IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
GIBSON BRANDS, INC., *et al.*,	Case No. 18-11025 (CSS)
Debtors.[1]	Jointly Administered
	Response Deadline: **October 19, 2018 at 4:00 p.m. (ET)** **Hearing Date:** **November 19, 2018 at 11:00 a.m. (ET)**

DEBTORS' OBJECTION TO
TRONICAL'S PROOFS OF CLAIM, PURSUANT TO 11 U.S.C. §502(B),
FED. R. BANKR. P. 3007 AND LOCAL RULE 3007-1

The above-captioned debtors and debtors in possession (the "Debtors"), by and through their undersigned counsel, hereby file this objection (this "Objection"), for entry of an order, substantially in the form attached hereto as **Exhibit 1**, disallowing the Tronical[2] Claims[3] (as defined below), pursuant to section 502(b) of title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this Objection, the Debtors rely upon and incorporate by reference the Declaration of Bruce Mitchell in Support of Debtors' Objection to

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[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Gibson Brands, Inc. (4520); Cakewalk, Inc. (2455); Consolidated Musical Instruments, LLC (4695); Gibson Café & Gallery, LLC (0434); Gibson International Sales LLC (1754); Gibson Pro Audio Corp. (3042), Neat Audio Acquisition Corp. (3784); Gibson Innovations USA, Inc. (4620); Gibson Holdings, Inc. (8455); Baldwin Piano, Inc. (0371); Wurlitzer Corp. (0031); and Gibson Europe B.V. (Foreign). The Debtors' corporate headquarters is located at 309 Plus Park Blvd., Nashville, TN 37217.

[2] As used herein, "Tronical" shall refer, collectively, to Tronical GmbH, Tronical Components GmbH, Tronical Solutions GmbH, and Tectus Ansalt, each of whom filed a Proof of Claim against Gibson Brands, Inc.

[3] The Debtors reserve all rights to supplement this Objection to Tronical's Proofs of Claim, which remain subject to ongoing discovery pursuant to Fed. R. Bankr. P. 2004 and Del. Bankr. L. R. 2004-1, as ordered by the Court. *See* Dkt. No. 620.

Tronical's Proofs of Claim, Pursuant to 11 U.S.C. §502(B), Fed. R. Bankr. P. 3007 and Local Rule 3007-1 attached hereto as **Exhibit 2** (the "Mitchell Declaration" or "Mitchell Decl."), and respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief requested in the Motion is section 502(b) of the Bankruptcy Code as supplemented by Bankruptcy Rule 3007.

3. The Debtors confirm their consent pursuant to Local Rule 9013-1(f) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

GENERAL BACKGROUND

4. On May 1, 2018 (the "Petition Date"), the Debtors each commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases"). The Debtors' Chapter 11 Cases are being jointly administered for procedural purposes only. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On May 9, 2018, the Office of the United States Trustee for the District of Delaware appointed the Official Committee of Unsecured Creditors (the "Committee"). No trustee or examiner has been appointed in these cases.

6. A detailed description of the Debtors, including their business operations, their corporate and capital structure, and the events leading to the commencement of the Chapter 11 Cases, is set forth in greater detail in the *Declaration of Brian J. Fox in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* (Dkt. No. 4) and incorporated by reference herein.

7. On June 29, 2018, the Debtors filed their schedules of assets and liabilities and statements of financial affairs. Debtor Gibson Brands, Inc. ("Gibson") scheduled each of the entities comprising the defined term "Tronical" with contingent, unliquidated and disputed claims on account of Tronical's asserted potential litigation claims—each in undetermined amounts. *See* Dkt. No. 336 at 229-30.

8. On August 1, 2018, the Debtors filed the *Debtors' Third Amended Joint Chapter 11 Plan of Reorganization* (Docket No. 565) (as may be amended or supplemented, the "Plan"). A hearing to consider confirmation of the Plan is scheduled for September 27 and 28, 2018.

THE TRONICAL CLAIMS

9. On July 25, 2018, Tronical filed four proofs of claim against Gibson Brands, Inc., one each in the name of (1) Tronical GmbH ("Tronical GmbH Claim"), (2) Tronical Solutions, GmbH ("Tronical Solutions Claim"), (3) Tronical Components, GmbH ("Tronical Components Claim"), and (4) Tectus Anstalt ("Tectus Claim").[4] The total damages amount Tronical seeks under the Tronical GmbH Claim, the Tronical Solutions Claim, the Tronical Components Claim, and the

[4] Tronical GmbH is identified as the "creditor" to whom notices for each of the Tronical GmbH Claim, the Tronical Solutions Claim, the Tronical Components Claim, and the Tectus Claim should be sent.

Tectus Claim is $61,429,718.88 (the "Tronical Claims" or "Claims"), plus certain "unknown" damages based on Gibson's alleged ongoing infringement of certain intellectual property rights. True and correct copies of the Tronical GmbH Claim, the Tronical Solutions Claim, the Tronical Components Claim, and the Tectus Claim are attached hereto as **Exhibit 3**, **Exhibit 4**, **Exhibit 5**, and **Exhibit 6**, respectively.

10. In the Tronical GmbH Claim, Tronical asserts three separate claims, all allegedly stemming from Gibson's alleged breach of a September 23, 2009 Letter of Intent ("LOI") with Tronical GmbH and Tectus and a June 25, 2010 Master Professional Services Agreement ("MPSA") with Tronical GmbH. Based on Gibson's alleged breaches of the LOI and MPSA, Tronical claims to have "exercised its termination rights" under the LOI and MPSA to terminate those agreements effective November 13, 2017.

11. In the Tronical Solutions Claim, Tronical asserts that Gibson owes Tronical Solutions, as the assignee of Tronical GmbH, payment for research and development services provided to Gibson pursuant to Sections 2 and 3 of the MPSA.

12. In the Tronical Components Claim, Tronical asserts that Tronical Components manufactured and delivered certain automatic tuning products to Gibson pursuant to alleged Gibson purchase orders for which Gibson failed to pay.

13. In the Tectus Claim, Tronical asserts two separate claims, both of which relate to Gibson's alleged use of Tectus intellectual property.

14. Each of these Claims is invalid, for the reasons detailed below, but they share several deficiencies. Specifically, the Claims fail because (i) Tronical calculated the royalties, consulting fees and profit-sharing damages for the Tronical GmbH Claim and Tectus Claim based on the number of products delivered to Gibson rather than the "net sales" of such products; (ii)

Tronical, self-servingly and without support, used the high range of Gibson's declared \$60-65 million EBITDA projection as the basis for its \$26 million demand for profit-sharing damages for the Tronical GmbH Claim, which resulted in an incorrect, entirely arbitrary, and highly inflated profit number; (iii) Tronical failed to provide supporting documentation for each of the Tronical GmbH Claim, the Tronical Solutions Claim, the Tectus Claim and the Tronical Components Claim; and (iv) Tronical claimed more than \$23 million in future research and development services under the Tronical GmbH Claim and more than \$5 million in damages under the Tronical Solutions Claim when Gibson and Tronical never executed a statement of work ("SOW") for performing such services as required by the parties' agreement.

THE RELATIONSHIP BETWEEN THE DEBTORS AND TRONICAL

15. Over the past decade, Tronical and Gibson have entered into a number of contracts and other agreements involving automatic tuning systems for guitars. *See* Mitchell Decl. at ¶ 5. Gibson sought to outfit certain of its signature guitar models with automatic tuning systems, and contracted with Tronical to research and develop automatic tuning systems and then acquire from Tronical the automatic tuning systems that Gibson then installed on various guitar models. *Id.* Understanding Gibson and Tronical's relationship, the key provisions from the relevant agreements that have bound them, and the litigation that has resulted between the parties, provides necessary context for evaluating the Tronical Claims.

16. Among the agreements Tronical and Gibson have executed are the LOI and MPSA, which defined the rules of the road for Tronical and Gibson's business relationship. Among other things, the agreements provide that:

a. Gibson would pay "royalties to Tectus and consulting fees to Tronical based on net units sold by Gibson per year" (LOI, Section A.3);

b. Gibson shall have "a worldwide, exclusive right and license to use, for any and all purposes, including but not limited to the manufacture and sale of musical instruments and related products" certain Tectus/Tronical technology and "patents, technology, software and hardware related to the Future Products" (LOI, Sections A.4, B.7);

c. Gibson and Tronical will "define[] in writing" all projects, including "the essential elements of such projects, including the resources required, milestones, and anticipated payments" (LOI, Section B.3; MPSA, Sections 2.2-2.3);

d. Tronical shall "deliver documented weekly invoices and weekly status reports to Gibson" (LOI, Section B.5);

e. "All profits generated by the exploitation of the Tronical TuningLight shall first be paid to [Gibson] to recoup [Gibson's] investment in the technology" (MPSA, Section 3.3); and

f. Gibson will pay Tronical "royalties and fees" for "exclusive use and ownership" of certain products, but "royalties shall only be due on Net Sales," which are the "total sales of a product received by [Gibson] minus discounts, taxes, returns and pricing adjustments" (MPSA, Section 8.4).

17. Critically missing from the Tronical Claims, Gibson has advanced funds and paid Tronical millions of dollars for the development of automatic tuning systems over the lifetime of these agreements, and it is Tronical—not Gibson—that has failed to perform its contractual obligations.

18. In 2015, Tronical Components requested that Gibson pre-pay for certain automatic tuning systems, which Gibson agreed to do, memorializing its agreement in a Letter of Understanding on July 24, 2015. *See* Mitchell Decl. at ¶ 13. Gibson in fact prepaid more than $1.7 million to Tronical Components under this Letter of Understanding. *Id.* Yet, Tronical Components never supplied the tuners for which this prepayment was made and refused to reimburse Gibson for the funds it already paid and to account for such funds—breaching its obligations under the Letter of Understanding. *Id.* In addition, Tronical Components failed to deliver other automatic tuning systems Gibson had already paid for, in some cases doubling the

price of certain tuners after Gibson had already placed the orders, after Tronical Components had accepted the orders, and after Gibson had delivered payment in full at the original agreed-upon price. *Id.* at ¶ 14. Tronical Components neither delivered all of the tuners nor returned Gibson's money. *Id.*

19. After Tronical's repeated failure to honor its contractual obligations, Gibson sued Tronical on December 8, 2017 in the District Court of the Middle District Court of Tennessee. *Gibson Brands, Inc. v. Tronical Components GmbH, et al.*, No. 17-cv-1542 (M.D. Tenn.) (Dkt. No. 1) ("Tennessee Matter"). Gibson alleged several causes of action in the Tennessee Matter, including claims for breach of contract, unjust enrichment, and fraud. This case remains pending in federal court in Tennessee.

20. In seeming retaliation for the lawsuit Gibson had filed against it, Tronical filed a complaint against Gibson in the District Court of Hamburg (the "German Complaint") less than one month later, on December 29, 2017, based on alleged misconduct that took place years before by Gibson.

21. Specifically, Tronical GmbH claimed that Gibson breached the MPSA and LOI by allegedly failing to pay certain consulting fees and royalties to Tronical GmbH in connection with Gibson's purchase of automatic tuning systems. *See* Mitchell Decl. at ¶ 18. Tronical GmbH alleged that it delivered 49,250 automatic tuning systems to Gibson between 2013 and 2014, but that Gibson failed to pay the consulting fees and royalties for these tuning systems as allegedly required by the MPSA and LOI. *Id.* Tronical GmbH sought damages of $198,080.00 in the German Complaint. *Id.*

22. The German Complaint is ostensibly the precursor for the Tronical Claims. However, even though all of the pre-petition damages Tronical seeks with the Tronical

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Claims involve alleged breaches of the MPSA and LOI by Gibson that predate the filing of the German Complaint, Tronical did not raise any of these allegations when it initially filed the German Complaint. Tronical's failure to assert in the German Complaint those claims it now asserts in the Tronical Claims, when those claims arose under the same set of facts underlying the claims in the German Complaint, coupled with the fact that Tronical's alleged damages have increased from less than $200,000 to more than $61 million, renders the Tronical Claims highly suspect.

23. Promptly after filing the German Complaint in December 2017, based on Gibson's alleged conduct from *years earlier*, Tronical moved to dismiss the Tennessee Matter on *forum non conveniens* grounds, alleging that the case should instead proceed in Germany. This sequence of events suggests that Tronical filed suit in German to thwart the Tennessee Matter and engineer a basis for transferring the case to Germany.

24. Similarly, in the months since filing the German Complaint, Tronical has adopted an aggressive litigation and publicity strategy in connection with the German case to seize an outsized and inflated stake in the Debtors' assets and insinuate itself into the chapter 11 proceedings.

25. Specifically, on May 7—six days after the Debtors filed for bankruptcy—Tronical GmbH, out of nowhere, sent two invoices to Gibson for more than $50 million. *Id.* at ¶ 22. These invoices sought payment from Gibson for alleged profit-sharing and future unearned fees based on Gibson's alleged breach of an "exclusive research and development agreement," but included no detail on how Tronical GmbH calculated these exaggerated sums, the basis for Tronical GmbH's claims, or why Tronical GmBH was entitled to payment under contracts it alleged were terminated. *Id.*

26. On May 9, Tronical GmbH appeared at the formation meeting for the Committee of Unsecured Creditors ("Committee"), representing that it had a significant claim in the Chapter 11 Cases, based on nothing more than the $50 million invoices it had sent Gibson two days earlier. Tronical GmbH used these invoices to gain membership on the Committee, which would in theory permit Tronical GmbH to exert control over the course of the chapter 11 proceedings and maneuver events to advantage its own interests.

27. The Tronical Claims followed on July 25, 2018.

28. As the above chronology shows, Tronical has engaged in a pattern of gamesmanship when it comes to litigating the alleged claims that form the basis of the German Complaint and the Tronical Claims. First, it took Gibson initiating the Tennessee Matter in 2017 for Tronical to take any legal action at all with respect to these alleged claims, even though the German Complaint and Tronical Claims assert that Gibson had breached its obligations under the MPSA and LOI several years earlier. Tronical then moved promptly to dismiss the Tennessee Matter on *forum non conveniens* grounds, suggesting that Tronical filed suit in Germany at least in part to manufacture a basis to dismiss the Tennessee Matter. Second, even though the claims underlying Tronical's more than $60 million Claims existed at the time Tronical filed the German Complaint and were based on the same nucleus of facts as the claims in the German Complaint, Tronical did not assert these claims until *after* Gibson filed for bankruptcy. Thus, even before evaluating the Tronical Claims themselves—which are invalid because they lack support, are based on Tronical's self-serving and unsupported assumptions, and rely on misinterpretations of the MPSA and LOI—this chronology makes clear that the Claims are spurious.

RELIEF REQUESTED

29. For the reasons set forth in greater detail herein, the Debtors seek entry of an order disallowing the Tronical Claims in their entirety.

ARGUMENT

30. Under section 101 of the Bankruptcy Code, a creditor holds a claim against a bankruptcy estate only to the extent that (a) it has a "right to payment" for the asserted liabilities, and (b) the claim is otherwise allowable. 11 U.S.C. § 101(5); *see also* 11 U.S.C. §§ 101(10) and 502.

31. When asserting a claim against a bankrupt estate, a claimant must allege facts that, if true, would support a finding that the debtor is legally liable to the claimant. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992); *In re Int'l Match Corp.*, 69 F.2d 73, 76 (2d Cir. 1934). Where the claimant alleges facts sufficient to support its claim, the claim is afforded *prima facie* validity. *See In re Allegheny Int'l, Inc.*, 954 F.2d at 173. A party wishing to dispute such a claim must produce evidence in sufficient force to negate the claim's *prima facie* validity. *See id*. In practice, the objecting party must produce evidence that would refute at least one of the allegations essential to the claim's legal sufficiency. *See id.* at 173-74. Once the objecting party produces such evidence, the burden shifts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *See id.* at 174. The burden of persuasion is always on the claimant. *See id*.

32. The Debtors respectfully request that the Tronical Claims be disallowed in their entirety. The Tronical GmbH Claim, Tronical Solutions Claim, Tronical Components Claim, and Tectus Claim are all invalid, for the reasons detailed below, but they share several deficiencies. Specifically, the Claims fail because: (i) Tronical calculated the royalties, consulting fees and profit-sharing damages for the Tronical GmbH Claim and Tectus Claim based on the number of products

delivered to Gibson rather than the "net sales" of such products; (ii) Tronical, self-servingly and without logic, used the high range of Gibson's declared $60-65 million EBITDA projection as the basis for its $26 million demand for profit-sharing damages for the Tronical GmbH Claim, which resulted in an incorrect, inflated, and entirely arbitrary profit number; (iii) Tronical failed to provide supporting documentation or facts for each of the Tronical GmbH Claim, the Tronical Solutions Claim, the Tronical Components Claim, and the Tectus Claim; and (iv) Tronical claimed more than $23 million in future research and development services under the Tronical GmbH Claim and more than $5 million in damages under the Tronical Solutions Claim when Tronical never obtained Gibson's approval or executed an SOW for performing such services.

A. **The Tronical GmbH Claim Fails Because It is Based on Misinterpretations of the MPSA and LOI and on Unsupported and Arbitrary Assumptions.**

33. The Tronical GmbH Claim asserts three separate claims.

34. First, Tronical claims that from 2011 through 2017, Gibson did not pay royalties and consulting fees to Tronical or provide Tronical with quarterly reports of its financial records, in violation of Sections 8.4 and 8.6 of the MPSA and Section A.3 of the LOI. Tronical claims pre-petition damages in the amount of $606,911.50 for these alleged breaches, and derives this alleged damages amount "based upon the units of Deliverables provided by Tronical to Gibson." *See* Addendum to Tronical GmbH Claim, at 1. Section 8.4 of the MPSA provides that Gibson shall pay royalties and fees to Tronical GmbH based "only" on Gibson's "Net Sales" of "Deliverables" provided under the LOI, with "Net Sales" defined as "total sales for a product received by [Gibson] minus discounts, taxes, returns and pricing adjustments." Section 8.6 of the MPSA requires that Gibson "shall provide its financial records . . . for determining the amount of any royalty or fee . . . owed to . . . Tronical," including with respect to "profits made with exploitation of Tronical TuningLight technology." Section A.3 of the LOI provides that "if Gibson sells any products that

include technology that exists as of the Effective Date for which Tectus owns or controls a patent, then Gibson shall pay royalties to Tectus and consulting fees to Tronical based on net units sold by Gibson per year" according to a schedule set forth in the LOI.

35. Second, Tronical claims that Gibson owes Tronical profits in the amount of $26,392,473.45 from "exploitation of the Tronical TuningLight technology" under Section 3.3 of the MPSA, which requires Gibson to pay Tronical 50% "of all profit generated by the exploitation of the Tronical TuningLight technology" after Gibson "recoup[s] [its] investment in such technology." Tronical alleges that Gibson failed to pay any profits derived from the Tronical TuningLight technology to Tronical and also failed to provide Tronical with quarterly financial records showing the amount of any such profit, in violation of Section 8.6 of the MPSA. Tronical calculated its more than $26 million pre-petition profit-sharing damages by first dividing $65,000,000 (*i.e.*, Gibson's publicly-reported EBITDA projection) by 170,000 (*i.e.*, the approximate number of Gibson guitars sold) to determine "the per-unit profit" for "exploitation of the Tronical TuningLight technology." Tronical obtained Gibson's EBITDA (*i.e.*, earnings before interest, taxes, depreciation, and amortization) from a press release that Gibson provided KKR with an adjusted EBITDA range of $60-$65 million projection for Gibson's Musical Instrument/Pro Audio businesses ("MI Business"). To calculate the profits Gibson allegedly owed, Tronical then multiplied this "per-unit profit" by the number of TuningLights it provided to Gibson, rather than the number of guitars installed with TuningLights that Gibson actually sold. Tronical's damages calculation does not factor in the extent to which Gibson has "recoup[ed] [its] investment in [the TuningLights] technology," even though Section 3.3 of the MPSA does not require Gibson to share TuningLight profits with Tronical until Gibson has recouped its investment in the technology.

36. Third, Tronical claims post-petition damages in the amount of 23.660 million Euros for future payments Gibson allegedly continues to owe Tronical pursuant to Sections 2 and 3 of the MPSA. Pointing to one email chain from 2011, Tronical alleges that there was an "agreement" under which Gibson would make weekly payments to Tronical of €65,000.00 for Tronical's "research and development services." *See* Addendum to Tronical GmbH Claim, at 3. Tronical asserts that "Gibson's breach of the MPSA caused Tronical to lose future earnings of €65,000.00 per week for the remaining 364 weeks of the initial term of the MPSA, totaling €23,660,000.00." *Id.* Tronical does not allege that it continues to perform research and development services for Gibson following Tronical's termination of the MPSA, nor does Tronical identify any SOW or other authorization from Gibson requiring Gibson to make weekly payments of €65,000.00 for research and development services, much less for such services post-dating termination of the MPSA. Section 2.2 of the MPSA provides that any "projects" agreed to between Tronical and Gibson shall be set forth in a SOW executed by the parties.

37. None of the claims asserted in the Tronical GmbH Claim are supported by facts or evidence to sustain the burden of prima facie validity.

38. Tronical's claim for $606,911.50 in royalties and consulting fees under Section 8.4 is unsupported and inaccurate. First, the MPSA does not require Gibson to pay Tronical royalties in connection with the TuningLight technology. Rather, the MPSA provides that Gibson "shall provide royalties and fees to Tronical for exclusive use and ownership of the *Deliverables* provided under the LOI in accordance with Exhibit D." *See* MPSA, at Section 8.4 (emphasis added). These "deliverables" are to be "listed on the Product Lists" attached as Exhibit E to the MPSA. *Id.*, at Definitions. Tronical does not attach this Exhibit E to the

Tronical GmbH Claim, and otherwise fails to offer any support for the point that the TuningLight is a "Deliverable" for which Gibson must pay royalties to Tronical.

39. However, even if the TuningLight is a "Deliverable" under the MPSA, Tronical miscalculates the amount of royalties to which it alleges it is entitled. Tronical derived these fees "based upon the units of Deliverables provided by Tronical to Gibson." *See* Addendum to Tronical GmbH Claim, at 1. But Section 8.4 of the MPSA is unambiguous: "For the sake of clarity royalties shall only be due on Net Sales." Section A.3 of the LOI is also clear: "if Gibson sells any products that include technology that exists as of the Effective Date for which Tectus owns or controls a patent, then Gibson shall pay royalties to Tectus and consulting fees to Tronical based on *net units sold by Gibson* per year." *See* LOI, at Section A.3 (emphasis added). Because the amount of royalties cannot be determined without a finding of the "Net Sales," and because Tronical bases its royalties and consulting fees on "Deliverables provided" and not "Net Sales," it follows that the royalties and consulting fees claim in Tronical GmbH's Claim is flawed and should not be credited.

40. In addition to the inaccurate numbers, there are other discrepancies between the Tronical GmbH Claim and the MPSA and LOI that render Tronical's calculation of royalties and consulting fees pegged to "Deliverables provided" fundamentally flawed. Notably, while the LOI does not define "Deliverables," Section A.3 of the LOI states that "if Gibson sells any products that include technology that exists as of the Effective Date [*i.e.*, September 23, 2009] for which Tectus owns or controls a patent, then Gibson shall pay royalties to Tectus and consulting fees to Tronical based on net units sold by Gibson per year." Many of the Tectus patents included on Gibson products are no longer in force. *See* Mitchell Decl. at ¶¶ 29, 46. Because Section A.3 of the LOI requires Gibson to pay royalty fees only with respect to patents

Tectus "owns or controls" (*i.e.*, not "own*ed* or controll*ed*"), there is no basis for Tronical to demand royalties based on the sale of products installed with patents that Tectus no longer "owns or controls."

41. Tronical's claim for $26,392,473.45 in "Tronical TuningLight Profits" is likewise baseless, propped up on multiple flawed and self-serving assumptions and an incomplete reading of the MPSA. This is so for multiple reasons. First, under Section 3.3 of the MPSA, Gibson need only pay Tronical 50% "of all profit generated by the exploitation of the Tronical TuningLight technology" after Gibson "recoup[s] [its] investment in such technology." The MPSA is unclear on Gibson's initial investment in the TuningLight Technology, as Section 3.3 refers to the figures and numbers given in Exhibit F, which is not attached to the MPSA submitted with the Tronical GmbH Claim. Over the last decade, Gibson has advanced funds and paid Tronical in excess of $30 million for the development of automatic tuning systems for guitars. *See* Mitchell Decl. at ¶ 11. Tronical's demand for more than $26 million in profit-sharing fees from Gibson ignores that Gibson's profit-sharing obligation does not become due unless and until Gibson recoups this investment in the TuningLight Technology. Tronical does not even reckon with this contractual provision in deriving its profit-sharing demand, much less attach any documents to the Tronical GmbH Claim showing that Gibson has recouped any of its investment in the Tronical Tuning Light.

42. Second, Tronical's demand for more than $26 million in profit-sharing fees is entirely speculative and untethered to any profits generated from "exploitation of the Tronical TuningLight Technology" by reason of net sales of guitars with Tronical TuningLight Technology. Tronical calculated its more than $26 million pre-petition profit-sharing damages by first dividing $65 million (*i.e.*, Gibson's publicly-reported EBITDA projection) by 170,000

(*i.e.*, the approximate number of Gibson guitars sold) to determine "the per-unit profit" of a Gibson Guitar. Tronical obtained Gibson's EBITDA projections from a press release announcing that the majority shareholders of Gibson provided KKR with a projected adjusted EBITDA range of $60-$65 million for Gibson's MI Business in connection with certain pre-bankruptcy discussions. A marketing projection is not a measure of actual profits.

43. Further, Tronical's methodology is flawed. It assumes that Gibson's aggregate earnings from its MI Business are based solely on sales of guitars with the Tronical TuningLight and the profit is exclusively from "exploitation" of the TuningLight Technology arising from Gibson selling such guitars. This is not remotely reflective of reality. Gibson's MI Business encompasses much more than selling guitars with Tronical TuningLight Technology. *See* Mitchell Decl. at ¶ 31. Gibson's aggregate profits cannot be used to measure the profits of a guitar containing the Tronical Tuninglight Technology, let alone an EBITDA projection. Tronical's adoption of the $65 million EBITDA projection thus vastly inflates Tronical's per-unit profit calculation. Moreover, the profits Gibson realizes from selling a guitar with a Tronical TuninglLight are not solely the result of the "exploitation" of the TuningLight Technology. This logic would mean that the Tronical TuninglLight is the only item of value on the entire guitar, which is clearly not the case. Gibson's aggregate profits, as well as the source of its profits on the sale of a single guitar, are attributable to a host of factors, not simply the "exploitation of the Tronical TuningLight technology."

44. In fact, to accurately measure the profit derived from the "exploitation of the Tronical TuningLight technology," Tronical would need to show how much additional incremental profit Gibson realized on the sale of a guitar as a result of a TuningLight being added to the guitar. That is, if a *Les Paul* without a TuningLight sold for $1,000, and a *Les Paul*

with a TuningLight sold for $1,100, that additional revenue of $100, minus the material and labor costs for installing the TuningLight, would be the profit derived from the "exploitation of the Tronical TuningLight technology." Tronical instead assumes that all profit on the sale of any guitar, whether or not it had a TuningLight installed, should be used to calculate Tronical's alleged profit-sharing fees. This overly-simplified view of per-unit profits is wrong, and invalidates Tronical's claim for more than $26 million in profit-sharing fees.

45. Tronical's profit-sharing calculation also assumes that Gibson has sold every guitar on which it installed a Tronical TuningLight. This is a flawed assumption. First, Gibson has incurred substantial costs in replacing defective TuningLights that it purchased from Tronical and installed on its guitars. *See* Mitchell Decl. at ¶ 34. Gibson bore these costs, and these costs would come out of any profit Gibson would receive on the sale of any guitars (as well, by extension, on any profits due to Tronical). Second, Gibson continues to sit on a significant inventory of unsold guitars equipped with Tronical TuningLights. *Id.* These guitars have sold poorly, and Gibson, as a result, continues to hold a significant number of such guitars in its inventory. *Id.* Gibson paid Tronical for the TuningLights installed on these guitars but, because these guitars did not sell, Gibson has not realized a profit on them. Tronical should have excluded these guitars from its profit-sharing calculation, but did not.

46. Third, in measuring the profits from "exploiting" the Tronical TuningLight Technology, Tronical bases its total claim on "the units of Tronical TuningLights provided to Gibson by Tronical," rather than the "Net Sales" of such products, as the MPSA and LOI both require. *See* MPSA, at Section 8.4; LOI, at Section A.3. *See also supra* at ¶ 39. For all of these reasons, the $26 million profit-sharing demand in the Tronical GmbH Claim fails.

47. The €23,660,000.00 claim for "Future Research and Development Fees" in the Tronical GmbH Claim is also invalid. Tronical does not attach any SOW to the Tronical GmbH Claim establishing the terms, resources required, milestones, anticipated payments, or scope of "research and development services" for which Gibson allegedly owes Tronical "weekly payments of €65,000." Both Section B.3 of the LOI and Section 2.2 of the MPSA make clear that "all" "projects" between Gibson and Tronical "will be defined in writing" and that an SOW shall be finalized for such "projects." Tronical fails to identify any SOW defining these alleged "research and development services" and Tronical's entitlement to a weekly payment of €65,000 for such services. Instead, to justify this element of the Tronical GmbH Claim, Tronical attaches a series of emails between Gibson and Tronical discussing the budget proposal for 2011. *See* Exhibit D. These emails *only* address the 2011 budget and plainly do not constitute an SOW under the MPSA or LOI. It is not clear from the emails that Gibson and Tronical had a meeting of the minds for the 2011 budget, let alone for Tronical providing "weekly" "research and development services" for years into the future.

48. More incredibly, Tronical claims that it is entitled to weekly payments of €65,000 for the next *seven years*, through 2025, even though Tronical terminated the MPSA and LOI on November 13, 2017. This is plainly absurd—Tronical terminated the contractual relationship between the parties almost a year ago, Tronical does not claim that it intends to continue performing research and development services for Gibson for the next seven years, and there is no SOW defining the terms and scope of any such agreement for Tronical to perform and Gibson to pay for such services.

B. **The Tronical Solutions Claim for Research and Development Fees Fails Because Gibson and Tronical Did Not Enter an SOW for Such Services.**

49. In the Tronical Solutions Claim, Tronical alleges that it provided Gibson with research and development services between July 14, 2017 and November 10, 2017 related to "G-Force II KW28-2017" and "TuningPeg KW29-2017," that it sent Gibson invoices and "weekly status reports" in connection with such services, and that Gibson did not pay for these services. *See* Addendum to Tronical Solutions Claim, at 1. Tronical asserts that Gibson owes $1,222,042.17 for these unpaid research and development services. But Section B.3 of the LOI and Section 2.2 of the MPSA require that "projects" like the alleged G-Force II and TuningPeg research and development services "be defined in writing" and formalized in an SOW. *See* LOI, at Section B.3; MPSA, at Section 2.2. Tronical does not attach an SOW for either the G-Force II or TuningPeg to the Tronical Solutions Claim, or otherwise state any facts demonstrating that Gibson and Tronical ever executed an SOW for G-Force II or TuningPeg. Thus, Tronical fails to identify any proof that it had Gibson's authorization or formalized an SOW with Gibson for these services, and absent an SOW identifying the research Tronical would perform, the deliverables it would provide, and the payment Gibson would make in return, the Tronical Solutions Claim fails.

50. Nor does the Tronical Solutions Claim include any attachments that suggest that Gibson ever received any deliverables or intellectual property from Tronical Solutions related to the G-Force II and TuningPeg research and development services Tronical allegedly performed. Tronical claims that it provided Gibson with "weekly status reports on the progress of its work," but these "weekly status reports" were not attached to the Tronical Solutions Claim. Without any documentation supporting that Gibson received anything of value from the research and development services Tronical allegedly performed and for which it now

seeks payment, there is no basis for Tronical to seek damages under a quantum meruit theory, which Tronical in any event fails to assert in the Tronical Solutions Claim.

C. **The Tronical Components Claim is Largely Devoid of Factual Support.**

51. Tronical alleges that Gibson owes $530,361.76 for certain "products" Tronical "manufactured and delivered" to Gibson pursuant to "purchase orders issued to Tronical Components by Gibson," for which Gibson "failed to pay." *See* Addendum to Tronical Components Claim, at 1. In support of this claim, Tronical attaches invoices that it alleges show the total amount Gibson owes for these automatic tuning products that it claims Gibson ordered, that Tronical Components manufactured and delivered, and that Gibson received and never paid for. One invoice (*i.e.*, Exhibit A) was issued on October 19, 2017 (or, after Tronical had demanded payment for unauthorized research and development services related to the G-Force II and TuningPeg, *see supra* at ¶ 49), and seeks immediate payment of $333,587.76 on a purchase order Gibson supposedly made on September 22, 2014. Another invoice (*i.e.*, Exhibit B), also issued on October 19, 2017, seeks payment of $196,774.00 for seven allegedly outstanding purchase orders, each of which is attached to the Tronical Components Claim, and only two of which were signed by Gibson. The purchase orders list the payment terms as "cash in advance" and range in date from October 26, 2015 to December 12, 2016.

52. Tronical's specious claim that Gibson owes damages in the amount of $530,361.76 for certain products Tronical Components "manufactured and delivered" to Gibson pursuant to certain purchase orders is not based on reliable documentation, and should not be allowed. Tronical attached two invoices to the Tronical Components Claim, which it alleges show the total amount Gibson owes for these automatic tuning products that it claims Gibson

ordered, received, and did not pay for, but the timing of these invoices, and the purchase orders on which they are allegedly based, raise significant doubts about their authenticity and validity.

53. Both invoices were issued on October 19, 2017, which is after Tronical had demanded payment from Gibson for unauthorized research and development services related to the G-Force II and TuningPeg. *See supra* at ¶¶ 49-50. This timing suggests that Tronical manufactured these invoices as an end-run around Gibson's refusal to pay the invoices Tronical issued seeking payment for unauthorized research and development services.

54. The purchase orders that form the basis of these invoices are also suspect. The invoice at Exhibit A to the Tronical Components Claim seeks payment "immediately" of $333,587.76 on a purchase order that Gibson supposedly made more than three years earlier, on September 22, 2014. PO000133350, the subject purchase order for this invoice, was not attached to the Tronical Components Claim, even though it constitutes the majority of the Tronical Components Claim.

55. The invoice at Exhibit B seeks payment of $196,774.00 for seven allegedly outstanding purchase orders, each of which is attached to the Tronical Components Claim, and only two of which were signed by Gibson. The purchase orders list the payment terms as "cash in advance" and range in date from October 26, 2015 to December 12, 2016, and Gibson's accounting records show that Gibson has already paid for at least some of these invoices. *See* Mitchell Decl. at ¶ 43. Tronical has failed to reconcile these payments with its invoices.

56. Gibson also prepaid Tronical Components for certain products that Tronical Components never provided. *Id.* Tronical should have deducted Gibson's prepayment for goods not received from its damages claim, but did not do so.

D. **Tronical's Claims for Royalties and "Unknown" Patent Infringement Damages in the Tectus Claim Are Meritless.**

57. In the Tectus Claim, Tronical alleges that Gibson owes Tronical $5,007,560.00 in unpaid royalties and consulting fees for the use of "Tectus Technology" under Section A.3 of the LOI, as well as damages in an "amount unknown" based on Gibson's alleged infringement of certain patents. Neither claim holds any merit.

58. First, just like it did with its claim for royalties in the Tronical GmbH Claim, Tronical does not include any support in the Tectus Claim establishing that the undefined "Tectus Technology" for which it claims royalties is a "Deliverable" under the MPSA for which Gibson must pay royalties. *See supra* at ¶ 38. The Tectus Claim fails for this threshold reason.

59. However, even if this "Tectus Technology" were a "Deliverable" under the MPSA, Tronical's claim for royalties fails for the same reason as Tronical's claims for royalties, consulting fees, and profit-sharing fees in the Tronical GmbH Claims fail. Namely, Tronical calculates the royalties owed "based upon the Units of Deliverables . . . provided by Tronical to Gibson," rather than on the "Net Sales" of such products, as Section 8.4 of the MPSA and Section A.3 of the LOI require. *See supra* at ¶¶ 39-40, 46. Tronical includes no evidence in the Tectus Claim regarding the "net sales" of the products Gibson sold containing "Tectus Technology," rendering its claim for $5,007,560.00 in unpaid royalties and consulting fees entirely arbitrary.

60. Section A.3 of the LOI further provides that Gibson shall pay royalties to Tectus only if it "sells any products that include technology that exists as of the Effective Date for which Tectus *owns* or *controls* a patent." (emphasis added). Tronical does not indicate whether any of the patents for which Gibson allegedly owes royalties remained in force at the time Gibson sold the products allegedly containing the "Tectus Technology," which is further grounds for disallowing the Tectus Claim.

61. Second, Tronical alleges that Gibson owes an "amount unknown" based on it "continu[ing] to manufacture, use, sell, and offer to sell the Tectus Technology falling within the scope of certain United States and foreign patents owned or licensed by Tectus or certain of its affiliates." *See* Addendum to Tectus Claim, at 2. Tronical asserts that Gibson has infringed some or all of the patents listed in the Tectus Claim, and it claims "unknown" damages in the amount to "fully compensate the patent holders and their licensees" for patent infringement damages, as well as for "the loss of certain convoyed sales related to this patented technology" and for "lost certain derivative sales." *Id.*

62. Tronical has no legitimate claim to patent infringement for the simple reason that patent infringement damages are not awarded on expired patents. Tronical includes no documentation supporting that any of the allegedly infringed patents remain in-force, which dooms its patent infringement claim. Nor has Tronical provided any evidence as to what alleged valid and subsisting claim the Gibson technology infringes. Additionally, even though the alleged infringement allegedly occurred over the last ten years, Tronical never raised Gibson's alleged patent infringement until now, which means that Tectus would be prohibited by laches from proceeding on any infringement claim even if it had one, which it does not.

63. Additionally, Section C.3 of the LOI provides a one-year sell-off period for any Tectus Technology sold by Gibson after the LOI is terminated. Tronical alleges it terminated the LOI on November 13, 2017. *See* Addendum to Tectus Claim, at 1. According to Tronical's alleged termination date, Gibson is allowed to sell-off remaining Tectus Technology until November 13, 2018, over two months from today's date.

64. Nor can Tronical claim that Gibson owes damages for any alleged infringement that occurred prior to expiration of the patents. Sections A.4 and B.7 of the LOI

provide that Gibson shall have "a worldwide, exclusive right and license to use, for any and all purposes, including but not limited to the manufacture and sale of musical instruments and related products" certain Tectus/Tronical technology and "patents, technology, software and hardware related to the Future Products." *See* LOI, at Sections A.4 and B.7. Gibson plainly cannot be liable for patent infringement damages when it had a "worldwide, exclusive right and license" to use the patented technology. At most, failure to pay a royalty could in theory constitute a breach of contract, but Tronical does not allege this in the Tectus Claim, nor provide any facts that would support a breach of contract claim. Thus, the patent infringement claim in the Tectus Claim also fails.

RESERVATION OF RIGHTS

65. As noted above (*supra* at ¶¶ 17-19), prior to the Petition Date, Gibson commenced a lawsuit against Tronical in the U.S. District Court for the Middle District of Tennessee (the "Tennessee District Court"). In the Tennessee Matter, Gibson alleged several causes of action, including claims for breach of contract, unjust enrichment, and fraud. This case remains pending in the Tennessee District Court.

66. In other words, it is the Debtors' contention that Tronical owes them money, not the other way around. This is a further reason for this Court to disallow the Tronical Claims.

67. The Debtors hereby reserve the right to pursue their affirmative damage claims against Tronical either (i) in the Tennessee District Court, (ii) in this Court through

removal pursuant to 28 U.S.C. § 1452 and Bankruptcy Rule 9027[5], or (iii) through a separate adversary proceeding commenced in this Court pursuant to Bankruptcy Rule 7001(1).

NOTICE

68. Notice of the Objection will be provided to: (i) Tronical; (ii) the Office of the United States Trustee for the District of Delaware; (iii) counsel to the Committee; (iv) counsel to the DIP Agent; (v) counsel to the Prepetition ABL Agent; (vi) counsel to the Indenture Trustee; (vii) counsel to the Ad Hoc Group of Secured Noteholders; and (viii) all persons and entities that have filed a request for service of filings in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002.

WHEREFORE, the Debtors respectfully request that this Court enter an order disallowing the Tronical Claims, and granting the Debtors such other and further relief as the Court deems just and proper.

Dated: August 30, 2018
Wilmington, Delaware

Respectfully submitted,

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- and -

[5] The deadline for the Debtors to file a removal notice with respect to the Tennessee Matter is November 27, 2018 pursuant to this Court's August 15, 2018 *Order Granting Motion of Debtors for Entry of an Order Pursuant to Federal Rules of Bankruptcy Procedure 9006(b) and 9017 Extending the Time to File Notices of Removal of Civil Actions* [Docket No. 593].

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