

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION**

In re	§	
	§	
PROPEX INC.,	§	Case No. 08-10249
PROPEX HOLDINGS INC.,	§	Case No. 08-10250
PROPEX CONCRETE SYSTEMS	§	
CORPORATION,	§	Case No. 08-10252
PROPEX FABRICS INTERNATIONAL	§	
HOLDINGS I INC.,	§	Case No. 08-10253
PROPEX FABRICS INTERNATIONAL	§	
HOLDINGS II INC.,	§	Case No. 08-10254
	§	
Debtors.	§	
	§	Chapter 11
	§	
	§	Jointly Administered Under
	§	Case No. 08-10249

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PROPEX INC., ET AL. TO THE DEBTORS’ EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO OBTAIN POST-PETITION FINANCING, (II) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION LENDERS, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001

The Official Committee of Unsecured Creditors (the “Committee”) of Propex Inc. (“Propex”) and its affiliated debtors and debtors in possession (collectively with Propex, the “Debtors”) submits this objection (the “Objection”) to the Debtors’ Emergency Motion (the “Motion”)¹ for Interim and Final Orders (I) Authorizing the Debtors to Obtain Post-Petition Financing, (II) Authorizing the Debtors to Use Cash Collateral; (III) Granting Adequate Protection to the Prepetition Lenders; (IV) Modifying the Automatic Stay and (V) Scheduling a Final Hearing. In support of its Objection, the Committee respectfully states as follows:

¹ Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion and, as applicable, the term sheet attached thereto (the “Term Sheet”).

PRELIMINARY STATEMENT

The proposed debtor in possession financing facility is inappropriate, overreaching and not in the best interest of the Debtors or their creditors (other than the DIP Lender and other secured lenders). First, the proposed financing facility inappropriately forces the Debtors to liquidate their assets in a short period of time without any showing that a sale will maximize value. The proposed financing facility is not just inextricably linked to a quick sale of the Debtors' assets, but designed to allow the secured lenders to purchase the Debtors' assets at the lowest price by publicly forcing an expedited sale where proper marketing will not occur and potential purchasers will not have time to conduct necessary diligence or compete against the secured lenders, which have already performed extensive diligence and have the right to control the sale process under the proposed financing facility.

Second, the proposed financing facility is a sub rosa plan, which cannot be approved by this Court. Having all of the hallmarks of a sub rosa plan, the proposed financing facility (i) dictates the terms of the Debtors' reorganization in that it forces the immediate liquidation of the Debtors' assets, (ii) significantly alters all creditors' rights with respect to the Debtors' assets in that, once the proposed financing facility is approved, creditors and parties in interest have no meaningful opportunity to oppose the sale of the Debtors' assets without jeopardizing the Debtors' postpetition financing and (iii) requires that the Debtors liquidate all of their assets immediately, leaving nothing left to reorganize. Since the proposed financing facility constitutes an improper sub rosa plan, the relief requested in the Motion must be denied.

Third, prosecution of the Motion violates the Debtors' fiduciary duties to creditors. The proposed financing facility impermissibly seeks to transfer to the DIP Lender -- a party with no fiduciary obligations to the Debtors' creditors -- the power to determine the course of these

chapter 11 cases and, therefore, prosecution of the Motion constitutes a violation of the Debtors' fiduciary obligations to their estates and the relief requested therein must be denied.

Finally, the Debtors waited to file the Motion until after hours on Friday, January 16, 2009 (the start of a holiday weekend), thereby giving the Committee and other parties in interest less than three business days to review the relief requested and the impact that such relief will have on the Debtors and their estates. The lack of fundamental due process was compounded by the failure to include a Credit Agreement (which, according to the Motion, supersedes any of the provisions set forth in the Motion or Term Sheet), a proposed form of DIP Order, a DIP Budget and numerous other basic documents without which the Committee could not fully analyze the relief requested in the Motion. Moreover, despite numerous requests, the Committee did not receive drafts of any of the foregoing documents. As a result of this denial of fundamental notice and due process, the Committee has not had sufficient time to analyze the relief requested in the Motion or prepare a fully informed objection.

While the Committee believes that the foregoing terms should never be approved, consideration of these matters should, at a minimum, be deferred to provide the Committee and other parties in interest sufficient time to (i) review the Motion, the Credit Agreement, the proposed form of DIP Order and the other documents, (ii) discuss these documents with the Debtors, the DIP Lender and other secured lenders, (iii) determine if financing is available that does not dictate an expedited liquidation of the Debtors' assets, and (iv) present a fully informed objection to the Court.

BACKGROUND

1. On January 18, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code")

in the United States Bankruptcy Court for the Eastern District of Tennessee, Southern Division (the “Court”).

The 2008 DIP Facility

2. On the Petition Date, the Debtors filed an expedited motion (the “January 18, 2008 DIP Motion”) seeking approval of a debtor in possession financing facility (the “2008 DIP Facility”) arranged by BNP Paribas (“BNP”), as administrative agent, and certain other financial institutions (collectively with BNP, the “2008 DIP Lenders”). Upon information and belief, the 2008 DIP Lenders are the same or a subset of the financial institutions that are lenders (collectively, the “Prepetition Lenders”) under the Debtors’ prepetition credit facility (the “Prepetition Credit Facility”).

3. On January 23, 2008 and February 13, 2008, respectively, the Court entered interim and final orders authorizing the 2008 DIP Facility. The 2008 DIP Facility matures on January 23, 2009.

The Foreign Stock Pledge Litigation

4. On July 29, 2008, the Debtors filed a Motion for an Order Authorizing and Approving the Debtors’ Amendment to Security Agreement and Extension and Confirming Grant of Lien on the Stock of the Debtors’ Foreign Subsidiaries (the “Foreign Stock Pledge Motion”). On August 15, 2008, the Committee filed an objection to the Foreign Stock Pledge Motion (the “Foreign Stock Pledge Objection”).² On August 21, 2008, the Court entered an order (the “Order”) granting, in part, the relief requested in the Foreign Stock Pledge Motion. On September 2, 2008, the Committee timely filed a notice of appeal from the Order. On September 11, 2008, the Debtors filed a notice of cross-appeal from the Order.

² The facts set forth in the Foreign Stock Pledge Motion are cross-referenced and hereby incorporated.

5. On January 14, 2009, the United States District Court for the Eastern District of Tennessee (the “District Court”) held a hearing on the Committee’s appeal and the Debtors’ cross-appeal. At the conclusion of the hearing, the District Court stated that it would take the matter under advisement. As of the date hereof, the appeal and cross-appeal remain pending.

The Proposed 2009 DIP Facility

6. On January 16, 2009, the Debtors filed the Motion for entry of interim and final orders authorizing the Debtors to enter into a debtor in possession financing facility (the “2009 DIP Facility”) arranged by Wayzata Investment Partners LLC (the “DIP Lender”). The 2009 DIP Facility provides the Debtors with up to \$65 million of postpetition financing, “subject to the terms and conditions of the Credit Agreement.” Motion, p.2.

OBJECTION

7. A court should approve a proposed debtor in possession financing only if such financing “is in the best interests of the general creditor body.” In re Roblin Indus., Inc., 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing In re Texlon Corp., 596 F.2d 1092, 1098-99 (2d Cir. 1979)); see also 3 Collier on Bankruptcy ¶ 364.05[1] (15th ed. rev. 2007). “[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate.” In re Ames Dep’t Stores, Inc., 115 B.R. 34, 39 (Bankr. S.D.N.Y. 1990). In particular, a financing arrangement may not be so favorable to a lender so as to cause Bankruptcy Code protections to serve only that lender, contrary to the intent of Congress. See In re Mid-State Raceway, Inc., 323 B.R. 40, 59. (Bankr. N.D.N.Y. 2005) (noting that “bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender”).

8. On this point, the case In re Tenney Village, 104 B.R. 562 (Bankr. D.N.H. 1989), is particularly instructive. There, the debtor sought approval of postpetition financing that, among other things, provided the lender with undue control over the debtor's business operations and rendered it an event of default if the court confirmed a plan of reorganization over the lender's objection. See id. at 568. The court denied the debtor's motion, characterizing the proposed financing facility as one that "would pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specifically crafted for the benefit of the Bank and the Debtor's principals who guaranteed its debt." Id.

9. Stated differently by another court, postpetition financing is not consistent with the requirements of section 364 of the Bankruptcy Code where it would "skew the conduct of the bankruptcy case" and "destroy the adversary process." Ames Dep't Stores, 115 B.R. at 38.

10. The Debtors cannot carry their burden under section 364 of the Bankruptcy Code because the 2009 DIP Facility is not "fair, reasonable and adequate." The 2009 DIP Facility cedes control of the Debtors' estates to the proposed DIP Lender by mandating that the Debtors pursue an expedited sale process with the DIP Lender and the other secured lenders being the likely purchaser. The 2009 DIP Facility and the immediate liquidation of the Debtors' assets required thereunder will leave the Debtors unable to exercise their fiduciary duty to restructure in a manner that they determine maximizes value and leaves no room for the Debtors, the Committee or any other party to explore any value maximizing alternative.

11. Since the 2009 DIP Facility is not "fair, reasonable and adequate," as mandated by section 364 of the Bankruptcy Code, the relief requested in the Motion must be denied.

I. Due Process Demands that the Committee Be Given Additional Time to Review the Relief Sought in the Motion.

12. Rule 2002 of the Federal Rules of Bankruptcy Procedure, as well as applicable local rules, require twenty days notice of any substantive motion. See Fed. Bankr. R. 2002; see also E.D. Tenn. L.R. 9013-1(f)(2)(ii). Moreover, as this Court is well aware, due process requires that parties in interest receive notice of and an opportunity to be heard in connection with matters that affect such parties. See Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (“For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’ It is equally fundamental that the right to notice and an opportunity to be heard ‘*must be granted at a meaningful time and in a meaningful manner.*’”) (emphasis added).

13. Here, the Debtors and the DIP Lender have completely failed to provide notice of the relief requested in the Motion “at a meaningful time and in a meaningful manner.” Viewed in the most charitable light, parties in interest, including the Committee, were given approximately five days (of which only two were business days) to evaluate the propriety of the relief requested in the Motion.³ Moreover, the above-mentioned five days notice is illusory because the Motion failed to include such critical documents as the Credit Agreement, the proposed form of DIP Order and the DIP Budget. Without these documents, the Committee could not fully analyze the relief requested in the Motion. Indeed, the Motion explicitly states that to the extent of any

³ The Debtors further burdened parties in interest by filing two additional motions after hours on Friday, January 16, 2009 – i.e., the (1) Debtors’ motion to extend exclusivity and (2) the Debtors’ motion for authorization to payoff the 2008 DIP Facility. The Committee began preparing an objection to the Debtors’ exclusivity motion until it was withdrawn by the Debtors one day prior to the hearing. Accordingly, the Committee was forced to analyze three motions and prepare two objections on less than five days’ notice. As set forth in previous pleadings filed with this Court, the Debtors have engaged in such tactics on numerous instances throughout these chapter 11 cases. Such conduct is inappropriate and should not be allowed to continue.

discrepancy between the Motion and the Credit Agreement, the “terms of the Credit Agreement shall govern and control.” See Motion, p.3, n.4.

14. The expedited basis on which the Debtors have sought relief is particularly egregious, given that the Debtors refused to share drafts of the Term Sheet, Credit Agreement or any other Loan Document with the Committee, despite its numerous requests. The Debtors even refused to provide the Committee with the agreed upon Term Sheet when it was finalized, which was several days prior to the filing of the Motion.

II. The Proposed Case Control Provisions Are Wholly Inequitable and Constitute An Improper Sub Rosa Plan Of Reorganization.

15. The Motion ambiguously states that “[u]nder the Credit Agreement, the Debtors will covenant to take certain actions in these chapter 11 cases, including, among other things, seeking confirmation of an amended chapter 11 plan which will incorporate a sale of substantially all of their assets, or in the absence of confirmed plan a sale of substantially all of their assets pursuant to section 363 of the Bankruptcy Code, within certain time periods prior to [March 24, 2009].” Motion, p.5.⁴

16. First, as a threshold matter, without the Credit Agreement – which was not filed with the Motion – it is impossible to ascertain what these provisions require the Debtors to do, including without limitation, the “certain actions” that the Debtors are required to undertake, and the “certain time periods” in which the Debtors must complete a sale. Second, by dictating a “sale of substantially all of [the Debtors’] assets” on or before March 24, 2009, the 2009 DIP Facility constitutes a *sub rosa* plan.

⁴ As initially filed, the Motion set a deadline of April 23, 2009. We have been advised by the Debtors that the deadline has been pushed forward to March 24, 2009.

17. It has long been recognized that a chapter 11 debtor cannot restructure its prepetition debt obligations through motion practice that does not comport with the Bankruptcy Code's plan solicitation and disclosure requirements. Indeed, the Bankruptcy Code affords numerous critical protections to creditors and parties-in-interest with regard to the formulation and confirmation of a plan of reorganization, including, without limitation, the opportunity to obtain sufficient information enabling informed participation in the process. See In re Crowthers McCall Pattern Inc., 114 B.R. 877, 881 (Bankr. S.D.N.Y. 1990) (Bankruptcy Code provisions addressing disclosure and plan confirmation are "among the most significant protections of Chapter 11").

18. A motion that attempts an end-run-around plan disclosure and solicitation requirements is a plan sub rosa and will not be countenanced by the law. See, e.g., In re Swallen's, Inc., 269 B.R. 634, 637-638 (6th Cir. BAP 2001) (quoting Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983)) (holding that "a bankruptcy court cannot issue orders that bypass the requirements of Chapter 11, such as disclosure statements, voting, and a confirmed plan, and proceed to a direct reorganization on the terms the court thinks best, no matter how expedient that might be"); In re Braniff Airways, Inc., 700 F.2d at 940 ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of a plan sub rosa in connection with the sale of assets."); In re Quality Beverage Co., 181 B.R. 887, 895 (Bankr. S.D. Tex. 1995) (court denied motion for approval of proposed settlement agreement because "[n]either the Committee nor the Chapter 11 Trustee should be permitted to bind those creditors without the disclosure, claims allowance, and voting safeguards of plan confirmation in Chapter 11"); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 983 (Bankr. N.D.N.Y. 1988) (refusing to authorize debtor to enter into lease of its assets,

where the lease “effectively put the Court’s imprimatur on the sale and confirm[ed] the Plan long before the hurdles of Chapter 11 are overcome”); see also 3 Collier on Bankruptcy ¶ 363.02[5] at 363-20 (“Attempts to determine plan issues in connection with the sale will be improper and should result in a denial of the relief requested.”).

19. In Braniff Airways, the Court of Appeals for the Fifth Circuit, articulating the sub rosa plan doctrine, held that a proposed sale of all the assets of a debtor could not be authorized under section 363(b) of the Bankruptcy Code because the transaction was at its essence a reorganization that, in effect, short circuited the chapter 11 process. See Braniff Airways, 700 F.2d at 940. In that case, the debtor sought approval of an agreement under section 363 of the Bankruptcy Code providing the debtor’s transfer of cash, airplanes and equipment, terminal leases and landing slots to a third-party in return for travel scrip, unsecured notes, and a profit participation in the third-party’s operations. See id at 939. The agreement required significant restructuring of the rights of the debtor’s creditors. Id. The Fifth Circuit found that the agreement “not only changed the composition of Braniff’s assets, the contemplated result under § 363(b), it also had the practical effect of dictating some of the terms of any future reorganization plan.” Id. at 939-940. Thus, the court held that the relief requested could not be granted outside of the plan process.

20. Since Braniff Airways, courts have cited several factors when analyzing whether a transaction is actually a sub rosa plan of reorganization, including: (i) whether the transaction will dictate the terms of any plan of reorganization; (ii) whether the transaction will alter the rights of creditors with respect to the debtor’s assets; and (iii) whether the transaction will leave the debtor with nothing left to reorganize. See, e.g., Institutional Creditors of Continental AirLines, Inc. v. Continental AirLines, Inc. (In re Continental AirLines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986) (court emphasizing that section 363 sale must not dictate the terms of a plan

or alter the rights of creditors); Copy Crafters, 92 B.R. at 983 (court denying motion to approve a lease of debtor's asset, where authorization of the lease would "confirm the plan long before the hurdles of Chapter 11 are overcome").

21. The 2009 DIP Facility in its current form is a sub rosa plan, which should not be approved by this Court. First, the 2009 DIP Facility dictates the terms of the Debtors' reorganization in that it forces the immediate liquidation of the Debtors' assets. Second, the 2009 DIP Facility alters all creditors' rights with respect to the Debtors' assets in that, once the 2009 DIP Facility is approved, creditors and parties-in-interest have no meaningful opportunity to oppose the sale of the Debtors' assets without jeopardizing the Debtors' postpetition financing. Finally, the 2009 DIP Facility requires that the Debtors liquidate all of their assets immediately, leaving nothing left to reorganize.

22. Moreover, the 2009 DIP Facility obligates the Debtors to initiate a liquidation of all of their assets and mandates that the process be completed within approximately 90 days of this emergency hearing, leaving the Debtors and their creditors no time to perform a meaningful analysis of whether a sale of the Debtors' assets is in their best interests.

23. Since there have been no sales efforts to date, the March 24 deadline will not give the Debtors sufficient time to market their assets and, as a result, the only likely purchaser of the Debtors' assets will be the parties that have already completed their diligence -- the DIP Lender and the other secured lenders. Indeed, there should be little doubt that the March 24 deadline has been specifically designed to give the secured lenders the ability to acquire the Debtors' assets at a fraction of the value such assets would (i) receive if they were marketed via a fullsome sales process or (ii) have in standalone chapter 11 plan.

24. Thus, the 2009 DIP Facility casts in stone the course of the chapter 11 cases -- a quick sale which would leave the estates with no assets to confirm a chapter 11 plan or even pay administrative creditors.

25. Since the 2009 DIP Facility constitutes an improper sub rosa plan, the relief requested in the Motion must be denied.

III. The Debtors Have Breached Their Fiduciary Duties.

26. A debtor in possession must comply with all of the legal obligations applicable under state law as if it had not sought chapter 11 protection. See 28 U.S.C. § 959(b). Section 959(b) establishes the standard of care, providing in pertinent part as follows:

Except as provided in section 1166 of title 11, a . . . debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

27. “Implicit in Section 959(b) is the notion that the goals of the federal bankruptcy laws, including rehabilitation of the debtor, do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws.” City of New York v. Quanta Resources Corp. (In re Quanta Resources Corp.), 739 F.2d 912, 919 (3d Cir. 1984), aff’d sub nom, Midlantic Nat’l Bank v. New Jersey Dep’t of Environmental Protection, 474 U.S. 494 (1986); see also Robinson v. Michigan Consol. Gas Co. Inc., 918 F.2d 579, 589-590 (6th Cir. 1990) (citing to Midlantic and holding that state law provisions governing utility termination procedures are applicable to debtors); Norris Square Civic Ass’n v. St. Mary Hosp. (In re St. Mary Hosp.), 86 B.R. 393, 398 (Bankr. E.D. Pa. 1988) (“The statutory provision requires that all laws must be followed by the debtor in possession.”) (emphasis in original); see also 1 Collier on Bankruptcy ¶ 10.03 at 10-5 (“Under 29 U.S.C. § 959(b), a debtor in possession or an operating trustee in a case under the

Code must comply with all applicable state laws that regulate any aspect of ‘carrying on’ a business.”).

28. Accordingly, a court may not grant a motion by the debtor if the relief requested would infringe on the debtor’s obligations and responsibilities under state law. See, e.g., Quanta Resources, 739 F.2d. 912 (court denied debtor’s motion for an order approving the abandonment of property of the estate because the property was contaminated and abandonment would violate state hazardous waste disposal laws).

29. This is especially true where a debtor seeks approval of a postpetition financing arrangement that is so onerous as to violate the debtor’s fiduciary duties to its creditors. See Tenney Village Co., 104 B.R. at 569 (court denied approval of proposed debtor in possession financing that was so onerous as to violate the debtor’s fiduciary obligations to the estate); In re Roblin Indus., Inc., 52 B.R. 241, 243 (Bankr. W.D.N.Y. 1985) (court denied approval of proposed debtor in possession financing because, as a condition to extending the loan, the debtors were required to waive avoidance actions against the lenders in violation of their fiduciary duties).

30. Here, the Debtors have violated their fiduciary duties in seeking approval of the 2009 DIP Facility. The terms of this financing arrangement are so one-sided and overly aggressive that it prevents the Debtors’ from, consistent with their fiduciary duty, restructuring in a manner that maximizes value. Specifically, the DIP Lender, through the 2009 DIP Facility, has dictated an immediate liquidation of all of the Debtors’ assets and is designed such that the DIP Lender and the secured lenders will be the likely purchaser and sole beneficiary of these chapter 11 cases. Further, it remains a possibility that the Debtors will not be able to satisfy the obligations imposed upon them by the DIP Lender, resulting in a breach of their postpetition financing arrangement and the loss of substantial estate value that otherwise could be distributed

to the Debtors' prepetition creditors. The Debtors' breach of fiduciary duties is made all the more apparent by the Debtors' failure to negotiate with the Committee with respect to a plan of reorganization, allow the Committee to propose its own chapter 11 plan or otherwise move these cases towards a successful restructuring during the one year the Debtors have had the exclusive right to propose a plan of reorganization and financing under the 2008 DIP Facility. The Debtors' current position is a direct result of the Debtors' own inaction, which has left them in a vulnerable position where they apparently believe that they must turn control of these cases over to the DIP Lender, one of their secured lenders, pursuant to the 2009 DIP Facility.

31. Since the 2009 DIP Facility (i) impermissibly seeks to transfer to the DIP Lender, a party with no fiduciary obligations to the Debtors' creditors, the power to determine the course of the chapter 11 cases, and (ii) imposes risks of substantial loss to the Debtors' prepetition creditors as a result of the expedited forced liquidation of the Debtors' assets, prosecution of the Motion constitutes a violation of the Debtors' fiduciary obligations to their estates and the relief requested therein must be denied.

IV. Additional Modifications Should be Made to the 2009 DIP Facility Prior To Its Approval.

32. Certain other provisions of the 2009 DIP Facility are inappropriate and inequitable and, as a condition of approval thereof, must be clarified or modified:

- Exit Fee. Upon the termination, repayment or refinancing in full of the 2009 DIP Facility (other than pursuant to a confirmed plan or a section 363 sale), the Debtors are required to pay the DIP Lender a fully earned, non-refundable Exit Fee equal to 3% of the Gross Commitment. Since the Gross Commitment is \$65 million, the Exit Fee amounts to \$1.95 million. See Motion, p.5. This Exit Fee should be stricken because: First, the Exit Fee is a refinancing penalty that is payable even if the obligations under the 2009 DIP Facility are repaid in full; Second, the Exit Fee is payable on the full \$65 million Gross Commitment, regardless of whether the Required Lenders (in their sole discretion) allow the Debtors to draw in excess of the \$40 million Facility Threshold; and Third, and most importantly, the Exit Fee works hand in hand with the inappropriate case control provisions discussed above by operating as a prohibitive penalty that deters the Debtors from seeking to refinance the 2009 DIP Facility in order to pursue a restructuring other than the forced liquidation mandated by the 2009 DIP Facility.

- Other Fees and Costs. In addition to the Exit Fee, the Debtors are required to pay several front-end fees. Specifically, the Debtors must pay (i) upon entry of the Interim DIP Order, a Facility Fee equal to 1.5% of the \$40 million Facility Threshold; (ii) upon entry of the Final DIP Order, a second Facility Fee equal to 1.5% of the \$40 million Facility Threshold; and (iii) if the Debtors are permitted to make draws in excess of the \$40 million Facility Threshold, a Threshold Facility Fee equal to 3% of the difference between the Gross Commitment and the Facility Threshold. Together these fees add up to \$1.95 million (in addition to the \$1.95 million Exit Fee). Moreover, the Debtors are required to pay interest at LIBOR (subject to a 5% floor) plus 1000 basis points (*i.e.*, a minimum interest rate of 15 percent). The foregoing fees and costs are onerous, even under current market conditions. These fees and costs, however, become completely inequitable in light of the fact that the 2009 DIP Facility imposes a forced liquidation of the Debtors' assets for the sole benefit of the DIP Lender and the other secured lenders.

- Section 506(c) Waiver. The Debtors should not be forced to waive their rights under section 506 of the Bankruptcy Code. 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 (2000). In fact, courts within the Sixth Circuit and First Circuit have concluded that 506(c) waivers are *per se* invalid. See In re Brown Bros., Inc., 136 B.R. 470, 474 (W.D. Mich. 1991) (holding that a 506(c) waiver "is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal"); In re Ridgeline Structures, Inc., 154 B.R. 831, 832 (Bankr. D. N.H. 1993) (holding that a section 506(c) waiver "is against public policy and unenforceable *per se*"). A section 506(c) surcharge is especially appropriate here, where the DIP Lender and the other secured lenders are seeking to acquire the Debtors' assets by forcing a quick sale and are, thus, effectively utilizing the chapter 11 process solely to maintain and preserve their own collateral for solely their own benefit. It is inequitable to have the estates incur administrative expenses liquidating the secured lenders collateral at their insistence when there may not be any way to pay such administrative costs absent imposition of a surcharge pursuant to section 506(c).

- DIP and Cash Collateral Budgets. The Term Sheet provides that the Debtors will be required to comply with a "13 week cash flow budget satisfactory to the Lenders." Term Sheet, ¶ 10; see also Term Sheet, ¶ 15 (providing that Debtors covenant to "adhere to an approved budget"). In addition, the Motion states the Debtors will be authorized to use the Prepetition Lenders' Cash Collateral, as "set forth in the applicable Budget (a copy of which will be filed separately with the Court on or before the hearing date on th[e] Motion)." Motion, ¶ 32. As noted, the Debtors did not provide the Committee with a copy of the DIP Budget or the Cash Collateral Budget. Without copies of the foregoing budgets, it is impossible for the Committee to determine whether the 2009 DIP Facility provides the appropriate amount of financing for the Debtors' operations and, similarly, whether the 2009 DIP Facility provides the Debtors with appropriate budget variances. Moreover, it is unclear whether the budget concept is being used to silence estate professionals from opposing the course of action that the DIP Lender and the secured lenders are dictating. Accordingly, any approval of the 2009 DIP Facility should be deferred so that the parties can fully understand the proposed financing facility.

- Foreign Stock. As the Court is aware, the Committee does not believe that 100% of the Debtors' foreign stock was pledged pursuant to the 2008 DIP Facility. The Committee recognizes that the Court disagrees with this position, however, the Court's decision on this matter is currently on appeal and, until that appeal is fully adjudicated, the 2009 DIP Facility should not include a pledge of the remaining 34% of the foreign stock that is at issue in the appeal. Any other result would be highly prejudicial to the Debtors' unsecured creditors.

- Avoidance Actions. There is a discrepancy between the Motion and Term Sheet about whether Avoidance Actions and the proceeds thereof are part of the Collateral. Accordingly, the DIP Order should explicitly provide that Avoidance Actions and the proceeds thereof are not part of Collateral, nor available to satisfy the superpriority and/or adequate protection claims of the DIP Lenders or the Prepetition Lenders.

CONCLUSION

For all of the foregoing reasons, the Committee respectfully requests that the Court: (i) deny the relief requested in the Motion and (ii) grant such other relief as the Court deems just, proper and equitable.

Respectfully submitted this 21 day of January 2009.

/s/ James R. Savin

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