**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re:<br><br>WHITE FOREST RESOURCES, INC., *et al.*,[1]<br><br>Debtors. | Chapter 11<br>Case No. 25-10195 (TMH)<br><br>(Jointly Administered)<br><br>**RE: D.I. 17** |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS PURSUANT TO SECTIONS 105, 361, 362, 363, AND 364 OF THE BANKRUPTCY CODE AND RULES 2002, 4001, 6004 AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE (I) AUTHORIZING THE DEBTORS TO (A) USE CASH COLLATERAL, (B) OBTAIN SENIOR SECURED SUPERPRIORITY POSTPETITION FINANCING AND GRANT LIENS AND SUPERPRIORITY ADMINISTRATIVE CLAIMS, AND (C) PROVIDE ADEQUATE PROTECTION, (II) SCHEDULING A FINAL HEARING, AND (III) GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors (the "**Committee**") of White Forest Resources, Inc. and its affiliated debtors and debtors in possession (the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**") hereby files this objection (the "**Objection**") to the *Debtors' Motion for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363, and 364 of the Bankruptcy Code and Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (I) Authorizing the Debtors to (A) Use Cash Collateral, (B) Obtain Senior Secured Superpriority Postpetition Financing and Grant Liens and Superpriority Administrative Claims, and (C) Provide Adequate Protection, (II) Scheduling a Final Hearing,*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: White Forest Resources, Inc. (3764); Xinergy Corp. (3865); Xinergy of West Virginia, Inc. (2401); Shenandoah Energy, LLC (6770); South Fork Coal Company, LLC (3113); Bull Creek Processing Company, LLC (0894); Raven Crest Mining, LLC (0122); Brier Creek Coal Company, LLC (9999) Raven Crest Contracting, LLC (7796); Raven Crest Leasing, LLC (7844); and Raven Crest Minerals, LLC (7746). The Debtors' service address is 1295 Ashford Hill Rd., Ashford, WV 25009.

*and (III) Granting Related Relief*, dated February 7, 2025 [ECF No. 17] (the "**DIP Motion**").[2] In support of this objection, the Committee respectfully states as follows:

## PRELIMINARY STATEMENT

1. The DIP Facilities should not be approved in their present form. They amount to a land-grab by the Debtors' prepetition lenders, Spectrum Origination LLC ("**Spectrum**")[3] and Aegis Business Credit, LLC ("**Aegis**") (collectively, the "**DIP Lenders**") by seizing all unencumbered assets and insulating themselves from liability, in the form of roll-ups of both the Debtors' prepetition term loans and asset-based revolving facility, combined with the pledge of the Debtors' causes of action (including chapter 5 actions) and any unencumbered assets as security for the DIP Facilities. In these cases, where there does not appear to be any clear value to satisfy the claims of general unsecured creditors, the Debtors' causes of action and any unencumbered assets must be preserved for the benefit of such creditors.

2. The DIP facility is a gross example of insider self-dealing. Spectrum, the Debtors' primary prepetition secured lender and majority owner, has two of three seats on the Debtors' board of directors and has controlled the Debtors for years. Now, as one of the proposed DIP lenders, now seeks to use these cases to obtain broad releases without an appropriate investigation. What makes the DIP Lenders land-grab more egregious is that one of the DIP Lenders, and by far the more significant one in terms of debt – Spectrum – is the Debtors' consummate insider. Spectrum's managing member and the signatory on its loan documents is Jeffrey A. Schaffer, who is also the managing partner and portfolio manager of Spectrum Group Management LLC

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[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the DIP Term Sheet, DIP Credit Agreements (as defined below), or Interim Order, as applicable.

[3] Spectrum is affiliated with Spectrum Group Management LLC, the majority owner of lead debtor and parent company White Forest Resources, Inc.

("**Spectrum Parent**"), the majority owner of lead debtor and parent company White Forest Resources, Inc. One of the lead debtors' other two directors is Brian Asby, a senior analyst for Spectrum Parent. While the Committee has yet to fully investigate the overlapping governance structures of the Debtors and the Spectrum entities, it seems evident that the Debtors are not entitled to business ju.

3. The DIP Facility cannot be saved by the reported recusal of Schaffer and Asby from approval of the DIP Facilities, particularly when they did not recuse from any other business decisions (including the decision to file and other key decisions made and to be made in these cases). The Court should not accept this purported recusal, which seems to be nothing more than merely abstaining from a vote on the DIP Facility at the board meeting, to approve this process. Furthermore, the remaining director – Gregory A. Whirley – is *by definition* not independent or disinterested as the President and Chief Executive Officer of the Debtors. Finally, the Debtors' retention of Debtors' counsel on or around January 17, and retention of a Chief Restructuring Officer on or around January 24, does not remedy the issue.

4. In sum, the proposed DIP Facilities (and other material business decisions to be made in these cases by the Debtors) should be evaluated under the entire fairness standard rather than the business judgment standard.

5. While roll-ups are commonly approved subject to scrutiny about the terms, in general, the Debtors – and Spectrum – must demonstrate that the prepetition term loans are fully secured in order to benefit from a roll-up. To the extent they are not secured, they should not be rolled-up, and any roll-up that has occurred (if the Court approves the roll-up) should be subject to challenge by the Committee and unwinding by the Court should the collateral value be insufficient.

6. Regarding certain other terms of the DIP Facilities, the Committee has significant issues, including but not limited to the following: The fee budget allocated to the Committee professionals is inadequate. The Committee's challenge period should be extended, the limits proposed on the Committee's challenge rights are improper, and the Committee's investigation budget is inadequate. The proposed waivers of Sections 506(c) and 552 are improper. The waiver of marshalling rights is improper. The proposed milestone to file and prosecute a chapter 11 plan "acceptable" to the Lenders is improper and unworkable. These and other objections are set forth in further detail below.

## BACKGROUND

### I. General Background

7. On February 7, 2025 (the "**Petition Date**"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the District of Delaware (the "**Court**"), thereby commencing these chapter 11 cases (the "**Chapter 11 Cases**"). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors' Chapter 11 Cases are being jointly administer for procedural purposes only.[4] No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases.

8. On the Petition Date, the Debtors filed the DIP Motion.[5] In support of the DIP Motion, the Debtors filed the *Declaration of Brian Ryniker in Support of the Debtors' Motion for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363, and 364 of the*

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[4] *See* ECF Nos. 3 and 29.

[5] *See* ECF No. 17.

*Bankruptcy Code and Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (I) Authorizing the Debtors to (A) Use Cash Collateral, (B) Obtain Senior Secured Superpriority Postpetition Financing and Grant Liens and Superpriority administrative Claims, and (C) Provide Adequate Protection, (II) Scheduling a Final Hearing, and (III) Granting Related Relief* dated February 7, 2025 (the "**Ryniker Declaration**").[6]

9. On February 11, 2025, the Court entered an Interim Order Pursuant to Sections 105, 361, 362, 363, and 364 of the Bankruptcy Code and Rules 2002, 4001, 6004 and 9104 of the Federal Rules of Bankruptcy Procedure (I) Authorizing the Debtors to (A) Use Cash Collateral, (B) Obtain Senior Secured Superpriority Postpetition Financing and Grant Liens and Superpriority Administrative Claims, and (C) Provide Adequate Protection, (II) Scheduling a Final Hearing, and (III) Granting Related Relief [ECF No. 42] (the "**Interim DIP Order**").

10. On February 26, 2025, pursuant to section 1102(a) of the Bankruptcy Code, the U.S. Trustee appointed the Committee.[7] The Committee is comprised of the following three members: (i) Mallard Environmental Services, Inc.; (ii) Tri-State Industrial Supply, Inc.; and (iii) Webster Trucking, Inc.

## II. <u>The Proposed DIP Facilities</u>

### *A. Facilities Size and Key Terms*

11. Pursuant to the DIP Motion, the Debtors seek authority to enter into two parallel DIP credit facilities comprised of term loans and a revolving credit facility, with a roll-up component. (the "**DIP Facilities**").

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[6] *See* ECF No. 18.

[7] Notice of Appointment of Committee of Unsecured Creditors, dated February 26, 2025 [ECF No. 84].

12. For the term loans, the Debtors seek authority to borrow up to $15,333,333.33 comprised of (a) $4,333,333.33 of new money term loans (including the New Money Upfront Fee) (the "**Interim DIP Term Loan**"), (b) a roll-up based on the interim funding of $5,100,000.00 (the "**Interim DIP Term Loan Roll-Up Amount**") plus certain fees, (c) an additional $4,000,000.00 of new money term loans (the "**Final DIP Term Loan**"), and (d) an additional roll-up based on the final funding of $1,900,000.00 (the "**Final DIP Term Loan Roll-Up Amount**") (totaling up to $15,333,333.33 of DIP Term Loans). The DIP Facilities include guaranties by the debtor borrowers.

13. For the revolving facility (the "**Revolver**"), the Debtors seek authority to borrow, on a superpriority basis, (a) on a new money revolving basis, an amount not to exceed the lesser of (x) the Borrowing Base (defined in the DIP Revolving Loan Credit Agreement) or (y) $4,000,000.00, inclusive of, and conditioned upon approval in the Interim Order of, the Rollup DIP Revolving Loans; and (b) upon entry of the Interim Order, the full outstanding balance of the Prepetition Revolving Loan Agreement, equal to $1,412,081.97 shall be converted on a dollar for dollar basis in exchange for a corresponding amount of its loan under the Interim DIP Revolving Loan. The Revolver is also guaranteed by the borrowing Debtors.

## OBJECTION

14. A court should only approve debtor-in-possession financing if a debtor meets its burden to prove that such financing "is in the best interest of the general creditor body."[8] Postpetition financing should not be authorized if its primary purpose is to benefit or improve the position of a particular secured lender. Indeed, the law has long acknowledged the unequal

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8 *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (*citing In re Vanguard Diversified, Inc*., 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983); *see also In re Tenney Village Co., Inc*., 104 B.R. 562, 569 (Bankr. D.N.H. 1989) ("The debtor's prevailing obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries").

bargaining power inherent in negotiations leading to proposed postpetition financing, as well as the very significant harm that can befall creditors if the proposed financier is permitted to exploit its leverage position.

15. As a rule, the burden is on the Debtors to demonstrate that (a) the proposed financing is an exercise of sound and reasonable business judgment;[9] (b) the financing is in the best interests of the estate and its creditors; (c) the transaction is necessary to preserve the assets of the estate, and is necessary, essential, and appropriate for the continued operation of the debtor's business; (d) the terms of the transaction are fair, reasonable, and adequate given the circumstances of the debtor-borrower and proposed lender; and (e) the financing was negotiated in good faith and at arm's length by the debtor, on the one hand, and the lender, on the other hand.[10]

16. In terms of whether the business judgment rule should apply, in the Third Circuit, the business judgment rule is based on the assumption that reasonable diligence has been used in reaching the challenged decision, assessed through the following factors: (i) was the board disinterested; (ii) was the board assisted by counsel and other professionals; (iii) did the board prepare a written report; (iv) was the board was independent; (v) did the board conduct an adequate investigation; and (vi) whether the board rationally believed its decision was in the best interests of the corporation.[11]

17. As discussed herein, the proposed DIP Facilities are tainted by the fact that the term loan component is effectively an insider loan, as well as containing numerous terms that are objectively objectionable. The overarching theme is the pledging of unencumbered assets to the

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9 As set forth in the next section of the Objection, the Committee asserts that the business judgment standard should be, in these cases, replaced by the "entire fairness" standard for the DIP Facilities,

10 *See In re Los Angeles Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011).

11 *In re Lemington Home For Aged*, 659 F.3d 282, 292 (3rd Cir.2011) (citing *Cuker v. Mikalauskas*, 547 Pa. 600, 692 A.2d 1042, 1046 (1997).)

lenders that otherwise should benefit the estates' general unsecured creditors. If approved in its current form, the proposed DIP Facilities unreasonably and unfairly benefits the Prepetition Secured Lenders – and in particular, term loan lender Spectrum - and allows all of the DIP Lenders the ability to seize the control of the cases and the reigns of reorganization for their benefit.[12]

18. For the reasons set forth herein, the Committee submits that the DIP Facilities should be denied their present form.

## III. <u>Approval of the DIP Facilities Should Require Application of the Entire Fairness Standard.</u>

19. In seeking approval of the DIP Facilities, the Debtors cannot rely on the business judgment standard, but must demonstrate that the DIP transaction meets the "entire fairness" standard.[13]

20. The Board resolution attached to the Debtors' petitions asserts that the DIP Facilities were negotiated and approved by one so-called "non-conflicted' voting director of the borrower entities – Gregory A. Whirley, Jr.[14] The so-called "conflicted" directors are Jeffrey A. Schaffer and Brian Asby, both appointed to the Board as representatives of Spectrum Group Management (defined earlier herein as Spectrum Parent), the majority owner of lead debtor White Forest Resources, Inc., and an affiliate of DIP Facilties provider Spectrum Origination LLC. Schaffer and Asby are not merely "representatives" of Spectrum Parent – they are Spectrum.

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12 *Tenney Village*, 104 B.R. at 568.

13 *See In re Los Angeles Dodgers*, 457 B.R. 308, 313-314 (Bankr. D. Del. 2011) (discussing application of Delaware's "entire fairness" transaction in connection with proposed DIP financing, and ultimately denying approval).

14 *See e.g.* Petition of lead debtor White Forest Resources, Inc., at PDF page 15 of 25 (Resolution), footnote 1 ("For the purposes of this section II, the "Governing Bodies" shall mean only the non-conflicted Board of Directors, Member, or Manager(s) of each of the Companies. For the avoidance of doubt, Gregory A. Whirley Jr. is the only non-conflicted, voting Director for White Forest Resources, Inc. and Xinergy Corp. as it pertains to the consents of this section.").

According to the Spectrum Parent website, Schaffer is its managing partner and portfolio manager – its only identified partner - and Asby is one of only two senior analysts.

21. Furthermore, Schaffer is the managing member and signatory for DIP lender Spectrum – again, at the lender/Debtor counterparty level, he is Spectrum and on both sides of the table.

22. According to the Resolution, Schaffer and Asby recused themselves from approval of the DIP Facilities, but not from any other business decisions. This left Whirley as the remaining director to approve the DIP Facilities proposed in these cases. Whirley may not be "conflicted" but, as the companies' CEO, he is neither independent nor disinterested.

23. The Debtors did not put Mr. Ryniker in place as CRO until January 17, 2025, and did not hire bankruptcy counsel until January 24, 2025. The Committee is understandably concerned about the roles played by the three directors in the run-up to the Petition Date, and there are significant questions about the extent to which the proposed entry into the DIP Facilities constitutes an "arms-length" transaction.

## IV. **The Roll-Up Overreaches and Should be Subject to Reconsideration Upon a Committee Challenge**

24. The DIP Facilities provides for two roll-ups, one up to $7,000,000 of the Debtors' Prepetition Term Loan Obligations, and one a roll-up of the outstanding debt on the Prepetition Revolving Loan Agreement into the Revolver up to that balance ($1,412,081.97) (collectively, the "Roll-Up").

25. The Committee has not had the opportunity to investigate the validity of the prepetition liens and the level of security afforded against the Prepetition Term Loans and Prepetition Revolving Loan, the extent to which they are over- or undersecured. A roll-up of an

undersecured prepetition loan should not be approved, particularly where the collateral proposed to secured such rolled-up debt is previously unencumbered assets.

26. Roll-ups are "generally viewed as a more controversial form of adequate protection that courts will approve sparingly."[15] They are generally disfavored because they provide no benefit to the estate while favoring certain prepetition creditors over others.[16] Among other reasons, courts often refuse to grant a roll-up of prepetition debt that is potentially unsecured because it has the effect of elevating an unsecured claim to a secured claim.[17]

27. Roll-ups, like the roll-up in the DIP Facilities at issue, harm unsecured creditors in several ways. ***First***, they enhance the lenders' collateral package by providing liens over unencumbered assets—assets that would otherwise be available to unsecured creditors and not available for credit bidding. ***Second***, the Bankruptcy Code requires this "rolled-up" debt to be repaid in full and in cash in order for a debtor to successfully emerge from chapter 11, thereby precluding the debtor from treating the prepetition rolled-up debt in accordance with section 1129(b)(2)(A) of the Bankruptcy Code.[18] ***Third***, payment of prepetition secured debt violates the

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15 1 COLLIER LENDING INSTITUTIONS & THE BANKRUPTCY CODE ¶ 5.03[2][b] (citing cases).

16 *In re Verasun*, No. 08-12606 (BLS) (Bankr. D. Del. Dec. 3, 2008) [ECF No. 316] (J. Shannon noting that Bankruptcy Courts in the District of Delaware, the Southern District of New York, and elsewhere have found that "rollups are not favored. They are strongly discouraged on day one, and the bottom line is that for approval a substantial showing [of need for the financing] has to be made."). *See also In re Bruin E&P Partners, LLC*, Tr. of Hr'g at 67:9–10, Case No. 20-33605 (Bankr. S.D. Tex Jul. 17, 2020) (finding that roll-ups are "heavily disfavored under the Bankruptcy Code"); *see also Reynolds v. Servisfirst Bank (In re Stanford)*, 17 F.4th 116, 128 (11th Cir. 2021) (Jordan, J., concurring).

17 *See, e.g.*, *Saybrook*, 963 F.2d at 1495 (holding postpetition financing arrangement *per se* impermissible where undersecured prepetition lender provided postpetition financing in exchange for a security interest in debtor's postpetition property to secure its prepetition debt); *In re FCX, Inc.*, 54 B.R. 833, 840 (Bankr. E.D.N.C. 1985) ("[I]f an undersecured creditor can obtain unencumbered assets as security for all of its prepetition claims, that creditor is being preferred to the detriment of other unsecured claimants.").

18 *See, e.g.*, 3 COLLIER ON BANKRUPTCY ¶ 364.06[2] (16th ed.).

Bankruptcy Code's requirements for plan voting, because (other than 503(b)(9) payments and Court-approved critical vendor payments, for example) prepetition debt is not supposed to be paid prior to voting and plan confirmation.

28. While roll-ups are commonly approved subject to scrutiny about the terms, in general, the Debtors – and Spectrum – must demonstrate that the prepetition term loans are fully secured in order to benefit from a roll-up. To the extent they are not secured, they should not be rolled-up, and any roll-up that has occurred (if the Court approves the roll-up) should be subject to challenge by the Committee and unwinding by the Court should the collateral value be insufficient to fully secure those loans.

29. As for the Revolver – the Committee fails to understand the benefit to any party (including Aegis) – of rolling up the ABL. Aegis has a senior position to Spectrum on specific collateral relevant to the prepetition ABL and benefits from that same senior position under the postpetition Revolver. It seems unlikely that Aegis will be, at any point, undersecured. To the extent that there are any additional benefits to Aegis in the Revolver, they are coming out of the hide of the general unsecured creditors.

30. Accordingly, no roll-up should be approved, and any roll-up amounts approved in connection with the Interim DIP Order should be disallowed.

31. However, if the Court approves the roll-up of either or both of the Debtors' prepetition secured facilities, such approval should be subject to the Committee's Challenge rights and to reconsideration and unwinding by this Court. Furthermore, to the extent that any component of the DIP Facilities, including but not limited to the provision of adequate protection or any lender's claims, depends on a determination of the value of collateral, the right to assert, assess and take up that determination should not be limited by the Committee's Challenge rights or the

Challenge Period, as the value of prepetition collateral may not be at issue and subject to resolution until after the Challenge Period closes.

## V. <u>There Should Be No Outright Pledge of Unencumbered Assets</u>

32. The Debtors propose to lien-up all Unencumbered Assets (or the proceeds thereof) that would otherwise be available to unsecured creditors in favor of the DIP Lenders and, to the extent of any diminution in value, the Prepetition Secured Parties. The assets that the Committee believes were unencumbered as of the Petition Date, and the proceeds of same, must be preserved for the benefit of unsecured creditors. These include all avoidance actions, commercial tort claims, D&O claims under the Debtors' insurance policies, any other claims under the Debtors' insurance policies to the extent such claims are unencumbered, and any proceeds of the foregoing (collectively, the "**Excluded Assets**").

33. The only way to preserve and protect the interests of unsecured creditors under such circumstances is to treat the Unencumbered Assets as sacrosanct and free and clear of any liens or superpriority claims. As proposed, the DIP Facilities would encumber all such previously Unencumbered Assets in favor of the DIP Lenders and Prepetition Term Loan Secured Parties, without any prospect of a recovery by the unsecured creditors in these Chapter 11 Cases, including certain cash held in local depository accounts on the Petition Date, which was not properly perfected.

34. Avoidance actions (and the proceeds thereof), in particular, are uniquely for the benefit of general creditors of the estate, not secured creditors, and should not be encumbered in favor of secured lenders.[19] Avoidance actions are statutory rights designed to ensure equitable

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[19] *See Official Comm. of Unsecured Creditors v. Goold Electronics Corp. (In re Goold Electronics Corp.)*, No. 93- 4196, 1993 U.S. Dist. LEXIS 14318, at *12 (N.D. Ill., Sept. 20, 1993) (vacating bankruptcy court order approving post-petition financing "to the extent that the order assigns to the bank a security interest in the debtor's preference actions."). This is because avoidance actions are

distributions of a debtor's estate. Indeed, avoidance powers are intended to allow a debtor in possession or other party with standing to gain recoveries for the benefit of all unsecured creditors. Accordingly, bankruptcy courts often restrict a debtor's ability to pledge avoidance actions and their proceeds as collateral.

35. Here, the Excluded Assets should be carved out and excluded from the DIP Liens.

36. Furthermore, to the extent that other encumbered assets are pledged as security, that pledge can secure, and be subject to, superpriority administrative claims for new money and diminution in value adequate protection claims, but not to secure any Roll-Up amounts.

37. Absent these protections, general unsecured creditors may be wholly disenfranchised and left with no recovery in these Chapter 11 cases.

## VI. Adequate Protection Should be Redefined and Limited

38. The Bankruptcy Code only requires debtors to provide a secured creditor with adequate protection to the extent that the automatic stay, the debtors' use of property, or a priming lien "results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(1). The purpose is to protect a secured creditor from diminution in the value of its collateral during the use period.[20] "[T]he initial burden of showing the need for adequate protection [is] upon

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not property of a debtor's estate, but rather a construct of bankruptcy law for the benefit of unsecured creditors. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.14 at n.1 ("The avoiding powers of a debtor in possession granted in chapter 5 of the [Bankruptcy] Code are not property of the estate but statutorily created powers to recover property."); *see also Frank v. Mich. State Unemployment Agency (In re Thompson Boat Co.)*, 252 F.3d 852, 854 (6th Cir. 2001) (affirming lower courts' determination that "the bankruptcy Code allows only a trustee, not debtors, to initiate a preference action to avoid certain transfers, so proceeds recovered are property of the bankruptcy estate, not the debtor.").

[20] *See United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 368 (1988); *In re 495 Central Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (goal is to "safeguard the secured creditor from diminution in the value of its interest"); *Lincoln Nat'l Life Ins. v. Craddock-Terry Shoe Corp. (In re Craddock-Terry Shoe Corp.)*, 98 B.R. 250, 255 (Bankr. W.D. Va. 1988) (finding that what needs to be adequately protected is the decrease in value attributable to the stay arising on the petition date).

the creditor having an interest in the property being used by the debtor. In order to meet this burden, the secured creditor must demonstrate that such relief is required by showing a likelihood that the collateral will decrease in value or establishing some other basis for the relief. The burden then shifts to the debtor to show that adequate protection is not needed or can be provided in a different manner."[21]

39. Here, there has been no showing that adequate protection in favor of the Prepetition Secured Parties is needed to the extent proposed in the DIP Motion and provided through the DIP Facilities.

40. Absent diminution, no adequate protection is needed. So, where a lender's collateral is not diminishing as a result of its use, nothing further is required for adequate protection.[22] And, diminution is not equivalent to cash collateral use. A prepetition lender is "not entitled to an adequate protection claim on a dollar-for-dollar basis for cash collateral used during the case."[23]

41. The Committee proposes that the Prepetition Secured Parties' adequate protection rights be narrowed and redefined as follows:

a. "Diminution in Value" should be defined as "an amount equal to the aggregate diminution in the value of their respective interests in the Prepetition Collateral (including Cash Collateral) from and after the Petition Date for any reason provided

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21 *Zink v. Vanmiddlesworth*, 300 B.R. 394, 402-03 (N.D.N.Y. 2003) (citations omitted). *See also In re Gunnison Ctr. Apartments*, 320 B.R. 391, 396 (Bankr. D. Colo. 2005) ("The secured creditor 'must, therefore, prove this decline in value—or the threat of a decline—in order to establish a *prima facie* case.'") (quoting *In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994)); *In re Continental Airlines, Inc.*, 146 B.R. 536, 539 (Bankr. D. Del. 1992) ("Post-Timbers courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral.").

22 Save Power Ltd. v. Pursuit Athletic Footwear (In re Pursuit Athletic Footwear), 193 B.R. 713, 716 (Bankr. D. Del. 1996).

23 Official Comm. v. UMB Bank, NA (In re Residential Cap.), 501 B.R. 549, 596-97 (Bankr. S.D.N.Y. 2013).

under the Bankruptcy Code." The rest of the language proposed by the Debtors should be stricken.

b. Adequate Protection Obligations, Adequate Protection Liens, and Adequate Protection Superpriority Claims should not extend to the Excluded Assets.

c. The DIP Order should include language providing that if a Prepetition Secured Party is undersecured, then any such adequate payments shall be automatically applied to principal, dollar for dollar.

d. Furthermore, the right to disgorge or recharacterize any interest, fees or other payments based upon the valuation of the collateral should not be subject to the Challenge period.

e. Finally, any request for further or different adequate protection must be made upon notice and a hearing.

## VII. Section 506(c), Section 552(b) and Marshaling Waivers are Inappropriate

42. The Debtors intend to grant broad waivers of Bankruptcy Code section 506(c) surcharge, marshaling, and "equities of the case" rights as to the DIP Lenders and the Prepetition Secured Parties. The Committee objects to each of these provisions.

43. Specifically, the waiver of rights under section 506(c) of the Bankruptcy Code is inappropriate and must be denied. Section 506(c) of the Bankruptcy Code allows a debtor to charge the costs of preserving or disposing of a secured lender's collateral to the collateral itself.[24] This provision ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured creditor recoveries.[25] Courts have widely recognized that section 506(c) waivers are not

[24] *See* 11 U.S.C. § 506(c).

[25] *See*, *e.g.*, *Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F. 3d 321, 325 (3d Cir. 1995) ("section 506(c) is designed to prevent a windfall to the secured creditor"); *Kivitz v. CIT Group/Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md. 2000) ("the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs").

to be granted lightly.[26] Indeed, courts have explicitly provided that the waiver is not permitted without the consent of the committee[27] or unless modified to provide for timely payment of administrative claims.[28]

44. Through the proposed section 506(c) waiver, the Debtors would irrevocably waive the estates' rights to charge certain costs or expenses incurred in the administration of these Chapter 11 Cases. This provision should be stricken from any Final Order because all such rights should be expressly preserved.

45. To the extent the Court determines that any of these waivers are appropriate, they should remain subject to the Committee's Challenge rights.

46. The DIP Lenders and Prepetition Secured Parties also seek to restrict this Court's ability to implement equitable marshaling. The waiver of any marshaling requirements is prejudicial because the DIP Lenders and the Prepetition Secured Parties, to the extent that either is granted any interest in the Unencumbered Assets, will enable the DIP Secured Parties to realize payment of the DIP "new money" money against all Unencumbered Assets. The lenders should be required to exhaust remedies from other DIP Collateral before turning to the Unencumbered

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[26] *See*, *e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000) (finding that section 506(c) is a rule of fundamental fairness for all parties in interest and authorizing the surcharge of a secured lender's collateral where reasonable and appropriate).

[27] *See In re Mortgage Lenders Network, USA, Inc.*, Case No. 07-10146 (PJW), Hr'g Tr. (Docket No. 346) at 21 (Bankr. D. Del. March 20, 2007) (noting that without the committee's prior approval, the section 506(c) waiver may not be approved).

[28] *See In re NEC Holdings Corp.*, No. 10-11890 (Bankr. D. Del. July, 13, 2010), ECF No. 233, and Hearing Tr. at 108:1-5, ECF No. 224 ("I need some evidence that there's a probability that admin claims are going to be paid in full, including 503(b)(9) claims or I won't approve the financing."); *Hartford Fire Ins. v. Northwest Bank Minn. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (BAP 8th Cir. 1998) (holding that provision in financing order purporting to immunize the postpetition lender from section 506(c) surcharge was unenforceable); *In re Colad Grp.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (refusing to approve postpetition financing agreement to the extent that the agreement purported to modify statutory rights and obligations created by the Bankruptcy Code by prohibiting any surcharge of collateral under section 506(c)).

Assets, especially in these Chapter 11 Cases where there may be no value for unsecured creditors from any other sources aside from the Unencumbered Assets. Marshaling may be a key remedy in ensuring that unsecured creditors do not bear the brunt of the expense of this case while having no prospect of any other distributions.[29]

47. Finally, the Debtors propose that the "equities of the case" exception under Bankruptcy Code section 552(b) not apply to the DIP Lenders and the Prepetition Secured Parties. The "equities of the case" exception in section 552(b) of the Bankruptcy Code allows a debtor, committee, or other party in interest to exclude postpetition proceeds from prepetition collateral on equitable grounds, including to avoid using unencumbered assets to fund the cost of a secured lender's foreclosure. [30] "'The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which normally would go to general creditors) to cause the appreciated value.'"[31] There should be no waiver of any equitable rights of the Debtors' estates.

48. In sum, the waiver of section 506(c), marshaling, and "equities of the case" rights are inappropriate for the reasons set forth herein and should be excised from the Final DIP Order.

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[29] *See Official Comm. v. Hudson United Bank (In re America's Hobby Center)*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998); *Ramette v. United States (In re Bame)*, 279 B.R. 833 (BAP 8th Cir. 2002) (marshaling doctrine invoked against taxing authorities to benefit estate's unsecured creditors).

[30] *See* 11 U.S.C. § 552(b

[31] *In re Muma Servs*., 322 B.R. 541, 558-559 (Bankr. D. Del. 2005) (quoting *Delbridge*, 104 B.R. at 826). There is no reason to waive such rights here. *See*, *e.g*., *In re Metaldyne Corp*., 2009 Bankr LEXIS 1533, at *19 (Bankr. S.D.N.Y. June 23, 2009) ("[T]he Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make. If, in the event, the Committee or any other party [in] interest argues that the equities of the case exception should apply to curtail a particular lender's rights, the Court will consider it."); *Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re TerreStar Networks)*, 457 B.R. 254, 272-73 (Bankr. S.D.N.Y. 2011) (request for section 552(b) waiver was premature because factual record not fully developed).

## VIII. The Carve Out and DIP Budget Should be Modified

49. The Committee should be granted more than $25,000.00 to conduct a full investigation of the Prepetition Secured Parties' asserted liens and claims. At a minimum, the Committee's investigation budget should be increased to $100,000.

50. The DIP Budget currently has a consolidated line item for case professionals. The Committee should have a separate line item, funded appropriately as compared to the Debtors' professionals, and the budgeted Committee amounts should be deposited into the Professional Fee Reserve Account as is currently proposed for the Debtors' professionals.

51. It is crystal clear that these cases will prove difficult for general unsecured creditors. Present projections show no straight path to a distribution to unsecured creditors, either through the production of excess cash from the proceeds of the proposed sale of Raven Crest, through the theoretical reorganization and recapitalization of the Debtors post-sale, or through the pursuit of causes of action. As noted previously, the DIP Facilities currently propose that causes of action are collateral either under the prepetition facilities or as additional security under the DIP Facilities. Similarly, any other unencumbered assets – yet to be identified – are security under the DIP Facilities.

52. For avoidance of doubt, given the complexity of these Cases and the challenges facing the Committee on behalf of the estates' unsecured creditors, the Committee's budget should be 50% of the budget for the Debtors' professionals. Under the proposed 13-week Budget attached to the Interim DIP Order, that figure would be $511,667 for the first 13 weeks.

53. The reasonable out of pocket expenses of the Committee members, incurred in connection with their Committee duties, should also be included in the Carve Out. Such expenses are anticipated to be minimal (and may be $0) but the Committee members should not be expected

to carry the freight if they do, in fact, incur unanticipated out of pocket expenses in connection with their service. Such expenses would not include any member's out of pockets for personal attorneys or other personal professionals in connection with their claims or contracts with the Debtors.

54. The Carve Out and Budget contain no provision for a chapter 7 trustee, should the cases convert. The Carve Out and Budget should include a line item of $50,000 for a chapter 7 Trustee, separate and apart from any "burial" expenses budgeted for the case professionals.

55. Finally, the Carve Out Trigger Period should be modified to be five (5) days after the Committee's receipt of a Carve Out Trigger Notice.

## IX. The Proposed Challenge Provisions are Discriminatory, Vague, or Inadequate and Should be Modified

56. Given the complexity of the Prepetition Secured Loans, the Challenge Period should be extended to ninety (90) days, subject to further extension by the Court for cause.

57. The Committee should also be granted immediate standing to pursue any available Challenge. The Debtors have already stipulated and released any viable claims or objections relating to the Prepetition Secured Parties. The Debtors are hopelessly conflicted. Furthermore, certain of the Debtors are limited liability companies, which could create standing issues for creditors under some courts' interpretations of applicable state law. The Committee therefore either should be granted standing now to pursue any Challenge on behalf of the estates or, alternatively, the stipulations and releases in favor of the Prepetition Secured Parties should be stricken.

58. Paragraph 2(c) of the DIP Order provides that a so-called $1 million "Emergency Payroll Loan" and related "Emergency Loan Refinance Advance" was authorized to be immediately and "indefeasibly" paid, and although it was made prepetition, was to be excepted

from any review or challenge, including by the Committee pursuant to its Challenge rights. There is no justification for making this prepetition transaction exempt from the Committee's Challenge rights. The DIP Order should be modified to remove the restrictions on investigating and, if appropriate, issuing a Challenge to either loan transaction.

## X. Other Proposed Modifications to the DIP Facilities and/or Any DIP Order

59. The Committee has various additional objections and requested modifications to any proposed further interim or final order:

A. ***Stipulated Findings.*** The DIP Order should expressly provide that any stipulated "facts" or "findings" remain subject to the Committee's Challenge rights.

B. ***Use of Proceeds.*** Paragraph 12 of the DIP Order should be modified to add the following language: "Notwithstanding the forgoing provisions of paragraph [], the Carve Out, the proceeds of any DIP Loans, DIP [Collateral] and Prepetition [Collateral] (including Cash Collateral) may be used for the allowed fees and expenses incurred by the Committee and its professionals in furtherance of its duties as set forth under section 1103 of the Bankruptcy Code, including, but not limited to, any objection filed to the DIP Motion, any objection to credit bidding, any objection filed to any disclosure statement or plan of reorganization or liquidation filed in these Chapter 11 Cases, and any objection or other pleading contesting whether the DIP Lender or Prepetition Lender have the right to the exercise of remedies, including the prosecution of any such motions and objections.

C. ***Indemnification.*** The indemnification provided by the Debtors should be limited to the DIP Lenders, in that capacity, and their related parties. Prepetition Secured Parties, in that capacity, should not be indemnified.

D. ***Credit Bidding***. Any credit bidding of any of the DIP Lenders and Prepetition Secured Parties must be expressly subject to the rights of the Committee and parties in interest to object and to the provisions of section 363(k) of the Bankruptcy Code.

E. ***Budgets, Amendments, and Committee Reporting Rights***. The Committee must be granted notice of any new budgets or amendments to the DIP Credit Agreement, whether material or nonmaterial, and provided concurrently with all financial reporting delivered to the DIP Secured Parties and the Prepetition Secured Parties.

F. ***Review of Lenders' Professional Fees.*** The DIP Order should provide that the Court may, in its discretion, require that the fees and expenses of the Prepetition

Secured Lenders and DIP Lenders be subject to Court review and approval.

G. ***Prepayment Penalty***. The requirement contained in Sections 2.4(b) of the DIP Credit Agreement that the Debtors pay to the DIP Secured Parties accrued interest on the principal amount being prepaid to the date of prepayment is a make-whole in disguise. It should be stricken entirely from the DIP Credit Agreement.

H. ***DIP Milestones***. The milestones requiring the filing of a plan and disclosure statement by April 11, 2025, and to have confirmed a plan "acceptable" to Spectrum and Aegis not later than 120 days post-Petition Date should be deleted. This timeline is unworkable under the circumstances of these cases and provides a unilateral default opportunity for those parties. Any DIP Milestones should be scrutinized such that there is no risk of a foot-fault Event of Default under any of the other Milestones that the Debtors are seeking to impose in these Chapter 11 Cases.

I. ***Rights and Remedies Upon Default***. The DIP Order should be modified to provide the following:

1. The DIP Lenders should not have automatic stay relief and opportunity to enforce remedies. The DIP Order should be modified to provide that the DIP Lenders may seek such relief upon five (5) business days written notice.

2. Furthermore, the DIP Order should be modified to provide that the Debtors or the Committee may seek an emergency after receipt of such notice for a determination as to whether, in fact, an event of default has occurred.

3. In addition, any default or termination notice sent to the Debtors must be simultaneously delivered to counsel for the Committee.

4. Finally, the DIP Order should expressly authorize the Debtors to pay accrued and unpaid administrative expenses under the Budget through the DIP Termination Date.

J. ***506(b) Rights Preserved.*** The following provision should be added to the DIP Order: "To the extent that it is determined on a final basis by the Court that of the Prepetition Secured Loans are not oversecured for purposes of section 506(b) of the Bankruptcy Code, the Committee retains the right to seek an equitable remedy, including, without limitation, requiring the [lenders] to reallocate payments of fees and interest to the secured prepetition principal amount owed by the Debtors, or to recover such payments, and the [lenders] reserve the right to object to any such remedy (the "506(b) Remedy")" The 506(b) Remedy is not subject to any Challenge Period.

K. ***Certain Remedies Preserved.*** The following provision should be added to the DIP Order: "Notwithstanding anything to the contrary in this Order, in the event of a successful Challenge, and the Court's entry of a final order with respect

> thereto, or with respect to a 506(b) Remedy, the Court shall retain the ability and authority to fashion an appropriate remedy for the Debtors' estates, including without limitation to recharacterize, reallocate or recover any payments or transfers made by or on behalf of the Debtors or the estates."

## RESERVATION OF RIGHTS

60. The Committee has been in place for less than two weeks and is just commencing its investigations into the Debtors' loans and obligations and its business operations and assets.

61. The Committee hereby reserves its rights to supplement this Objection and/or to further object to the DIP Motion.

**WHEREFORE,** for all of the foregoing reasons, the Committee respectfully requests that this Court: (i) sustain this Objection and (ii) grant the Committee such other and further relief as this Court deems just and proper.

[*continued on following page*]

Dated: March 9, 2025
Wilmington, Delaware

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