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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	**Chapter 11**
	§	
GREEN FIELD ENERGY SERVICES, INC., et al.,	§	**Case No. 13-12783 (KG)**
	§	
	§	**Jointly Administered**
Debtors.[1]	§	
	§	**Ref. Docket Nos. 304, 383, 409, 410, 413, 478, 479, 576, and 580**
	§	

EXAMINER'S REPORT

Dated: March 4, 2014

By: */s/ Daniel K. Hogan*
Daniel K. Hogan (DE No. 2814)
THE HOGAN FIRM
1311 Delaware Avenue
Wilmington, DE 19806
Telephone: (302) 656-7540
Facsimile: (302) 656-7599
dkhogan@dkhogan.com

PROPOSED ATTORNEY FOR THE EXAMINER

AND -

STUTZMAN, BROMBERG, ESSERMAN & PLIFKA,
A Professional Corporation
Peter C. D'Apice TX. Bar. No. 05377783
(admitted *pro hac vice*)
Jacob L. Newton TX. Bar. No. 24046523
(admitted *pro hac vice*)
2323 Bryan Street, Suite 2200
Dallas, Texas 75201
Telephone: (214) 969-4900
Facsimile: (214) 969-4999

ATTORNEYS FOR THE EXAMINER

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax or organizational identification number, are: Green Field Energy Services, Inc. ("GFES") (2539); Hub City Tools, Inc. (2827); and Proppant One, Inc. (6035). The above-captioned Debtors' mailing address is 4023 Ambassador Caffery Parkway, Suite #200, Lafayette, LA 70503.

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TO THE HONORABLE KEVIN GROSS
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Steven A. Felsenthal, the court appointed examiner (the "Examiner"), files this report (the "Report") pursuant to the *Order Under 11 U.S.C. § 1104(c) Authorizing Appointment of an Examiner* [Docket No. 383] (the "Original Examiner Order"), and the *Order Amending Order Under 11 U.S.C. § 1104(c) Authorizing Appointment of an Examiner* [Docket No. 580] (the "Amended Examiner Order").[2] The Examiner respectfully states as follows:

I. BACKGROUND

A. The Debtor's Business

1. On October 27, 2013 (the "Petition Date"), the Debtors[3] filed petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code" or the "Code"). The Debtor operates its business and manages its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. Prior to the Petition Date, the Debtor operated as an independent oilfield services company that provided a wide range of services to oil and natural gas exploration and production

[2] As discussed *infra*, the Examiner received the Committee's initial position paper on January 24, 2014 (the "Committee's Initial Submission"). On January 31, 2014, the Examiner received responsive submissions from the Debtor and the other RSA Parties, which are referred to herein as the "Debtor's Initial Submission," the "Noteholders' Initial Submission," the "Moreno Initial Submission," and the "Shell Initial Submission," respectively. On February 4, 2014, the Debtor also served an *Addition to Debtors' Submission to the Examiner*. The Original Examiner Order authorized the Examiner to "adopt procedures intended to make best and most efficient use of information gathering and analysis already completed by the Parties." Pursuant to that authority, the Examiner accepted a supplemental submission from the Committee on February 10, 2014 (the "Committee's Supplemental Submission") and supplemental submissions from the other parties on February 14, 2014 (respectively, the "Debtor's Supplemental Submission," the "Noteholders' Supplemental Submission," the "Moreno Supplemental Submission," and the "Shell Supplemental Submission").

[3] The Debtors are headquartered in Lafayette, Louisiana. As of the Petition Date, the Debtors had approximately 335 employees located in 14 facilities in Louisiana and Texas. *See* Declaration of Earl J. Blackwell in Support of Chapter 11 Petitions and First Day Motions, dated October 28, 2013 [Docket 2] (the "Blackwell Declaration"), ¶ 19. For ease of reference, the Examiner uses the word "Estate" to mean collectively the Debtors' estates as proposed to be merged by the Joint Plan of Liquidation of Green Field Energy Services, Inc., *et al.* (the "Plan"), filed on February 6, 2014. *See* Docket No. 478. Further, because the Plan calls for the consolidation of the Debtors, the Examiner refers collectively to all three Debtors as the "Debtor" unless the context requires otherwise.

companies to help develop and enhance the production of hydrocarbons. The Debtor's services included, among other things, hydraulic fracturing or "fracking,"[4] as well as cementing, coiled tubing, pressure pumping, acidizing, and other pumping services.[5]

3. The Debtor's hydraulic fracturing operations utilized turbine-powered hydraulic fracturing pumping equipment that, according to the Debtor, provides several advantages over the diesel-powered pumping equipment typically used by others in the industry. These advantages include reduced emissions, a smaller operating footprint, lower operating costs when burning natural gas, and greater fuel flexibility—including the ability to operate on natural gas provided at a well head.[6]

B. Company History

4. The Debtor was formed in 1969. GFES was formerly a Louisiana limited liability company called Hub City Industries, L.L.C. In September 2011, Hub City Industries, L.L.C. changed its name to Green Field Energy Services, LLC and, in October 2011, was converted into a Delaware corporation.[7] Until 2010, the Debtor primarily focused its operations on traditional well-related services. The Debtor began providing fracking services in December 2010, and in recent years has focused on expanding its fracking operations.[8]

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[4] Hydraulic fracturing involves pumping a fluid down a perforated well casing or tubing under high pressure to cause the underground formation to fracture, thereby allowing the oil or natural gas to flow more freely. A propping agent—generally sand, bauxite, resin-coated sand, or ceramic particles—is suspended in the fracturing fluid and props open the cracks created by the hydraulic fracturing process in the underground formation. *See* Blackwell Declaration, ¶ 7.

[5] *Id.*, ¶ 6.

[6] *Id.*, ¶ 8.

[7] GFES has also previously been named Green Field Energy Services, LLC and Green Field Energy Services, Inc., a Louisiana corporation. *See* Blackwell Declaration, ¶ 10.

[8] *Id.*

5. Organizationally, GFES is the direct parent of Hub City Tools, Inc., and Proppant One, Inc. GFES is the main operating entity, and both Hub City Tools, Inc. and Proppant One, Inc., are currently non-operating companies. Proppant One, Inc. was formed in 2011 primarily to market the Debtor's sand operations, and Hub City Tools, Inc., is a legacy entity from GFES's earlier operations.[9]

6. GFES holds a 50% equity interest in Turbine Powered Technology, LLC, a Louisiana limited liability company ("TPT"). TPT is a joint venture between GFES and MTT Properties, LLC ("MTT"),[10] the operations of which are described later in this Report.

C. Prepetition Debt Structure

7. Prior to the Petition Date, the Debtor incurred the following obligations:[11]

Type of Prepetition Indebtedness	Approximate Amount of Outstanding Debt as of the Petition Date[12]
Shell Credit Facility	$80 million
2016 Senior Secured Notes	$255.9 million
Trade Debt	$98.6 million

1. Amended and Restated Shell Credit Facility

8. On September 2, 2011, GFES and SWEPI, Inc. (together with its affiliates and subsidiaries, "Shell") entered into that certain Contract for High Pressure Fracturing Services (as amended and restated, the "Shell Contract"), which included a credit facility (as amended and

[9] *Id.*, ¶ 12.

[10] *Id.*, ¶ 13.

[11] *Id.*, ¶ 47.

[12] These amounts exclude interest, fees, and expenses.

restated, the "Shell Credit Facility").[13] Pursuant to the Shell Contract, the Debtor agreed to provide and operate fracking spreads at Shell drilling sites for negotiated compensation rates, and Shell agreed to provide up to $100 million in the aggregate of senior secured term loans, which loans could not be reborrowed once repaid. As of the Petition Date, there was an aggregate principal amount of approximately $80 million in term loans outstanding under the Shell Credit Facility.[14]

9. The Shell Credit Facility was intended to be secured by first priority security interests on certain of the Debtor's motor vehicles and equipment designated by Shell, but excluding the vehicles securing certain Ford Motor Credit Company, LLC loans and certain capital leases with Nations Fund I, Inc. The certificates of title for certain of the Debtor's motor vehicles identify Shell as a lienholder (the "Shell Titled Assets").[15]

10. In connection with the Shell Credit Facility, Shell and the Indenture Trustee (as defined below) entered into an amended and restated intercreditor agreement (the "Intercreditor Agreement"),[16] setting forth the relative priorities and interests with respect to the Debtor's motor

[13] The Shell Contract and Shell Credit Facility changed several times during the course of the parties' relationship, and were amended eight times in all during the two years between initial execution and the Petition Date. *See* Debtor's Initial Submission, ¶ 32. The Shell Contract and Shell Credit Facility are attached to the Debtor's Initial Submission as Exhibit 6.

[14] *See* Blackwell Declaration, ¶ 48. As described in the Debtor's Initial Submission, ¶¶ 33-34, in September 2011, the Debtor signed the initial version of the Shell Contract, which provided for Shell to make a prepayment of $100 million to the Debtor in three installments. In November 2011, the Debtor entered into the 2016 Senior Secured Note Indenture (defined below) and was required to repay the initial prepayment from Shell, and did in fact did so. On April 26, 2012, the Debtor and Shell entered into the Third Amendment to the Shell Contract, which replaced the prepayment with a $30 million revolving senior credit facility. On October 22, 2012, the Debtor and Shell again amended the Shell Contract. In the Fourth Amendment to the Shell Contract, Shell agreed to advance an additional $70 million term loan to the Debtor on October 24, 2012. At the time of the Fourth Amendment, $24 million remained outstanding from the Third Amendment revolving facility, and this $24 million was added to the $70 million term loan in the Fourth Amendment, for a total loan of $94 million. Prior to the Petition Date, the Debtor apparently paid down $14 million of the loan, leaving a remaining balance of approximately $80 million. *Id.*

[15] *Id.*, ¶ 49.

[16] The Intercreditor Agreement is attached as Exhibit 7 to the Debtor's Initial Submission.

vehicles and equipment as between Shell and the Indenture Trustee, with respect to the 2016 Senior Secured Notes (also as defined below). The Intercreditor Agreement includes a "payment over" provision requiring the Indenture Trustee to remit certain recoveries related to Shared Collateral (as defined in the Intercreditor Agreement) to Shell in certain circumstances.[17]

11. On May 10, 2012, Shell filed an insufficient UCC financing statement (the "Insufficient Financing Statement"). Instead of specifically listing or identifying the specific collateral in which it was claiming an interest, Shell noted "(See Attached Sheets)," but failed to attach any documents, thus failing to perfect any security interest in the Debtor's assets. Shell failed to file a valid UCC-1 financing statement in the jurisdiction in which the Debtor is incorporated and, as a result, Shell did not have properly perfected liens on the Debtor's equipment under the Insufficient Financing Statement in May 2012.[18] Shell acknowledges that it does not have a perfected security interest in the Debtor's non-vehicle assets, and under the RSA,[19] Shell agreed to stipulate to the avoidance of its security interests pursuant to Section 547 of the Bankruptcy Code.[20]

12. On October 8, 2013, Shell delivered a notice of default to GFES stating that the Debtor (i) had failed to pay outstanding indebtedness within 10 days after such indebtedness became due; and (ii) had defaulted on any credit, loan, prepayment, or other financial obligation, and thus had defaulted on the Shell Credit Facility. The notice of default formally demanded full payment of all outstanding indebtedness and procurement of the release of any liens attached to

[17] *See* Blackwell Declaration, ¶ 50.

[18] *Id.*, ¶ 51.

[19] As defined in paragraph 41, *infra.*

[20] *See* Shell Initial Submission, ¶ 72.

the assets falling under the purview of the Shell Credit Facility.[21] The notice of default did not accelerate the balance of the loan.

13. On October 11, 2013, Shell filed a new UCC Financing Statement (the "Preference Period Financing Statement"), attaching a list of the Debtor's assets in which Shell asserted a security interest and seemingly perfecting Shell's interest in the collateral. The list of collateral in the Preference Period Financing Statement includes:

> All of debtor's equipment, tools, trucks, blenders, sanders, pumps, Frac Spreads (namely, a complement or spread of equipment required to perform hydraulic fracturing), and motor vehicles, including but not limited to those described on Appendix A.[22]

2. 2016 Senior Secured Notes

14. On November 15, 2011, GFES and Wilmington Trust, National Association, as trustee and collateral agent (the "Indenture Trustee"), entered into that certain Indenture (as amended by the Supplemental Indenture dated as of October 23, 2012, the "2016 Senior Secured Note Indenture") pursuant to which GFES issued 250,000 units, with each unit consisting of: (i) $1,000 principal amount, totaling $250 million as the aggregate principal amount, of 13% Senior Secured Notes due 2016 (the "2016 Senior Secured Notes" or the "Notes");[23] and (ii) one warrant to purchase 0.988235 shares of common stock ("Warrants"). The holders of the units informed the trustee of the decision to separate the units on November 15, 2011, so that the

[21] *See* Blackwell Declaration, ¶ 52.

[22] *See* Debtor's Initial Submission, ¶ 39.

[23] The Debtor conducted a successful consent solicitation to modify the terms of the 2016 Senior Secured Note Indenture as set forth in the Supplemental Indenture dated as of October 23, 2012. Following these modifications, the Debtor was allowed to incur a one-time borrowing of up to $95 million in senior term loans under the Shell Credit Facility, and permitted debt and permitted liens that could be obtained and granted senior to the liens of the Notes in an amount up to $30 million. In addition, the Supplemental Indenture contained an agreement to pay the holders of the Notes a consent fee in the amount of 2.5% of the principal amount of the Notes that consented, which ultimately increased the principal amount due under the 2016 Senior Secured Note Indenture to $255.948 million. *See* Blackwell Declaration, ¶ 54.

Notes and the Warrants would be traded independently.[24] The beneficial holders of the Notes are referred to herein as the "Noteholders."

15. The Notes mature on November 15, 2016 and bear interest at a fixed annual rate of 13%, payable semiannually on May 15 and November 15 of each year. The Notes are secured by security interests in substantially all of the Debtor's tangible and intangible assets subject to certain exceptions. The covenants under the 2016 Senior Secured Note Indenture allow the Debtor to enter into a senior credit facility in addition to the Shell Credit Facility in an aggregate principal amount not exceeding the greater of $30 million or a specified percentage of the Debtor's tangible assets.[25]

16. On October 14, 2013, the Indenture Trustee delivered a notice of default to GFES stating that the Debtor had failed to (i) make a payment on the Notes; and (ii) make a semi-annual offer to repurchase, and thus had defaulted on the 2016 Senior Secured Note Indenture. The notice provided that the Indenture Trustee is continuing to forbear, on a day-to-day basis, from exercising its rights and remedies as a result of this default, but reserved all of the rights and remedies available to it under the 2016 Senior Secured Note Indenture.[26]

3. Trade and Other Unsecured Debt

17. The Debtor has certain trade debt due and owing to vendors, suppliers and other prepetition creditors. As of the Petition Date, the total of the outstanding obligations due and owing to vendors, suppliers and other general unsecured creditors (other than the lenders under the financings discussed above) was approximately $95.9 million. Additionally, the Debtor

[24] *See* Debtor's Initial Submission, ¶ 41.

[25] *See* Blackwell Declaration, ¶ 55.

[26] *See* Blackwell Declaration, ¶ 60.

estimates that, as of the Petition Date, approximately $2.7 million of obligations to vendors had accrued but not yet been invoiced to the Debtor.[27]

D. Share Purchase Agreements

18. Under that certain Share Purchase Agreement dated as of October 24, 2012, among the Debtor and two Moreno Affiliated Entities,[28] namely MOR MGH Holdings, LLC ("MOR MGH") and Moody Moreno & Rucks, LLC ("MMR") (the "2012 Share Purchase Agreement"), GFES agreed to issue, and MOR MGH and MMR agreed to purchase, up to $25 million in preferred shares of GFES stock.[29] Under the 2012 Share Purchase Agreement, MOR MGH and MMR were obligated to purchase shares in accordance with their percentage interests in GFES.[30] Based on their respective ownership percentages, MOR MGH was obligated to purchase 88.9% of the shares and MMR was to purchase 11.1%.[31] The 2012 Share Purchase Agreement initially called for MOR MGH and MMR to purchase $10 million in preferred stock. Thereafter, at the end of each calendar quarter beginning in the fourth quarter of 2012, the purchase price was the amount, if any, by which $10 million exceeded the amount of cash GFES

[27] *See* Blackwell Declaration, ¶ 61.

[28] As defined in the Plan, "Moreno Affiliated Entities" means:

> Tiffany C. Moreno, Moreno Properties, LLC, Dynamic Industries, Inc., Casafin II, LLC, Aerodynamic, LLC, Elle Investments, LLC, Alliance Consulting Group, LLC, Frac Rentals, LLC, Moody, Moreno and Rucks, LLC, MOR, TCM 2011 DOH GRAT, MBM 2011 MGH GRAT, TCM 2011 MGH GRAT, MBM 2011 DOH GRAT, Riverstone and Rucks, Dynamic Group Holdings, LLC, Shale Support Services, LLC, Dynamic Energy Services International, LLC, MOR 2013 Holdings, LLC and MOR MGH Holdings, LLC, and their respective officers, directors, shareholders, members and/or enrollees, employees, representatives, advisors, attorneys, financial advisors, investment bankers, or agents.

[29] *See* Moreno Initial Submission, ¶ 27. The 2012 Share Purchase Agreement is attached as Exhibit 15 to the Committee's Initial Submission.

[30] *See* 2012 Share Purchase Agreement, § 2.01(a).

[31] *Id.*, Exhibit A.

held as of the last day of each quarter until a maximum of an additional $15 million was purchased.[32]

19. The Debtor acknowledges that MOR MGH and MMR purchased the initial $10 million of preferred stock in accordance with Section 2.01(a) of the 2012 Share Purchase Agreement.[33] The Debtor also acknowledges that MOR MGH and MMR purchased the requisite amount of preferred stock—in the amount of $1,566,461—following the end of Q4 2012.[34] The Debtor and Michel Moreno both agree that GFES did not issue, and MOR MGH and MMR did not purchase, preferred stock in the required amounts of $4,464,626 for Q1 2013 and $2,242,455 for Q2 2013.[35] The Debtor states that MOR MGH and MMR also failed to purchase preferred stock for Q3 2013 in the amount of $4,086,369.[36] Mr. Moreno and the Moreno Affiliated Entities justify this non-payment because it was allegedly due after GFES commenced its chapter 11 proceeding and because the 2012 Share Purchase Agreement contained a material adverse change ("MAC") clause.[37] Finally, the Debtor notes that, as there is no end date under terms of the 2012 Share Purchase Agreement, the remainder of the $15 million aggregate cap arguably remains open for potential liquidity shortfalls in future quarters and results in a potential further claim against MOR MGH and MMR in the aggregate amount of $2,640,089.[38] Mr. Moreno and the Moreno Affiliated Entities respond by citing the MAC clause and, further, that there was no

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[32] *Id.*, §§ 2.01 and 2.02.

[33] *See* Debtor's Initial Submission, ¶ 147.

[34] *Id.*, ¶ 149.

[35] *Id.*; *see also* Moreno Initial Submission, ¶ 29.

[36] *See* Debtor's Initial Submission, ¶ 149.

[37] *See* Moreno Initial Submission, ¶¶ 29-30.

[38] *See* Debtor's Initial Submission, ¶ 150.

requirement to purchase any preferred stock after Q4 2013 because GFES had more than $10 million of cash on hand at that time based on its receipt of DIP financing.[39]

20. MOR MGH and GFES are also parties to a Share Purchase Agreement dated June 28, 2013 (the "2013 Share Purchase Agreement").[40] Under the 2013 Share Purchase Agreement, MOR MGH was obligated to purchase $10 million in preferred stock from GFES.[41] The 2013 Share Purchase Agreement provided that "[MOR MGH] agrees to purchase from [GFES], and [GFES] agrees to sell and transfer to [MOR MGH], the number of Preferred Shares determined by the quotient of $10,000,000.00 divided by the Per Share Purchase Price."[42] The 2013 Share Purchase Agreement also required that "[p]ayment with respect to the Purchase shall be made on the date hereof by wire transfer of immediately available funds to an account or accounts designated by [GFES]."[43] Based on the Debtor's records, MOR MGH never paid the $10 million required under the 2013 Share Purchase Agreement.[44]

21. The Debtor acknowledges that the Estate may have a "strong breach of contract action" against MOR MGH and MMR with respect to the 2012 Share Purchase Agreement, and

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[39] *See* Moreno Initial Submission, ¶¶ 29-30.

[40] The 2013 Share Purchase Agreement is attached as Exhibit 28 to the Debtor's Initial Submission. The Committee also provided the Examiner with a document that it cites as the 2013 Share Purchase Agreement. *See* Exhibit 31 to Committee's Initial Submission. The Committee's version, however, is not fully executed and includes, in addition to GFES and MOR MGH, MMR. Given that the Committee's version of the 2013 Share Purchase Agreement is not fully executed, for purposes of this Report the Examiner will use the 2013 Share Purchase Agreement attached to the Debtor's Initial Submission as Exhibit 28.

[41] According to the Moreno Initial Submission, ¶ 31, the $10 million purchase obligation was conditioned on the same type of MAC clause contained in the 2012 Share Purchase Agreement.

[42] *See* 2013 Share Purchase Agreement, § 2.01(a).

[43] *Id.*, § 2.01(b).

[44] *See* Debtor's Initial Submission, ¶ 151.

against MOR MGH with respect to the 2013 Share Purchase Agreement.[45] The Committee also alleges that Mr. Moreno is liable for tortious interference based on his interference "with the performance by ... his affiliates MMR and MORMGH" with the two Share Purchase Agreements.[46] These claims are discussed further in Section IV.B.2.a.ii(I)(B) and IV.B.2.c, *infra*.

E. Joint Venture with MTT

22. In September 2011, the Debtor formed TPT as a joint venture with MTT. TPT purchased the turbine engines used in the Debtor's turbine-powered hydraulic fracturing units, or "TFPs", and assembled the TFPs. Under the joint venture arrangements, the Debtor has the exclusive right to purchase turbines and accessory equipment from TPT for use in hydraulic fracturing until October 2016, but does not have the right to use the technology for other purposes. The Debtor's royalty-free, perpetual license to use purchased equipment will survive the termination of the exclusive rights period described in this paragraph. Following the termination of the exclusive rights period, the Debtor will also have a perpetual right of first offer on all TFPs sold by TPT.[47]

23. Along with the equipment purchase arrangements, the Debtor entered into installation and maintenance agreements with TPT. Under these agreements, TPT provided all labor and professional supervisory and managerial personnel required for installation of turbine engines on trailers or into skids and was to maintain and repair all turbine-powered equipment, accessory equipment, and all gearboxes and accessory gearboxes that the Debtor purchased.

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[45] *See* Debtor's Initial Submission, ¶ 146. This Report refers to the 2012 Share Purchase Agreement and the 2013 Share Purchase Agreement collectively as the "Share Purchase Agreements."

[46] *See* Committee's Supplemental Submission, ¶ 128.

[47] *See* Blackwell Declaration, ¶ 33.

Under these agreements, the Debtor was to pay costs plus agreed markups to TPT. As of the Petition Date, the Debtor owed TPT approximately $8,679,668 on account of products and services.[48]

F. Turbine Generation Services, LLC

24. In late 2012, Mr. Moreno began to explore a potential business line that would utilize the turbine engines developed by TPT for power generation (the "Power Generation Business"). Initially, it was contemplated that GFES would develop the Power Generation Business as an addition to the Debtor's existing well services and hydraulic fracturing services.[49] In fact, GFES and its employees worked to develop the Power Generation Business and Mr. Moreno sought financing for the business from numerous sources, including the Noteholders, General Electric Corporation, and many others.[50]

25. Ultimately, however, Mr. Moreno decided to pursue the Power Generation Business outside of the Debtor's corporate structure, allegedly because the Debtor was unable to obtain adequate financing to pursue development of the Power Generation Business within GFES.[51] On March 7, 2013, Turbine Generation Services, LLC ("TGS") was formed by its sole member, MOR DOH Holdings, LLC ("MOR DOH"),[52] to pursue the Power Generation Business. Pursuant to the Written Consent of the Shareholders and Directors of Green Field

[48] *See* Blackwell Declaration, ¶ 34.

[49] *See* Debtor's Initial Submission, ¶ 211.

[50] *Id.* After TGS was formed, TGS reimbursed GFES for certain work performed by GFES and its employees in connection with the Power Generation Business. *See* Debtor's Initial Submission, ¶ 218 (citing to the *Agreement Between Green Field Energy Services, Inc. and Turbine Generation Services, LLC for the Period of November 2012 Through June 2013* (the "TGS Reimbursement Agreement"), a copy of which is attached as Exhibit 39 to the Debtor's Initial Submission.

[51] *See, e.g.,* Moreno Initial Submission, ¶ 52.

[52] MOR DOH was, at the time, owned 100% by MBM 2011 DOH GRAT and TCM 2011 DOH GRAT, two trusts owned and controlled by Mr. Moreno or his wife, Tiffany Moreno. *See* Blackwell Declaration, ¶ 36.

Energy Services, Inc., dated May 13, 2013 (the "Power Generation Waiver"), GFES determined to waive the opportunity to pursue the Power Generation Business and agreed that Mr. Moreno, TGS and TPT could purse the Power Generation Business outside of GFES.[53] Notably, in June 2013, one month after the Debtor waived the opportunity to pursue the Power Generation Business, Powermeister, LP ("Powermeister"), an entity unrelated to the Debtor or its equity holders, purchased a 9.6% equity interest in MOR DOH for $20 million.[54]

26. In order to fund the Power Generation Business operations, on May 13, 2013, TGS entered into a Senior Secured Promissory Note pursuant to which GE Oil & Gas, Inc. ("GE O&G") provided a $25 million loan to TGS secured by substantially all of the assets of TGS.[55] On June 21, 2013, TGS entered into a Turbine Driven Power Generation Equipment License Agreement with TPT pursuant to which TGS licensed certain technologies developed by TPT, and used in connection with the Debtor's operations, for use in the Power Generation Business.[56] Additionally, on June 21, 2013, GFES, TGS and TPT entered into a three-party agreement (the "Tri-Party Agreement") for the manufacture and sale of turbine powered generators pursuant to which (a) TPT agreed to provide turbine generators to TGS, (b) GFES agreed to act as contract manager, overseeing the production of the turbine generators for TGS, and (c) TGS agreed to remit funds to GFES as deposits which would, in turn, be remitted by GFES to TPT upon fulfillment of orders.[57]

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[53] *See* Debtor's Initial Submission, ¶ 213. The Written Consent of the Shareholders and Directors of Green Field Energy Services, Inc., is attached to the Debtor's Initial Submission as Exhibit 38.

[54] *See* Debtor's Initial Submission, ¶ 212.

[55] *Id.*, ¶ 214.

[56] *See* Blackwell Declaration, ¶ 38.

[57] *See* Moreno Initial Submission, ¶53; *see also* Blackwell Declaration, ¶ 38.

27. During the period of March 29, 2013 through the Petition Date, TGS provided $27,994,171 to GFES as deposits. As of the Petition Date, GFES had made the following payments from the deposits, on behalf of TGS: (a) $11,337,218 to TPT, (b) $2,321,250 to third party vendors, and (c) $2,210,884 to TGS. The remaining $12,124,820 was commingled with GFES funds. TGS asserts that the remaining funds constitute an obligation owing by GFES to TGS.[58]

28. Additionally, starting in March 2013, TGS paid the Debtor $23,091,245 for turbine engines, resulting in a profit margin of approximately 50% for GFES on the sales.[59] The Debtor subsequently repurchased two engines from TGS for $766,000, which amount remained due and owing as of the Petition Date.

G. Related Party Transactions

29. In addition to TPT and TGS, the Debtor engaged in various related party transactions, primarily with Mr. Moreno and the Moreno Affiliated Entities.[60] These transactions are discussed in further detail in Section IV.B.2, *infra*.

H. Events Leading to the Chapter 11 Filings

30. Due to what it perceived to be the competitive advantages of the turbine-powered hydraulic fracturing technology utilized by the Debtor, the Debtor greatly expanded its hydraulic fracturing operations and capabilities, increasing the number of TFPs in its fleet from eight in 2011 to sixty-five as of the Petition Date. According to the Debtor, it had to rapidly expand in order to compete with the established fracking services companies serving the industry (*e.g.*,

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[58] *See* Blackwell Declaration, ¶ 39.

[59] *See* Debtor's Initial Submission, ¶ 217.

[60] *See* Blackwell Declaration, ¶ 42. A chart identifying each of the Moreno Affiliated Entities and their relationship to the Debtor is attached hereto as Exhibit A.

Halliburton and Schlumberger). Unfortunately, market conditions adversely changed shortly after the expansion. Among other things, reduced demand for fracturing services combined with increased supply capacity created intense pricing competition and very difficult market conditions for fracking service providers such as the Debtor.[61]

31. As a result, the Debtor's customer base became more and more concentrated. In the last three years the Debtor's top five customers accounted for 38% of revenues (2010), 52% of revenues (2011), and 88% of revenues (2012). Additionally, in August 2013, Shell, by far the Debtor's largest customer—accounting for 79% of total revenues in 2012—informed GFES that it was reducing its fracturing operations in the areas the Debtor serviced the most, specifically the Eagle Ford Shale formation in southern Texas.[62] The absence of Shell's business severely reduced the Debtor's revenues and resulted in a need for reorganization of the Debtor's debt structure.[63]

32. As a result of the foregoing, the Debtor began to explore operational modifications to save operating costs, as well as financing options. On September 30, 2013, the Debtor retained Alvarez and Marsal North America, LLC ("Alvarez") to perform a variety of restructuring related services. Additionally, in October 2013 the Debtor retained Carl Marks Advisory Group, LLC ("Carl Marks") to provide investment banking related services. The Debtor and its advisors continued to evaluate operational changes that could result in decreased

[61] *See* Debtor's Initial Submission, ¶ 23.

[62] As described in footnote 6 of the Debtor's Initial Submission, the Eagle Ford Shale formation is a gas and oil producing site situated in South Texas. It is 400 miles long and 50 miles wide, containing hundreds of oil leases and gas wells. The Eagle Ford Shale formation is possibly the largest single economic development in the history of Texas, and is potentially the largest oil and gas development in the world. An estimated $30 billion in development costs were expended in 2013, and over 116,000 jobs in twenty counties are supported by the development. As discussed below, Shell is currently seeking to sell its stake in the Eagle Ford Shale formation.

[63] *See* Blackwell Declaration, ¶ 63.

cost, while also negotiating with the lenders under their prepetition credit facilities. These operational changes included the cessation of substantially all of the Debtor's fracking operations and significant reductions in force.[64]

33. Ultimately, the Debtor filed its bankruptcy petition on October 27, 2013.

I. Debtor-In-Possession Financing

34. On October 29, 2013, the Debtor, as borrower, executed a Bridge Note in the amount of $15 million (the "Bridge Note") in favor of ICON Capital, LLC ("ICON Capital") and GB Credit Partners, LLC ("GB"), in their capacities as co-administrative agents under the Bridge Note, due December 11, 2013. On October 29, 2013, the United States Bankruptcy Court for the District of Delaware (the "Court") approved the Bridge Note and authorized the Debtor to borrow up to $15 million in the aggregate on an interim basis (the "Interim DIP Order").[65]

35. Following entry of the Interim DIP Order, the Debtor reached an agreement with GB and ICON Capital on the documentation of a term loan facility and, on November 26, 2013, the Debtor, as borrower, entered into a Debtor-In-Possession Term Loan and Security Agreement (the "DIP Credit Agreement") providing for up to $30 million as a debtor-in-possession credit facility (the "DIP Credit Facility") with ICON Agent, LLC ("ICON") and GB as co-administrative agents (GB and ICON collectively, the "DIP Agents"), and the other lenders party thereto. On November 26, 2013, the Court entered its *Final Order (I) Authorizing Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364 and 507(b), and (II) Granting Adequate Protection to Certain Prepetition secured Parties Pursuant to Sections 361,*

[64] *Id.*, ¶ 64. Moreover, the Debtor has now shifted largely all of their assets into storage facilities.

[65] *See Interim Order (I) Authorizing Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364, and 507(b), (II) Granting Adequate Protection to Certain Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) and (c)* [Docket No. 62].

362, 363 and 364 of the Bankruptcy Code (the "Final DIP Order")[66] permitting the Debtor to obtain credit and incur debt to a maximum amount of $30 million. Proceeds of the DIP Credit Facility were used to pay all outstanding amounts owing under the Bridge Note.

36. In connection with the Final DIP Order, the Debtor granted the DIP Agents Superpriority Claims (as defined in the Final DIP Order) and DIP Liens (as defined in the Final DIP Order) consisting of (i) first priority liens on all assets of the Debtor not subject to Pre-Petition Permitted Encumbrances (as defined in the Final DIP Order), (ii) junior liens on the Debtor's assets that are subject to Pre-Petition Permitted Encumbrances, (iii) first priority priming liens on the Debtor's assets that are subject to the Pre-Petition Lender Primed Liens (as defined in the Final DIP Order), and (iv) priming liens on any assets subject to the liens of Junior Lienholders (as defined in the Final DIP Order) that received notice of the Final DIP Order.[67]

37. In consideration for the use of Indenture Collateral (as defined in the Final DIP Order) and the priming of the Indenture Liens (as defined in the Final DIP Order), the Final DIP Order provided for the adequate protection of the Indenture Trustee including (i) replacement liens on the Collateral (as defined in the Final DIP Order) to the extent of the diminution in the value of the Indenture Collateral, subject to certain restrictions, (ii) a weekly accounting of the Pre-Petition Segregated Funds (as defined in the Final DIP Order), and (iii) reimbursement for the reasonable fees and expenses of restructuring and Delaware counsel to the Noteholders (defined below) up to an aggregate $400,000.[68]

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[66] *See* Docket No. 191.

[67] *See* Debtor's Initial Submission, ¶ 51.

[68] *Id.*, ¶ 52.

38. The Final DIP Order did not grant the DIP Agents, the Indenture Trustee or anyone else liens or super-priority claims on causes of action under chapter 5 of the Bankruptcy Code.[69]

39. The Final DIP Order requires the Debtor to segregate proceeds from postpetition services and business activities into a separate bank account (the "Postpetition Segregated Funds") and permits use of the Postpetition Segregated Funds to pay, among other things, fees and expenses incurred in the Chapter 11 cases in accordance with the budget (as defined in the Final DIP Order). The Final DIP Order also requires the proceeds from any sale of pre-petition unencumbered assets to be placed into a segregated bank account subject only to the DIP Liens and the Noteholder Adequate Protection Liens (as defined in the Final DIP Order).

40. Until all DIP Obligations (as defined in the DIP Order) are paid, no claims may be charged against the Collateral (as defined in the DIP Order) pursuant to Bankruptcy Code Section 506(c).

II. RESTRUCTURING SUPPORT AGREEMENT

41. On December 31, 2013, the Debtor filed its *Motion Pursuant to Sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019 for an Order Authorizing the Debtors to Enter Into and Perform Their Obligations Under a Restructuring Support Agreement with the Moreno Entities, Turbine Powered Technology, LLC,*[70] *SWEPI, LP,*[71] *and Consenting Noteholders*[72] (the "RSA Motion").[73] The Restructuring Support Agreement ("RSA")

[69] *See* Final DIP Order, ¶ 9.

[70] As defined previously, TPT.

[71] As defined previously, Shell.

[72] As defined in Amendment No. 1 to Restructuring Support Agreement, "Consenting Noteholders" means the holders of at least 60% of the aggregate amount of the 2016 Senior Secured Notes. *See* Docket No. 396.

contemplated a chapter 11 plan in which the Debtor would release all causes of action against Shell, the Moreno Releasees (defined in the RSA Motion), TGS, TPT, and the Noteholders (defined below), except for the Debtor's rights, claims and causes of action against Shell under chapter 5 of the Bankruptcy Code.

42. As characterized by the Debtor, the settlement contemplated by the RSA called for Shell to (i) stipulate that its filing of the Preference Period Financing Statement in October 2013 was a voidable preference, (ii) fix its valid secured claim at $5 million, (iii) cap its turnover claim under the Intercreditor Agreement at $40 million, and (iv) release Mr. Moreno's personal guaranty of Shell's claims against the Debtor. Shell also agreed that approximately $30 million of proceeds from the sale of Shared Collateral[74] could be used, together with the proceeds from the sale of the Noteholders' Collateral, to pay the DIP Credit Facility, other Administrative Claims,[75] Priority Tax Claims, and Priority Non-Tax Claims. Further, Mr. Moreno agreed to contribute his interests in TGS into a newly formed entity ("NewCo") and to manage the operations of NewCo and TGS. Certain members of the ad hoc group of Noteholders agreed to permit the proceeds of the Noteholders' Collateral, with the proceeds of the Shared Collateral, to be used to pay $12 million to TPT, the DIP Credit Facility, other Administrative Claims, Priority Tax Claims, Priority Non-Tax Claims, any and all cash distributions to be required to be made to Ford Motor Credit Company LLC and Nations Fund I Inc., up to $3 million of Other Secured Claims (as defined in the RSA Motion) and up to $1 million to fund the Litigation Trust (as

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[73] *See* Docket No. 299.

[74] As discussed in Section I.C, *supra*, the Indenture Trustee—acting for the benefit of the Noteholders—has a first lien on substantially all of the Debtor's assets. Pursuant to an Intercreditor Agreement between the Indenture Trustee and Shell, the Indenture Trustee's first lien is contractually subordinated to Shell's second lien on a subset of the Debtor's assets (the "Shared Collateral"). For purposes of this Report, the Examiner refers to the lien on assets not subject to subordination to Shell under the Intercreditor Agreement as the "Noteholders' Collateral."

[75] Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Plan.

defined in the RSA Motion) to pursue avoidance actions. The Noteholders also agreed to receive a percentage of the equity of NewCo, to which the Debtor's 50% equity interest in TPT would also be contributed, rather than share in the recovery of unsecured creditors on account of avoidance actions.[76] The Noteholders agreed to effectively waive their unsecured deficiency claim and to allow the proceeds of the Noteholders' Collateral and the Shared Collateral to fund the chapter 11 plan contemplated by the RSA.

43. Under the RSA, TPT agreed to consent to the assumption and assignment of its license of intellectual property to the Debtor and its equipment supply agreement with the Debtor to a buyer of the Debtor's assets, enhancing the value the Estate will receive from the sale of those assets. TPT also agreed to consent to the admission of NewCo as a full member of TPT. Finally, the Debtor agreed to release any causes of action against Mr. Moreno and the other Moreno Releasees, the Noteholders, TPT, TGS and Shell, except for avoidance actions against Shell. The Debtor and the other RSA Parties[77] asserted that the chapter 11 plan contemplated by the RSA would provide significantly higher recoveries to general unsecured creditors than could be achieved absent the RSA.

44. The Committee disagreed with this assertion. The Committee challenged the RSA on the basis that both Shell and the Moreno Releasees (including Mr. Moreno) were providing little or disproportionately small value to the Estate in exchange for receiving releases

[76] Specifically, the Noteholders were to receive 70% of the Class A preferred equity of NewCo, 50% of the Class B preferred equity of NewCo and 30% of the common equity of NewCo. The Class A preferred equity will have a $300 million liquidation preference. The Class B preferred equity will have a $300 million liquidation preference following payment of the Class A preferred equity. *See* Docket No. 351, p.7.

[77] As defined in the RSA Motion, the "RSA Parties" are the Consenting Noteholders, the Debtor, Mr. Moreno and certain of the Moreno Affiliated Entities, TPT, and Shell.

from valuable Estate claims and causes of action against them.[78] On January 5, 2014, the Committee filed a motion seeking the appointment of an examiner to analyze the RSA, arguing that "[t]his case has, from inception, involved serious factual and legal issues regarding: (i) historical insider decision-making and conduct; (ii) the Debtor['s] dubious lending/customer relationship with ... Shell; and (iii) questionable affiliate transactions of large dollar amounts," and, further, that a "report from an independent examiner is compelled by the law and warranted under the circumstances. Such a report would, among other things: (i) meaningfully assist this Court, given that the Debtor[] ha[s] now set in motion a very hotly contested matter (with little time reserved for discovery) that likely will involve a complex, fact-intensive trial; (ii) remediate a serious process infirmity and thereby restore confidence in the debtor-in-possession's day-to-day stewardship of the estate[]; and (iii) aid unsecured creditors (as well other parties-in-interest also not allowed to participate in the 'secret' settlement negotiations), given that hidden information finally will be brought to light."[79]

III. APPOINTMENT OF EXAMINER

45. The Court held a hearing on January 13, 2014, to consider the Committee's examiner request. On January 14, 2014, the Court entered the Original Examiner Order.[80] On January 17, 2014, the Office of the United States Trustee filed the *United States Trustee's Application for Order Approving Appointment of Examiner*,[81] requesting the appointment of

[78] As acknowledged by the Debtor in the RSA Motion, "[t]he Committee was not actively involved in the negotiations of the RSA -- largely due to the number of RSA Parties involved, the fact that the negotiations were a continuation of negotiations prior to the Petition Date, and because the Debtor[] thought it would be most productive to share the RSA with the Committee once it had been finalized by the RSA Parties." *See* Docket No. 299, ¶ 14.

[79] *See* Docket No. 304, pp.1-3.

[80] *See* Docket No. 383.

[81] *See* Docket No. 410.

Steven A. Felsenthal, Esq., as the Examiner ordered by the Court. On January 17, 2014, the Court entered the order appointing Mr. Felsenthal as Examiner.[82]

46. Since his appointment, the Examiner has been proceeding with his duties in this case, which are set forth in the Original Examiner Order. Among other things, the Original Examiner Order provided the following direction to the Examiner, in Paragraph 3 thereof:

> The examiner shall investigate and prepare a report providing his/her factual and legal conclusions respecting whether the estate[] hold[s] valuable claims or causes of action against any of the parties that would receive a release if the Chapter 11 Plan described in the RSA is confirmed and whether the value being contributed by the parties to the RSA (the "RSA Parties") justifies granting such releases. The Committee shall submit to the examiner on or before January 24, 2014, with copies to each of the RSA Parties, a description of all claims and causes of action that the Committee believes exist against any of the parties that would receive a release if the Chapter 11 Plan described in the RSA is confirmed. Each of the RSA Parties may submit to the examiner on or before January 31, 2014, with a copy to each of the other RSA Parties and the Committee, a response to the description submitted by the Committee. The examiner shall take into account both submissions in issuing his/her report.

47. As noted on the docket in these Chapter 11 cases, on February 7, 2014, the Debtor terminated the RSA.[83] Moreover, one day earlier on February 6, 2014, the Debtor filed a proposed plan which contains terms varying from those contemplated by the RSA prior to its termination.[84]

48. Accordingly, on February 24, 2014, pursuant to a joint request supported by the Debtor and the other RSA Parties, the Committee, the Office of the United States Trustee, and the Examiner, the Court modified the directive given to the Examiner, as follows:

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[82] *See* Docket No. 417.

[83] *See Notice of Withdrawal of Docket No. 299* (Docket No. 480).

[84] *See* Docket No. 478.

> The examiner shall investigate and prepare a report providing his/her factual and legal conclusions respecting whether the estates hold valuable claims or causes of action against any of the parties that would receive a release if the Chapter 11 Plan that was filed by the Debtors on February 6, 2014 [Docket No. 478], including any plan revisions that represent a consensual resolution of matters that would have otherwise been covered in the examiner's report, is confirmed and whether the value being contributed by the parties to the RSA (the "RSA Parties") justifies granting such releases. The examiner shall take into account the submissions of the Committee and the RSA Parties in issuing his/her report.[85]

IV. EXAMINATION

49. The Committee and the RSA Parties timely submitted their initial papers and supporting documentation to the Examiner as provided by the work and expense plan filed with the Court, as modified.[86] Following a round of discovery, the parties each submitted supplemental memoranda and additional supporting documentation.[87] The Examiner consulted with the parties on several occasions, in person and by phone, and both individually and collectively. The Committee and the RSA Parties have assisted and fully cooperated with the Examiner.

50. As noted, on February 6, 2014, the Debtor filed its joint Plan, together with the Disclosure Statement With Respect to the Joint Plan of Liquidation of Green Field Energy Services, Inc., et al. (the "Disclosure Statement").[88] The Court has scheduled a hearing on the Disclosure Statement on March 11, 2014.

51. On February 7, 2014, the Debtor filed its *Motion of Debtors for Order (I) Under 11 U.S.C. §§ 105(a), 363, 365, 503, 507 and 1146(a), Fed R. Bankr. P. 2002, 6004, 6006, 9007*

[85] *See* Amended Examiner Order, ¶ 1.

[86] *See supra* note 2.

[87] *Id.*

[88] *See* Docket No. 479.

and 9014 and Del. Bankr. L.R. 2002-1, 6004-1 and 9006-1 Authorizing and Approving (A) Bidding Procedures in Connection with the Sale of Certain Assets of the Debtors, (B) Agent Bid Protections, (C) the Form and Manner of Notice of the Sale Hearing and (D) Related Relief; and (II) Under 11 U.S.C. §§ 105(a), 363, 365, 503, 507 and 1146(a), Fed. R. Bankr. P. 2002, 6004, 6006, 9007 and 9014 and Del. Bankr. L.R. 2002-1, 6004-1 and 9006-1 Authorizing (A) the Sale of Certain Assets of the Debtors Free and Clear of All Claims, Liens, Liabilities, Rights, Interests and Encumbrances Except for Permitted Encumbrances in Certain Circumstances; (B) the Debtors to Enter Into and Perform Their Obligations Under the GBCI Agency Agreement or an Alternative Sale Transaction; (C) the Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases; and (D) Related Relief (the "Sale Motion").[89] As set forth in the Sale Motion, as of February 7, 2014, the Debtor had entered into an Agency Agreement, dated February 7, 2014, with Gordon Brothers Commercial & Industrial, LLC ("Gordon Brothers"). Under the Agency Agreement, which operates substantially similarly to a traditional stalking horse contract, Gordon Brothers will act as the Debtor's exclusive sales agent to sell the Debtor's assets free and clear of all liens, claims and encumbrances. The Debtor will receive a guaranteed $50 million under the Agency Agreement plus the next $17.5 million in sales proceeds, for a total of $67.5 million, before Gordon Brothers receives any compensation for its services. Notably, for purposes of accepting Qualified Bids pursuant to the Bid Procedures Order (defined below), the Court has valued the Gordon Brothers transaction at $67.5 million.[90]

52. On February 19, 2014, the Court held a hearing to consider entry of an order approving the bidding procedures (the "Bid Procedures"), which establishes the key dates and

[89] *See* Docket No. 482.

[90] *See* Transcript of February 19, 2014, hearing, at p. 62.

times related to the sale of the Debtor's assets. Following the hearing on February 19, 2014, the Court entered its *Order (I) Approving Bid Procedures in Connection With Sale of Certain Assets of the Debtors; (II) Scheduling Hearing to Consider Sale of Assets; (III) Approving Form and Manner of Notice Thereof; (IV) Approving Agent Bid Protections and (V) Granting Related Relief* (the "Bid Procedures Order"),[91] approving the Debtor's proposed Bid Procedures and establishing March 5, 2014, as the deadline for submitting bids for the Debtor's assets. Further, as set forth in the Bid Procedures Order, to the extent the Debtor receives one or more Qualified Bids (as defined in the Bid Procedures Order), the Debtor will conduct an auction on March 7, 2014, to determine the highest or otherwise best bid for the Debtor's assets.[92]

53. The Court has scheduled a hearing on the Debtor's Sale Motion on March 11, 2014—after the Examiner's Report is due.[93] The purchase price for the Debtor's assets will ultimately inform the Plan and the confirmation process. For purposes of this Report, the Examiner assumes that the sale will result in a net recovery to the Debtor of $67.5 million. As described herein, the Debtor's assets are subject to several liens, including the DIP Lien held by the DIP Agents, the liens held by both Shell and the Noteholders on Shared Collateral, and the Noteholders' lien on the Noteholders' Collateral. The Debtor also holds $8 million of the Noteholders' cash collateral.

54. Pursuant to the Original Examiner Order, as modified by the Amended Examiner Order, the Examiner respectfully files this Report. If requested or directed by the Court, the Examiner is prepared to perform other functions to assist in the resolution of these cases.

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[91] *See* Docket No. 561.

[92] *See* Bid Procedures Order, ¶ 5. The auction will be held at the offices of Latham & Watkins LLP, co-counsel to the Debtor, in Houston, Texas. *Id.*

[93] As set forth in the Original Examiner Order, the Examiner's Report is due on March 4, 2014.

55. As set forth in the Amended Examiner Order, this Report (i) identifies the parties receiving releases under the Plan and the consideration provided for the releases, (ii) describes and discusses the claims and causes of action identified by the parties against the parties receiving releases, (iii) assesses the value of the claims and causes of action, and (iv) assesses the value of the consideration provided for the releases under the Plan.

56. In determining whether the Estate "hold[s] valuable claims or causes of action against any of the parties that would receive a release" under the Plan, the Examiner will find a claim to be a "valuable claim" if, based on all the facts and arguments available to the Examiner and the circumstances surrounding pursuit of the claim, the Examiner concludes that the claim is one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation. The Examiner expects that a defendant would provide consideration within a range of reasonableness standard under Bankruptcy Rule 9019 to settle such a claim. To be a valuable claim or cause of action under this definition, the claim or cause of action would, therefore, not necessarily result in a judgment in favor of the Debtor. The Examiner does not presume to determine the actual outcome of litigation. Under the Examiner's analysis, a claim warranting only nuisance settlement consideration is considered valueless.

A. Summary of the Releases Under the Plan and the Consideration Provided For Such Releases

57. The Plan incorporates an interrelated settlement among and between the Debtor and the other RSA Parties, including a package of treatment and consideration in exchange for the releases. Under the Plan, the Noteholders agree that the proceeds of the Noteholders' Collateral, together with the proceeds of the Shared Collateral, will be used to pay the DIP Credit Facility, other Administrative Claims, Priority Tax Claims and Priority Non-Tax Claims, subject to a formula to recover a portion of the proceeds of their collateral should the sale of the Debtor's

assets exceed certain levels.[94] [redacted] The Plan also proposes that the Noteholders effectively waive or withdraw their deficiency claims.[95] As of the writing of this Report, the Noteholders have not formally agreed to waive or withdraw their deficiency claims, and it remains to be seen whether they will support or object to the Plan. Under the Plan, the Noteholders will receive, in exchange for the use of their collateral (and, under the Plan, non-participation in the Litigation Trust), equity in NewCo that will be formed to own TGS, provided Michel Moreno operates TGS.

58. Similarly, Shell agrees under the Plan that the proceeds of the Shared Collateral, together with the proceeds of the Noteholders' Collateral, will be used to pay the DIP Credit Facility, other Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims. Shell also agrees under the Plan to withdraw its claims against the Estate in exchange for an estimated $5 million payment on account of the Shell Secured Claim[96] and releases by the Estate of all potential claims and causes of action against Shell.

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[94] *See* Plan, § 1.01 (defining "Senior Noteholder Cash Distribution")). The first $67.5 million is projected by the Debtor to be used to satisfy First Tier Claims under the Plan. Gordon Brothers is then entitled to the next $7.8 million of any sale proceeds. *See* Sale Motion, pp. 8-9. To the extent the sale proceeds exceed $75.3 million ($67.5 million plus $7.8 million) [redacted] Upon full repayment to the Noteholders of the amount of Priority Tax Claims, Priority Non-Tax Claims, and 503(b)(9) claims paid with the proceeds of the Noteholders' Collateral, the Plan provides that each additional dollar in sales proceeds will be split 57% to the Estate (for the benefit of General Unsecured Creditors) and 43% to the Noteholders. *See* Plan, § 1.01 (defining "Initial Litigation Trust Funding"). [redacted] and according to the Debtor, it is highly unlikely that the sale price will exceed $75.3 million, meaning that the Noteholders are unlikely to recover any portion of the proceeds of the Noteholders' Collateral. As mentioned earlier, for purposes of this Report the Examiner is assuming that the sales proceeds will equal the stalking horse bid of $67.5 million.

[95] The Plan provides that the Noteholders exchange their entire "Senior Noteholder Claim," including any deficiency claim, in exchange for, *inter alia*, equity in NewCo as provided in Section 5.04 of the Plan. Further, the definition of "General Unsecured Claim" in the Plan makes clear that the Noteholders' deficiency claim will not share in the recoveries or distributions from the Litigation Trust. *See* Plan, § 1.01 ("Any Deficiency Claim of the Senior Secured Notes Indenture Trustee or any ... Noteholder is deemed waived and is not a General Unsecured Claim.").

59. Finally, under the Plan, Mr. Moreno agrees to operate TGS for a salary and compensation package and to cause certain of the Moreno Affiliated Entities to contribute equity to NewCo and property to TGS in exchange for releases from the Estate of all claims and causes of action against Mr. Moreno and the Moreno Affiliated Entities. As mentioned previously, a chart identifying each of the Moreno Affiliated Entities and their relationship to the Debtor is attached hereto as Exhibit A.

1. Noteholders

60. A discussion of the Notes and the Noteholders is set forth in Section I.C.2 above. As stated therein, the Notes mature on November 15, 2016 and bear interest at a fixed annual rate of 13%, payable semiannually on May 15 and November 15 of each year. The Notes were issued in the original aggregate principal amount of $250 million, and are secured by security interests in substantially all of the Debtor's tangible and intangible assets subject to certain exceptions. According to the Consenting Noteholders,[97] as of the Petition Date, the Debtor was obligated for an aggregate principal amount of approximately $256 million plus certain other amounts under the 2016 Senior Secured Note Indenture.

61. The Indenture Trustee has a first lien on substantially all the Debtor's assets. Pursuant to an Intercreditor Agreement between the Indenture Trustee and Shell, the Indenture Trustee's first lien—held for the benefit of the Noteholders—is contractually subordinated to Shell's second lien on a subset of the Debtor's assets defined above as the Shared Collateral. For purposes of this Report, the Examiner refers to the lien on assets not subject to subordination to

[96] As defined in the Plan, the "Shell Secured Claim" refers to the "Shell Claim to the extent such Claim is secured by security interests in certain of the Debtor['s] motor vehicles as the result of notations on certificates of title of such motor vehicles." According to the Debtor, Shell has agreed to cap its recovery on account of the Shell Secured Claim at $5 million, although the Plan as filed does not impose such a cap.

[97] *See supra* Note 72 (defining "Consenting Noteholders").

Shell under the Intercreditor Agreement as the Noteholders' Collateral. As a working proposition for this Report and for the Plan, the parties agree that the Shared Collateral amounts to 57% of the Debtor's assets, and that the Noteholders' Collateral amounts to 43%.

62. The Debtor, Shell and the Noteholders agree that $10 million must be paid to other and superior lienholders (as defined in the Plan, the "Other Secured Claims"). For purposes of this Report, the Examiner assumes that the $10 million will be paid first from the net recovery of $67.5 million discussed in paragraph 51 of this report.[98] After reducing the $67.5 million by $10 million, the Examiner assumes that Shell's portion of the proceeds of the prospective sale of the assets amounts to $32.775 million (57% of $57.5 million), with the Noteholders' portion being $32.725 million (43% of $57.5 million + $8 million cash collateral).

63. Under the Plan, the Noteholders contribute $32.725 million, as well as their subordinated interests in Shell's portion of the proceeds, to the payment of the DIP Credit Facility, other Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims. The Plan also proposes that the Noteholders effectively withdraw their deficiency claims but, as noted, the Noteholders have not yet agreed to do so. The Plan also provides that, in the event the proceeds of the asset sales exceed a certain amount, the Noteholders will recover a portion of the proceeds of their collateral.[99] [redacted] Further, the Plan provides that if the Noteholders fully recover for the amount of the Noteholders' Collateral used to pay Priority Tax Claims, Priority Non-Tax

[98] This assumption is consistent with the position espoused by the Noteholders. The Debtor, on the other hand, alleges that the $10 million should be subtracted from the Noteholders' 43% share of the sales proceeds. For purposes of this Report, the Examiner accepts the Noteholders' position.

[99] *See supra* note 94.

Claims, and claims under 11 U.S.C. § 503(b)(9), the Noteholders and the Estate (for the benefit of General Unsecured Creditors) will share any additional sales proceeds 57% to the Estate and 43% to the Noteholders. [redacted] As mentioned, for purposes of this Report, the Examiner has assumed that the net proceeds to the Estate from the Sale Motion will not exceed $67.5 million. To the extent that the net proceeds from the sale exceed that amount, then each dollar paid to the Noteholders reduces by one dollar the value of the consideration paid to the Estate that may be considered as compensation for releases.

64. In exchange for the payment of $32.725 million to pay for the DIP Credit Facility, the administration of the Estate and the various Priority Tax Claims and Priority Non-Tax Claims, the Plan provides that the Noteholders will receive an equity interest in NewCo. NewCo will own GFES's 50% interest in TPT, along with the 90% interest in TGS held by certain Moreno Affiliated Entities. TGS will operate the Power Generation Business. Mr. Moreno has agreed to be employed by TGS as its chief executive officer for a salary and benefits. [redacted] The Examiner does not expect that the value of TGS will be liquid on the Effective Date

[100] The Examiner recognizes that it is highly unlikely that the sales proceeds will exceed this threshold amount, which—assuming Priority Tax Claims, Priority Non-Tax Claims, and 503(b)(9) claims total $20 million—equates to $95.3 million ($67.5 million sales proceeds plus $7.8 million in fees to Gordon Brothers plus $20 million reimbursement).

[101] The recovery of the sales proceeds of the Noteholders' Collateral used to pay the DIP Credit Facility, other Administrative Claims and Priority Tax Claims and Priority Non-Tax Claims will be a moot point if the sale proceeds do not exceed a certain amount.

of the Plan; that is, the ability of the Noteholders to realize value on their equity interests in NewCo depends on the operational success of TGS over time. If TGS succeeds over time, the Noteholders' equity value will likewise increase with the prospect of a market for the equity. If TGS does not succeed, then the Noteholders will realize minimal recovery, if any. Under the Plan, recovery by the Noteholders turns on the success of TGS.

2. Michel Moreno and the Moreno Affiliated Entities

65. GFES's equity is held by MMR, MOR MGH, and Mr. Fontova. Elle Investments, LLC ("Elle"), which is owned by Michel and Tiffany Moreno,[102] holds a one-third interest in MMR.[103] MMR owns 10.203% of the common stock and 11.11% of the preferred stock of GFES. Two other trusts controlled by Mr. Moreno, MBM 2011 MGH GRAT and TCM 2011 MGH GRAT, each own 50% of MOR MGH, which owns 81.634% of the common stock and 88.89% of the preferred stock of GFES.[104] Mr. Fontova, the Debtor's President, owns the remaining common stock of GFES.[105]

66. As discussed in Section I of this Report, GFES provided traditional oil field services before expanding into the fracking business[106] through the development of a new technology that utilized turbine-powered frac pumps that could run on natural gas from the wellhead, thereby substantially reducing operating costs. The Debtor also owns a 50% interest in

[102] At times, "MBM" refers to Michel B. Moreno, and "TCM" refers to Tiffany C. Moreno, Michel's wife.

[103] *See* Debtor's Initial Submission, ¶ 137.

[104] *Id.*

[105] *Id.*, ¶ 9.

[106] Per the Debtor's Initial Submission, the Debtor conceived of entering the fracking business in 2006 and started the development of fracking technology and equipment shortly thereafter, long before Mr. Moreno obtained control. *See* ¶¶ 9, 90.

TPT.[107] TPT is in the business of building power generation turbines using technology it developed with Ted McIntyre. TPT sells the turbines with applicable intellectual property licenses to customers, including GFES.

67. TGS was formed on March 7, 2013, to develop, construct, sell and rent turbine and gas engine power generation (as defined above, the Power Generation Business).[108] TGS is owned by MOR DOH, which in turn is owned by MBM 2011 DOH GRAT and TCM 2011 DOH GRAT (collectively, 90.4%) and Powermeister (9.6%), a third party. TGS does not provide services related to fracking.

68. Under the Plan, Mr. Moreno and the Moreno Affiliated Entities obtain releases from the Estate. In exchange, Mr. Moreno and the Moreno Affiliated Entities will cause MBM 2011 DOH GRAT and TCM 2011 DOH GRAT to contribute their equity interests in TGS to NewCo, and GFES will transfer its 50% equity interest in TPT to NewCo. Mr. Moreno will be the chief executive officer of TGS, for which he will be compensated with a salary and management package.

69. The Debtor and the Noteholders contend that the proceeds of the Noteholders' Collateral contributed by the Noteholders to the Estate should be deemed consideration for the Moreno releases.

70. The Moreno Affiliated Entities assert claims totaling $49,316,529.41,[109] which, under the Plan as filed, they are not withdrawing.

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[107] The other 50% interest in TPT is owned by MTT Properties, LLC, an entity owned by Ted McIntyre.

[108] *See supra* Section I.F.

[109] *See* Exhibit M-2 to Moreno Initial Submission.

3. Shell

71. As discussed in Section I.C.1 above, GFES and Shell entered into the Shell Contract on September 2, 2011. Under the Shell Contract, the Debtor initially agreed to provide fracking services to Shell for discounted pricing of 33.3% compared to the then-prevailing market rates, and Shell agreed to provide prepayments of up to $100 million. Mr. Moreno and his wife guaranteed the re-payment of the prepaid amounts. Shell actually provided the Debtor with a $42 million prepayment in 2011, which the Debtor repaid with the proceeds of the 2016 Senior Secured Note Indenture.[110] Shell then loaned the Debtor $94 million in 2012.[111]

72. Shell asserts a secured claim of approximately $80 million plus any mechanics and material providers' liens that Shell pays, which Shell alleges bring the total claim amount to $111,326,451.22.[112] Shell perfected its security interest in the Shared Collateral during the preference period and, consequently, Shell's lien is avoidable. However, Shell does have a valid, unavoidable security interest in several vehicles, defined in the Plan as the Shell Secured Claim.[113]

73. In exchange for full releases from the Estate and the payment of an estimated $5 million in satisfaction of the Shell Secured Claim, the Plan provides that Shell will contribute the proceeds of the sale of the Shared Collateral (valued for this report at $32.775 million) to the

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[110] *See* Moreno Initial Submission, ¶ 16.

[111] According to the Debtor, Shell served two roles for the Debtor: that of a creditor-lender and that of a large customer. As a new player in the fracking industry, hoping to use new technology that had not been tested in that industry before, the Debtor asserts that it needed additional funding to continue expanding its frac spread fleet to take advantage of the new technology, and that it also needed and benefited from the prestige and credibility that its relationship with Shell brought. *See* Debtor's Initial Submission, ¶ 3. The Committee disputes much of this and takes a different view of the Debtor's relationship with Shell.

[112] *See* Proof of Claim filed by Shell, attached to the Shell Initial Submission as Exhibit A.

[113] *See supra* note 96.

Estate for the payment of the DIP Credit Facility, other Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims. Other than the estimated $5 million payment in satisfaction of the Shell Secured Claim, Shell receives nothing under the Plan other than the releases.[114]

4. Turbine Powered Technologies, LLC ("TPT")

74. As discussed above, TPT builds turbines and power generating equipment using certain licensed intellectual property and products. TPT is owned 50% by GFES and 50% by MTT. MTT is owned by Ted McIntyre, who invented certain technologies used by TPT.

75. TPT sold equipment to GFES with a license to use the intellectual property. TPT asserts a claim of approximately $12.5 million, although the Debtor's schedules show that TPT is owed approximately $8.7 million.[115] In exchange for the releases under the Plan, TPT will withdraw its claim and agree that GFES's 50% equity interest in TPT may be transferred to NewCo, and that NewCo will otherwise become a 50% member of TPT. TPT will sell equipment with licenses to TGS.

B. Causes of Action Against Those Parties Receiving Releases Under the Plan

1. Alleged Causes of Action Against Shell

76. The Committee contends that the Estate holds eight claims or causes of action against Shell: (1) preferential transfer; (2) fraudulent transfer; (3) equitable subordination; (4)

[114] *See* Plan, § 5.05(b) ("Under the Plan, in full satisfaction, settlement and release of and in exchange for the Shell Other Claim, Shell shall receive the release set forth in Section 12.07 of the Plan. Solely to effectuate the foregoing and the provisions of this Plan, on the Effective Date the Shell Other Claim, and all rights relating thereto, shall be transferred to the Debtor[].").

[115] The Debtor and TPT do not entirely agree on the exact amount owed to TPT by the Debtor. Copies of the TPT proofs of claim are attached to the Debtor's Initial Submission as Exhibit 46. The Debtor's revised liquidation analysis, attached as Schedule A to the Debtor's Supplemental Submission, reflects $8.7 million as the value of TPT's claims released under the Plan.

recharacterization; (5) wrongful termination of Shell Contract and breach of promises; (6) lender liability; (7) prima facie tort; and (8) aiding and abetting a breach of fiduciary duty.

a. Preferential Transfers

77. Shell perfected its liens on the Shared Collateral during the preference period of 11 U.S.C. § 547. Shell agrees that the liens are avoidable.[116] Under the Plan, the alleged preferential transfer claim against Shell is released.

78. The Committee contends that, following the avoidance of Shell's perfected lien, the lien is preserved for the benefit of the Estate by 11 U.S.C. § 551. Section 551 provides as follows:

> Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

79. As discussed above, under the Intercreditor Agreement, the Noteholders' first lien on the Shared Collateral is contractually subordinated to Shell's otherwise second lien on the Shared Collateral. The Committee contends that by virtue of Section 551, the Estate benefits from that subordination agreement, entitling the Estate to receive the proceeds of the sale of the Shared Collateral.

80. Under the Plan, this is a moot issue. Shell is providing the Estate with the proceeds of the Shared Collateral, in an amount of $32.775 million (57% of $57.5 million). The Estate will use these funds to pay the DIP Credit Facility ($30 million), plus other Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims (estimated at $31 million).[117]

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[116] *See, e.g.*, Shell Supplemental Submission, ¶ 37.

[117] As reflected in the Debtor's revised liquidation analysis, attached as Schedule A to the Debtor's Supplemental Submission, the Debtor estimates total Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims to be $29.5 million. The Plan also contemplates a $1 million contribution to the Litigation Trust. For purposes of this Report, the Examiner will include this $1 million contribution in the estimated total Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims, and therefore the Examiner uses $31 million as the aggregate total.

81. The Committee also contends that during the one year period prior to the Petition Date, the outstanding balance of the Shell Credit Facility was paid down by approximately $14 million, from $94 million to $80 million.[118] The Committee alleges that Shell is an insider, and that it received $14 million in avoidable preferential transfers during the one year prior to the Debtor's bankruptcy.[119] Shell responds by alleging that it was not an insider of the Debtor, and thus the preference period under 11 U.S.C. § 547 is only 90-days (rather than one year).[120] Further, Shell argues that the Committee ignores the fact that the Debtor's payments to Shell were made in the ordinary course of business, giving Shell a complete defense to any such claim under 11 U.S.C. § 547(c)(2). Finally, because Shell continued to provide work and revenue to the Debtor, Shell asserts that it has a new value defense under 11 U.S.C. § 547(c)(1) and (4).[121]

82. As discussed below,[122] the Examiner concludes that Shell is not an insider of the Debtor. Because all the alleged preferential transfers were outside the 90-day preference period under 11 U.S.C. § 547, the Examiner concludes that there is no valuable claim against Shell on account of the alleged $14 million in payments made under the Shell Contract within one year (but more than 90 days) prior to the Debtor's Petition Date.

83. Accordingly, the Examiner concludes that the alleged preferential transfer claims against Shell do not constitute valuable claims under the standard set forth above. Shell has

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[118] *See* Committee's Initial Submission, ¶ 118.

[119] *See* Committee's Supplemental Submission, ¶ 176 ("Shell is liable to the Debtor for approximately $14 million in preferential payments that it received from the Debtor in the one year period preceding the Debtor's bankruptcy cases. There is no dispute that, beginning in October of 2012 up to and including May, 2012, Shell received approximately $14 million in payments from the Debtor in respect of its loans.").

[120] *See* Shell Supplemental Submission, ¶¶ 35-36.

[121] *See* Shell Supplemental Submission, ¶ 36.

[122] *See* Section IV.B.1.c, *infra*.

agreed that its lien on the Shared Collateral is avoidable, and under the Plan Shell is providing the Estate with $32.775 million in proceeds of the Shared Collateral based on the assumptions in this Report.

b. Fraudulent Transfers

84. Under the Shell Contract, GFES provided fracking services to Shell at a 33.3% discount off the prevailing market rates at the time the original Shell Contract was executed. The Committee contends that this discount amounts to a fraudulent transfer.[123] Shell contends there is a body of case law establishing that contractual prices are not subject to avoidance under fraudulent conveyance laws.[124]

85. Section 548(a)(1) provides as follows:

> The trustee may avoid any transfer … of an interest of the debtor in property, or any obligation … incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> **(A)** made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> **(B)**
>
> **(i)** received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> **(ii)**
>
> **(I)** was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> **(II)** was engaged in business or a transaction, or was about to engage in business or a transaction, for which any

[123] *See* Committee's Initial Submission, ¶¶ 126-27.

[124] *See* Shell Initial Submission, ¶¶ 80, 84.

> property remaining with the debtor was an unreasonably small capital;
>
> **(III)** intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> **(IV)** made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

86. Shell and GFES entered the Shell Contract as of September 2, 2011. The Shell Contract, as noted, called for a discount of 33.3% off of the then-prevailing market rates.

87. Nevertheless, Shell provided reasonably equivalent value in exchange for the discount.[125] The value Shell provided in exchange for the market discount must be measured at the time of the contract. [redacted] In addition, Shell provided GFES with a substantial customer base, funded prepayment of services in the amount of $42 million, subsequently provided an interest free loan, and, from the perspective of GFES, provided market credibility for GFES's emerging business.[128] Based on the facts and arguments available to the

[125] For purposes of this analysis, the Examiner assumes without deciding that a debtor can successfully state a claim under Section 548(a)(1) based on a contractual discount.

[redacted]

[128] *See, e.g.*, Shell Initial Submission, ¶ 83 (noting that the Debtor had few, if any, other customers offering to pay for its services at a rate higher than that offered by Shell); Debtor's Initial Submission, ¶ 3 (recognizing that the Debtor was "a new player in the fracking industry, hoping to use new technology that had not been tested in that

Examiner and the circumstances surrounding pursuit of this claim, the Examiner concludes that a reasonable business client that is responsible for its own legal fees and costs would not authorize its counsel to pursue the fraudulent transfer claim against Shell.

88. The Examiner, therefore, finds that the fraudulent transfer claim does not constitute a valuable claim. Assuming, *arguendo*, that the claim had value, the Committee contends that the difference between the contractual price of the services and the prevailing market at the time of the Shell Contract amounts to $150 million.[129] Shell, however, agreed to adjust the contractual pricing in a subsequent amendment to the contract.[130] Further, the prevailing market rates changed during the term of the contract, arguably diminishing the amount of the discount.[131] Finally, and dispositively, Shell is providing the Estate with $32.775 million (57% of $57.5 million) and withdrawing claims of $80 million to $111 million, in exchange for the release and $5 million attributable to the Shell Secured Claim.[132] Accordingly, even assuming that the fraudulent transfer claim against Shell constitutes a valuable claim, the Examiner concludes that Shell has provided adequate consideration for the release of the claim.

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industry before, [the Debtor] needed additional funding to continue expanding their frac spread fleet so as to take advantage of their new technology, and [the Debtor] needed and greatly benefited from the prestige and credibility that [its] relationship with Shell brought").

[129] *See* Committee's Supplemental Submission, ¶ 59.

[130] *See* Shell Initial Submission, ¶ 21 ("As the first anniversary of the Contract approached, the Debtor[] approached Shell seeking a price increase (even though the market prices had dropped). Contrary to [the Debtor's] predictions, the Debtor[was] not realizing efficiencies over the established technologies. Indeed, [the Debtor was] experiencing higher costs than [its] competitors. Although Shell was under no obligation to accommodate the Debtor['s] request (in fact, market changes warranted a price reduction under the Contract's terms), it did so and agreed to a 5% price increase.").

[131] *Id.* (recognizing that the changed market conditions actually warranted a further decrease in the pricing under the Shell Contract).

[132] *See supra* note 96.

c. Equitable Subordination

89. The Committee contends that Shell's claims should be equitably subordinated. Under the Plan, this is moot except for the estimated $5 million payment attributable to the Shell Secured Claim.[133] Shell is contributing the proceeds of the sale of the Shared Collateral to the Estate and withdrawing its remaining secured and deficiency claims (which total between $80 million – $111 million) except for the $5 million Shell Secured Claim.

90. Section 510(c) of the Bankruptcy Code provides as follows:

> Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—
>
> > (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> >
> > (2) order that any lien securing such a subordinated claim be transferred to the estate.

91. Three elements must be satisfied before a court will exercise the power to equitably subordinate a claim: (i) the claimant must have engaged in some type of inequitable conduct; (ii) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977).[134]

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[133] As discussed above, the Shell Secured Claims relates to Shell's security interest on certain vehicles, the perfection of which has not been challenged by any party.

[134] This test was recognized by the Third Circuit in *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 986-87 (3d Cir. 1998).

92. The Committee alleges that Shell dominated and controlled the Debtor by agreeing to provide up to an aggregate $100 million[135] of senior secured term loans to the Debtor.[136] The Committee also claims that Shell acted inequitably when Shell "abruptly ended its services contract with GFES, knowing that it was GFES's only financial lifeline, and then declared $80 million in advances immediately due and payable knowing that GFES had no ability to repay that sum absent Shell's fracking revenues."[137] In its Supplemental Submission, the Committee reiterates that Shell acted inequitably by "a) using its functional expertise to make the Debtor[] totally beholden to Shell and to force [it] to continue to provide Shell with fracking services at prices below the competition and at which the Debtor[] would always lose money; b) saddling the Debtor[] with unsustainable debt; and c) abruptly suspending the Debtor['s] services at Eagle Ford and, a few weeks later, accelerating and demanding immediate repayment of its loans, which culminated in the Debtor['s] bankruptcy."[138]

93. [redacted]

[135] As discussed above, as of the Petition Date, there was approximately $80 million in aggregate principal amount of term loans outstanding under the Shell Credit Facility. *See supra* ¶ 8; *see also* Debtor's Initial Submission, ¶ 32.

[136] *See* Committee's Initial Submission, ¶ 112 (characterizing Shell's loan as "excessive" and "unsustainable").

[137] *Id.*, ¶ 113.

[138] *See* Committee's Supplemental Submission, ¶ 155.

[139] This is consistent with the Fourth Amendment to the Shell Contract, wherein Shell agreed to advance an additional $70 million term loan to the Debtor on October 24, 2012. At the time of the Fourth Amendment, $24 million remained outstanding from the Third Amendment revolving facility, and this $24 million was added to the $70 million term loan in the Fourth Amendment, for a total loan of $94 million. According to the terms of the Fourth Amendment, the Debtor was required to make monthly principal repayments, with all indebtedness expected to be repaid in or before November 2014, approximately two years after the execution of the Fourth Amendment. *See* Debtor's Initial Submission, ¶ 34.

[redacted] Mr. Moreno was also in discussion with two potential lenders to fund the Debtor's operations and the new Power Generation Business.[141] Shell's discontinuance of the use of the Debtor's fracking services effectively ended these efforts, according to Mr. Moreno.

94. After Shell ceased providing fracking work to the Debtor, Shell demanded that the Debtor cure the existing loan default. Shell, however, did not accelerate the loan or take any other collection efforts against the Debtor.[142] Shell's discontinuance of services under the Shell Contract and its demand that the Debtor cure the loan default could be considered to have injured the Debtor's other creditors [redacted] While these circumstances may bear on a breach of contract claim, the Examiner concludes that Shell did not take unfair advantage of the Debtor. In addition, regardless of whether the Debtor may have been undercapitalized from September 2011 to the Petition Date, Shell was not the cause of any such undercapitalization. Further, Shell does not appear to have engaged in inequitable conduct, and the Examiner cannot conclude that Shell overreached in its relationship with the Debtor. The Shell Contract was executed following arms-length negotiations and had significant benefits for both Shell and the Debtor. There does not appear to have been any pre-existing relationship between Shell and the Debtor that would allow Shell to dominate the contractual negotiations,[143]

[redacted]

[141] *See* Moreno Initial Submission, ¶ 52 (noting that Mr. Moreno was in discussions with GE and with Goldman to provide financing).

[142] *See* Debtor's Initial Submission, ¶ 113.

[143] The fact that the Debtor's President, Enrique "Rick" Fontova, previously worked for Shell is not indicative of any special bargaining power in Shell's favor, nor does it support a finding that Shell was an insider of the Debtor.

and in fact, both the Debtor and Shell concluded that the Shell Contract would allow each of them to advance their own separate business objectives. The Debtor sought to establish its fracking services business with the credibility, customer base, and capital provided by Shell.[144] Shell, in turn, sought to establish a competitive alternative to the major fracking service providers such a Halliburton and Schlumberger.[145] [redacted]

95. Accordingly, the Examiner concludes that Shell's conduct *vis-à-vis* the Debtor does not rise to the level necessary to justify the equitable subordination under Section 510(c) of the $5 million payment that Shell stands to receive under the Plan on account of the Shell Secured Claim. The equitable subordination claim is not a valuable claim under the standard set forth above.

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[144] *See supra* note 128.

[145] *See* Shell Initial Submission, ¶ 9.

[redacted]

96. The Committee also argues that Shell is an insider of the Debtor under the standard announced by the Third Circuit in *Shubert v. Lucent Technologies Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382 (3d Cir. 2009), and that Shell's inequitable conduct under the first *Mobile Steel* factor should therefore be judged by the "simple unfairness" standard articulated in *Blasbalg v. Tarro (In re Hyperion Enters., Inc.)*, 158 B.R. 555, 563 (D.R.I. 1993).

97. In assessing whether a creditor is an insider, courts examine, *inter alia*, whether the creditor: (i) had greater ability than other creditors to assert control; (ii) made management decisions for the debtor; (iii) directed work performance; or (iv) directed payment of the debtor's expenses.[147] Shell was the Debtor's major customer. Further, the Debtor provided fracking services to Shell at a rate that was one-third below market at the time of the initial Shell Contract. Shell and the Debtor subsequently modified the price under the Shell Contract, and [redacted] Further, while Shell initially sought to obtain an equity position in the Debtor during the negotiations over the Shell Contract, the Debtor refused to give Shell an equity interest and Shell ultimately did not acquire an equity interest in the Debtor [redacted] Nor did Shell and the Debtor enter into a partnership

[147] *Shubert v. Lucent Technologies Inc. (In re Winstar Commc'ns, Inc.)*, 348 B.R. 234, 279 (Bankr. D. Del. 2005).

[redacted]

agreement, as discussed in Section IV.B.1.f.i below.[150] Also as discussed below, Shell did not exercise sufficient control over the Debtor or the Debtor's management to justify a finding that Shell was an insider of the Debtor.[151] Nor did Shell agree to assume any liabilities of the Debtor. Shell had no right to a share of any profits made by the Debtor. Other than the loan evidenced by the Shell Credit Facility and the contractual obligation to pay for the fracking services provided by the Debtor, Shell had no obligation to contribute any money to the Debtor.

98. Under the Shell Contract, Shell had the right to establish performance targets for the fracking work performed by the Debtor on behalf of Shell.[152] Shell also had the right to require that the Debtor comply with certain safety standards for work performed on behalf of Shell.[153] The Debtor further agreed not to permit any lien to attach to the Shell worksites.[154] Shell contends that these contractual controls and requirements are ordinary and customary for a customer to exercise over a supplier in the oilfield. The Examiner finds that these contractual controls and requirements do not rise to the level of control over the Debtor sufficient to deem Shell a non-statutory insider of the Debtor. Unlike *Shubert*,[155] the Examiner has not been presented with sufficient evidence to justify a conclusion that Shell exercised such control over

[150] The Debtor and Shell occasionally referred to their relationship as a "partnership" or to themselves as "partners," but only in a colloquial sense. *See infra* notes 194-95 and accompanying text.

[151] According to the Debtor, Shell never made any decisions for the Debtor, nor did Shell demand any specific decisions outside of certain demands relating to the Shell sites. Shell did not demand that the Debtor enter into the fracking market. To the contrary, the Debtor had already determined to enter the fracking market four years prior to the execution of the Shell Contract, and, in fact, the Debtor had actually entered the fracking market prior to the execution of the Shell Contract. *See* Debtor's Initial Submission, ¶ 124.

[152] *See* Shell Contract, Section 7, Performance Management.

[153] *See* Shell Contract, Section 6, Health Safety Security Environment (HSSE) Requirements.

[154] *See* Shell Contract, Section 2, art. 20.

[155] *See Shubert*, 554 F.3d at 400 (holding that Lucent was a non-statutory insider of the debtor).

the Debtor that Shell had the ability to coerce the Debtor into transactions not in the Debtor's interest,[156] or that the Debtor's transactions with Shell were not conducted at arm's length.[157]

99. Hence, the Examiner concludes that Shell is not an insider of the Debtor. Consequently, evidence of more egregious conduct such as fraud, spoliation or overreaching is necessary for equitable subordination. *Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1465 (5th Cir. 1991). The Examiner is not aware of any such

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[156] *Id.* at 397. Here, the *Shubert* court relied on various findings to conclude that Lucent dominated and controlled the debtor, including the following:

a. Lucent "forced the 'purchase' of its goods [by the debtor] well before the equipment was needed and in many instances … never needed at all" *Id.*;

b. Lucent "treated [the debtor] as a captive buyer for Lucent's goods" *Id.*;

c. Lucent used the debtor "as a means for Lucent to inflate its own revenue" *Id.*;

d. Lucent "controlled many of [the debtor's] decisions relating to the buildout of the network" *Id.*;

e. Lucent "involve[d] [the debtor's] employees in certain improper transactions that benefitted Lucent" *Id.*; and

f. "Lucent forced [the debtor] to pay it $135 million 'for software it did not need, did not use, and had a fair market values of substantially less than the contract price.'" *Id.* at 398.

[157] *Id.* at 397-99. In *Shubert*, the court found that the multiple one-sided transactions that were only in Lucent's best interest refuted any suggestion of arm's length dealings between Lucent and the debtor. *Id.* at 399. Among other things, the court cited to the following:

a. Lucent pressured the debtor into making purchases which forced the debtor out of compliance with the Second Credit Agreement with Lucent, thereby entitling Lucent to issue a refinancing notice *Id.* at 398; and

b. "Lucent subsequently 'deliberately held up' the issuance of a refinancing notice under the Second Credit Agreement, which the Bankruptcy Court characterized as 'the equivalent of a financial death knell,' in order 'to ensure that [certain] loan and [] private equity investments occurred and new equity was infused into the dying [debtor].'" *Id.* at 397.

evidence as would survive a summary judgment motion. Accordingly, the Examiner finds that the remaining equitable subordination claim does not constitute a valuable claim.

d. Recharacterization

100. The Committee contends that Shell's debt should be recharacterized as equity. In the Third Circuit, courts consider the following factors, *inter alia*, to determine whether recharacterization of a debt as equity is appropriate:

1) the name given to the instrument;
2) the intent of the parties;
3) the presence or absence of a fixed maturity date;
4) the right to enforce payment of principal and interest;
5) the presence or absence of voting rights;
6) the status of the contribution in relation to regular corporate contributors; and
7) the certainty of payment in the event of the corporation's insolvency or liquidation.

See Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.), 432 F.3d 448, 455-56 (3d Cir. 2006).

101. After examining these factors and the arguments of the parties, the Examiner concludes that the recharacterization claim against Shell is not a valuable claim. As set forth in the Shell Contract, the parties themselves called the obligation a loan.[158] Shell always expected the loan to be repaid, and the Debtor expected to be able to repay the loan, albeit with revenues earned from fracking services provided to Shell under the Shell Contract.[159] Shell did not have

[158] *See, e.g.*, Fourth Amendment to the Shell Contract, dated October 22, 2012 (referring to an existing $30 million credit facility (with an outstanding balance of $24 million) and to "an additional term loan" in the amount of $70 million).

[159] *See* Annual Report of Green Field Energy Services, Inc. for the Fiscal Year Ended Dec. 31, 2012, at 8, attached to Shell's Initial Submission as Exhibit D ("Shell agreed to provide up to an aggregate $100.0 million of senior secured term loans, which loans may not be reborrowed once repaid.").

any voting rights, nor did Shell ever attend any meetings of the Debtor's board of directors.[160] Further, the Shell Contract sets out a specific schedule of payments that were intended to fully amortize the debt within a specified period of time,[161] Shell had the right to enforce repayments,[162] and Shell was to be repaid regardless of the Debtor's success. While it is true that the Shell Contract did not include any interest on the loan, Shell did receive a discount on the fracking services provided by the Debtor. [redacted]

102. The Committee cites certain documents as purported proof that "Shell at all times viewed the 'loans' it extended to the Debtor[] as de facto equity investments."[164] [redacted][165] wrote in an email that Shell had "made an exception to take a measure of 'equity' instead of assets." At his deposition, however, [redacted] explained his statement as follows:

> Q. Did you -- by putting "equity" in quotes, did you intend to suggest that the -- that Shell was taking an actual equity or ownership interest in Green Field?
>
> A. No.
>
> Q. In fact, the only purpose of this was to fill a gap in collateral coverage?
>
> A. Correct. As I mentioned previously, there—my recollection is there were not enough assets to meet the thresholds that were stipulated in the contract. And therefore, to make up that gap, we, Shell, had to take a lien

[160] *See* Debtor's Initial Submission, ¶ 124.

[161] *See, e.g.*, Fourth Amendment to the Shell Contract, Section 3.3.

[162] *See* Shell Contract, Section 8.6.

[redacted]

[164] *See* Committee's Supplemental Submission, ¶¶ 58, 163 [redacted]

[165] In connection with the Committee's discovery efforts relating to the RSA and the Plan, [redacted] testified as Shell's corporate representative pursuant to FED. R. CIV. P 30(b)(6).

or a pledge, if you will, of stock in the company that Mr. Moreno owned, but it was not in any way us taking equity in the company. And as a nonfinancial type, that's why I put that word in quotes, I believe.

Q. Mr. [redacted] I'm going to show you a document on a computer screen.

* * *

Q. (By Mr. Rubenstein) But it's entitled Pledge and Indemnity Agreement dated as of September 19, 2011, by MOR MGH Holdings, LLC and Shell Western Exploration Production, Inc., with Mr. Moreno also appearing for limited purposes. You've seen this document before?

A. I have.

Q. (By Mr. Rubenstein) And I'll let you scroll through the document, but my question is: Is that the document by which Shell took the quote, "equity," closed quote, interest?

* * *

A. (Witness reviews document.) It is.

Q. (By Mr. Rubenstein) And so, the quote, "equity," closed quote, interest that Shell took in Green Field was a pledge of a membership interest indirectly owned by Mr. Moreno?

A. Yes.[166]

103. Similarly, in the other documents cited by the Committee [redacted] Shell executives wrote that Shell was "essentially accepting quasi debt returns for what is clearly equity risk," and that Shell is "de-facto providing start-up funding beyond the immediate needs arising from Greenfield's business with Shell." The Examiner does not believe that these emails materially weigh in the Committee's favor. Shell is basically acknowledging that its loan is subject to increasing risk given the Debtor's financial state, yet Shell is not receiving (nor was it entitled to receive) a share of the Debtor's profits or

[166] *See* [redacted] Transcript, at 232:20-234:13. The Pledge and Indemnity Agreement shown to [redacted] during the deposition is attached to Shell's Supplemental Submission as Exhibit "C." Further, the Release of Pledge and Lien is attached to Shell's Supplemental Submission as Exhibit "D."

an ownership interest in the Debtor. In fact, as discussed above, both Shell [redacted] acknowledge that although Shell was initially interested in making an equity investment, the Debtor rejected that proposition:

- [redacted]
- [redacted]

104. Based on the parties' respective submissions and the evidence presented, the Examiner finds that the recharacterization claim against Shell is not one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation. Accordingly, the Examiner finds that the recharacterization claim does not constitute a valuable claim.

e. Wrongful Termination of Shell Contract and Breach of Promises

105. The Committee contends that Shell breached the Shell Contract with the Debtor. According to the Committee, after the Debtor completed the second fracking spread in the third quarter of 2012, Shell became obligated to continue the contract for two years—until the third quarter of 2014,[168] unless one of two exceptions apply. The Debtor timely delivered the spreads making the exception of Section 3.2(a) inapplicable.[169] Further, Shell never gave a termination notice under Section 3.2(d) of the contract, making this exception inapplicable.[170] Nevertheless,

[redacted]

[168] *See* Shell Contract, Section 1, art. 2.

[169] *Id.*, Section 3, art. 3.2.

[170] *Id.* Under this section, Shell could terminate by giving 180 days notice to the Debtor.

Shell ceased using the Debtor's services in the summer of 2013. The Committee contends that Shell's decision amounts to a breach of the Shell Contract.

106. Shell contracted for hydraulic fracking services with the Debtor under the Shell Contract. The Shell Contract provides for services primarily in the Eagle Ford Shale in Texas. The Shell Contract provides that "[Shell] does not guarantee any specific quantities or volumes throughout the duration of the awarded Contract."[171] According to Shell, it never terminated or suspended the Shell Contract; "[r]ather, it simply did not have any fracturing work in the Eagle Ford Shale that could be provided to the Debtor[]."[172]

107. The termination and requirements provisions of the Shell Contract arguably make the contract ambiguous, which, absent the settlements embodied in the Plan, could require a determination of the parties' intentions by a trier of fact.

108. In analyzing the Committee's allegation that Shell breached the Shell Contract, the Examiner must first consider which law to apply. "In the absence of a specific federal policy or interest dictating the use of federal choice of law rules, it is well settled in [the Third Circuit] that a bankruptcy court faced with the issue of which substantive state law to apply to a claim for relief in an adversary proceeding applies the choice of law rules of the forum state." *Arrow Oil & Gas, Inc. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 407 B.R. 112, 133 (Bankr. D. Del. 2009) (applying Delaware choice of law rules); *Kaiser Group Holdings, Inc. v. Squire Sanders & Dempsey LLP (In re Kaiser Group Int'l Inc.)*, No. 09-52317, 2010 Bankr. LEXIS 2505, at *11 (Bankr. D. Del. Aug. 17, 2010) (holding that state choice of law rules should be applied to state law questions arising in a bankruptcy case in the absence of a significant federal interest).

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[171] *Id.*, Section 1, art. 6.

[172] *See* Shell Initial Submission, ¶ 25.

109. Delaware courts follow the approach of the Restatement (Second) of Conflicts of Laws and apply the "most significant relationship" test to resolve conflicts of law issues for actions arising in either tort[173] or contract.[174] Here, the Shell Contract called for the Debtor to provide work for Shell primarily in Texas, substantially all of the work performed under the Shell Contract occurred in Texas, and the parties agreed that Texas law would govern the Shell Contract.[175] After examining the relationship between Shell and the Debtor, the Examiner concludes that Texas law governs the breach of contract claim.

110. Under Texas law, the non-guarantee of any specific quantities of work is a requirements provision. *T.R. Hamilton v. Herrin Transp. Co.*, 343 S.W.2d 300, 303 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); *Holguin v. Twin Cities Servs.*, 750 S.W.2d 817, 819 (Tex. App.—El Paso 1988, no pet. his.); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 851 (Tex. 2009). Shell contends that a requirements contract does not guarantee the seller any actual work, just the right to perform work as required by the buyer.[176] Shell agreed under the Shell Contract to deliver work in the Eagle Ford Shale to the Debtor. Shell delivered that work until it divested its assets in the Eagle Ford Shale.

111. On the other hand, once the Debtor completed the second fracking spread, Shell could not terminate the Shell Contract for two years absent one of two exceptions, neither of which is applicable. Shell contends that it never formally terminated the Shell Contract.

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[173] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties under the principles stated in § 6.") (emphasis added).

[174] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) ("The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, *has the most significant relationship to the transaction and the parties* under the principles stated in § 6.") (emphasis supplied)

[175] *See* Contract Section 2, art. 27.

[176] *See* Shell Initial Submission, ¶ 36 (citing *James L. Gang & Assocs., Inc. v. Abbott Labs., Inc.*, 198 S.W.3d 434, 437–38 (Tex. App.—Dallas 2006, no pet.)).

Arguably, however, Shell's decision to unilaterally suspend or eliminate all work under the Shell Contract before the third quarter of 2014 functionally terminated the contract in violation of Section 1, art. 2.

112. Assuming the Committee prevails on establishing a breach, Shell contends that the Debtor suffered no damages caused by the breach. The Debtor did not realize efficiencies over the established fracking technology and the Debtor did not realize the 20-25% profit margin under the Shell Contract [redacted].[177] Indeed, the Debtor experienced higher costs than its competitors. Further, it appears that the Debtor operated at a loss for most of the time that the Shell Contract was in existence.[178] Even the Committee acknowledges that the Shell Contract "always represented a losing transaction for [the Debtor]."[179]

113. [redacted] In addition, under the contract, GFES and Shell could revisit pricing semi-annually.[181] Although Shell was under no obligation to accommodate the Debtor's request

[177] *See* Shell Initial Submission, ¶ 37 ("It appears to be undisputed that the Debtor[was] unable to realize a profit on the work governed by the [Shell] Contract."); [redacted]

[178] *See* Debtor's Initial Submission, ¶ 83 ("The Debtor[] consistently operated at a loss in [its] work for Shell.").

[179] *See* Committee's Supplemental Submission, ¶ 50.

[redacted]

[181] *See* Shell Contract, Section 3, art. 3.7(b).

(in fact, market changes warranted a price reduction under the terms of the Shell Contract), Shell agreed to a 5% price increase.[182]

114. [redacted] However, Shell personnel discussed continued business with the Debtor servicing wells drilled in the first half of 2013 and at other spreads in the Permian Basin, Marcella spread, and in Canada.[183]

115. Mr. Moreno engaged in negotiations [redacted] and with two investors, which, if materialized, would have resulted, according to Mr. Moreno, in the recapitalization of the Debtor.[184] But Shell kept retracting its work in June and July 2013 and ceased using the Debtor's services altogether in August 2013.[185] Without Shell as a customer for the remainder of the term of the Shell Contract, the Debtor's prospective capitalization vanished and it could not pursue the new customers. In addition, by ceasing to require services from the Debtor without providing a services bridge into 2014, Shell effectively deprived the Debtor of the revenue necessary to service the Shell Credit Facility. Shell knew, or should have known, that it was the Debtor's dominant customer and that the Debtor could not cure the Shell loan defaults without the fees for services provided to Shell.

[182] *See* Shell Initial Submission, ¶ 21. [redacted]

[183] The Debtor ultimately informed Shell that it would not be providing fracking services at these other locations. *See* Debtor's Initial Submission, ¶ 66.

[redacted]

[185] *See* Debtor's Initial Submission, ¶ 65 ("[O]n August 29, 2013, Shell decided to dramatically scale down its hydraulic fracturing operations in Eagle Ford and cancel the current pad for which the Debtor[] had been providing services.").

116. Based on all of the above, the Examiner finds that the breach of contract claim is more likely than not a valuable claim.[186] The Noteholders, however, likely have a perfected lien on the breach of contract claim and on the proceeds of the claim. The value of the breach of contract claim—if the Estate ultimately obtained any recovery—will reduce the Noteholders' claims. Moreover, in the event of a judgment for a breach of contract, Shell would have the right to set off its claim of $80 million to $111 million against any judgment.

117. Accordingly, the Estate would have to obtain a judgment in excess of $80 million to $111 million to realize a net recovery on the breach of contract claim against Shell, and any net recovery over and above Shell's set off rights would first go to the Noteholders to reduce the Noteholders' claims.

118. Under the Plan, Shell has agreed to contribute the value of its interest in the proceeds of the Shared Collateral to the Estate, which, for purposes of this Report, is assumed to be $32.775 million (57% of $57.5 million). Shell also agrees to withdraw its claim of $80 million to $111 million.[187] The Examiner finds that, under the Plan, Shell has provided valuable consideration for the release of this claim.

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[186] Because Shell and the Debtor had a binding contract, the doctrine of promissory estoppel is not available under Texas law. Promissory estoppel becomes available to a claimant only in the *absence* of a valid and enforceable contract. *See, e.g., Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 636 (Tex. App.—Houston [144th Dist.] 2004, pet. abated); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 226 (Tex. 2002) ("[T]he promissory-estoppel doctrine presumes no contract exists ...."); *Superior Laminate & Supply, Inc. v. Formica Corp.*, 93 S.W.3d 445, 449 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("Promissory estoppel operates to enforce an otherwise unenforceable promise; '[i]t cannot replace an enforceable contract.'"); *Richter v. Wagner Oil Co.*, 90 S.W.3d 890, 899 (Tex. App.—San Antonio 2002, no pet.) ("Promissory estoppel is not applicable to a promise covered by a valid contract....") (citation omitted). Thus, a claim for promissory estoppel and a contract claim are mutually exclusive claims; a litigant cannot recover on one if it recovers on the other. *See, e.g., Barker v. Brown*, 772 S.W.2d 507, 510 (Tex. App.—Beaumont 1989, no writ) ("The law is well settled that the doctrine of promissory estoppel is not applicable where there exists a legally valid contract between the parties.").

[187] As discussed *supra*, under the Plan the Estate will pay Shell $5 million on account of the Shell Secured Claim.

f. Lender Liability

119. Lender liability is a term that refers to various legal theories used by borrowers in litigation against lenders in connection with loans.[188] The term encompasses various actions brought in contract, tort, and agency law by borrowers against lenders. The Examiner finds that Texas law applies to the alleged lender liability causes of action.[189]

120. The Committee contends that Shell amounted to a de facto joint venture partner of the Debtor that controlled the Debtor's business, causing Shell to become a fiduciary of the Debtor and resulting in an obligation to transact business with the Debtor under a covenant of fair dealing and good faith.[190] Based on Shell's "overall course of conduct towards the Debtor[], particularly its termination of fracking services and acceleration of its so-called loans," the Committee also contends that Shell breached its fiduciary duty to the Debtor and likewise breached the covenants of good faith and fair dealing.[191]

i. No Implied Partnership Between the Debtor and Shell

121. After analyzing the parties' respective submissions, the Examiner concludes that the Committee's partnership allegations do not constitute a valuable claim under the standard articulated in paragraph 56 above. The Committee correctly defines a partnership under Texas law as "an association of two or more persons to carry on a business for profit as owners."[192] In

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[188] *See, e.g., Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp.*, 981 S.W.2d 38, 42 (Tex. App.–Corpus Christi 1998, pet. denied) ("IEDC filed suit against IBC on August 23, 1994, *alleging various lender liability causes of action including breach of an oral contract to loan* IEDC $9 million.") (emphasis added).

[189] *See supra* notes 173-75 and corresponding text.

[190] *See* Committee Initial Submission, ¶¶ 91-93. *See also* Committee's Supplemental Submission, ¶166 (citing "Shell's domination over the Debtor[]," "the degree to which [Shell] entwined itself within the Debtor['s] operations," and the fact that Shell was the Debtor's "primary, nearly exclusive, customer" as evidence that Shell formed a special or fiduciary relationship with the Debtor).

[191] *See* Committee Initial Submission, ¶¶ 91-93.

[192] *See* Committee's Supplemental Submission, ¶ 168 (citing TEX. BUS. ORGS. CODE § 152.051).

determining whether the parties have created an implied partnership, courts in Texas analyze the following five factors:

a. receipt or right to receive a share of profits of the business;

b. expression of an intent to be partners in the business;

c. participation or right to participate in control of the business;

d. agreement to share or sharing:

i. losses of the business; or
ii. liability for claims by third parties against the business; and

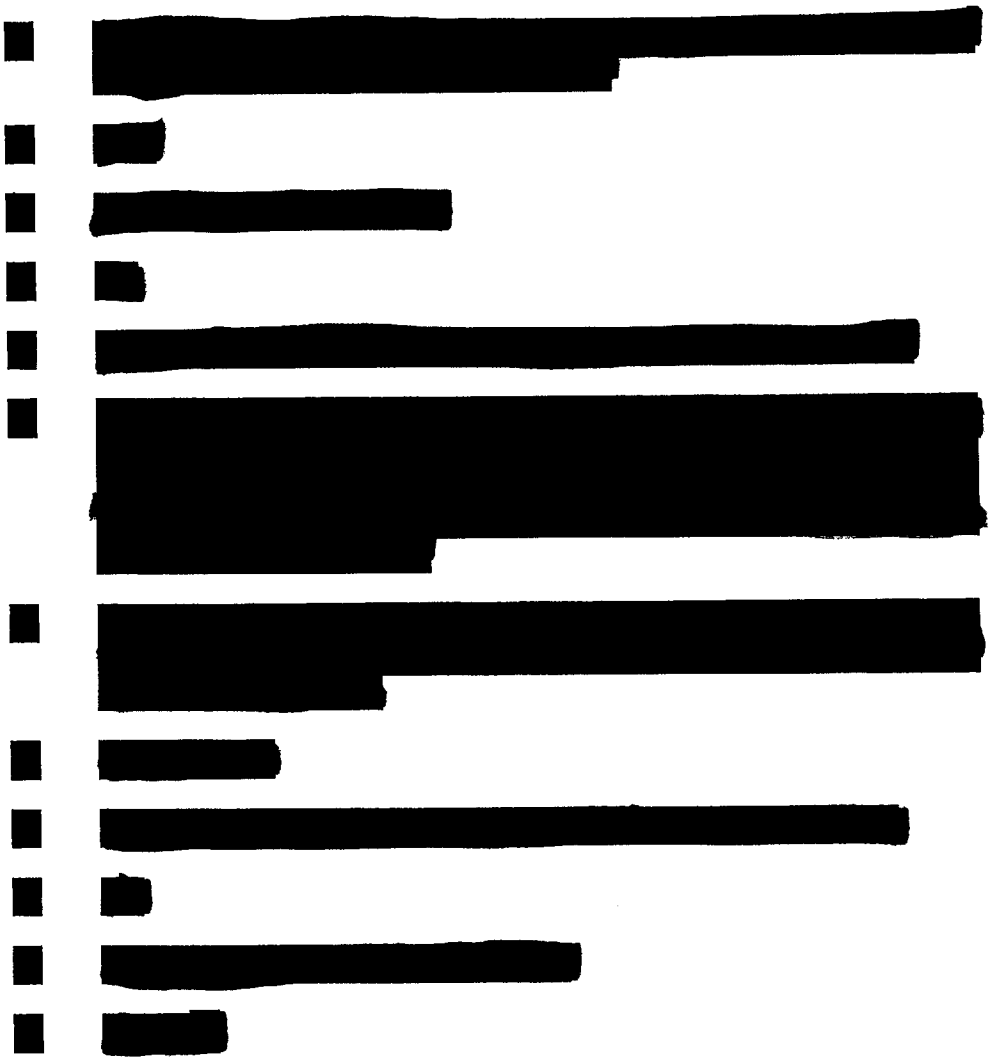
e. agreement to contribute money or property to the business.

See TEX. BUS. ORGS. CODE § 152.052(a).

122. Shell never had any right to receive a share of the profits from the Debtor's business. Nor did Shell have liability for any losses of the business or any liability for claims by third parties against the Debtor.[193] Shell also had no agreement to contribute money or property to the Debtor beyond the loan embodied in the Shell Credit Facility. Further, although Shell and certain Debtor employees occasionally used the word "partnership" to describe their relationship, the use of that term is not dispositive. *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 288 (Tex. 1978) (stating that "the terms used by the parties in referring to the arrangement do not control"); *see also Ingram v. Deere*, 288 S.W.3d 886, 898 (Tex. 2009) ("Even conclusive evidence of only one factor normally will be insufficient to establish the existence of a

[193] The Committee claims that "Shell acted on behalf of the Debtor[], directly negotiating the terms of the Debtor['s] payment obligations with its vendors." *See* Committee's Supplemental Submission, ¶172 [redacted] A review of the [redacted] reveals that Shell is concerned about a particular dispute between GFES and a vendor because that particular vendor had filed a lien against Shell's assets. Shell then pressured both GFES and the vendor to resolve the issue, although the Shell employee made clear in the email that the "direction we received before was that Shell should not get involved in GFES' business with its suppliers."

partnership"). Indeed, the Debtor characterizes the few "partnership" references as mere puffery.[194] [redacted]



123. Finally, under the "control" factor, Shell did, at times, provide direction to the Debtor regarding the equipment to be used on the Shell spreads as well as the operations and testing of the equipment. Shell also approved the Debtor's personnel assigned to Shell's spreads

[194] *See* Debtor's Supplemental Submission, ¶28 ("These types of statements are common puffery between a service provider and customer; they do not evidence an actual intent for the parties to be partners in GFES in the way envisioned by the Texas Business Code.").

[195] [redacted]

in the Eagle Ford Shale, and Shell required the Debtor to maintain proper safety protocols on the Shell spreads. The Examiner, however, concludes that to the extent Shell exercised any control over the Debtor's operations, it was the type of control that is customary for a customer to exercise over a supplier in the oilfield and does not support an inference that Shell and the Debtor entered into a legal or equitable partnership.

ii. No Fiduciary or Other "Special" Relationship Between the Debtor and Shell

124. The Committee also alleges that Shell's domination over the Debtor and the degree to which Shell entwined itself with the Debtor created a special or fiduciary relationship, causing Shell to owe fiduciary duties to the Debtor.[196] As support for this argument, the Committee cites many of the same facts (discussed above) purportedly supporting the existence of a partnership relationship. In addition, the Committee alleges that Shell was the Debtor's major customer, accounting for 79% of the Debtor's business. Shell was also a major lender to the Debtor. However, as discussed above, Shell did not control the management or operational decisions of the Debtor, except for certain services directly related to the services covered by the Shell Contract. Further, Shell and the Debtor did not have a relationship before entering the Shell Contract. The prior employment of Mr. Fontova, the Debtor's President, by Shell, does not inform the fiduciary duty analysis or the lender liability analysis. Moreover, the Shell Contract was periodically revised with benefits for the Debtor. Based on these facts and the submissions from the parties, the Examiner concludes that the Shell Contract was negotiated at arm's length, with both parties negotiating in their own best interests. The Shell Contract contains benefits for both Shell and the Debtor. The Examiner has not been provided with any credible evidence that Shell exercised undue control over the Debtor or that Shell dominated the Debtor, and therefore

[196] *See* Committee's Supplemental Submission, ¶ 165.

cannot conclude that Shell become a fiduciary of the Debtor or that Shell owed any fiduciary duties to the Debtor. The Examiner finds that this allegation by the Committee—to the extent it constitutes a separate claim—is not a valuable claim and would not likely be pursued by a reasonable business client that is responsible for its own legal fees and costs.

iii. The Alleged Lender Liability Claims Lack Value

125. Having concluded that Shell and the Debtor were not partners and that Shell did not owe any fiduciary duty to the Debtor, the analysis of the purported lender liability claims against Shell becomes more straightforward. As acknowledged above, Shell did, at times, provide direction to the Debtor regarding the equipment to be used on the Shell spreads as well as the operations and testing of the equipment. At times, Shell approved the Debtor's personnel assigned to Shell's spreads in the Eagle Ford Shale, and Shell required the Debtor to maintain proper safety protocols on the Shell spreads. These contractual controls regarding the specific services to be provided to Shell do not constitute control of the management or business affairs of the Debtor sufficient to justify the Committee's alleged lender liability claims.[197]

126. The Committee also cites to Shell's decision to cease requiring fracking services from the Debtor without providing a services bridge into 2014. In making the decision to exit or substantially curtail its North America fracking operations, which had nothing to do with the quality of the work being performed by the Debtor but related solely to a strategic shift in Shell's business operations, Shell effectively deprived the Debtor of the revenue necessary to service the

[197] Shell also had the right to exercise a degree of control over the Debtor's ability to sell its business. *See* Shell Contract, Section 2, art. 3.3(e) (imposing, in the event of any Change of Control of the Debtor, liquidated damages in the amount of $100 million). [redacted] There is no evidence that the Debtor ever pursued any sale to Halliburton or anyone else, or that Shell ever took affirmative steps to interfere or preclude such a sale. Moreover, this type of "change of control" provision is not uncommon in commercial contracts, particularly service contracts. The Examiner does not find any basis for lender liability based on this fact alone.

Shell Credit Facility. In fact, Shell effectively concedes that it held that power over the Debtor when it contends that the Shell Contract was only a requirements contract.[198] Shell knew or should have known that it was the Debtor's dominant customer and that the Debtor could not cure the Shell loan defaults without the revenue generated under the Shell Contract. Absent controlling precedent, however, the Examiner cannot conclude that Shell's decision to suspend services—even with the knowledge that the resulting lack of revenue would prevent the Debtor from servicing its debt to Shell—results in any lender liability.

127. The Examiner has not been provided with supporting Texas law imposing lender liability on Shell based on the "change in control" provision in the Shell Contract or for the impact of Shell's cessation of business on the Debtor's ability to service the Shell Credit Facility. Based on all the facts and arguments available to the Examiner and the circumstances surrounding pursuit of the alleged lender liability claims, the Examiner concludes in his judgment that these claims are not ones that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation.

128. Accordingly, the Examiner finds that the lender liability claims are not valuable claims.

g. Prima Facie Tort

129. The Committee contends that Shell may be found liable for having committed a prima facie tort because Shell's "decision to terminate the Debtor['s] services and accelerate its loans was made deliberately, wrongfully, arbitrarily and without cause and with knowledge that it would destroy Debtor['s] business and render them incapable of repaying Shell's loans and

[198] *See* Shell Initial Submission, ¶ 35 (stating that the Shell Contract was, at most, an implied requirements contract).

other creditors."[199] Before addressing the Committee's claims, the Examiner must first consider which state law applies to the Committee's asserted action. As stated in Section IV.B.1.e *supra*, Delaware choice of law rules govern this analysis.[200]

130. Delaware courts apply the "most significant relationship test" as outlined in the Restatement (Second) of Conflict of Laws. *Pickett v. Integrated Health Servs., Inc. (In re Integrated Health Servs., Inc.)*, 304 B.R. 101, 106 (Bankr. D. Del. 2004), *aff'd*, 233 F. App'x 115 (3d Cir. 2007) (citing *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1255–56 (Del. Super. Ct. 2001)). In a tort action, the "most significant relationship test" identifies which state has the most interest in a particular tort claim by analyzing the following factors: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)).

131. Here, Texas law has the most significant relationship to the Committee's asserted prima facie tort claim against Shell. The purported injury and the conduct purportedly causing such injury occurred in Texas where the Shell Contract was performed, for the most part, by the Debtor. Furthermore, the relationship between the Debtor and Shell concerns the provision of services, which were performed almost entirely in Texas. Therefore, the Examiner concludes that the Court would likely apply Texas law to this cause of action.

132. "The cause of action known as 'prima facie tort' has been defined as the infliction of an intentional harm without excuse or justification by an act or series of acts which otherwise

[199] *See* Committee's Initial Submission, ¶ 96.

[200] *See supra* notes 173-75 and corresponding text.

would be lawful and which results in special damage." *Tatum v. Nationsbank of Texas, N.A.*, No. 05-94-01998-CV, 1995 WL 437413 at *6 (Tex. App.—Dallas July 25, 1995, writ denied) (citing *Martin v. Trevino,* 578 S.W.2d 763, 772 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)). To date, no Texas court has adopted a cause of action for prima facie tort. A number of Texas courts have considered the question of whether a prima facie tort cause of action should be adopted in Texas. *See, e.g., Id.*; *A.G. Servs, Inc. v. Peat, Marwick, Mitchell & Co.,* 757 S.W.2d 503, 507 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Martin,* 578 S.W.2d at 772-73. "These courts have universally held that if such a cause of action is to be adopted, its adoption is a matter to be addressed by the legislature, not the courts." *Tatum*, 1995 WL 437413 at *6; *A.G. Services,* 757 S.W.2d at 507; *Martin,* 578 S.W.2d at 773.

133. The Texas legislature has not, as of the date of this Report, adopted legislation recognizing a cause of action known as "prima facie tort." Consequently, the Examiner finds that the Committee's proposed prima facie tort claim against Shell is not one that a reasonable business client, responsible for its own legal fees and costs, would pursue in litigation.

h. Aiding and Abetting Breach of Fiduciary Duty

134. The Committee contends that Shell may be liable for aiding and abetting a breach of fiduciary duty by Mr. Moreno to the Debtor.

135. The Debtor is a Delaware corporation. To determine whether a claim exists against Shell for aiding and abetting a purported breach of fiduciary duty by Mr. Moreno to the Debtor, the Examiner looks to Delaware law. "When the claim against a third-party is that it was knowingly complicitous in a breach of fiduciary duty against a Delaware entity, Delaware's interest is paramount" and its substantive law will govern such a claim. *Shandler v. DLJ Merchant Banking, Inc.*, C.A. No. 4797-VCS, 2010 WL 2929654 at *19 (Del. Ch. July 26, 2010)

(citing *Am. Int'l. Group, Inc. v. Greenberg*, 965 A.2d 763, 822 (Del. Ch. 2009)); *see also, LaSala v. Bordier*, 519 F.3d 121, n. 13 (3d Cir. 2008) (citing *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 959 (Del. Ch. 2007) and recognizing that substantive law of Delaware controls aiding and abetting breach of fiduciary duty claim where "the claims involve the corporation's internal affairs, and the state of incorporation is Delaware").

136. Under Delaware law, aiding and abetting a breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in the breach by a non-fiduciary, and (4) damages. *Green v. NYMEX (In re NYMEX S'holder Litig.)*, CA Nos. 3621-VCN and 3835-VCN, 2009 WL 3206051 at *12 (Del. Ch. Sept. 30, 2009); *see also LaSala*, 519 F.3d at 130 (identifying elements of aiding and abetting breach of fiduciary duty claims as (1) a breach of fiduciary duty, (2) knowing participation in that breach by the defendant, and (3) damages).

137. Assuming that Mr. Moreno owed a fiduciary duty to the Debtor and that he breached that duty (issues that are addressed later in this Report), the Committee would have to show that Shell knowingly participated in the particular actions constituting Mr. Moreno's breach. Conclusory allegations of "knowing participation" by Shell are insufficient as a matter of law. *NYMEX Shareholder Litig.*, 2009 WL 3206051 at *12 (holding "[w]ith regard to the third element—'knowing participation'—conclusory allegations such as '[aiding and abetting defendant] had knowledge of the [fiduciary d]efendant's fiduciary duties and knowingly and substantially participated and assisted in the [fiduciary d]efendant's breaches of fiduciary duty, and, therefore, aided and abetted such breaches of fiduciary duties' are insufficient as a matter of law"). Here, the totality of factual allegations asserted against Shell with respect to the Committee's aiding and abetting theory is as follows:

> In this case, Shell played a dominant role in the Debtor['s] business and its demise. Indeed, it appears that [Mr.] Moreno's sudden transformation of the Debtor['s] business was done in order to meet Shell's needs and demands. Moreover, given Shell's extensive experience in the oil and gas business, it defies credulity that Shell did not fathom the extent of the damage its onerous contractual terms would exact upon the Debtor[] and foresee its ultimate collapse.

See Committee's Initial Submission, ¶ 99.

138. These allegations do not support a claim for aiding and abetting a breach of fiduciary duty by Mr. Moreno. In fact, the allegations are not inconsistent with Shell's assertion that it merely acted as a major customer and lender to the Debtor. There is no allegation that Shell played a direct role in any action taken by Mr. Moreno that might have constituted a breach of his fiduciary duties. Shell entered into an arms-length agreement with the Debtor and appears to have exercised Shell's contractual rights under such agreement, at least until Shell suspended its services in the summer of 2013. Even assuming that Mr. Moreno was placed in a position where he had to breach his fiduciary duties to the Debtor in order to comply with the Shell Contract (an assumption the Examiner is not prepared to make, given the facts presented by the parties), such a circumstance would not constitute advocation or assistance by Shell in Mr. Moreno's breach of fiduciary duty.

139. Whether or not Shell breached the contract, the Examiner cannot draw an inference from Shell's actions related to the Shell Contract that Shell aided and abetted any breach of a fiduciary duty by Mr. Moreno to the Debtor. The Committee has not provided the Examiner with any facts showing that Shell acted in any fashion to advocate or assist Mr. Moreno in the breach of his fiduciary duty to the Debtor. The Examiner concludes that an aiding and abetting a breach of fiduciary duty claim is not one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation.

Therefore, the Examiner finds that the aiding and abetting breach of fiduciary duty claim is not a valuable claim.

i. Summary of Shell Analysis

140. The Examiner finds that the claim against Shell for an alleged preferential transfer is moot or otherwise not valuable. The Examiner finds that the breach of contract claim against Shell is a valuable claim. The Examiner further finds that the claims or causes of action for fraudulent transfer, equitable subordination, recharacterization, prima facie tort, lender liability, and aiding and abetting breach of fiduciary duty lack value to the Estate.

141. Based on Shell's agreement under the Plan to contribute the value of its interest in the proceeds of the Shared Collateral to the Estate, which, for purposes of this Report, is assumed to be $32.775 million (57% of $57.5 million), and Shell's agreement to withdraw its claim of $80 million to $111 million, the Examiner finds that Shell has provided valuable consideration under the Plan to justify the releases of these claims.

2. Alleged Causes of Action Against Michel Moreno and the Moreno Affiliated Entities

142. The Committee contends that the Estate holds claims or causes of action against Mr. Moreno and/or the Moreno Affiliated Entities for (a) breach of fiduciary duty by Mr. Moreno based on (i) duty of loyalty, (ii) usurping a corporate opportunity, and (iii) duty of care, (b) violation of the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA"), (c) tortious interference with contract by Mr. Moreno, (d) conversion of corporate opportunity by Mr. Moreno, (e) unjust enrichment, (f) actual and constructive fraudulent transfers by Mr. Moreno and several Moreno Affiliated Entities, and (g) preferential transfers to various Moreno Affiliated Entities.

a. Breach of Fiduciary Duty Claims Against Mr. Moreno

143. Under Delaware law, the directors of a corporation have a legal responsibility to manage the business of the corporation for the benefit of its shareholders and, therefore, the directors owe their fiduciary obligations to the corporation and its shareholders. Shareholders rely on directors to act as fiduciaries to protect their interests. *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007). By contrast, creditors hold numerous means to protect their interests, including through the contractual agreements they negotiate with a debtor, liens on assets, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law and general commercial law. *Id.*

144. In its general discussion of breach of fiduciary duty, the Committee asserts that, when a corporation is in the zone of insolvency, directors and controlling shareholders owe fiduciary duties to creditors as well as stockholders.[201] Mr. Moreno responds that the Delaware courts have retreated from case law suggesting that the director's fiduciary duty extends to a corporation's creditors when a corporation operates within a zone of insolvency, holding in recent cases that the duty remains to the corporation even if the corporation is in a zone of insolvency.[202]

145. Recent Delaware case law holds that the general rule that directors of a corporation owe their fiduciary obligations to the corporation and its shareholders remains unchanged even when the corporation is operating in what some call a "zone of insolvency" *and* when insolvent. Indeed, the Supreme Court of Delaware in *Gheewalla* explained:

> When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their

[201] *See* Committee Initial Submission, ¶ 129.

[202] *See* Moreno Initial Submission, ¶¶ 41-42.

> business judgment in the best interests of the corporation for the benefit of its shareholder owners.

Gheewalla, 930 A.2d at 101. As the Court reasoned in *Gheewalla*, a corporation operating in a "zone of insolvency" needs the freedom and ability to negotiate in good faith with its creditors and needs effective and proactive leadership—goals that could be undermined if a director faces the prospect of individual liability arising from the pursuit of direct claims by creditors. *Id.* at 100-101; *see also Trenwick America Litigation Trust v. Ernst & Young*, 906 A.2d 168, 204 (Del. Ch. 2006) (noting that Delaware imposes no absolute obligation on the board of an insolvent company to pay its bills, cease operations and to liquidate, but rather allows a board to pursue good faith strategies that maximize the value of the firm in the hopes of turning things around.); *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 790 (Del. Ch. 2004) (recognizing that a corporation operating in the zone of insolvency, having complied with its legal obligations to its creditors, ordinarily is "free to take economic risk for the benefit of the firm's equity owners, so long as the directors comply with their fiduciary duties to the firm by selecting and pursuing with fidelity and prudence a plausible strategy to maximize the firm's value"). Accordingly, the Supreme Court of Delaware in *Gheewalla* concluded that a creditor does not possess a direct claim against a director for breach of fiduciary duty, even when operating in the "zone of insolvency." *Gheewalla*, 930 A.2d at 101.

146. Furthermore, while recognizing that a corporation's insolvency makes creditors the principal constituency injured by any breaches of fiduciary duty, the *Gheewalla* Court determined that upon a corporation's insolvency a creditor still does not obtain a direct cause of action against a director for a breach of fiduciary duty. *Id.* at 103. The Supreme Court of Delaware in *Gheewalla* unequivocally rejected the idea that the directors of an insolvent corporation owed a direct fiduciary duty to creditors. *Id.* Nevertheless, upon a corporation's

insolvency, a creditor of a debtor corporation is bequeathed with standing to bring a derivative claim for breach of fiduciary duty against the corporation's directors. *Id.* at 103. As explained in a quote used by the *Gheewalla* Court (but taken from the *Production Resources* case):

> The fact that the corporation has become insolvent does not turn [derivative] claims into direct creditor claims, it simply provides creditors with standing to assert those claims. *At all times, claims of this kind belong to the corporation itself* because even if the improper acts occur when the firm is insolvent, they operate to injure the firm in the first instance by reducing its value, injuring creditors only indirectly by diminishing the value of the firm and therefore the assets from which the creditors may satisfy their claims.

Gheewalla, 930 A.2d at 102 (quoting *Prod. Res. Group, L.L.C.*, 863 A.2d at 776) (emphasis added). As noted by the Court of Chancery in *Trenwick America*:

> In other words, insolvency does not suddenly turn directors into mere collection agents. Rather, the creditors become the enforcement agents of fiduciary duties because the corporation's wallet cannot handle the legal obligations owed. Theft from the firm remains theft from the firm, even if the firm as seen by academics is a legal fiction. In other words, the fiduciary tool is transferred to the creditors when the firm is insolvent in aid of the creditor's contract rights.

906 A.2d at 195, n. 75.

147. Though a creditor of an insolvent corporation may have standing to assert a derivative claim against a director for breach of fiduciary duty, upon a bankruptcy filing by the insolvent corporation, creditors (and shareholders alike) are generally stripped of such right. *See Seinfeld v. Allen*, 169 F. App'x. 47, 49 (2d Cir. 2006) (holding that the filing of a bankruptcy petition alters the rights of the corporation and the manner in which its rights can be asserted and recognizing that the right to bring derivative causes of action on behalf of the debtor resides with the DIP and/or Trustee); *see also Mitchell Excavators, Inc. v. Mitchell*, 734 F.2d 129 (2d Cir. 1984).[203]

[203] However, if the DIP/trustee abandons the cause of action or a creditor petitions the bankruptcy court for authority to bring the derivative action on behalf of the corporation in the DIP/trustee's stead, a bankruptcy court may grant the creditor standing to prosecute the cause of action, depending on the circumstances of the case. *Mitchell*

i. What Standard Applies—Entire Fairness or the Business Judgment Rule?

148. Under Delaware law, the business affairs of a corporation are managed by its board of directors. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1994). The business judgment rule, which is both a procedural guide for litigants and a substantive rule of law, "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." *Id.* Only if the presumption of the business judgment rule is defeated will the entire fairness standard apply. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1371 n. 7 (Del. 1995). Thus, a plaintiff challenging a board decision has the burden at the outset to rebut the presumption of the business judgment rule by presenting evidence that "directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty—good faith, loyalty or due care." *Cede & Co.*, 634 A.2d at 361.

149. A breach of loyalty may be established by evidence establishing that the director: (1) was on both sides of the transaction or (2) derived any personal financial benefit from the transaction in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. *Id.* at 363. If the plaintiff succeeds in rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the entire fairness of the transaction. *Id.* at 361.

150. The entire fairness standard requires the interested defendants to "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." *In re Southern Peru Copper Corp. S'holder Litig.*, 52 A.3d 761, 787 (Del. Ch. 2011). The entire fairness standard has two basic aspects of fairness: fair dealing and fair price. *Id.* at 787. Fair dealing questions "when the transaction was timed, how it was initiated, structured, negotiated, disclosed

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Excavators, Inc., 734 F.2d at 131. In sum, "if the plaintiff is dissatisfied with the trustee's action or inaction on the claim, he must petition the bankruptcy court before proceeding derivatively." *Seinfeld*, 169 F. App'x. at 49.

to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* Fair price deals with economic and financial considerations. *Id.*

151. Although still tested by the entire fairness standard, the defendant director may be able to shift the burden of persuasion by showing that the transaction was approved either by an independent board majority (or, in the alternative, by a "well functioning" special committee of independent directors) or, assuming certain conditions, by an informed vote of the majority of the minority shareholders. *Southern Peru*, 52 A.3d at 788-89; *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994); *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). The shift of the burden of persuasion often cannot be determined by the trial court until after all the evidence has been elicited. *Southern Peru*, 52 A.3d at 793.

152. In assessing the exercise of fiduciary duty, a director of a Delaware corporation may attempt to invoke the so-called "safe harbors" embodied by the Delaware General Corporation Law § 144(a). The "safe harbors" are as follows:

1. Approval of an interested transaction by a fully-informed majority of disinterested directors, even though the disinterested directors be less than a quorum (DEL. CODE ANN. tit. 8 § 144(a)(1));

2. Approval in good faith of an interested transaction by fully-informed stockholders entitled to vote thereon (DEL. CODE ANN. tit. 8 § 144(a)(2)); or

3. The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders (DEL. CODE ANN. tit. 8 § 144(a)(3)).

153. If a director establishes the safe harbor provided by § 144(a)(1)—approval by fully-informed disinterested directors—Delaware law is unclear as to whether that results in the challenged transaction being examined under the business judgment rule or whether the challenged transaction is still examined under the entire fairness standard. *See Lynch Commc'n*

Sys, Inc., 638 A.2d at 1117 (finding that even when the interested transaction is approved by a majority of minority stockholders or by an independent committee of disinterested directors, an entire fairness analysis is the only proper standard of judicial review); *Southern Peru*, 52 A.3d at 788 (noting that "[u]nder the *Lynch* doctrine, when the entire fairness standard applies, controlling stockholders can never escape entire fairness review...."); *but see Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) (holding that "[a]fter approval by disinterested directors, courts review the interested transaction under the business judgment rule"). As the Court of Chancery explained in *Benihana*, section 144(a)(1) "merely protects against invalidation of a transaction 'solely' because it is an interested one." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 185 (Del. Ch. 2005). The *Benihana* Chancery Court further rejected the idea that if the requirements of 144(a) are met that the transaction is beyond the reach of entire fairness. *Id.* In rejecting this proposition, the *Benihana* Court relied on the *HM/Courtland Properties, Inc. v. Gray* Court's reasoning:

> While non-compliance with §§ 144(a)(1), (2)'s disclosure requirement by definition triggers fairness review rather than business judgment rule review, the satisfaction of §§ 144(a)(1) or 144(a)(2) alone does not always have the opposite effect of invoking business judgment rule review.... Rather, satisfaction of §§ 144(a)(1) or (a)(2) simply protects against invalidation of the transaction 'solely' because it is an interested one. As such, § 144 is best seen as establishing a floor for board conduct but not a ceiling.

HMG/Courtland Props. Inc. v. Gray, 749 A.2d 94, 114 n. 24 (Del. Ch. 1999).

154. In addition, the Delaware courts appear to limit the safe harbor embodied by 8 Del.C. § 144(a)(2)—approval by fully-informed stockholders—to "circumstances where a fully informed shareholder vote approves director action that does *not* legally require shareholder approval in order to become legally effective." *Ebay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, n. 147 (Del. Ch. 2010) (quoting *Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009))

(emphasis added). There is also Delaware case law indicating that where a transaction is between a corporation and its controlling shareholder the standard of review remains entire fairness. *See Ebay*, 16 A.3d at 42, n. 147.

155. As to the safe harbor embodied in 8 Del.C. § 144(a)(3), Delaware courts have interpreted this safe harbor to simply codify the entire fairness standard. *See Cede & Co.*, 634 A.2d at 366, n. 34 (describing the safe harbor provided by § 144(a)(3) as allowing a non-disclosing interested director to remove the taint of interestedness by proving the entire fairness of the challenged transaction); *see also Unitrin,* 651 A.2d at 1371, n. 7.

156. Mr. Moreno served as a director of GFES and, in effect, as its controlling shareholder through MMR and MOR MGH, two Moreno Affiliated Entities that hold 100% of the GFES preferred stock and the majority of the GFES common stock. In the transactions discussed below, Mr. Moreno was effectively on both sides of the transaction. The Examiner finds genuine issues of material fact on the question of the application of the business judgment presumption. Furthermore, the "safe harbors" provided for in section 144(a)(1) or 144(a)(2) of the Delaware General Corporation Law, whether met or not, may not relieve Mr. Moreno from the application of the entire fairness standard.

ii. Breach of Fiduciary Duty—Duty of Loyalty

157. The Committee asserts that Mr. Moreno engaged in conduct that breached his duty of loyalty to the Debtor by causing numerous transactions to occur between the Debtor and other Moreno Affiliated Entities that appear to have resulted in personal gains for Mr. Moreno or the Moreno Affiliated Entities at the expense of the Debtor.

(I) Duty of Loyalty—Transactions Between the Debtor and the Moreno Affiliated Entities

(A) The Power Generation Business

158. The Committee alleges that Mr. Moreno breached his duty of loyalty by orchestrating the transfer of the Power Generation Business from GFES to TGS, a corporation owned by Moreno Affiliated Entities. The factual background surrounding the Power Generation Business is set forth in Section I.F above. The transfer of the Power Generation Business to TGS is analyzed in Section IV.B.2.a.iii below, in the context of the discussion of the claim of breach of fiduciary duty by usurping a corporate opportunity.

(B) The Share Purchase Agreements

159. The Committee alleges that Mr. Moreno breached his duty of loyalty by using two companies under his control—MMR and MOR MGH—to enter into two Share Purchase Agreements that contemplated the aggregate purchase of $35 million worth of GFES's preferred stock by MMR and MOR MGH, but then causing MMR and MOR MGH to breach their respective obligations by failing to honor their payment obligations under the Share Purchase Agreements, paying $11.6 million rather than the full $35 million owed to the Debtor.[204] The Share Purchase Agreements are described in Section I.D above.

160. The Committee argues that as a fiduciary of the Debtor, Mr. Moreno had a duty to demand and obtain payment from MMR and MOR MGH in May 2013 and August 2013, when demand was required to advance GFES's best interests. The Committee asserts that Mr. Moreno prevented the demand of payment from MMR and MOR MGH. At the time when GFES should have demanded from MMR and MOR MGH in May 2013 and in August 2013, Mr.

[204] *See, e.g.*, Committee's Supplemental Submission, ¶ 76.

Blackwell sent an email to Mr. Moreno notifying him of the need to demand payment.[205] Mr. Blackwell never followed up with Mr. Moreno and Mr. Moreno never notified the other directors.[206] Mr. Moreno did not exercise his control over MOR MGH or his authority in MMR to cause or even to attempt to cause these two entities to make the requisite contractual purchases.

161. The Committee argues that by causing MOR MGH and MMR to breach their respective obligations to Debtor under the Share Purchase Agreements, Mr. Moreno deprived the Debtor of up to $23.4 million in contractually committed capital contributions, further exacerbating the Debtor's liquidity issues and causing significant harm.[207]

162. The Debtor and Mr. Moreno both agree that GFES did not issue, and MOR MGH and MMR did not purchase, preferred stock in the required amounts of $4,464,626 for Q1 2013 and $2,242,455 for Q2 2013.[208] Further, MOR MGH and MMR also failed to purchase preferred stock for Q3 2013 in the amount of $4,086,369.[209] [redacted] Under the 2013 Share Purchase Agreement, MOR MGH

[205] *See* Blackwell Transcript, at 96:17-25.

[206] *Id.*

[207] *See* Committee's Initial Submission, ¶ 140; *but see* Debtor's Initial Submission, ¶ 155 (calculating the total amount owed as $20,793,450).

[208] *See* Debtor's Initial Submission, ¶ 149; *see also* Moreno Initial Submission, ¶ 29.

[209] *See* Debtor's Initial Submission, ¶ 149.

[redacted]

was obligated to purchase $10 million in preferred stock from GFES.[211] Based on the terms of the 2013 Share Purchase Agreement, it appears that the $10 million payment was due on the date the agreement was executed, June 28, 2013.[212] MOR MGH never paid the $10 million required under the 2013 Share Purchase Agreement.[213] According to the Debtor, the Estate has "strong" claims against MMR and MOR MGH for their breaches of the two Share Purchase Agreements.[214]

163. Mr. Moreno refutes the contention that MMR and MOR MGH breached their contractual obligations under the Share Purchase Agreements and are liable to GFES for damages in the amount of approximately $23.4 million. MMR is liable (putting aside any defenses to a breach of contract action it might have) for only 11.1% of the unpaid purchase amount under the 2012 Share Purchase Agreement, and has a setoff claim for $23 million which far exceeds its potential exposure.[215] [redacted]

[211] According to the Moreno Initial Submission, ¶ 31, the $10 million purchase obligation was conditioned on the same type of MAC clause contained in the 2012 Share Purchase Agreement.

[212] *See* 2013 Share Purchase Agreement, § 2.01(b).

[213] *See* Debtor's Initial Submission, ¶ 151.

[214] *Id.*, ¶ 146.

[215] *See* Moreno Initial Submission, Exhibit M-2.

[216] *See* Alvarez Memorandum, p. 9. The Alvarez Memorandum is attached as Exhibit 25 to the Debtor's Initial Submission.

[redacted]

164. Further, Mr. Moreno argues that he ensured that GFES obtained capital notwithstanding MOR MGH's inability to acquire the preferred shares and that the timing of the Share Purchase Agreements, including how they were initiated, structured and implemented, demonstrates the utmost good faith on the part of Mr. Moreno for several reasons. First, the purchases were made to facilitate an additional loan by Shell and a modification to the 2016 Senior Secured Note Indenture.[218] Second, the purchasers did fund $11.6 million of preferred share acquisition in late 2012 and early 2013, even though GFES's economic environment had turned markedly negative.[219] Third, at the time in 2013 that the purchases required under the Share Purchase Agreements were not made, Mr. Moreno had capitalized TGS and took on substantial additional personal exposure. Mr. Moreno worked to ensure that GFES got the resulting benefit of, among other things, (i) a $13 million profit on the sale by GFES to TGS of excess turbine engines, (ii) the retention by GFES of $9.9 million of deposits funded by TGS for purchases from TPT. and (iii) the right of GFES to serve as contract manager under the Tri-Party Agreement.[220] As discussed in Section I.F above, the Tri-Party Agreement was designed to allow GFES to share in 50% of the profits from TPT's sales on account of GFES's ownership interest in TPT, as well as eliminate the need to provide further funding to TPT.[221] Mr. Moreno further argues that GFES suffered no damages from MMR's and MOR MGH's failure to acquire preferred shares because GFES's relationship with TGS bestowed more value upon GFES than would have been the case if the shares had been purchased. Moreover, Mr. Moreno's

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[218] *See* Moreno Initial Submission, ¶ 56.

[219] *Id.*

[220] *Id.*, ¶ 57.

[221] *Id.*

relationships and interests were disclosed and known to all parties involved with the 2012 Share Purchase Agreement and the 2013 Share Purchase Agreement, and the transactions were fair as to GFES as of the time they were implemented.[222] Accordingly, Mr. Moreno maintains that he cannot be held to have breached his duties of good faith and loyalty to GFES in connection with the Share Purchase Agreements.

165. Mr. Moreno also argues that although not specifically invoked by the purchasers, the MAC clause could have been invoked by MMR and/or MOR MGH. Finally, he argues, there is no evidence that he is an alter ego of MMR, MOR MGH or GFES, all of which observed corporate formalities, engaged in arms-length transactions, and in the case of GFES had a board with independent directors.[223]

166. In connection with this duty of loyalty issue, the Debtor argues that the "affiliate exception" under Delaware law creates an exception to any potential claim against Mr. Moreno for his interference in causing MMR and MOR MGH to breach the Share Purchase Agreements. The Debtor also argues a potential defense under New York law's "economic interest" defense, which justifies a defendant's interference as proper when acting to protect his own legal or financial stake in the breaching party's business.[224]

167. The Committee responds that the affiliate exception, if applicable, would be an affirmative defense that Mr. Moreno would have the burden of establishing.[225] In addition, a plaintiff can overcome the affiliate or economic interest privilege, if established by the defendant, by showing the interference was improper. *See Shearin v. E.F. Hutton Group, Inc.,*

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[222] *Id.*, ¶ 58.

[223] *Id.*, ¶ 70.

[224] *See* Debtor's Initial Submission, ¶ 241.

[225] *See* Committee's Supplemental Submission, ¶ 129.

652 A.2d 578, 591 (Del. Ch. 1994). Improper interference in the case of an affiliated defendant can be established by showing that the defendant acted in bad faith. *Id.* In the case of a corporate agent, bad faith is established by showing that the defendant was motivated by his own personal goals or interest, and not by a desire to further the best interests of the corporation. *See Nation v. Am. Capital, Ltd.*, 682 F.3d 648, 652 (7th Cir. 2012); *see also Holloway v. Skinner,* 898 S.W.2d 793, 795 (Tex. 1995). Further, the Committee argues that while New York law has recognized the economic interest defense for a shareholder's interference in the company's business, *see Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 686 (N.Y. Ct. App. 1969), a distinction on this doctrine's applicability must be drawn between *Felsen*, where the interfering defendant was the sole shareholder of the corporate party to the contract, and this case, where Mr. Moreno is only a 33% owner of MMR.[226]

168. Based on all the facts and arguments available to the Examiner and the circumstances surrounding pursuit of the breach of contract claims against MOR MGH and MMR relating to the Share Purchase Agreements, the Examiner concludes that the claims are ones that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation and, therefore, constitute valuable claims belonging to the Estate. Further, with respect to the breach of duty of loyalty claim, Mr. Moreno, a GFES director, was effectively on both sides of the Share Purchase Agreements, arguably giving rise to an "entire fairness" review of that claim. [redacted] Mr. Moreno conflates his interest in TGS with his fiduciary

[226] *See* Moreno Initial Submission, ¶ 55.

duty to GFES. Indeed, as discussed below, had TGS been formed as a subsidiary of GFES, many of the issues addressed in this Report may not have existed, even if the TGS venture ultimately failed.

169. As illustrated by the timeline attached to this Report,[227] GFES needed the capital investment contemplated by the Share Purchase Agreements in the same time frame that the Moreno Affiliated Entities formed TGS and GFES transferred the Power Generation Business to TGS without consideration—thereby implicating an issue of fair dealing as discussed above in paragraph 150. The functioning of the Debtor's Board of Directors during this time would also be tested at trial.

170. Based on the above, the Examiner finds that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue the breach of duty of loyalty claim against Mr. Moreno relating to the Share Purchase Agreements. Consequently, the breach of duty of loyalty claim is a valuable claim.

171. For purposes of this Report, the Examiner accepts the Debtor's calculation of unpaid amounts under the Share Purchase Agreements, pre-petition:

Under the 2012 Share Purchase Agreement:

MMR was to pay GFES $1,199,152
MOR MGH was to pay $9,594,298

Under the 2013 Share Purchase Agreement:

MOR MGH was to pay GFES $10,000,000.

Total MMR = $1,199,152
Total MOR MGH = $19,594,298
$20,793,450

[227] *See* Exhibit B, attached hereto.

172. These calculations do not take into account any mitigating defense or offset that Mr. Moreno or the Moreno Affiliated Entities may have relating to the Share Purchase Agreements. The Examiner recognizes that Mr. Moreno, MMR, and MOR MGH may have various defenses and offsets that arguably would diminish, or perhaps even eliminate, the damages that could be recovered on account of the various causes of action relating to the Share Purchase Agreements.

(C) GFES's Agreement with Alliance

173. In January 2012, GFES contracted with Alliance Consulting Group, LLC ("Alliance") to build and operate a wet and dry sand processing plant.[228] Alliance is owned 50% by Elle, an entity owned and controlled by Mr. Moreno.[229] The Committee argues that the Debtor's payment of $4.6 million to Alliance—for a sand plant that was never built and for sand that was never delivered to the Debtor—is grounds for a breach of fiduciary duty of loyalty claim against Mr. Moreno.[230]

174. Mr. Moreno observes that Alliance is a Louisiana limited liability company originally formed in July 2010 to provide administrative support to GFES and other entities.[231] In the beginning of 2012, Alliance sought to expand its operations by building a facility in Picayune, Mississippi (the "Picayune Drying Facility") to dry frac sand delivered from nearby

[228] *See* Committee's Initial Submission, ¶ 51.

[229] *See* Moreno Initial Submission, ¶ 34. According to Mr. Moreno, Ryan L. Hess ("Hess"), Alliance's manager, owns the other 50% of Alliance, although Mr. Hess alleges that he and his father own 100%. *Id.*

[230] *See* Committee's Initial Submission, ¶¶ 135-36.

[231] *See* Moreno Initial Submission, ¶ 34.

mines, including a sand mine in Hancock County, Mississippi, previously owned by Frac Diamond Aggregates LLC ("FDA").[232]

175. Mr. Moreno reports that to finance this expansion, Alliance entered into a credit agreement with certain lenders and Spectrum Originating LLC ("Spectrum"), as administrative agent, in the original principal amount of $30.8 million. In contemplation of Alliance providing GFES with dry frac sand, which was a necessary component of GFES's fracking business, Alliance and GFES entered into a Sand Mining and Refining Agreement as of January 23, 2012 (the "Alliance Agreement").[233] Under the terms of the Alliance Agreement, GFES had the right of first refusal on one million tons of processed sand per year, with a minimum guarantee by Alliance to process and deliver to GFES at least 40,000 tons of sand per month.[234] In exchange, GFES agreed to make a prepayment to Alliance for the sand.[235] GFES ultimately prepaid $4.6 million to Alliance for sand to be delivered to GFES.[236]

176. Mr. Moreno argues that the terms of the Alliance Agreement and GFES's prepayment of $4.6 million for sand to be produced and delivered were appropriate. Mr. Moreno reports that in 2011 and early 2012, it was common practice for fracking companies to prepay for sand under similar arrangements.[237] The Debtor acknowledged that processed sand, which was necessary to the hydraulic fracking process, was in extraordinarily high demand at the time, and

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[232] *Id.*, ¶ 35.

[233] *Id.*, ¶ 36. The Alliance Agreement is attached as Exhibit M-18 to the Moreno Initial Submission.

[234] *See* Alliance Agreement, § 4.1.

[235] *Id.*, § 7 (requiring a $4 million prepayment).

[236] *See* Debtor's Initial Submission, ¶ 139.

[237] *See* Moreno Initial Submission, ¶ 37.

that companies often secured delivery of sand through prepayment arrangements.[238] Mr. Moreno provided the Examiner with Exhibit M-19, which summarizes three other examples of sand prepayment arrangements in the industry during 2011.

177. In July 2013, Spectrum accelerated payment under the credit agreement and subsequently instituted an action to foreclose the drying facility assets held by Alliance. On the day of the scheduled foreclosure sale, October 3, 2013, a group of creditors filed an involuntary bankruptcy petition against Alliance in the United States Bankruptcy Court for the Southern District of Mississippi, Case No. 13-51937.[239] The bankruptcy court entered an order for relief on October 5, 2013. The court subsequently appointed a Chapter 11 trustee to operate Alliance's business and assets. The bankruptcy case remains pending and litigation is ongoing between Hess and Spectrum regarding the viability of Spectrum's claim against the estate and other issues.[240] GFES has filed a claim in the case.[241]

178. As the transaction with Alliance did not result in benefit to GFES, the Committee contends that Mr. Moreno breached his fiduciary duty to GFES.[242] Alliance's failure to perform does not give rise to a breach of fiduciary duty claim against Mr. Moreno. A plaintiff in a breach of fiduciary duty action cannot rely on hindsight in asserting claims against fiduciaries. *In re*

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[238] *See* Debtor's Initial Submission, ¶ 156.

[239] *See* Moreno Initial Submission, ¶ 38. As explained therein, Mr. Moreno reports that prior to the involuntary filing, Mr. Moreno (through Elle) attempted to restructure Alliance's obligations to avoid foreclosure. Part of Elle's attempted restructuring was Elle's assumption of a portion of the Spectrum debt ($12.8 million in principal) held by Spectrum affiliates. To ensure that GFES would obtain sand, Shale Support Services, LLC ("SSS" or "S3"), began to operate the Picayune Drying Facility at its own expense on behalf of Alliance and FDA. SSS is owned 70% by MOR MGH (one of the Moreno Affiliated Entities), [redacted] by [redacted] and [redacted] by [redacted] FDA is a co-borrower under Alliance's credit agreement and formerly owned the Picayune Drying Facility. Spectrum previously foreclosed on certain of FDA's assets in connection with its obligations under the credit agreement.

[240] *Id.*

[241] *See* Debtor's Initial Submission, ¶ 157.

[242] *See* Committee's Initial Submission, ¶¶ 135-36.

NYMEX S'holder Litig., 2009 WL 3206051, at *8 (holding that fiduciary duties were not violated in making a decision to reject one portion of a merger that in hindsight would have been beneficial to shareholders) (citing *In re The Coleman Co., Inc. S'holders Litig.*, 750 A.2d 1202, 1209 (Del. Ch. 1999)).

179. Mr. Moreno was effectively on both sides of this transaction, arguably giving rise to an entire fairness review. However, given the state of the fracking business in 2011, the Examiner finds that GFES acted reasonably in attempting to secure a steady, reliable source of sand—a necessary component to GFES's fracking business. In addition, as acknowledged by the Debtor, the prepayment terms of the Alliance Agreement may have not been unusual in the market at the time. Further, Mr. Moreno does not appear to have derived any personal benefit from the Alliance Agreement. Based on the facts and evidence presented by the parties, the Examiner finds that the claim is not one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation. Consequently, the Examiner finds that the breach of duty of loyalty claim with respect to the Alliance Agreement is not a valuable claim.

(D) The Airplanes[243]

180. The Committee alleges that Mr. Moreno breached his duty of loyalty in connection with two airplanes leased by Debtor from entities owned or controlled by Mr. Moreno, at the expense to the Debtor of millions of dollars, and that the aircraft were used by Mr. Moreno for, among other things, personal travel.[244]

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[243] The factual discussion of the aircraft in question, along with the Debtor's involvement with three of the Moreno Affiliated Entities—Aerodynamic, LLC ("Aerodynamic"), Moreno Properties, LLC ("Moreno Properties"), and Casafin II, LLC ("Casafin")—is set forth in Section V.B.4 of the Debtor's Initial Submission, and is adopted herein.

[244] *Id.*

181. Mr. Moreno responds that the Debtor's transactions involving the aircraft do not rise to the level of a breach of duty of loyalty, that the aircraft were utilized to avoid paying hefty prices for commercial flights and to save valuable time of executives, that such arrangements are entirely appropriate and the cost-benefit analysis was reasonable and justified, and that any alleged overcharges for the Debtor's aircraft usage are nominal.[245]

182. Based on the need for travel and the costs of airplane travel from the GFES corporate headquarters, and the other facts and circumstances of this claim, the Examiner concludes in his judgment that this claim is not one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation. Consequently, the Examiner finds that a breach of fiduciary duty based on the airplanes claim is not a valuable claim.

iii. Breach of Fiduciary Duty—Usurping Corporate Opportunity

183. The claim of usurpation of corporate opportunity involves the decision by GFES, at the request of Mr. Moreno, to not pursue the GFES business opportunity related to the development, construction, sale and rental of turbine and gas-engine powered power generation—referred to in this Report as the Power Generation Business—but rather to allow TGS, another entity owned indirectly by Mr. Moreno, to pursue and develop the Power Generation Business.

184. In addition to breach of fiduciary duty by usurpation of corporate opportunity, the Committee also contends that the action by GFES constitutes an avoidable transfer to TGS and, further, that it amounts to the conversion of the corporate opportunity, unjust enrichment and a violation of LUTPA. In this Section of the Report, the Examiner provides the background for

[245] *See* Moreno Initial Submission, ¶ 61.

the Power Generation Business and the transaction by which TGS obtained the right to pursue it, and then addresses the usurpation of corporate opportunity claim in the context of the discussion of breach of fiduciary duty. In later Sections, the Examiner returns to the Power Generation Business to address the claim of avoidable fraudulent transfer, conversion of corporate opportunity, and LUTPA violations.

(I) Background

185. As discussed in Section I.F above, MOR DOH owns 100% of TGS. Two Moreno Affiliated Entities own 90.40767% of MOR DOH, and Powermeister owns the remaining 9.59233%. Section 7.02 of the Plan provides in part that, on or prior to the Effective Date, "NewCo shall have been created and the MOR/TGS Interests shall have been contributed to NewCo." Under the Plan, the "MOR/TGS Interests" means "90.40767% of the equity of MOR."

186. Pursuant to the Power Generation Waiver, the Debtor's shareholders and directors waived the Debtor's right to pursue the business opportunity related to the Power Generation Business. The Debtor allowed the opportunity/asset constituting the Power Generation Business to be pursued by TGS. Under the Plan, NewCo will end up owning 90.40767% of MOR DOH, which in turn owns all of TGS, which in turn possesses the opportunity/asset constituting the Power Generation Business.

187. Usurpation of a corporate opportunity falls within the fiduciary duty of loyalty. *See Guth v. Loft, Inc.*, 5 A.2d 503, 511 (Del. 1939). Delaware courts will find a breach of a fiduciary duty for usurping a corporate opportunity if: "'there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, [the opportunity] is ... in the line of the corporation's business and is of practical advantage to it, [it] is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the

opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation.'" *Yiannatsis v. Stephani,* 653 A.2d 275, 278 (Del. 1995) (quoting *Guth*, 5 A.2d at 511); *see also Dweck v. Nasser*, No. 1353-VCL, 2012 WL 161590, *17 (Del. Ch. Jan. 18, 2012) (finding usurpation of corporate opportunity where corporation used its own business operations to develop competing business interest). "[T]he determination of 'whether or not a director has appropriated for himself something that in fairness should belong to the corporation is a factual question to be decided by reasonable inference from objective facts.'" *Broz v. Cellular Info. Sys.,* 673 A.2d 148, 155 (Del. 1996) (citing *Johnston v. Greene*, 121 A.2d 919 (Del. 1956)). Delaware courts have found that corporate opportunity does not exist and therefore cannot be usurped when the first element—that the corporation has the financial ability to take on the opportunity—is absent. *See Gen. Video Corp. v. Kertesz*, CA No. 1922-VCL, 2008 WL 5247120, at *19 (Del. Ch. Dec. 17, 2008) (explaining that there was no corporate opportunity because the corporation was "irremediably insolvent" at the time the alleged opportunity was presented); *see also Broz,* 673 A.2d at 156 (finding that no corporate opportunity was usurped because, among other things, the company did not have the financial ability to exploit the opportunity).

(II) Moreno Argues that Power Generation Was Not an Asset of the Debtor

188. Mr. Moreno argues that no asset owned by the Debtor was given or transferred to TGS for use in the opportunity to develop the Power Generation Business.[246] Mr. Moreno argues that TGS was formed on March 7, 2013, to develop, construct, sell and rent turbine and gas engine power generation unrelated to the fracking services or other well services that the

[246] *See* Moreno Initial Submission, ¶24.

Debtor provides, and that TGS will not utilize any asset belonging to the Debtor for the Power Generation Business.[247]

189. TGS was formed by its sole member, MOR DOH, the majority owners of which are Moreno trusts.[248] TGS was capitalized, in part, by (i) $8 million in equity from Mr. Moreno, (ii) $20 million in equity from Powermeister invested through MOR DOH, and (iii) $25 million in debt from GE Capital, which debt was guaranteed by Mr. Moreno.[249] Powermeister is an unrelated entity that became owner of 9.59% of MOR DOH.

190. In or around 2006, Ted Lee McIntyre, II, invented an oil field turbine stimulation pump that utilizes the split shaft turbine or free turbine to control the flow rate and fluid pressure during oilfield pumping operations (the "Invention").[250] On January 1, 2006, McIntyre granted MTT (an entity owned by McIntyre) an exclusive right to make, have made, use, offer for sale, and sell the Invention.[251] On or about August 25, 2010, McIntyre filed a Non-Provisional Patent Application (the "Patent Application") for the Invention related to "hydraulic fracturing of earth formations, and more particularly to the hydraulic fracturing of hydrocarbon bearing formations, *e.g.* oil and gas sands, for the purpose of increasing the production rate and total amount of recovery of the hydrocarbons from a well completed in such a formation."[252] The subject of the

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[247] *Id.*, ¶ 25.

[248] *See* corporate chart attached hereto as Exhibit A.

[249] *See* Moreno Initial Submission, ¶ 18 (citing to Exhibit M-12, Guarantee Agreement dated May 13, 2013); *see also* Alvarez Memo, annexed to Examiner Motion as Exhibit G, p. 15.

[250] *See* Exhibit M-13 to the Moreno Initial Submission—Equipment Purchase Agreement, dated July 8, 2011 (the "Equipment Purchase Agreement"), p. 1.

[251] *Id.*

[252] *See* Exhibit M-14 to Moreno Initial Submission, line 20.

Patent Application was subsequently registered by the United States Patent and Trademark Office on July 19, 2011, under the mark "Frac Stack Pack."

191. Under the Equipment Purchase Agreement, MTT granted Hub City Industries, L.L.C., a predecessor of GFES, the exclusive license and right to purchase the turbine engines used by MTT in conjunction with the Invention for use in the Well Service Business.[253] The Equipment Purchase Agreement did not give GFES's predecessor any other right of ownership in the Invention nor any patents, trademarks or other intellectual property of MTT.[254]

192. MTT's rights and obligations under the Equipment Purchase Agreement were subsequently assigned to TPT. As discussed above, TPT is an entity in which GFES and MTT each hold 50% interests. TPT's principal is McIntyre.

193. In short, after these transactions were consummated, TPT held the exclusive right to make, have made, use, offer for sale, and sell the oil field turbine stimulation pump that is referred to above as the Invention, and GFES's predecessor—Hub City Industries, L.L.C.—held the exclusive license and right to purchase the turbine engines used by TPT in conjunction with the Invention for use in the Well Service Business.

194. TPT then granted GFES (1) a royalty-free, exclusive, fully transferable and assignable worldwide license to the Frac Stack Pack trade mark, and (2) a perpetual, irrevocable, royalty-free, fully transferable and assignable, exclusive license to the Frac Stack Pack

[253] *See* Exhibit M-13 to Moreno Initial Submission, pp. 1, 3. Under the Equipment Purchase Agreement, "Well Service Business" means "only procedures or services performed down hole in oil and gas wells such as: pump down work, cementing services, acidizing and chemical pumping, fracturing services, gravel packing and sand control services, coiled tubing, nitrogen pumping services, wireline, turbine testing and handling and rig work including well services and plug and abandonment." *Id.*, p. 3.

[254] *Id.*

technology.[255] As a result, the equipment purchased by GFES under the Equipment Purchase Agreement was Frac Stack Pack™ Technology.[256] Pursuant to the GFES License Agreement, GFES could make, use, sell, offer to sell, transfer, lease, pledge, commercialize or make any agreement or otherwise deal with turbine driven hydraulic fracturing units with other ancillary and supporting equipment ("Licensed Products") in the Well Service Business.[257] The GFES License Agreement does not preclude TPT from using or practicing rights under its intellectual property outside of the Well Service Business.[258]

195. Effective June 21, 2013, TGS, as licensee, executed the Turbine Driven Power Generation Equipment License Agreement with TPT, as licensor (the "TGS License Agreement"),[259] which grants TGS a perpetual license to, among other things, make, use, sell, commercialize, or otherwise engage the Technology in the Power Generation Business.[260] Under the TGS License Agreement, "Technology" is defined as "the use of a turbine to develop and generate portable electrical power together with processes and techniques for installing, modifying, operating and maintaining the same."[261] Hence, the assets conveyed to TGS by the

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[255] *See* Exhibit M-15 to the Moreno Initial Submission—Turbine Driven Equipment License Agreement dated September 22, 2011 (the "GFES License Agreement"), ¶¶ (II)(1) and (II)(2).

[256] *Id.*

[257] *Id.*, p. 2.

[258] *Id.*, p. 3.

[259] *See* Exhibit M-16 to Moreno Initial Submission, p. 3.

[260] The TGS License Agreement includes its own definition of "Power Generation Business," defining it to mean "only procedures related to or applications of the Technology," and including "all current and future application of the Technology for power generation *but shall not include pressure pumping for hydraulic fracturing applications.*" *Id.*, p. 2 (emphasis added). The definition is substantially similar to the definition used by the Examiner in this Report.

[261] *Id.*, p. 2.

TGS License Agreement are, by definition, different from those conveyed to GFES in the GFES License Agreement.

196. The Power Generation Waiver dated May 13, 2013, states that Mr. Moreno "has approached the Company with a business opportunity related to the development, construction, sale, and rental of turbine and gas-engine powered Power Generation (the 'Opportunity')."[262] In the Power Generation Waiver, GFES's shareholders and directors expressed a desire to waive the right to pursue the Opportunity and agreed that Mr. Moreno and TPT may pursue the Opportunity outside of the Company.[263]

197. Mr. Moreno argues that the Power Generation Waiver and Opportunity are for power generation applications that were unrelated to the Debtor's rights for Licensed Products in the Well Service Business under the Equipment Purchase Agreement or the GFES License Agreement.[264] Therefore, according to Mr. Moreno, the Power Generation Waiver did not transfer any of the Debtor's rights or property to TGS or to any other entity. GFES would operate the fracking business and TGS would operate the Power Generation Business. In sum, Mr. Moreno argues that GFES never owned any assets or rights connected to the Power Generation Business, and therefore, the transfer of assets or rights relating to the Power Generation Business to TGS was not a conveyance of any asset or right of the Debtor.[265]

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[262] *See* Exhibit 23 to Committee's Initial Submission, p. 1.

[263] *Id.*

[264] *See* Moreno Initial Submission, ¶ 24.

[265] *Id.*

(III) The Committee Argues that the Power Generation Business Belonged to the Debtor

198. The Committee argues that the Power Generation Business belonged to the Debtor. In the year leading up to the Petition Date, Mr. Moreno repeatedly portrayed the Power Generation Business's potential economic benefit to GFES, in presentations to bondholders and elsewhere.[266] The Debtor first considered the Power Generation Business in the summer of 2012.[267] Shortly after that time, in approximately September of 2012, General Electric Corporation ("GE") expressed interest in the Debtor's work with turbines, and "began some conversations to know more and potentially look at a way to work together."[268] By January of 2013, the Debtor "had solicited several other potential investors for the opportunities of Green Field and power generation."[269]

199. In short, through May 2013, the Debtor was engaged in negotiations with GE and "numerous sources" regarding an investment in the Power Generation Business.[270] GE in

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[266] *See, e.g.*, Exhibit 17 to Committee's Initial Submission—Transcript of November 21, 2012 Bondholders' Call, at 3 (describing Power Generation as a "very exciting thing for the Company"); Exhibit 20 to Committee Initial Submission—MM_0023259 (draft of press release summarizing the GFES/GE arrangement); [redacted] Transcript, at 210:3-25 (Shell's corporate representative "generally" recalls that Mr. Moreno told Shell that revenue from the Power Generation Business would allow GFES to satisfy its obligations to Shell)

[267] Fontova Transcript, at 65:5-11 ("It was brought forward from one of [the Debtor's] customers mentioning, 'Are you guys considering using the turbines—the unique turbine supply chain that you have to generate power?"). The timeline provided by the Debtor, attached hereto as Exhibit B, indicates that the Power Generation Business may not have been conceived until the Fourth Quarter of 2012. Whether conceived in the summer or the fall of 2012, GFES began developing the Power Generation Business in 2012.

[268] *Id.*, at 66:11-15.

[269] *Id.*, at 68:7-10.

[270] *See* Debtor's Initial Submission, ¶ 211; Exhibit 36 to Debtor's Initial Submission—e-mail dated May 1, 2013, between Mike Hosford and Mr. Moreno.

particular was willing to invest up to $100 million for a share of the Power Generation Business.[271]

200. The Debtor's employees worked on the development of the Power Generation Business. GFES paid bills incurred in connection with the development of the Power Generation Business. The Debtor acquired engine inventory and other assets related to the Power Generation Business.[272]

201. The Committee points out that the Power Generation Waiver formally waives the "*opportunity* related to the development, construction, sale, and rental of turbine and gas-engine powered PowerGeneration," *i.e.*, the *opportunity* for GFES to pursue the Power Generation Business, and formally agrees that Mr. Moreno and TPT could pursue the Power Generation Business outside of GFES.[273]

(IV) The Debtor Denies the Financial Ability to Develop the Power Generation Business Rights or Assets

202. The Debtor acknowledges that it had "fundamental knowledge, practical experience and ability to pursue" the Power Generation Business, "which, logically and naturally, is adaptable to its business, and consonant with its reasonable needs and aspirations for expansion."[274] The Debtor also acknowledges that "[i]nitially, it was contemplated that GFES would develop the Power Generation Business as an addition to the Debtor['s] existing well

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[271] *See* Exhibit 36 to Debtor's Initial Submission—e-mail dated May 1, 2013 from Mike Hosford to Mr. Moreno; *see also* Exhibit M-22 to Moreno Initial Submission, at 3.

[272] *See supra* note 50 and related discussion surrounding the TGS Reimbursement Agreement, attached as Exhibit 39 to Debtor's Initial Submission (allocating to TGS the "cost of services" relating to the Power Generation Business provided by various GFES employees (including Mr. Moreno, Mr. Fontova, and Mr. Blackwell) between November 2012 and June 2013).

[273] *See* Power Generation Waiver, attached to the Debtor's Initial Submission as Exhibit 38 (emphasis added).

[274] *See* Debtor's Initial Submission, ¶ 221.

services and hydraulic fracturing services. GFES and [its] employees worked to develop potential models for development of the Power Generation Business."[275] Additionally, the Debtor paid the costs and expenses associated with the development of the Power Generation Business (although they were later reimbursed by TGS).[276]

203. The Debtor asserts that the Estate would have a "strong" (*i.e.*, more than a 50% chance) cause of action for usurpation of corporate opportunity against Mr. Moreno.[277] Other than subsequent payment of GFES employees' time developing the Power Generation Business, TGS did not compensate GFES for the Power Generation Business "opportunity."

204. However, the Debtor observes that GFES may not have had sufficient finances to develop the Power Generation Business. As pointed out above, the Power Generation Business was a start-up venture outside the Well Service Business, and utilized technology held by TPT and not the Debtor. Further, the Debtor attempted but had been unable to secure financing for the Power Generation Business. Feedback on requests for financing from investors reflected a lack of interest to fund the opportunity at GFES.[278] In addition, term sheets received from several funding sources and the agreement ultimately executed with GE[279] reflected funding of the opportunity outside of GFES. As a result, Mr. Moreno announced GE's requirement for

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[275] *Id.*, ¶ 211.

[276] *See supra* note 50 and related discussion surrounding the TGS Reimbursement Agreement, attached as Exhibit 39 to Debtor's Initial Submission.

[277] *See* Debtor's Initial Submission, ¶ 225.

[278] *See, e.g.*, Exhibit M-20 to Moreno Initial Submission—May 13, 2013 e-mail stating "Goldman less interested in investing at GFES level, solely power gen."

[279] *See* Exhibit M-21 to Moreno Initial Submission—GE Promissory Note, p. 1.

funding the Power Generation Business outside of GFES during their quarterly conference call on May 22, 2013.[280]

205. The Committee contends that GE did not preclude development of the Power Generation Business as a subsidiary of GFES. Rather, GE merely required a separate corporate entity.[281] Mr. Moreno replies that GE required a "separation of the Debtor['s] fracking business from the PowerGen business," and would only fund the Power Generation Business outside of the Debtor.[282]

206. A "basic requirement"[283] of Delaware law for establishing usurpation of a corporate opportunity is financial ability, on the part of the corporation, to exploit the opportunity. *Broz*, 673 A.2d at 155. This basic requirement is not dispositive, however, as the other requirements or elements must be taken into account.[284] The absence of a capitalized entity capable of developing and operating the Power Generation Business in May 2013 may translate into a diminished valuation of the usurping claim. Consideration of the other basic requirements, however, casts Mr. Moreno's ownership of TGS and placement of the Power Generation Business with TGS as potentially inimical to his duties to GFES.

207. Absent capital, GFES lacked the financial ability to pursue the Power Generation Business. However, the parties have not satisfactorily developed the evidence of financing availability if a subsidiary of GFES developed the Power Generation Business. Therefore, the

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[280] *See* Exhibit M-22 to Moreno Initial Submission—Transcript from GFES 2013 First Quarter Conference Call, pp. 3, 8 and 9.

[281] *See* Committee Initial Submission, ¶ 91.

[282] *See* Moreno Supplemental Submission, ¶¶ 12-14.

[283] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 972 (Del. Ch. 2003), (citing *Broz. v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del 1996)).

[284] *Id.* The other "basic requirements"—elements—are that the opportunity is within the corporation's line of business; the corporation has an interest or expectancy in the opportunity; and by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimical to his duties to the corporation. *Id.*

Examiner cannot find that potential investors would not have financed the development of the Power Generation Business in a subsidiary of GFES. GFES had the infrastructure to pursue the business in a subsidiary. GFES's employees were working on the Power Generation Business. GFES had an ownership interest in TPT and a working relationship with TPT. Mr. Moreno had equity control of GFES.

208. The Examiner finds that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue litigation regarding the breach of fiduciary duty by usurpation of corporate opportunity claim. Consequently, the Examiner finds that the claim constitutes a valuable claim belonging to the Estate.

(V) The Standard for Determining the Value of the Power Generation Business Opportunity

209. As the Supreme Court succinctly explained in *United States v. Cartwright*, 411 U.S. 546, 559 (1973), the fair value of property is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *See also Basic Inc. v. Levinson,* 485 U.S. 224, 243-47 (1988) (market information is dispositive in determining the value of a stock at a specific point in time).

210. The fundamental value of operative business enterprises like the Power Generation Business is based on its earning potential. *See, e.g., Consolidated Rock Prods. Co. v. Du Bois*, 312 U.S. 510, 526 (1941) (a valuation based on earnings capacity "is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties"); *Galveston, Harrisburg, and San Antonio Ry. Co. v. Texas,* 210 U.S. 217, 226 (1908) ("[T]he commercial value of property consists in the expectation of income from it"). This is most reliably reflected in market expressions of interest

and valuation. *See, e.g., Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 North La Salle St. P'ship*, 526 U.S. 434, 457 (1988) ("[T]he best way to determine value is exposure to a market."); *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 633 (3d Cir. 2007) ("Absent some reasons to distrust it, the market price is 'a more reliable measure of the stock's value than the subjective estimates of one or two expert witnesses.'"); *In re Cent. Ice Cream Co.*, 836 F.2d 1068, 1072 n.3 (7th Cir. 1987) ("[S]elf-interest concentrates the mind, and people who must back their beliefs with their purses are more likely to assess ... value ... accurately than are people who simply seek to make an argument."); *Statutory Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 293 (Bankr. S.D.N.Y. 2007) (rejecting plaintiff's valuation which failed "to account for, to adequately explain or to reconcile the abundant market data"); *In re Boston Generating, LLC*, 440 B.R. 302, 325-26 (Bankr. S.D.N.Y. 2010) ("[B]ehavior in the marketplace is the best indicator of enterprise value.").

211. Book value or GAAP valuations are purchase price minus depreciation. Because GAAP is not necessarily based on fair market value or intrinsic value, courts have uniformly rejected its use. *See Lawson v. Ford Motor Co. (In re Roblin Indus. Inc.)*, 78 F.3d 30, 36 (2d Cir. 1996) ("[B]ook values are not ordinarily an accurate reflection of the market value of an asset."); *WRT Creditors Liquidation Trust v. WRT Bankr. Litig. Master File Defendants (In re WRT Energy Corp.)*, 282 B.R. 343, 369 (Bankr. W.D. La. 2001) ("Book value may not be equivalent to fair market value."); *DeRosa v. Buildex Inc. (In re F & S Cent. Mfg. Corp.)*, 53 B.R. 842, 849 (Bankr. E.D.N.Y. 1985) ("Asset values carried on a balance sheet, even if derived in accordance with 'generally accepted accounting principles,' do not necessarily reflect fair value."); *see also Arrow Elecs., Inc. v. Justus (In re Kaypro)*, 230 B.R. 400, 413 (B.A.P. 9th Cir. 1999); *Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 278 (B.A.P. 9th Cir. 1989);

Peltz v. Hatten, 279 B.R. 710, 743 (D. Del. 2002); *Zeta Consumer Prods. Corp. v. Equistar Chem., LP (In re Zeta Consumer Prods. Corp.)*, 291 B.R. 336, 347 (Bankr. D. N.J. 2003); Stan Bernstein, Susan Seabury & Jack Williams, Squaring Bankruptcy Valuation Practice with Daubert Demands, 16 AM. BANKR. INST. L. REV. 161, 174 (2008).

212. Under Delaware law, "damages resulting from a breach of fiduciary duty are liberally calculated." *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 814 (Del. Ch. 2011) (citing *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del.1996)). "As long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, 'mathematical certainty is not required.'" *Id.* (citing *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch.1999), *aff'd*, 766 A.2d 437 (Del. 2000)).

213. The Examiner finds that the Estate could establish damages for the usurpation of the Power Generation Business plan, but there is a genuine issue of material fact regarding the value of the Power Generation Business to GFES and to TGS at the time of the transfer. The Committee maintains that the correct valuation is the $200 million recognized by the market a month later (based on Powermeister's $20 million payment for 9.6% of MOR DOH), and buttresses its position with other market-driven indicators of value. *See, e.g., In re Iridium Operating LLC*, 373 B.R. at 293.

214. GFES lacked the capital in May 2013 to continue to develop the Power Generation Business. The Examiner recognizes the case law instructing that a willing buyer would pay a willing seller for such an asset based on its capacity for future earnings. The parties have not provided the Examiner with evidence of what a willing buyer would have paid GFES in May 2013 for the Power Generation Business opportunity. In the hands of GFES, the Power Generation Business opportunity in May 2013 may have had little, if any, market value,

particularly given GFES's financial condition at the time. However, in the hands of a potentially capitalized TGS one month later in June 2013, TGS apparently had considerable value in the market.

215. Under the "liberal calculation" standard, the Examiner finds that value in the market for the corporate opportunity at the time of the usurpation to be an appropriate and reasonable basis for estimating damages. The Examiner concludes that the value in the market for the corporate opportunity in May 2013 would have been what a willing buyer would have paid GFES for the Power Generation Business opportunity. The Examiner assumes, for purposes of this analysis, that a willing buyer would have the capital and other wherewithal to develop and operate the business. The question, then, is what is the market value of the Power Generation Business opportunity if sold by GFES to a willing buyer with the capital to develop the business in May 2013.

216. The market provides some guidance. One month after the Power Generation Waiver, in June 2013, with the Power Generation Business concept transferred away from GFES to TGS, an unaffiliated third party, Powermeister purchased a 9.6% equity interest in MOR DOH for $20 million, implying an enterprise valuation of $208 million.[285] The Examiner has seen no evidence explaining why Powermeister bought its interest, but it bought into the equity of the owner of TGS, which was at that time negotiating with GE for operating capital. From the evidence presented to the Examiner, Powermeister purchased its equity interest after TGS acquired the Power Generation Business opportunity or plan. Powermeister appears to be a venture investor in a start-up company with the expectation of capitalization by an entity such as

[285] *See* Debtor's Initial Submission, ¶ 301; Committee's Supplemental Submission, ¶ 42 (citing MM_00223135-MM_00223137—a July 18, 2013 draft Term Sheet, including definitions, corresponding to the Amended and Restated Limited Liability Agreement for new investors in MOR DOH).

GE. Projecting a value onto TGS based on the Powermeister investment in June 2013 informs the analysis of the value of the Power Generation Business plan to GFES in May 2013.

217. [redacted]

218. This market evidence of the value of TGS/Power Generation Business contrasts with the $13.6 million valuation that the Debtor asserts was obtained through "utilizing book values of assets."[287] The Debtor suggests splitting the difference between these two numbers for a mid-point enterprise valuation of TGS/Power Generation Business at approximately $106 million, with MOR DOH's 90% share being $96 million.[288]

219. The Examiner finds that the Power Generation Business opportunity or plan owned by GFES in May 2013 had value in the market. The Examiner does not have direct evidence of the value of TGS in May 2013 without the Power Generation Business, but the Examiner finds that there are genuine issues of material fact that Mr. Moreno caused GFES to waive the opportunity in favor of TGS because of the value that the Power Generation Business opportunity provided TGS.

220. The Examiner cannot determine the value other than recognizing that TGS with Power Generation had a market value of $200 million one month after the Power Generation Waiver. Put another way, there are genuine issues of material fact for resolution at trial that had

[redacted]

[287] *See* Debtor's Supplemental Submission, ¶ 2.

[288] *See* Debtor's Initial Submission, ¶ 302.

GFES established TGS as a subsidiary in June 2013—owned 90% by GFES and 10% by Powermeister—TGS would have had a market value of $200 million of which GFES would own 90%. In June 2013, TGS was negotiating with GE for financing. TGS may have been able to pursue that financing as a subsidiary of GFES. The Examiner has not seen convincing evidence that GE's decision to fund the Power Generation Business would have been different had the Moreno Affiliated Entities owned TGS directly or indirectly through GFES.

221. The Examiner finds that there are genuine issues of material fact on the value of the Power Generation Business in May 2013 that would inform damages for the breach of fiduciary duty by usurpation of corporate opportunity claim.

iv. Claims Against Moreno Affiliated Entities For Unjust Enrichment

222. The Committee contends that the transfer of the Power Generation Business also supports a claim for unjust enrichment.[289] However, as discussed below, the claim would be against TGS, not Mr. Moreno.

223. In Delaware, unjust enrichment is defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of equity and good conscience." *Tolliver v. Christina Sch. Dist.,* 564 F. Supp. 2d 312, 315 (D. Del. 2008). "It is a quasi-contract theory of recovery to remedy the absence of a formal contract." *Id.*

224. Under Delaware law, the elements of an unjust enrichment claim are: "(1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law." *B.A.S.S. Group, LLC, v. Coastal Supply Co.*, No. 3743-VCP, 2009 WL 1743730, at *6

[289] *See* Committee's Supplemental Submission, n. 53.

(Del. Ch. June 19, 2009). With respect to damages, "[t]he typical remedy for unjust enrichment is restitution." *Coastal Supply Co.*, 2009 WL 1743730, at *7. In addition, a constructive trust may be imposed where "the unjustly obtained funds can be traced into specific property . . . provided that . . . the entity that received the funds was not a bona fide purchaser for value." *Id.* For instance, in *Coastal*, the court found that the property that was the subject of the unjust enrichment claim should either be transferred back to the damaged party, *i.e.*, restitution, or be held by the defendant subject to a constructive trust for the benefit of the damaged party, until the damaged party had "been made whole." *Id.* Furthermore, even in the absence of a formal contract between the parties, standard contract damages may be awarded to compensate the plaintiff for an unjust enrichment claim. *See Pike Creek Prof. Ctr. v. Eastern Elec. & Heating, Inc.*, Nos. 137,1987, 138,1987, 139,1987, 1988 WL 32028, at *2 (Del. Apr. 5, 1988); *see also Callaway Golf Co. v. Slazenger*, 384 F. Supp. 2d 735, 743-44 (D. Del. 2005) (awarding $1.1 million in lost profits damages for unjust enrichment claim).

225. The Committee argues that a claim for unjust enrichment exists in connection with the transfer of Power Generation to TGS. The transfer satisfies the required elements for an unjust enrichment claim because: a) TGS was enriched; b) at the expense or impoverishment of the Debtor; c) there is a direct relation between the enrichment of TGS and the impoverishment of the Debtor; d) the transfer lacked justification; and e) due to the absence of an express contract governing the transfer, there is likely no remedy provided by law. *See Coastal Supply Co.*, 2009 WL 1743730, at *6. As a consequence, restitution damages could be available to the Debtor, which could take the form of: a) a compelled transfer of the Power Generation Business back to the Debtor; b) imposition of a constructive trust on the transferred value for the benefit of the

Estate; or c) an award to the Estate of any lost profits wrongfully gained by TGS on account of the transfer. *See Pike Creek*, 1988 WL 32028, at *2.

226. The Examiner finds that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue the unjust enrichment claim. Consequently, the Examiner finds that the unjust enrichment claim against TGS is a valuable claim.

v. Breach of Fiduciary Duty of Care

227. The Committee alleges that Mr. Moreno breached the duty of care by causing the Debtor to adopt a precarious business strategy in which it undertook massive indebtedness to fund capital expenditures to enter the fracking business and that the strategy adopted by Mr. Moreno was so imprudent as to be grossly negligent and therefore not entitled to the protection of the business judgment standard.[290]

228. The Committee argues that as a director and as controlling shareholder of the Debtor, Mr. Moreno owed a duty of care to the Debtor. *See, e.g., Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987). Under Delaware law, the fiduciary duty of care requires that directors, when making business decisions, act with the requisite care in the discharge of their duties and consider "all material information reasonably available." *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000); *see also Cede & Co.*, 634 A.2d at 367. Under Delaware law, a breach of the duty of care will occur where a director is grossly negligent in acting on behalf of the corporation, showing a "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006); *see also Trenwick*, 906 A.2d at 194 ("To state a claim for gross negligence, a complaint

[290] *See* Committee Initial Submission, ¶ 137.

might allege, by way of example, that a board undertook a major acquisition without conducting due diligence.").

(I) Delaware's Exculpation Statute

229. Mr. Moreno argues that as a threshold matter, any claims against him for breach of his duty of care would be dismissed as a matter of law pursuant to the provisions of Delaware's exculpation statute.[291] The Delaware Code expressly permits a corporation to include provisions in its certificate of incorporation exculpating decision makers from liability for certain actions taken while acting on behalf of the company. Namely, Section 102(b)(7) of the Delaware General Corporation Law provides, in part, that a certificate of incorporation may contain:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under §174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.... All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with §141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

DEL. CODE ANN. tit. 8 §102(b)(7).

230. Mr. Moreno argues that section 102(b)(7) permits companies to exculpate claims for breach of duty of care. The two Delaware Debtors, GFES and Proppant One, both included clauses exculpating their directors to the extent applicable under Delaware law.[292] Although the Delaware statute is facially limited to directors, because controlling shareholders and officers

[291] *See* Moreno Initial Submission, ¶ 62.

[292] *See* Exhibit M-27 to Moreno Initial Submission—Certificates of Incorporation, ¶ 8.

have been held to have the same fiduciary duties as directors, courts recognize that controlling shareholders and officers are likewise entitled to the protections of the statute. *See Shandler v. DLJ Merchant Banking, Inc*, CA No. 4797-VCS, 2010 WL 2929654, at *16 (Del. Ch. July 26, 2010) ("[A] controlling stockholder cannot be held liable for a breach of the duty of care when the directors are exculpated."); *Abraham v. Emerson Radio Corp.*, 901 A.2d 751, 759 (Del. Ch. 2006) (questioning the logic of holding a controlling shareholder liable when duty of care claims against directors were exculpated, and noting that, "the unthinking acceptance that a greater class of claims ought to be open against persons who are ordinarily not subject to claims for breach of fiduciary duty at all—stockholders—than against corporate directors is inadequate to justify recognizing care-based claims against sellers of control positions"); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Investcorp S.A.*, 137 F. Supp. 2d 502, 515 (S.D.N.Y. 2001) (applying Delaware law, stating that "[e]nabling plaintiff to sue the [controlling] shareholder defendants for acts of [the director] for which [the director] personally cannot be held liable would provide an illogical end-run around the protections of § 102(b)(7)"); *Continuing Creditors' Committee of Star Telecomms., Inc. v. Edgecomb,* 385 F. Supp 2d. 449, 464 (D. Del. 2004) (citing *Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001)) (holding that officers were exculpated under § 102(b)(7) and corporate charter).

231. The Committee replies that even if the Debtor attempted to waive liability for breaches of the duty of care through a provision in the corporation's certificate of incorporation as permitted by Section 102(b)(7) of the Delaware General Corporation Law, the statutory limitation does not exculpate breaches that are the result of acts that are not in good faith or which involve intentional misconduct, or breaches with respect to transactions from which a

director derived an improper personal benefit, so that Mr. Moreno and the rest of the Debtor's board of directors are not entitled to exculpation pursuant to Section 102(b)(7).[293]

232. Because of the Examiner's conclusion, below, the Examiner sees no need to resolve whether Delaware's Exculpation Statute applies.

(II) The Business Judgment Rule

233. Mr. Moreno argues, even if he were not entirely exculpated from any breach of duty of care claims as a matter of law, he still would be afforded the protection of the business judgment rule.[294] A breach of duty of care can occur only where there is a finding of gross negligence evidencing a reckless disregard for the corporation's stockholders as a whole.[295] This heightened showing is required because of the protection given to corporate decision makers under the business judgment rule. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." *Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009).

234. To rebut the business judgment rule, the plaintiff must plead facts to support a reasonable inference that in making the challenged decision, the decision maker breached its duty of care by acting in a grossly negligent manner. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) decision modified on reargument, 636 A.2d 956 (Del. 1994) (citing *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) overruled by *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)). "[I]f the plaintiff fails to satisfy that burden, 'a court will not substitute

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[293] *See* Committee's Supplemental Submission, ¶ 95.

[294] *See* Moreno's Initial Submission, ¶ 64.

[295] *See* Committee's Submission at ¶ 137 (citing *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006); *Trenwick*, 906 A.2d at 914).

its judgment for that of the board if the ... decision can be attributed to any rational business purpose.'" *Gantler*, 965 A.2d at 706. Moreover, in cases involving breach of fiduciary duty, plaintiffs cannot rely on "hindsight" in challenging a failed growth initiative. *In re NYMEX S'holder Litig.*, 2009 WL 3206051 at *8 (holding that fiduciary duties were not violated in making a decision to reject portion of a merger that in hindsight would have been beneficial to shareholders) (citing *In re The Coleman Co., Inc. S'holders Litig.*, 750 A.2d 1202 (Del.Ch.1999)). In evaluating breach of fiduciary duty claims, a court instead must determine whether the fiduciary's decision, at the time it was made, was so reckless and grossly negligent that it does not deserve the broad protections of the business judgment rule.

(III) Moreno Describes the Market at the Time

235. Mr. Moreno argues that his conduct can be exonerated under the business judgment rule in light of the market data in 2011 that showed that demand for natural gas production was strong when Mr. Moreno built GFES and in light of the fact that large and sophisticated lenders and Shell determined that substantial investments in the industry were warranted and would be profitable. Specifically, Mr. Moreno denies that he was "flying by the seat of his pants"[296] or engaged in an "all in" gamble in growing GFES,[297] and disputes the Committee's contention that "GFES's massive expansion was undertaken when the industry environment was unfavorable, particularly to GFES's new business focus."[298] Moreno observes that in support of these claims, the Committee references a 2012 report published by the Federal Energy Regulatory Commission on May 16, 2013, nearly two years after Mr. Moreno and his

[296] As asserted in the Examiner Motion, ¶ 5.

[297] *Id.*, ¶ 8.

[298] *See* Committee's Initial Submission, ¶ 26.

partners began the transformation of GFES.[299] Mr. Moreno observes that since the information cited in the Committee's Submission did not even exist during the GFES start-up, Mr. Moreno could not have considered it when formulating capital expenditures and other plans, and so this information cannot support an argument that Mr. Moreno breached his fiduciary duty.[300]

236. Rather, Mr. Moreno argues, a 2011 survey of the industry, which was available during the GFES start-up, suggests a starkly different outlook: Natural gas was seen as a much cleaner and cost effective alternative to coal for power generation; consequently it significantly increased its share of fossil-fueled electricity generating capacity and total electricity generating capacity over the five years ended 2010.[301] U.S. consumption of natural gas rose 6.0% during 2010 and was forecast to increase another 1.8% during 2011.[302] Natural gas producers rushed to fill this increased demand relying in part on the exploitation of new sources of unconventional gas resources utilizing technologies such as fracking.[303] While new production lowered 2011 gas prices, certain experts had forecast those prices to rebound during 2012.[304]

237. Further, Mr. Moreno asserts that negative trends affecting the industry became more apparent during 2012. For example, a mild winter kicked off a further reduction of natural

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[299] *Id.*

[300] *See* Moreno Initial Submission, ¶ 12.

[301] *See* Exhibit M-3 to Moreno Initial Submission—IBIS World, Coal & Natural Gas Power in the US, September 2011, p. 13.

[302] *See* Exhibit M-4 to Moreno Initial Submission—Standard & Poor's Industry Survey Oil Gas: Production and Marketing, September 29, 2011, p. 32.

[303] *See* Exhibit M-5 to Moreno Initial Submission—Standard & Poor's Industry Survey Oil & Gas: Production and Marketing, March 11, 2010, p. 4.

[304] *See* Exhibit M-6 to Moreno Initial Submission—Standard & Poor's Industry Survey Oil & Gas: Production and Marketing, March 31, 2011, p. 31.

gas prices which caused producers to reduce drilling activity.[305] In addition, significant capacity additions and high costs, combined with low natural gas prices, further depressed margins in the fracture stimulation industry in mid to late 2012.[306]

238. Significantly, says Mr. Moreno, GFES was not alone in experiencing an industry downturn which negatively impacted its operations. As an example, after a nearly six-fold increase in revenues from $389 million in 2009 to $2,339 million in 2011 experienced by a company called Frac Tech Holding LLC ("FTS"), a consortium paid nearly $3.5 billion for FTS.[307] However, during 2012, revenues for FTS dropped to $1,918 million (an 18% decrease) while net income dropped from $644 million in 2011 to negative $30 million during 2012.[308] Mr. Moreno concludes that GFES's downturn must be viewed in this economic context.

239. Mr. Moreno refutes the Committee's characterization of him as a reckless gambler by asserting that highly sophisticated parties viewed GFES and the industry as a very good investment at the time. Jefferies & Company, Inc., a global investment banking firm, provided a $53 million bridge loan to GFES on May 19, 2011.[309] That loan restructured the Company's debt and provided liquidity until long-term financing could be secured to fund GFES's growth plans. GFES then negotiated the Shell Contract under which Shell prepaid $42.5 million to GFES for the purchase, mobilization, modification and preparation of equipment and services provided under the agreement. Later, in the Indenture, GFES issued $250 million in

[305] *See* Exhibit M-7 and Exhibit M-8 to Moreno Initial Submission—for natural gas pricing 2010-2013 and U.S. rig counts 2010-2013, respectively.

[306] *See* Exhibit M-9 to Moreno Initial Submission—Reuters, S&P downgrades FTS International Services to 'B-'; Outlook Negative, November 26, 2012, p. 1.

[307] *See* Exhibit M-10 to Moreno Initial Submission—FTS Annual Report year ending December 31, 2012, p. 16.

[308] *Id.*

[309] *See* Exhibit M-11 to Moreno Initial Submission—Hub City Industries, LLC (predecessor of GFES) Bridge Loan Agreement.

bonds to the Noteholders, which, as of October 15, 2012 included several of the nation's largest asset managers, such as Credit Suisse Securities, Goldman Sachs and Co., Brown Brothers Harriman & Co., J.P. Morgan, Morgan Stanley, The Bank of New York Mellon, and State Street Bank & Trust Company.[310] Upon repayment of the bridge loan and prepayment from the Indenture proceeds, GFES and Shell amended their agreement, reaffirming Shell's exposure up to $100 million.[311] Mr. Moreno concludes that the involvement of all these other sophisticated investors refutes the accusation that Mr. Moreno was a reckless, irresponsible gambler who breached his duties and whose actions fall outside the business judgment rule.

240. The Examiner concludes that regardless of the effectiveness of the corporate exculpation clause, the decision and actions by Mr. Moreno to venture in the fracking business by expanding the GFES business would be protected by the business judgment rule. The wild swings in the fracking markets from 2010 to 2012 are not inconsistent with the ebb and flow of the oil and gas business. GFES got caught in the decline. Had it been able to continue in business for some period of time, it may have benefitted from the next incline. Be that as it may, the Examiner finds the claim that Mr. Moreno failed to exercise his duty of care by the venture into the fracking services business would not be pursued by a reasonable business client that is responsible for its own legal fees and costs, and therefore is not a valuable claim.

b. Claims Against Mr. Moreno—Violation of LUTPA

241. Delaware courts apply the "most significant relationship test" as outlined in the Restatement (Second) of Conflicts of Laws. *See* discussion and cases cited in paragraph 130 above. The Debtor's principal executive offices are located in Louisiana. The Committee posits

[310] *See* Moreno Initial Submission, ¶ 16.

[311] *See* Exhibit 21 to Committee's Initial Submission.

that the decisions culminating in the transfer of the Power Generation Business to TGS almost certainly took place in that state.

242. The Committee therefore argues that Mr. Moreno may be subject to liability under LUTPA.[312] LUTPA makes unlawful all "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[313] LUTPA authorizes a private cause of action on account of which a plaintiff may recover actual or treble damages, as well as attorney's fees and court costs, but also authorizes an award of fees to a defendant if a claim was groundless and brought in bad faith or for purposes of harassment.[314]

243. Conduct involving fraud, misrepresentation, deception, breach of fiduciary duty or other unethical conduct may support a claim under LUTPA. *Nursing Enters., Inc. v. Marr*, 719 So. 2d 524, 528 (La. Ct. App. 1998); *Walker v. La. Health Mgmt. Co.*, 666 So.2d 415, 421 (La. Ct. App. 1995). Unfair practices under LUTPA are those that "offend[] established public policy" and are "unethical, oppressive, unscrupulous, or substantially injurious." *Risk Mgmt. Servs., L.L.C. v. Moss*, 40 So. 3d 176, 184 (La. Ct. App. 2010). In turn, a trade practice is deceptive when it involves "fraud, deceit, or misrepresentation." *Id.* The Committee argues that by breaching his fiduciary duty to GFES by usurping the Power Generation Business opportunity, Mr. Moreno has engaged in unlawful conduct under LUTPA. The Committee argues that a fiduciary violates LUTPA by transferring, without consideration, the assets of an entity to which the duty is owed into a separate "shelf" corporation.[315] *See Thibaut v. Thibaut*, 607 So. 2d 587, 608 (La. Ct. App. 1992) (finding violation of LUTPA where defendant partners

[312] *See* LA. REV. STAT. ANN. § 51:1401 (2013).

[313] *See* LA. REV. STAT. ANN. § 51:1405(A).

[314] *Id.* § 51:1409.

[315] *See* Committee's Initial Submission, ¶ 98.

in a partnership "secretly conceived, planned, and carried out their scheme to close down the partnership and to transfer the business, employees, and customers ... into their 'shelf' corporation"). The Committee asserts that the usurpation is an act of "business deception" triggering damages under LUTPA, arguing that a violation of LUTPA will lie where a fiduciary diverts a corporate opportunity away from the corporation for the fiduciary's personal benefit. *See Adler v. Smith (In re Thundervision, L.L.C.)*, No. 12-01058, slip op. at 17 (Bankr. E.D. La. Feb. 5, 2014).

244. The Committee further argues that Mr. Moreno's actions offend public policy, are unethical, oppressive, and substantially injurious to the Debtor and the Committee.[316] *See Risk Mgmt. Servs., L.L.C.*, 40 So. 3d at 184. Accordingly, the Committee submits that on account of Mr. Moreno's violations of LUTPA, the Estate may recover actual or treble damages, as well as attorney's fees and court costs.[317]

245. The same justifications supporting a determination that a reasonable business client would pursue the usurpation claim in litigation apply to the alleged violations of LUTPA. Under LUTPA, damages may be trebled if the court finds the unfair or deceptive method, act, or practice was knowingly used after notice by the state attorney general.[318] The Examiner has been presented with no evidence of a notice by the Louisiana attorney general. Consequently, any damages under LUTPA would not be trebled. The Examiner therefore finds that the LUTPA claim is a valuable claim except for the claim of treble damages.

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[316] *See* Committee's Initial Submission, ¶ 99.

[317] *See* LA. REV. STAT. ANN. §51:1409.

[318] LA. REV. STAT. ANN. §51:1409(A).

c. *Claims Against Mr. Moreno—Tortious Interference with Contracts*

246. The Committee contends that Mr. Moreno tortiously interfered with the performance by certain of his affiliates, MMR and MOR MGH, under the two Sale Purchase Agreements described in paragraphs 18-21 and 159-72 above.[319] As described above, two Moreno Affiliated Entities—MOR MGH and MMR—had contracts with GFES to purchase GFES equity at certain times for calculated amounts under certain conditions.

247. The Committee asserts that Mr. Moreno prevented or failed to demand payment from MMR and MOR MGH. The Committee argues that by causing these Moreno Affiliated Entities to breach their obligations to Debtor under the Share Purchase Agreements, Mr. Moreno deprived the Debtor of up to $23.4 million in contractually committed capital contributions, further exacerbating the Debtor's liquidity problems and causing significant harm. The Committee argues that tortious interference may properly be asserted against a third party who wrongfully induces a contracting party to breach its contract with their counter-party. *See, e.g., Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

248. As stated in Section IV.B.2.a.ii.(I)(B) above,[320] the Examiner has found that the Debtor has a valuable claim against MOR MGH and MMR for breach of contract. For purposes of this Report, and not giving any consideration to any mitigating defense or offset that Mr. Moreno or the Moreno Affiliated Entities may have, the Examiner accepts the Debtor's calculation of unpaid amounts under the Share Purchase Agreements, pre-petition:

Under the 2012 Share Purchase Agreement:
MMR was to pay GFES $1,199,152
MOR MGH was to pay $9,594,298

[319] *See* Committee's Initial Submission, ¶ 139.

[320] *See supra* ¶ 168.

Under the 2013 Share Purchase Agreement:
MOR MGH was to pay GFES $10,000,000.

Total MMR = $1,199,152
Total MOR MGH = $19,594,298
$20,793,450

249. The law governing this tortious interference claim would likely be Texas law. *See* cases cited in paragraph 130, above. Under Texas law, a claim for tortious interference with a contractual relationship requires a showing that (1) a contract was subject to interference; (2) there was a willful and intentional act of interference; (3) the willful, intentional act was the proximate cause of the plaintiff's damage; and (4) there was actual damage or loss. *See, e.g., Friendswood Dev. Co.*, 926 S.W.2d at 282.

250. As between Texas and Delaware law, the elements of tortious interference are very nearly the same. The Delaware elements are: "(1) a valid contract; (2) about which defendants knew; (3) an intentional act that is a significant factor in causing the breach of such contract; (4) without justification; (5) which causes injury." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 605 (Del. Ch. 2010) (quoting *AeroGlobal Capital Mgmt., LLC. v. Cirrus Indus., Inc.*, 872 A.2d 428, 437 n. 7 (Del. 2005)). The only difference between the two states' formulations concerns whether the contractual interference was justified. Delaware includes as an element of the claim that the interference be "without justification." *Beard Research, Inc.*, 8 A.2d at 605. Texas, on the other hand, regards justification as an affirmative defense that may be raised by a defendant. *Prudential Ins. Co. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77-78 (Tex. 2000) ("[A]s an affirmative defense, a defendant may negate liability on the ground that its conduct was privileged or justified."). For purposes of this Report only, the Examiner sees no meaningful difference between Texas and Delaware law on this defense.

251. Mr. Moreno has some bases on which to assert the defense of justification to the tortious interference claim, including that he had duties, fiduciary or otherwise, to MOR MGH and MMR and interests in the economic well being of the affiliates, especially in the light of the circumstances at the time.

252. The Moreno Affiliated Entity MOR DOH formed TGS on March 7, 2013. The Moreno Affiliated Entities MOR MGH and MMR failed to make their equity purchases for the first quarter of 2013. GFES waived the Power Generation Business opportunity in favor of TGS on May 13, 2013. GE made an investment in TGS on May 13, 2013. Shell announced a discontinuance of its North American fracking operations in early summer 2013. The Moreno Affiliated Entities MOR MGH and MMR failed to make their equity purchases for the second quarter of 2013. Shell discussed alternative services with GFES in the summer of 2013. Shell discontinued using GFES's services on August 29, 2013. [redacted]

253. Material adverse changes in GFES might have excused the obligation of MMR and MOR MGH to perform under the Share Purchase Agreement.[321] Mr. Moreno may be able to assert material adverse changes as a defense to the tortious interference claim, on the grounds that the material adverse changes excused the performance of MMR and MOR MGH, and thus there was no obligation with which to interfere.

254. To overcome a justification defense (or to establish the element of non-justification), the Estate must show that Mr. Moreno's personal priorities were inconsistent with

[redacted]

his duty to further GFES's interests. *See Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995) (in case where defendant of tortious interference of contract claim was president, director and largest shareholder, court held that the "plaintiff must show that the defendant acted in a fashion so contrary to the corporation's best interests that his actions could only have been motivated by personal interests"). [redacted] He contends that Shell's discontinuance of services from GFES (which came in roughly the same time frame as the obligations came due under the Share Purchase Agreements) damaged GFES's ability to pursue this business development. The capital investments contemplated by the Share Purchase Agreements may have furthered the development of the GFES business plans and were as needed as the Shell business.

255. In addition, rather than provide notice to MMR and MOR MGH of the capital requirements for the first and second quarters of 2013 and demand payments, Mr. Moreno chose not to take any action to enforce the contractual obligations of the Moreno Affiliated Entities at a time nearly contemporaneous with the transfer of the Power Generation Business to TGS, an entity owned by other Moreno Affiliated Entities. Mr. Moreno may have had direct or indirect control over the MMR and MOR MGH who were the parties to the Share Purchase Agreements. He may have been able to cause the equity purchases to have been made; at a minimum, he could have demanded that the purchases be made. He chose not to do so. After the Powermeister investment in TGS in June 2013, Moreno Affiliated Entities owned TGS with an arguable value of $200 million, and GFES failed to receive the capital investments from the Moreno Affiliated Entities due under the Share Purchase Agreements.

[redacted]

256. On the other hand, Mr. Moreno caused TGS to enter the Tri-Party Agreement in June 2013. Mr. Moreno expected that GFES would receive a profit from the sale of turbine engines to TGS, would earn service fees from TGS and could potentially profit from its 50% ownership interest in TPT.[323]

257. The amount due on these contracts as of the Petition Date is $20,793,450. Mr. Moreno may be able to mitigate the damages by the transactions that resulted in profitable sales by GFES of equipment.

258. Based on the foregoing, contracts existed. Mr. Moreno knew of the contracts and intentionally acted or failed to act to attempt to enforce the contracts. The lack of the capital investment harmed GFES in the same manner that Mr. Moreno contends the discontinuance of the Shell business harmed GFES. From the point of view of Mr. Moreno's duties to the Moreno Affiliated Entities, Mr. Moreno's actions or inactions may be justified. From the point of view of GFES, however, the Examiner cannot conclude that his actions or inactions were justified.

259. After considering the facts and arguments presented to the Examiner in connection with the tortious interference claim, including whether Mr. Moreno intentionally interfered with the contracts, whether he may invoke meritorious affirmative defenses, and whether the Estate may counter those defenses, the Examiner concludes that the claim is one that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue in litigation. Accordingly, the Examiner finds that the tortious interference claim is a valuable claim.

[323] *See* Moreno Initial Submission, ¶ 57.

d. Claims Against Mr. Moreno—Conversion of Corporate Opportunity

260. The Committee contends that Mr. Moreno converted the Power Generation Business opportunity from GFES to TGS for Mr. Moreno's benefit.[324] Mr. Moreno observes that he is not aware of any case recognizing conversion as a proper cause of action when a person holding a fiduciary duty to one entity forms a separate entity to operate another business line. Mr. Moreno suggests that the issue is whether Mr. Moreno usurped Green Field's corporate opportunity to pursue the Power Generation Business, not whether he converted the opportunity.[325] Mr. Moreno argues that Delaware considers corporate opportunity questions within the umbrella of breach of fiduciary duty. The Examiner concludes that the conversion of corporate opportunity claim is another way of phrasing the breach of fiduciary duty claim analyzed above, and since the Examiner found that claim to be valuable and the recovery is the same, the Examiner does not analyze this conversion claim. For purposes of valuation, the Examiner finds that this claim adds no value beyond the other claims discussed above relating to the Power Generation Business.

e. Claims Against Mr. Moreno and the Moreno Affiliated Entities—Actual and Constructive Fraudulent Transfer Relating to TGS and the Power Generation Business

261. The Committee contends that the "waiver" of the "opportunity" to develop the Power Generation Business amounts to actual and constructive fraudulent transfers to TGS that may be avoided under the Bankruptcy Code.[326]

262. Section 548(a)(1) provides as follows:

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[324] *See* Committee's Initial Submission, ¶¶ 153, 156.

[325] *See* Moreno Initial Submission, ¶ 76.

[326] *See* Committee's Initial Submission, ¶ 141.

> The trustee may avoid any transfer … of an interest of the debtor in property, or any obligation … incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> **(A)** made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> **(B)**
>
> **(i)** received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> **(ii)**
>
> **(I)** was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> **(II)** was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> **(III)** intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> **(IV)** made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1).

263. As discussed in this Report, GFES developed the Power Generation Business line. Mr. Moreno, on behalf of GFES, promoted the Power Generation Business line to GFES's creditors. Mr. Moreno caused the Moreno Affiliated Entities to create TGS in March 2013 separate from GFES rather than as a subsidiary of GFES. In May GFES waived the opportunity

to continue to develop the Power Generation Business and allowed Mr. Moreno to pursue that business outside of GFES. The Examiner has considered case law that holds that the business developed by GFES constitutes an interest in property. "An interest in property, for purposes of [Section] 548, includes any interest of the debtor that would have been preserved for the benefit of the bankruptcy estate but for the alleged transfer."[327] In *Digital Commerce, Ltd. v. Sullivan (In re Sullivan)*, a bankruptcy court found a "concrete corporate opportunity"[328] to be intangible property akin to intellectual property and susceptible to embezzlement for the purpose 11 U.S.C. § 523(a)(4).[329] Interests in property susceptible to embezzlement are necessarily susceptible to other manners of transfer, leading to the inevitable conclusion that a debtor's fraudulent transfer of a concrete, business opportunity may be avoided. GFES in effect transferred an interest in property to TGS. As discussed above, in June 2013, after the transfer, TGS had considerable value in the market with the Power Generation Business line.

264. TGS did not provide consideration to GFES for the Power Generation Business. The subsequent payment by TGS of the services provided by the GFES employees in connection with the development of the business, work on pertinent equipment or other activities related to the Power Generation Business does not constitute consideration for the transfer of the Power Generation Business opportunity itself. Rather, it amounts to payment for services rendered. Other than fees for services rendered and possible increased value to GFES's 50% interest in

[327] *See, e.g., Besing v. Hawthorne (In re Besing)*, 981 F.2d 1488, 1493 (5th Cir. 1993) *cert. denied sub nom. Besing v. Hawthorne*, 510 U.S. 821 (1993).

[328] *Digital Commerce, Ltd. v. Sullivan (In re Sullivan)*, 305 B.R. 809, 826 (Bankr. W.D. Mich. 2004). The defendant, as president of one company, contacted a potential client to discuss future business opportunities, but at the same time was exploring potential employment opportunities with the potential client. Months later, the defendant formed his own company, which entered into a lucrative contract with the same potential client.

[329] *Id.* The concreteness of the business opportunity was viewed as significant by the district court in *National Sign & Signal v. Livingston*, 422 B.R. 645, 652 (W.D. Mich. 2009), which posited that while Michigan courts may extend the definition of property to intangibles, the mere expectation of a benefit from property might fail outside even a broad definition of property. *Id.* at 655-56.

TPT, the creditors of GFES received no benefits from the transfer to TGS, whereas TGS arguably obtained considerable value.

265. There are genuine issues of material fact from which a fact finder may infer an intent by the Debtor, of which Mr. Moreno was Chairman and CEO, to hinder or delay the Debtor's creditors by authorizing the pursuit of the Power Generation Business opportunity outside of the Debtor, to TGS's benefit, without consideration to the Debtor. *See Schnelling v. Crawford (In re James River Coal Co.),* 360 B.R. 139, 161 (Bankr. E.D. Va. 2007) (holding that a corporation is incapable of formulating or acting with intent and therefore "the fraudulent intent of an officer or director may be imputed to the Debtors for purposes of recovering an intentional fraudulent transfer"); *McNamara v. PFS (In re Pers. & Bus. Ins. Agency)*, 334 F.3d 239, 242-43 (3d. Cir. 2003) (recognizing the "sole actor" exception where if an agent is the sole representative of a principal, the sole actor's fraudulent conduct is imputable to the principal regardless of whether the agent's conduct was adverse to the corporation's interests). This is not conclusive, however. There were other directors, and their intent is unknown.

266. GFES directors and shareholders signed the Power Generation Waiver in May 2013. The Examiner lacks sufficient evidence to opine on whether GFES was insolvent throughout the summer of 2013. On the other hand, the Examiner has no evidence that GFES could have been sold as a going concern for value sufficient to pay its liabilities or that it could have sold its assets for sufficient value to pay its liabilities.

267. For these reasons, and for the same reasons cited by the Examiner for his finding that usurpation of corporate opportunity is a valuable claim, set forth above, the Examiner finds that a reasonable business client that is responsible for its own legal fees and costs would

authorize its counsel to pursue the claim of actual fraudulent transfer by GFES in favor of TGS. The Examiner therefore concludes that this claim is a valuable claim.

268. Similarly, as GFES may well have been insolvent in May 2013 and, as discussed above, GFES received no consideration from TGS for the Power Generation Business itself, the Examiner finds that a reasonable business client that is responsible for its own legal fees and costs would authorize its counsel to pursue the constructive fraudulent transfer claim. The Examiner therefore finds that the constructive fraudulent transfer claim is a valuable claim.

f. Claims Against Mr. Moreno and the Moreno Affiliated Entities—Preferential and Fraudulent Transfers

269. The Committee contends that the Estate holds valuable avoidance actions against the Moreno Affiliated Entities.[330] The Debtor confirms in the Debtor's Initial Submission that in the one year period prior to the Petition Date, the Debtor made substantial payments and transfers to Moreno Affiliated Entities, including:

- $4,995,988 in payments to Alliance, as of December 31, 2012, to build a sand processing plant that was never completed [redacted]
- $3,444,411 in payments to SSS for fracking sand;
- $605,000 in payments to Aerodynamic for use of a Learjet 40 aircraft (FAA Tail #N404EL) (the "Learjet")
- $239,588 in payments to Moreno Properties for maintenance services related to the Learjet;
- $1,391,158 in payments to Casafin for use of a Bombardier Challenger aircraft (FAA Tail # N300GM);
- $780,221 in payments to Dynamic Industries, Inc. ("Dynamic") for the provision of materials and labor related to manufacturing of frac unit "skids";
- $743,966 in payments to Frac Rentals, LLC ("Frac Rentals") for safety equipment rentals;

[330] *See* Committee's Initial Submission, ¶ 157.

[redacted]

- $4,614,310 in payments to MOR DOH, the sole owner of Frac Rentals, in a sale/lease back transaction with Frac Rentals in which GFES agreed to sell certain frac safety equipment to Frac Rentals; and
- $2,210,883.76 in payments to TGS as a reimbursement in connection with the Debtor's purchasing components for the manufacture of PowerGen equipment for TGS.[332]

In their submission, the Debtor concedes that substantially all of these transfers are likely avoidable as preferences or fraudulent conveyances, depending on the facts and circumstances surrounding each such payment.

270. To the above, the Committee adds these transfers:

- Payments to Mr. Moreno totaling more than $500,000 during 2013 purportedly for salary, bonus and expense reimbursement;
- More than $20,000,000 paid by the Debtor to TPT during 2013.[333]

271. Section 547 of the Bankruptcy Code provides that a trustee or debtor-in-possession may avoid certain "preferential" transfers of the debtor's property made (1) to or for the benefit of a creditor; (2) on account of antecedent debt; (3) while the debtor was insolvent; and (4) which enables the creditor to receive more than it would have if the transfer was not made and the case was one under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 547(b). Typically, this kind of transfer can be avoided only if it is made within 90 days prior to the bankruptcy filing. *Id.* If the party who received the transfer is an insider, however, any such transfer made within one year prior to the bankruptcy filing can be avoided. 11 U.S.C. § 547(b)(4).

[332] *See* Debtor's Initial Submission ¶¶146-208; Debtor's Supplemental Submission ¶5.

[333] TPT receives a release under the Plan. In exchange, TPT will withdraw $12.5 million in claims filed against the Debtor. Under the Plan, TPT also agrees that GFES's 50% equity interest in TPT may be transferred to NewCo, and that NewCo will otherwise become a 50% member of TPT. TPT will continue to sell equipment with licenses to TGS. Regardless of whether the alleged avoidance claims against TPT have value, the Examiner concludes that TPT is contributing sufficient consideration under the Plan to justify its release.

272. The elements for fraudulent transfer under Section 548 of the Bankruptcy Code are set forth above, in the immediately preceding section.

273. The Debtor and the Committee disagree on the value of these avoidance actions, primarily due to their differing views on the strength of Moreno Affiliated Entity defenses based on new value and ordinary course. Schedule B to Debtor's Initial Submission estimates a total of $16.2 million in potential avoidance actions against the Moreno Releasees, plus $1.8 million in potential avoidance actions against TPT and Marine Turbine Technologies ("Marine"), other than any claim relating to Mr. Moreno's compensation. Of that $16.2 million, the Debtor observes that the Indenture Trustee may be able to assert a pre-petition lien on fraudulent conveyance proceeds by arguing that it was the Indenture Trustee's collateral that was conveyed. The Debtor observes that if the Indenture Trustee's argument is successful, then $8,220,186 of the $16.2 million would be subject to the Indenture Trustee's pre-petition liens.[334]

274. The Committee asserts the collective value of these avoidance claims is far greater than the Debtor's valuation of the claims.[335] Mr. Moreno argues that the Examiner's analysis should recognize the litigation expenses required to recover avoidance judgments against the Moreno Affiliated Entities. In addition, Mr. Moreno asserts that eight entities in which Mr. Moreno has an interest hold unsecured claims against the Estate aggregating $49,316,529.41. He also contends that Moreno-related and non-related unsecured claims total $129,650,705.68, without consideration of the Noteholders' deficiency claims, meaning that the Moreno-related claims total approximately 38% of the aggregate general unsecured claims

[334] *See* Debtor's Initial Submission, ¶ 208 and n. 50.

[335] *See* Committee's Supplemental Submission, ¶100.

against the Estate (again, ignoring the Noteholders' deficiency claims).[336] Moreover, Mr. Moreno asserts that he has a significant contingent indemnification claim if ultimately found to have exposure under his personal guarantee to Shell. Under the Plan, Mr. Moreno and the Moreno Affiliated Entities have not withdrawn their claims.

275. The Examiner does not dismiss the validity of any of these competing arguments and counter-arguments, but has determined that these are issues that can only be evaluated in an individual analysis of each alleged transfer, an analysis that the Examiner does not engage in here. Rather, the Examiner takes a collective view of the avoidance causes of action alleged against Mr. Moreno and the Moreno Affiliated Entities. The parties do not disagree that facially avoidable transfers occurred, that defenses may exist regarding several of the transfers, and that the Estate would incur litigation costs in pursuing the claim. On this alone, and without analyzing each of the transfers in greater deal, the Examiner finds that collectively the avoidance claims are valuable claims belonging to the Estate.

g. Summary of Claims Against Mr. Moreno and the Moreno Affiliated Entities

276. The Examiner finds that the following claims are valuable claims:

- breach of contract claims against MOR MGH and MMR (relating to the Share Purchase Agreements);
- breach of duty of loyalty claim against Mr. Moreno (relating to the Share Purchase Agreements);
- breach of fiduciary duty claim against Mr. Moreno for usurpation of corporate opportunity (relating to the Power Generation Business);
- unjust enrichment claim against TGS (relating to the Power Generation Business);
- LUTPA claim against Mr. Moreno, except for the claim of treble damages (relating to the Power Generation Business);
- tortious interference with contracts claim against Mr. Moreno (relating to the Share Purchase Agreements);
- claim of actual fraudulent transfer by GFES in favor of TGS (relating to the Power Generation Business);

[336] *See* Moreno Initial Submission, ¶ 7 and n. 5.

- constructive fraudulent transfer claim (relating to the Power Generation Business); and
- avoidance claims, collectively, against the Moreno Affiliated Entities and Mr. Moreno.

277. The Examiner finds that the following claims are not valuable claims:

- breach of duty of loyalty claim against Mr. Moreno (relating to the airplane leases);
- breach of duty of loyalty claim against Mr. Moreno (relating to the Alliance agreement);
- breach of duty of care claim against Mr. Moreno (relating to the GFES business strategy); and
- conversion of corporate opportunity claim.

278. Except for the claims listed above, the Examiner further finds that any other claims discussed by the Parties in their respective submissions to the Examiner for which any party would receive a release under the Plan are of no value to the Estate.

h. Consideration for Releases of Mr. Moreno and the Moreno Affiliated Entities

279. For this discussion, the Examiner groups the valuable claims identified above as follows:

- The "Power Generation Claims" (breach of fiduciary duty claim against Mr. Moreno by usurpation of corporate opportunity; unjust enrichment claim against TGS; LUTPA claim against Mr. Moreno, except for the claim of treble damages; claim of actual fraudulent transfer by GFES in favor of TGS; constructive fraudulent transfer claim);[337]

- The "Share Purchase Agreement Claims" (breach of contract claims against MOR MGH and MMR; breach of duty of loyalty claim against Mr. Moreno; tortious interference with contracts claim against Mr. Moreno;

- The "Avoidance Claims", collectively, against the Moreno Affiliated Entities.

[337] The Examiner finds that the Estate cannot get a double recovery for any of the alleged claims. For example, the Estate cannot both recover the Power Generation Business concept under Section 548 and 550 and recover a money judgment under the usurpation claim. If the transfer is avoided, the Estate has recovered the value of the Power Generation Business. If the transfer is not avoided, but the Estate recovers on the usurpation claim, the Estate would recover the value of the Power Generation Business. But the Estate cannot get a double recovery. *See also* Committee's Supplemental Submission, n.53.

i. The Exchange

280. Under the Plan, the Noteholders agree to contribute the proceeds from the sale of the Noteholders' Collateral and the Noteholders' interest in the proceeds of the Shared Collateral to the Estate. The Noteholders agree that the proceeds of their collateral may be used to pay the DIP Credit Facility, other Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims. The Noteholders, the Debtor and Mr. Moreno assert that this consideration, under the Plan, is provided in exchange for the releases of all claims against Mr. Moreno and the Moreno Affiliated Entities.[338] Mr. Moreno possesses the wherewithal to develop the Power Generation Business. For that and other reasons, the Noteholders are willing to pay the value of their collateral subject to the Sale Motion for releases of Mr. Moreno and the Moreno Affiliated Entities under the Plan and to accept equity in NewCo in partial satisfaction of their claims, provided Mr. Moreno serves NewCo and TGS. Mr. Moreno asserts that he will only serve NewCo and TGS if the Estate releases claims against him and the Moreno Affiliated Entities.

281. For purposes of this Report, the Examiner has attributed $32.725 million as the Noteholders' contribution to the Estate.[339]

282. Under the Plan, in exchange for the releases, Mr. Moreno agrees to cause certain Moreno Affiliated Entities to contribute their TGS equity to NewCo. Mr. Moreno will obtain equity in NewCo. Mr. Moreno will be employed by TGS as its chief executive officer for which he will be paid a salary and receive a management package of benefits.

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[338] Under certain circumstances, third parties may contribute value to an estate for the release of non-debtors. *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (identifying relevant factors for determining whether a non-debtor release is appropriate); *In re Am. Family Enters.*, 256 B.R. 377, 428 (Bankr. D.N.J. 2000) (release of noncontributing defendants through a settlement agreement not a reason for disapproving the compromise) (quoting *Duban v. Diversified Mortgage Investors*, 87 F.R.D. 33, 40 (S.D.N.Y.1980)).

[339] *See supra* ¶ 62.

283. While there is no assurance of success for TGS, the upside is considerable. If TGS is successful, NewCo has value, the Noteholders will recover some of their claims, and Mr. Moreno will recover some of his investments in GFES.

284. While this arrangement provides consideration for the release of the Power Generation Claims and the Share Purchase Agreement Claims, as discussed below, the arrangement does not, in the Examiner's opinion, address or provide consideration to the Estate for releases of the Avoidance Claims.

285. The Debtor expects that the Noteholders' contribution to the Estate, coupled with Shell's contribution, will retire the DIP loan and pay Administrative Claims, Priority Tax Claims, and Priority Non-Tax Claims, and provide the $1 million seed funding to the Litigation Trust. That constitutes considerable contribution to the Estate.

286. However, this contribution cannot be fully credited as compensation for the Moreno releases. In exchange for the contribution and as treatment for their claims, the Noteholders obtain an equitable interest in NewCo. Some of the value of the Noteholders' contribution must be attributed to the acquisition of NewCo equity. Further, Mr. Moreno or the Moreno Affiliated Entities also obtain equity in NewCo, which further diminishes the value of the Noteholders' consideration to the Estate.

287. Based on the discussion in paragraph 286, the Examiner would be inclined to discount, to some degree, the $32.725 million considered as compensation for the releases of Mr. Moreno and the Moreno Affiliated Entities.

288. However, the Plan provides that the Noteholders' deficiency claims would not be included in the Litigation Trust, which the Examiner deems as providing for the functional equivalent of the withdrawal of the deficiency claims. The Debtor contends that the Plan's

treatment of the Noteholder deficiency claims constitutes additional value for the releases of Mr. Moreno and the Moreno Affiliated Entities in the Plan. As of the writing of this Report, the Noteholders have not agreed to the Plan's treatment of their deficiency claims. Nevertheless, the Examiner is charged with evaluating the consideration under the Plan. The value to the other unsecured creditors of not including the Noteholders' deficiency claims in the Litigation Trust offsets the diminution of the consideration discussed in paragraphs 286 and 287 above.

ii. Is the Value Contributed for the Release of the Power Generation and Shared Purchase Agreement Claims Sufficient?

289. As discussed in Section IV.2.a.ii(II)(E) above, the Examiner finds that the Power Generation Business owned by GFES in May 2013 had value in the market. The Examiner does not have direct evidence of the value of TGS in May 2013 without the Power Generation Business, but the Examiner finds that GFES waived the opportunity in favor of TGS. The Power Generation Business opportunity provided value to TGS. The Examiner cannot determine the value of the Power Generation Business in May 2013 other than recognizing that TGS with the Power Generation Business had a market value of approximately $200 million one month after the Power Generation Waiver. Ultimately, the Court would address the value of the Power Generation Business owed by GFES in May 2013.

290. Put another way, had GFES been able to establish TGS as a subsidiary in June 2013 that was owned 90% by GFES and 10% by Powermeister, TGS would have had a market value of $200 million of which GFES would have owned 90%. In June 2013, TGS was negotiating with GE for financing. The Examiner has found genuine issues of material fact of whether TGS could have pursued that financing as a subsidiary of GFES. The Examiner has not seen convincing evidence that GE's decision to fund the Power Generation Business would have

been different had the Moreno Affiliated Entities owned TGS directly or indirectly through GFES. Nevertheless, the issue is the value of the Power Generation Business and not the value of the corporation that owned the business.

291. If the Court avoided the transfer of the Power Generation Business, the Estate may obtain an interest in TGS. If TGS had been a subsidiary of GFES, then GFES could have reorganized around TGS or eliminated the Moreno Affiliated Entities' interest under the absolute priority rule, unless Mr. Moreno or the Moreno Affiliated Entities or a person or persons on their behalf made a significant contribution to the Estate.

292. In sum, the Power Generation Business owned by GFES at the time of the alleged transfer or usurpation had a market value of something less than the value of TGS in June 2013. If successful on the Power Generation Claims, the Estate would either recover an interest in TGS representing the value of the transfer or a money judgment. But the Estate cannot double recover.

293. The Estate bears the risk and the cost of litigating the Power Generation Claims. While the Examiner has found that the Power Generation Claims have value, the Examiner has not and cannot conclude that the Estate will prevail in the litigation of the Power Generation Claims. The Estate would not likely have the funds to pay for the litigation of the claims, meaning that counsel may have to front all expenses and be retained on a contingency contract.

294. Depending on the judgment or judgments, the Noteholders may assert a lien on the recovery of proceeds.[340] The Estate would have to litigate the issue of the Noteholders' security interest. The cost of that litigation must be considered. If the Noteholders are

[340] Among other things, the Noteholders have a lien on "Commercial Torts" as defined in their security agreement. Commercial Torts is a defined term limited to the causes of action identified on an exhibit to the security agreement. The LUTPA claim, for example, sounds in commercial tort. The LUTPA claim is not on the exhibit so the Noteholders do not have a lien on the LUTPA claim. However, the Noteholders assert a lien on proceeds, including proceeds of litigation.

successful in asserting a lien on the recovery from the Power Generation Claims, the value of the judgment to the Estate will be reduced.

295. If the Estate recovers a money judgment, the Estate will also have to address the cost and likelihood of collection.

296. Some facts may mitigate the damages recoverable by the Estate. For example, Mr. Moreno points out that GFES stood to benefit by maintaining a manufacturing role in the new business line. Under the Tri-Party Agreement, GFES was to serve as the Contract Manager and assist TPT with production and delivery scheduling. Further, GFES was to collect deposits from TGS and pay TPT for equipment as it is produced. During the period March 2013 to September 2013, TGS sent nearly $28 million to GFES as deposits for the purchase of equipment from TPT under the Tri-party Agreement ($2.2 million of these deposits were subsequently returned).[341] Nearly $23 million of deposits were sent to a non-segregated bank account at GFES,[342] thereby providing liquidity until the funds were remitted to TPT. Approximately $12 million of the deposits were paid to TPT.[343] Roughly $3.9 million of the deposits were used to purchase inventory from GFES, thereby creating additional liquidity for the Debtor through the liquidation of unused assets.[344]

297. The total amounts owing under the Share Purchase Agreements are $1,199,152 for MMR and $19,594,298 for MOR MGH, for a total of $20,793,450. Payment obligations may be subject to the material adverse change clause. If the defendants successfully invoke the

[341] *See* Exhibit M-1 to Moreno Initial Submission.

[342] *See* Exhibit M-24 to Moreno Initial Submission—Contract Account Wire Instructs and GFES Vendor Ledger.

[343] *See* Exhibit M-25 to Moreno Initial Submission—TGS Deposit Schedule.

[344] *See* Exhibit M-26 to Moreno Initial Submission—GFES to TGS Inventory Listings.

material adverse change clause in the litigation, the Estate may be precluded from recovery under any of the Share Purchase Agreement Claims.

298. As with the Power Generation Claims, the Estate bears the risk and cost of the litigation of the Share Purchase Agreement Claims. The Examiner projects that the Estate would not likely have the funds to pay for the litigation of the claims, meaning that counsel may have to front all expenses and be retained on a contingency contract.

299. The Noteholders have a lien on the breach of contract claim and may assert a lien on the proceeds of the tortious interference claim. As with the Power Generation Claims, the Estate will incur the cost of litigating the Noteholders' security interests.

300. Collectability of the Share Purchase Agreement Claims may likely present a considerable obstacle, especially regarding MOR MGH.

301. The Examiner recognizes that any settlement of the Power Generation Claims and the Share Purchase Agreement Claims would be based on assessments of the genuine issues of material fact for trial, potential damages, difficulty of valuation proof, mitigation factors, the risks of litigation, the costs of litigation, collectability and other factors. *See Myers v. Martin (In re Martin),* 91 F.3d 389, 393 (3d Cir. 1996) (identifying the four primary factors a bankruptcy court should consider in approving a settlement as: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors").

302. For purposes of this Report, under the Plan the Noteholders are contributing $32.725 million for the releases plus the release of Noteholder lien claims on the Shared Collateral. The Examiner has performed a number of calculations based on the range of values

of the Power Generation Business at the time of transfer; the risk of litigation; the expense of litigation; the Noteholders' security interests; the cost of litigating the extent of the Noteholders' security interests; the risk that an avoidance of the Power Generation Business with a judgment awarding an interest in TGS provides a highly speculative recovery contingent on the successful funding, growth, and future operations of TGS; various mitigation factors; affirmative defenses; and issues of collectability. Under various combinations of assumptions regarding these factors, the Examiner finds that $32.725 million in cash to the Estate (plus the release of Noteholders' lien claims on the Shared Collateral) is within a range of reasonableness to settle the Power Generation Claims and the Shared Purchase Agreement Claims and therefore constitutes reasonable consideration for the releases of Mr. Moreno and the Moreno Affiliated Entities relating to those claims.

iii. Is the Value Contributed for the Release of the Avoidance Claims Sufficient?

303. Under the Plan, the Moreno Affiliated Entities receive releases for the Avoidance Claims.

304. The Noteholders' liens do not attach to preferential transfers and may not attach to fraudulent transfers recoverable under Section 548 and 550.

305. Avoidance judgments under Section 550, if collected, would result in funds for the Estate. Under the Plan, funds recovered by Section 550 judgments for avoided preferential transfers would be available for holders of General Unsecured Claims through the Litigation Trust. If the Avoidance Claims against Mr. Moreno and the Moreno Affiliated Entities were not released, the Examiner assumes the Avoidance Claims would be prosecuted on behalf of the Estate by the Litigation Trust, as are the other non-released Chapter 5 causes of action. Assuming any of the claims the Moreno Affiliated Entities assert against the Estate are

allowable, to the extent the Estate obtains a Section 550 judgment against a Moreno Affiliated Entity holding an allowable claim, that Moreno Affiliated Entity's claim will be disallowed under Section 502(d) absent satisfaction of the Estate's Section 550 judgment.

306. Mr. Moreno and the Moreno Affiliated Entities are not making any payments to the Estate to resolve or settle the Avoidance Claims, nor are they withdrawing their claims under the Plan. Under the Plan, Mr. Moreno and the Moreno Affiliated Entities obtain equity in NewCo. As a result, the Examiner cannot find a basis to attribute part of the $32.725 million consideration discussed above to support releases of the Avoidance Claims.

307. The Examiner finds that the RSA Parties have not contributed sufficient value to justify granting a release of the Avoidance Claims against Mr. Moreno and the Moreno Affiliated Entities.

V. COMPARISON OF PLAN TO CHAPTER 7

308. The Debtor suggests that the Examiner compare the Plan to recovery under a hypothetical Chapter 7 liquidation. The Court has not charged the Examiner with that assignment.

VI. CONCLUSION

309. The Examiner concludes that the Plan, if confirmed without further changes (and presumably over the objections of the Noteholders regarding their deficiency claims) with the value being contributed by the RSA Parties justifies the granting of all of the releases of valuable claims against any of the parties that would receive a release under the Plan, except for the release of the Avoidance Claims against Mr. Moreno and the Moreno Affiliated Entities. The Examiner concludes that the value being contributed by the RSA Parties does not justify granting the release of the Avoidance Claims against the Moreno Affiliated Entities.

Respectfully submitted on this 4th day of March 2014.

By: */s/ Steven A. Felsenthal*
STEVEN A. FELSENTHAL,
EXAMINER
Tex. Bar No. 06889900

STUTZMAN, BROMBERG, ESSERMAN & PLIFKA,
A Professional Corporation
2323 Bryan Street, Suite 2200
Dallas, Texas 75201
Telephone: (214) 969-4900
Facsimile: (214) 969-4999

- AND -

STUTZMAN, BROMBERG, ESSERMAN & PLIFKA,
A Professional Corporation

Peter C. D'Apice TX. Bar. No. 05377783
(admitted *pro hac vice*)
Jacob L. Newton TX. Bar. No. 24046523
(admitted *pro hac vice*)
Briana L. Cioni TX. Bar. No. 24044161
(admitted *pro hac vice*)
2323 Bryan Street, Suite 2200
Dallas, Texas 75201
Telephone: (214) 969-4900
Facsimile: (214) 969-4999

ATTORNEYS FOR THE EXAMINER