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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
Quebecor World (USA) Inc., *et al*.,	Case No. 08-10152 (JMP) Jointly Administered
Debtors.	Honorable James M. Peck

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF QUEBECOR WORLD (USA) INC., *ET AL*. TO MOTION FOR ENTRY OF (I) AN INTERIM ORDER (A) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION SECURED FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(C) AND 364(E), (B) AUTHORIZING USE OF CASH COLLATERAL AND GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED LENDERS, (C) USING POSTPETITION FINANCING TO PURCHASE RECEIVABLES PORTFOLIO AND (D) SCHEDULING FINAL HEARING PURSUANT TO FED. R. BANKR. P. 4001(B) AND (C); AND (II) A FINAL ORDER AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION SECURED FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(C) AND 364(E)

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of Quebecor World (USA) Inc., *et al*. (collectively, the “Debtors”), by and through its undersigned counsel, hereby objects (the “Objection”) to the Debtors’ Motion for Entry of (i) an Interim Order (A) Authorizing the Debtors to Obtain Postpetition Secured Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c) and 364(e), (B) Authorizing the Use of Cash Collateral and

Granting Adequate Protection to Prepetition Secured Lenders, (C) Using Postpetition Financing to Purchase Receivables Portfolio, and (D) Scheduling Final Hearing Pursuant to Fed. R. Bank. P. 4001(b) and (c); and (ii) a Final Order Authorizing the Debtors to Obtain Postpetition Secured Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c) and 364(e) (the "Motion"). In support of its Objection, the Creditors' Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. By the Motion, the Debtors seek to provide the Lenders[1] under the DIP Facilities with rights and protections that are inappropriate and unauthorized under the facts and circumstances of these cases. As necessary as access to postpetition financing and the use of cash collateral are to the Debtors, pursuant to the Motion, the Debtors seek to provide the Lenders with more protection than they are entitled, to the detriment of the Debtors and their unsecured creditors and in contravention of provisions of title 11 of the United States Code (the "Bankruptcy Code"), the United States Bankruptcy Court for the Southern District of New York Guidelines for Financing Requests, adopted by General Order No. M-274, dated as of September 9, 2002 (the "Guidelines") and principles of equity.

2. The Creditors' Committee recognizes the Debtors' need for postpetition financing and supports approval of the DIP Financing and the Final DIP Order (as defined below), provided however, that the proposed Final DIP Order or DIP Credit Agreement, as applicable, contain the following modifications:

- Proceeds from Avoidance Actions. Avoidance Actions and the proceeds thereof are not property of the Debtors' estates, but are statutorily created causes of action for the benefit of unsecured creditors. As such, these assets should not be subject to any liens or claims of any of the Lenders, including adequate protection liens or superpriority claims. The Final DIP Order should make clear that neither the Lenders' liens and claims nor the

[1] All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Motion or the DIP Credit Agreement, as applicable.

adequate protection liens or superpriority claims can be satisfied from Avoidance Actions or the proceeds thereof.

- Section 506(c) Waiver. The Final DIP Order inappropriately requires the Debtors to waive their right to seek to surcharge, pursuant to Bankruptcy Code section 506, any costs of administration of the chapter 11 cases against the Collateral. Accordingly, such provision must be stricken or altered to confer such authority on the Creditors' Committee.

- Limitations on the Use of Financing Proceeds and Collateral. The Final DIP Order eliminates the ability of any party in interest (including the Creditors' Committee) to use any proceeds of the DIP Facilities, including, but not limited to the Carve-Out, to, among other things, (a) object, contest or raise any defenses to the validity, perfection, priority, extent or enforceability of any amount due under the DIP Loan Documents or the liens or claims granted under the Final DIP Order or the DIP Loan Documents, (b) assert any Claims and Defenses or other causes of action against the Agents or the Secured DIP Creditors and (c) pay any professional fees and disbursements incurred in connection with any of the foregoing actions. This provision should be modified to allow the Creditors' Committee to investigate and, if necessary, pursue causes of action utilizing proceeds of the DIP Facilities, including the Carve-Out, for bad acts, such as fraud, willful misconduct or gross negligence by the Secured DIP Creditors and the Agents, with respect to the Debtors.

- Event of Default. The Final DIP Order provides that upon the occurrence of an Event of Default, the automatic stay is vacated and modified. The Final DIP Order further provides that the only issue parties may raise at any hearing relating to an Event of Default, as defined in the DIP Credit Agreement, is whether, in fact, an Event of Default has occurred and is continuing, and the Debtors waive their right to seek relief to the extent such relief would impair or restrict the rights and remedies of the Agents and the other Secured DIP Creditors. Such a limitation is too restrictive and should be broadened to permit any parties-in-interest, including, but not limited to, the Creditors' Committee to raise any issues which may serve to maximize estate assets, and the Court should be the arbiter of all facts relevant to the circumstances giving rise to such hearing. Accordingly, this stringent limitation should be removed.

- Notice. The Final DIP Order provides that, upon "advance notice" provided to the Creditors' Committee and certain other major parties in these cases, the Debtors may make amendments to the DIP Credit Agreement without any further approval of the Court, provided that such amendments do not shorten the maturity of the extension of credit thereunder, or increase either the commitments, the rate of interest payable or letter of credit fees payable thereunder. To the extent the Debtors seek to make any "material" amendments to the DIP Credit Agreement or the DIP Loan Documents, including, but not limited to those in the preceding sentence, the Debtors should be required to obtain the prior written consent of the Creditors' Committee or, in the absence of such consent, approval by the Court. For any other "immaterial" amendments, the Debtors and the

Lenders should be required to provide counsel to the Creditors' Committee with two (2) business days advance written notice of such modifications or amendments.

- <u>Payment of Agents' Fees</u>. The Final DIP Order provides that the Debtors are authorized and directed to pay the Agent and the Arrangers for the costs and expenses provided for in the DIP Credit Agreement and the Fee Letters, as well attorneys' fees and financial advisor fees, incurred by the Agents and the Arrangers with respect to the DIP Credit Facility and all matters related to these cases. None of the costs and expenses, however, will be subject to approval of the Court, nor shall any recipient of such payments be required to file any interim or final fee application with the Court. The Creditors' Committee requests that the Agents and the Arrangers be required to submit monthly invoices for all fees and expenses of their professionals and that the Final DIP Order provide a mechanism for appropriate review of such fees and expenses by the Debtors and the Creditors' Committee and, following an attempt by the parties to resolve any disagreements regarding the reasonableness of such fees, this Court.

- <u>Other Modifications</u>.[2] A number of other modifications, set forth in detail below, should also be made to the Final DIP Order or the DIP Credit Agreement, as applicable. These include (i) modification of the definitions of "Borrowing Base Availability" and "DIP Borrowing Base" so that certain "Reserves" are only deducted once in the calculation of the Borrowing Base Availability; (ii) modification of certain provisions in the DIP Credit Agreement related to ERISA Events so that such events will no longer constitute Events of Default; (iii) eliminating the Administrative Agent's unilateral ability to determine whether an order is material for purposes of determining an Event of Default; (iv) clarifying that it will not constitute an Event of Default if the Debtors file a motion or any pleadings seeking authority to pay off the DIP Financing; and (v) limiting the Debtors' ability to implement any hedging programs or enter into Hedge Agreements without advance input and approval from the Creditors' Committee.

3. The proposed Final DIP Order and DIP Credit Agreement, as drafted, serve to benefit the Lenders, while inequitably limiting the rights and interests of the Debtors and their unsecured creditors. For all of the foregoing reasons, and as more fully described herein, the Creditors' Committee respectfully requests that the Court deny entry of the Final DIP Order unless and until the foregoing provisions are appropriately modified.

[2] During discussions with counsel to the Debtors and the Lenders, counsel to the Creditors' Committee was advised that other issues raised by the Creditors' Committee would be addressed in the DIP Credit Agreement and/or an amendment thereto. The Creditors' Committee reserves its right with respect to such additional issues if they are not so addressed.

BACKGROUND

4. On or about January 21, 2008 (the “Petition Date”), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. Since the Petition Date, the Debtors have continued in possession of their property and have continued to operate and manage their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On January 23, 2008, the Court entered an order jointly administering these chapter 11 cases pursuant to Bankruptcy Rule 1015(b) for procedural purposes only.

6. On January 20, 2008, the Debtors’ corporate parent, Quebecor World Inc., together with each of the Debtors, commenced a proceeding before the Superior Court, Commercial Division, for the Judicial District of Montreal (the “Canadian Proceeding”) for a plan of compromise or arrangement under the Canadian Companies’ Creditors Arrangement Act (“CCAA”). Each of the Debtors was joined in the Canadian Proceeding so that each such Debtor could obtain the protection of a stay under the CCAA, as well as under the Bankruptcy Code.

7. On January 31, 2008, pursuant to section 1102 of the Bankruptcy Code, the United States Trustee for the Southern District of New York appointed the Creditors’ Committee.[3]

The Debtors’ Proposed Postpetition Financing Facility

8. On the Petition Date, the Debtors filed the Motion, seeking to obtain authorization to incur up to $1 billion of secured debtor in possession financing (the “DIP Financing”) from the Lenders, comprised of (i) a senior secured term loan facility in an aggregate principal amount of up to $600 million (the “Term Facility”) and (ii) subject to availability, a senior secured revolving credit facility in an aggregate principal amount of up to $400 million (the “Revolving

[3] The Creditors’ Committee is comprised of the following entities: Abitibi Consolidated Sales Corp.; Cellmark Paper, Inc.; International Paper Company; MEGTEC Systems Inc.; Pension Benefit Guaranty Corporation; The Bank of New York Mellon; and Wilmington Trust Company.

Credit Facility" and, together with the Term Facility, the "DIP Facilities"). Proceeds of the DIP Facilities will be (or have been) used: (a) to purchase the existing North American accounts receivable securitization facility for approximately $418 million (the "Existing Receivable Facility"); (b) for working capital and other general corporate purposes of the Debtors and, subject to limitations to be agreed upon, the non-debtors; and (c) for the payment of fees and expenses incurred in connection with the foregoing.

9. On January 23, 2008, this Court entered the Interim Order (A) Authorizing the Debtors to Obtain Postpetition Secured Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c) and 364(e); (B) Authorizing Use of Cash Collateral and Granting Adequate Protection to Prepetition Secured Lenders; and (C) Using Postpetition Financing to Purchase Receivables Portfolio (the "Interim DIP Order"), authorizing the Debtors to borrow up to $750 million under the DIP Facilities, and granted interim authorization for other aspects of the Motion, including certain adequate protection for the Prepetition Secured Lenders, who purportedly have liens on certain collateral of the Debtors and/or pledges of stock of certain of the Debtors that may ultimately be the subject of Avoidance Actions before this Court.

10. A final hearing on the Debtors' Motion currently is scheduled for March 6, 2008 at 10:00 a.m. (ET), at which time the Debtors will seek entry of a final order (the "Final DIP Order").

OBJECTION

11. The rights and protections provided to the Lenders under the Final DIP Order are overbroad and excessive. Moreover, several of the terms of the proposed Final DIP Order and the DIP Credit Agreement are specifically identified in the Guidelines because they are extraordinary and should not be countenanced by this Court. As such, the Creditors' Committee

respectfully requests that the Court deny entry of the Final DIP Order until and unless the inappropriate provisions are remedied.

12. A court should approve a proposed debtor in possession financing only if such financing "is in the best interests of the general creditor body." In re Roblin Indus., Inc., 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing In re Texlon Corp., 596 F.2d 1092, 1098-99 (2d Cir. 1979)). In order to obtain postpetition secured financing under Bankruptcy Code section 364(d), a debtor bears the burden of demonstrating, among other things, that: (1) it is unable to obtain unsecured credit; (2) the credit transaction is necessary to and in fact does preserve the assets of the estate; and (3) the terms of the proposed financing are fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender. In re Aqua Assoc., 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991) (citing In re Crouse Group, Inc., 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987)); In re Ames Dep't Stores, Inc., 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990) (considering these factors); see also In re Mid-State Raceway, Inc., 323 B.R. 40, 60 (Bankr. N.D.N.Y. 2005) (looking at several factors in considering whether to approve postpetition secured financing, including whether financing is necessary to preserve the assets of the estate and whether the terms are fair, reasonable and adequate); In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 630 (Bankr. S.D.N.Y. 1992) (noting that the debtor has the burden of proving that the requirements of section 364(d) of the Bankruptcy Code have been met); 3 Collier on Bankruptcy ¶ 364.05[1] (15th ed. rev. 2007).

13. "[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate." Ames Dep't. Stores, 115 B.R. at 39 (citing In re Crouse Group, Inc., 71 B.R. at 551); see also Mid-State Raceway, 323 B.R. at 59 (citing Ames Dept. Stores, 115 B.R. at 39); Aqua Assocs., 123 B.R. at 196 ("[C]redit should not

be approved when it is sought for the primary benefit of a party other than the debtor . . . ."). Such financing does not qualify as fair, reasonable and adequate.

14. In particular, a financing arrangement may not be so favorable to a lender so as to cause Bankruptcy Code protections to serve only that lender, contrary to the intent of Congress. See Mid-State Raceway, 323 B.R. at 59 (noting that "bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender.") (citing In re Defender Drug Stores, Inc., 145 B.R. 312, 317 (9th Cir. BAP 1992)); In re Tenney Vill. Co., Inc., 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (characterizing the proposed financing facility as one that would "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the Bank and the Debtor's principals who guaranteed its debt"); In re Roblin Indus., Inc., 52 B.R. at 243 (denying approval of proposed debtor in possession financing where, as a condition to extending the loan, the debtors were required to waive avoidance actions against the lenders in violation of their fiduciary duties).

15. On this point, the case In re Tenney Vill., Inc. is particularly instructive. There, the Bankruptcy Court denied the debtor's motion for approval of a postpetition financing arrangement because it incorporated terms that were too overreaching, such as a prohibition on the debtor asserting avoidance actions against the lender, terms that prevented the cram down of a plan on the lender and provisions that disabled independent operation of the debtor's businesses. See In re Tenney Vill., Inc., 104 B.R. at 568 (stating that "[u]nder the guise of financing a reorganization, the Bank would disarm the Debtor of all weapons usable against it for

the bankruptcy estate's benefit, place the Debtor in bondage working for the Bank, seize control of the reins of reorganization, and steal a march on other creditors in numerous ways").

16. Stated differently, postpetition financing is not consistent with the requirements of Bankruptcy Code section 364 where it would "skew the conduct of the bankruptcy case" and "destroy the adversary process." Ames Dep't Stores, 115 B.R. at 38; General Elec. Capital Corp. v. Hoerner (In re Grand Valley Sport & Marine, Inc.), 143 B.R. 840, 852 (Bankr. W.D. Mich. 1992) ("this court will not authorize postpetition financing pursuant to § 364 where a creditor leverages a debtor in possession into making a concession unauthorized by, or in conflict with, the Bankruptcy Code as a condition for the requested credit").

17. In these cases, the rights and protections afforded to the Lenders in the Final DIP Order go beyond what is fair, reasonable and appropriate under the circumstances, to the substantial detriment of the Debtors and their unsecured creditors. In order to preserve value for and protect the estates and the Debtors' unsecured creditors, the offensive provisions of the DIP Credit Agreement and the Final DIP Order identified in this Objection must be stricken or properly modified.

A. The Collateral Agent Should Not Be Granted Liens or Superpriority Claims on Proceeds from Avoidance Actions

18. Paragraph 6 of the Final DIP Order inappropriately grants the Collateral Agent, for its own benefit and the benefit of the Secured DIP Creditors, liens on the proceeds of all types of avoidance actions (the "Avoidance Actions"). The securing of Avoidance Actions and/or the proceeds thereof is fundamentally at odds with the unique purposes served by Avoidance Actions. Avoidance Actions are distinct creatures of bankruptcy law designed to ensure equality of distribution among general unsecured creditors.

19. Numerous courts severely restrict a debtor in possession's ability to pledge avoidance actions as security for postpetition financing. See Official Comm. of Unsecured Creditors v. Goold Elecs. Corp. (In re Goold Electronics Corp.), 1993 WL 408366, *3-4 (N.D. Ill., Sept. 22, 1993) (vacating bankruptcy court order approving postpetition financing "to the extent that the order assigns to the bank a security interest in the debtor's preference actions."). This is because avoidance actions are not property of a debtor's estate. See Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics, Corp.), 226 F.3d 237, 244 (3d Cir. 2000) (concluding that avoidance actions are not property of the estate, but are essentially rights held by the estate for the benefit of creditors); In re Sweetwater, 55 B.R. 724, 731 (D. Utah 1985), rev'd on other grounds, 884 F.2d 1323 (10th Cir. 1989) ("The avoiding powers are not 'property' but a statutorily created power to recover property."); 5 Collier on Bankruptcy ¶ 541.14 at n.1 (same).

20. Several courts have, in turn, recognized that, at least with respect to proceeds recovered pursuant to section 544(b) of the Bankruptcy Code, "empowering the trustee or debtor in possession to avoid a transaction by pursuing an individual creditor's cause of action is a method of forcing that creditor to share its valuable right with *other unsecured creditors*." In re Cybergenics, Corp., 226 F.3d at 244 (emphasis added); see also Buncher Co. v. Official Committee of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) ("When recovery is sought under section 544(b) of the Bankruptcy Code, *any recovery is for the benefit of all unsecured creditors*, including those who individually had no right to avoid the transfer.") (emphasis added). In addition, the Guidelines provide that "extraordinary provisions include the granting of liens on the debtors' claims and causes of action arising under sections

544, 545, 547, 548 and 549[4] [of the Bankruptcy Code], and the proceeds thereof, or superpriority administrative claims payable from the proceeds of such claims and causes of action." See Guidelines, p. 10.

21. Since the Avoidance Actions are not property of the Debtors' estates, there is no legal basis for this Court to grant the Collateral Agent a lien on the proceeds thereof. This provision is nothing but a "backdoor" method to obtain an inappropriate lien on Avoidance Actions and must be stricken. The impropriety of granting such liens is particularly acute in these cases because, on October 26, 2007 (within the preference period), RBC and Soc Gen were granted liens on certain of the Debtors' assets. The grant of such liens to RBC and Soc Gen will be investigated and may, in fact, be avoidable transfers. Accordingly, Avoidance Action proceeds should be excluded from the Collateral and reserved for the benefit of the Debtors' unsecured creditors.

22. Additionally, paragraph 7 of the Final DIP Order grants the Collateral Agent superpriority claims on the proceeds of Avoidance Actions. The Collateral Agent should be required to waive any right to satisfaction of its potential superpriority claim under sections 364(c)(1) and 507(b) of the Bankruptcy Code through proceeds derived from the Avoidance Actions. Providing the Collateral Agent with a superpriority claim with respect to the Avoidance Actions has the same effect as approving liens on Avoidance Actions and their proceeds. Accordingly, the Creditors' Committee requests that the Final DIP Order be modified to prevent the Collateral Agent's potential superpriority claim from attaching to the proceeds of Avoidance Actions.

[4] This does not include liens on recoveries under section 549 of the Bankruptcy Code on account of collateral as to which the lender has a postpetition lien.

23. Lastly, the Final DIP Order emasculates Bankruptcy Code section 551 and the estate's ability to avoid a lien by providing that in the event a lien is avoided, that avoided lien is subject to the liens of the Lenders. This is contrary to the intent of section 551 of the Bankruptcy Code, which was promulgated to preserve avoided liens for the benefit of the estate. See In re DeLancey, 94 B.R. 311, 313 (Bankr. S.D.N.Y. 1988) (noting that the rationale behind the automatic preservation of liens under section 551 "is that the estate should benefit from each avoidance rather than promoting the priority of unavoidable junior secured interests who would otherwise improve their positions at the expense of the estate.") (internal citations omitted); In re Wilkinson, 185 B.R. 133, 136 (Bankr. W.D.N.Y. 1995) ("The legislative history to [§ 551] is clear, stating that § 551 'as a whole prevents junior lienors from improving their position at the expense of the estate when a senior lien is avoided.'") (citing H.R. Rep. No. 595, 95th Cong., 1st Sess., at 54 (1978)); 5 Collier on Bankruptcy ¶ 441.01[1] (15th ed. rev. 2007) (same).

24. The Lenders entered into the DIP Loan Documents knowing that certain of their liens were junior to the liens of the Prepetition Secured Lenders. Thus, the Lenders did not rely on those assets already encumbered by the liens of the Prepetition Secured Lenders being available to them. By providing that in the event a lien is avoided, that avoided lien is subject to the liens of the Lenders, paragraph 6 of the Final DIP Order invalidates the estate's ability to step into the shoes of the avoided lienholder and is a windfall to the Lenders in complete derogation of section 551 of the Bankruptcy Code. As such, the Lenders seek to improperly improve their position at the expense of the Debtors' estates. Accordingly, the Final DIP Order should be modified to provide a "carve out" for the proceeds of Avoidance Actions, including preserved liens, from the liens and superpriority claims of the Lenders.

B. The Debtors Should Not Be Forced to Waive Their Rights under Bankruptcy Code Section 506(c)

25. The proposed Final DIP Order contemplates the waiver by the Debtors of any right to surcharge Collateral pursuant to section 506(c) of the Bankruptcy Code. This waiver of the estates' right to seek a surcharge against the collateral securing the DIP Facilities pursuant to Bankruptcy Code section 506(c) is inappropriate. Section 506(c) of the Bankruptcy Code is a rule of fundamental fairness for all parties-in-interest, providing that secured creditors share some of the burden of administrative expenses in a bankruptcy case where it is reasonable and appropriate for surcharges to be ordered.

26. Courts routinely reject the waiver of surcharge rights under section 506(c). See, e.g., Hartford Underwriters Inc. Co. v. Union Planters Bank, N.A. (In re Hen House Interstate Inc.), 530 U.S. 1, 120 S. Ct. 1942 (2000); Hartford Fire Ins. Co. v. Norwest Bank Minnesota. (In re Lockwood Corp.), 223 B.R. 170, 176 (8th Cir. B.A.P. 1998) (holding that provision in financing order purporting to immunize the postpetition lender from section 506(c) surcharges was unenforceable); In re Colad Group, Inc., 324 B.R. 208, 224 (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)).

27. In Hartford Underwriters, the United States Supreme Court ruled that only the debtor is vested with standing to seek administrative surcharges under Bankruptcy Code section 506(c). 530 U.S. 1, 120 S. Ct. 1942. Thus, following Hartford Underwriters, if this Court were to approve the abrogation of the Debtors' section 506(c) rights, all parties in interest could lose this valuable Bankruptcy Code protection. Accordingly, the Creditors' Committee submits that the surcharge waiver be stricken.

28. Alternatively, if this Court is unwilling to strike the Debtors' waiver of their section 506(c) rights, the Creditors' Committee should, in the Final DIP Order, be explicitly vested with standing to seek a surcharge against the Collateral if the facts ultimately prove that a surcharge is appropriate. Providing the Creditors' Committee with standing to seek a section 506(c) surcharge, if appropriate, will preserve estate assets for the benefit of all unsecured creditors.

C. The Final DIP Order Improperly Restricts the Use of Financing Proceeds and Collateral

29. Paragraph 24 of the Final DIP Order forecloses the ability of any party in interest, including the Creditors' Committee, to use any proceeds of the DIP Financing, the Collateral (including cash) and the Carve-Out to, among other things, (a) object, contest or raise any defenses to the validity, perfection, priority, extent or enforceability of any amount due under the DIP Loan Documents, (b) assert <u>any</u> Claims and Defenses or other causes of action against the Agents or the Secured DIP Creditors, and (c) pay any professional fees and disbursements incurred in connection with any of the foregoing actions.

30. These restrictions are wholly inappropriate without providing certain exceptions. Specifically, the Creditors' Committee should have the ability to investigate and, if necessary, pursue causes of action utilizing proceeds of the DIP Facilities or the Carve-Out (i) for bad acts, such as fraud, willful misconduct or gross negligence by the Secured DIP Creditors and the DIP Agent,[5] with respect to the Debtors; and (ii) with regard to challenging the liens or claims granted pursuant to the Final DIP Order or the DIP Loan Documents.

[5] The Creditors' Committee has no reason to believe that there have been any bad acts, but it must have the right to use DIP Financing proceeds to pursue such claims should facts and circumstances be revealed that these types of acts have occurred.

D. The Debtors Should Not Have the Unfettered Right to Pay the Agents' Fees and Expenses

31. Pursuant to paragraph 9 of the Final DIP Order, the Debtors are authorized and directed to (i) promptly make non-refundable payment to the Agents and the Arrangers for all costs and expenses provided in the DIP Credit Agreement and the Fee Letters and (ii) pay all costs, fees and out of pocket expenses of the Agent and the Arrangers, including attorneys' fees and expenses and financial advisors' fees and expenses, incurred in connection with the DIP Facilities and all matters arising in or in connection with these cases. Prior to such payment, however, the Agents and the Arrangers should be required to provide the Debtors and the Creditors' Committee with copies of all invoices for which payment is requested and, to the extent any disagreement as to the reasonableness of such fees are not resolved by the parties, the Creditors' Committee should be afforded the opportunity to object to such requests for payment with this Court being the final arbiter of the reasonableness of such fees and expenses.

E. The Creditors' Committee Should be Given Sufficient Notice of Any Modifications to the DIP Credit Agreement and the DIP Loan Documents

32. The Creditors' Committee objects to the unrestricted ability of the Debtors to amend the DIP Credit Agreement and the DIP Loan Documents. The Final DIP Order provides that, upon "advance notice" provided to the Creditors' Committee, the Debtors may make amendments to the DIP Credit Agreement without any further approval of the Court, provided that such amendments do not shorten the maturity of the extension of credit thereunder, or increase either the commitments, the rate of interest payable or letter of credit fees payable thereunder.

33. First, to the extent any amendments are "material" amendments to the DIP Credit Agreement or the DIP Loan Documents, the Creditors' Committee, as a fiduciary to all of the

Debtors’ unsecured creditors, must be provided sufficient notice of such amendments and the opportunity to object before any such “material” amendments become binding on the Debtors or these estates. The need for sufficient notice is particularly acute in these cases where the term “material” is not defined in the Final DIP Order or the DIP Credit Agreement. As such, the Final DIP Order should be modified to provide that the Debtors must obtain the prior written consent of the Creditors’ Committee or, in the absence of such consent, approval by the Court, to the extent they seek to make any material amendments or modifications to the DIP Credit Agreement or the DIP Loan Documents.

34. Second, the Debtors should not be permitted to make “immaterial” amendments to the DIP Credit Agreement or the DIP Loan Documents with only “advance notice” to counsel to the Creditors’ Committee. Without providing advance *written* notice within a specified time period, such immaterial amendments may be made within minutes of providing any form of notice to the Creditors’ Committee. Accordingly, the Debtors should be required to provide counsel to the Creditors’ Committee with two (2) business days advance written notice of any immaterial modifications or amendments to the DIP Credit Agreement and the DIP Loan Documents so that the Creditors’ Committee can determine if such amendments are in fact “immaterial” and are appropriate.

F. The Provisions in the Final DIP Order Pertaining to Events of Default and the Automatic Stay are Wholly Inappropriate

35. The proposed Final DIP Order provides that, upon the occurrence of an Event of Defaut, the automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to permit the Agents and the other Secured DIP Creditors to exercise, (i) immediately upon such occurrence, all rights and remedies under the DIP Loan Documents (other than certain specified rights and remedies against the Collateral) and (ii) with

(5) business days prior notice of any such occurrence to the Debtors, the Creditors' Committee and certain other major parties in these cases, all rights and remedies against the Collateral provided for in the DIP Loan Documents (including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the Agents or any Secured DIP Creditors). The proposed Final DIP Order further provides that, in any hearing regarding any exercise of such rights or remedies, including the lifting of the automatic stay, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing. Additionally, the proposed Final DIP Order provides that the Debtors waive their right to seek relief in connection with the exercise of such rights and remedies under the Final DIP Order or the DIP Loan Documents.

36. These provisions violate basic principals of equity and impermissibly prejudice the Debtors, the Creditors' Committee and all other interested parties from presenting all pertinent facts and circumstances to the Court related to the alleged Event of Default. Indeed, the need to remove these provisions are particularly acute here, where the Lenders are permitted to call an Event of Default, even if the Event of Default is immaterial.

37. Further, a myriad of circumstances could occur in these cases that would make it inequitable to limit what parties may argue to the Court in connection with an Event of Default. If, for example, the Lenders' conduct created or contributed to an Event of Default, neither the Debtors nor the Creditors' Committee could make the Court aware of such facts under the restrictions set forth in the Final DIP Order. In light of the limitless circumstances that could occur in these cases, including inequitable conduct by the Lenders, there should not be any limitation on what issues can be raised regarding an Event of Default. Accordingly, this

provision should be removed so that the Court may have the benefit of all relevant facts at any hearing.

G. The DIP Credit Agreement Should Include the Following Modifications.

- Definitions of "Borrowing Base Availability" and "DIP Borrowing Base". Under the DIP Credit Agreement, the definition of the "Borrowing Base Availability", provides that "Borrowing Base Availability" is calculated by subtracting, among other things, certain "Reserves" from the "DIP Borrowing Base." See DIP Credit Agreement, p. 5, "Borrowing Base Availability" at (a)(i-iii). The definition of "DIP Borrowing Base" however, already includes a deduction in respect of the "Reserves." See id., p. 12, "DIP Borrowing Base." Therefore, as currently drafted, the Lenders are essentially permitted to "double-dip" and deduct the Reserves twice in calculating the "Borrowing Base Availability." It is inappropriate to limit the Debtors' access to liquidity based on a definition which double counts the Reserves that limit such availability. Accordingly, the definitions of "Borrowing Base Availability" and/or "DIP Borrowing Base" must be appropriately modified to provide that the applicable Reserves may only be deducted once for purposes of calculating "Borrowing Base Availability."

- ERISA Events. Under the DIP Credit Agreement, the Debtors have represented that the underfunding of their pension plans does not exceed an amount that would rise to the level of a Material Adverse Effect (the "Underfunding Representation"). At this time, however, no one knows whether or to what extent the Debtors' pension plans are underfunded. Regardless of the extent of such underfunding, if any, a breach of this representation would constitute an Event of Default. See DIP Credit Agreement, § 6.01(b). Any underfunding of the Debtors' pension plans, however, should not constitute an Event of Default because most claims related to an underfunding of the Debtors' pension plans will be unsecured and, thus, are irrelevant to the Agents and the Secured DIP Creditors as such claims will have no impact on the ability of the Debtors to satisfy their obligations under the DIP Loan Documents.[6] As such, a breach of the Underfunding Representation should not constitute an Event of Default.

  Additionally, as defined in the DIP Credit Agreement, an "ERISA Event" includes the termination of a pension plan. See DIP Credit Agreement, p. 20, "ERISA Event." There will be an Event of Default if an ERISA Event occurs and the "Insufficiency" of any pension plan or plans exceeds $15,000,000 or requires payments exceeding $7,500,000 per annum. See id., § 6.01(j). If this provision is read broadly, the termination of the Debtors' pension plans[7] could be viewed as a technical Event of Default if the

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[6] See, e.g., In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 891 (Bankr. S.D.N.Y. 1993) ("In our view, the obligation to pay minimum funding requirements is a prepetition debt not entitled to priority insofar as it relates to prepetition labor by Debtor's employees").

[7] At this point in time, the Creditors' Committee is unaware of any intent of the Debtors to terminate any pension plan.

underfunding on termination exceeds $15,000,000. As stated above, any underfunding of the pension plans should only create unsecured claims. Thus, such a termination should not constitute an Event of Default because it would have no impact on the Agents and the Secured DIP Creditors. Accordingly, the DIP Credit Agreement should be modified appropriately to limit all Event of Defaults such that any ERISA liabilities which do not impact the Agents or the Secured DIP Creditors are removed.

- Determination of Materiality. Section 6.01(n) of the DIP Credit Agreement and recital (f) of the proposed Final DIP Order provide that an Event of Default will occur, and the Lenders may accelerate the maturity of all Borrowings and terminate their commitments upon, among other things, the entry of any "material (in the sole discretion of the Administrative Agent) order or orders granting relief from any stay or to holders of any secured interest to permit foreclosure on any assets of the Debtors." (emphasis added). The Administrative Agent should not have the unilateral ability to determine whether such an order is material, particularly where a determination of materiality will result in an Event of Default. Rather, whether an order granting relief from the stay is material is a matter that should be determined by the Court upon notice to the Creditors' Committee and other parties in interest.

- Paydown of DIP Financing. Section 6.02(q)(i) provides that an Event of Default will occur if the Debtors file a motion to obtain financing from any person other than the Lenders under section 364(c) of the Bankruptcy Code. Similarly, section 6.02(v) provides that an Event of Default will occur if the Debtors file any pleadings related to obtaining financing from any other person other than the Lenders. For clarity, these sections should explicitly carve out any motion that contemplates the paydown in full of the indebtedness outstanding under the DIP Facilities.

- Hedge Agreements. The DIP Credit Agreement and the Final DIP Order (i) authorize the Debtors to execute and deliver any Hedge Agreement required or permitted under the DIP Credit Agreement to which a Debtor is a party, and (ii) modifiy the automatic stay to the extent necessary to, among other things, permit the Secured DIP Creditors that are parties to Secured Hedge Agreements to exercise their rights and remedies thereunder. Upon information and belief, the Debtors do not yet have a hedging program in place and have not provided the Creditors' Committee with any information regarding their proposed hedging strategy. Accordingly, the Final DIP Order should be modified to provide that, to the extent the Debtors seek to implement any hedging programs or enter into any Hedge Agreements, advance approval from the Creditors' Committee is required.

CONCLUSION

For all of the foregoing reasons, the Creditors' Committee respectfully requests that the Court: (i) condition the relief requested in the Motion by compelling the Debtors to amend the Final DIP Order and/or the DIP Credit Agreement, as appropriate, to reflect the changes discussed above; and (ii) grant such other relief as the Court deems just, proper and equitable.

Dated: New York, New York
March 4, 2008

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ David H. Botter__________

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