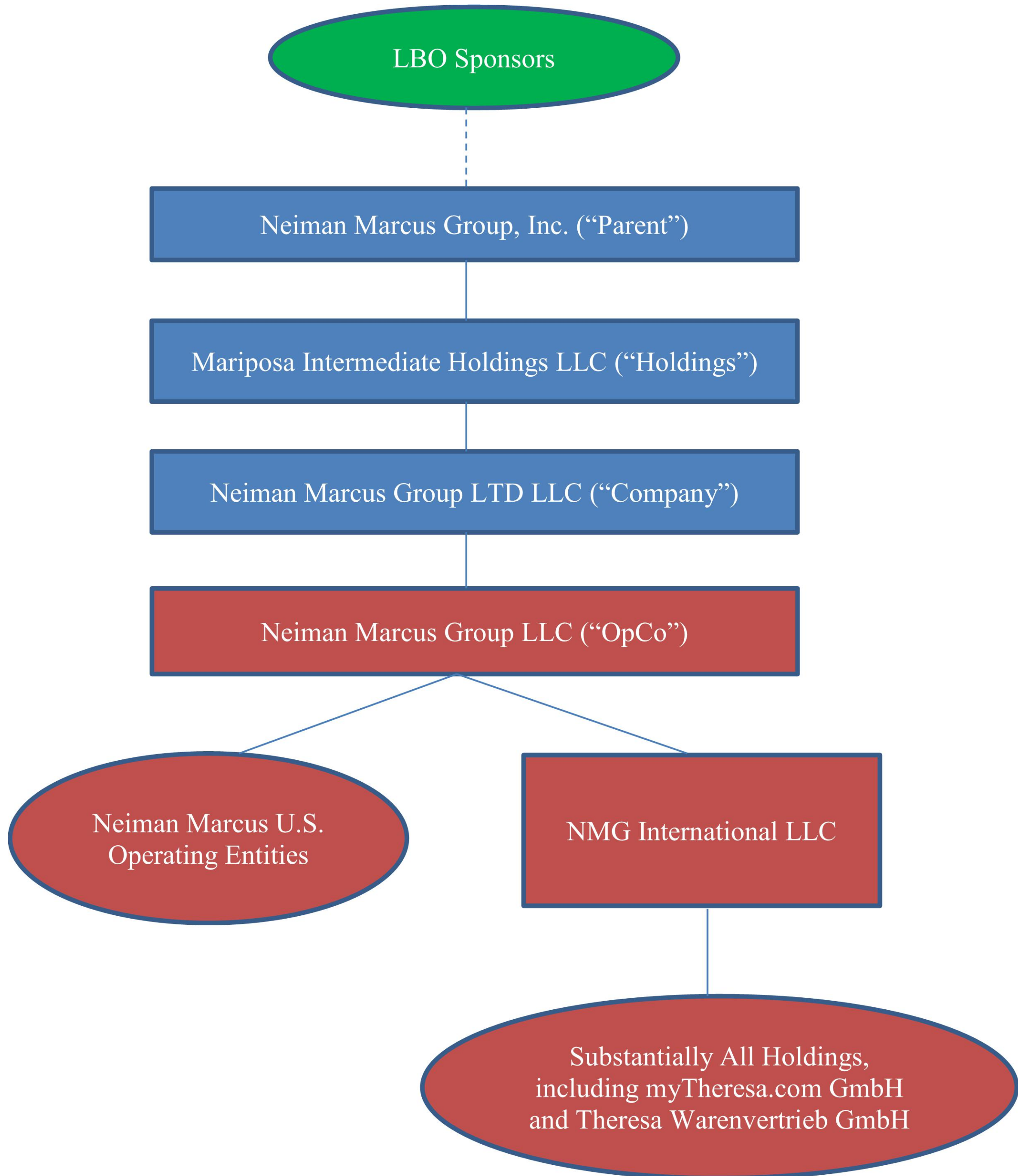
27. On October 28, 2013, the corporate form of the Company was changed from a Delaware corporation to a Delaware limited liability company. The Company is a "member managed" limited liability company. The sole member of the Company is Holdings. Holdings is the direct subsidiary of Parent. Pursuant to the publicly-filed version of the agreement governing the limited liability company, the LBO Sponsors designed the structure to eliminate any independent governing body at the Company by requiring that "[a]t no time shall the Company have any board of managers, board of directors or similar governing body." Instead, the sole member of the Company is Holdings, another pass-through limited liability company, which manages the business and affairs of the Company. Holdings, in turn, is a pass-through limited liability company, solely managed by Parent. This structure was intended by the LBO Sponsors, and their conflicted counsel, to eliminate any independence of the Company in the event of the Company's insolvency in favor of the Parent's sole control.

28. Upon information and belief, the LBO Sponsors exercise complete control over the Company by virtue of their ability to designate and to remove members of the Parent Board. The Parent, in turn, has absolute control over Holdings, by virtue of it being the sole member of Holdings which, as noted above, is a member-managed limited liability company.

29. The Company's operations are conducted through direct and indirect subsidiaries of the Company's immediate subsidiary, Opco.

30. The corporate structure of the Company immediately prior to the Scheme was as follows:

# PRE-SCHEME CORPORATE STRUCTURE



## B. Capital Structure

31. The Company's funded debt obligations exceed $4.91 billion, as of October 27, 2018. This is comprised of:

- **a.** $2,802.9 million of obligations under the Term Loan Credit Agreement, dated as of October 25, 2013, among Holdings, the Company, the subsidiaries of the Company from time to time party thereto, Credit Suisse AG, Cayman Islands Branch, as Administrative and Collateral Agent, and the lenders thereto, as amended (the "Credit Agreement");
- **b.** $367.3 million in revolving advances and letters of credit under the Revolving Credit Agreement, dated as of October 25, 2013, among Holdings, the Company, the subsidiaries of the Company from time to time party thereto, Deutsche Bank AG New York Branch, as Administrative and Collateral Agent, and the lenders thereunder (the "ABL");
- **c.** $960 million in principal amount of 8.0% Senior Cash Pay Notes due 2021 (the "Cash Pay Notes") under an indenture dated as of October 21, 2013 (the "Cash Pay Indenture"); and
- **d.** $658.4 million in principal amount of 6.875%/9.5% Senior PIK Toggle Notes due 2021 (the "PIK Notes") issued under an indenture dated as of October 21, 2013 (the "PIK Notes Indenture," and, collectively with the Cash Pay Indenture, the "Indentures").

32. In addition, Opco is an issuer of $125 million of pre-LBO secured debentures due June 1, 2028.

## C. MyTheresa Acquisition

33. In October 2014, the Company acquired myTheresa, a luxury retailer headquartered

in Munich, Germany for approximately $182 million in cash. Post-closing, the Company has paid an additional $50 million in disclosed "earn-out" payments based on the performance of myTheresa over the two-and-a-half years following its acquisition. The operations of myTheresa are conducted primarily through the mytheresa.com website and include a flagship store in Germany. To acquire myTheresa and pay subsequent earn-out payments, the Company used cash on its balance sheet.

34. Prior to the Scheme, the myTheresa assets were owned by indirect subsidiaries of the Company and NMG International.

**D. Weakening Financial Outlook for Retail**

35. Following the LBO, the Company's financial performance continued to decline. Although the Company has suffered from challenges specific to its own operations and assets, the past several years have also been a period of general decline for the department store sector. Secular headwinds for the retail apparel industry include customers spending less on apparel relative to other areas, a shift from shopping in-store to online, greater price transparency and increased competition from discount retailers. These changes are not transient – the financial press now refers to the current environment as the "retail apocalypse."

36. The bleak reality for retailers is well-illustrated by scores of retail bankruptcies including Claire's, Sports Authority, Bon-Ton, Toys-R-Us and, most recently, Sears, as well as predictions of bankruptcy and/or liquidation for historic brands such as JC Penney. Even storied companies like Macy's have been forced to shrink their store base, sell real estate and rethink their corporate strategy to survive in this "New Normal" retail environment. Relevant to consideration of the Scheme, retail businesses responding to these trends have looked to expand their presence online to maintain market share and appeal to a younger generation.

37. Same store sales dropped precipitously in the fourth quarter of 2015 in tandem with

declines in the price of oil and the U.S. dollar. Continuing during 2016 and 2017, the Company experienced same store sales declines of up to 8%. Even online sales in the U.S. (which exclude myTheresa) decreased materially. As discussed above, annual EBITDA declined by over 30% during this period, decreasing cash flows significantly. The impact of these developments on the Company would have been entirely foreseeable to the Parent. The Company generates a substantial portion of revenues from U.S. operations where consumer spending is particularly exposed to the price of oil and the value of the U.S. dollar. During this time period, the price of oil dropped precipitously and the U.S. dollar appreciated by approximately 15% against a basket of currencies. Due to deterioration of operating trends during 2016 and 2017, the Company recorded impairment charges for such periods aggregating $466.2 million in fiscal year 2016 and $510.7 million in fiscal year 2017.

38. The 2016 and 2017 impairment charges were primarily associated with the Neiman Marcus and Bergdorf Goodman brands.

39. The "retail apocalypse" is of obvious concern to the holders of the billions of dollars of Company obligations. However, the response of the LBO Sponsors, who control the Parent and accordingly, also the Company, has been to protect their own interests at the expense of the Company and its creditors. Upon information and belief, commencing in 2017 and continuing at present, the Parent, the Company and/or the LBO Sponsors have engaged in planning, negotiations and the implementation of transactions designed to remove assets owned by the Company, where they would be subject to the claims of the Company's creditors (whose funds were used to acquire those assets) and to transfer those assets to the Parent where they would not be subject to such claims and could be sold, used as collateral or otherwise misappropriated for the benefit of the LBO Sponsors.

**E. Step One: Creation of Unrestricted Subsidiaries.**

40. In March 2017, the Company revealed that it had redesignated certain "Restricted Subsidiaries" as "Unrestricted Subsidiaries" under the Indentures (the "Redesignation"). These newly unrestricted subsidiaries included the entities that owned myTheresa, as well as certain real properties in Texas and Virginia.

41. Prior to the Redesignation, the former Restricted Subsidiaries were subject to covenants imposed by the Indentures that limited the ability of those entities to transfer assets. Following the Redesignation, these restrictions were no longer applicable.

42. This Redesignation was met with concern, even alarm, by Plaintiffs and other creditors of the Company, as reflected by the plunging prices at which the bonds and loans of the Company traded in the subsequent months. The revelation of the Redesignation of the entities holding myTheresa and the Texas and Virginia real properties was not accompanied by any disclosure about the Company's ultimate plans for these "Unrestricted Subsidiaries." However, as subsidiaries of the Company, albeit Unrestricted Subsidiaries, these entities, at minimum, continued to provide meaningful credit support for the Company's debt.

43. Of course, the Company cannot simply redesignate its controlled subsidiaries – it can only do so in compliance with specific and highly technical provisions of its various debt instruments. Knowing this, the Company has deliberately chosen to conceal the data and calculations upon which it purportedly relied in effectuating the Redesignation. This lack of transparency has, of course, further stoked creditor concerns. Plaintiffs' repeated requests for the relevant information have been refused.

**F. Step Two: The Transfers**

44. At the time of the Redesignation and for several months thereafter, the Company maintained silence about its plans. Left in the dark, Plaintiffs attempted to understand the basis

upon which the Company had proceeded with the Redesignation – and also to foresee what further transactions the Redesignation portended. As recently as September 14, 2018, Plaintiffs advised Lazard Freres, financial advisors to the Company, that they were concerned that the Redesignation may have caused a default under the Indentures.

45. Then, less than a week later, the Company executed on its Scheme to cause the direct owners of the redesignated entities to distribute the equity of the redesignated entities up the corporate structure. This distribution was misleadingly disclosed as an "organizational change" of the Company. In fact, it was a removal of assets from the Company. The pertinent part of the disclosure is as follows:

> [T]the Company effected an organizational change as a result of which the entities through which the Company operates the MyTheresa business now sit directly under Neiman Marcus Group, Inc., the Company's ultimate parent entity. These entities were unrestricted, non-guarantor subsidiaries under the Company's debt instruments. *As a result of this change, going forward the financial results of the MyTheresa entities will no longer be included in the Company's publicly reported financial statements.*

46. Because the entities that hold the assets used in the myTheresa business (the "Transferred Entities") are no longer subsidiaries of the Company, if the Company defaults on its obligations to creditors, creditors will not be able to access, through liquidation or other means, the assets of the Transferred Entities (the "Transferred Assets") to satisfy their claims.

47. In order to move the Transferred Entities from the Company to the Parent pursuant to the so-called "organizational change," the Transferred Entities were distributed upwards in the corporate structure: first to each Transferred Entity's immediate parent, then to the parent of that transferee and so on until the Company became the direct owner of the Transferred Entity. Once the Company became the direct owner of a Transferred Entity, the Company then further distributed each Transferred Entity to Holdings. Holdings then further transferred the entity to

Parent or, possibly to affiliates of Parent. The pertinent part of the disclosure is as follows:

> In September 2018, substantially all of the holdings of NMG International LLC were distributed to NMG, to the Company, to Holdings and, ultimately, to Parent (the "Distribution"). These holdings consisted principally of the entities through which we conduct the operations of MyTheresa."

Form 10-K for the fiscal year ended July 28, 2018 at Note 19.

48. Upon information and belief, as a result of step two of the Scheme, the Parent is now the direct or indirect owner of the Transferred Assets. The Parent paid nothing for ownership of these assets. Since the Parent is privately owned, the creditors of the Company ***that financed the acquisition of myTheresa and oversaw its initial success and growth*** no longer even have access to information about the ownership of the Transferred Entities or Transferred Assets. It may be that the Transferred Entities or the Transferred Assets have been further transferred to one or more entities owned or controlled by the Parent or the LBO Sponsors.

49. None of the LBO Sponsors, the Parent or Holdings is obligated on the Term Loan or any of the Company's other funded debt. Upon information and belief, the Parent has no material creditors, meaning that the result of the two-step scheme is that the LBO Sponsors now beneficially hold the full value of the Transferred Assets.

50. The Company has refused to disclose a commercial justification for the so-called "organizational change" or to adequately answer any of Plaintiffs' inquiries regarding the independence of the Board of Directors and their advisors involved in the Scheme and the Company's purported solvency at the time of the Scheme.

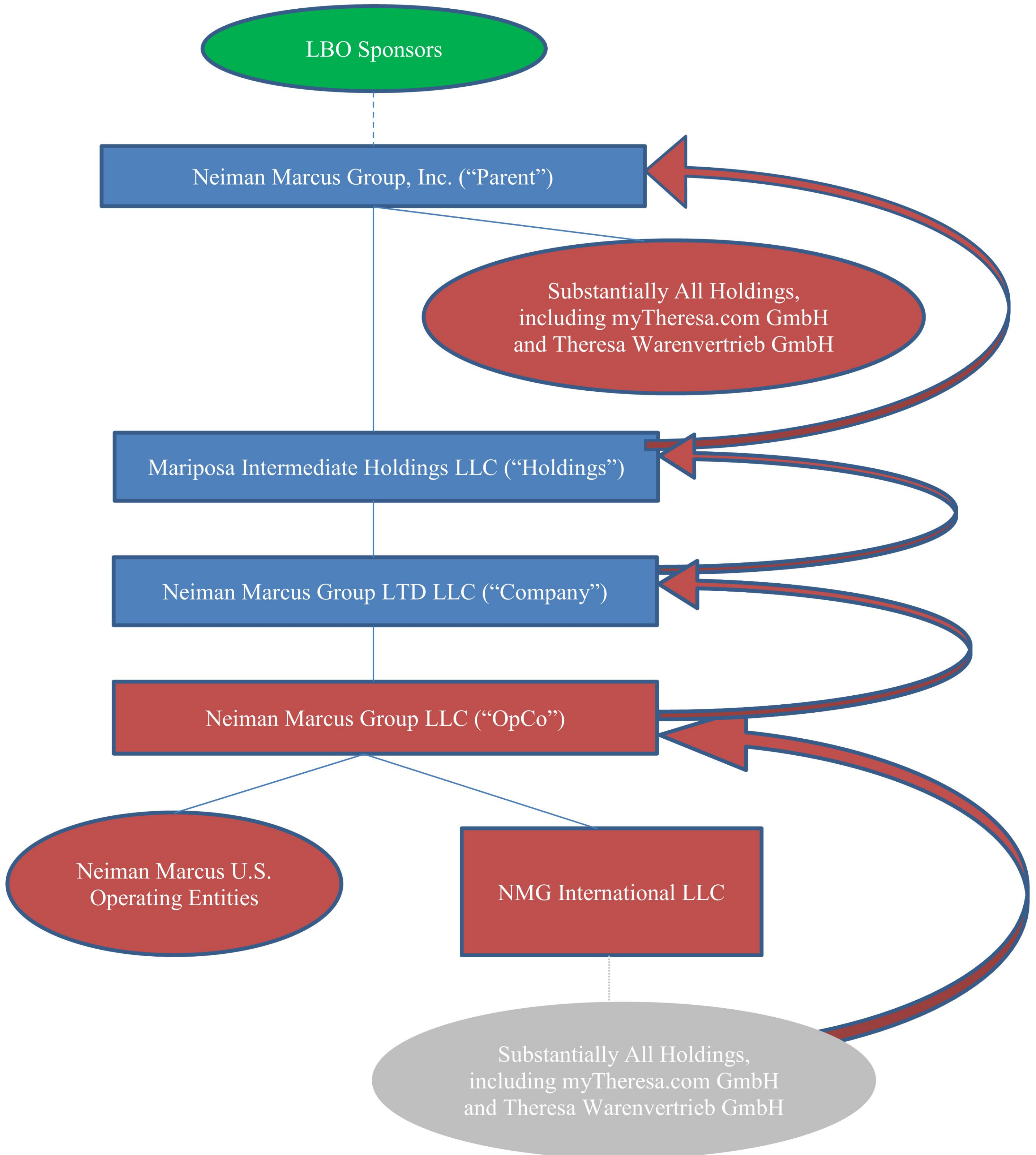
51. Plaintiffs believe that the change in ownership of the Transferred Assets was not accompanied by any change in the management or operations of myTheresa. Because the operations of myTheresa continue to be integrated with those of the Company, myTheresa's

operations will continue to benefit from synergies associated with the Company's other brands and operations. However, all of those benefits will flow to the Parent.

52. The Company's refusal to explain the commercial purpose of these transactions despite repeated requests evinces a conscious and deliberate decision to conceal, defraud, hinder and delay.

53. The following chart indicates the post-Scheme ownership of the Transferred Entities/ Transferred Assets:

**POST-SCHEME CORPORATE STRUCTURE**



### G. The Company Was Insolvent Prior to the Scheme and Became Further Insolvent as a Result.

54. Same store sales started to drop precipitously in the fourth quarter of 2015. Continuing during 2016 and 2017, the Company experienced same store sales declines of up to 8% resulting in decreasing profitability. Quarterly EBITDA also declined by up to 40% and declined year on year for over two years.

55. Prior to the Redesignation and the distribution of the Transferred Assets, the Company's Cash Pay and PIK Notes traded at significant discounts to par. Since the distribution of the Transferred Assets, the market value of the Company's notes has further declined, with both Cash Pay and PIK Notes trading close to 50c. Such substantial distress in the trading prices of the Company's funded indebtedness represents a market consensus regarding (and, thus, *prima facie* evidence of) both the Company's insolvency at the time of these transactions and its increased insolvency as a result thereof. A widely-read subscription publication, *Debtwire,* began publishing recovery estimates reflecting the impact of these trends on the Company's valuation as of December 2016.

| | Debtwire Credit Reports on Neiman Marcus Group | | | | | | |
|---|---|---|---|---|---|---|---|
| | December 2, 2016 | March 20, 2017 | June 22, 2017 | October 24, 2017 | December 14, 2017 | March 6, 2018 | June 29, 2018 |
| Bondholder Recovery: | 64% | 20% | 2% | 11% | 6% | 33.10% | 43.70% |
| Result: | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent | Insolvent |

56. Based on its most recent filing on Form 10-K, the Company achieved earnings before interest, taxes, depreciation, and amortization (or, "EBITDA") of $478 million for fiscal year 2018. Market participants and professional appraisers use a company's EBITDA as a key driver of its valuation. One common methodology compares the EBITDA of a privately-owned company (such as the Company) to public companies with known market capitalizations or private companies that have changed hands at known prices. Retailers comparable to the Company have market capitalizations or have changed ownership at EBITDA multiples that would imply that the

Company is deeply insolvent. On an LTM basis for the twelve-month period ended July 2018, the Company's leverage was approximately 10x EBITDA, a level far in excess of any valuation multiple implied by comparable firms.

57. The Company's assets are diverse and include a mix of poorly performing stores, faster-growing e-commerce activities and real estate. Since myTheresa is growing rapidly, it would be appropriate to use a higher multiple to value its operations. And, since performance of the brick-and-mortar operations has declined, it would be appropriate to apply a lower multiple to their earnings. Some assets, such as certain real estate also might have a fair value that cannot be ascertained based on EBITDA. It is clear that, pursuant to the Scheme, the Company has looted the myTheresa assets for the benefit of its LBO Sponsors and is prepared to do the same with the Real Estate.

58. Debtwire analyst recovery estimates imply that the Company without myTheresa may more appropriately be valued at $3.6 billion. Since the Company has approximately $4.7 billion in funded debt, its EBITDA and reasonable market multiples strongly indicate that its assets at a fair valuation are worth far less that its funded debt obligations.

59. In sum, since completion of the Scheme and as a result thereof, the Company has become significantly more insolvent. Moreover, the Company has suffered additional diminution in value since the Company is now a retailer that does not have financially integrated online operations in Europe and other important luxury markets. Not only will the Company not benefit from the growth of myTheresa, the Company's strategy will not include operations in the lucrative markets in which myTheresa operates. Going forward, the Company will likely avoid any activities that would bring it into competition with myTheresa, thereby compounding the detriment to the Company from the transfer of myTheresa.

60. The marketplace has taken note of the Company's increased insolvency: *Debtwire* reduced its recovery estimate even further to 31.6% after the Scheme occurred and Goldman Sachs published a recovery estimate of between 7% and 26%, indicating that the Company was and continues to be hopelessly insolvent. Even including Goldman Sachs' estimate of the value of myTheresa, recovery would range between 55% and 96%, even after returning the myTheresa assets to the Company.

**H. The Company Did Not Receive Equivalent Value For the myTheresa Assets**

61. Upon information and believe, the Scheme was completed without receipt by the Company of reasonably equivalent value in exchange for the Transferred Assets. Upon information and belief, the Company received **no consideration whatsoever** for its transfer of the Transferred Assets to the Parent.

**I. The Scheme Was Intended to Hinder, Delay and Defraud Creditors of the Company**

62. The Scheme was completed with the intent to hinder, delay and defraud creditors.

63. The Company, under the control of the LBO Sponsors and/or the Parent has taken extraordinary steps to obstruct the ability of creditors to lawfully challenge the Scheme. These steps have included instructing the Administrative Agent under the Credit Agreement not to consent to assignments of loans. Since, under the Credit Agreement, the purchaser of a loan succeeds to certain rights of lenders only upon assignment, and since the Company must consent to assignment (which consent however cannot be unreasonably withheld), the Company transparently seeks to hinder, delay and obstruct creditors by preventing them from acquiring these contractual enforcement rights. Upon information and belief, the withholding of consent is selective and is based on excluding any creditor that is unwilling to relinquish certain rights and/or that is perceived as antagonistic to the goals of the LBO Sponsor and/or the Parent.

64. The Company's intent to and hinder, delay and defraud creditors is further evidenced by the following badges of fraud:

(i) Transfer to an Insider. The purpose of the Scheme was to benefit the LBO Sponsors and/or the Parent. As a result of the Scheme, these insiders will, directly and indirectly hold the Transferred Assets free of the liens of the Company's creditors.

(ii) Retention of Control by the Debtor. Despite its transfer, the myTheresa Assets will continue to be operated by the Company and its management. From an operational aspect, the Scheme was a complete sham in that it had no operational effect or other legitimate, articulated business purpose.

(iii) Concealment of the Transfer. As alleged above, despite repeated requests, the Company, the LBO Sponsors, the Parent and their respective advisors have failed and refused to provide information to Marble Ridge to ascertain whether the Scheme transfers constituted a default under the Indebtedness. This willful silence is sufficient basis to conclude that the Company is well aware that it has acted in violation of the covenants of its debt instruments.

(iv) Absence of the Exchange of Reasonably Equivalent Value. As alleged, upon information and belief, the Transfers did not involve a reasonably equivalent value exchange. Upon information and belief, the Company received no consideration for the Transferred Assets.

(v) Ongoing or resulting insolvency. As alleged, the Company was insolvent at the time of the Transfers and remains insolvent at present.

**COUNT I**

(Intentional Fraudulent Transfer)

65. Plaintiffs incorporate all of the allegations of this petition into this cause of action as if fully re-alleged herein.

66. Pursuant to applicable fraudulent transfer law, a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer with actual intent to hinder, delay or defraud any creditor of the debtor.

67. The Scheme included transfers (the "Transfers") made after the Company incurred obligations to lenders and participants under the Credit Agreement.

68. The Transfers had no legitimate business purpose and was accompanied by badges of fraud as alleged above.

69. The Transfers was an effort to hinder, delay or defraud creditors, including Plaintiffs, in their exercise of rights and remedies against assets of the Company.

70. The Transfers were intentional fraudulent transfers under applicable fraudulent transfer law.

**COUNT II**

(Constructive Fraudulent Transfer)

71. Plaintiffs incorporate all of the allegations of this petition into this cause of action as if fully re-alleged herein.

72. Pursuant to applicable fraudulent transfer law, a transfer made by a debtor is fraudulent as to a creditor if the transfer was made (a) without receiving a reasonably equivalent value in exchange for the transfer, and (b) the debtor was insolvent at time or became insolvent as a result of the transfer.

73. The Transferred Entities were property of the Company.

74. The Company did not receive reasonably equivalent value in exchange in connection with the Transfers.

75. Both before and after the Transfers the Company, the sum of the Company's debts was greater than all of the Company's assets at a fair valuation.

76. The Company was insolvent or became insolvent as a result of the Transfers.

77. The Transfers were a fraudulent transfer under applicable fraudulent transfer law.

**COUNT III**

(Fraudulent Transfer)

78. Plaintiffs incorporate all of the allegations of this petition into this cause of action as if fully re-alleged herein.

79. Pursuant to applicable fraudulent transfer law, a transfer made by a debtor is fraudulent as to a creditor if the transfer was made (a) without receiving a reasonably equivalent value in exchange for the transfer, and (b) the debtor was engaged in a business for which the remaining assets of the debtor were unreasonably small in relation to the business of the debtor.

80. The Company did not receive reasonably equivalent value in connection with the Transfers.

81. The assets of the Company after the Transfers are unreasonably small in relation to the business of the Company to manage all assets and properties of such entities.

**COUNT IV**

(Appointment of a Receiver)

82. Plaintiffs incorporate all of the allegations of this petition in this cause of action as if fully re-alleged herein.

83. Pursuant to Texas Business Organizations Code § 11.410, the Court may appoint a receiver for all the property, in and outside of Texas of a foreign entity doing business in Texas in

the event the District Court determines within the ordinary usages of equity, that circumstances exist that necessitate the appointment of a receiver even if a receiver has not been appointed by another court.

84. The misconduct of Parent for the benefit of the LBO Sponsors, in looting approximately $1 billion in assets of the insolvent Company, pursuant to the Scheme, and other misconduct alleged herein which raise the grave prospect of further waste or dissipation of assets, warrants immediate appointment of a receiver for Holdings and the Company, that would allow a neutral third party to address this misconduct, *inter alia*, by bringing claims with respect to the misconduct alleged herein.

## VI. <u>CONDITIONS PRECEDENT</u>

85. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

## <u>REQUEST FOR RELIEF</u>

Plaintiffs respectfully request entry of judgment on the Petition as follows:

(i) On Count I, entry of a judgment against the Company, Parent, and Holdings (i) avoiding the transfer of the Transferred Assets, (ii) setting aside such transfer and all underlying transactions, (iii) returning the Transferred Assets to the Company and (iv) awarding damages based on the diminution of value of obligations owed by the Company.

(ii) On Count II, entry of a judgment against the Company, the Parent, and Holdings (i) avoiding the transfer of the Transferred Assets, (ii) setting aside such transfer and all underlying transactions, (iii) returning the Transferred Assets to the Company and (iv) awarding damages based on the diminution of value of obligations owed by the Company.

(iii) On Count III, entry of a judgment against the Company, and the Parent (i) avoiding

the transfer of the Transferred Assets, (ii) setting aside such transfer and all underlying transactions, (iii) returning the Transferred Assets to the Company and (iv) awarding damages based on the diminution of value of obligations owed by the Company.

(iv) On Count IV, immediate appointment of a receiver for Holdings and the Company.

Dated: December 10, 2018
Dallas, Texas

Respectfully submitted,

*/s/ Joshua L. Hedrick*

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