

**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

**DEBTORS’ REPLY TO OBJECTIONS AGAINST EMERGENCY MOTION
PURSUANT TO 11 U.S.C. §§ 105, 361, 363 AND 364 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 PRE-PETITION LENDERS,
(IV) MODIFYING THE AUTOMATIC STAY, AND (V) SCHEDULING A FINAL
HEARING PURSUANT TO BANKRUPTCY RULE 4001**

(this relates to Docket Nos. 829, 841, 842, 844 & 846)

Propex Inc. (“Propex”), Propex Holdings Inc. (“Holdings”), Propex Concrete Systems Corporation (“Concrete”), Propex Fabrics International Holdings I Inc. (“Fabrics I”), and Propex Fabrics International Holdings II Inc. (“Fabrics II”), each a debtor-in-possession (collectively, the “Debtors”), pursuant to sections 105, 361, 363, and 364 of title 11 of the United States Code (the “Bankruptcy Code”), hereby file their reply (the “Reply”)¹ to the objections of the Official Committee of Unsecured Creditors (the “Committee Objection”), the United States Trustee (the “Trustee Objection”), and certain of the Prepetition Lenders (the “Black Diamond Objection”) to

¹ Capitalized terms not defined herein are defined in the earlier Motion.

the Debtors' emergency motion for entry of interim and final orders (i) authorizing the Debtors to obtain post-petition financing, (ii) authorizing the Debtors to use cash collateral of the prepetition lenders, (iii) granting adequate protection to the prepetition lenders, (iv) modifying the automatic stay, and (v) scheduling a final hearing pursuant to Rules 4001(b) and 4001(c) of the Federal Rules of Bankruptcy Procedure (the "DIP Financing Motion"). In support of this Reply, the Debtors respectfully represent as follows:

SUMMARY OF REPLY

There should be no legitimate question regarding the Debtors' need for a DIP facility to satisfy and retire the existing DIP which matured on January 23, 2009 and to provide the necessary funding for their normal, on-going operations. The two remaining objections are by the Creditors Committee and Black Diamond. The PBGC Objection has been resolved, and the Trustee Objection went solely to the sufficiency of the notice of the hearing last week, which objection is now moot.

The Creditors Committee has agreed that there is insufficient value to satisfy the pre-petition secured indebtedness, and its' appeal regarding the foreign stock pledge and the adversary are expressly carved out of liens granted in the proposed Interim DIP Order. Therefore, the position represented by the Creditors Committee is subordinate to that of the pre-petition lenders. By all accounts (and as acknowledged by the Creditors Committee), the value of the company does not satisfy the pre-petition secured lenders—so unsecured creditors are frankly out of the money. Accordingly, the voice and weight of the Creditors Committee is significantly minimized in this matter.

Black Diamond is a member of the pre-petition secured lender group (as is Wayzata). Black Diamond objected to the proposed 2009 DIP Facility—yet, Black Diamond has now (as of

January 23, 2009) proposed essentially the same DIP financing and the same adequate protection package to the Debtors². Notably, Black Diamond can only speak for itself and a few other prepetition lenders; the agent for the Pre-Petition Credit Facility, BNP Paribas (who represents the Pre-Petition lender group), has not objected to the proposed 2009 DIP Facility.

The 2009 DIP Facility represents the product of a sound business purpose on the Debtors' part by (i) providing the Debtors with the opportunity to salvage their businesses, (ii) maximizing the recovery of estate assets, and (iii) preserving thousands of jobs. The Debtors turned to Wayzata for the 2009 DIP Facility when they had exhausted all other options, which included unsuccessfully reaching out to the 2008 DIP Lenders to extend the maturity date of the 2008 DIP Loan. Prior to receiving the January 23, 2009 letter from Black Diamond (which proposes financing on substantially the same terms as provided by Wayzata), the Debtors had no other written DIP Financing commitment.

The 2008 DIP Lenders refused to extend defaults under the 2008 DIP Loan past January 9, 2009. Disagreements within the pre-petition lender group made it apparent there would be no extension of the DIP maturity past January 23, 2009. Facing maturity of their existing DIP facility and without any other viable alternatives, the Debtors approached Wayzata, their proposed exit lender³, to discuss new debtor-in-possession financing. The Debtors and Wayzata worked feverishly over the course of a few days to negotiate and finalize the terms of the proposed 2009 DIP Facility that would help the Debtors avoid the liquidation of the Debtors' businesses, preserve and maximize the value realized by the estates and creditors, and avoid the termination of thousands of jobs.

² Decisively, the proposed adequate protection package follows what has been in place for over a year per the existing DIP orders.

³ The pre-petition lenders had refused to provide an exit facility for the then Debtors' plan of reorganization even though the plan was specifically drafted and filed with the lenders input.

Importantly, and contrary to the allegations in the Objections, in light of the credit risk and short-term notice of the proposed 2009 DIP Facility, the terms are reasonable and justified. The terms are substantially similar to those contained in the 2008 DIP Facility and conform to the terms of other debtor-in-possession financing approved by other courts. The result of the Debtors' and Wayzata's negotiations is a proposed DIP Facility that allows the Debtors to conduct a value-maximizing going concern sale of their business, potentially to Wayzata or another higher or best bidder, under essentially the same terms as the 2008 DIP Facility.

REPLY

1. As the Court is aware and there is no factual dispute, the maturity date for the 2008 DIP Financing was January 23, 2009 (the "January 23 Maturity Date"). Prior to such maturity date, despite numerous communications between the Debtors and the 2008 DIP Lenders, the lenders did not agree to an extension.⁴

2. After it became clear that the existing DIP Lenders would not extend the maturity date, the Debtors approached Wayzata Investment Partners LLC ("Wayzata") about providing a DIP Loan. The Debtors and Wayzata conducted negotiations regarding the terms of ongoing financing in light of the January 23 Maturity Date and reached an agreement regarding same. On January 16, 2009, the Debtors filed their DIP Financing Motion seeking Court authority to enter into a DIP Financing Agreement with Wayzata, which would provide the Debtors with necessary financing past the January 23 Maturity Date (the "2009 DIP Facility").

3. On January 21, 2009, objections to the DIP Financing Motion were filed by the Official Committee of Unsecured Creditors (Docket No. 841) (the "Committee Objection") and

⁴ In its objection, Black Diamond states that the Debtors never approached the 2008 DIP Lenders with a request for extension of the January 23 Maturity Date. However, this statement is inaccurate, the Debtors engaged the 2008 DIP Lenders regarding such an extension, never received such an extension and were informed no extension would occur.

Black Diamond Capital Management, Inc. (Docket No. 844) (the “Black Diamond Objection”). On January 22, 2009, the United States Trustee filed an objection to the DIP Financing Motion (Docket No. 846) (the “Trustee Objection”) (the Committee Objection, Black Diamond Objection and Trustee Objection are collectively referred to herein as the “Objections”).⁵

4. On January 22, 2009, the Court held an interim hearing on the DIP Financing Motion and postponed the interim hearing until January 28, 2009, to provide parties-in-interest with sufficient time to review documents relating to the 2009 DIP Facility.

5. Essentially, the Objections allege the following with regard to the DIP Financing Motion and the 2009 DIP Facility:

- a. Lack of due process;⁶
- b. The 2009 DIP Facility fails to satisfy Section 364 of the Bankruptcy Code;⁷
- c. The contemplation of a Section 363 sale in the 2009 DIP Facility constitutes a sub rosa plan of reorganization;⁸ and
- d. The 2009 DIP Facility constitutes a breach of the Debtors’ fiduciary duties.⁹

LEGAL BASES FOR REQUESTED RELIEF

I. Sufficient Notice Has Been Provided to All Parties

6. The Objections allege a lack of sufficient time within which to review the DIP Financing Motion and all documents related thereto. At the January 22 hearing on the DIP Financing Motion, the Court postponed the hearing on the DIP Financing Motion to January 28

⁵ An objection was also filed by the Pension Benefit Guaranty Corporation (“PBGC”) on January 21, 2009 (Docket No. 842) and subsequently withdrawn on January 26, 2009 (Docket No. 857).

⁶ See Committee Objection, pp. 7-8; Black Diamond Objection, p. 4; Trustee Objection, pp. 2-3.

⁷ See Committee Objection, pp. 5-6; Black Diamond Objection, pp. 6-7.

⁸ See Committee Objection, pp. 8-12.

⁹ See Committee Objection, pp. 12-14.

to provide parties-in-interest with sufficient time to review all applicable documents. As such, this objection is now moot.¹⁰

II. The Terms of the DIP Financing Satisfy Section 364 of the Bankruptcy Code

A. The 2009 DIP Facility Provides Adequate Protection to the Pre-Petition Lenders

7. The Black Diamond Objection argues that the 2009 DIP Facility fails to provide the Pre-Petition Lenders with adequate protection under Section 364 of the Bankruptcy Code.¹¹ However, the 2009 DIP Facility provides sufficient adequate protection of the Pre-Petition Lenders' interest. Under the 2009 DIP Facility, the Pre-Petition Lenders receive the same adequate protections they maintained and received for the last twelve months under the 2008 DIP Facility.¹² Moreover, had the Debtors commenced a confirmation hearing by January 23, the 2008 DIP Facility and adequate protection package would have automatically been extended to April 23, 2009. Thus, the adequate protection package in the 2008 DIP Facility was expected to extend through April 23, 2009 and is essentially being carried forward in the 2009 DIP Facility.

8. Furthermore, on January 23, 2009 (one week after the Debtors filed their DIP Financing Motion), Black Diamond sent a letter to the Debtors proposing to extend financing to the Debtors on substantially the same terms as provided under the 2009 DIP Facility. By such action, Black Diamond acknowledges that the 2009 DIP Facility provides the Pre-Petition Lenders with sufficient adequate protection as contemplated under Section 364.

¹⁰ The Trustee Objection only raised due process which is moot.

¹¹ The Black Diamond Objection also posits that the granting of priming liens to Wayzata is not allowed under the 2008 DIP Agreement. However, since the new 2009 financing is expressly conditioned upon the 2008 financing being paid and satisfied, this argument has no merit.

¹² This includes payment of monthly interest in the aggregate amount of approximately \$14.2 million for the months of March 2008 through December 2008 (with an additional projected amount of approximately \$1 million to be paid in January), plus attorney and advisor fees of Skadden and Kroll, respectively, in the aggregate amount of approximately \$3.3 million for invoice dates ranging between February 2008 and January 2009.

9. In light of the current situation, the Pre-Petition Lenders should welcome the 2009 DIP Facility. The 2009 DIP Facility will allow the Debtors to conduct an orderly sale process for their assets thereby maximizing the value of the Pre-Petition Lenders' collateral. Absent approval of the 2009 DIP Facility, the Debtors likely will be compelled to liquidate their assets to the detriment of the Pre-Petition Lenders' interests. Under the 2009 DIP Facility, however, any party may bid for the assets in a bidding process (including Black Diamond) that is subject to approval of this Court. For all of the above reasons, the Black Diamond Objection should be overruled.

B. The Terms of the 2009 DIP Facility are Fair, Reasonable and Adequate

10. Faced with a rapidly approaching maturity date under the 2008 DIP Facility and without any more favorable alternatives, the Debtors turned to their proposed exit lender for additional DIP financing. As the Court and creditors are aware, prior to mid-January, Wayzata and the Debtors had engaged in discussions regarding exit financing. However, during the course of the exit financing negotiations, it became clear that the Debtors would require additional DIP funding to maintain their operations.

11. The Debtors will experience a need for additional cash in the next three months that will threaten their financial viability. The 2009 DIP Facility allows the Debtors time to conduct an orderly sale process to maximize the value of their assets, preserve jobs and avoid liquidation. The Debtors' efforts to pursue a sale of their assets to preserve value and employee jobs are an appropriate use of the Chapter 11 process. *See, e.g., In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 211 (3d Cir. 2003) (finding that a debtor's use of chapter 11 to conduct a going-concern assets sale to maximize the value of their estates is an appropriate use of chapter 11); *In re GST Telecom, Inc.*, 2002 WL 442233, at *2 (D. Del. Mar. 20, 2002) (“[T]here are times when

it is more advantageous for the debtor to begin to sell . . . assets . . . in order to insure that the assets do not lose value.”).

12. Further, with the January 23, 2009 maturity and the lenders position to not extend that maturity, the Debtors had few alternatives. Prior to January 23, 2009, the Debtors had received no written commitment from anyone (other than Wayzata) to undertake a replacement DIP Financing.

13. Faced with a situation where no DIP Financing alternative was available and the maturity of the 2008 DIP Facility, the Debtors approached Wayzata regarding a replacement DIP facility on or about January 10, 2009. By January 13, 2009, Wayzata prepared and executed a term sheet to provide the Debtors with additional financing upon terms that are substantially similar to the terms of the 2008 DIP Facility.

14. To ensure the Debtors maintained continued access to financing after the January 23 Maturity Date of the 2008 DIP Facility, Wayzata worked with the Debtors to obtain approval of the proposed 2009 DIP Facility in an expeditious manner. Immediately after entering into the DIP term sheet, Wayzata retained counsel and worked over the next few days, including over the holiday weekend, to finalize and file the interim DIP order and proposed credit agreement. During this period, and fully aware that the 2008 DIP Facility was about to mature, neither the Pre-Petition Agent nor any of the Pre-Petition Lenders notified the Debtors that they would be willing to provide an extension of the maturity date or additional DIP financing. In fact, the only communications from the Pre-Petition Lenders were that they were unwilling to waive existing defaults under the 2008 DIP Facility past January 9, 2009.

15. Simply put, Wayzata’s proposal provided the only alternative for the Debtors to exit these cases as a continued going-concerns and thereby preserve thousands of jobs. Without

the additional funds under the 2009 DIP Facility, the Debtors' opportunity to maintain their operations in light of declining liquidity would be scarce and liquidation likely would be forthcoming.

16. The terms of the 2009 DIP Facility are fair, reasonable, and consistent with market terms in the current market environment. As with all credit facilities, the terms of the 2009 DIP Facility account for financial risks specific to the Debtors' circumstances. As even Black Diamond recognizes in its objection, the Debtors will experience a need for additional cash of approximately \$30 million during the 90-day term of the 2009 DIP Facility. The terms of the 2009 DIP Facility reflect this significant liquidity decline and attendant uncertainty surrounding the Debtors' financing position.

17. Far from taking undue advantage of this situation as the Creditors Committee and Black Diamond imply, Wayzata, in effect, has proposed to fund this need for additional cash and allow the Debtors time to market and sell their assets to preserve the value of the Debtors' business. Further, contrary to these same contentions, the fees and costs of the 2009 DIP Facility are reasonable and consistent with terms of other DIP facilities recently approved in other Chapter 11 cases.¹³ See, e.g., *In re Lyondell Chemical Co.*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 8, 2009) (entering order approving same interest rate as in the Proposed DIP Facility, LIBOR plus 10%); *In re Verasun Energy Corp.*, Case No. 08-12606 (Bankr. D. Del. Nov. 28, 2008) (approving interest rate of 16.50%).

¹³ The Creditors Committee also objects to the Debtors' waiver of their right under Bankruptcy Code § 506 to surcharge Wayzata with the costs and expenses of preserving collateral. DIP lenders commonly request and receive approval of a waiver of a debtor's ability to surcharge DIP lenders' collateral and such waiver is in the 2008 DIP Facility. Additionally, the proposed interim DIP order adequately addresses the Creditors Committee's concerns regarding liens with respect to avoidance actions. Further, the Creditors Committee's objection to the Debtors' pledge of foreign stock involves an issue that has previously been decided and rejected by the Court, and, accordingly, should be overruled.

18. Likewise, the facility and exit fees set forth in the 2009 DIP Facility also are consistent with fees contained in other recent DIP facilities. *See In re Tronox Inc.*, Case No. 09-10156 (ALG) (Bankr. S.D.N.Y. Jan. 13, 2009) (approving an upfront 3% facility fee for \$125 million of debtor-in-possession financing); *In re Lyondell Chemical Co.*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 8, 2009) (approving exit fee of 3% of a principal amount term loan portion of debtor-in-possession financing); *In re Verasun Energy Corp.*, Case No. 08-12606 (Bankr. D. Del. Nov. 28, 2008) (entering final order approving an exit fee of 5% of the principal amount of the funded debtor-in-possession loans). Moreover, under the Debtors' projections, the Debtors do not expect to need more than \$40 million of financing during the term of the 2009 DIP Facility, making it less likely that the Debtors will have to pay the additional 3% threshold facility fee imposed on any amounts above \$40 million that the Debtors draw on the 2009 DIP Facility.

19. In further support of the fairness and adequacy of the 2009 DIP Facility, the Debtors note that although the Creditors Committee and Black Diamond have posed objections to the 2009 DIP Facility, neither they nor any other party has proposed an alternate, committed financing arrangement which provides the Debtors and their estates with more favorable terms. In essence, approval of the Objections leads only to one conclusion: no financing for the Debtors and an inevitable liquidation of the Debtors' assets (which will yield less than the Section 363 sale contemplated under the 2009 DIP Facility), risks thousands of jobs and creates the very real potential for a significant increase in unsecured claims.¹⁴ The Debtors submit that this is a conclusion that is neither fair, reasonable nor adequate.

¹⁴ This conclusion, which is a necessary result of the relief sought in the Committee Objection, runs contrary to the fiduciary duties the Creditors Committee must provide to unsecured creditors.

20. As described above, after appropriate investigation and analysis and given the exigencies of the circumstances, the Debtors' management has concluded that the 2009 DIP Facility is the only alternative available in the circumstances of these cases. In fact, there is no better offer before the Debtors or the Court. Bankruptcy courts routinely defer to the debtor's business judgment on most business decisions, including the decision to borrow money. *See Group of Institutional Investors v. Chicago, Mil., St. P., & Pac. R.R. Co.*, 318 U.S. 523, 550 (1943); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985) ("Business judgments should be left to the board room and not to this Court."); *In re Lifeguard Indus., Inc.* 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same). "More exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N. A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

21. In general, a bankruptcy court should defer to a debtor's business judgment regarding the need for and the proposed use of funds, unless such decision is arbitrary and capricious. *In re Curlew Valley Assocs.*, 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). Courts generally will not second-guess a debtor's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of [its] authority under the Code." *Id.* at 513-14 (footnotes omitted).

22. The Debtors have exercised sound business judgment in determining that a credit facility beyond the January 23, 2009 maturity is appropriate. The Debtors clearly satisfy the legal prerequisites to borrow under the 2009 DIP Facility. The terms of the 2009 DIP Facility are fair and reasonable, are in the best interests of the Debtors' estates, and were negotiated by

the parties in good faith and at arm's length. Accordingly, the Debtors should be granted authority to enter into the 2009 DIP Facility and the Objections should be overruled.

III. The 2009 DIP Facility Is Not A Sub Rosa Plan

23. The Committee Objection further alleges that the 2009 DIP Facility constitutes a *sub rosa* plan of reorganization. In reaching this conclusion, the Committee ignores controlling Sixth Circuit precedent and instead relies on *In re Braniff Airways*, an inapposite Fifth Circuit case which, instead of confronting whether a debtor may sell substantially all of its assets under section 363, instead “expressly reserved the question whether § 363(b) authorizes the sale of all of a debtor’s assets.” *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 389 (6th Cir. 1986).¹⁵ The Committee Objection fails to mention the controlling Sixth Circuit case establishing the standard for Section 363 sales of substantially all of a debtor’s assets: “a bankruptcy court can authorize a sale of all of a Chapter 11 debtor’s assets under § 363(b)(1) when a sound business purpose dictates such action.” *Id.* at 390.

24. In *McClung*, the Sixth Circuit determined that a sound business purpose existed to sell substantially all of the debtor’s assets where (i) the trustee was unable to operate the business at a profit and (ii) the trustee faced the prospect of ceasing operations as a result of not being able to fund payroll and other operating expenses. The Debtors in these cases face a similar fate.

Without financing past the January 23 Maturity Date, it is undisputed that the Debtors will

¹⁵ *In re Swallens* is not to the contrary. See 269 B.R. 634 (6th Cir. B.A.P. 2001). In *In re Swallens*, the Bankruptcy Appellate Panel rejected a debtor’s proposal to dismiss its bankruptcy case and distribute assets under section 507 without the benefit of a confirmed Chapter 11 plan. *Id.* at 637-389. *In re Swallens* is easily distinguishable from the case at bar because the proposal at issue there was not a § 363(b) sale. *Id.* at 638-39. Rather, the debtor proposed an unprecedented dismissal and distribution pursuant to the court’s § 105(a) power. *Id.* at 636-37 (“[W]e are aware of no court that has decided a case exactly like this one.”). By contrast, the Debtors here propose a DIP financing which includes a time table for a sale pursuant to section 363(b) (all subject to Court approval), which expressly authorizes the relief sought. Furthermore, even if *In re Swallens* had held that § 363(b) sales of all a debtor’s assets are prohibited—which it did not—such a decision could not overturn the binding Sixth Circuit precedent in *McCLung*, which allows such sales upon the showing of a sound business purpose (which the Debtors prove in this Reply).

deplete their funds on or before February 20, 2009. Thereafter, and similarly to *McClung*, the Debtors will be unable to fund operating expenses, will be unable to pay employees (and will have to subsequently terminate approximately two thousand of its employees), and will have to cease their business operations and convert their cases to a Chapter 7 liquidation case. Further, and as a result thereof, the Debtors' assets will continue to decline in value as the glimmer of liquidation becomes brighter, which is another factor recognized by the Sixth Circuit in *McClung* in determining whether a sound business purpose exists for a Section 363 sale. *Id.* (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)). Concomitantly, without the financing sought hereunder, thousands of the Debtors' current employees will lose their jobs, and the continuing viability of vendors' businesses, many of which substantially rely on continuing business relations with the Debtors, will hang in the balance.

25. Contrary to the implications made in the Committee Objection, the 2009 DIP Financing Agreement does not identify the ultimate buyer and purchase price of the Debtors' assets. Instead, sufficient time will be allotted for marketing Debtors' assets and conducting a bidding process (all subject to approval of the Court) which will assure that, when the Debtors do file their Section 363 motion with this Court, the highest and best price obtainable for the Debtors' assets will be presented to the Court and creditors.

26. In summation, the Debtors, without any written expressions to extend financing prior to the January 23, 2009 maturity (other than from Wayzata), have determined that a sound business purpose exists to enter into the 2009 DIP Facility. The 2009 DIP Facility provides the Debtors' estates and their creditors with several positives, such as sufficient funding to continue their business operations as they continue to market their assets and seek to maximize the value of their assets. On the flip side, denial of the 2009 DIP Facility leads only to negatives for all

parties involved, as discussed above, and no party has presented the Court or the Debtors with any better alternative to the 2009 DIP Facility. Since the 2009 DIP Facility is a product of a sound business purpose expressed by the Debtors, it should be authorized and all Objections should be overruled.

IV. The Debtors have Fulfilled their Fiduciary Duties to Creditors by Maximizing the Value of their Assets

27. In its' Objection, the Creditors Committee recklessly and with no support alleges that the proposed Section 363 sale contemplated under the DIP Financing Agreement constitutes a violation of the Debtors' fiduciary duties. However, as demonstrated above, the Debtors' decision to enter into such DIP Financing Agreement is in accordance with binding Sixth Circuit authority, the result of a sound and valid business purpose for the following reasons: (i) the 2008 DIP Loan matured on January 23, 2009, (ii) the 2008 DIP Lenders declined to extend the January 23 Maturity Date, thereby leaving the Debtors with the possibility of a lack of financing past the January 23 Maturity Date, (iii) the Debtors attempted to obtain financing from other sources, yet received no written expressions of interest prior to the January 23 Maturity Date except from Wayzata, (iv) the Debtors and Wayzata negotiated the terms of the 2009 DIP Financing in good faith and at arm's length fashion, (v) without financing past the January 23 Maturity Date, the Debtors will deplete their funds on or before February 20, 2009, and thereafter will not have sufficient cash to fund their business operations or payroll, (vi) without funds beyond the February 20 date, the only option in these cases will be to pursue liquidation under Chapter 7, and (vii) liquidation under Chapter 7 will reduce the value of the Debtors' assets and, as opposed to the Section 363 sale contemplated under the 2009 DIP Facility, fail to maximize the value that

could be realized by the estate and creditors.¹⁶ The ability to maximize value and preserve thousands of jobs evidences sound and proper business judgment. Debtors submit that the sound business purpose shown above fulfills the primary fiduciary responsibility of a debtor-in-possession, i.e. to maximize the value of estate assets for creditors. As such, the 2009 DIP Facility should be granted, and the Objections should be overruled.

CONCLUSION

The Proposed 2009 DIP Facility provides the Debtors with the financing necessary to maintain their business as a going concern. Wayzata has agreed to provide the necessary funding to bridge the Debtors through the remainder of these cases to a sale that maximizes the value of the Debtors' assets, preserves jobs of Debtors' employees, and prevents a potential domino effect of subsequent bankruptcy filings from vendors (including those conducting business in the state of Tennessee) relying on ongoing business relations with the Debtors. Contrary to the Creditor Committee's and Black Diamonds' objections, Wayzata has stepped forward to help salvage the Debtors' businesses and to ensure a recovery for those estates. The adequate protection package will be essentially the same that the Pre-Petition Lenders have had for 12 months, and that the 2008 DIP Facility contemplated through April 23, 2009. Therefore, the Court should overrule all objections and approve the 2009 DIP Facility on an interim and final basis.

WHEREFORE, PREMISES CONSIDERED, the Debtors request this Court (i) overrule the Committee Objection, the Prepetition Lender Objection and the Trustee Objection, (ii) grant

¹⁶ A Chapter 7 liquidation will also ensure that approximately two thousand of Debtors' employees will lose their jobs and may potentially lead to a domino effect of Debtors' vendors (many of which substantially rely on continued business relations with the Debtors) filing bankruptcy proceedings and terminating employees. While the Creditors Committee may be unmoved by the fate of Debtors' employees (and the potential loss of thousands of other jobs), the Debtors maintain that not only do they have a fiduciary duty to maximize the value of their estate assets for creditors, but they also have a fiduciary duty to maintain the jobs of their existing employees. The 2009 DIP Facility accomplishes both tasks.

the DIP Financing Motion and (iii) grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 27th day of January, 2009

KING & SPALDING LLP

By: /s/ Henry J. Kaim

Henry J. Kaim
Texas Bar No. 11075400
HKaim@kslaw.com
Mark W. Wege
Texas Bar No. 21074225
MWege@kslaw.com
Edward L. Ripley
Texas Bar No. 16935950
ERipley@kslaw.com
King & Spalding, LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002
Telephone: (713) 751-3200
Fax: (713) 751-3290

- and -

Shelley D. Rucker
Tennessee Bar No. 010098
Miller & Martin PLLC
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402-2289
Phone: (423) 785-8289
Fax: (423) 785-8480
Email: srucker@millermartin.com

**COUNSEL FOR
THE DEBTORS IN POSSESSION**