Docket #0250 Date Filed: 05/11/2026

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**Chapter 11**
	§	
ASCEND ELEMENTS, INC., et al.,	§	**Case No. 26-90440(CML)**
	§	**Jointly Administered**
Debtors.	§	

OBJECTION OF RMF NOOTER, LLC TO DESIGNATION OF STALKING HORSE BIDDER AND PROPOSED BID PROTECTIONS
[Docket No. 206]

RMF Nooter, LLC ("Nooter") holds an approximately $40 million Kentucky mechanic's and materialman's lien (the "M&M Lien") against the Debtors' Apex 1 facility in Hopkinsville, Kentucky. Nooter objects to the Debtors' Notice of Designation of Bluegrass Infrastructure Partners Holdings, LLC ("Bluegrass") as Stalking Horse Bidder and Proposed Bid Protections (the "Designation").

Introduction and Preliminary Statement

1. The Designation fails on multiple grounds. It is untimely under the Bid Procedures Order. It proposes bid protections that dwarf any value delivered to the estates. It rests on what appears to be an undisclosed insider transaction: Bluegrass is managed or controlled by the proposed DIP lender and consists largely of the Debtors' prepetition lenders and equity holders, some of whom have not made the disclosures Federal Rule of Bankruptcy Procedure 2019 requires and whose liens appear on their face to be avoidable. And it suffers from additional defects under the Bankruptcy Code, the Bankruptcy Rules, and controlling case law. The Court should deny the Designation.

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2. This Objection presents a threshold defect and several core sale-process infirmities. First, the Designation is late. The Bid Procedures Order fixed a stalking horse designation deadline of May 6, 2026; the Debtors filed the Designation on May 7, 2026. That alone warrants rejection.

3. Second, the bid protections are excessive measured against any incremental value delivered to the estates. The proposed $2,000,000 break-up fee and up to $1,500,000 expense reimbursement total $3,500,000. The Stalking Horse APA's purchase price consists overwhelmingly of insider credit bids of DIP and prepetition note obligations; the only "new money" in the structure is the $30 million proposed DIP facility, which the Debtors have already earmarked predominantly for a non-debtor Polish land option. Measured against the $30 million, the break-up fee alone equals 11.67%. Under controlling authority, break-up fees are allowable only when "actually necessary to preserve the value of the estate" under section 503(b), not because a debtor exercises business judgment. Fees that chill bidding or reward potential insiders without demonstrable benefit must be denied. These protections fail that test.

4. Third, the purchaser's undisclosed insider composition undermines the integrity of the process. Bluegrass is "managed or controlled" by the DIP lender and consists largely of the holders of the Senior Secured Convertible Notes and Junior Secured Convertible Notes, along with equity holders—precisely the Debtors' prepetition constituents. Yet Decarbonization Partners, a lead Senior CLN Investor and second largest equity holder, has filed no Rule 2019 verified statement disclosing its aggregated and coordinated positions while actively participating in these cases. Compounding the opacity, the Debtors filed board resolutions in support of their petitions without executed signature pages. These failures violate Rule 2019's text and purpose and preclude approval of an insider designation.

5. Fourth, additional defects require denial or, at minimum, conditioning of any approval. The Designation deviates from the Bid Procedures Order by imposing a $3.2 million initial overbid increment that, in context, does little more than cover the stalking horse's fee and expenses, chilling bidding. Postpetition marketing was inadequate before designation. The sale structure routes substantial DIP cash to acquire non-debtor Polish assets for the benefit of Newco and other non-debtor constituencies. And this insider sale must satisfy entire fairness, not mere business judgment. It does not.

6. Fifth, the Stalking Horse Bid incorporates the secured claim of the Senior Secured Noteholders, which appears to be avoidable as a preferential transfer under 11 U.S.C. § 547(b)(4). The Court should deny a credit bid where the lender's secured status is subject to a bona fide dispute.

7. For these reasons, and as detailed below, the Court should deny the Designation to protect the estates and creditors, including Nooter.

Relevant Dates, Background and Procedural History

Date	**Action**
December 22, 2025	Debtors enter into Senior Note Agreements with "Senior Secured Noteholders"
April 2, 2026	"Senior Secured Noteholders" record the UCC-1 Financing Statement with Delaware Department of State.
April 6, 2026	Kinterra Capital forms Bluegrass
April 9, 2026	Debtors file Chapter 11 Bankruptcy Cases
April 10, 2026	Debtors filed Cash Collateral Motion asserting that "Senior Secured Noteholders" hold first priority, senior liens on substantially all the Debtor's personal property, including Cash Collateral
April 11, 2026	Debtors file Motion for Bid Procedures seeking credit bid rights for "Senior Secured Noteholders"
April 17, 2026	Bid Procedures Order entered by Court setting deadlines: May 6, 2026 – Stalking Horse Designation Deadline May 9, 2026 – Bid Deadline May 12, 2026 – Auction, if necessary May 21, 2026 – Sale Hearing

May 6, 2026	Debtors file Motion for Senior, Superpriority DIP Financing with Bluegrass
May 7, 2026	Debtors (tardily) file Notice Designating Bluegrass as Stalking Horse Bidder with credit bidding rights to include Senior Secured Noteholder claims and Junior Note Holder claims.
May 7, 2026	Debtors file Motion to Deny Credit Bid Rights of M&M Lien Holders.

8. As identified above, the Bid Procedures Order, fixed deadline by which the Debtors "may file a stalking horse notice designating any Stalking Horse Bidder and any proposed Bid Protections." That deadline was May 6, 2026.

9. On May 7, 2026, the Debtors filed the Notice designating Bluegrass as stalking horse and attaching the Stalking Horse APA dated May 6, 2026, a summary of material terms, and a proposed order approving the designation and bid protections. The Notice describes Bluegrass as a "newly formed entity managed or controlled by Kinterra Capital Corp." and confirms that the Stalking Horse APA permits the Senior Secured Convertible Notes and Junior Secured Convertible Notes to be contributed to Bluegrass for credit-bid consideration. Delaware corporate filings reflect that Bluegrass was formed by Kinterra on April 6, 2026.

10. The Notice further states that the Stalking Horse APA's purchase price consists of a credit bid equal to "(a) all accrued obligations under the DIP Financing, (b) all accrued obligations under the Senior Secured Convertible Note and Warrant Purchase Agreement, and (c) $30 million of accrued obligations under the Subordinated Secured Convertible Note Purchase Agreement," with limited cash for cure costs above $2 million. It also seeks approval of bid protections consisting of a $2,000,000 break-up fee, up to $1,500,000 in expense reimbursement, a $3,200,000 initial overbid increment, and smaller subsequent increments.

11. The proposed order confirms these protections. It provides that the "purchase price of the Stalking Horse Bid is $80,000,000" and that the bid protections "will be payable . . . without

further order of the Court."[1] The proposed order also adjusts the initial and subsequent overbid increments notwithstanding the original Qualified Bid requirements.

12. The Stalking Horse APA confirms that the consideration is overwhelmingly a credit bid: all DIP obligations, the Senior CLNs in full, and $30 million of the Junior CLNs. There is no new-cash purchase price for estate assets beyond limited incremental cash tied to excess cure costs. The APA further confirms that Newco will acquire 100% of the equity in multiple non-debtor affiliates, including the Polish entities central to the "Apex 2" platform.

13. Concurrently, the Debtors seek approval of a $30 million DIP facility from Bluegrass that requires approximately $18.8 million of DIP proceeds to exercise a Polish land option for a non-debtor indirect subsidiary (Ascend Elements Poland 2 sp. z o.o.) and imposes extensive Polish-focused milestones and liens—value that would inure directly to the non-debtor assets Bluegrass proposes to acquire by credit bid.

Legal Argument

I. The Designation Is Untimely and Should Be Rejected or Disregarded

14. The Bid Procedures Order set a firm Stalking Horse Designation Deadline of May 6, 2026. Its timeline expressly provides "May 6, 2026 — Stalking Horse Designation Deadline" and contemplates filing of a stalking horse notice and any proposed bid protections by that date. The Debtors filed the Notice on May 7, 2026. The Designation therefore violates the Order's express timing requirements and is procedurally defective.

15. Although the Bid Procedures permit certain modifications with consent of the senior secured holders, the Debtors filed no notice of modification extending the designation deadline, and the Notice identifies no consented modification. The Court approved a specific

[1] The structure of the credit bid appears to favor certain participating senior and junior noteholders, and presumably discriminates against the other note holders, leaving the non-participating note holders creditors of the estates.

calendar to ensure fairness and transparency. The late-filed Designation should be rejected as untimely to vindicate the integrity of that process.

II. The Proposed Bid Protections Are Excessive and Should Be Denied Under the Heightened Section 503(b) Standard.

A. Legal standard

16. Break-up fees and expense reimbursements should not be approved under a deferential business-judgment rule when the stalking horse consists primarily of insiders. Bluegrass acknowledges that its bid is largely an insider credit bid: $50,000,000 of the $80,000,000 stalking horse consideration comes from the Debtors' insiders. Heightened scrutiny is required, and the Court should apply the standard adopted by the Third Circuit in *In re O'Brien Environmental Energy, Inc*., 181 F.3d 527 (3d Cir. 1999).[2] O'Brien held that break-up fees are allowable as administrative expenses only if "actually necessary to preserve the value of the estate" within the meaning of 11 U.S.C. § 503(b)(1)(A). Id. at 535. The Third Circuit declined to "develop a general common law of break-up fees" and emphasized that courts may not create extra-statutory rights of recovery against the estate. Id. at 532. Considering the circumstances and the unclear relationships in these cases, the Court should asses: (1) is the relationship of the parties who negotiated the break-up fee and whether it is tainted by self-dealing or manipulation; (2) does the fee hamper, rather than encourage, bidding; and (3) is the amount of the fee unreasonable relative to the proposed purchase price. *In re Bidermann Indus. U.S.A., Inc.,* 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997) citing *Integrated Resources,* 147 B.R. at 657; *see also In re 995 Fifth Avenue Associates, L.P.,* 96 B.R. 24 (Bankr.S.D.N.Y.1989).

[2] Nooter acknowledges that courts in the 5th Circuit generally apply the business judgment standard. However, considering that in this case the Stalking Horse Bidder consists mostly of insiders, and that the majority of the cash component of the stalking horse bid would go to exercise a land purchase option for a non-Debtor in Poland, heightened scrutiny and the entire fairness standard should apply.

17. Although O'Brien declined to adopt the multifactor test endorsed by some courts, it identified considerations relevant to whether a fee is necessary to preserve estate value—including whether the fee induces bidding that would not otherwise occur, whether it chills competing bids, relationship of the parties who negotiated the break-up fees, potential self-dealing, whether it serves as a catalyst to higher bids, and whether the asserted research function actually benefited the estate. Id. at 536–37.

18. Although the Fifth Circuit and other courts outside the Third Circuit have applied business-judgment or blended tests, those decisions consistently require that bid protections be reasonable and value-enhancing in fact, not merely in aspiration. Bankruptcy courts in Texas evaluate protections under business judgment with an overlay of section 503(b), requiring evidence that the protections encourage, rather than impede, competitive bidding and confer a tangible benefit on the estate.

B. Application to the Designation

19. The proposed break-up fee and expenses total $3,500,000, atop a $3,200,000 initial overbid increment that effectively compels any competing bidder to "pay for" the stalking horse's protections just to reach the starting line. That structure chills, rather than fosters, competitive bidding, particularly where the stalking horse purchase price consists almost entirely of insider credit bids rather than cash available for distribution to creditors.

20. The Stalking Horse APA's consideration consists of a credit bid of all DIP obligations, all Senior Secured Convertible Notes, and $30 million of Junior Secured Convertible Notes, with limited incremental cash only if cure costs exceed $2 million. No cash purchase price is paid to the estate at closing. The "new money" in this structure is the separate $30 million DIP loan, which the Debtors admit must be applied first and foremost—approximately $18.8 million—

to a Polish land option for a non-debtor indirect subsidiary. Measured against the only real cash entering the system before closing, the protections are wildly disproportionate to any estate benefit.

21. Nor are the protections "necessary" to induce Bluegrass's bid. Bluegrass is also the proposed DIP Lender; its bid is the integrated product of the DIP facility and existing secured claims, including an express DIP milestone calling for entry of the stalking horse order. This is not an at-risk third party requiring inducement. It is insiders potentially leveraging their DIP and prepetition positions to fix a value floor through a largely non-cash, credit-bid transaction, then extracting heavy bid protections that deter competition. *O'Brien* instructs that, where a bidder would bid anyway, bid protections are not necessary and should be denied. 181 F.3d at 537.

22. The $3,200,000 initial overbid increment underscores the chilling effect. It substantially exceeds the $500,000 minimum contemplated by the Bid Procedures and is calibrated to track the combined break-up fee and expense reimbursement, requiring any rival bidder to bridge that gap immediately. Courts disfavor such constructs because they tax competition at the outset and depress auction dynamics, particularly where the stalking horse is an insider credit bidder.

23. Under *O'Brien's* administrative-expense standard, and even under blended approaches that overlay business judgment, the Debtors have not shown that a $3.5 million protection package is actually necessary to preserve or maximize estate value. The protections should be denied or, at a minimum, capped at a de minimis amount commensurate with documented, incremental, and reasonable costs that demonstrably benefited the estate.

III. The Insider Nature of Bluegrass / Newco and Rule 2019 Disclosure Failures Preclude Approval.

24. The Designation concedes that Bluegrass is a newly formed entity "managed or controlled" by Kinterra Capital Corp., the DIP lender, and that the holders of the Senior and Junior

Secured Convertible Notes will contribute their notes to Bluegrass for a coordinated credit-bid purchase. The APA confirms that the Senior CLNs include Decarbonization Partners, Fifth Wall, and Doral; that the Junior CLNs include Decarbonization Partners, Fifth Wall, Doral, and additional investors; and that the Debtors' equity roster includes the same overlapping names. By any measure, this appears to be an insider purchase.

25. In such circumstances, transparency is paramount. Yet Decarbonization Partners—identified by counsel as part of the Senior CLN Investors and actively participating in bid-procedure filings—failed to file a Rule 2019 verified statement contemporaneously with its participation. On May 6, 2026, Nooter requested confirmation of CLN Investor Rule 2019 compliance; the only verified statement filed was on May 8, on behalf of a "Senior CLN Group" comprising Fifth Wall and Doral identifying that they are senior and junior lenders and equity holders of the Ascend Elements, Inc. Decarbonization Partners has not filed the Rule 2019 statement. Rule 2019 requires every group or committee of creditors or equity holders that act in concert in a chapter 11 case to disclose their disclosable economic interests, including aggregated positions. Failure to do so warrants denial of relief. The Court should not approve a stalking horse designation on a record that lacks complete and accurate Rule 2019 disclosures.

26. Compounding the opacity, the Debtors filed board resolutions in support of the Voluntary Petition without executed signature pages, raising basic corporate-authority questions at the heart of the sale authorization. The Omnibus Resolutions appear in the Debtors' Voluntary Petition, but the filing includes no executed consents or signature attestations. Given the speed and insider configuration of the stalking horse proposal, the absence of executed authorizations is unacceptable, particularly where the Debtors' board likely consists of members of the same

prepetition secured lenders driving the deadlines. On this basis alone, the Court should deny the Designation and prohibit Bluegrass from credit bidding.

IV. Additional Grounds Require Denial or Conditioning of Any Approval

A. Noncompliance with the Bid Procedures Order

27. Beyond the untimeliness addressed above, the Designation departs materially from the Bid Procedures Order in ways that risk chilling the auction. The proposed order rewrites the initial minimum overbid increment to $3,200,000 and subsequent increments for whole-company and partial bids, despite the Bid Procedures' default $500,000 increment and the framework for comparing bids to a stalking horse bid. Although the Bid Procedures allow flexibility, they exist to maximize competition, not to front-load barriers to entry aligned with an insider stalking horse's fee package. The Debtors have not shown that these deviations promote, rather than chill, robust bidding.

B. Inadequate marketing prior to designation

28. Jefferies' prepetition outreach reached approximately 120 parties and produced about 18 confidentiality agreements. Postpetition, the Debtors compressed the sale timeline and designated an insider stalking horse on the heels of requesting interim DIP approval, despite the absence of a competitive cash purchase price. Kinterra formed Bluegrass on April 6, 2026, for the express purpose of pursuing this transaction. The record does not reflect meaningful postpetition marketing or accommodation of rival bids before designation. On this record, designating an insider stalking horse with heavy protections risks locking in a process that has not been adequately marketed.

C. The sale structure improperly diverts estate resources and value to non-debtor Polish assets for the benefit of Bluegrass.

29. The DIP facility mandates that approximately $18.8 million of estate borrowings be used to acquire a Polish land option held by a non-debtor indirect subsidiary (Ascend Elements Poland 2 sp. z o.o.), together with extensive Polish security packages, consents, and milestones. The Stalking Horse APA then sweeps the equity in the Polish affiliates, including the newly optioned land, into the Acquired Assets to be transferred to Newco for credit-bid consideration with no additional cash to the estate. That structure enriches an insider purchaser by directing estate liquidity into non-debtor assets Bluegrass will acquire without paying cash, to the detriment of U.S. creditor recoveries. Such allocation violates the requirement that a section 363 sale benefit the estate, not non-debtor affiliates and insiders, and further undercuts any claim that the bid protections are necessary or reasonable.

30. The APA's "Polish Matters" provisions confirm the focus on transferring government grant rights and arranging EBRD financing for the Polish platform, again for the benefit of the post-sale buyer, not the U.S. estate. The Debtors have not justified folding estate-funded improvements to non-debtor assets into an insider credit-bid transaction without compensatory cash consideration.

D. The insider transaction fails the heightened scrutiny required for related-party sales

31. Insider transactions require more than business judgment; they require entire fairness, including fair dealing and fair price. This insider Designation lacks both. As to process, the Debtors missed the designation deadline, proposed protections that deter competition, failed to ensure transparent Rule 2019 disclosures, and filed unexecuted board resolutions. As to price, the transaction delivers no cash to the estate other than amounts that fund payments to professionals taking direction from the CLN Investors, and it leverages estate-funded improvements to non-

debtor Polish assets that the buyer will capture without paying cash. On this record, entire fairness is not satisfied.

32. The Court should deny approval of the Designation outright as untimely and substantively deficient. The Court should also deny Bluegrass any credit bidding rights and require the Debtors to file all executed board resolutions and complete Rule 2019 disclosures from all CLN investor participants (including Decarbonization Partners), and extend the sale timetable to allow fair, open, and fully informed bidding.

V. The Stalking Horse's Credit Bid Rights is tied to the Senior Secured Noteholders' Claim that is Subject to a Preference Action.

33. The Designation contemplates a credit bid that incorporates the asserted secured claim of the Senior Secured Noteholders. That claim, however, appears to be avoidable as a preferential transfer under 11 U.S.C. § 547(b). The Senior Note Agreements were entered into on December 22, 2025, but the UCC-1 Financing Statement purporting to perfect the Senior Secured Noteholders' lien was not recorded with the Delaware Department of State until April 2, 2026, just seven days before the Petition Date of April 9, 2026, and squarely within the 90-day preference window prescribed by section 547(b)(4)(A). On the present record, the perfection of that lien constitutes a transfer of an interest of the Debtors in property, to or for the benefit of an antecedent-debt creditor (or likely an insider), made while the Debtors were presumed insolvent under section 547(f), that enables the Senior Secured Noteholders to receive more than they would in a hypothetical chapter 7 liquidation. The lien securing the credit-bid claim is therefore subject to a colorable preference challenge, and the underlying secured claim cannot properly serve as the foundation for a credit bid under section 363(k). See 11 U.S.C. § 502(d) (claims of transferees of avoidable transfers must be disallowed until the transfer is repaid); *In re Fisker Auto. Holdings,*

Inc., 510 B.R. 55, 60-61 (Bankr. D. Del. 2014) (capping or denying credit bid where lender's secured status was subject to bona fide dispute).

Conclusion and Prayer for Relief

For the foregoing reasons, RMF Nooter respectfully requests that the Court (i) deny the Debtors' Notice and proposed order designating Bluegrass Infrastructure Partners Holdings, LLC as stalking horse and approving bid protections; (ii) require full Rule 2019 compliance by all insider participants, including Decarbonization Partners; (iii) require the filing of executed corporate resolutions and consents evidencing proper authorization to file the Voluntary Petitions; and (iv) grant such other and further relief as is just and proper.

Date: May 11, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2026, I electronically filed the foregoing documents with the Clerk of the U.S. Bankruptcy Court for the Southern District of Texas, using the CM/ECF system. The ECF system will send a "Notice of Electronic Filing" to all counsel of record who have consented in writing to accept service of this document by electronic means.

/s/ T. Josh Judd
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