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*Official Committee of Unsecured Creditors*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re | Chapter 11 |
| SquareTwo Financial Services Corporation, *et al.* | Case No. 17-10659 (JLG) |
| | Jointly Administered |
| Debtors.[1] | |

**OMNIBUS OBJECTION, REQUEST FOR ADJOURNMENT, AND RESERVATION OF RIGHTS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' (I) DIP MOTION, (II) INVESTOR PROTECTIONS MOTION, (III) CANADIAN GUC MOTION, AND (IV) KBW & MILLER BUCKFIRE RETENTION APPLICATION**

The Official Committee of Unsecured Creditors (the "Committee") of SquareTwo Financial Services Corporation, and its affiliates (collectively, the "Debtors") appointed pursuant to section 1102 of Title 11 of the United States Code (the "Bankruptcy Code") in the above-captioned jointly administered chapter 11 cases (the "Chapter 11 Cases"), by and through its undersigned proposed counsel, hereby submits this Omnibus Objection, Request for an

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal taxpayer identification number and/or Canadian equivalent are as follows: Astrum Financial, LLC (2265); Autus, LLC (2736); CA Internet Marketing, LLC (7434); CACH, LLC d/b/a Fresh View Funding (6162); CACV of Colorado, LLC (3409); CACV of New Jersey, LLC (3499); Candeo, LLC (2809); CCL Financial Inc. (7548); Collect Air, LLC (7987); Collect America of Canada, LLC (7137); Healthcare Funding Solutions, LLC (2985); Metropolitan Legal Administration Services, Inc. (6811); Orsa, LLC (2864); Preferred Credit Resources Limited (0637); ReFinance America, Ltd. (4359); SquareTwo Financial Canada Corporation (EIN: 1034; BN: 0174); SquareTwo Financial Corporation (1849); and SquareTwo Financial Services Corporation d/b/a Fresh View Solutions (5554). The Debtors' executive headquarters are located at 6300 South Syracuse Way, Suite 300, Centennial, CO 80111.

Adjournment and Reservation of Rights ("Omnibus Objection") to (a) the *Debtors' Motion for Interim and Final Orders: (I) Approving Postpetition Financing; (II) Authorizing Use of Cash Collateral; (III) Granting Adequate Protection to Prepetition Secured Parties; and (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [Docket No. 43] (the "DIP Motion"); (b) the *Debtors' Motion for Order: (A) Approving and Authorizing Certain Plan Investor Protections; and (B) Granting Related Relief* [Docket No. 17] (the "Investor Protections Motion"); (c) *Canadian Debtors' Motion for Interim and Final Orders Authorizing Payment of Prepetition Canadian General Unsecured Claims in the Ordinary Course of Business and Granting Related Relief* [Docket No. 14] (the "Canadian GUC Motion"); and (d) *Debtors' Application Pursuant to 11 U.S.C. §§ 327(a) and 328(a), Fed. R. Bankr. P. 2014(a) and 2016, and Local Rules 2014-1 and 2016-1 for Authority to Employ and Retain Keefe, Bruyette & Woods, Inc. and Miller Buckfire & Co., LLC as Investment Bankers Nunc Pro Tunc to the Petition Date* [Docket No. 73] (the "KBW & Miller Buckfire Retention Application").[2]

**PRELIMINARY STATEMENT**

1. The Committee objects to a number of First Day motions that serve no legitimate business purpose, do not advance the benefits of the estate or the creditors, and would only lock the Debtors (and the Court) down a path to approve the Debtors' proposed Plan which the Committee believes may contain fatal infirmities.

2. The DIP Motion is particularly improper. Simply put, the Debtors openly admit – as they must – that a DIP loan is not necessary to continue operations or preserve the assets of the estates. At best the Debtors contend that a DIP may become necessary at some future time in the event their cash receipts do not match their own financial projections. Rather than funding operations, the proposed DIP Facility would only commit the Debtors to preferential treatment of

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the applicable Motion.

a single class of their prepetition creditors at the expense of all others. The proposed DIP Facility provides unnecessary and inappropriate payments, protections and control to the Prepetition Secured Parties. Specifically, the Debtors request approval of a $58.5 million postpetition financing package provided by the DIP Parties – a group comprised of the identical parties as the Debtors' Prepetition First Lien Lenders. At least $41 million of the DIP Facility will be used to "roll-up" the Prepetition First Lien Lender's Revolving Loan as an inappropriate form of adequate protection and another approximately $4.3 million will be used to fund certain extraneous fees and expenses of the DIP Parties and make interest payments to the Prepetition Secured Parties.[3] Combined these obligations constitute more than $45.3 million for the two and a half-month period covered by the Budget. And, based on the Debtors' own representation to the Court, the DIP Facility is not necessary to for ordinary course operating and funding the chapter 11 process. Indeed, the Debtors project improving their current cash position through ordinary course operation by more than $3.4 million, even after taking into account restructuring costs and advisor fees.

3. The Debtors' Budget forecasts a cash surplus of receipts in excess of disbursements that range from $6.5 million to $1.9 million over the life of the DIP Facility. At no point are the Debtors budgeted to be cash negative during this time. Rather than provide the Debtors' liquidity under the Chapter 11 Cases, the DIP Facility is being used to (a) elevate the Prepetition Secured Parties' position in these cases which is inappropriate as a matter of law, (b) provide significant fees and expenses to the Prepetition Secured Parties, and (c) lock the Debtors into the Plan by tying the DIP Facility to the RSA thus making it impossible for the Debtors to explore alternative structures that could provide additional benefits to all stakeholders. In light of the Debtors' positive cash flow and forecast, the Committee submits that moving forward with

[3] This is in addition to the approximately $850,000 in fees paid prior to the filing related to the DIP Facility.

the DIP Motion is unnecessary at this time. The proposed DIP Facility appears to be a concession to Prepetition Secured Parties made in order to secure their consent to the proposed Plan.[4]

4. Likewise, the relief sought in the Investor Protection Motion and Canadian GUC Motion are premature and, if granted, will serve to further lock the estates into the flawed reorganization strategy by approving restrictive and costly provisions in the Plan Funding Agreement that serve to ensure that the Debtors are unable to examine any restructuring alternatives and authorize the Debtors to make distributions to prepetition creditors outside of the Plan. Such relief is unnecessary and unwarranted at this time.

5. As this Court is aware, the Debtors seek confirmation of the Plan on an expedited timeline (a mere 35 days from the Committee's appointment) through a "prepackaged plan." Unlike typical "prepackaged plans" where unsecured creditors are left unimpaired, this Plan provides no recoveries to general unsecured creditors of the U.S. Debtors.[5] As a result, the Committee believes that the truncated process applicable to prepackaged cases is inappropriate here.[6]

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[4] Given these circumstances, the Committee is considering filing a motion for an examiner under section 1104 of the Bankruptcy Code.

[5] In *In re True Temper Sports, Inc.*, Case No. 09-13446 (PJW) (Bankr. D. Del. 2009), Judge Walsh expressed serious concern about confirming a prepackaged plan providing no recovery for general unsecured creditors. Indeed, only after the proposed order was modified to leave unsecured creditors unimpaired was the plan confirmed. *See* Omnibus Hearing Transcript, 53:22-54:2, 55:6-9, November 30, 2009. Judge Walsh explained, "I can't remember a prepack that did not allow general unsecureds to pass through[]" and "I have the more fundamental problem that . . . this does not comport with all of my experiences with prepacks. None of our other judges ever heard of this kind of a prepack. And there's no reported decision approving it, so far as I know." *Id*. at 26:22-23, 30:7-12. A copy of the relevant portions of the transcript is attached hereto as Exhibit A.

[6] As such, concurrently herewith, the Committee has filed The Motion of the Official Committee of Unsecured Creditors to Amend Order (I)(A) Scheduling Combined Hearing on Adequacy of Disclosure Statement and confirmation of Prepackaged Plan, (B) Establishing Procedures For Objecting to Disclosure Statement and Prepackaged Plan, (C) Approving Form and Manner of Notice of Combined Hearing (D) Waiving Requirement for Filing list of Creditors and List of Equity Holders, (E) Authorizing Debtors to File Consolidated List of Creditors , and (f) Postponing or Waiving Section 341(a) Meeting, and (G) Granting Related Relief (the "Committee Confirmation Scheduling Motion") seeking to establish a workable plan confirmation schedule that strikes a balance between the Debtors' desire for speed and the parties' right to a fair process.

6. Moreover, based on its limited review thus far, the Committee believes that the proposed Plan cannot be confirmed for a number of reasons. Some examples of concern include the following:[7]

- The Plan violates the absolute priority rule. The Plan preserves value for existing equity. Incredibly, SquareTwo Financial Canada Corporate will repurchase Christopher Walker's equity securities for an undisclosed purchase price. General unsecured creditors of the U.S. Debtors, however, are receiving no distribution. This structure is designed to benefit equity holders and creditors of the Canadian Debtors at the expense of the creditors at the U.S. Debtors.

- The Plan provides disparate and discriminatory treatment by providing that the general unsecured creditors at the Canadian Debtors are paid in full and unjustifiably excluding the general unsecured creditors at the US Debtors. Consideration of the Canadian GUC Motion in furtherance of this disparate treatment in the Plan is unnecessary and inappropriate at this time.

- The Plan, without adequate notice, enjoins individuals subject to collection proceedings from asserting setoff rights, counterclaims or defenses on any basis, including for violations of the FDCPA in those proceedings while allowing the Debtors' successors to continue to pursue collection actions against those individuals. The Plan provides no consideration for such release. The Committee is investigating whether the Debtors' insurance policies could be a source of potential recovery for holders of FDCPA claims.

- The Plan extinguishes intercompany claims among the Dissolving Debtors and the Acquired Debtors without any disclosure as to intercompany balances, the nature of such claims or value being distributed.

7. For these reasons, among others, the Committee intends to oppose confirmation of the Plan at the combined hearing to consider approval of the disclosure statement with respect to the Plan (the "Disclosure Statement") and confirmation of the Plan (the "Combined Hearing"). As discussed in further detail herein, the DIP Motion, Investor Protections Motion and Canadian GUC Motion (collectively, the "Case Determinative Motions") are each critical to the

[7] The following are only examples of certain questionable provisions of the Plan and this list is not meant to be exhaustive.

implementation of the non-confirmable Plan but unnecessary for the Debtors' estates at this time.[8]

8. In the 8-days since the Committee's selected counsel (and despite the intervening Easter and Passover holidays), the Committee has requested initial discovery and information from the Debtors; participated in an in-person meeting with the Debtors' professionals; and reached out to the Debtors to discuss a possible global resolution of issues and adjustments to the hearing schedule. Although the Committee remains hopeful and available to discuss settlement, the parties have declined to extend the hearing and objection deadline. Therefore, the Committee files this Omnibus Objection.

## BACKGROUND

A. The Chapter 11 Cases

9. On March 19, 2017 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief (the "Chapter 11 Cases") under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. On March 22, 2017, the Ontario Superior Court of Justice entered the Initial Recognition Order (Foreign Main Proceeding) recognizing these chapter 11 cases as foreign main proceedings under Part IV of the *Companies' Creditors Arrangement Act.*

10. No trustee or examiner has been appointed in the Chapter 11 Case. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors in possession.

11. On the evening of April 7, 2017, the Office of the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. *See* [Docket No. 103].

[8] In support of the Case Determinative Motions, the Debtors filed the *Declaration of J.B. Richardson, Jr. in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 3] (the "First Day Decl.").

The Committee is comprised of five members: (a) Enver Cehic, (b) Daniel Mente, (c) Huntington National Bank, (d) Lynn M. Dingwall, and (d) Shana Long.

12. On April 12, 2017, the Committee selected Arent Fox LLP to serve as its counsel. On April 13, 2017, Gavin Solomonese to serve as its financial advisor in the Chapter 11 Cases.

B. The Plan, RSA and Plan Funding Agreement

13. Prior to the Petition Date, the Debtors, Resurgent Holdings LLC (the "Plan Investor") and the secured lenders under the Debtors' prepetition secured credit facilities representing (a) 100% in principal amount and 100% in number of holders of their Prepetition First Lien Credit Facility held by Cerberus Business Finance, LLC, as Collateral Agent and Administrative Agent, (b) 100% in principal amount and 100% in number of holders of their Prepetition 1.25 Lien Credit Facility held by Apollo Capital Management, L.P. and KKR Credit Advisors (US) LLC, and (c) approximately 83.2% in principal amount of their Prepetition 1.5 Lien Credit Facility a majority held by Apollo Capital Management, L.P. and KKR Credit Advisors (US) LLC (the "Consenting Lenders") entered into the Restructuring Support Agreement (the "RSA") pursuant to which each party agreed to support the "consensual" restructuring subject to terms and conditions outlined in the RSA. Pursuant to the *Joint Prepackaged Chapter 11 Plan for SquareTwo Financial Services Corporation and Its Affiliated Debtors* [Docket No. 20] (the "Plan") and Plan Funding Agreement, the Plan Investor will acquire substantially all of the Debtors' assets through the acquisition of the equity interests of certain of the Debtors, as reorganized, under the Plan.

14. Thereafter, the Debtors solicited the Plan to those classes of creditors entitled to vote under the Plan (*i.e.,* the classes overwhelmingly controlled by the RSA Parties). Unsurprisingly, the Debtors received the requisite support from those creditors entitled to vote.

The Debtors then commenced the Chapter 11 Cases to obtain confirmation and consummation of the Plan.

15. A hearing on confirmation of the Debtors' Plan is scheduled for May 12, 2017 – less than sixty (60) days after the Petition Date and thirty-five (35) days after formation of the Committee.

16. Notably, the complex transactions contemplated under the Plan are in many ways an extension of the transactions and recapitalization that took place in the during the year prior to the Petition Date that created the Prepetition First Lien Credit Facility, Prepetition 1.25 Lien Credit Facility, and Prepetition 1.5 Lien Credit Facility. The validity of those transactions is simultaneously being examined by the Committee, as is the prepetition sale process that was allegedly overseen by an independent board.

17. Under the terms of the Plan, (a) holders of Claims under the Second Lien Indenture, (b) General Unsecured Claims against the U.S. Debtors, and (c) Existing U.S. Interests will not receive any recovery on account of their Claims and/or Interests. *See* Plan §§ 5.6-5.7, 5.9. All claims against the Canadian Debtors (including general unsecured creditors and equity interests), other than the Debtors' prepetition secured credit facilities (which classes of claims have voted to accept the Plan by the requisite thresholds) are unimpaired. *See id.* §§ 5.1-5.5, 5.8, 5.10.

## OBJECTIONS

### I. Approval of the DIP Motion is Premature as the DIP Facility is Unnecessary and Overreaching

18. To secure approval of postpetition financing pursuant to Bankruptcy Code section 364(c) or (d), the debtor bears the burden of proving that (i) the proposed financing is an exercise of sound and reasonable business judgment; (ii) no alternative financing is available on any other basis; (iii) the financing is in the best interests of the estate and its creditors; and (iv) as a

corollary to the first three points, that no better offers, bids, or timely proposals are before the Court. *See In re Western Pacific Airlines, Inc.*, 223 B.R. 567, 572 (Bankr. D. Colo. 1997). While courts generally defer to a debtor's business judgment in granting section 364 financing, "granting post-petition financing on a priming basis is extraordinary and is allowed only as a last resort." *In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) (citing cases).

19. Here, the Debtors have failed to demonstrate that the proposed DIP Facility is necessary, let alone warranted as a "last resort." Indeed, the Debtors assert that the DIP Facility is designed to provide the Debtors' key constituents with "the confidence that the Debtors will have sufficient cash if the Debtors' revenues turn out to be uneven and/or insufficient." *See* DIP Motion ¶ 3. This core premise for the DIP Motion must be rejected. The Debtors do not anticipate a cash shortfall and should stand behind their own financial projections. They should seek the DIP Facility and the extraordinary protections it provides for the Prepetition Secured Parties only if and when the need for it becomes apparent.

20. Thus, at a minimum, by the Debtors' own admission, the DIP is premature. The Debtors have failed to show any evidence that the Debtors' revenues will be insufficient or that any of the Debtors' creditors are concerned about the Debtors' liquidity. In fact, the Debtors' budget attached to the DIP Motion (the "Budget") reflects a cash surplus of receipts in excess of disbursement ranging from $6.577 million to $1.953 million over the life of the Budget. Indeed, without the "roll-up" the Debtors are cash flow positive during the period. *See* Budget.

21. It appears that the unnecessary DIP Facility is being used to (a) elevate the Prepetition Secured Parties' position in these cases which is inappropriate as a matter of law,[9] (b)

[9] "Adequate protection is made available to protect creditors from the diminution of collateral during the pendency of the bankruptcy petition; not to compensate creditors for delay in being able to foreclose on collateral." *Qmect, Inc. v. Burlingame Capital Partners II, L.P.*, 373 B.R. 682, 689–90 (N.D. Cal. 2007) (*citing In re Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 377, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)).

encumber any and all collateral not subject to the Prepetition Secured Parties' lien, (c) provide significant fees and expenses to the Prepetition Secured Parties, and (d) lock the Debtors into the Prepackaged Plan by tying the DIP Facility to the RSA thus making it impossible for the Debtors to explore alternative structures that could provide additional benefits to all stakeholders. Indeed, over ten (10) percent of the proceeds of the DIP Facility will be used to fund fees and expenses of the DIP Parties and make interest payments to the DIP Lenders while all of the Debtors' cash receipts are being taken by the Prepetition First Lien Secured Parties (the same party as the DIP Lenders) disguised as adequate protection payments and being used to pay off the entire prepetition claim. In light of the Debtors' positive cash flow and forecast, the Committee submits that moving forward with the DIP Motion is unnecessary at this time and should be denied.

22. In the event the Court is inclined to move forward with the hearing on the final DIP order as proposed (the "Final DIP Order"), the Committee submits that the DIP Motion be denied unless certain material modifications to the DIP Facility and the attendant Budget are made. Even in cases where sale proceeds are limited, a DIP Facility must nonetheless satisfy the legal and equitable standards appropriate for debtor-in-possession financing. The Committee highlights the following provisions of the DIP Facility that are objectionable and that warrant either modification or elimination.

- **The DIP Credit Agreement is Impermissibly Intertwined with the RSA**. The Debtors seek approval of a proposed DIP Credit Agreement that is inextricably tied to the Plan and RSA, which has yet to be vetted by the Committee or this Court. Specifically, the Debtors' ability to access the DIP Facility and continued use of Cash Collateral is conditioned upon the Debtors' continued adherence to the restrictions and covenants set forth in the RSA. *See* Final DIP Order ¶¶ 20, 21. This feat is accomplished through the DIP Credit Agreement cross-default provision that provides the DIP Parties and Prepetition Secured Parties the ability to terminate the Debtors' use of the DIP Facility and Cash Collateral upon a termination event under the RSA. *See* DIP Credit Agreement § 9.01(gg). Such a cross-default improperly handcuffs the Debtors' reorganization efforts to a prescribed plan construct and schedule that the Committee believes is not in the best interests of the Debtors' estates. Accordingly, the DIP Motion should be

denied to the extent it seeks approval of Events of Default that tie the Debtors to the RSA and Plan, and otherwise lock the Debtors into a predetermined case outcome.

- **The Roll-Up Should be Removed**. As adequate protection for the Prepetition First Lien Secured Parties, the proposed Final DIP Order provides for the rolling-up of the prepetition Revolving Loan in the amount of $41 million through the use of the Debtors' cash receipts, in addition to the payment of approximately $1.4 million in fees, expenses and interest discussed above. *See* Final DIP Order § 12.

    - As an initial matter, the Prepetition First Lien Secured Parties are not entitled to a "roll-up" of the prepetition debt as a form of adequate protection. "The goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization." *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (denying adequate protection to the holder of a senior lien that was primed by a postpetition financing lien where the proceeds of the financing enhanced the value collateral). Therefore, the Prepetition First Lien Secured Parties are only entitled to adequate protection to the extent there has been a diminution in value in the value of their interests in the Prepetition First Lien Collateral. The burden of establishing diminution in value—and thus that adequate protection is necessary—lies squarely with the party seeking adequate protection. *See Official Comm. Of Unsecured Creditors v. UMB Bank (In re Residential Capital, LLC)*, 501 B.R. 549, 591 (Bankr. S.D.N.Y. 2013) (Glenn, J.). The parties have not (and cannot) show diminution equal to the amount of the roll-up.

    - Further, the local rules promulgated in this district reflect the general reluctance to permit prepetition debt from transforming into postpetition debt. 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][e] n.35 (noting that a roll-up attracts intense scrutiny from the court and the United States Trustee, and the Southern District Local Rule 4001-2(a)(7) requires "these provisions be highlighted in any motion seeking approval of postpetition financing"). In the present case, no substantial showing has been made whatsoever and rejection of the roll-up is appropriate here. Because there is complete identity of interest between the pre- and postpetition lenders, there would be no true priming of the prepetition obligation and thus, no need to roll-up the prepetition obligations.[10] As a result, it appears that the

[10] Courts are often circumspect whether a prepetition secured lender seeks to roll-up prepetition debt. *See, e.g., In re Saybrook Mfg. Co.*, Inc., 963 F.2d 1490, 1494–96 (11th Cir. 1992) (noting that cross-collateralization is inconsistent with bankruptcy law because it (a) is not authorized as a means of postpetition financing pursuant to section 364 and (b) is directly contrary to the fundamental priority scheme of the Bankruptcy Code); *Official Comm. of Unsecured Creditors of New World Pasta Co. v. New World Pasta Co.*, 322 B.R. 560, 569 n.4 (M.D. Pa. 2005) (noting that roll-up provisions "have the effect of improving the priority of a prepetition creditor"); *In re Tenney Vill. Co.*, 104 B.R. 562, 570 (Bankr. D.N.H. 1989) (holding that "Section 364(d) speaks only of the granting of liens as security for new credit authorized by the Court"); *In re Monach Circuit Indus., Inc.*, 41 B.R. 859, 862 (Bankr. E.D. Pa. 1984) (stating that cross-collateralization constitutes an unauthorized preference); *In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983) (noting that cross-collateralization is "a disfavored means of financing").

"roll-up" nature of the DIP Facility is designed to not only satisfy the prepetition obligations but to impair the rights and remedies of unsecured creditors and bind these estates to a sale through the Plan, which is projected to result in recoveries for only the Prepetition Secured Parties, Canadian creditors and equity insiders to the detriment of general unsecured creditors of the U.S. Debtors.

- The approval of the "roll-up" would effectively usurp any unencumbered assets available to general unsecured creditors and eliminate the ability of the Committee to challenge the validity of the liens on the Revolving Loan under the terms of the proposed Final DIP Order.[11] Final DIP Order ¶ 12(a). Therefore, approval of the "roll-up" is premature until after the completion of the Committee's investigation. The Committee requests that the roll-up provision be stricken and the amount of the DIP Facility reduced accordingly. Further, to the extent that the Revolving Loan has already been rolled-up under the Interim DIP Order, the Committee seeks that such roll-up be unwound. Moreover, if the Court is inclined to grant the roll-up, the Committee requests that the proposed Final DIP Order must make clear that the roll-up is not "irrevocable" and is subject to the Committee's right to unwind the paydown in the event of a successful Challenge.

- **Collateral Granted by the DIP Motion Should be Narrowed to Exclude Liens and Claims on Unencumbered Assets and Avoidance Actions and Preclude the Prepetition Secured Parties from Earmarking any Avoidance Payments**. The collateral packages granted to the DIP Parties and Prepetition Secured Parties for the use of the DIP Facility and Cash Collateral should also be reduced to exclude value that, but for the commencement of these Chapter 11 Cases, would be available for unsecured creditors.

  - The Committee is still investigating whether any of the Debtors' assets are unencumbered, including the Debtors' deposit accounts. As a result, any collateral package granted to the DIP Parties and Prepetition Secured Parties must exclude such assets that were unencumbered as of the Petition Date.

  - By granting DIP Liens and Adequate Protection Liens on the Avoidance Action recoveries and commercial tort claims, the Debtors propose to shift potential significant unencumbered value to the DIP Parties and Prepetition Secured Parties in a manner that is fundamentally at odds with the purpose of the Bankruptcy Code and which prejudices unsecured creditors. *See* Final DIP Order ¶¶ 11(a), 12(b), 13(a), 14(a), 15(a) (providing proceeds of Avoidance Actions as DIP Collateral and Cash Collateral). Moreover, the proposed Final DIP Order requires that any payments made by the Prepetition First Lien Lender on account of

[11] The investigation into prepetition transactions has only just begun, however, the Committee intends to investigate whether cause exist to challenge the liens granted to the Prepetition Secured Parties.

Avoidance Actions or other causes of action (the "Avoided Payments") *must* be used by the Debtors to prepay the DIP Loans. *See* Final DIP Order ¶ 27.

- The Final DIP Order is impermissibly ensuring that any recoveries on account of successful Challenges by the Committee be directed to the same Prepetition Secured Parties. It is well established that avoidance actions should be preserved for the benefit of unsecured creditors. *See* 11 U.S.C. § 551. Avoidance actions, designed to facilitate equality of distribution among unsecured creditors, are not truly property of a debtor's estate, but instead are rights the estate holds in trust for the benefit of creditors. *See Bethlehem Steel Corp. v. Moran Towing Corp. (In re Bethlehem Steel Corp.)*, 390 B.R. 784, 786-87 (Bankr. S.D. N.Y. 2008) ("Avoidance actions . . . never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession . . . ."); *In re Worldcom, Inc.*, 401 B.R. 637, 646-47 (Bankr. S.D.N.Y. Feb. 26, 2009) (holding that chapter 5 claims do not belong to the debtor). In these cases in particular, the Avoidance Actions and proceeds thereof are an important potential source of recovery for general unsecured creditors. The investigation into prepetition transactions has only just begun, however, the Committee intends to investigate whether cause exists to assert material Avoidance Actions and claims against the Debtors' officers and directors resulting from the prepetition recapitalization. Further, the Committee is investigating whether the Debtors' insurance policy could be a source of potential recovery for holders of FDCPA claims. Should such Avoidance Actions and commercial tort claims exist, permitting the Prepetition Secured Parties to benefit from the potential avoidance of their own liens resulting from the Avoidance Action would be antithetical to the purposes of the Bankruptcy Code.

- **The Proposed Committee Challenge Fund Violates the Bankruptcy Code**. The Final DIP Order also unduly limits the budget for the Committee to undertake its investigation regarding the extent and validity of the liens on the Prepetition Secured Obligations and attempts to require the Committee to waive its rights to seek payment of any fees in excess of the alleged arbitrarily-imposed cap by the Debtors and DIP Lenders.[12] Specifically, paragraph 26 of the Final DIP Order improperly imposes a cap of $100,000 of Cash Collateral or proceeds of the DIP Facility (the "Committee Challenge Fund") for the Committee's professionals to investigate claims against the Prepetition Secured Parties unless the cap is increased "upon further order of the Bankruptcy Court for 'cause' shown by the Committee". Final DIP Order ¶ 26. Moreover, the Debtors seek to waive the Committee's right to an administrative expense claim for fees incurred in excess of the Committee Challenge Fund. *See id.* The Committee objects to the imposition of the Committee Challenge Fund and waiver of their rights under

[12] Two hours before the objection deadline the Committee's professionals received a copy of a revised paragraph 26 of the Final DIP Order which contains (for the first time) the proposed waiver of the Committee's rights under section 1129 of the Bankruptcy Code.

section 1129(a)(9)(A) for the following reasons. First, the Committee Challenge Fund is inadequate in light of the size and complexity of the Chapter 11 Cases. Second, the Committee is only permitted to use the proceeds of the DIP Facility and Cash Collateral for the purpose of reviewing the Prepetition Secured parties liens, but not to pursue any causes of action. Such a limitation on the size and use of the Committee Challenge Fund prevents the Committee from exercising its duties, while improperly shielding the Prepetition Secured Parties from potential claims. Fourth, the Debtors' attempt to create a new standard for review of fees and expenses (*i.e.*, the proposed "cause shown" rather than satisfying the requirements of section 330 and 331 of the Bankruptcy Code) is invalid and cannot be permitted.[13] Finally, the Committee, as holder of the Claim, does not agree to waiver of its potential administrative claim under section 1129(a)(9)(A) of the Bankruptcy Code. *See In re Molycorp*, Case No. 15-11357 (Bankr. D. Del. Jan. 5., 2017) ("In other words, in the context of a plan confirmation, a cap on the amount to be paid towards administrative expenses may only be approved after obtaining the administrative claimants' consent"). This is yet another example of overreaching by the Debtors and Prepetition Secured Parties and further confirmation as to why this DIP Facility should be denied in its entirety.

- **Adequate Protection Granted to Undersecured Creditors is Inappropriate**. The proposed Final DIP Order also provides for the (a) the grant of replacement liens and superpriority administrative expense claims and payment of fees to the Prepetition 1.25 Lien Lenders and Prepetition 1.5 Lien Secured Parties, and (b) the grant of replacement liens and superpriority administrative expense claims to the Prepetition Second Lien Secured Parties for the use of Cash Collateral. *See* Final DIP Order ¶¶ 13, 14, 15. This adequate protection provision is improper as a matter of black letter law. Section 506(b) of the Bankruptcy Code allows current payment of postpetition interest, fees, and costs only to the extent a secured claim is oversecured. The Debtors admit that the Prepetition 1.5 Lien Secured Parties and Prepetition Second Lien Secured Parties are undersecured, and, as a result, not entitled to adequate protection. *See* First Day Decl. ¶¶ 40-46, Ex. C, D (providing the Debtors' total assets and the Secured Parties' approximate outstanding claims). On this record, the payment of interest and fees would violate the principle that a prepetition secured creditor is entitled only to the protection that it bargained for pre-bankruptcy, as if there was no bankruptcy and postpetition financing. If, however, the Court determines that adequate protection is appropriate, the Committee respectfully submits that the Final DIP Order should make any payment of postpetition fees to these undersecured creditors subject to both recharacterization and disgorgement.

[13] In *Sandridge Energy*, Judge Jones rejected language in the proposed final cash collateral order that declared any committee fees in excess of $250,000 "shall not be considered for determining compliance with 1129(a)(9)(A)." The Court held that given the early stage of the case, where the Court had yet to even approve retention applications, "I am not today under any circumstances going to determine what the Committee can and can't spend and what they're entitled to. I don't have a fee application before me. . . . I would be abrogating the Bankruptcy Code if I were to approve such a provision and I just won't. . . . [I]in no way am I going to through a cash collateral order start defining what the administrative claims in this case are and aren't. I'm not about to do that." *See* In re Sandridge Energy, Inc., No. 16-32488 (Bankr. S.D. Tex. June 30, 2016): 69:25-71:3. A copy of the relevant portions of the transcript is attached hereto as Exhibit B.

- **The DIP Fees are Excessive and Must be Reduced**. The DIP Facility charges numerous fees including a $438,750 Closing Fee prepetition, a $585,000 Exit Fee, a Loan Servicing Fee of $25,000 paid quarterly, as well as an Unused Line Fee, Audit and Collateral Fees paid to the DIP Parties, in addition to the fees and expenses of the DIP Parties. The DIP Facility also provides for the payment of interest and unlimited fees and expenses of the professionals of the Prepetition First Lien Agent (the same parties as the DIP Parties) as adequate protection. The Budget demonstrates that the Debtors have already paid $849,000 in fees prior to the Petition Date and are projected to spend an additional $647,000 in professional and closing fees and $3,596,000 in interest during the first ten weeks of these cases. These fees are excessive in light of the fact that no new money is being provided and the expedited timeframe of Chapter 11 Cases. The Committee requests that the fees be reduced.

- **The Calculation of Diminution Claims Must be Expressly Defined**. The Committee asserts that the adequate protection proposed in the DIP Motion, including the proposed roll-up, the granting of superpriority administrative expense claims and replacement liens and the payment of interest and fees and other amounts to professionals on undersecured creditors, is excessive and improper. *See* Final DIP Order ¶¶ 12, 13, 14, 15. If, however, the Court determines that the adequate protection is appropriate here, the Committee respectfully submits that any adequate protection should be limited to the actual postpetition diminution in value of the Prepetition Collateral. Further, the calculation of the diminution in value of the collateral should not include the payment professional fees during the Chapter 11 Cases and all payment of postpetition interest and fees should be subject to both recharacterization and disgorgement.

- **Budget and Professional Fee Inequality**. The Budget fails to provide a breakdown of professional fees by party. The Committee believes the Budget was prepared excluding professional fees for Committee professionals. The Committee seeks confirmation that a reasonable and comparable monthly allowance for professionals fees for the Committee be included in the Budget.

- **The Committee Challenge Period Must be Extended**. The Final DIP Order unduly limits the time period for the Committee to undertake its investigation regarding the extent and validity of the liens on the Prepetition Secured Obligations to May 12, 2017[14] (*i.e.*, less than twenty (20) days after entry of the Final DIP Order if it is approved at the hearing on April 25, 2017). By the Committee Confirmation Scheduling Motion, the Committee has sought an adjournment of the Combined Hearing to consider confirmation of the Plan to June 15, 2017. As a result, the Committee requests the Challenge Deadline be extended to the *later* of sixty (60) calendar days from the date of formation of the

[14] The earliest of (i) sixty (60) calendar days from the date of formation of the Committee and (ii) the date of the commencement of the hearing to consider confirmation of a chapter 11 plan (currently scheduled for May 12, 2017) (the "Challenge Period"). *See* Final DIP Order ¶ 17.

Committee and (ii) the date of the commencement of the hearing to consider confirmation of a chapter 11 plan, with the right to seek further extension by agreement and/or for cause shown (the current proposed DIP Order only permits extension by agreement of the parties).

- **Automatic Remedial Rights Must be Modified**. The proposed Final DIP Order provides that, upon expiration of the Remedies Notice Period, the automatic stay provisions of section 362 of the Bankruptcy Code are modified to permit the DIP Parties and Prepetition Secured Parties to pursue all remedies. *See* Final DIP Order ¶ 22. To the extent the Court approves the DIP Financing, the Committee believes the rights and remedies upon an Event of Default should be revised to (a) extend the Remedies Notice Period to ten (10) business days; (b) expressly provide that the DIP Parties and Prepetition Secured Parties may not foreclose on the their collateral without further order of the Court; and (c) permit the Debtors the right to seek to continue using Cash Collateral on a nonconsensual basis.

- **506(c) and Marshalling Waivers Should be Stricken**. The Debtors are seeking a waiver of the estates' right to surcharge collateral pursuant to section 506(c) of the Bankruptcy Code. *See* Final DIP Order ¶ 32. Section 506(c) of the Bankruptcy Code is borne out of a rule of fundamental fairness for all parties-in-interest, providing that secured creditors share some of the burden of administration in a bankruptcy case where it is reasonable and appropriate for surcharges to be ordered, and, importantly, estate assets are to be protected for the sole benefit of secured parties. The proposed waiver of section 506(c) is particularly egregious in this case because it is undoubtedly being run primarily for the benefit of the Prepetition Secured Parties.[15] Indeed, the Debtors' Plan and Disclosure Statement assert that there will not be recoveries for unsecured creditors of the U.S. Debtors. Additionally, the proposed Final DIP Order provides that upon entry of the Final DIP Order, the DIP Parties and Prepetition Secured Parties shall not be subject to the equitable doctrine of marshalling. *See* Final DIP Order ¶ 32. The waiver of marshalling rights should not be permitted. As such, the Committee submits the section 506(c) and marshalling waivers should be eliminated from the Final DIP Order.

- **522(b) Equities of the Case Waiver Should be Preserved**. The proposed Final DIP Order seeks an inappropriate waiver of the "equities of the case" exception to section 552(b) of the Bankruptcy Code as it relates to the Secured Parties and should be denied. *See* Final DIP Order ¶ 33; *see also In re Metaldyne Corp.*, No. 09-13412 MG, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009)

[15] Courts routinely reject the waiver of surcharge rights under section 506(c). *See In re The Colad Group, Inc.*, 324 B.R. 208, 223-24 (Bankr. W.D.N.Y. 2005) (refusing to approve postpetition financing agreement to the extent that the agreement purported to modify statutory rights and obligations created by the Bankruptcy Code prohibiting any surcharge of collateral under section 506(c)). In *Hartford Underwriters*, the Supreme Court of the United States ruled that only the debtor is vested with standing to seek administrative surcharges under section 506(c) of the Bankruptcy Code. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). Thus, following *Hartford Underwriters*, if this Court approves the abrogation of the Debtors' section 506(c) rights, all parties-in-interest, including any subsequently appointed trustee, could lose this valuable Bankruptcy Code protection resulting in a severe detriment to the estates and their creditors thereof.

(declining to prospectively waive the equities of the case exception to section 552(b)); *see also In re iGPS Co. LLC*, No. 13-11459 (KG), 2013 WL 4777667, at *5 (Bankr. D. Del. July 1, 2013) (declining to waive the section 552(b) exception with respect to committee of unsecured creditors). The Committee believes that at a minimum, paragraph 33 of the Final DIP Order should reflect that the waiver does not apply to any party that obtains standing on the Debtors' behalf. *See, e.g., In re Residential Capital, LLC*, No. 12-12020 MG (Bankr. S.D.N.Y. June 25, 2012) [Docket No. 491] ("equities of the case" exception contained in section 552(b) would be waived only as to the debtors with respect to the prepetition collateral). The Committee does not seek a Court order applying the "equities of the case" exception at this time, but merely to preserve the ability to seek such a determination during the course of these cases.

- **Release Provisions are Inappropriate Outside of the Plan**. The release provisions contained in the paragraph 17(d) of the proposed Final DIP Order are overly broad, inappropriate outside of a plan of reorganization and should be stricken.

- **The Committee Should be Provided with Copies of Reports**. The Final DIP Order should require that all reports provided to the DIP Parties and Prepetition Secured Parties under the Final DIP Order or the DIP Credit Agreement, variance reports, financing reports, notices of default etc., should be provided to the Committee as well.

- **Committee Review and Comment Rights Must be Expanded**. The Final DIP Order should expressly provide the Committee with review and comment rights with respect to the Budget and amendments, supplements or modifications thereto.

## II. The Investor Protection Motion and Canadian GUC Motion Should be Considered At Plan Confirmation

23. By the Investor Protection Motion, the Debtors seek to pre-approve certain provisions of the Plan Funding Agreement prior to consideration of the actual agreement at confirmation of the Plan. Similarly, the Canadian GUC Motion seeks to implement aspects of the proposed Plan by authorizing the payment of Canadian general unsecured creditors on account of their prepetition claims during the Chapter 11 Cases. The Plan Funding Agreement and the proposed distribution to creditors are an integral component of the Plan and should be considered at confirmation.[16]

[16] The Debtors submit that the Plan Investor "has required that the Debtors obtain relief in [the] Motion within 35 days of the Petition Date." *See* Investor Protections Motion ¶ 6. The Debtors would have this Court believe that any

**A. The Investor Protection Motion**

24. In the event the Debtors decide to move forward with the Investor Protection Motion at this time, such relief must be denied. The Debtors propose to pay a $12 million Termination Fee (*i.e.*, 4.5% of the estimated Final Purchase Price)[17] if, for instance, the Debtors abandon pursuit of the Plan in favor of an alternative structure which maximizes value of the Debtors' estates for all stakeholders. Binding the estates to the Termination Fee should be denied because it is not in the best interest of the Debtors' estates. There is a high likelihood that the Court may extend the confirmation schedule or deny confirmation of the Plan – both actions that would (if approved) trigger the estates' obligation to pay a $12 million Termination Fee. Under those circumstances, the payment of a Transaction Fee is unwarranted.

25. Moreover, while "break-up fees" are common during a robust marketing and auction process, the requested protections here are not designed to protect the buyer during the auction process. In fact, the Debtors are also seeking approval of certain "Investor Protections" which act as a no-shop provision and contain extremely restrictive terms upon which the Debtors may negotiate Alternative Transactions or enter into Superior Proposals. *See* Plan Funding Agreement § 6.7. Approval of such Investor Protections will have the adverse effect of

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further delay in consideration of the relief requested in the Investor Protections Motion may cause the Plan Investor to terminate the RSA and Plan Funding Agreement and walk away from the proposed transaction. The Committee would prefer the risk of the Plan Investor walking now, given the likelihood of triggering the Termination Fee in the event the motion is approved.

[17] Not only is a Termination Fee inappropriate given the lock-up provisions proposed, but the fee is above-market. *See, e.g.*, *In re Integrated Res., Inc.*, 147 B.R. 650, 662-63 (S.D.N.Y. 1992) (Mukasey, J.) (approving a break-up fee that is 1.6% of the proposed purchase price and noting testimony that the industry average is 3.3%); *In re MSR Hotels & Resorts, Inc.*, No. 13-11512 (SHL), 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013) (Lane, J.) (denying a breakup fee where no evidence of the size of the transaction had been provided despite testimony that the fee would not exceed 3%); *In re: Genco Shipping & Trading Ltd.*, 509 B.R. 455, 465 (Bankr. S.D.N.Y. 2014) (Lane, J.) (approving a $26.5 million termination fee that is 2.2% of the committed purchase price of more than $1.2 billion); *In re Metaldyne Corp.*, 409 B.R. 661, 670 (Bankr. S.D.N.Y. 2009) (approving a break-up fee and expense reimbursement totaling less than 3% of the purchase price) (Glenn, J.); *In re Chrysler LLC*, No. 09-50002 (AJG), 2009 WL 1360869, at *3 (Bankr. S.D.N.Y. May 7, 2009) (Gonzalez, J.) (order approving a breakup fee representing less than 1.75% of the cash portion of the purchase price, noting that the purchaser was not entitled to any other fees or expenses).

hindering or deterring higher and better offers to the detriment of the estate.[18] Unlike typical "prepackaged plans", the Plan contemplates no recoveries to holders of unsecured claims against the U.S. Debtors. The Debtors cannot be precluded from taking all actions possible to maximize value to its creditor constituencies.[19]

B. **Canadian GUC Motion**

26. The glaring flaw of the Canadian GUC Motion is that it presumes that the Plan will be confirmed. However, like the Plan, the Canadian GUC Motion discriminates between U.S. and Canadian general unsecured creditors. It cannot be approved at this time for the same reasons the Plan is noncomfirmable. Neither the Canadian GUC Motion nor the Plan provides a sufficient justification for the disparity in treatment between the unsecured creditors of the Canadian Debtors and the U.S. Debtors. Notably, the Debtors cite to several cases where courts have authorized the current payment of general unsecured creditors prior to confirmation of the Plan. *See* Canadian GUC Motion ¶ 23. Unlike the case at hand, in each of the cited cases, all unsecured creditors were left unimpaired under the Plan. Here only general unsecured creditors of the Canadian Debtors are proposed to be paid in full while general unsecured creditors of the U.S. Debtors are projected to receive no distribution. The Committee represents all general unsecured creditors and cannot support preferring certain similarly situated creditors over others. However, whether such disparate treatment is permissible is an issue for confirmation of the Plan.

[18] The Plan Funding Agreement does not purport to limit the Debtors' ability to exercise their fiduciary duties to act or refrain from acting but any such exercise of fiduciary obligations may, nevertheless, result in a breach of the Plan Funding Agreement and the triggering of the Termination Fee.

[19] Given these circumstances, the Committee is evaluating whether the Debtors should reopen the marketing process. As a result, the relief requested in this Investor Protections Motion is premature.

## III. The Terms of the KBW & Miller Buckfire Retention Must be Clarified or Modified

27. While the Committee does not object to the retention of Keefe, Bruyette & Woods, Inc. and Miller Buckfire & Co., LLC as investment bankers ("KBW & Miller Buckfire"), the Committee believes terms of the proposed retention of KBW & Miller Buckfire as investment banker must reflect the facts and circumstances of these Chapter 11 Cases. The Committee has questions regarding the calculation of any Contingent Fee (as defined below) earned by KBW & Miller Buckfire in these Chapter 11 Cases.

28. As proposed, in addition to a Monthly Service Fee of $50,000, upon the closing of a Transaction, KBW will receive non-refundable cash fee (the "Contingent Fee") equal to 1.10% of the *aggregate consideration* paid for the Company in the Transaction. In the event a Transaction is completed and the Contingent Fee is therefore due and payable to KBW, the aggregate amount of the Monthly Services Fee and the Opinion Fee, to the extent then-previously paid to KBW, will be credited against the Contingent Fee. Pursuant to the engagement letter, annexed to the Application to Employ KBW & Miller Buckfire as Exhibit 1, the term "aggregate consideration" is defined as follows:

> the total amount of cash and the fair market value on the date, of closing or on such other date as may be set forth herein, of all other property paid or payable by the Buyer directly or indirectly to the Company and its securityholders in connection with a Transaction (including amounts paid by Buyer or the Company to holders of any warrants or convertible securities of the Company and to holders of any options or stock appreciation rights issued by the Company, whether or not vested) plus the value of any debt or preferred stock obligations of the Company assumed by the Buyer, or retired or defeased in connection with the Transaction . . . If the Transaction involves the acquisition of all or substantially all of the operating assets of the Company, the term "aggregate consideration" shall not include (x) the value of any assets not sold to Buyer, or (y) the value of any accrued liabilities not assumed by Buyer. Any amounts to be paid by the Buyer contingent upon future events shall be estimated for purposes of the fee calculation at an expected value mutually agreed to by KBW and the Board at the time of closing, except that amounts held in escrow shall be deemed paid at the closing.

Engagement Letter, at 4. According to the Debtors, the Plan and Plan Funding Agreement contemplate obtaining a new money investment by the Plan Investor of $405,100,000 (subject to purchase price adjustments which the Debtors estimate will result in a final purchase price of approximately $264 million) in exchange for 100% of the equity of those Debtor entities that are being reorganized.

29. While the Committee does not dispute that KBW will be entitled to a Contingent Fee in connection with the consummation of the transaction contemplated pursuant to the Plan and Plan Funding Agreement, the Committee believes the calculation of "aggregate consideration" should be limited to the final purchase price of approximately $264 million received by the Debtors and requests that the order be clarified or modified accordingly.

## RESERVATION OF RIGHTS

30. The Committee reserves its rights to supplement, modify and amend this Objection in writing or orally at the final hearing on Motions.

## CONCLUSION

**WHEREFORE**, the Committee respectfully requests that the Court deny Motions unless the issues, objections and concerns of the Committee are adequately addressed.

Dated: April 20, 2017
New York, New York

**ARENT FOX LLP**

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*Proposed Counsel for the Official Committee of Unsecured Creditors*

**Exhibit A**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | | |
|---|---|---|
| **IN RE:** | ) | Case No. 09-13446 |
| | ) | (JOINTLY ADMINISTERED) |
| **TRUE TEMPER SPORTS, INC., et al.** | ) | Chapter 11 |
| | ) | |
| | ) | Courtroom 2 |
| | ) | 824 Market Street |
| **Debtors.** | ) | Wilmington, Delaware 19801 |
| | ) | |
| | ) | November 30, 2009 |
| | ) | 1:29 P.M. |

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

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understand how we could value this transaction at anything less than 100 -- the roughly $105 million that is being provided by the -- that is being provided to the first lien lenders. Certainly the projections that have been attached to the various declarations that have been submitted to this Court show that there is the ability for the company to service this $35 million so there can be no question as to whether that is a discounted -- whether you can discount the value of that $35 million.

So, we would -- we would argue, Your Honor, that anything in excess of that has to be value, and has to show that the first lien lenders are in the money and are entitled to what is now roughly $928,000 that is going to be made out of that account to the second lien lenders.

Again, there is a second lien lender that didn't vote in favor of the plan and will receive its portion of that distribution. The remainder would go to the trade account, which would be used to fund the trade.

Your Honor, we have worked long and hard to try to preserve as much value for as many creditor constituencies as we possibly can here. The plan that has been provided has been proposed, and has been voted on, again, overwhelmingly by the first and second lien lenders, provides value far in excess of what was available under third party scenarios, far in excess of what was proposed to the company by the first lien lenders,

treats trade by payment through a trade account in full, and leaves, Your Honor, roughly 21 general unsecured claimants. Again, I am excluding the two professionals with nominal claims in the -- in Gilbert Global on account of its rejection claim. Relieves those -- leaves those three -- those claimants with no recovery. It's impossible for me say, Your Honor, whether there is real value to those claims or not. They have not -- people have had an opportunity to show up, nobody has showed up. Nobody has sought to participate on a creditors' committee. There has been no creditors' committee that was appointed. Nobody has showed up at the 341 meeting, other than the United States Trustee's Office and a representative of the IRS. I just -- I think that --

THE COURT: Let me ask you this. Are you aware of any court approving this type of plan as a prepack?

MR. HYMAN: I don't have precedent for the approval of this type of plan as a prepack, Your Honor. I do believe that most prepacks involve a cramdown of some sort, whether it is of equity or otherwise.

THE COURT: But typically --

MR. HYMAN: I don't think --

THE COURT: And I can't remember a prepack that did not allow general unsecureds to pass through.

MR. HYMAN: Your Honor, I don't know whether that is or is not the standard, Your Honor. Whether or not we can --

(Attorneys engaged in off the record colloquy)

MR. HYMAN: Your Honor, just to clarify something from earlier. Because the company is assuming all of the insurance policies under the plan of reorganization, to the extent that any of those claims were entitled to insurance, presumably they would be entitled to payment under the insurance policies. The amount that those claimants would be out would be that deductible amount, which is the roughly $100,000 per claim.

(Attorneys engaged in off the record colloquy)

MR. HYMAN: I apologize, Your Honor. Under the terms of the plan, the insurance policies would be paid, to the extent that they were covered by insurance. And the deductible would be paid, as well.

MS. QUIRK: And, Your Honor, just for a point of reference. In -- if you have the plan handy -- it's Page 35 -- 35 of the plan, the bottom of the page covers insurance policies.

THE COURT: I'm sorry. Page 35 of the plan?

MS. QUIRK: Page 35 of the plan. It's Article 7(d) covering insurance policies, which specifically provides that all the insurance policies are going to be treated as executory contracts and assumed under the plan.

Then it later essentially indicates that subject to the rights and remedies of the debtors under agreements. But

our understanding of this provision and the intent is the insurance policies would be assumed. So, if this plays out with the concern Your Honor has with respect to these pending litigation claims, if the insurance policies are assumed, and the debtor takes on the obligations of paying the deductibles, to the extent they have a liquidated claim, they could go after the insurance proceeds.

THE COURT: Yeah, but if their claim is discharged, how can they go after insurance?

MS. QUIRK: Well, Your Honor, I guess the insurance companies could argue that they don't have a claim. But the policies themselves would be assumed.

MR. WARGIN: Matt Wargin, Your Honor. I think it's pretty common when you get relief from the -- you can get relief from the stay to proceed just against the insurance, and just against the insurance proceeds. And I think it's a similar situation here because we would be able to proceed against the insurance.

THE COURT: But under your plan, the claim is discharged.

MR. WARGIN: As to the debtor.

THE COURT: It's wiped out. It doesn't exist.

MR. LEVY: As to the debtor. Rick Levy on behalf of the --

THE COURT: That's not the way I read it. It says

it's discharged.

MR. LEVY: Well, why don't we clarify -- why don't we clarify it? If there's any -- if it's ambiguous, we can clarify it.

MS. QUIRK: Yeah, we can make a clarifying -- add clarifying language to the confirmation order with respect to this issue specifically as it relates to insurance policies and these particular claims, if that would address Your Honor's concern.

THE COURT: I'm not quite sure how it would address them. Can you elaborate?

MS. QUIRK: Well, I think what we're considering saying here --

THE COURT: And can we agree that the insurance companies will agree with what you're doing?

MS. QUIRK: Well, that, Your Honor, is tough. I mean it would be a confirmation order. But I'm -- I'm sure they would argue that they whatever rights and defenses they otherwise think they --

THE COURT: Yeah, for example, if they have the right to sit back and let you pay the first $100,000, I can't deny them that right.

MS. QUIRK: And you're right, Your Honor, sometimes they do take pretty strong position with respect to meeting the deductible before you can get access to the actual policies.

But it's often a negotiated issue in bankruptcy cases where you -- you know, these claims happen to be unliquidated at this particular time. I don't know if the litigation plaintiffs would even pursue the claims because they're product liability claims, I don't even know what stage they are in the litigation. I think it's the very initial stages.

THE COURT: Okay. Well, I don't think it's a problem that we can resolve here. I have the more fundamental problem that I -- this does not comport with all of my experiences with prepacks. None of our other judges ever heard of this kind of a prepack. And there's no reported decision approving it, so far as I know.

MR. HYMAN: Your Honor, the Bankruptcy Code does allow for and contemplate prepetition solicitation. It certainly doesn't talk about whether you need to carry through general unsecured creditors. It is our view that we have comported with all of the requirements set forth in the Bankruptcy Code with respect to prepetition solicitation. We have gotten those votes.

The Code does say to the extent that there is a class of unsecured creditors or class of creditors that is deemed to reject not getting any property under the terms of the plan of reorganization, that that class doesn't have to be solicited.

In accordance with those strictures, we did not solicit the general unsecured creditor class --

THE COURT: I understand all that. But I just -- this is unprecedented. And I think the general unsecured creditors are being treated unfairly. And you say there's only 21 of them, and many of the claims are marginal.

MR. HYMAN: Um-hum.

THE COURT: But I'm -- and I'm totally battled as to why nobody objected to this, other than the U.S. Trustee.

MR. HYMAN: I think it's conceivable, Your Honor, that there isn't considerable merit in any of the claims, and parties didn't want to participate and spend the money that would be required to object.

I also don't know, Your Honor. It is a very small subset of general unsecured creditors out there. Perhaps, Your Honor --

(Attorneys engaged in off the record colloquy)

MR. HYMAN: Your Honor, we certainly could have Mr. Jenne, the CFO and Vice President of the debtors, run through the various litigation, to the extent that that would be helpful to Your Honor.

THE COURT: I'm not -- I don't know whether it would be helpful or not. But I really think I'd have to examine them -- all 21 of them, or receive evidence on all 21 of them.

MR. HYMAN: Yeah, it is -- it's only six of them, Your Honor, due to the fact that certain of them are co-plaintiffs, as well as co-defendants.

the schedule. I mean you could have somebody with a slip and fall case 20 months ago, but they just haven't sued yet.

MR. HYMAN: Yes, Your Honor. And under this formulation, that slip and fall case would be discharged pursuant to the terms of the bankruptcy case.

THE COURT: Okay. Well, I'm not sure we're there yet.

MR. HYMAN: Can I just have one minute with the United States Trustee's Office?

THE COURT: Yes.

(Pause)

MR. HYMAN: Thank you, Your Honor. I have been advised that the plan investor would be willing to allow the general unsecured claims, the unknown general unsecured claims to ride through. I think it would be our preference, Your Honor, to try to resolve this in the context of the confirmation order, as opposed to a revised plan of reorganization.

I think the United States Trustee's Office has a view that it should be an amended plan of reorganization. I think that could work from our perspective for convenience for speed, we would certainly prefer to do it in the context of a confirmation order, however, Your Honor.

MS. QUIRK: And what we would be providing, Your Honor, is just providing, Your Honor, is just a provision in

the proposed confirmation order that essentially says notwithstanding any provision of the plan, all general unsecured claims shall be reinstated. And that would, I believe, address the concerns that Your Honor raised. And we would just add that as a provision to the confirmation order. And we have the support of the agent for that change.

THE COURT: I'm not sure why you say "reinstated" because --

MS. QUIRK: We can say --

THE COURT: Because they haven't --

MS. QUIRK: -- "shall not be discharged."

THE COURT: They haven't been --

MS. QUIRK: I'm sorry.

THE COURT: -- impaired, so --

MS. QUIRK: I apologize, Your Honor.

THE COURT: You're not reinstating them.

MS. QUIRK: We will say "shall not be discharged."

THE COURT: I think even better language would be that they're not impaired.

MS. QUIRK: "Are not impaired and shall not be discharged."

MR. BUCHBINDER: Dave Buchbinder for the record.

How about something to the effect of "general unsecured claims in Class 5 shall pass through the plan unimpaired, and not be subject to the debtors' discharge."

Period.

THE COURT: That sounds good to me.

MR. BUCHBINDER: And I would prefer -- I would prefer it as an amendment to the plan, and in the confirmation order for the reason being that the plan is a new contract between the debtor and its creditors, and this is a provision that should be in the contract.

I don't think we should have people go hunting for it in the confirmation order at some future date.

MS. QUIRK: Well, Your Honor, the solution, I think, could be that we -- I mean I don't necessarily agree with him at all. I think you often times have provisions in your plan that get modified by way of the confirmation order.

So, I think the debtor would still be bound by whatever terms are in the confirmation order as amended -- as reflecting amendments to the plan.

And as Mr. Hyman mentioned, in terms of speed, this would be an easy provision to add to our confirmation order and to submit to Your Honor today, hopefully, to have our signed confirmation order, and then start the clock ticking on the appeal period so that we can close by the deadlines set forth in the plan support agreement.

THE COURT: Is the -- will the confirmation order be sent to all claimants?

MS. QUIRK: Well, Your Honor, what we have proposed,

and we can work with this a little bit, is to send what we have drafted as a notice of entry of the confirmation order to essentially everyone. And that would lay out the bar date for objection damages, the administrative claim bar date, and we could add this specific provision to that notice.

THE COURT: I'll allow it by the order, but I want the notice to very explicitly say something to the effect that "contrary to the treatment in the plan as specified for Class 5, the treatment is the claims in that class are unimpaired."

MS. QUIRK: That will be an easy fix, Your Honor, to add that specific provision.

THE COURT: So, they don't have to read the order, they don't have to read the plan. They can read a two or three-page document.

MS. QUIRK: Correct.

THE COURT: Okay.

MS. QUIRK: That's what we anticipate.

THE COURT: Okay.

MS. QUIRK: And so what we have -- what we can propose is a notice substantially in the form that you would approve, but we would obviously make the changes that you've just alluded to.

THE COURT: Okay.

MS. QUIRK: So, I can quickly add this to the confirmation order, and then submit -- hand up a copy if Your

Honor prefers.

THE COURT: Do we have any other unresolved matters, Mr. Buchbinder?

MR. BUCHBINDER: Your Honor, if the debtor is agreeing to amend the order so that Class 5 is amended such that all Class 5 claims are passed through the plan unimpaired and not subject to a discharge, I am prepared to, and I'm authorized to, withdraw the United States Trustee's objection to confirmation.

THE COURT: Okay. I had problems with the release, but this solves it because there was no way I was going to give a release with respect to claims that are denied in full. But that problem is solved now.

And let me see. I don't think I really had anything else. Let me just check my notes.

(Pause)

THE COURT: No, I have nothing else.

MR. HYMAN: Your Honor, for completeness of the record, I wonder whether, Your Honor, we should submit the declarations of Jason Jenne, the CFO and Vice President?

THE COURT: They're in the record.

MR. HYMAN: They're in the record. Thank you, Your Honor.

I have nothing else, Your Honor.

THE COURT: Are you going to try to hand up an order

today?

MR. HYMAN: We're working on that.

MS. QUIRK: Yes, Your Honor.

THE COURT: We can take a recess. Whenever you're finished, put it in through chambers.

MS. QUIRK: Okay. If that what you prefer, Your Honor. It will take me just a -- probably 30 more seconds.

THE COURT: Okay. Anything else from the United States Trustee?

MR. BUCHBINDER: Nothing, Your Honor.

THE COURT: Okay. We stand in recess.

(Whereupon, at 3:33 P.M., the hearing was adjourned.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Karen Hartmann* AAERT CET**D0475 Date: December 10, 2009

TRANSCRIPTS PLUS, INC.

**Exhibit B**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **IN RE:** | ) | **CASE NO: 16-32488** |
| | ) | |
| | ) | **Houston, Texas** |
| **SANDRIDGE ENERGY, INC.,** | ) | |
| **ET AL.,** | ) | **Thursday, June 30, 2016** |
| | ) | |
| | ) | **(3:11 p.m. to 3:33 p.m.)** |
| **Debtors.** | ) | **(4:00 p.m. to 5:15 p.m.)** |

**HEARING**

**BEFORE THE HONORABLE DAVID R. JONES,**
**CHIEF UNITED STATES BANKRUPTCY JUDGE**

**COURTROOM APPEARANCES:** **(Continued on page 2)**

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**STEVEN N. SERAJEDDINI, ESQ.**
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**Courtroom Deputy/ERO:** **Diyana Staples**

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**Proceedings recorded by electronic sound recording; transcript produced by transcription service.**

**COURTROOM APPEARANCES FOR: (CONTINUED)**

| | |
|---|---|
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| **Official Committee of Unsecured Creditors:** | **CHARLES R. GIBBS, ESQ.**<br>**Akin Gump Strauss, et al.**<br>**1700 Pacific Ave., Suite 4100**<br>**Dallas, TX 75291**<br><br>**ABID QURESHI, ESQ.**<br>**BRAD M. KAHN, ESQ.**<br>**Akin Gump Strauss, et al.**<br>**One Bryant Park**<br>**New York City, NY 10036** |
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**THE COURT:** It says what?

**MR. SERAJEDDINI:** I'm sorry?

**THE COURT:** It says what?

**MR. SERAJEDDINI:** It says that those claims are disallowed to the extent they're unable to be satisfied from unencumbered assets. But if --

**THE COURT:** It says that they're disallowed? I did not see that. Where is that?

**MR. SERAJEDDINI:** It's the last sentence, your Honor, of Paragraph 26.

**(Pause)**

**THE COURT:** I don't see a Paragraph 26. Somebody want to help me?

**MR. SERAJEDDINI:** Sure, your Honor. If I may approach, I can point it out for your Honor.

**THE COURT:** All right.

**(Pause)**

Oh, so this is different than the Order, there's been an additional paragraph.

**(Pause)**

**MR. GIBBS:** Hence our concern, Judge.

**THE COURT:** All right, now I understand.

**MR. GIBBS:** What they want is a determination today that I can't have an allowed claim under 330 --

**THE COURT:** Yeah, I get it.

**MR. GIBBS:** -- for anything over whatever the number is you pick or whatever the number is they agree to.

**THE COURT:** Yeah.

**MR. GIBBS:** And we can't live with that. We put language in our objection that we think tracks the Code and we think is appropriate, which is that to the extent we exceed the budget and it turns out to be fees for which we have an allowed claim, it will be an allowed administrative claim. That's the way the Code works, as your Honor pointed out to counsel for Second Lien Ad Hoc.

**THE COURT:** All right. Mr. Monsour?

**MR. MONSOUR:** Thank you, your Honor. I think we're looking at the carve-out wrong, because the carve-out is in the event -- if you confirm a Plan and you pay the administrative expenses to confirm a Plan, the carve-out never kicks in. What happens is, if you look on Page 29 of the Order, if there's a termination event, which means you're not going to confirm a Plan, cash collateral is going to be cut off, that's when the carve-out kicks in and there's a guaranteed minimum for the Committee of $250,000 out of the collateral, where they may not have it otherwise.

**THE COURT:** Did you read this provision? It actually says --

**MR. MONSOUR:** It says on a termination event.

**THE COURT:** -- that anything over 250 shall not be

considered for determining compliance with 1129(a)(9)(A). That's not --

**UNIDENTIFIED SPEAKER:** This has nothing to do with the carve-out.

**THE COURT:** -- that's confirmation.

**MR. MONSOUR:** Okay.

**THE COURT:** Yeah. Let me tell you all that I did not understand that. It would have been a much shorter hearing had I understood this. I am not today under any circumstances going to determine what the Committee can and can't spend and what they're entitled to. I don't have a fee application before me. I would be abrogating --

**MR. GIBBS:** You have a retention application.

**THE COURT:** I have a retention application. I would be abrogating the Bankruptcy Code if I were to approve such a provision and I just won't. If that's problematic for the Debtors and their reorganization, that's problematic for the Debtors and their reorganization.

I don't have any issue with the 507(b) provision. I don't have any issue with the marshaling provision. And I'll just say that flat out. Those two don't bother me at all. But in no way am I going to through a cash collateral order start defining what the administrative claims in the case are and aren't. I'm not about to do that.

You know, I'll rule on applications, subject to all

objections, whenever they're filed. But that's just -- that's gone -- that's just one step too far and I'm not about to entertain that.

Where does that leave us?

**MR. SERAJEDDINI:** Your Honor, I'd request that we have a minute to talk to our lenders about that.

**THE COURT:** Absolutely. Let me tell you --

Ms. Staples?

**(Court confers with clerk)**

All right, I'm going to lose my staff at 5:30. You have me until then. So I'll step down. Once you canvass -- I'll also tell you with respect to the number, I'm happy for you all to negotiate a number. I'm also happy to pick the number. And it won't bother me either way. All right? All right.

**MR. SERAJEDDINI:** Okay, thank you.

**MR. MARCUS:** Your Honor, can I just share with the Court --

**THE COURT:** Yes, sir, of course.

**MR. MARCUS:** -- one brief comment? I just wanted to make it clear that when your Honor had asked is there a disagreement, I'm not -- you were looking at me and I was shaking my head. I wasn't trying to mislead your Honor, I read it the way your Honor had read it.

**THE COURT:** Right.

**MR. MARCUS:** And that's completely my fault. So I also was --

**THE COURT:** All fine.

**MR. MARCUS:** -- not aware that this was an issue. I apologize.

**THE COURT:** I'll let you guys work on this. That's --

**MR. TENZER:** Your Honor, both in the interest of resolving the matter and making sure your staff can get home at 5:30, and the reason that I had come to the podium is I just wanted to clarify that what was troubling the Court was the language that was in there regarding the non-allowance of the administrative claim, but not, as you say, as a number. Certainly I, and I believe Mr. Schaible, are willing to live with the 250 without that language in there. If that satisfies the Committee, we're done.

**THE COURT:** Well, maybe more importantly, if it satisfies the Court.

**MR. TENZER:** Your Honor, yes.

**THE COURT:** And I will just tell you, I mean I'm perfectly happy to give you all a couple minutes if you want to talk.

**MR. SCHAIBLE:** We're fine to concede, your Honor --

**THE COURT:** All right.

**MR. SCHAIBLE:** -- concede that.

**THE COURT:** All right. And so you offered earlier -- I just want to make sure Mr. Gibbs knows what his options are. Both of you echoed earlier that you had no objection to the Committee coming back if they thought that they needed more. Is that offer still available?

**MR. SCHAIBLE:** Yes, your Honor.

**MR. TENZER:** Yes, your Honor.

**THE COURT:** All right. With that caveat, and I'll certainly listen to arguments to the contrary, with the understanding that the language that we talked about regarding the 1129 issue is coming out, so it's a what I'm going to call a conventional carve-out of 250, subject to 330 limitations and wherever the Plan confirmation process goes, it goes.

You know, without -- Mr. Gibbs, I'll hear any argument you want make. But to me that sounds like an entirely appropriate place to go and I'll -- if you think that it's not, I'll -- I now understand the argument you were making about 330 and no cap. I read the provision all wrong and I didn't understand your argument and I apologize for not understanding your argument, because now I do. So I get it.

**MR. GIBBS:** To the extent a paid litigant comes here and makes an argument that the Court doesn't understand, I think I should be the one making the apology, your Honor.

**THE COURT:** Not at all, because I read the Order wrong. I was operating off a fact that you and I were looking

at entire different and -- I mean I hope you would agree that looking at it my way, the argument was hard to understand. Given what you had read and you were in fact right, and I'll put that on the record, you were right --

**MR. GIBBS:** I'd prefer --

**THE COURT:** -- it may --

**MR. GIBBS:** I prefer Mr. Laurinaitis's adjectives.

**(Laughter)**

**THE COURT:** Fair enough.

**MR. GIBBS:** I'll settle for that.

**THE COURT:** It makes perfect sense. So if we can modify the Order in that regard, get it done, get it uploaded, let Mr. Alonzo know, and I will sign it as soon as you tell me that it's there. All right? And make sure to run it by Mr. Gibbs to include the language regarding the ability to come back and to strike the language on -- that deals with the 1129 issue. I'll leave it there.

**MR. GIBBS:** Do I understand that the Court is also inclined to grant the 507(b) super priority admin claim for the lenders, to the extent they have one proved up in the case --

**THE COURT:** I don't think --

**MR. GIBBS:** -- on proceeds?

**THE COURT:** I think the Code simply envisions it and so I don't think it's inappropriate. I think it is within the range of reasonable business judgment. I am approving that.