

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

In re:

LE-MAR HOLDINGS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 17-bk-50234-RLJ

(Jointly Administered)

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS FOR AN ORDER APPOINTING A CHAPTER 11 TRUSTEE**

The Official Committee of Unsecured Creditors (the “Committee”) of Le-Mar Holdings, Inc. (“Le-Mar”), *et al.*, the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), by and through its undersigned counsel, hereby files this motion (the “Motion”) for an order appointing a chapter 11 trustee pursuant to 11 U.S.C. § 1104(a). In support of this Motion, the Committee submits the *Declaration of Carol Cabello in Support of Motion of the Official Committee of Unsecured Creditors for an Order Appointing a Chapter 11 Trustee*, attached hereto as **Exhibit A** (the “Cabello Declaration”). In further support of the Motion, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Debtors face a fundamental cash crisis that can only be remedied by an impartial trustee prepared to act in the best interests of all stakeholders. The Debtors are party to valuable contracts with the USPS, but incumbent management is woefully incapable of managing

¹ The Debtors in these jointly administered Chapter 11 cases are: Le-Mar Holdings, Inc., Edwards Mail Service, Inc., and Taurean East, LLC.

the Debtors' books and records competently – let alone restructuring the Debtors' overall business operations, leading to a complete erosion of creditor confidence in the Debtors' rehabilitation.

2. The Debtors are barely cash flow positive and have incurred, and continue to incur, administrative expenses that exceed any projected cash on hand. These administrative expenses result from the Debtors' decision to delay payment to their equipment lessors for the first 60 days of these cases, which predictably has created a hostile environment with vendors critical to the Debtors' operations. A brief review of the docket reveals countless motions to lift the stay or to compel the debtors to assume or reject leases for necessary equipment due to postpetition nonpayment and ongoing failure to pay budgeted administrative claims following the initial 60-day period.

3. Absent principled and disciplined financial management and oversight, the Debtors' eroding cash position will only get worse and descend deeper into administrative insolvency. There is no long-term or short-term business plan. The most recent budget concludes on January 31. While that budget projects a razor-thin cash margin, it relies overwhelmingly on projected cost savings the Debtors have completely failed to implement. That failure compounds flaws and unsustainable projections advanced in prior budgets. When the budget is rationalized to include payment of all administrative claims, it is abundantly clear that, absent the appointment of a skilled and fiscally disciplined trustee, the Debtors will not have enough cash to satisfy their administrative obligations or any prospect for confirming a plan.

4. The Debtors' gross mismanagement stems long before these bankruptcy cases were filed. In the months prepetition, management inexplicably ceded control of the Debtors to a convicted felon and made avoidable fraudulent and/or preferential transfers to third parties for the

benefit of this criminal. The Debtors made these payments when they were not able to make payroll, putting the lifeblood of their business at risk for no appreciable benefit.

5. Finally, the Debtors' books and records are in total disarray. The Debtors do not possess reviewed financial statements for 2016, the tax returns and financial statements provided contain unexplainable gaps and inconsistencies, and intercompany transactions cannot be reconciled. The tax returns are missing schedules and the financial statements reveal inappropriate shifting of expenses and inexplicable variances in fees and expenses. There is no way the Debtors can reorganize without a clear, coherent understanding of their finances. The Debtors are obligated to provide, and the creditors are entitled to, an accurate picture of the Debtors' financial condition. Current management is incapable of providing this information. A chapter 11 trustee is required to gain control over the Debtors' books, records and business to implement a viable exit strategy. The best interests of these estates and their creditors demand nothing less.

BACKGROUND

6. On September 17, 2017 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas. Since the Petition Date, the Debtors have remained in possession of their assets and continued to operate and manage their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Except for this Motion, no request has been made for the appointment of a trustee or examiner in these cases.

7. The Committee is comprised of: (i) Ryder Truck Rental Inc. ("Ryder"); (ii) Volvo Financial Services Leasing Co.; and (iii) North American Dispatch.² On October 17, 2017, the

² Docket Nos. 115, 134.

Committee selected Kelley Drye & Warren LLP as its lead counsel. The Committee also selected Tarbox Law, P.C. as its local counsel and Province, Inc. (“Province”) as its financial advisor.

A. The Debtors’ Business

8. The Debtors provide freight delivery services to the United States Postal Service (the “USPS”) pursuant to more than twenty renewable contracts (collectively, the “USPS Contracts”).³ The USPS is the Debtors’ only customer, and any payments to the Debtors (current or future, the “USPS Payments”) under the USPS Contracts are the Debtors’ sole source of income.⁴

9. The Debtors operate a fleet of over 250 tractor-trailers, trucks, vans and cars that enable the Debtors to perform under the USPS Contracts.⁵ Ryder owns approximately 115 of these vehicles and is the Debtors’ largest equipment lessor.⁶ The Debtors own approximately 79 vehicles,⁷ and the Committee believes the remaining vehicles are owned by other equipment lessors.

10. Under the USPS Contracts, the USPS typically pays Debtors at the end of each month.⁸ As an accommodation to the Debtors, the USPS had been making weekly payments to the Debtors and, upon information and belief, is currently making bi-weekly payments.

³ Declaration of Chuck C. Edwards in Support of the Chapter 11 Petition and First Day Motions (the “First Day Affidavit”), Docket No. 11 at ¶¶ 3-4.

⁴ Id. at ¶ 3.

⁵ Id. at ¶ 5.

⁶ Supplement to Objection to (I) Debtors’ Emergency Cash Collateral Motion; (II) Cash Management Motion; and (III) Wages Motion at ¶ 15 (“Ryder Supplemental Objection”). Docket No. 97.

⁷ Id.

⁸ See Highway Contract Route dated March 20, 2015 at Clause B-74, attached as Exhibit A to Debtors’ Omnibus Reply in Further Support of (I) Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders; (II) Cash Management Motion; and (III) Wages Motion (the “Debtors’ Reply”). Docket No. 114.

B. Events Leading to the Petition Date

11. Since 2014, the Debtors have faced serious cash flow issues.⁹ According to the Debtors, new regulations dramatically increased the costs to maintain and operate the Debtors' fleet of vehicles.¹⁰ As cash flow tightened, the Debtors were forced to factor the USPS Payments pursuant to financing arrangements with City Bank and Mobilization Funding, LLC ("Mobilization").¹¹

12. In late spring of 2017, the Debtors retained Mario Figueroa ("Figueroa"), a convicted felon,¹² to assist with business operations.¹³ In the months preceding the Petition Date, Chuck Edwards ("Edwards"), the Debtors' Chief Executive Officer, executed a power of attorney on behalf of Le-Mar that ceded complete control of the Debtors' financial affairs and operations to Figueroa.¹⁴ Upon information and belief, Figueroa acted on the Debtors' behalf in negotiating loans and engaging professionals for the Debtors with respect to these cases.¹⁵

⁹ First Day Affidavit at ¶ 13.

¹⁰ *Id.*

¹¹ *Id.* ¶¶ 13-18.

¹² *See Judgment in a Criminal Case*, Case No. 3:05-cr-00181-AET (D.N.J. Jan. 29, 2009) (the "Judgment") attached hereto as **Exhibit C**, finding Figueroa guilty of (a) conspiracy to commit securities fraud and (b) securities fraud, and ordering Figueroa to make restitution in the amount of \$24,930,431. The Committee requests that the Court take judicial notice of the Judgment.

¹³ *Objection to Application of Debtors for Entry of an Order Pursuant to 11 U.S.C. §§ 327(A), 328 and 1107(B), Fed. R. Bankr. P. 2014 and 2016, and Bankruptcy Local Rule 2014 – 1 Authorizing Retention and Employment of Moses & Singer LLP as Counsel to the Debtors, Nunc Pro Tunc to the Petition Date* (the "Mobilization Retention Objection"). Docket No. 115. Recorded transcript of meeting held pursuant to section 341 of the Bankruptcy Code (the "341 Meeting") on October 20, 2017 at 56:00 – 57:58 (discussing retention of Figueroa); 1:15:58 – 1:16:51 (discussing fact that Figueroa is a convicted felon). The recorded transcript of the 341 Meeting can be obtained by contacting the U.S. Trustee.

¹⁴ 341 Meeting, at 54:53 – 56:00; 1:17:35 – 1:17:53.

¹⁵ Mobilization Retention Objection, at ¶ 12; 341 Meeting at 55:18 – 55:30 ("my intent was to have [Figueroa] negotiate on [Le-Mar's] behalf for some settlements and stuff"); 1:12:12 – 1:14:34 (discussing diversion of Debtors' funds into bank account controlled by Figueroa).

13. On August 2, 2017, Edwards requested that Mobilization disburse (a) \$1,039,591.50 to pay certain specified operational expenses of the Debtors, and (b) \$597,139 payable to First Sun Capital, LLC (“First Sun”), a Figueroa affiliate.¹⁶ Although Mobilization did not make the requested disbursement to First Sun, Edwards diverted \$525,000 of the \$1,039,591.50 earmarked for operations to First Sun (the “Figueroa Transfer”).¹⁷

14. On August 28, 2017, Figueroa submitted to Mobilization a budget for the Debtors that allocated hundreds of thousands of dollars for payment of Figueroa’s purported commissions, consulting, and success fees.¹⁸ This budget was submitted just weeks before the Petition Date, when the Debtors were desperately seeking loans from both City Bank and Mobilization to meet payroll.¹⁹

15. Mobilization ultimately cut off funding, leaving the Debtors unable to pay their equipment lessors.²⁰ These lessors sent notices of default, and the Debtors filed these cases to avoid termination of their truck leases.²¹

¹⁶ Mobilization Retention Objection, at ¶ 10; 341 Meeting at 1:07:51 – 1:08:49.

¹⁷ Mobilization Retention Objection, at ¶ 11; *see also Affidavit of Scott Peper in Support of Creditor Mobilization Funding, LLC’s Objection to Debtors’ Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders (the “Peper Affidavit”)* at ¶ 37, Docket No. 100; *Statement of Financial Affairs of Le-Mar Holdings, Inc., Part 2, § 3.27*; 341 Meeting at 1:07:51 – 1:08:49.

¹⁸ Mobilization Retention Objection at ¶ 14.

¹⁹ *See City Bank’s Response and Limited Objection to Debtor’s Emergency Motion to Use Cash Collateral and Wages Motion*, ¶¶ 8-9, Docket No. 34; Peper Affidavit at ¶ 20.

²⁰ First Day Affidavit at ¶ 19; Peper Affidavit at ¶ 37.

²¹ *Id.*

C. Events During the Bankruptcy Cases

(i) Failure to Pay Administrative Expenses

16. The Debtors and their creditors have had an acrimonious relationship since the outset of these cases. Given their continued cash flow issues, the Debtors did not pay their equipment lessors during the first 60 days postpetition.²² Ryder alone asserts an administrative claim of at least \$400,000 for the first 60 days of these cases.²³ Other equipment lessors are similarly situated and will have valid administrative claims for their postpetition services. While the Debtors may challenge the liquidated amount of these claims, it is undisputed that claims for the postpetition use of equipment during the 60-day period are valid administrative expenses that must be paid before a plan can be confirmed.²⁴

17. The docket of these cases amply reflects the Debtors' failure to satisfy their administrative obligations. In addition to Ryder,²⁵ the following creditors also have moved to compel the Debtors to make postpetition payments and/or to lift the automatic stay: (a) David Kehl – motion to compel payment of postpetition stub rent under a nonresidential real property lease;²⁶ (b) HP Lumina – motion to compel payment of postpetition rent under a nonresidential real

²² See *First Order Granting on an Interim Basis Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders*. Docket No. 46; *Second Order Granting on an Interim Basis Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders*. Docket No. 129.

²³ See *Supplement to Objection to (I) Debtors' Emergency Cash Collateral; (II) Cash Management Motion; and (III) Wages* at ¶ 16. Docket No. 97.

²⁴ See 11 U.S.C. § 1129(a)(9) (requiring that administrative claimants receive cash equal to the amount of their allowed claim on the effective date of a plan in order to confirm a chapter 11 plan); *Memorandum Opinion and Order* denying Ryders' motion for immediate payment of postpetition administrative claims and finding "Ryder will no doubt hold an administrative claim with the legal leverage that that provides going forward in this chapter 11 case." Docket No. 204.

²⁵ See *Ryder Truck Rental, Inc.'s Expedited Motion to Compel Payment of Post-Petition Administrative Charges and for Adequate Protection*. Docket No. 66.

²⁶ Docket No. 86.

property lease;²⁷ (c) BMO Harris Bank, N.A. (“BMO Harris”) – motion to lift the automatic stay to repossess certain equipment due to pre- and postpetition nonpayment;²⁸ (d) Ailco Equipment Finance Group, Inc. – motion to compel assumption or rejection of an equipment lease, or alternatively to lift the automatic stay, due to postpetition nonpayment;²⁹ (e) Capital Asset Resources – motion to lift the automatic stay to repossess vehicles and trailers due to postpetition nonpayment;³⁰ (f) Mintaka Financial, LLC – motion to lift the automatic stay to repossess equipment the Debtors improperly transferred to a third party who is in arrears;³¹ and (g) VFS Leasing Co. – motion to lift the automatic stay due to postpetition arrears and the Debtors’ failure to maintain the underlying vehicles.³² These pleadings demonstrate that the Debtors are failing to remain current on their administrative obligations.

(ii) Cash Collateral/Budget Issues

18. This Court has held three contested hearings on the Debtors’ use of cash collateral. A fourth interim cash collateral hearing is scheduled on January 24, 2018. In connection with the second cash collateral hearing, the Debtors submitted a six-month budget (the “Six Month Budget”) through April 2018.³³ The Six Month Budget did not provide for any payments to equipment lessors for the first 60 days’ use of their equipment. It also failed to budget the

²⁷ Docket No. 122. HP Lumina also requested that the Debtors assume or reject the lease pursuant to section 365 of the Bankruptcy Code. *See also Agreed Order Regarding Motion to (I) Require Debtors to Assume or Reject Commercial Lease, (II) to Require Debtors to Perform Lease Obligations, (III) Revoke License to Collect Third Party Tenant Rents, (IV) for Allowance of Administrative Rent Claim Including Costs and Fees* resolving the HP Lumina motion and requiring the Debtors to cure postpetition defaults. Docket No. 262.

²⁸ Docket No. 156.

²⁹ Docket No. 229.

³⁰ Docket No. 248.

³¹ Docket No. 257.

³² Docket No. 279.

³³ *See Notice of Filing of Debtors’ Proposed Second Interim Budget.* Docket No. 93.

contractual rate of payment to Ryder for periods after the first 60 days of these cases.³⁴ Even after taking these two handicaps, the Debtors only estimated having \$541,465 in cash on hand as of April 2018. If the Debtors had included payments owed to lessors, the Six Month Budget would have reflected administrative insolvency from day one.

19. Because of these significant deficiencies, along with objections to the use of cash collateral filed by Ryder, City Bank, and Mobilization,³⁵ the Court did not grant the Debtors a six month use of cash collateral. Instead, the Court limited the cash collateral period to 6 weeks.³⁶

20. On November 15, 2017, the Court held a third contested cash collateral hearing and authorized the Debtors to use cash collateral through January 2018 in accordance with an interim budget for this period (the “Interim Budget”).³⁷ The Interim Budget projects a meager \$101,516.33 in cash as of January 31, 2018.³⁸ Despite the Committee’s request, the Debtors have not provided any supplemental financial projections beyond January 31, 2018.

³⁴ The Six Month Budget did not provide for full payment to Ryder, the Debtors’ largest equipment lessor, because the Debtors intended to (but did not) file a motion to reduce the contractual payments due Ryder. See Debtors’ Reply at p. 8 (“the Debtors’ intend to file a motion under section 365(d)(5) to reduce the payments to Ryder to be consistent with the market rate for the equipment that Ryder is providing”).

³⁵ Ryder Supplemental Objection. Docket No. 97; *City Bank’s Supplemental Objection to Debtor’s Emergency Motion to Use Cash Collateral*. Docket No. 105; *Objection to Debtors’ Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders*. Docket No. 99.

³⁶ See *Second Order Granting on an Interim Basis Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders*. Docket No. 129.

³⁷ See *Third Order Granting on an Interim Basis Emergency Motion for Interim and Final Orders Authorizing Debtors to Use Cash Collateral and Granting Adequate Protection to Pre-Petition Lenders*. Docket No. 236.

³⁸ *Id.*

21. The Interim Budget projects \$396,967.67 in payments to equipment lessors for December 2017.³⁹ The Debtors have not made these projected payments and, upon information and belief, are in default under various leases.

22. The Interim Budget does not provide any payments to equipment lessors in January 2018. Instead, the Interim Budget projects \$250,000 for “Replacement Equipment.”⁴⁰ As of the filing of this Motion, the Debtors have entered into only one new agreement to lease 19 cars, with no agreements in place to replace their fleet of trucks, which the Debtors continue to use at a monthly cost of \$396,967.67. As a result, at a minimum, the Debtors will be not less than \$146,967.67 off budget in January. That discrepancy alone wipes out the limited net cash projected under the Interim Budget and demonstrates that the Debtors will be cash flow negative by the end of January.

23. The Debtors have not effectuated the cost-saving measures on which the Interim Budget relies.⁴¹ That failure will further exacerbate the Debtors’ inevitable cash shortfall. As a result, it is doubtful the Debtors will remain cash flow positive or be able to survive long-term without additional financing.

(iii) *Exclusivity Motion*

24. On December 11, 2017, the Debtors filed a motion to extend by 120 days their exclusive periods (the “Exclusivity Motion”) to file a plan (from January 15, 2018 to May 15, 2018) and solicit acceptances of a plan (from March 16, 2018 to July 17, 2018).⁴² To support the

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Equipment Lessors/Lenders, Maintenance, and Mortgage sections of the Interim Budget.

⁴² Docket No. 260. At the request of the U.S. Trustee, the Debtors have since scaled back on their initial request and are now seeking to extend their exclusive periods for an additional 60 days.

Exclusivity Motion, the Debtors contend that they have made significant progress in these cases by: (a) negotiating a settlement with Mobilization, (b) negotiating a DIP facility with City Bank, (c) entering into negotiations with a potential stalking horse for the Debtors' real estate in Grand Prairie, Texas (the "Grand Prairie Property"), (d) negotiating an amended lease for certain equipment with BMO Harris, (e) negotiating with replacement equipment lessors and lenders, and (f) making unspecified operational changes.⁴³

25. The Debtors grossly overstate their efforts and have made almost no progress in these cases. For example:

- The Debtors have not obtained new financing from City Bank. Without receiving weekly USPS Payments (which the USPS is not required to make and periodically threatened to terminate), the Debtors are unable to satisfy their postpetition obligations as they come due.
- Ryder has a right of first refusal on the Grand Prairie Property. Ryder sent the Debtors a letter of intent ("LOI") to purchase the Grand Prairie Property, which the Debtors ignored. The LOI has expired. The Debtors have not identified the stalking horse for the Grand Prairie Property with whom they are negotiating, they have not entered into a stalking horse agreement, and they have not explained why Ryder's LOI was not pursued or preserved for the benefit of creditors. Given the Debtors' precarious cash position, it is unclear whether the Debtors can sustain their current operations through a sale process or that any sale will generate material value for unsecured creditors or provide sufficient liquidity to reorganize.
- Pursuant to the motion seeking retention of a broker (the "Broker Motion"),⁴⁴ if the Debtors sell the Grand Prairie Property to Ryder or FuelSmith, LLC ("FuelSmith") the commission structure changes. FuelSmith was formed postpetition in November 2017 by, upon information and belief, a current or former employee of the Debtors who was hired immediately before the Petition Date. The Debtors have not disclosed the nature of the agreement or relationship with FuelSmith or the insider.

⁴³ *Id.*

⁴⁴ Docket No. 265.

- The Debtors have negotiated with only one of eight or more equipment lessors. The Debtors' fleet of trucks is critical to operations. The Debtors have not filed a motion to replace any trucks.⁴⁵ The Interim Budget does not provide for current payments to truck lessors beyond December 2017.⁴⁶ It is inconceivable that, in four months, the Debtors have not made any progress renegotiating and/or replacing their fleet of trucks, which are essential to the Debtors' business, and the Debtors have failed to make budgeted payments to their truck lessors.
- Although the Debtors have filed a motion to settle Mobilization's claim at \$1.1 million,⁴⁷ that settlement has not been approved and remains subject to challenge. Moreover, there are no excess funds available to pay the settlement payment, even if the settlement is approved.
- Upon information and belief, the Debtors have disputed the vast majority of postpetition invoices in order to claim that they are paying their "undisputed" postpetition debts in full. Absent such arbitrary, self-serving disputes, the Debtors would not be current on their postpetition obligations.

(iv) *Other Issues*

26. The Committee has requested numerous documents and information from the Debtors to assess the state of the Debtors' business and finances in the furtherance of the Committee's statutory duties. As set forth in the Cabello Declaration, the Debtors were slow to respond to the Committee's requests and not forthcoming or cooperative in providing data to the Committee.⁴⁸ The Debtors have not agreed to requests for in-person meetings or site visits, and have not been available to discuss the questions stemming from recent production.⁴⁹ The information the Committee ultimately received raises more questions than answers.

⁴⁵ See *Supplemental Declaration of Chuck C. Edwards in Support of the Debtors' Motions to Extend the Exclusive Periods* annexed as Exhibit B to the Exclusivity Motion, at ¶ 11 (noting that the Debtors have entered into an agreement, subject to Bankruptcy Court approval, to replace their fleet of 45 cars with brand new cars).

⁴⁶ See Interim Budget.

⁴⁷ Docket No. 282.

⁴⁸ See Cabello Declaration at ¶ 9.

⁴⁹ *Id.*

27. Prepetition, the Debtors' books and records are a mess.⁵⁰ The financial reports for 2014-2015 and the tax returns for 2014-2016 are replete with errors, gaps and discrepancies that undermine the integrity of the reported data.⁵¹ Even more troubling, there are no reviewed financial reports—reliable or unreliable—for 2016 *at all*.⁵² Based on the limited information it has received, the Committee has identified numerous issues with the Debtors' prepetition books and records, including (a) inappropriate shifting of expenses among categories and entities across several years, (b) unexplained spikes in the costs of fuel and equipment leases, (c) inexplicable revenue for Le-Mar in excess of the USPS Payments, (d) questionable adjustments and asset sales reported on the tax returns, (e) questionable management fees paid to wholly-owned subsidiaries, and (f) unreconciled intercompany transactions.⁵³ Moreover, the financial reports are not consolidated which masks the true economic picture of the Debtors' assets, liabilities, revenue, and expenses and makes it impossible to gauge the complete effect of any intercompany or shareholder loans, receivables, or payables other than what has been selectively disclosed.⁵⁴

28. The data also undermines the Debtors' purported reasons for seeking secured financing and filing these cases because repair and maintenance costs fell 45% from 2014 to 2016 and the financial reports do not reveal any specific deterioration in operations.⁵⁵ Prepetition operations were similarly mismanaged, with enormous transfers made to a felon during the Debtors' slide into bankruptcy.⁵⁶

⁵⁰ *Id.* at ¶ 10.

⁵¹ *Id.* at ¶ 11.

⁵² *Id.* at ¶ 10.

⁵³ *Id.* at ¶¶ 12-18.

⁵⁴ *Id.* at ¶ 15.

⁵⁵ *Id.* at ¶ 19.

⁵⁶ Upon information and belief, the Debtors retained prepetition and continue to pay at least one employee to negotiate truck leases and financing who, given the status of these cases, has not provided any value to these

29. Postpetition, despite being in chapter 11 for almost 4 months, the Debtors do not have a long- or short-term business plan. As set forth above, the Debtors also have failed to generate a believable and achievable cash collateral budget, and none of the Debtors' promised cost-savings measures have come to fruition. As of January 2018, the Debtors are operating on negative cash flow.⁵⁷ Absent the strict financial oversight and competent management a qualified, independent chapter 11 trustee will bring, the Debtors will run out of cash before they can propose, let alone confirm, a chapter 11 plan.

ARGUMENT

30. A debtor-in-possession "has the same fiduciary duties as a trustee appointed by a court"⁵⁸ and "holds its powers in trust for the benefit of creditors."⁵⁹ A debtor-in-possession owes creditors "the highest duties of care and loyalty," and must "protect and conserve property in its possession for the benefit of creditors."⁶⁰

31. Indeed, "[t]he willingness of Congress to leave a debtor-in-possession [in control of its assets and business] is premised on an expectation that current management can be depended upon to carry out the fiduciary responsibilities of a trustee."⁶¹ If a debtor-in-possession defaults in this duty, courts do not hesitate to replace a debtor-in-possession with a disinterested trustee who

estates. The Debtors do not have the resources to waste estate funds as their financial situation continues to deteriorate.

⁵⁷ Tellingly, despite numerous requests, the Debtors have not provided any budget to actual comparisons for the months of November and December 2017. Presumably, those comparisons will underscore the Debtors' dire cash position.

⁵⁸ *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989).

⁵⁹ *Id.* at 524-25 (collecting cases).

⁶⁰ *In re Nartron Corp.*, 330 B.R. 573, 593 (Bankr. W.D. Mich. 2005); *In re Marvel Entm't Group, Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (quotation marks omitted).

⁶¹ *In re V. Savino Oil*, 99 B.R. at 526.

will “preserve the integrity of the bankruptcy process and [] insure that the interests of creditors are served.”⁶²

32. Section 1104 of the Bankruptcy Code governs the appointment of a chapter 11 trustee. Pursuant to section 1104(a), a court must order the appointment of a chapter 11 trustee if “cause” exists, or where “such appointment is in the interests of creditors.”⁶³ Specifically, section 1104(a) states:

(a) [a]t any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

33. The standard for appointing a trustee pursuant to section 1104(a) of the Bankruptcy Code is disjunctive.⁶⁴ Subsection (a)(1) addresses management’s pre- and post-petition misdeeds or mismanagement, while subsection (a)(2) provides the court with “particularly wide discretion” to direct the appointment of a trustee even in the absence of wrongdoing or mismanagement.⁶⁵

⁶² *In re Celeritas Techs., LLC*, 446 B.R. 514, 518 (Bankr. D. Kan. 2011).

⁶³ 11 U.S.C. § 1104(a).

⁶⁴ *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989).

⁶⁵ *In re Bellevue Place Associates*, 171 B.R. 615, 623 (N.D. Ill. 1994).

A. Cause Exists to Appoint a Trustee

34. A court must appoint a trustee if “cause” exists.⁶⁶ The grounds for appointing a trustee pursuant to section 1104(a)(1) of the Bankruptcy Code are illustrative, not exhaustive, and the “court need not find any of the enumerated wrongs to find cause for appointing a trustee.”⁶⁷

35. A court may consider management’s pre- and postpetition misconduct when determining whether cause exists to appoint a trustee.⁶⁸ Other considerations include (a) the severity of any misconduct, (b) the debtor-in-possession’s evenhandedness (or lack thereof) in dealings with insiders and affiliates versus dealings with other creditors, (c) the existence of pre-petition preferences or fraudulent conveyances, (d) whether conflicts of interest impair the debtors’ ability to fulfill its fiduciary duties, (e) whether there has been self-dealing or a squandering of estate assets,⁶⁹ and (f) the “inability to formulate a business plan and make operating projections which have a longevity of more than several months” coupled with operating losses (*i.e.*, incompetence).⁷⁰

36. Here, several factors establish cause to appoint a trustee. Among other things:

- The Debtors are administratively insolvent and have not developed a short- or long-term business plan for restructuring their business and returning to profitability. They also have not provided reliable projections to establish that they are (and will remain) cash flow

⁶⁶ See *Sharon Steel*, 871 F.2d at 1226 (recognizing that “[s]ection 1104(a) mandates appointment of a trustee when the bankruptcy court finds cause”); *Oklahoma Refining Co. v. Blaik (In re Oklahoma Refining Co.)*, 838 F.2d 1133, 1136 (10th Cir. 1988); *Official Comm. Of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 285 B.R. 148, 158 (Bankr. D. Del. 2002) (where the court finds either that cause exists or that appointment is in the interest of the parties, an order for the appointment of a trustee is mandatory).

⁶⁷ *In re Oklahoma Refining Co.*, 838 F.2d at 1136; *In re Marvel Entertainment Group, Inc.*, 140 F.3d at 472; 7 Collier on Bankruptcy ¶ 1104.02[3][c] (15th ed. Rev. 2003) (noting “fraud, dishonesty, incompetence and gross mismanagement... are not the exclusive bases for finding cause for the appointment of a trustee”).

⁶⁸ See 11 U.S.C. § 1104(a)(1); *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. at 526; *In re 1031 Tax Group, LLC*, 374 B.R. at 86.

⁶⁹ *In re Keeley & Grabanski Land P’ship*, 455 B.R. 153, 163 (B.A.P. 8th Cir. 2011).

⁷⁰ *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 170 (Bankr. S.D.N.Y. 1990).

positive. To the contrary, the Debtors have mounting administrative expenses they cannot satisfy under current projections, and they have not implemented promised cost-saving measures that are necessary to conserve cash. In short, in four months, current management has failed completely to propose any viable path forward.

- Current management handed total control of the Debtors' financial affairs to a convicted felon.
- Current management requested and authorized the Figueroa Transfer, which diverted over a half a million dollars earmarked for operations to Figueroa when the Debtors could barely pay their workers. Management also authorized the payment of other fees, commissions and non-essential expenses when the Debtors were struggling to find cash to meet payroll.
- The Figueroa Transfer is an avoidable transfer that should be clawed back. It is unlikely that current management (who authorized the transfer) will cause the Debtors to aggressively pursue the avoidance of, or any other potential causes of action related to, the Figueroa Transfer.
- Management has failed to renegotiate their equipment leases, enter into new lease agreements for their trucks, or to implement other cost-saving measures despite being in chapter 11 for almost 4 months. Rather than stabilizing and improving, the Debtors' financial condition is eroding in chapter 11.

37. Simply put, current management is not up to the task of reorganizing these estates, and creditors cannot wait for management to get its act together while the Debtors descend deeper into administrative insolvency. Management has proven its inability (or unwillingness) to make the hard, disciplined decisions required to save the Debtors' business and deliver value to creditors. Cause exists to appoint a chapter 11 trustee.

B. A Trustee is in the Best Interests of Creditors

38. As an alternative, section 1104(a)(2) of the Bankruptcy Code provides for the appointment of a trustee when such appointment is in the best interest of creditors.⁷¹ Courts look

⁷¹ *Id.* at 168.

to the “practical realities and necessities” to determine if a trustee is in the best interest of the estate and its creditors.⁷²

39. Courts consider the following factors to determine whether a trustee is in the best interest of creditors: (a) the debtor’s trustworthiness; (b) the debtor’s past and present performance and prospects for rehabilitation; (c) the confidence (or lack thereof) of the business community and creditors in present management; and (d) the benefits to be derived from a trustee, balanced against the cost of the appointment.⁷³ Each of these factors supports the appointment of a trustee in these cases:

- Current management is not trustworthy because it allowed a felon to run the Debtors’ business and diverted operational funds to pay that criminal when the Debtors were desperate for cash and could barely pay their workers.
- The Debtors are cash flow negative and administratively insolvent with no ability to meet their own budget projections. The Debtors have no plan for getting out of bankruptcy, and their cash position weakens further as each day passes. They have made no material progress negotiating with their equipment lessors, nor have they endeavored to negotiate an exit strategy with the Committee. Without a trustee, the Debtors’ prospects for rehabilitation are dim.
- Creditor confidence has eroded completely. The Committee has not received basic financial data despite repeated requests and the Debtors have not been forthcoming or cooperative in providing data. The Debtors have not agreed to in-person meetings or site visits and have not made themselves available for a call to discuss the issues found in documents produced. Numerous creditors have sought stay relief due to the Debtors’ postpetition nonpayment. The Debtors are not making the payments projected under the Interim Budget, and the universe of unpaid administrative expenses continues to grow with no end in sight.

⁷² *Id.*

⁷³ *See In re Cajun Electric Power Co-Op, Inc.*, 191 B.R. 659, 661-62 (M.D. La. 1995) *aff’d* 74 F.3d 599 (5th Cir. 1996), cert. denied, 117 S.Ct. 51 (1996).

- The benefits of a trustee far outweigh the cost. A chapter 11 trustee will bring restructuring expertise and financial discipline to bear on these cases. A trustee will provide confidence to creditors that the Debtors' business is in competent hands and that key financial information is accurate and projections are reasonable. A trustee will not hesitate to pursue viable causes of action to benefit creditors. In short, a trustee can right the ship and maximize the value of the Debtors' business for creditors.

40. Based on the foregoing, the Court should appoint a trustee pursuant to 11 U.S.C. § 1104(a). A trustee is necessary to “preside in an objective and impartial manner to bring the[se] case[s] to a swift and successful conclusion.”⁷⁴

⁷⁴ *Id.* at 663.

CONCLUSION

WHEREFORE, the Committee requests that the Court enter an order in the form annexed hereto as **Exhibit B** (a) appointing a chapter 11 trustee and (b) granting such other and further relief as the Court deems just and proper.

Dated: Lubbock, Texas
January 5, 2018

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Creditors of Le-Mar Holdings, Inc., et al.*

CERTIFICATE OF SERVICE

I, Max R. Tarbox, do hereby certify that a true and correct copy of the foregoing Motion was served by either court enabled electronic service or regular first class U. S. Mail upon the following listed parties on this 5th day of January, 2018:

1. U. S. Trustee's Office
1100 Commerce Street, Room 976
Dallas, Texas 75242
2. All parties in interest registered with the
U. S. Bankruptcy Court to receive electronic
notices in this case.
3. All creditors and parties in interest
listed on the attached mailing matrix.

/s/ Max R. Tarbox

Max. R. Tarbox