IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
F21 OPCO, LLC, *et al*.,[1]	Case No. 25-10469 (MFW)
Debtors.	**Related Docket Nos. 15 & 88**
	(Jointly Administered)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING POSTPETITION USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION, (III) MODIFYING THE AUTOMATIC STAY, AND (IV) SCHEDULING A FINAL HEARING, AND (V) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), by and through its undersigned proposed counsel, hereby submits this objection (this "Objection") to the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection to the Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 15] (the "Motion").[2] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

Less than six years after their predecessors filed for bankruptcy, the Debtors commenced these Chapter 11 Cases to liquidate their remaining assets and confirm a chapter 11 Plan supported by the Debtors' secured lender constituencies. Unsecured creditors, however, were not party to those negotiations and, as discussed herein, do not support the Plan. The following facts

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: F21 OpCo, LLC (8773); F21 Puerto Rico, LLC (5906); and F21 GiftCo Management, LLC (6412). The Debtors' address for purposes of service in these Chapter 11 Cases is 110 East 9th Street, Suite A500, Los Angeles, CA 90079.

[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion, the Interim Cash Collateral Order (defined below) or the First Day Decl. (defined below).

make clear that the Debtors' employees, landlords, and vendors will be the net losers in these cases:

- The prospects of a going concern sale are grim given that the Debtors appear to have sold their valuable Forever 21 intellectual property assets to a subsidiary of Authentic Brands Group ("ABG"), an affiliate of the Debtors' majority equity holders, prior to the Petition Date;[3]

- The Prepetition Secured Parties have asserted their aggregate $1.582 billion in purported secured claims against the Debtors alone, and may unfairly seek to recover more than the amount of money actually loaned to the Debtors,[4] notwithstanding the numerous other non-debtor borrowers and obligors under these loan facilities;

- Many of the Debtors' largest vendors are currently holding significant amounts of branded Forever 21 inventory that, as of the date hereof, they have not been able to resell;[5]

- Certain of the Debtors' vendors allege that the Debtors extracted significant discounts on goods shipped immediately prior to the Petition Date on claims that would have been entitled to full payment under the Plan under Section 503(b)(9) of the Bankruptcy Code; and

- Under the Plan, general unsecured creditors will receive either 6% or 3% of the net distributable proceeds from the liquidation, depending on whether the class votes to accept or reject the Plan, respectively. **In either instance, distributions would be less than a single penny given the projected $433 million claims pool**, which is currently diluted by a $80,750,000 claim asserted by SPARC (one of the Debtors' major equity holders) on account of an intercompany payable allegedly owed by the Debtors to the non-debtor SPARC subsidiaries.

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[3] Even though the order approving the asset purchase agreement in the Prior Bankruptcy [Prior Bankruptcy Docket Nos. 922, 927] transferred substantially all of Old F21's assets to F21 OpCo, LLC, including intellectual property, the Debtors have admitted that these assets are now owned by an affiliate of ABG. *See* First Day Decl. ¶ 18. ABG licenses these assets to the Debtors in exchange for a large fee. The Committee is currently investigating the transfer of the intellectual property assets.

[4] Under the Plan, the Prepetition ABL Lenders are projected to receive 94% to 97% of all remaining cash, along with any additional recoveries received by the estates prior to confirmation. The Term Loan Lenders and Subordinated Lenders appear entirely unsecured and are waiving their deficiency claims in exchange for releases under the Plan.

[5] Based on discussions with these creditors, the goods are currently either at the vendors' factories or warehouses, or in transit.

Under the circumstances, the Plan's proposed treatment of unsecured claims is patently unacceptable. The outcome of these cases is dire for many of the Debtors' unsecured creditors: the viability of certain of the Debtors' largest vendors and the livelihoods of their employees are on the line. In accordance with its mandate, the Committee is aggressively investigating all prepetition transactions, including the SPARC Acquisition: the transaction whereby the Debtors were acquired by JC Penney and joined and obligated themselves, along with certain non-debtor affiliates, to pay the pre-existing debts of JC Penney under the Prepetition ABL Facility and Prepetition Term Loan Facility. The results of that investigation will inform the Committee's position on the appropriate treatment for all stakeholders under the Plan. In the meantime, however, the proposed terms of any cash collateral agreement must establish a fair playing field for all parties. Much like the Plan, the relief sought in the Motion prejudices unsecured creditors and should not be approved absent the following revisions:

1. No Adequate Protection Liens on, or Superpriority Claims to, Avoidance Actions, Commercial Tort Claims, or the Proceeds of the Foregoing. Given the projected *de minimis* recoveries for general unsecured creditors under the Plan, these assets should remain wholly unencumbered and preserved for the benefit of holders of unsecured claims. At minimum, however, under no circumstance should the Prepetition Secured Parties receive liens on, or claims to, any causes of action asserted against the lenders themselves, the Debtors' directors and officers, equity holders, or any affiliates of the foregoing.[6]

2. No Cash Sweeps or Immediate Cash Payment of Prepetition Agents' Professional Fees. As additional adequate protection, the Prepetition ABL Lenders seek, among other things, a tri-weekly cash sweep of all cash held by the Debtors in excess of $65,000,000 to pay down the Prepetition ABL Facility. Because the Committee's investigation will focus largely on the validity, extent, and perfection of the Prepetition Secured Parties' liens and claims, no funds should leave the estates until after that investigation is complete. Moreover, because only the portion of a creditor's claim that is secured is entitled to adequate protection, the Prepetition Secured Parties are not entitled to immediate payment of fees as adequate protection. For purposes of

[6] Under the Plan, all avoidance actions, including preference actions against creditors, are expressly preserved. *See* Plan, Art. III(M), Art. VIII(C); *see also* Plan, Art. I(A)(21).

voting on the Plan, these lenders have taken the position that they are either woefully undersecured or entirely unsecured. They cannot have their cake and eat it too by now seeking massive amounts of adequate protection under the Final Cash Collateral Order.

3. No Prejudicial Budget or Carve-Out Restrictions. The Budget and the terms of the Final Cash Collateral Order unduly prejudice the Committee. The Debtors' professional fees are subject to the carve-out, while Committees' professional fees are capped at the amount included in the Budget: $750,000, only 7.2% of the approximate $10.4 million allocated for the Debtors' professionals.

4. No 506(c) Waiver Absent Actual Payment of All Known Administrative Claims. While the Budget purports to include amounts for all Stub Rent Claims and 503(b)(9) Claims, it is not clear whether the budget is adequate or that those amounts will actually be funded. Whether the Plan can be confirmed depends, at least in part, on the results of the Committee's ongoing investigation. As such, an immediate 506(c) waiver is premature and should instead be conditioned on the actual payment in full of these administrative claims—not their mere inclusion in the Budget.

The Committee is willing to work with the Debtors and Prepetition Secured Parties on an acceptable form of a chapter 11 Plan that provides for fair treatment of *all* stakeholders, including general unsecured creditors. If the Motion is approved in its current form, however, the Prepetition Secured Parties will obtain adequate protection liens on potentially valuable litigation claims, siphon out excess cash from the Debtors to reduce their own claims that the Committee has not yet determined are valid, and unduly restrict the Committee's ability to investigate those claims through onerous carve-out language and budget limitations. For the foregoing reasons, the Court should deny the Motion absent the modifications requested herein.

BACKGROUND

A. The Chapter 11 Cases

1. On March 17, 2025, each of the Debtors commenced a voluntary case (collectively, the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Code (the

"Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware. These Chapter 11 Cases have been jointly consolidated for administrative purposes only.

2. The Debtors are operating their businesses and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. No request has been made for the appointment of a trustee or examiner in these Chapter 11 Cases.

4. Additional information regarding the Debtors, including their businesses and affairs, their capital and debt structures, and the events leading to the filing of these Chapter 11 Cases is set forth in the *Declaration of Stephen Coulombe in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 2] (the "First Day Decl.").

5. On March 26, 2025, the United States Trustee for Region 3 appointed the Committee, which is comprised of the following members: (i) C&C Nantong Cathay Clothing Co, Ltd, (ii) Hangzhou Qidi Fashion Apparel Co Ltd, (iii) Shanghai Toex International Co Ltd, (iv) Grand Apparels Designs Limited, (v) Guang Zhou Hong Ying Da Clothing Co. Ltd., (vi) Denim & Beyond LLC, and (vii) Urban National Apparel, Inc. *See* Docket No. 115.

B. The Prior Bankruptcy, the Debtors' Prepetition Indebtedness and the SPARC Acquisition

6. On September 29, 2019, Forever 21, Inc. and its debtor affiliates (collectively, "Old F21") commenced voluntary cases under chapter 11 of the Bankruptcy Code (the "Prior Bankruptcy") in the United States Bankruptcy Court for the District of Delaware. *See In re Forever 21, Inc.*, Case No. 19-12122 (MFW) (Bankr. D. Del. 2019); First Day Decl. ¶ 16.

7. On February 13, 2020, the Bankruptcy Court approved a going concern sale (the "F21 Acquisition") of Old F21's operations and assets, including the Forever 21 brand name and intellectual property, to F21 OpCo, LLC (one of the Debtors in these Chapter 11 Cases), whose

equity owners consisted of (i) a joint venture between Simon Property Group ("Simon") and Brookfield Property Partners ("Brookfield") and (ii) ABG. *See* First Day Decl. ¶ 17.[7]

8. Although Debtor F21 OpCo, LLC appears to have purchased Old F21's intellectual property in the Prior Bankruptcy, the Debtors state that such assets are now owned by a subsidiary of ABG. *Id.* ¶ 18. The ABG subsidiary licenses the Forever 21 intellectual property back to the Debtors for domestic operations and to third parties that operate under the Forever 21 brand internationally. *Id.*

9. One year after the F21 Acquisition, Brookfield sold its interest in F21 OpCo, LLC to SPARC Group Holdings LLC ("SPARC"),[8] whose primary equity holders were Simon and ABG. *Id.* ¶ 17.[9]

10. As a result of the F21 Acquisition, the Debtors participated in a cash pooling arrangement whereby all cash generated by SPARC's subsidiary brands was swept and pooled together into an account held by Aero (the "Cash Pooling Arrangement"). *Id.* ¶ 22. Aero used those pooled funds to pay down the Old SPARC ABL Facility (defined below). *Id.* When one of SPARC's subsidiaries needed funds, Aero would draw on the Old SPARC ABL Facility and disburse the funds accordingly. *Id.* These transactions were booked by the recipient SPARC subsidiary as an intercompany payable to Aero. *Id.* The Cash Pooling Arrangement continued even after the Old SPARC ABL Facility was replaced with the Prepetition ABL Facility. *Id.* As of the Petition Date, the Debtors allegedly owed approximately $320 million under the Cash Pooling Arrangement. *Id.*

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[7] The Court authorized the sale of all "Acquired Assets" to F21 OpCo, LLC. *See* Prior Bankruptcy Docket No. 927. The asset purchase agreement for Old F21's assets defined "Acquired Assets" to include domestic and international trademarks, copyrights, patents, and other intellectual property. *See* Prior Bankruptcy Docket No. 922.

[8] SPARC Group Holdings II LLC, an entity owned by Simon, ABG, and e-commerce platform Shein, owned SPARC immediately prior to the SPARC Acquisition (defined herein). *See* First Day Decl. ¶ 28. SPARC Group Holdings II LLC is now a minority owner of the Debtors. *Id.*

[9] SPARC operates several fashion and apparel companies, including the Debtors, Aéropostale ("Aero"), Brooks Brothers, Eddie Bauer, Nautica and Lucky Brands. *Id.* ¶ 19.

11. Prior to the SPARC Acquisition (defined below), the Debtors were parties to a credit agreement (the "Old SPARC ABL Credit Agreement") which provided an asset-backed facility (the "Old SPARC ABL Facility"), another credit agreement (the "Old SPARC LC Term Loan Agreement") which provided a term loan backed by a letter of credit (the "Old SPARC LC Term Loan Facility"), and the initial Subordinated Loan Credit Agreement originally entered into in February 2024, which provided intercompany loans for the benefit of SPARC's direct and indirect subsidiaries. *Id.* ¶ 31.

12. Shortly before the SPARC Acquisition, on December 6, 2024, (i) the Old SPARC ABL Facility and Old SPARC LC Term Loan Facility were refinanced and repaid and the Debtors' commitments under the Old SPARC ABL Credit Agreement and Old SPARC LC Term Loan Agreement were terminated and (ii) SPARC and certain of its direct and indirect subsidiaries, including the Debtors, became loan parties to the existing debts of JC Penney, one of the Debtors' affiliates, under the Prepetition ABL Credit Agreement and Prepetition Term Loan Credit Agreement (*i.e.*, the Prepetition ABL Facility and the Prepetition Term Loan Facility). *Id.* ¶ 32. The Prepetition ABL Facility and Prepetition Term Loan Facility are allegedly secured by liens on, and security interests in, all assets of the ABL Loan Parties and Term Loan Parties, including the Debtors' assets. *Id.* ¶¶ 35, 38.

13. On December 19, 2024, SPARC was acquired by JC Penney, forming a new company, Catalyst Brands[10] (the "SPARC Acquisition"). *Id.* ¶ 28. In connection with the SPARC Acquisition, all equity interests in SPARC were acquired by JC Penney's parent company, and SPARC Group Holdings II LLC became a minority owner in Catalyst Brands. *Id.* Certain JC Penney entities that are Prepetition ABL Loan Parties and Prepetition Term Loan Parties then became obligors under the Prepetition Subordinated Loan Facility as part of the amended and

[10] Certain affiliates of Simon, ABG and Brookfield hold equity in Catalyst Brands as part of the SPARC Acquisition. These entities are affiliates and insiders of the Debtors.

restated Subordinated Loan Credit Agreement. *Id.* ¶¶ 28, 32. The Prepetition Subordinated Loan Facility is allegedly secured by liens on, and security interests in, all assets of the Subordinated Loan Parties, including the Debtors' assets. *Id.* ¶ 44.

14. As of the Petition Date, the Debtors allege that the following amounts remain outstanding under the Prepetition ABL Facility, the Prepetition Term Loan Facility, and the Prepetition Subordinated Loan Facility:

Funded Debt	**Maturity**	**Approximate Outstanding Principal Amount as of Petition Date**
Prepetition ABL Facility	December 16, 2026	$1.085 billion
Prepetition Term Loan Facility	December 16, 2026	$321 million
Prepetition Subordinated Loan Facility	May 26, 2027	$176 million
Total Funded Debt		**$1.582 billion**

Id. ¶ 33.

C. The Motion

15. On the Petition Date, the Debtors filed the Motion seeking, among other things, authority to use the Prepetition Secured Parties' cash collateral, subject to certain protections discussed herein. On March 19, 2025, the Court granted the Motion on an interim basis (the "Interim Cash Collateral Order") [Docket No. 88].

16. The salient terms of the relief requested in the Motion are summarized below:

i. The Lender Protections

17. Through the Motion, the Debtors propose to grant the Prepetition Secured Parties adequate protection consisting of, among other things:

- adequate protection liens on all pre- and postpetition property of the Debtors' estates, including Avoidance Actions (including claims against the Prepetition Secured Parties *themselves*), commercial tort claims, and

the proceeds therefrom, provided there is diminution in value of the Prepetition Secured Parties' Collateral; and

- superpriority administrative expense claims to the extent of any diminution in value of the Prepetition Secured Parties' Collateral.

Interim Cash Collateral Order ¶ 7(a)-(f).

18. In addition to the above forms of adequate protections, the Debtors seek to authorize sweeps of any cash held by the Debtors in their Deposit Accounts in excess of $65,000,000 (the "Cash Sweeps") to repay the obligations under the Prepetition ABL Facility.[11] *Id.* ¶ 7(i).

19. The Prepetition Secured Parties seek several other protections, including:

- a limited $50,000 investigation budget for the Committee to investigate the validity, extent, amount, perfection, priority, or enforceability of any of the Prepetition Liens, the Prepetition Secured Obligations, or Loan Documents, *see id.* ¶ 4(f);

- waivers of (i) the Debtors' surcharge rights under section 506(c) of the Bankruptcy Code, (ii) the equities of the case exception under section 552(b) of the Bankruptcy Code, and (iii) the equitable doctrine of marshalling, *see id.* ¶¶ 20, 21; and

- a prejudicial carve-out for the Committee professionals' fees, which are capped as provided in any Approved Budget, versus a full carve-out for the Debtor professionals' fees, *see id.* ¶ 13.

20. Finally, the Debtors seek authority to pay professional fees for the Prepetition ABL Agents and Prepetition Term Loan Agent during these cases, notwithstanding that such parties have not demonstrated they are oversecured.[12] *Id.* ¶ 7(g).

ii. The Budget

21. Through the Motion, the Debtors seek approval of the 13-week cash collateral

[11] Cash Sweeps occur three times a week on Mondays, Wednesdays and Fridays during the pendency of these Chapter 11 Cases. According to the Budget, the Cash Sweeps are expected to total $81 million prior to the Effective Date milestone of the proposed Plan. *See* Interim Cash Collateral Order Ex. A.

[12] Although the Budget does not include any amounts for payment of lender fees during the postpetition period, the Committee understands that such fees will be paid in the ordinary course of business through the Prepetition ABL Facility itself (which is being paid down through the Cash Sweeps).

budget annexed as Exhibit A to the Interim Cash Collateral Order (the "Budget"). *Id.* ¶ 4(a). The Budget contemplates, among other things:

- payment of $3.5 million of 503(b)(9) Claims in the week ending July 5, 2025 (two weeks after the Effective Date milestone of the proposed Plan);
- payment of $1.788 million of Stub Rent Claims in the week ending May 3, 2025; and
- payment $13.437 million of allowed fees and expenses incurred by Debtor Professionals and Committee Professionals, of which approximately $10.4 million is allocated towards fees of the Debtors' counsel, financial advisor and CRO, while $750,000 is allocated towards fees of all Committee Professionals.

See Interim Cash Collateral Order Ex. A.

iii. The Milestones

22. As additional adequate protection, the Prepetition Secured Parties seek imposition of the following case milestones:

Date	Event
April 20, 2025	Entry of finals orders approving the Motion and the Store Closing Motion (defined herein)
May 5, 2025	Entry of orders approving Disclosure Statement and Solicitation Procedures
June 2, 2025	Expiration of Challenge Period
June 14, 2025	Entry of Confirmation Order
June 19, 2025	Effective Date of Plan

See Interim Cash Collateral Order ¶ 10.

D. The Sale Process

23. The Debtors commenced these Chapter 11 Cases to liquidate their remaining assets while simultaneously exploring the possibility of a going concern sale. *See* First Day Decl. ¶¶ 9, 111. Although certain parties have expressed interest in purchasing certain of the Debtors' leases, no actionable offers have been made to date and the Debtors expect to conclude their remaining store closing sales by the end of April.

E. The Plan

24. The Debtors commenced these Chapter 11 Cases with a Plan Support Agreement [Docket No. 17] (the "PSA"). The PSA was executed by each of the Debtors and holders of(i) ABL Claims, (ii) Term Loan Claims, and (iii) Subordinated Loan Claims. PSA at 1.[13] No equity holder is party to the PSA.

25. On March 28, 2025, the Debtors filed the *Debtors Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 123] (the "Plan"), which provides the following treatment of claims:[14]

- The Prepetition ABL Lenders' claims will be allowed in the amount of $1,085,633,778.08, plus interest, fees, and other costs. The Prepetition ABL Lenders will receive distributions of 94 to 97% of Net Proceeds,[15] or an estimated recovery of up to 3% of the value of their claims, depending on whether general unsecured creditors vote to accept or reject the Plan. *See* Plan, Art. III(B)(3).

- The Prepetition Term Loan Lenders' claims will be allowed in the amount of $320,875,000.00, plus interest, fees, and other costs. However, the Prepetition Term Loan Lenders have agreed to waive any distributions in exchange for the releases in the Plan. *See* Plan, Art. III(B)(4).

- The Prepetition Subordinated Loan Lenders' claims will be allowed in the amount of $176,147,053.95 plus interest, fees, and other costs. However, the Prepetition Subordinated Loan Lenders have agreed to waive any distributions in exchange for the releases in the Plan. *See* Plan, Art. III(B)(5).

- General Unsecured Creditors will receive, to the extent allowed, 3 to 6% of Net Proceeds, depending on whether General Unsecured Creditors vote to accept or reject the Plan. The Plan estimates the general unsecured

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[13] Notwithstanding the substantial number of co-obligors under the Prepetition Loan Documents, none of the other Catalyst Brands or SPARC entities are parties to the PSA or debtors in these Chapter 11 Cases, despite their joint and several liability for the obligations.

[14] The claims of Prepetition ABL Lenders, Prepetition Term Loan Lenders, Prepetition Subordinated Loan Lenders, and General Unsecured Creditors are impaired, and those creditors are entitled to vote on the Plan. *See* Plan, Art. III(B)(3)-(6).

[15] "Net Proceeds" means all Cash held by the Debtors on the Effective Date *after* funding wind-down costs, the Professional Fee Escrow Amount, and the other costs associates with these Chapter 11 Cases. *See* Plan, Art. I(A)(71).

claims pool at approximately $432,951,881.00[16] ($80,750,000 of which is comprised of the SPARC Payable),[17] and such holders are expected to recover approximately 0.19% to 0.46% on account of their claims. *See* Plan, Art. III(B)(6); *see also* Disclosure Statement at 15.

26. The Plan also contains various releases, including a release of all the Debtors' direct and derivative claims, other than actual fraud, willful misconduct, or gross negligence, against various parties including the other Debtors, the Debtors' direct and indirect subsidiaries, the Prepetition Secured Parties, the SPARC Parties (as defined in the Plan), and, to the extent they opt in, all Holders of Claims. *See* Plan, Art. VII(B).

ARGUMENT

A. The Prepetition Secured Parties Should Not Receive Adequate Protection Liens on, or Superpriority Claims to, Avoidance Actions, Commercial Tort Claims, or the Proceeds Thereof

27. The Committee objects to any adequate protection liens on, and superpriority claims to, Avoidance Actions and their proceeds. Courts have consistently held that Chapter 5 causes of action (and the proceeds thereof) are uniquely reserved for the benefit of unsecured creditors of a Chapter 11 estate, not secured creditors, and are rarely encumbered in favor of secured lenders. *See In re Tribune Co.*, 464 B.R. 126, 171 (Bankr. D. Del. 2011) ("[C]ase law permits all unsecured creditors to benefit from avoidance action recoveries.").

28. The intent behind the avoidance powers is to allow the debtor in possession to gain recoveries for the benefit of all unsecured creditors. *See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000); *In re Cybergenics Corp.*, 226 F.3d 237, 244 (2d Cir. 2000) (stating that "the debtor in possession is similarly endowed to bring [avoidance] claims on behalf of, and for the benefit of, all creditors");

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[16] This amount accounts for projected rejection damages claims. *Disclosure Statement for Debtors' Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 124] (the "Disclosure Statement") at 16.

[17] As part of a settlement with the SPARC Parties, the Debtors and the Prepetition Secured Parties agreed to allow the SPARC Parties' general unsecured claim for amounts owed under the Cash Pooling Arrangement in the amount of approximately $323 million (the "SPARC Payable"), and the SPARC Parties have agreed to waive their right to recover 75% of the SPARC Payable.

In re Sweetwater, 55 B.R. 724, 735 (D. Utah 1985), *rev'd on other grounds*, 884 F.2d 1323 (10th Cir. 1989) (holding avoiding powers are meant to benefit creditors generally and promote equitable distribution among all creditors).

29. Commercial tort claims are likewise normally unencumbered and final cash collateral and financing orders routinely exclude both avoidance actions and commercial tort claims from the scope of adequate protection liens and superpriority claims. *See, e.g.*, *In re Gymboree Group, Inc.*, Case No. 19-30258 (KLP), Docket No. 348 at ¶¶ 15, 18 (Bankr. E.D. Va. Feb. 15, 2019) (excluding avoidance actions, commercial tort claims, and the proceeds thereof from adequate protection liens and claims); *In re Frank Theatres Bayonne/South Cove, LLC*, Case No. 18-34808 (SLM), Docket No. 212 at ¶ 3(b)-(c) (Bankr. D.N.J. Jan. 28, 2019) (same); *In re Promise Healthcare Group, LLC*, Case No. 18-12491 (CSS), Docket No. 218 at ¶¶ 12, 14 (Bankr. D. Del. Dec. 4, 2018) (excluding avoidance actions and proceeds thereof and commercial tort claims and proceeds thereof, in part, from adequate protection liens and claims); *In re The Weinstein Co. Holdings LLC*, Case No. 18-10601 (MFW), Docket No. 267 at ¶ 12(d)-(e)) (Bankr. D. Del. Apr. 19, 2018) (excluding avoidance actions and commercial tort claims from adequate protection liens and claims).

30. Given that unsecured creditors will receive less than a penny on the dollar under the Plan, these assets should remain wholly unencumbered, be preserved, and transferred to a trust or other post-confirmation vehicle to be controlled by, and monetized for the benefit of, unsecured creditors. At a minimum, however, the Prepetition Secured Parties should not receive liens on, or superpriority claims to, the Avoidance Actions and commercial tort claims against themselves or any insider or major stakeholder of the Debtors, such as directors and officers, SPARC and its other subsidiaries, or ABG. In connection with its ongoing investigation, the Committee may ultimately determine that the estates possess colorable claims against the

Prepetition Secured Parties and other parties involved in, among other things, the SPARC Acquisition: a complex transaction that implicates the Debtors' existing capital and corporate ownership structures. The Prepetition Secured Parties, equity holders, directors and officers, and other insiders should not be permitted to obtain backdoor releases of potentially valuable claims through the provision of the adequate protection liens on those assets. *See, e.g.*, *In re Penn Transp. Co.*, 458 F. Supp. 1346, 1355 (E.D. Pa. 1978) ("The bankruptcy laws are intended to be a shield, not a sword.").

B. The Section 506(c) Waiver Is Premature and Must Be Denied or Conditioned on Payment of Administrative Expenses

31. Section 506(c) of the Bankruptcy Code allows a debtor to recover from property securing a claim "the reasonable, necessary costs and expenses of preserving, or disposing of, such property." 11 U.S.C. § 506(c). The Motion seeks to have the Debtors waive this right without guaranteeing full payment of 503(b)(9) Claims and Stub Rent Claims. Therefore, the Court should deny the proposed waiver.

32. Section 506(c) 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. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 11-12 (2000). This section is designed to "prevent a windfall to the secured creditor … [Section 506(c)] understandably shifts to the secured party … the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate." *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995). In light of this, a number of courts have held that section 506(c) waivers cannot be approved without committee consent. *See, e.g., In re Mortg. Lenders Network USA, Inc.*, Case No. 07-10146 (PJW) (Bankr. D. Del.), Mar. 20, 2007 Hr'g Tr. at 21:7-

13 [Docket No. 346][18] ("If the Committee doesn't agree with the waiver, it doesn't happen."); *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del.), June 5, 2014, Hr'g Tr. at 212:8-22 [Docket No. 3927][19] (disapproving a waiver "based primarily … on the fact that it's not fully consensual"); *In re Nova Wildcat Shurt-Line Holdings, Inc.*, Case No. 23-10114 (CTG) (Bankr. D. Del.), Mar. 2, 2023 Hr'g Tr. at 87:14-21 [Docket No. 212][20] (stating "if you're a secured creditor and want to invoke the bankruptcy process for the purpose of what will likely be maximizing the value of your collateral, you don't get to impose the costs of that on other people … you've got to pay the freight associated with [that] process …").

33. Preserving the Debtors' section 506(c) surcharge rights is critical in these cases. First, it is unclear whether the Budget provides for payment of all known administrative claims. In particular, the Committee is currently investigating the adequacy of the $3.5 million budgeted for 503(b)(9) Claims due to vendors' allegations of significant discounts extracted on the claims immediately prior to the Petition Date. Second, although the Debtors seek confirmation of the Plan (which would necessitate payment of all administrative claims in full), it is not yet clear to the Committee that the Plan is feasible and can actually be confirmed, particularly given the early stages of the Committee's investigation. The mere fact that Stub Rent Claims and 503(b)(9) Claims are presently budgeted does not mean that they will actually be paid.

34. Accordingly, the Committee respectfully requests that the Court either deny the proposed waiver of the Debtors' section 506(c) surcharge rights or condition such waiver upon the actual payment of all allowed Stub Rent Claims and 503(b)(9) Claims.

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[18] A copy of the relevant portion of this hearing transcript is annexed hereto as **Exhibit 1**.

[19] A copy of the relevant portion of this hearing transcript is annexed hereto as **Exhibit 2**.

[20] A copy of the relevant portion of this hearing transcript is annexed hereto as **Exhibit 3**.

C. The Prepetition ABL Agents and Prepetition Term Loan Agent Are Not Entitled to Immediate Payment of Attorneys' Fees

35. The Debtors seek to pay the attorneys' fees and costs of the Prepetition ABL Agents and Prepetition Term Loan Agent. *See* Interim Cash Collateral Order ¶ 7(g). As such payments are impermissible under the Bankruptcy Code, the Court should deny the request to make such payments.

36. Under the Bankruptcy Code, only an oversecured creditor is entitled to interest, reasonable fees, costs, or charges if provided for in the underlying credit agreement. *See* 11 U.S.C. § 506(b). "[A] secured claim is 'oversecured' to the extent that the value of the creditor's interest in the estate's interest in property is greater than the amount of the creditor's allowed prepetition claim." *DeNofa v. Nat'l Loan Inv'rs, L.P. (In re Denofa)*, 124 F. App'x 729, 731 (3d Cir. 2005) (quoting 5 Collier on Bankruptcy ¶ 506.04[1] (15th rev. ed. 2003)).

37. Neither the Prepetition ABL Lenders nor the Prepetition Term Loan Lenders have demonstrated that they are oversecured and thus fail to qualify for the payment of their attorneys' fees and costs. Indeed, for purposes of Plan voting, such parties have taken the position that they are either woefully undersecured (Prepetition ABL Lenders to receive up to 3% recoveries) or entirely unsecured (Prepetition Term Loan Lenders to receive nothing). *See* Disclosure Statement at 15. As neither the Prepetition ABL Lenders nor the Prepetition Term Loan Lenders qualify for the payment of their attorneys' fees and costs, the Debtors' request for authority to make such payments must be denied, and any improper postpetition payments made to date must be returned to the Debtors' estates. *Finova Grp., Inc. v. BNP Paribas (In re Finova Grp., Inc.)*, 304 B.R. 630, 638 (D. Del. 2004) (affirming disallowance of unsecured creditor's claim for postpetition fees under section 506(b) of the Bankruptcy Code); *In re Loewen Grp. Int'l, Inc.*, 274 B.R. 427, 445 n.36 (Bankr. D. Del. 2002) (stating "the language in § 506(b) limiting the recovery of post-petition fees and costs to oversecured creditors [is] demonstrative of

Congressional intent not to allow the recovery of post-petition fees and costs by creditors whose claims are not oversecured.").

D. Other Provisions of the Motion Prejudice the Committee and Should Be Modified

38. The Committee further submits the following objections to the Motion and requests that the Final Cash Collateral Order be amended accordingly to the extent the Motion is not denied:

a. The Cash Sweeps Are Inappropriate Pending Plan Confirmation. Because the Prepetition Secured Parties' claims arose through the SPARC Acquisition and the refinancing of prior debts, the validity, extent, and perfection of the Prepetition Secured Parties' liens and claims will be central to the Committee's investigation. The ABL Lenders should not be permitted to sweep any cash from the estates until that investigation is complete. Instead, all cash should be retained by the estates and distributed in accordance with the Plan. *See, e.g.,* Interim Cash Collateral Order ¶ 3.

b. The Committee Fee Allocation Is Inequitable. The Budget contains a line item for aggregate case professional fees totaling approximately $13.5 million. Based on documents provided to date, the Committee believes that approximately $10.4 million of that amount has been allocated for the Debtors' counsel, financial advisor, and CRO, versus $750,000 for the Committee's professionals, or approximately 7.2% of that allocated for the Debtors' counsel, financial advisor, and CRO. The Budget should be modified to provide the Committee's professionals with an amount equal to one-third of that allocated to the Debtors' counsel, financial advisor, and CRO, which is market in large chapter 11 cases in this jurisdiction. *See* Interim Cash Collateral Order Ex. A.

c. The Proposed Carve-Out Language Prejudices the Committee. The carve-out in the Interim Cash Collateral Order limits payment of the Committee's professional fees to the amounts in the Budget, whereas all of the Debtors' professional fees are carved out from the prepetition collateral. The Committee's professionals must receive the same treatment of their fees as the Debtors' professionals. *See* Interim Cash Collateral Order ¶ 13.

d. The Committee Investigation Budget Is Inadequate. The Interim Cash Collateral Order substantially limits the Committee's investigation budget to only $50,000, which is significantly below amounts allocated for investigations into the validity, extent and perfection of liens in this district. Moreover, the Committee's investigation in these Chapter 11 Cases is particularly complex given that it must investigate a series of transactions that occurred in rapid succession, including (i) refinancing and repayment of the Old SPARC ABL Facility and Old SPARC LC Term Loan Facility, (ii) joining the Prepetition ABL Credit Agreement and Prepetition Term Loan

Agreement, and (iii) amending and restating the Subordinated Loan Credit Agreement. As such, the Committee's investigation budget should be increased to at least $100,000. *See* Interim Cash Collateral Order ¶ 4(f).

e. No Waiver of Marshalling or Equities of the Case Under Section 552(b). Given the Debtors' intent to liquidate, the Court should not eliminate these potential avenues of recovery for unsecured creditors unless the Debtors agree to immediately pay all 503(b)(9) Claims and Stub Rent Claims. The Interim Cash Collateral Order must also be modified to make clear that the Prepetition Secured Parties must first exhaust all prepetition collateral before seeking to satisfy their diminution claims, if any, from previously unencumbered assets. *See* Interim Cash Collateral Order ¶¶ 7, 19-21.

f. Committee Reporting Rights. The Committee must receive notice of any revised budgets and be concurrently provided with all financial reporting delivered to the Prepetition Administrative Agents. *See* Interim Cash Collateral Order ¶ 4.

RESERVATION OF RIGHTS

39. The Committee hereby fully reserves its right to further object, supplement and amend the Objection, including by filing declaration(s) in support hereof, and raise additional arguments to the Motion, any final order approving the Motion, and any stalking horse agreement or sales. The Objection is also without prejudice to the Committee's right to seek other appropriate relief, including reconsideration of the relief granted in the Interim Cash Collateral Order.

CONCLUSION

40. WHEREFORE, the Committee respectfully requests that the Court enter an order (i) denying the Motion on a final basis or, alternatively, modifying the terms of the Debtors' Final Cash Collateral Order in a manner consistent with the objections made herein, and (ii) granting such other and further relief as the Court deems just and proper.

Dated: April 10, 2025
Wilmington, Delaware

COLE SCHOTZ, P.C.

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Proposed Counsel to the Official Committee of Unsecured Creditors

Exhibit 1

March 20, 2007 Hearing Transcript in
***In re Mortg. Lenders Network USA, Inc.*, Case No. 07-10146 (PJW) (Bankr. D. Del.)**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
MORTGAGE LENDERS NETWORK USA, INC.,	.	Case No. 07-10146(PJW)
	.	(Jointly Administered)
	.	
Debtor.	.	March 20, 2007 (2:06 p.m.)
	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY COURT JUDGE

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

THE CLERK: Please rise.

THE COURT: Please be seated.

MS. DAVIS JONES: Good afternoon, Your Honor. Laura Davis Jones of Pachulski, Stang, Ziehl, Young, Jones & Weintraub on behalf of Mortgage Lenders Network USA. Your Honor, let me start on behalf of all of us and thank you for letting us continue this hearing from yesterday. There were a lot of discussions that occurred with respect to the cash collateral, and I think it has narrowed the issues that are still open. Your Honor, if I may, could we skip matter 1 on the second amended agenda, which I refer the Court, and take up matters 2 and 3 which I think I can dispose of quite quickly.

THE COURT: Okay.

MS. DAVIS JONES: Matter 2, Your Honor, is the motion of Wells Fargo as is matter 3 for relief from stay to terminate the debtor as servicer and to transfer servicing. Your Honor, the parties have agreed to a form of order to allow the substitution of Wells Fargo Bank NA as the replacement and servicer of MLN pursuant to the terms of the servicing agreement and have agreed to modify the stay to allow Wells to take reasonable steps to terminate MLN as the servicer in accordance with the servicing agreement. And, Your Honor, we do have proposed forms of order that will do that. In addition, though, Your Honor, all parties have

agreed to reserve their rights with respect to the servicing agreements and the trust loans. Your Honor, the parties are going to attempt to work out a procedure to resolve payment of amounts owed to the debtor, and if successful, will lodge a stipulation with the Court. If we're not successful, Your Honor, we'll probably be back before you in connection with this issue, but we're hopeful that we'll be able to work it out. Your Honor, if I may, what I'd like to do is approach with a form of order for matters 2 and 3.

THE COURT: Okay.

MR. BURNHAM: Your Honor, Noel Burnham from Montgomery, McCracken, Walker & Rhoads on behalf of Wells Fargo Bank National Association. Debtor's comments with respect to the resolution at this point of the two Wells' motions is correct, and we expect to proceed accordingly to try to resolve whatever remaining issues there are with respect to the servicing agreement, but at least as to the matters on the motion, this order will resolve those.

THE COURT: Okay.

MR. STAIB: Good afternoon, Your Honor. Jason Staib from Blank Rome on behalf of the Committee. Your Honor, Mr. Schaedle from our office handled this matter, and as I understand it, the Committee does not have an objection to the limited stay relief sought by Wells. Mr. Schaedle asks that I read a rather long-winded reservation of rights into

the record, which I'll do with your permission.

THE COURT: Okay.

MR. STAIB: "In connection with the release sought by Wells' stay and the Committee's non-objection, the Committee reserves all of the debtor's estates and creditors' rights and claims including without limitation for remittances, reimbursements, refunds, servicing, payments, offsets, and fees related to debtor receivables and payment in tangibles and/or relating to and in connection with the 1999-1 and 1999-2 servicing agreements, the 2000-1 pulling agreement, and related documents, agreements and instruments against Wells in any capacity, FSA, each of the Mortgage Lenders Network Home Equity Loan Trust 1999-1 and the Mortgage Lenders Network Home Equity Loan Trust 1999-2. Other parties to the servicing pulling agreements, MBIA, any successor servicer or sub-servicer and against collection or servicing accounts. The Committee asserts and believes that the parties all agree that nothing in the debtor's agreement to the stay relief granted today nor the replacement of the debtor as servicer creates administrative expenses or other claims against the estate. Each of Wells, the Trust, FSA and MBIA likewise reserve all of their rights and claims in connection with the foregoing."

THE COURT: Okay.

MR. BURNHAM: With that, Your Honor, I request

permission to be excused from the rest of the hearing.

THE COURT: Okay. I've signed the orders.

MR. BURNHAM: Thank you, Your Honor.

MR. GODSHALL: Good afternoon, Your Honor. Brad Godshall on behalf of the Pachulski firm on behalf of MLN. Number 1 on the agenda is the continued motion of the debtors concerning DIP financing and cash collateral use. Your Honor, since the last hearing - well, I guess to go back further, the last hearing ended, Your Honor, with the debtors finishing the direct examination of the chief restructuring officer of the debtor, Dan Skuller (phonetical). Before cross-examination started, the Committee and RFC and the debtors mutually agreed to a continuation of the hearing and a hopeful resolution of issues. Since that time, Your Honor, a lot has happened. Let me go through what's happened, because I think it will put the hearing today in context. There was a lot of discovery. The debtors obviously continued operating in the interim, and operated in a manner which was favorable to what had been projected in the budget. The Committee filed a supplemental objection on Friday, which I assume Your Honor has reviewed.

THE COURT: Yes.

MR. GODSHALL: And there's been a tremendous amount of negotiation. I believe that as we sit here today, we are down to perhaps four contested issues with respect to the

debtor's motion, but I'm not exactly sure, and I don't want to put words in the Committee's mouth. The Committee will advise you as to exactly what they're still objecting to. So, I think there's been a tremendous amount of hard work that's gone into resolving what were very, very numerous objections by the Committee. Your Honor, the most significant single change in the landscape, as we stand here today as compared to the last hearing, is the debtors no longer believe that they need DIP financing. The debtors believe that we can get to April 28 at which time all business operations of the debtors presumably will be terminated. There may be odds and ends in terms of assets to sell, but in terms of the business of servicing loans, and we think we'll be done with that by April 28, and we believe we can get there simply using cash collateral. So that's obviously an important change, and it's a change which, you know, we think resolves a lot of the objections that the Committee had - the Committee still has objections, but I'm sure they're more comfortable with what is being proposed now than they were at the last hearing. We gave Your Honor a redlined form of order only about a half an hour ago. I'm sure Your Honor hasn't had a chance to go through it yet, and the redline is a redline back to the interim order. There's going to be a tremendous amount of redlining that you'll see there because it's been changed from an interim order, which

approved financing, to a final order which only approves cash collateral use. So there's going to be a lot of changes there that are unavoidable. Attached to that - and Mr. Lenhart on behalf of RFC, you know, will walk through the order with you and show you - walk you through all the changes and the various objections of the Committee that the changes were intended to address. So we'll go through that. We also have a new budget attached to the order which is different from the budget that was attached to the interim order. It's different in some ways that are unavoidable. We actually have actual operating results where we had projections for, you know, the interim weeks here. The order - I mean, I think it would be fair to say that the budget overall reflects more favorable performance than was reflected in the budget concerning the interim hearing. I know the Committee wants to cross-examine Mr. Skuller. They didn't have the opportunity to do that at the initial hearing. I don't know how Your Honor would like to proceed, if Your Honor would like to go through what the open issues are first or whether Your Honor would like to hear the cross-examination of Mr. Skuller first, you know, we'll proceed in whichever way Your Honor believes that will be the most constructive.

THE COURT: Okay, well, let me hear from the Committee then.

MR. GODSHALL: Yes.

MS. KELBON: Good afternoon, Your Honor, and thank Your Honor for extending this time to us. Your Honor, the Committee is here today to oppose the cash collateral revised request on the basis of the terms and conditions that RFC is seeking to impose on the debtor. We still have a number of serious concerns that have been reflected in this revised order that we feel have to be addressed, and we also believe that we will be putting on evidence for Your Honor to show that the use of cash collateral is a contrived use. The way the budget has been revised shows a potential use of cash collateral that we believe will not be necessary. So, we do not think they will be able to show a need for cash collateral, and moreover, even if the debtor did need cash collateral, Judge, we don't think that the terms and conditions which RFC is imposing on the debtor for the use of this cash collateral are fair or reasonable under the circumstances, and if you'd like me to go through the specific ones that are objectionable to the Committee, I can do that right now, Your Honor.

THE COURT: Okay.

MS. KELBON: First, Your Honor, is the so-called diminution claim, and it probably would be helpful if we turn to the language in the order. It's pages 19 and 20.

MR. GODSHALL: Your Honor, may I ask if you have the

blackline that the messenger -

THE COURT: Yes.

MR. GODSHALL: Okay, thank you.

MS. KELBON: Your Honor, it reads: "As adequate protection for lender in respect of any diminution -"

THE COURT: I'm sorry, whereabouts on 19?

MS. KELBON: I'm sorry, number 3, Your Honor, at the bottom.

THE COURT: Number 3?

MS. KELBON: Yes, Your Honor.

THE COURT: Okay.

MS. KELBON: "As adequate protection for lender in respect of any diminution in the value of lender's interest in the pre-petition collateral resulting from (1) debtor's use of cash or (2) debtor's breach after the petition date if such breach constitutes a failure to act in a commercially reasonable manner with respect to any obligation set forth in this order regarding servicing, sale, or transfer of MLN owned loans." If I could just stay with that, Your Honor. The MLN owned loans are the loans that are the loans that generate the cash collateral. There's three kinds of proceeds: the debtor originated these loans, they're on the warehouse line, and they're pledged to RFC. There was about 420 million on the filing date. Since the sale a couple of weeks ago, I think they're down to about 80 or 100 million.

We have these loans. They're generating principal and interest payments from the underlying mortgagors. That is the permitted cash collateral that's going into the cash collateral account. There's also other proceeds. A mortgagor may pay off their loan, they may refinance. That's not permitted cash collateral. That goes directly to RFC. It pays down their pre-petition claim. The debtor is not using the mortgage loans. They're servicing them for RFC's benefit. They're not getting a servicing fee for that, and they are actively trying to sell them for RFC's benefit. This order in addition to do other things for RFC grants them immediate stay relief. If there's a breach of a sale or breach of a servicing or a breach of a transition, the law gives RFC, at best, a replacement lien for the use of their cash. We understand that, Your Honor. They would get a replacement lien on unencumbered assets for the actual cash that might be used in that cash collateral account if that cash or that lien that proves to be inadequate, then they get a super-priority claim under 507(b). That is what the law gives them. If the lien they get is inadequate, they get a super-priority claim. They don't get a super-priority claim and a lien for a post-petition breach. The remedy in this Circuit is to seek relief from the stay. They have that already in this order. They can take back their collateral. If there is a breach, they take back their warehouse loans.

The cash collateral is a separate issue. It's sitting in the cash collateral account. That is being protected. That's all they're entitled to protection for. We have a real problem with the order as drafted that they're trying to impose some amorphous diminution claim as a super-priority claim and a lien that goes on in the following pages on all assets for this so-called potential breach. Your Honor, that is a very big issue for this Committee. The second issue, Your Honor, that we are concerned about is the 506©) waiver, and again, I think it would be helpful if we turned to the language - Since I'm not as familiar with this blacklined order, it's going to take me a second, Your Honor. It's on page 25, Your Honor, paragraph (5). It recites: No cost or expenses of administration or other charge, meaning assessment or claim incurred at any time on or before a termination date, by the debtor or any person or entity shall be imposed against lender, its claims, or its collateral under 506©) of the Code or otherwise, and it goes on as well, Your Honor. Your Honor, we believe that there have been tremendous benefits that RFC has been given in this case, and the Committee would like to preserve any 506©) potential surcharge for this estate. Moreover, we believe that that language goes beyond just the 506©) waiver, and it prohibits any claim. It says "or otherwise that could have been imposed on them." So, we think that language is similarly

problematic. The third issue, Your Honor, is the control over the budget process. By means of the interim order and now this third budget that we're seeing, Your Honor, again, RFC has effectively neutered the Committee from carrying out its duties in this case. They have provided the Committee's professionals with just $300,000 for the period of February 20 through April 28th and they prohibit the debtor from paying professionals any amounts in excess of that from unencumbered cash. In stark contrast, RFC has agreed during the same period to provide the debtor's professionals with 1.9 million plus $722,000 of pre-petition retainers. In our view, Judge, this treatment is unfair and inappropriate. Moreover, RFC has exclusive control over the budget, and they will not give the Committee a veto power over any changes to the budget. The Committee was very concerned that there were payments of pre-petition claims made. We want to insure that that does not happen further. We don't want any changes to the budget without our consent. The other issues, Your Honor, that we have, have to deal with all of these imposed obligations on the debtor. It was first under the guise of the DIP financing. Now it's under the heading of cash collateral. There were three kinds of loans that the debtors serviced in this case that relate to RFC. The first kind was called the Master Service Loans. That was the big $8 billion portfolio. They were serviced under pre-petition agreements that were

purportedly terminated by RFC pre-petition, around, I believe, January 24th. Yet the order imposes continuing obligations on this debtor as debtor obligations, which but for this order, they would be pre-petition claims at best. The next type of loan - excuse me, loans that the debtors service are called the Emaxed Service Loans. These are loans that the debtor originated, and I believe they sold them to Emax. Emax used funds from RFC, a warehouse line with RFC. So RFC is a secured creditor of Emax on those loans. Those loans are purportedly being serviced under an agreement between the debtor and Emax which expired on February 28th. Again, but for this order, there would be no continuing ongoing servicing obligations. We are concerned not only that the debtor has undertaken these obligations, which would be fine in and of itself if that is the debtor's business judgment, but, Your Honor, they are now exposing themselves to a breach for such servicing obligations if in fact there's a breach of that obligation. The order also has the debtor obligated to actively sell loans for RFC's benefit. Our position is, if you want to put these provisions in the order, they should be limited to a termination of cash collateral, if there's a breach, or relief from stay to move the servicing but not impose further claims on this estate. Your Honor, there's other language issues I have with the order, and I can go through that, but I think they're much

less significant, but I would like to reserve the right to just go through and try to resolve some specific language with some of the blackline that I just saw. Would you like me to do that now?

THE COURT: No, but on the last point you made, the imposed obligation, I don't know where in the agreement those are recited.

MS. KELBON: They used to be paragraph (9) so I'll try to - I think it's now - It may be (6). It's (6) and then it's later on and further in the Events of Default section as well. The debtor agrees to do the following - This is at page 25, 26, and there's also further obligations - or I'm going to have to look at my notes, but - I believe it also comes in in the paragraph (7) under Modification of the Stay, and I have to just - if you'll give me a moment, I could find that for Your Honor as well. Your Honor, for these reasons, the Committee is very concerned about granting the debtor use of cash collateral to give RFC these super-priority liens and claims and other potential claims against this estate. We do believe that if the debtor did need cash collateral, it should have the ability to come into this Court and seek to use it, grant them a replacement lien and their diminution claim for the use of that cash collateral, but at this time, Your Honor, we don't think that need actually exists. Thank you.

MR. GODSHALL: Your Honor, would you like me to respond to the issues?

THE COURT: Yes, but bear in mind that I have not read this proposed form of order, so, I'm somewhat at a loss to specifically digest the fourth objection raised by the Committee. I think I understand the first two even without reading the document.

MR. GODSHALL: I actually listed five objections. I'll go through five, and we'll see how we numbered them differently than Your Honor.

THE COURT: Okay.

MR. GODSHALL: First of all, Your Honor, with respect to the diminution claim and the language that counsel referenced as objectionable, which is in paragraph (3) on page 19 of the order. Your Honor, this order, to the debtor's mind doesn't give a collateral diminution claim to RFC. The Bankruptcy Code gives a collateral diminution claim to RFC. What the debtor intended to do in paragraph (3) is to limit that claim not expand it, and I think Committee counsel has too narrow a view of what a collateral diminution claim might consist of. If this was the ordinary kind of manufacturing case, Your Honor, where the debtor manufactured widgets, and the widgets were sold today in accounts receivable, and the accounts receivable had a value of let's say of $2 million on the petition date, and at a date

sometime in the future it could be established that the accounts receivable had diminished to a million dollars, my understanding of the law, Your Honor, is that you have a collateral diminution claim of a million dollars. Now, Committee counsel seems to be taking the position that that is not correct, that just because the value of the accounts receivable has reduced from 2 million to 1 million over a period of time, doesn't necessarily result in a diminution claim. That the diminution has to be by reason of the use of the debtor of that cash collateral, and, Your Honor, I think that's much too narrow. If the debtor hasn't taken care of the collateral, if it hasn't gone out and collected the receivables or done what is necessary to protect the value of the cash collateral, that's what gives rise to a diminution claim. So here, Your Honor, counsel correctly characterized the nature of the cash collateral. It's the principal and interest. It's the value of this loan portfolio that the debtor owns and the debtor services and which is subject to the lien of RFC. Now, we're going to use cash collateral. We're going to use the principal and interest relating to those loans, and there's no dispute that our actual use of that principal and interest, since it's not going to be replaced, because we're not replacing cash collateral in this case, Your Honor, that would clearly give rise to a diminution claim. RFC also felt that since we were basically

the caretaker of this collateral that if the value of that collateral diminished during the case because the debtor didn't properly service the loans, or otherwise, you know, did something, you know, that was - you know, whatever, if the debtor did something which diminished the value of that collateral that it might give rise to a diminution claim, and under the law that would probably be, in our view, be a reasonable position for them to take. It's certainly a litigable position. So what the debtor did is to try to narrow that possible claim because the debtor was concerned, Your Honor - The debtor was concerned that it may not be able to adequately service, i.e., take care of the cash collateral of RFC through no fault of its own because everybody understands that this debtor is in a very precarious position.

THE COURT: I'm sorry. It is the debtor's need to use the cash collateral? Is there a need to use the cash collateral?

MR. GODSHALL: Yes, there is a need under this budget to use cash collateral before April 28th, not a lot, probably less than a million dollars, but to get the wind-down completed, there is expected to be a need for a use of cash collateral. So, what we did, Your Honor, what we got RFC to agree to is that there wouldn't be a diminution claim because we didn't take care of the cash collateral unless the

failure to do so was by reason of some behavior that was something other than commercially reasonable. In other words, Your Honor, if our servicing department all gets up and quits tomorrow because they see no future at MLN, that's not our fault, and RFC has bought into that risk. And so, this language limits their diminution claim in that scenario. It says that as long as we can say - RFC has agreed that as long as we can establish to Your Honor that we've done what we can do, given the difficult financial circumstances that we're under, that they will not have a diminution claim in that scenario, for example, because we just don't have the financial wherewithal to keep those people onboard. So, we weren't trying to create -

THE COURT: Okay, so - I'm sorry for the interruption -

MR. GODSHALL: Sure.

THE COURT: - but Im seeing this for the first time.

MR. GODSHALL: Sure.

THE COURT: So you're saying that clause Romanet II is addressing the issue you're talking about where -

MR. GODSHALL: Yes.

THE COURT: - the debtor's breach causes the diminution.

MR. GODSHALL: Yes, and what it says is that it has

to be basically an intentional breach as opposed to - and a breach that we just can't avoid -

THE COURT: Okay, that's if the breach constitutes failure to act commercially reasonably.

MR. GODSHALL: Yes, yes. So we're trying to limit the diminution claim that might be asserted not expand it. Now we may have a difference of opinion with the Committee on what gives rise to a diminution claim, but I don't think we're fighting about a lot here, because again, we thought we were limiting a diminution claim. They're concerned that by putting this in here we're expanding it, and I think that -

THE COURT: Let me ask you this question -

MR. GODSHALL: Yes.

THE COURT: We read everyday about what's happening in the sub-prime industry. Suppose the value of the portfolio loses value significantly just because of what's happening in the industry?

MR. GODSHALL: I'm glad you're asking me that, Your Honor, because that's exactly what this was supposed to carve out as a possible ground for a diminution claim. Because when you look at Romanet I and Romanet II, those are the only instances in which RFC's allowed to assert a diminution claim. And your hypothetical? That would not be diminution by reason of our use of cash collateral, and it would not be diminution because we've acted in something other than a

commercially reasonable manner, and I'm sure RFC would get up here and confirm -

THE COURT: Assuming you can prove that it's market driven -

MR. GODSHALL: Yes.

THE COURT: - no fault of anybody except the market.

MR. GODSHALL: Yes, yes, that's exactly what this was supposed to limit in terms of a collateral diminution claim. So, I'm not sure why we're at odds with the Committee on this first objection. I think this is a good thing for the estate not a bad thing. We're happy to try to resolve objections while we're here, but we think this objection is not well-taken for the reasons I've just stated. Now I can go onto number 2 or you can hear from -

THE COURT: No, why don't you cover all four or five as your - for your count.

MR. GODSHALL: Sure, Your Honor. The second objection that I identified is on page 29, paragraph (5), and this is the surcharge waiver. And, Your Honor, this is not an issue that the debtor feels as strongly about. This is obviously something that RFC's requested. I'm sure Your Honor has seen requests for surcharge waivers a thousand times, you know, in your career as a judge. They're obviously, absolutely standard in the context of DIP

financing to get some sort of a surcharge waiver. I think they're less standard in the context of a cash collateral use request which is what we have here.

THE COURT: Well, I don't think they're standard in a conventional DIP facility, not in my Court anyway.

MR. GODSHALL: Well, all right, well then -

THE COURT: Well, let me tell you what the law in this Court's been for at least the last five years. If the Committee doesn't agree with the waiver, it doesn't happen. I've had a couple of cases where the Committee has agreed to it because of exigent circumstances, but absent the Committee's approval I can't remember the last time I approved such a waiver, if I ever did.

MR. GODSHALL: All right, well, then, in that case, Your Honor, RFC's going to have a decision to make, and this wasn't, obviously, something that the debtor negotiated for. This is something that RFC has required. Third objection I heard, Your Honor, was RFC's control of the budget process and this is maybe where your numbering and mine diverge because under that heading I heard two separate objections, and the first objection, Your Honor, is that this order only permits professional fees to be paid in accordance with the budget, and the budget has an amount of professional fees for the Committee running through April 28 that is, I believe, $210,000 for Committee counsel and $90,000, I believe, for

Exhibit 2

June 5, 2014 Hearing Transcript in
***In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del)**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
ENERGY FUTURE HOLDINGS	:	
CORP., et al.,	:	Case No. 14-10979(CSS)
	:	
Debtors.	:	(Jointly Administration
_____	:	Requested)

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware
June 05, 2014
9:46 AM - 5:34 PM

B E F O R E :
HON CHRISTOPHER S. SONTCHI
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: AL LUGANO

ultimately will require that the DIP lender -- or that the debtor go out and get additional financing to repay that, which will then decrease the value of the equity that is ultimately going to the TCH secured creditor should the plan of reorganization that's contemplated under the RSA go forward.

For that reason, Your Honor, it's just not a timing issue, it actually is a substantive issue and it's a substantive entitlement that Section 363(c)(2) and 364(d) entitle the prepetition secured lenders to, in order for the debtor to have consensual use of cash collateral and the $4.475 billion priming DIP.

That's it. Thank you.

THE COURT: All right. I'm going to take a short recess and then I'll come out and rule, about 10-15 minutes.

(Recess)

THE CLERK: All rise.

THE COURT: Please be seated. All right, we're talking about the cash collateral motion and as people said, and I certainly appreciate, the hard work that went in to resolving the objections that were resolved and I understand that some were unresolvable and that is what it is, and I certainly don't have any problem with people protecting their rights and making arguments. If you can't settle, you can't settle.

So, the open issues on cash collateral at this point, I'm holding Aurelius issues aside, since that doesn't really kick in until we know if we're going to have a cash collateral order or not and it's a different issue is whether the amount or whether really any adequate protection payments should be made, whether the Court should allow a 506(c) waiver, and whether the investigation period and budget or (indiscernible - 4:25:53) period are adequate.

I would say that at first blush, I think the adequate protection payments seem overly generous or just plain unnecessary, but the facts is they were put out and in front of the Court and developed do lead to a different conclusion.

If we were just talking about cash collateral usage here -- excuse me, if just cash collateral was necessary and the debtors' cash flows are as positive as they appear, I wouldn't approve adequate protection payments. They wouldn't be necessary. Or if as it appeared when I first read the papers, if the debtor was just borrowing money on a priming basis for the sole reason to make adequate protection payments, I wouldn't approve the adequate protection payments. I wouldn't have approved the loan either.

But the testimony is that the debtors cannot survive solely on cash collateral usage, that the DIP loan

was only available on a priming basis, that prime secured creditors are entitled to adequate protection, and that secured creditors, whose cash collateral was being used, are entitled to adequate protection. Of course, the question is what is that -- what does that adequate protection mean, at least in that last piece?

Now, the price of consent to the priming and the use of cash collateral here are the adequate protection payments plus the other provisions that are included. And I think it's important to note that even on a non-consensual basis, the prime creditor would be entitled to adequate protection and possibly on the use of cash collateral.

So based on the reality of the situation, the fact that the debtors can't survive solely on cash collateral, they had to borrow the money. Now the size of that loan is large, why? Well, a big part of that is that the adequate protection piece is large because that was the price for consensual use. So, in my mind, I must approve the adequate protection package that's been proposed that's not a blank check.

Debtors get stuff in here and I don't -- I think it's important to note that there are no milestones. There is no linkage to the RSA. And we're talking about an extended 18 month period of cash collateral. Those are all very positive pieces of the package that go to what is

appropriate or wasn't appropriate.

But I have to look at it from -- looking out for the estate and, you know, what's actually necessary and what's appropriate adequate protection payment. Now, I think, although I'm going to approve them, that the adequate protection payments, even at the blended interest rate on the entire amount of the claim is a generous package of payments. And based partly on that and based primarily, as well, on the fact that it's not fully consensual, I think that a 506(c) waiver is not necessary and I want to prove it in this context.

Let me just make a little point about that. Judge Walsh once told me that he'd never approved a 506(c) waiver on a non-consensual basis and he'd never had a 506(c) hearing. It just doesn't arise. And a lot of times I think we're worried a lot about nothing, but in this case I think Mr. Shore brought out some very important points in the context of what would occur in the event there was some sort of collateral shut down or collateral transfer to the first lien lenders, and what would that leave behind, and where would the -- where would that leave the estate. So, I am not going to approve a 506(c) waiver.

In connection with the investigation period, in this instance, I am going to rely on the official committee's judgment in this issue. I'm not saying the ad

hoc committee's input is not important. And, in fact, I just upheld their objection to the 506(c) waiver, but I think investigation period's like this are particularly an issue where the Court's going to rely on what the official committee has to say. So, I'm going to approve what has been agreed to with the consent of the official committee of unsecured creditors. So, I will approve the adequate protection payments, no 506(c) waiver, investigation period and budget are sufficient as modified.

Now, just real quick, debtors' counsel seemed to indicate at one point that, I don't know if he's talking about me or others, but basically I can't pick and choose, or blue line the provisions of the agreement that the debtors have entered into in their business judgment. I sort of agree. I sort of disagree. That's part of my job. That's why I get an order. That's why we go through it. But what the issue is I can't force any party, including the first lien lenders, to consent. What I can do is indicate what I'll approve and what I won't approve, and in this cash collateral order I'll approve the adequate protection payments. I won't approve a 506(c) waiver and if that's a problem, we'll deal with it. If not, I'll approve the order subject to talking about Aurelius when we get a chance.

Is there any questions on that before we go any further?

Exhibit 3

March 2, 2023 Hearing Transcript in
***In re Nova Wildcat Shurt-Line Holdings, Inc.*, No. 23-10114 (CTG) (Bankr. D. Del.)**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 23-10114 (CTG)
	.	
NOVA WILDCAT SHUR-LINE	.	824 North Market Street
HOLDINGS, INC., et al.,	.	Wilmington, DE 19801
	.	
Debtors.	.	
	.	March 2, 2023
. . . . .		10:00 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE HONORABLE CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For Newtech Electronics Industries, LLC:	Landis Rath & Cobb, LLP By: MATTHEW B. McGUIRE, ESQ. 919 Market Street, Suite 1800 Wilmington, DE 19801

- - -

documents that have been filed on record in the case that I want to make sure are of evidence. If I may have one moment?

THE COURT: You may.

MR. BRESSLER: These were all things that I believe were referred to in our objection, so that's why I'm mentioning them. It's a declaration of Mark Rostagno in support of the Debtors' petitions and first day relief, Docket Number 4.

THE COURT: Okay.

MR. BRESSLER: I think the others may all be of evidence but I want to make sure the DIP cash collateral motion and what's in there, Docket 20, the sales procedure motion, 28, and the interim cash collateral order, Docket 53.

THE COURT: All right. Is there any objection of my taking judicial notice of matters that have been filed with the docket of the court?

MR. ANGELO: No, Your Honor.

THE COURT: Okay. So, I'll take judicial notice of those, Mr. Bressler.

MR. BRESSLER: Thank you, Your Honor.

THE COURT: Okay. Thank you.

Any other party in interest wish to present evidence as it relates to the motion to approve the DIP loan?

(No audible response)

Okay. Then now why don't we return to argument then?

MR. ANGELO: Thank you, Your Honor. Appreciate your

flexibility with us getting through this today.

THE COURT: We're all in this together.

MR. ANGELO: Yes. As I was starting to say, Your Honor, that at the outset I do think it's important to recognize and acknowledge that there's no dispute here that this DIP is both necessary and useful. Both witnesses have testified to that effect. And it's been useful thus far. We've been doing a pretty good job of collecting AR. And as stated in Mr. Meitiner's declaration, the Debtors did make effort to seek alternative financing. They were unable to find those sources and better terms than what's been provided by PNC.

Your Honor, I keep coming back to the phrase you can't get blood from a stone. This is the best DIP that we could get. It was hard fought and hard negotiated. There's simply nothing better available. At bottom, Your Honor, the issue really isn't whether the need for the DIP exists. The evidence does show that in a fairly straightforward manner.

With respect to the adequate protection being provided, the negotiations with the DIP agent regarding the use of pre-petition collateral, including cash collateral, were, as I mentioned, hard fought, ultimately resulted in the best possible outcome under the circumstances, thereby allowing the funding of the administration of the Debtors' estates and the continued operation of the business to maximize value.

PNC, as pre-petition agent for the pre-petition secured parties, has agreed to permit the Debtors to use their pre-petition collateral, including cash collateral, subject to the terms and conditions set forth in the DIP credit agreement and including the protections afforded by a party acting under good faith under 363(m) of the Code. The pre-petition parties are entitled to adequate protection under 361, 362, 362 and 364 for any diminution in value.

The terms of the proposed adequate protection arrangements and the use of cash collateral are fair and reasonable, reflect the Debtors prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the pre-petition agent's consent to the use thereof.

With respect to the 506(c) waiver and the equities of the case and marshaling doctrine waivers and the entitlement to 552 relief, in light of the subordination of their liens, Your Honor, and the super priority administrative claims to the carve-out in the case of the DIP secured parties and the carve-out of the DIP liens in the case of the pre-petition secured parties, we submit that each of the DIP secured parties and the pre-petition secured parties are entitled to all the rights and benefits of what we've been referring to, the lender protections that have been set forth as in the DIP credit agreement.

Your Honor, the witnesses here today elicited both in their proffer testimony and on the stand that the terms and conditions of this facility and the fees paid and to be paid thereunder, are fair, reasonable and the best available under the circumstances and they reflect the Debtors exercise of prudent business judgment consistent with their fiduciary duties and are supported by both reasonably equivalent value and fair consideration.

I'd again point out that the DIP credit agreement was negotiated in good faith at arms-length among the Debtors and the DIP secured parties with the assistance of counsel and their respective advisors. As such, the obligations under the DIP current agreement are entitled to full protections of Section 364(e) of the Bankruptcy Code.

Your Honor, with respect to the theme here that I think we've gotten in their pleadings and in their argument -- well, soon to be argument, they would have you believe that this is an egregious example of a federal foreclosure. Let's dispel that notion right away. Your Honor, as the witnesses testified, there was no other option here. We tried, we looked, we worked with PNC pre-petition to get to a better option and there simply was nothing better at the time and going into the sale process for unsecureds or any other parties in interest.

THE COURT: So, I don't mean to interrupt, but --

MR. ANGELO: No, please --

THE COURT: -- it might be helpful if I shared some overarching thoughts, so that you all have a sense of sort of where we are and what the target is that everyone is shooting at here.

I am not one who believes that there necessarily needs to be a recovery for unsecureds in order to legitimately invoke the bankruptcy process. I think that we take the pre-petition capital structure as we find it. What we do care about is are we maximizing value and if the bankruptcy process is being used for the purpose of maximizing value, then that value falls the way it falls and there's nothing wrong with doing that.

On the flip side, if you're a secured creditor and want to invoke the bankruptcy process for the purpose of what will likely be maximizing the value of your collateral, you don't get to impose the costs of that on other people. So, you've got to pay the freight associated with running a process that will maximize your value. And that includes paying the expected administrative expenses and the administrative expenses include reasonable committee fees.

MR. ANGELO: Certainly.

THE COURT: And so, there's an issue we have here about the Committee budget and whether it's reasonable. I think that's a topic that I'm going to hear from both sides on