IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH DAKOTA

IN THE MATTER OF: NORTHERN BEEF PACKERS LIMITED PARTNERSHIP, Debtor.	Case No. 13-10118 Chapter 11

MOTION OF AD HOC COMMITTEE OF EB-5 INVESTORS PURSUANT TO BANKRUPTCY RULE 7052(B) FOR AN ORDER AMENDING THE FINAL DIP FINANCING ORDER (DOC. 435) REGARDING THE RIGHT OF CREDITORS TO PURSUE, SEPARATELY OR COLLECTIVELY, DERIVATIVE CLAIMS UNDER CHAPTER 5 OF THE BANKRUPTCY CODE AGAINST WHITE OAK GLOBAL ADVISORS, LLC ON BEHALF OF THE BANKRUPTCY ESTATE

The Ad Hoc Committee of EB-5 Investors (the "EB-5 Committee"), by and through undersigned counsel, seeks clarification to, and an amendment of, the Court's September 26, 2013 Order granting Debtor's request for authority to obtain post-petition secured financing subject to certain limitations (Doc. No. 435) pursuant to Bankruptcy Rule 7052(b). Specifically, the EB-5 Committee respectfully seeks further guidance regarding the right of creditors to pursue derivative claims under Chapter 5 of the Bankruptcy Code against White Oak Global Advisors, LLC. In support of this Motion, the EB-5 Committee hereby states as follows:

I. BACKGROUND

1. Northern Beef Packers Limited Partnership ("Debtor") filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on July 19, 2013 ("Petition Date") and is a "debtor-in-possession" as defined in 11 U.S.C. § 1101(1).

2. On September 5, 2013, Debtor filed its Motion to obtain post-petition financing (Doc. 321) and requested approval of an attached Stipulation. On September 11, 2013, the Official Trade Committee filed a response document (Doc. 344) attaching a "Revised" Stipulation. And on September 13, 2013, the Debtor filed the "Revised" Stipulation as well (Doc. 360).

3. On September 12, 2013, White Oak Global Advisors, LLC ("White Oak") offered into evidence at a Court hearing the Declaration of Scott J. Johnston, which was received by the Court, as an explanation by White Oak of what its claims might be and the amounts thereof.

4. On September 13, 2013, White Oak filed its proof of claim in this proceeding as Claim No. 65-1 (the "White Oak Claim").

5. On September 16, 2013, this Court entered an Order granting Debtor preliminary authority to obtain secured credit, with certain limitations (Doc. 383). On September 26, 2013, this Court entered an Order granting the final request for authority to obtain secured credit, with certain limitations (Doc. 435). Such preliminary and final orders are collectively referred to herein as the "DIP Funding Orders."

6. The DIP Funding Orders authorize a release by the Debtor and the Official Trade Committee of all their claims against White Oak, including Chapter 5 avoidance actions (*see* ¶ 14 on page 13 of the "Revised" Stipulation).

7. The DIP Funding Orders also establish a deadline for creditors to, *inter alia*, file objections to the White Oak claim and to file "complaints respecting . . . the validity, extent, priority, avoidability or enforceability" of White Oak's claims (*see* ¶ 13 on page 13 of the "Revised" Stipulation). The DIP Funding Orders set such deadline at 90-

days after the date that White Oak filed its proof of claim. Accordingly, such objection deadline appears to be December 13, 2013.

II. JURISDICTION AND PREDICATE FOR RELIEF

8. The Court has jurisdiction for the relief requested herein under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C § 157(b)(A), (B), (C), (D), (H), (K) & (O), and the legal predicate for the relief requested is Fed. R. Civ. P. 52(b) as made applicable to this bankruptcy contested matter by Fed. R. Bankr. P. 7052 & 9014(c).

III. RELIEF REQUESTED

9. The Ad Hoc Committee moves the Court for the following relief to alter, amend or clarify and make more specific the generalized authorization granted in the DIP Funding Orders for creditors to pursue Chapter 5 avoidance claims:

a. A ruling that the Ad Hoc Committee, one or more of its individual members, and/or other creditors have derivative standing to pursue, either separately or collectively, Chapter 5 avoidance claims (*e.g.,* fraudulent transfer and preference claims) against White Oak pursuant to the criteria established by the Eighth Circuit Court of Appeals in *PW Enterprises, Inc. v. North Dakota Racing Comm'n (In Re Racing Service, Inc.)*, 540 F.3d 892, 898 (8th Cir. 2008), and discussed below. Accordingly, the Ad Hoc Committee requests that the Court make the following findings:

i. A finding that both the Debtor and the Official Trade Committee have, with this Court's approval, (i) released White Oak from any claims the Debtor might pursue; (ii) reserved and assigned the prosecution of such claims, including Chapter 5 avoidance actions, to creditors; and (iii) consented to and/or acquiesced in creditors bringing

such claims on behalf of the bankruptcy estate based upon their release of such claims;

ii. A finding by this Court that the Chapter 5 avoidance claims set forth below are colorable;

iii. A finding by this Court that permission is granted to creditors to initiate and assert Chapter 5 avoidance claims against White Oak on behalf of this bankruptcy estate;

iv. A finding by this Court that (i) the potential costs to the estate under the fee arrangement proposed below are minimal, and (ii) the potential benefit to the estate under the claims set forth below are substantial, particularly in light of the provisions in 11 U.S.C. § 551 preserving the avoided claims for the benefit of the bankruptcy estate and general unsecured creditors;

v. A finding by this Court that pursuit of such Chapter 5 avoidance claims by a creditor would, unquestionably, be "*both 'necessary and beneficial* to the fair and efficient resolution" of this bankruptcy proceeding and would not cause undue delay; and

vi. A ruling clarifying that this Court's prior and generalized authorization for creditors to pursue Chapter 5 avoidance claims separately or collectively on behalf of this bankruptcy estate is hereby expressly authorized.

IV. WHITE OAK'S PROOF OF CLAIM (CLAIM NO. 65-1)

10. White Oak's alleged claim is for the total amount of $64,450,638.20 (Claim No. 65-1, p. 4).

11. The first exhibit attached to White Oak's Proof of Claim, a copy of which exhibit is attached as Exhibit "A" hereto, appears to reveal that the total amount consists of the following:

$37,976,923.82	Principal and accrued interest as of the Petition Date
$24,195,098.94	"Yield Maintenance"
$2,278,615.44	"Make Whole"
$64,450,638.20	TOTAL

12. White Oak appears to have assiduously avoided any explanation on how the "Yield Maintenance" and "Make Whole" computations (collectively, the "Claim Multipliers") are based upon the language of its Loan and Security Agreement with Debtor (the "Loan Agreement") or what the computation formulas might be. This omission creates difficulties in tracking White Oak's computations. For example:

a. The term "Yield Maintenance" does not appear in the Loan Agreement, and White Oak should be required to, at least, identify the language in its loan documentation that allegedly provides or allows for the $24,195,098.94 "Yield Maintenance" multiplier effect and what the computation formula might be; and

b. The term "Make Whole" is defined as 3% of the outstanding principal balance on Debtor's term loans. (Filing No. 298-1, p. 13). Since 3% of $35,000,000 is $1,050,000, it is unclear, therefore, how the "Make Whole" amount could expand to $2,278,615.

13. The attached Exhibit "B" appears to (or allegedly) shows how White Oak's $35,000,000 loan to Debtor was distributed.

V. DERIVATIVE STANDING OF CREDITORS TO PURSUE CHAPTER 5 AVOIDANCE CLAIMS

14. Under the Bankruptcy Code, as a general rule, Chapter 5 avoiding powers belong to the Debtor's bankruptcy estate and, therefore, can be asserted only by the "trustee"—or by a debtor-in-possession under 11 U.S.C. § 1107—in the bankruptcy case.

15. There are circumstances, however, in which a creditor may obtain derivative standing to pursue Chapter 5 avoidance claims. The Eighth Circuit Court of Appeals has held that "derivative standing is available to a creditor to pursue avoidance actions when it shows that a Chapter 7 trustee (or debtor-in-possession in the case of Chapter 11) is 'unable or unwilling' to do so." *PW Enterprises, Inc. v. North Dakota Racing Comm'n (In re Racing Service, Inc.)*, 540 F.3d 892, 898 (8th Cir. 2008).

16. As set forth in *PW Enterprises*, a creditor can obtain derivative standing to pursue Chapter 5 avoidance actions when the following four elements are established: (i) the creditor petitioned the debtor-in-possession to bring the claims and the debtor-in-possession refused; (ii) the claims are colorable; (iii) the creditor sought permission from the bankruptcy court to initiate an adversary proceeding; and (iv) the debtor-in-possession unjustifiably refused to pursue the claims and/or consented to others pursuing such claims. *Id.* at 900.

17. In *PW Enterprises*, the Court added lengthy elaborations of its viewpoint on derivative standing. With respect to the four elements, the Court stated as follows:

> We expect in most cases creditors will readily satisfy the first three elements without much difficulty—petitioning the [debtor-in-possession] and bankruptcy court ought to be mere formalities. And a creditor's claims are colorable if they would survive a motion to dismiss.

Id. at 900-01.

18. As to the fourth element, the Court concluded that a creditor or creditor's committee may obtain derivative standing to pursue avoidance actions when the debtor-in-possession "either unjustifiably refuses to bring the creditor's proposed claims or consents to the creditor pursuing such claims in his stead." *Id.* at 904-05 (emphasis added).

19. Further, the Court explained that a cost-benefit analysis is required to determine whether a trustee is unjustifiably refusing to bring a creditor's proposed claim:

> At bottom, the determination of whether the trustee unjustifiably refuses to bring a creditor's proposed claim will require bankruptcy courts to perform a cost-benefit analysis. . . . While by no means exhaustive, among the factors the court should consider in conducting this analysis are: (1) 'the probabilities of legal success and financial recovery in event of success'; (2) the creditor's proposed fee arrangement; and (3) 'the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce' . . . We do not suggest, however, that the bankruptcy court 'undertake a mini-trial' in evaluating a creditor's request for derivative standing. . . . But the bankruptcy court must support its decision to grant or deny standing with a written or oral explanation that reflects it conducted the appropriate cost-benefit analysis.

Id. at 901 (emphasis added).

20. The EB-5 Committee is proposing the following fee arrangement for pursuing such avoidance claims, without prejudice to any person seeking approval from this Court of a different fee arrangement:

a. The party pursuing the avoidance claim is responsible to compensate its/his/her attorney, and

b. Such party and/or attorney may make, at any reasonable time, a request for reimbursement at this Court's discretion for "substantial contribution" under § 503(b)(3)(D).

21. The EB-5 Committee suggests that a cost-benefit analysis can be resolved in this matter by the following: (i) the "colorable" nature of the proposed Chapter 5 avoidance claims suggests a probability of success, and the § 551 preservation-for-the-estate provisions demonstrate a large financial recovery for the bankruptcy estate in the event of any success, (ii) the fee arrangement suggested above demonstrates that any such action would not be a burden upon this bankruptcy estate, and (iii) there should be no prejudicial delay from any such action, since this Court has already approved the terms of the "Revised" Stipulation that allows Debtor to obtain post-petition financing and sell its assets pursuant to 11 U.S.C. § 363.

22. The Eighth Circuit Court of Appeals specified, in *PW Enterprises*, that the Bankruptcy Court has substantial latitude to determine whether circumstances warrant granting derivative standing for pursuing Chapter 5 avoidance claims. *Id.* at 901.

VI. APPLICATION OF THE FOUR ELEMENTS FROM *PW ENTERPRISES* TO THE PROPOSED CHAPTER 5 CLAIMS AGAINST WHITE OAK

23. The following is an evaluation and explanation of how each of the four elements identified by the Eighth Circuit in *PW Enterprises* applies to the circumstances of the present situation.

A. *First Element:* The creditor petitioned the debtor-in-possession to bring the claims and the debtor-in-possession refused.

24. Since both the Debtor and the Official Trade Committee have already released, with this Court's approval, their respective rights to pursue Chapter 5

avoidance actions (*see* ¶ 14 on page 13 of the "Revised" Stipulation – Doc. 360), this first element appears to be satisfied.

25. Nevertheless, to the extent necessary to meet this specified element, demand is hereby made by the EB-5 Committee for the Debtor to promptly file a Complaint asserting Chapter 5 avoidance claims against White Oak, if Debtor is legally permitted to do so.

B. *Second Element:* The creditor's claims are colorable.

26. The Eighth Circuit has established the following legal standard for determining whether this second element is met: "a creditor's claims are colorable if they would survive a motion to dismiss." *Id.* at 900.

27. By way of example, a colorable Chapter 5 avoidance claim against White Oak exists under South Dakota's Uniform Fraudulent Transfer Act, which is incorporated into this case by 11 U.S.C. § 544(b).

Analysis of Claim Against White Oak Based Upon

Constructive Fraudulent Transfer

28. Under SDCL 54-8A-5(a), an "obligation incurred by a debtor" is avoidable for constructive fraud when the following two elements are met: (a) the debtor incurs the obligation "without receiving a reasonably equivalent value in exchange," and (b) "the debtor was insolvent at that time" or "became insolvent as a result of . . . the obligation."

First Element: Did Debtor incur the White Oak obligation without receiving a reasonably equivalent value from White Oak?

a. Question of Fact. Under South Dakota law, the question of "reasonably equivalent value" is one of fact.

> "Whether the transfer is for 'reasonably equivalent value' in every case is largely a question of fact, as to which considerable latitude must be allowed to the trier of facts. . . . Ultimately, courts must examine what debtors received in exchange for what they surrendered."

Prairie Lakes Health Care System v. Wookey, 583 N.W.2d 405, 412 (S.D. 1998).

b. Prohibited Claim Multipliers. Furthermore, South Dakota law specifically rejects the type of multipliers used by White Oak to dramatically increase the amount of its claim beyond the typical principal plus interest calculation. *See, e.g., American Federal Savings and Loan v. Mid-America Service Corporation*, 329 N.W.2d 124 (S.D. 1983); *In re Tri-State Ethanol Co., LLC,* 369 B.R. 481, 502 (D.S.D. 2007) (such a multiplier "is in the nature of *at least a double recovery* and the South Dakota Supreme Court would not find such to be equitable." (emphasis added)).

c. Even valid obligations can be avoidable. South Dakota law specifies that "(e)ven valid transfers made without fraudulent intent" may be "susceptible to avoidance as fraudulent" under constructive fraud provisions. *Prairie Lakes*, 583 N.W.2d at 410-11. Accordingly, even if a contract selection by White Oak and Debtor of California law were to somehow grant some type of authorization for the White Oak Claim Multipliers, such selection may not shield the obligation from avoidance under South Dakota's Uniform Fraudulent Transfer Act.

d. *Observation*: In this case, Debtor did not receive "reasonably equivalent value" within the meaning of South Dakota law:

i. White Oak's Claim (*see* Claim #65-1 and Johnston Declaration) as of the Petition Date ("White Oak Obligation") consists of $35 million principal advanced from September 29, 2012 through January of 2013, including $2.3 million for six-months prepaid interest that accrued at a rate of 20% per annum (25% default rate). The six months prepaid interest should have taken White Oak to approximately April Fool's Day in 2013, at which time the remaining balance should have been approximately $35 million. Yet, on the Petition Date (*i.e.*, three-and-one-half months after April Fool's Day) the White Oak claim amount expanded to $64 million based upon Claim Multipliers asserted by White Oak. That is an increase in claim amount of approximately 83% over a period of three-and-a-half months.

ii. Moreover, such massive increase is based upon Claim Multipliers that are potentially unenforceable under South Dakota law as "at least a double recovery." Such increase, along with the 20% / 25% interest rates, the pre-paid interest, and the White Oak loan fees demonstrate that the White Oak obligation was incurred without the Debtor receiving a "reasonably equivalent value" in exchange.

iii. Furthermore, the actual value provided by White Oak to Debtor under the White Oak Obligation is reduced from the $35 million

principal amount, based upon information in the attached Exhibit "B," by the following minimum alleged amounts:

$35,000,000	Principal amount
($ 2,300,000)	Less six months prepaid interest
($ 2,130,024)	Less loan fees paid to White Oak
$30,569,976	Maximum value actually given to Debtor

29. The first element of a fraudulent transfer analysis asks whether Debtor incurred the White Oak Obligation without receiving a reasonably equivalent value in exchange. The foregoing demonstrates that the Claim Multipliers, which increased the amount of the White Oak Obligation by 83% in less than four months, and are potentially unenforceable under South Dakota law, result in Debtor receiving much less than "reasonably equivalent value" in exchange for incurring the White Oak Obligation.

Second Element: Was Debtor insolvent at the time that the White Oak Obligation was incurred?

a. Time of Insolvency. Under South Dakota law, constructive fraud arises if the Debtor was or became insolvent when the obligation was incurred. SDCL 54-8A-5(a). Accordingly, insolvency "must be determined at the time of the alleged fraudulent transfer." *Prairie Lakes*, 583 N.W.2d at 414. When an obligation is in writing, it is "incurred . . . when the writing executed by the obligor is delivered to or for the benefit of the obligee." SDCL 54-8A-6.

i. *Observation*: The White Oak Loan Agreement is dated "as of September 12, 2012," the signature pages thereon contain the notation,

"Effective Date: September 26, 2012," and the attached Exhibit "A" shows the first $24,000,000 distribution occurred on September 29, 2012. It appears, therefore, that the White Oak Loan Agreement was "delivered" (and, therefore, "incurred" under SDCL 54-8A-6) during the month of September 2012 and on or before September 29, 2012 ("Incurred Date").

b. Balance Sheet Test. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." SDCL 54-8A-2(a).

i. *Observation*: Debtor was insolvent at all of the following times, as shown below: (i) immediately before the Incurred Date, (ii) on the Incurred Date, (iii) immediately after the Incurred Date, and (iv) on all subsequent dates.

c. Presumption of Insolvency. When a debtor is not paying its debts as they come due, the debtor "is presumed to be insolvent." SDCL 54-8A-2(b). Further, when such presumption arises, "substantial credible evidence" is required "to rebut presumed insolvency." *Prairie Lakes,* 583 N.W.2d at 414 n. 6.

i. *Observation*: Debtor was not paying its debts as they came due at any material times (*i.e.,* neither immediately prior to the Incurred Date, nor on the Incurred Date, nor at any time after the Incurred Date), as demonstrated, for example, by the millions of dollars of mechanic's liens that had been filed and by additional information appearing in this bankruptcy proceeding.

30. Debtor was insolvent at all materials times (*i.e.*, immediately prior to the Incurred Date, on the Incurred Date, and at all times after the Incurred Date).

a. Appraisal:

An appraisal by "The Mentor Group" dated as of May 18, 2012 ("Appraisal," Doc. 298-23) specifies (on page vii) as follows:

> "The buildings and land improvements were virtually complete (as designed and constructed); and the majority of the subject machinery and equipment was in-place on the date of inspection. As reported, the engineering and design effort was entering the final as-built phase as well as preparations of the commissioning of the production equipment with minor exceptions. The projected completion date (operational and productive), as designed, for the overall facility buildings and the related improvements as well as the production and ancillary equipment was estimated to be in summer of 2012."

The Appraisal distinguishes between and among market value "as is," market value "as complete" and market value "in use" as follows:

Valuation as of 5/18/2012	Value "As Is"	Value "As Complete"	Value "In Use" as profitable business
Real Estate	$59,900,000	$69,130,000	$79,600,000
Equipment	$16,500,000	$16,500,000	$22,700,000
TOTAL	$76,400,000	$85,630,000	$102,300,000

Distinctions among these three value conclusions in the Appraisal are as follows:

i. "As is" value is exactly what the name implies: the value of the appraised assets as of May 18, 2012. On such date, the assets were nearly completed, (i) with "Capital Cost Estimates to Complete" identified as $1,376,724 and (ii) with a value discount for "the perceived potential

risks and uncertainties associated with the efforts of completing the facility as an operating packing plant as designed and intended." (Appraisal at 46).

ii. "As complete" value is exactly what the name implies: the value of the appraised asset "upon completion of the facility construction and ready for occupancy" as of May 18, 2012. (Appraisal at 45).

(1) *Observation:* The "As complete" value is not the appropriate value of appraised assets, as of the Incurred Date, for at least two reasons: (i) the facility was not "complete" on the Incurred Date, and (ii) the "As complete" valuation did not (and could not) adequately consider and give weight to the perceived potential risks and uncertainties associated with the fully-extended construction periods or the greater-than-expected start-up costs.

iii. "In use" value "assumes a profitable business enterprise . . . the [in use] value may be invalid if a profitable business enterprise does not exist." (Appraisal at 48).

(1) *Observation:* The "In use" value is inapplicable to the present insolvency calculation for two reasons: (i) Debtor did not begin slaughtering cattle until October 17, 2012, and (ii) Debtor never operated profitably, losing millions of dollars during each of the months it attempted to operate until July of 2013.

b. Other Assets:

In September of 2012, when the White Oak Obligation was incurred, Debtor had no operations, no production employees, no inventory, no accounts receivable, and no cash.

c. Debts Exceeded Asset Values Immediately Before White Oak Debt Was Incurred.

Based exclusively on filings in this bankruptcy proceeding, the following claims against Debtor existed immediately before the White Oak Obligation was incurred, according to Schedule C and Schedule E to the White Oak Loan Agreement, to proofs of claim noted below and to the attached Exhibit "B":

$ 1,200,000	South.Dakota Development Corp. principal amount (Claim No. 5-1)
$ 362,990	Proofs of Claim for Lease and Executory Contract obligations (Nos. 2-1, 9-1, 10-1, 19-1, 29-1 & 30-1)
$ 81,315	Proofs of Claim for Trade Debt (Nos. 35-1, 46-1, 63-1 & 76-1)
$ 3,230,000	SDDC Loan Payment (*see* Exhibit "A")
$ 1,804,133	Cryovac Capital Lease
$58,000,000	SDIF 6 & 9 principal amounts
$ 1,040,000	Oshik Song principal amount
$ 1,170,025	Hanul Law principal amount (Claim No. 60-1)
$ 500,000	Polarway principal amount (Claim No. 59-1)
$ 2,114,975	Scott Olson principal amount (Claim No. 69-1)
$ 1,000,000	Approx. interest accrued on Scott Olson claim as of 9/12 (*see* Claim No. 69-1)
$ 7,100,000	Construction Lien paid from White Oak funds on 9/29/12 (*see* Exhibit "A")
$ 600,000	Pass Financial Charges (*see* Exhibit "A")
$ 1,100,000	Legal Fees (*see* Exhibit "A")
$ 1,000,000	Real Estate Taxes (approx.)—*see* Claim No. 22-1
$ 750,000	Minimum Broker's Fee for Selling Assets—*see* par. 7(c) on "Page 5 of 13" on Doc. 41-1
$81,053,438	Total amount of claims, apparent from Bankruptcy filings, that existed on the Incurred Date

In addition to the foregoing amounts, there were, presumably, substantial

amounts of additional obligations for other leases, other executory contracts, other interest accruals and other claims in existence on the Incurred Date that are yet to be included in the insolvency calculations.

d. Debts Exceeded Asset Values Shortly After White Oak Debt Incurred.

On September 29, 2012, White Oak allegedly advanced $24 million to Debtor, from which White Oak took $1,400,000 as its initial Loan Fee and designated $2,300,000 for pre-payment of six-months interest on its own loan. Additionally, Debtor experienced immediate start-up difficulties that involved greater-than-expected start-up costs. Moreover, Debtor went promptly into non-compliance with a number of its financial covenants with White Oak—although White Oak did not at that time issue a notice of default, White Oak did notify Debtor of White Oak's reservation of rights regarding such non-compliance. Accordingly, Debtor promptly incurred extensive obligations to White Oak, including the White Oak Claim Multipliers, for which Debtor received no corresponding value for insolvency calculation purposes.

e. Continuous Insolvency Throughout Debtor's Time of Operations and Thereafter.

Debtor experienced greater than expected start-up costs. Debtor never operated profitably, and Debtor incurred millions of dollars of unexpected losses during each of its months of operation—until it ceased operations in July of 2013. For example:

i. Debtor's Balance Sheet dated as of December 29, 2012, in Debtor's "Independent Auditor's Report" reveals a "Total equity" of $15,746,713 that should, actually, be a very-large and negative number, because it, (i) is based upon a "cost" number for "Total property and equipment" value of $110,163,214, which "cost" number is far greater than the actual value of such property and equipment for this non-profitable and failing business, and (ii) fails to account for the full amount of Debtor's obligations to White Oak by, for example, ignoring the White Oak Claim Multipliers despite Debtor's non-compliance at that time with financial covenants under its White Oak Obligation, for which all rights (including Claim Multiplier rights) were explicitly reserved by White Oak.

ii. Debtor's Schedules reveal, as of the Petition Date (July 19, 2013), total asset values of $79,251,225 and total debts of ($138,816,206), evidencing an insolvency on the Petition Date in the amount of ($59,564,981).

iii. Accordingly, Debtor has been insolvent at all material times and has never achieved a state of solvency at any from the Incurred Date in September 2012 to the present time.

What is the available remedy for a constructive fraud claim under the South Dakota Uniform Fraudulent Transfer Act?

31. SDCL § 54-8A-7(A)(1) authorizes "Avoidance of the ... obligation to the extent necessary to satisfy the creditor's claim." If White Oak acted in good faith, then under SDCL § 54-8A-8(d) White Oak may make a claim ***only*** "to the extent of the value

given" to the Debtor. The actual value given to Debtor by White Oak is less than $30.6 million, as detailed above.

32. On the issue of good faith, White Oak has failed to comply with both the lending license requirements of SDCL 54-4-36 *et seq.* and the mortgage lending license requirements of SDCL 54-14-12 *et seq.*: (a) "No person may engage in the business of lending money without a license" (SDCL 54-4-52), and (b) "No person may act as a mortgage lender . . . in this state . . . with respect to any property located in South Dakota without first obtaining and maintaining a license according to the requirements of this chapter" (SDCL 54-14-13). Available information regarding such licensing requirements includes the following: (a) White Oak holds itself out on its website as offering "customized lending products and services to small- and middle-market corporate clients" and, therefore, engages in the business of lending money, (b) according to its proof of claim filed in these proceedings, White Oak purports to have made a loan to Debtor in South Dakota that it claims is secured by a lien on real estate and other property located in South Dakota, and (c) a search of South Dakota web pages that identify licensees under such lending and mortgage license requirements does not identify White Oak Global Advisors, LLC, as a licensee.

Preservation of the Avoided White Oak Claim for the Bankruptcy Estate

33. Under 11 U.S.C. § 551, White Oak's avoided claim would be preserved for the benefit of the bankruptcy estate, and would not flow to the benefit of any single creditor. 11 U.S.C. § 551 provides: "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."

Accordingly, any purchase price amount available to the White Oak Obligation liens between $30.6 million (or less) and $45 million would belong to this bankruptcy estate and be available to pay its administrative, priority and general unsecured claims.

C. *Third Element:* The creditor sought permission from the bankruptcy court to initiate an adversary proceeding.

34. The Ad Hoc Committee, on behalf of its own members and for the benefit of all other creditors in this case, hereby seeks a clarification of the DIP Funding Order (specifically, of provisions in ¶ 13 on page 13 of the "Revised" Stipulation) that authorizes creditors to file and prosecute Chapter 5 avoidance claims on behalf of this bankruptcy estate. In *PW Enterprises*, the Eighth Circuit determined that permission for filing a Chapter 5 avoidance complaint could be requested either before or after the avoidance Complaint is filed, but with an apparent preference for advance authorization requests over retroactive authorization requests. *PW Enterprises,* 540 F.3d at 903-04. The Ad Hoc Committee believes that the advance authorization request contained in this document is essential so that bidding procedures, stalking horse arrangements, and other critical matters can be addressed with such permission (or a refusal to grant the permission) in mind.

D. *Fourth Element:* The debtor-in-possession unjustifiably refused to pursue the claim, or consented to creditors pursuing Chapter 5 avoidance claims on behalf of the bankruptcy estate.

35. The Eighth Circuit addressed an issue of first impression, regarding "consent" by a trustee or debtor-in-possession to a derivative standing for creditors to bring Chapter 5 claims, in *PW Enterprises*:

> PW Enterprises did not argue that the Trustee unjustifiably refused to pursue its claims. Rather, PW Enterprises sought permission to proceed derivatively under circumstances in which the Trustee did not oppose its complaint (or consented to its filing). This is an issue of first impression in this Circuit. . . . we are persuaded . . . and hold that a creditor may proceed derivatively when the trustee (or debtor-in-possession) consents (or does not formally oppose) the creditor's suit.

Id. at 901-02 (parenthetical text in original).

36. Elements for derivative standing when Debtor-in-Possession consents are described and explained as follows:

> A creditor may acquire standing to pursue the debtor's claims if (1) the creditor has the consent of the debtor in possession or trustee, and (2) the bankruptcy court finds that suit by the creditor is (a) in the *best interest* of the bankruptcy estate, and (b) *is necessary and beneficial* to the fair and efficient resolution of the bankruptcy proceedings.

Id. at 902.

> [B]ankruptcy courts must not lose sight of the fact that a creditor *must* show that its proposed 'consensual' derivative action is *both 'necessary and beneficial* to the fair and efficient resolution of the bankruptcy proceedings.' . . . Accordingly, bankruptcy courts should not passively view the [debtor-in-possession's] consent as a proxy that a proposed derivative action is 'necessary and beneficial.' If they did, bankruptcy courts would be effectively ceding their gatekeeper function to the [debtor-in-possession]. We therefore make plain that a [debtor-in-possession's] consent is a necessary, but not sufficient condition for granting a creditor derivative standing in this context. . . . the bankruptcy court has the same obligation to carefully scrutinize the request and satisfy itself that derivative standing is proper under the circumstances."

Id. at 902-03.

37. Based upon the foregoing elements for derivative standing by consent, it must be noted that the Chapter 5 avoidance claims set forth above, if successfully pursued, would result in (i) an avoidance of any and all White Oak claims and liens over and above approximately $30.6 million or less, (ii) a preservation of White Oak's liens

between approximately $30.6 million (or less) and the $45 million subordination amount for the benefit of the bankruptcy estate under 11 U.S.C. § 551, (iii) the pursuit of such claim would be at no cost to the estate, unless specifically granted by discretion of this Court for "substantial contribution," and (iv) there would be no undue delay to this case from such action.

38. Accordingly, the Ad Hoc Committee contends that the pursuit of such Chapter 5 avoidance claims would, unquestionably, be *both necessary and beneficial* to the fair and efficient resolution" of this bankruptcy proceeding.

DATED this 10th day of October, 2013.

AD HOC COMMITTEE OF EB-5 INVESTORS,

By: _____

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