

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

In re

ULTIMATE ESCAPES HOLDINGS,
LLC, *et al.*,

Debtors.

Chapter 11

Case No. 10-12915

(Jointly Administered)

Hearing Date: October 7, 2010 at 10:00 a.m.
Objection Deadline: September 28, 2010 at 4:00 p.m.
(extended until October 4, 2010 for the Committee)

Re: Docket No. 20

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
DEBTORS' MOTION FOR ORDER (I) AUTHORIZING (A) SECURED POST-
PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, AND 364(c) AND
364(d); (B) GRANTING SECURITY INTERESTS, SUPERPRIORITY CLAIMS AND
ADEQUATE PROTECTION; AND (C) USE OF CASH COLLATERAL AND (II)
SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001(C)**

The Official Committee of Unsecured Creditors (the "Committee") of Ultimate Escapes Holdings, LLC, *et al.*,¹ by and through its proposed counsel, Gordon & Rees LLP and Polsinelli Shughart PC, submits this Objection to Debtors' Motion for Order (I) Authorizing (A) Secured Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, and 364(c) and 364(d); (B) Granting Security Interests, Superpriority Claims and Adequate Protection; and (C) Use of Cash Collateral and (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(C) (this "Objection"). In support of this Objection, the Committee respectfully states as follows:

BACKGROUND

1. On September 20, 2010 (the "CS Petition Date"), the CS Debtors (as identified on Schedule 2 to the DIP Motion and incorporated herein by reference) filed voluntary petitions for

¹ A list of the Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, is attached to the DIP Motion, as defined herein, as Schedule 1 and incorporated herein by reference.

relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). On September 23, 2010 (the “New Debtors Petition Date”), UE Member NCS, LLC (“NCS”) and Private Escapes Platinum Link, LLC (“Link,” collectively with the CS Debtors, NCS and Link, the “Debtors”) each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, Debtors have continued in possession of their assets and in the operation of their businesses as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

2. Prior to the Petition Date, certain loans and other financial accommodations were made available to certain of the CS Debtors pursuant to a loan agreement (the “Pre-Petition Loan Agreement”) by and between the CS Debtors, CapitalSource Finance, LLC, as administrative, payment and collateral agent (“CapitalSource Finance”), CapitalSource Bahamas, LLC, as collateral agent (“CapitalSource Bahamas,” collectively with CapitalSource Finance, the “Agents”) and CapitalSource Finance and its assignee, CapitalSource Bank, as the lender (collectively, in such capacity, the “Original Lender”). Certain other documents were executed in connection therewith (the “Pre-Petition Loan Documents”).

3. On September 21, 2010, Debtors filed their Motion for Order (I) Authorizing (A) Secured Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, and 364(c) and 364(d); (B) Granting Security Interests, Superpriority Claims and Adequate Protection; and (C) Use of Cash Collateral and (II) Schedule a Final Hearing Pursuant to Bankruptcy Rule 4001(C) [Docket No. 20] (the “DIP Motion”).

4. Pursuant to the DIP Motion, the amount due and owing to the Original Lender under the Pre-Petition Loan Documents is \$97,276,905.84 (plus attorneys’ fees, costs, expenses, and fees, including default fees, unpaid thereon) (the “Indebtedness”) as of the Petition Date.

The Indebtedness and all obligations of the CS Debtors under the Pre-Petition Loan Documents are allegedly secured by a “first priority security interest held by Agents, as applicable, for the benefit of themselves and the Original Lender (the “Pre-Petition Liens”) in substantially all of the CS Debtors’ assets including, among other things, without limitation, all equipment, inventory, goods, fixtures, general liabilities, accounts, accounts receivable, real property, deposit accounts, general intangibles, tax refunds, contracts and intellectual property, all cash and the proceeds and products of the foregoing (the “Pre-Petition Collateral”). The DIP Motion seeks authority to allow Debtors to borrow an additional \$3,631,983 (the “DIP Loan”) from CapitalSource Bank, as lender (together with any and all affiliates, successors, agents or assignees to whom CapitalSource Bank or its affiliates, successors, agents or assignees has granted or assigned or may grant or assign certain or all of its rights in its capacity as Post-Petition Financing lender, individually or collectively, the “DIP Lender”).

5. On September 29, 2010, the Committee was appointed by the Office of the United States Trustee for Region 3 (the “US Trustee”).

6. An Amended Interim Order Granting the DIP Motion [Docket No. 85] (the “Interim Order”) was entered by the Court on September 29, 2010.

RELIEF REQUESTED

7. The Committee hereby objects to the DIP Motion to the extent that the DIP Motion and the final order granting the DIP Motion (the “Final Order”)² (i) provides the DIP Lender with collateral in excess of the DIP Loan; (ii) forces the Committee to limit its investigation into the enforceability of the DIP Lender’s liens on the Pre-Petition Collateral; (iii) unduly benefits the DIP Lender and harms unsecured creditors, Debtors and their estates; (iv)

² The Committee has not received or reviewed the proposed Final Order; however, the Committee assumes that the Final Order will likely be identical to the DIP Order for the purposes of this Objection.

sets deadlines for performance that are unreasonable; (v) provides for payment of post-petition attorneys' fees and costs incurred by the Original Lender, Agents and DIP Lender; (vi) includes a Budget (as defined below) that limits the Committee's participation in these cases while providing for the payment of unnecessary items; and (vii) does not require the Debtors to provide financial reporting to the Committee, fails to identify the provisions of the Pre-Petition Loan Documents that apply to the DIP Loan and provides for the payment of professional fees of a Special Reorganization Committee without defining or disclosing its purpose.

A. The Value of the Collateral Far Exceeds the Value of the DIP Loan

8. The collateral and other concessions proposed by Debtors in the DIP Motion far exceed the value of the DIP Loan. The DIP Lender shall receive from Debtors the following: (i) a very broad release of all causes of action, claims, obligations, suits, judgments, damages, demands, debts, rights and liabilities that Debtors may hold against the Agents, the Original Lender and each of their respective direct and indirect parents, subsidiaries, affiliates, members, managers, officers, directors, employees, attorneys, agents, representatives, predecessors, assigns and successors; (ii) administrative priority pursuant to § 364(c)(1) for the DIP Loan; (iii) a lien on real and personal property of the CS Debtors, including avoidance actions, recoveries from claims against third parties, tax refunds, commercial tort claims and insurance proceeds (the "DIP Collateral"); (iv) a first priority senior security interest upon the DIP Collateral that is not subject to a valid, perfected, non-avoidable lien pursuant to § 364(c)(2); (v) a junior lien pursuant to § 364(c)(3) on all of the DIP Collateral; (vi) a priming lien pursuant to § 364(d)(1) on the DIP Collateral that is senior to all liens except the DIP Lender's prepetition liens on the Pre-Petition Collateral and the Permitted Liens (as defined in the Interim Order); (vii) a lien on NCS' equity interests of BVD (as defined in the Interim Order); (viii) a lien against all of the real and personal

property of Link including avoidance actions and other litigation claims; (ix) replacement liens for all of the Pre-Petition Collateral that result from the use of cash collateral or the use, sale, loss, decline in value or price of the Pre-Petition Collateral; (x) a claim pursuant to § 507(b) for any use of cash collateral or the use, sale, loss, decline in value or price of the Pre-Petition Collateral; and (xi) a waiver of § 506(c) claims. The value of the above consideration far exceeds the amount and value of the DIP Loan. The excess amounts should be preserved for the benefit of other creditors, particularly the collateral that is not currently subject to a lien, the avoidance actions and the litigation claims.

9. Also, the provision of a release to the Original Lender is improper. The Original Lender may or may not be the DIP Lender, which results in a possible lack of consideration for the release. To the extent the Original Lender is the DIP Lender, the release is being given before the Committee is able to determine whether the estates hold any claims against the Original Lender that may provide value to the unsecured creditors.

10. In addition, the DIP Lender should only be entitled to a lien on the Pre-Petition Collateral. The Original Lender had agreed to provide Debtors with financing in an amount equal to seventy-five percent (75%) of the value of the Pre-Petition Collateral. Thus, the remaining value of the Collateral should provide the DIP Lender with sufficient collateral to cover the DIP Loan.

11. The Original Lender should also not be granted a replacement lien or administrative priority claim for the adequate protection of its interest in the Pre-Petition Collateral because, as explained below, the Original Lender or DIP Lender are not providing for use of cash collateral.

12. Further, the Debtors cannot waive the ability to surcharge the collateral of the Original Lender or DIP Lender under § 506(c) of the Bankruptcy Code. Section 506(c) of the Bankruptcy Code provides that the “[t]rustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.” 11 U.S.C. § 506(c). The Interim Order provides that the Debtors waive any rights to surcharge collateral under § 506(c).

13. Waivers under § 506(c) are disfavored and many courts have held them to be unenforceable. *See In re Brown Bros., Inc.*, 136 B.R. 470, 473-75 (Bankr. W.D. Mich. 1991) (section 506(c) waivers are “not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of the secured collateral for its preservation or proper disposal”); *In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993) (waiver immunizing FDIC from 506(c) and other expenses of administration was “against public policy” and unenforceable *per se*).

14. The precise reasons that § 506(c) waivers are disfavored are borne out in these cases. The DIP Lender is demanding that Debtors meet an unusually aggressive timetable for selling their assets. If these cases proceed as the Debtors and the DIP Lender anticipate, there is a substantial likelihood that the cases will be administered largely, if not exclusively, for the benefit of the Original Lender. It is entirely inappropriate for the Court to approve a waiver of the Debtors’ right to surcharge the Pre-Petition Collateral for the costs of administration of these cases under such circumstances.

B. The Committee's Ability to Investigate and Prosecute the Enforceability of Liens and Potential Claims is Severely Limited

15. The Interim Order places unreasonable restrictions on the amount of money and time available for the Committee to investigate claims, causes of actions and defenses released by the Debtors including challenges to the “validity, extent, priority, avoidability, or enforceability of the Pre-Petition Obligations, the Pre-Petition Liens in the Pre-Petition Collateral.” Interim Order, ¶ 27.

16. The Interim Order provides that only \$10,000 of the DIP Loan proceeds or proceeds of the Original Lender or DIP Lender collateral may be used to investigate causes of action against the Agents or the Original Lender regarding the Pre-Petition Obligations. Interim Order, ¶ 16(b). This is wholly insufficient. The Original Lender provided in excess of ninety-seven million dollars to the Debtors. There are eighty-seven debtors in these cases. *See* Schedule 1 to the Interim Order. These eighty-seven debtors “are one of the largest operators in the high-end luxury destination club industry.” DIP Motion, ¶ 10. Together, the Debtors “operated prepetition 119 luxury club residences...throughout the United States, Mexico, Central America, the Caribbean and Europe.” *Id.* The Committee submits that a minimum amount of \$150,000 should be allocated to the Committee’s investigation and prosecution of any claims or causes of action against the Agents and the Original Lender. This request is reasonable based on the complexity of these cases, the magnitude of the Debtors operations, the voluminous documents the Committee will be required to review and the short time frame in which the Committee must conclude its investigation. All compensation sought by Committee professionals for investigation and prosecution of claims against the Agents and the Original

Lender shall remain subject to review and approval by this Court pursuant to 11 U.S.C. §§ 330 and 331.

17. The Interim Order further prohibits the Committee from challenging the DIP Lender's right to credit bid on the Assets pursuant to Section 363(k) of the Bankruptcy Code. The Committee has not had the opportunity to determine whether sufficient grounds exist to challenge the DIP Lender's right to credit bid. Thus, the Committee should not be precluded from contesting the DIP Lender's credit bid if it determines there is sufficient justification therefore.

18. The Interim Order also limits the period of time in which the Committee can investigate potential claims against the Agents or the Original Lender to the lesser of sixty days or one day prior to the Sale Hearing. Interim Order, ¶ 27. The Debtors requested that the Sale Hearing be scheduled for October 20, 2010. This request is based on the October 22, 2010 deadline for the entry of an order approving the sale. Interim Order, ¶ 6(xiv). Thus, the DIP Lenders seek to restrict the Committee's investigation to twenty (20) days after which all claims against the Agents and the Original Lender will be barred. Interim Order, ¶ 27.

19. The Committee requests that if the Original Lender is not the purchaser at the Sale, the Investigation Period be extended to ninety (90) days from that date the Final Order is entered. This requested extension will not prejudice the Original Lender. The Committee further requests that the Investigation Period be subject to additional Court extensions, upon request from the Committee, beyond the date of the Sale Hearing regardless of whether the Original Lender is the purchaser at the Sale if the Debtors, the Original Lenders or the DIP Lenders refuse to cooperate with the Committee's investigation.

20. Finally, the Interim Order includes waivers, releases and Termination Dates which operate to entirely bar the Committee from challenging the extent, validity, priority or enforceability of the Pre-Petition Obligations or asserting claims or causes of action against the Agents and the Original Lender. Thus, the Interim Order provides the Committee a right without a remedy. If the Committee determines that causes of action exists against the Agents or the Original Lender, the Committee will be required to chose between prosecuting those actions and tanking the Debtors' bankruptcy cases or foregoing those actions and permitting the Debtors' bankruptcy cases to continue. *See* Interim Order, ¶ 6(x)-(xi) (defining a Termination Date as including commencement by any party (including the Committee) of an action against the Agents, the Original Lender or the DIP Lender). Furthermore, the Agents, the Original Lender and the DIP Lender will receive a windfall if the Committee is not able to prosecute, in addition to investigate, claims and causes of action against the Agents and the Original Lender. Absent the Committee's ability to prosecute these actions, the Original Lender obtains an expedited foreclosure proceeding unchallenged by any parties-in-interest.

21. The following non-exclusive list of provisions included in the Interim Order must be modified so that the Committee can prosecute any cause of action it discovers against the Agents and the Original Lender:

- a Termination Date includes “any party-in-interest (including the Committee) or person shall attempt to obtain, or this or any other Court enters, an order or judgment in any of the Chapter 11 Cases modifying, limiting, subordinating or avoiding the priority of the Indebtedness, or the perfection, priority or validity of the Agents' Pre-Petition or DIP Facility Liens or imposing, surcharging or assessing against the Agents, DIP Lender and/or Original Lender or their claims any Pre-Petition Collateral or DIP Facility Collateral an fees, costs or expenses...Interim Order, ¶ 6(x).
- a Termination Date also includes “any party-in-interest (including the Committee) or person that contests any provisions of the Interim Orders or the Pre-Petition Loan Documents, or asserts any claim or cause of action of any kind against the Agents, the DIP Lender and/ or Original Lender...Interim Order, ¶ 6(xi).

- “The filing of any such adversary complaint by the Committee or any party-in-interest shall constitute an immediate Termination Date under this Order and an Event of Default under the DIP Loan Documents.” Interim Order, ¶ 27.

22. The Interim Order also subordinates any lien that is “avoided or otherwise preserved for the benefit of Debtors’ estates” to the Pre-Petition Liens, the DIP Facility Liens and the Adequate Protection Liens. Interim Order, ¶ 9(f). This subordination provision also removes the Committee’s remedy should it discover a cause of action exists against the Agents and the Original Lender. If the subordination provision is not removed, the Committee will be left to prosecute any actions it identifies against the Agents and the Original Lender but will not be able to recover the proceeds there from unless the Indebtedness and the DIP Loan are paid in full, which is highly unlikely in these cases. Thus, the Committee once again is granted a right without a remedy by the Interim Order.

23. The Committee requests that the forgoing provisions, and any other provision in the Interim Order that leaves the Committee without a remedy, be modified so that the Committee is able to investigate and prosecute any cause of action identified within the revised Investigation Period.

C. The Provisions of the Interim Order Unduly Benefit the DIP Lender and Cause Excessive Harm to Unsecured Creditors and the Estates

24. The Interim Order contains a significant number of provisions that inure to the benefit of the DIP Lender that are unnecessary and unduly burdensome on the unsecured creditors.

25. Pursuant to the Interim Order, “proceeds or payments received by the Agents, Original Lender and/or DIP Lender . . . shall be applied as follows: (x) first, to the Pre-Petition Obligations consisting of accrued and accruing interest, fees, costs and expenses, including

without limitation attorneys' fees and costs; (y) next, to the Pre-Petition Obligations consisting of principal; and (z) last, to the outstanding balance of the DIP [Loan], including all accrued and accruing interest, fees, costs and expenses, including without limitation attorneys' fees and costs then principal." Interim Order, ¶ 4(a). This is in direct contravention of the absolute priority rule, which requires payment of administrative claims first. Second, it directly harms Debtors' administrative creditors, with the exception of the Carve-Out, by requiring that the entire Indebtedness be paid in full prior to any payments on the DIP Loan. At a bare minimum, this provision should be revised to provide for payment of the DIP Loan and then the Indebtedness.

26. The Interim Order states that the Debtors may not grant any other party a security interest in any of their assets without the prior written consent of the Agents, Original Lender or DIP Lender. Thus, Debtors cannot seek additional financing from *any* party unless the proceeds are used to pay the DIP Loan in full. While it may be acceptable to provide that Debtors may not obtain financing that will be senior to the interests of the DIP Lender in the DIP Lender's collateral, limiting Debtors' ability to obtain financing that does not impact the DIP Lender's interests or rights to repayment is unduly burdensome to the estate. Interim Order, ¶ 6(v).

27. Pursuant to the Interim Order, the DIP Loan may be terminated upon the occurrence of any of the Termination Dates listed in paragraph 6 of the Interim Order, including any Event of Default under any of the DIP Loan Documents (as defined in the Interim Order) without any grace or cure period or any notice requirements. This provision allows the DIP Lender to terminate the DIP Loan without any notice, or ability to cure, provided to any party, particularly the Committee. Interim Order, ¶ 6(xix). The Committee requests that the Debtors and the Committee receive five (5) business days notice and an opportunity to cure before the DIP Loan can be terminated.

28. Also, Debtors may not propose a plan of reorganization or liquidation or seek an extension of the exclusivity or solicitation periods without the written consent of Agents, Original Lender or the DIP Lender. Interim Order, ¶ 12. Such provision unjustifiably hinders Debtors' ability to administer their estates and forces Debtors, without regard to the views of the Committee, into a sale of all of their assets.

29. Similarly, Debtors are prohibited from selling any of "their assets outside of the ordinary course of business unless (a) all proceeds realized from such sale, less any accrued, allowable and payable portion of the Carve-Out as contained in this Order, are transferred to Agents, DIP Lender and the Original Lender. . .for immediate application in reduction of the Indebtedness...until such time as the Indebtedness shall have been satisfied in full." Interim Order, ¶ 14. This provision prevents Debtors from selling any assets that are not encumbered by the interests of the Original Lender, DIP Lender or other secured creditor and provides the Original Lender and DIP Lender with priority in payment. Any equity in Debtors' real or personal property must be used to administer the estate for the benefit of unsecured creditors.

30. In addition, the Interim Order modifies the automatic stay to allow the DIP Lender and/or the Original Lender to exercise their rights under the Pre-Petition Loan Documents, the Final Order and the DIP Loan without further application to the Court and without notice to any party. Interim Order, ¶ 15. Further, "section 105 of the Bankruptcy Code nor any other provision of the Bankruptcy Code, or any other law, shall be utilized to prohibit Agents, DIP Lender and/or Original Lender, from the exercise, enjoyment and enforcement of any of such rights, benefits, privileges and remedies." Interim Order, ¶ 15(a). In the event of default, Debtors' ability to administer the estate will be completely lost and the Committee will not receive any notice of the Agents,' DIP Lender's or Original Lender's exercise of their

contractual remedies or be able to assert any defense to vacation of the stay. This is a direct harm to the unsecured creditors.

31. Pursuant to the Interim Order, all collections and proceeds of any DIP Collateral or services provided by Debtors and all other cash or cash equivalents that come into Debtors' possession shall immediately become the sole and exclusive property of Agents. Interim Order, ¶ 17. Also, all cash and cash equivalents of the Debtors constitute "proceeds of the Pre-Petition Collateral and shall be immediately remitted to Agents for application against the Indebtedness." Interim Order, ¶ 17. Pursuant to these provisions, Debtor will not have access to any cash collateral at any given time and will be restricted to using only those funds borrowed from the DIP Lender. At the same time, the cash collected by the Agents will be used to pay down the Indebtedness, a prepetition obligation. Further, it is detrimental to the unsecured creditors to (i) allow the seizure of all cash on hand and (ii) grant the DIP Lender and the Original Lender additional liens and rights as compensation for use of cash collateral that Debtors, by the terms of the Interim Order, cannot access and have to immediately turnover to Agents.

D. The Proposed Financing Requires Debtors to Meet Certain Deadlines that are Unreasonable

32. The Interim Order sets a number of deadlines that if not met, constitute a Termination Date. Specifically, an order granting procedures for the sale of Debtors' assets must enter by October 1, 2010, an auction must occur by October 21, 2010, an order approving the sale must enter by October 22, 2010 and the sale must close no later than October 29, 2010. Interim Order, ¶ 6(xii) through (xv). Such timelines disenfranchise the unsecured creditors ability to analyze the best possible options for maximizing value, particularly since the Committee was only appointed on September 29, 2010. Further, as discussed more fully above,

the current timelines do not allow the Committee sufficient time to perform an investigation into the enforceability of liens or the value of collateral.

E. The Interim Order Incorrectly Allows for the Payment of Post-Petition Attorneys' Fees and Costs Incurred by the Original Lender, Agents and the DIP Lender

33. The Interim Order incorrectly provides for the payment of the Original Lender's, Agents' and the DIP Lender's post-petition attorneys fees and expenses. Section 506(b) of the Bankruptcy Code allows oversecured lenders to receive interest, and reasonable fees, costs or charges provided for under the agreement. 11 U.S.C. § 506(b). Undersecured creditors, or creditors who are just fully secured, have no right to receive postpetition interest, fees or expenses. *See generally United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'n, Ltd.*, 484 U.S. 365 (1988). The Committee is not in a position to make any determination at this point as to whether the Original Lender's liens are valid, properly perfected and extend to all of the Debtors' assets, or that the value of the Pre-Petition Collateral exceeds the Indebtedness. In addition, the DIP Lender seeks fees of \$25,000 a week plus fees incurred to date. Before such fees can be paid, the Court must determine that the fees are reasonable. 11 U.S.C. § 506(b). Thus, it is inappropriate to award attorneys' fees accrued post-petition to the Original Lender, the Agents or the DIP Lender.

F. The Proposed Budget Severely Limits the Committee's Ability to Participate in these Cases but Includes Other Inappropriate Payments

34. Attached as Exhibit C to the Interim Order is a weekly budget (the "Budget") for the five weeks following the Petition Date. Exhibit C to Interim Order. The Budget provides only \$125,000 for the Committee's professionals. *Id.* This is insufficient. The Committee requests that this amount be increased to \$500,000.

35. The requested increase is justified in these cases. The Budget provides \$755,000 for the Debtors' professionals. *Id.* While Debtors' professionals have been involved in these cases for sometime, the Committee's professionals were not engaged until September 29, 2010. Committee professionals have a considerable amount of work to get up to speed in these cases. Thus, the Committee's professionals are likely to incur substantially more fees in the early stages of this ceases; yet, the Committee professionals are budgeted for one-sixth the amount of Debtors' professionals.

36. The Committee's requested increase is also reasonable considering other professional's Budgeted fees in these cases. The Budget includes \$125,000 for the DIP Lender's counsel (the Committee questions whether the DIP Lender is even entitled to under the Bankruptcy Code) and \$200,000 for the Debtors' claims agent. *Id.* Neither the DIP Lender's counsel nor the claims agent will invest the substantial time the Committee's professionals will invest in these cases. Additionally, the Committee and its professionals will be involved in all aspects of these bankruptcy cases unlike the DIP Lender's counsel or the claims agent. Therefore, the requested increase in the budgeted amount for Committee professionals is necessary, proper and essential to the proper administration of these bankruptcy cases.

37. The Budget also includes a wind-down disbursement of \$200,000. *Id.* This is also insufficient. Again, these are complex bankruptcy cases involving eighty-seven entities. A reasonable estimate of the amount necessary to wind-down the Debtors is \$400,000. Such amount will allow the Debtors and the Committee to orderly wind-down and liquidate the Debtors' remaining assets following conclusion of the proposed sale. The current wind-down allocation would leave Debtors' estates unable to satisfy the Bankruptcy Code requirements necessary to wind-down their affairs.

38. In addition to failing to sufficiently provide for the Committee's professionals and the wind-down of the Debtors, the Budget also includes excessive items. For example, the Budget provides for International Expenses of \$62,000 but fails to disclose how these amounts benefit the Debtors' estates. *Id.* Next, the Budget includes \$243,357 for property leases; yet, the Debtors have not disclosed whether these leases are included in the Acquired Assets. *Id.* To the extent the property leases are not Acquired Assets, they are likely to be rejected by the Debtors as unnecessary, burdensome and of no benefit to Debtors or their estates. In this case, the payment of these leases prior to the Sale is not a necessary expense of maintaining Debtors' assets. The Debtors also propose paying \$9,429 per month for September and October mortgage payments. *Id.* There is no indication of whether the mortgages are senior or subordinate to the Pre-Petition Obligations and the DIP Facility Liens (as defined in the Interim Order). Furthermore, one of the mortgages is for the benefit of Richard Keith, a former manager of the Debtors. *Id.* The Committee objects to the monthly mortgage payments as it is unclear whether these mortgages are subordinate to the Pre-Petition Obligations. Further, the Committee objects to any payments to Mr. Keith, a former manager of the Debtors, since he is responsible for the Debtors' current financial crisis and may ultimately be determined to be liable to the Debtors' estates.

39. Next, the Budget includes two miscellaneous categories, Other - \$100,000 and Contingency - \$200,000. *Id.* The Debtors should be required to disclose what these amounts will be used for and the benefit that will be received by the Debtors and their estates. Finally, the Budget proposes paying \$20,000 to the Board Members. *Id.* The Committee disputes that payments to the Board Members are actual, necessary cost of preserving these estates. The

Board Members' are responsible for the Debtors' current financial crisis and should not continue to receive payments from the Debtors in spite of their poor performance.

40. Additionally, the Budget includes cash receipts that the Debtors are required to collect in order to avoid a Termination Date. While the cash receipts included in the Budget are *de minimus*, there is a considerable risk that the Debtors will not be able to collect any of the cash receipts thereby triggering a Termination Date. The Committee requests that given the *de minimus* nature of the cash receipts, the Debtors' inability to collect these amounts not be included as a Termination Date under the DIP Loan.

41. Finally, the Interim Order provides for a five percent (5%) cumulative variance in the overall Budget the unused portion of which rolls forward to the immediately succeeding week. However, it appears that the Debtors lose any unused variance to the extent not utilized in the immediately succeeding week. The Committee requests that five percent cumulative variance not be subject to the limitation that it be used in the immediately succeeding week. Instead, the Debtors should be able to roll the aggregate unused variance forward for the entire period of the Budget.

42. The Committee requests that the Budget be revised to reflect the foregoing objections.

G. Miscellaneous

43. The Interim Order provides that failure of the Court to enter an order approving the procedures relating to an auction of substantially all of the Debtors' assets by October 1, 2010, constitutes a Termination Date. The Debtors adjourned the hearing to consider the Bid Procedures to October 4, 2010 and that the Court further adjourned the hearing to October 7,

2010. Therefore, the Committee requests that the Interim Order be revised so that a Termination Date does not occur unless the Bid Procedures are not approved by October 7, 2010.

44. The Interim Order also references a “Special Reorganization Committee” and provides for payment of the actual fees and expenses incurred by professionals employed by such committee. Interim Order, ¶ 16(a). The Committee objects to payment of professional’s fees for the Special Reorganization Committee because it is not defined in the Interim Order and its purpose has not been disclosed. The Committee further objects to payment of professional’s fees for the Special Reorganization Committee to the extent services performed duplicate services performed by other professionals employed in these bankruptcy cases.

45. Next, Debtors propose providing Financial Reporting only to the Original Lender. Interim Order ¶ 19. The Committee requests that the Debtors also be required to provide the Financial Reporting to the Committee at the same time, and in the same manner, as provided to the Original Lender. The Financial Reporting will enable the Committee to monitor the Debtors’ operations. Furthermore, it is imperative that the Committee have the same current, up to date, information that the Debtors and the DIP Lender have.

46. The Interim Order also provides that the relief granted therein is binding on any subsequently appointed Chapter 7 or Chapter 11 Trustee. Interim Order, ¶ 24. However, the Agents, the Original Lender or the DIP Lender are not bound by any obligation in the Interim Order in the event of appointment of a chapter 7 or 11 trustee. *Id.* The Final Order should not be binding on any successors, including a subsequently appointed Chapter 7 or 11 trustee. The DIP Lenders should not be able to bind non-parties to the relief granted in the Final Order.

47. The DIP Motion states that the Pre-Petition Loan Documents are available from the Court upon request. However, this does not sufficiently apprise parties-in-interest of the

essential terms of the Pre-Petition Loan Documents. Given that the DIP Loan incorporates the Pre-Petition Loan Documents, parties-in-interest need to be notified of the essential terms of those documents. Therefore, the Committee requests that the Debtors prepare a summary of the essential terms of the Pre-Petition Loan Documents and file it as an exhibit to the Final Order. By filing a summary of the essential terms of the Pre-Petition Loan Documents all parties-in-interest will be able to determine what provisions thereof remain in force and effect unmodified by the Final Order.

WHEREFORE, the Committee respectfully requests this Court enter an order denying the Motion to the extent the issues raised in this Objection are not resolved by the Debtors and granting such other and further relief as this Court deems appropriate.

Dated: October 5, 2010
Wilmington, Delaware

POLSINELLI SHUGHART PC

/s/ Christopher A. Ward
Christopher A. Ward (Del. Bar No. 3877)
Shanti M. Katona (Del. Bar No. 5352)
222 Delaware Avenue, Suite 1101
Wilmington, Delaware 19801
Telephone: (302) 252-0920
Facsimile: (302) 252-0921
cward@polsinelli.com
skatona@polsinelli.com

- and -

Peter W. Ito, Esq. (*admitted pro hac vice*)
Megan M. Adeyemo, Esq. (*admitted pro hac vice*)
Ross A. Hoogerhyde, Esq. (*admitted pro hac vice*)
GORDON & REES LLP
555 Seventeenth Street, Suite 3400
Denver, Colorado 80202
Telephone: (303) 534-5160
Facsimile: (303) 534-5161
pito@gordonrees.com
madeyemo@gordonrees.com
rhoogerhyde@gordonrees.com

PROPOSED CO-COUNSEL FOR THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS