IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: SPORTCO HOLDINGS, INC., et al.,[1] Debtors.	Chapter 11 Case No. 19-11299 (LSS) (Jointly Administered) **Hearing Date: Oct. 21, 2019, at 10:00 A.M. (ET)** **Reply Deadline: Oct. 15, 2019, at 5:00 P.M. (ET)** **Ref. Docket Nos. 365, 374, 399 & 421**

THE WELLSPRING CREDITORS' (I) RESPONSE TO COMMITTEE'S OMNIBUS SUBSTANTIVE OBJECTION TO CLASSIFICATION OF WELLSPRING CLAIMS AND (II) RULE 3018 MOTION FOR TEMPORARY ALLOWANCE OF THE WELLSPRING CLAIMS FOR VOTING PURPOSES

Wellspring Capital Management LLC ("WS CM"), Wellspring Capital Partners IV, L.P. ("WS IV"), WCM GenPar IV, L.P. ("WCM LP"), and WCM GenPar IV GP, LLC ("WCM GP," and together with WS CM, WS IV, and WCM LP, the "Wellspring Creditors") hereby submit this (I) response (the "Response") to *The Official Committee of Unsecured Creditors' Omnibus Substantive Objection to the Classification of Proofs of Claim Nos. 92, 94, 97-123, 125-137, 139-158, 160-214 Filed by Wellspring Capital Management, LLC, Wellspring Capital Partners IV, L.P., WCM GenPar IV, L.P. and WCM GenPar IV GP, LLC* filed on September 10, 2019 [Docket No. 365] (together with Exhibit C thereto, filed on September 11, 2019 [Docket No. 374], the "Claim Objection"); and (II) motion (the "Rule 3018 Motion") pursuant to sections 105(a) and 502(c) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), Rule 3018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 3007-1(f)(iii) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy

[1] The Debtors (or collectively, the "Company"), together with the last four digits of each Debtor's federal tax identification number, are: Bonitz Brothers, Inc. (4441); Ellett Brothers, LLC ("Ellett") (7069); Evans Sports, Inc. (2654); Jerry's Sports, Inc. (4289); Outdoor Sports Headquarters, Inc. (4548); Quality Boxes, Inc. (0287); Simmons Guns Specialties, Inc. (4364); SportCo Holdings, Inc. (0355); and United Sporting Companies, Inc. (5758). The location of the Debtors' corporate headquarters and the service address for all Debtors is 267 Columbia Ave., Chapin, SC 29036.

Court for the District of Delaware (the "Local Rules"), temporarily allowing their proofs of claim for purposes of voting on the *Debtors' Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation* [Docket No. 394] (the "Plan").[2] In support of this pleading (the "Response and Motion"), the Wellspring Creditors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Plan, by impermissibly creating a subordinated class *just for* the Wellspring Creditors' claims, and the Claim Objection, by attempting to reclassify *all of* the Wellspring Creditors' claims into that one subordinated class, entirely disenfranchise the Wellspring Creditors. There is no basis to treat the Wellspring Creditors' claims in this manner, however, and the Wellspring Creditors therefore submit this Response and Motion to preserve their ability to vote on the Plan as holders of Class 4 General Unsecured Claims.

2. The Debtors and the Committee have complained that the Wellspring Creditors filed an excessive number of claims for purposes of obtaining a voting advantage. Not so. The Wellspring Creditors followed precisely the instructions in the Bar Date Order (as defined below). As submitted by the Debtors and approved by the Court, the Bar Date Order requires, among other things, that "[a]ny holder of a claim against more than one Debtor must file a separate proof of claim with respect to *each* Debtor." (Bar Date Order ¶ 7(e).)

3. The Wellspring Creditors accordingly each submitted separate proofs of claim (collectively, the "Wellspring Claims") for each of their claims against the nine Debtors totaling 117 proofs of claim. Of these, nine claims assert approximately $3.5 million in liquidated amounts due under a management agreement (collectively, the "Fee Claims") and the remainder assert contingent and unliquidated amounts due for contribution, indemnity (contractual and

[2] Capitalized terms used but not defined herein have the meaning ascribed to them in the Plan.

common law) and under section 502(h) of the Bankruptcy Code (collectively, the "Contingent Claims").

4. The Wellspring Creditors have a right to vote their claims. They are timely, and no one disputes that the Fee Claims are for unpaid, liquidated amounts due under a prepetition contract. At issue is whether all of the Wellspring Claims should be disenfranchised because the nine Fee Claims are allegedly subordinated and could be classified in a non-voting class. At the outset, the Fee Claims are not subordinated in these Chapter 11 Cases because the contractual subordination clause at issue does not subordinate non-cash distributions made under a bankruptcy plan. But even if such claims are subordinated, which the Wellspring Creditors dispute, the contractual subordination provision applies only to the nine Fee Claims and only subordinates them to the Prepetition Term Loan Deficiency Claims, *not to all General Unsecured Claims*.

5. Regardless, the Wellspring Creditors' remaining 108 Contingent Claims are clearly not subordinated and should be entitled to vote for $1.00 each. The Official Committee of Unsecured Creditors (the "Committee") concedes as much and only challenges the Wellspring Claims "to the extent based on" the Expense Reimbursement Agreement (as defined below) that governs the Fee Claims. (Claim Objection ¶ 13.) As such, the Solicitation Order (as defined below) permits the Contingent Claims to vote as Class 4 General Unsecured Claims. Out of an abundance of caution and to avoid any last minute objections, however, the Wellspring Creditors respectfully ask this Court to expressly allow the Contingent Claims for voting purposes in the amount of $1.00 each.

6. Finally, because the Claim Objection is substantive and does not limit itself to voting or classification, the Wellspring Creditors ask this Court to enforce Local Bankruptcy Rule 3007-1(f)(iii) against the Committee, the Debtors, Prospect Capital Corporation ("Prospect")

and all successor estate representatives, including any Liquidation Trustee. The Court should prohibit these parties from raising any further substantive objections to the Wellspring Claims and strike their purported reservation of rights to the contrary.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this Rule 3018 Motion pursuant to 28 U.S.C. §§ 157 and 1334.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The statutory and legal predicates for the relief sought herein are sections 105(a) and 502(c) of the Bankruptcy Code, Bankruptcy Rule 3018, and Local Rule 3007-1(f)(iii).

10. The Wellspring Creditors consent to entry of a final order in connection with the Rule 3018 Motion, in accordance with Local Rule 9013-1(f), if it is determined that the Court, absent the consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

BACKGROUND

A. The Chapter 11 Cases And The Plan.

11. On June 10, 2019, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases") in the United States Bankruptcy Court for the District of Delaware. The Debtors continue to operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed. On June 17, 2019, the United States Trustee of the District of Delaware appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code.

12. On August 22, 2019, the Debtors filed their first combined plan and disclosure statement [Docket No. 308] (the "Initial Plan"). The Initial Plan had four creditor classes: Class 1 – Other Priority Claims; Class 2 – Prepetition Term Loan Claims; Class 3 – Other Secured Claims; and Class 4 – General Unsecured Claims, which included the Prepetition Term Loan Deficiency Claims. On September 11, 2019, the Debtors filed an amended combined plan and disclosure statement [Docket No. 367] (the "First Amended Plan").

13. On September 13, 2019, the Debtors filed the current Plan. The Plan tries to implement the Debtors' disenfranchisement of the Wellspring Creditors by creating a new Class 5 – Wellspring Subordinated Claims that receive no recovery and, therefore, are not entitled to vote. The Debtors intend to seek confirmation of the Plan at the confirmation hearing scheduled for October 21, 2019 (the "Confirmation Hearing").

B. The Solicitation Order.

14. On September 17, 2019, this Court entered the *Order (A) Approving on Conditional Basis Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation for Solicitation Purposes Only, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Combined Disclosure Statement and Plan, (C) Approving the Form of Ballot and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures* [Docket No. 399] (the "Solicitation Order").

15. Among other things, the Solicitation Order provides that "[f]or the purposes of voting on the Plan, each Claim . . . for which a proof of claim has been filed with the Bankruptcy Court . . . as to which no objection to the allowance thereof has been Filed by the Record Date . . . shall be allowed." (Solicitation Order ¶ 6.) The Solicitation Order is silent on whether and in what amount contingent and unliquidated claims can vote in the absence of an objection.

16. The Solicitation Order further provides that any claimholder who "seeks to challenge the allowance of its Claim for voting purposes in accordance with the Tabulation Procedures" must "file a motion, pursuant to Bankruptcy Rule 3018(a) for an order temporarily allowing its Claim or Equity Interest in a different amount or classification for purposes of voting to accept or reject the Combined Plan and Disclosure Statement . . . ." (Solicitation Order ¶ 9.)

C. The Bar Date Order And The Wellspring Claims.

17. On September 12, 2019, this Court entered the *Order (I) Establishing Deadlines for Filing Proofs of Claim; (II) Approving Procedures for Filing Proofs of Claim; and (III) Approving the Form, Manner, and Sufficiency of Providing Notice Thereof* [Docket No. 387] (the "Bar Date Order"). Pursuant to the Bar Date Order, this Court established October 16, 2019, at 5:00 P.M. (prevailing Eastern Time) (the "General Bar Date") as the deadline by which all holders of claims must file proofs of claim, subject to exceptions for certain Administrative Expense Claims and claims asserted by governmental units.

18. Paragraph 7 of the Bar Date Order provides, among other things, that "[a]ny holder of more than one claim must file a separate proof of claim with respect to each claim" and that "[a]ny holder of a claim against more than one Debtor must file a separate proof of claim with respect to each such Debtor." This provision requires creditors to file a separate proof of claim against each Debtor and for each separate theory of recovery.

19. In anticipation of entry of the Bar Date Order, between August 26 and 29, 2019, the four Wellspring Creditors filed the Contingent Claims, comprised of three separate proofs of claim against each of the nine Debtors as follows:

(i) contingent and unliquidated indemnification claims arising under section 5 of the Expense Reimbursement Agreement (the "Contract Indemnity Claims");[3]

(ii) contingent and unliquidated indemnification and contribution claims arising under any other agreements or under common law (the "Other Indemnity Claims"); and

(iii) contingent and unliquidated claims arising pursuant to section 502(h) of the Bankruptcy Code (the "502(h) Claims").[4]

20. WS CM also filed a Fee Claim against each of the nine Debtors on account of its right to reimbursement of certain fees and expenses relating to management services. The Committee objects to the Fee Claims based solely on limited contractual subordination language in the governing agreement. The Claim Objection, however, does not object on any other grounds to the Fee Claims or, for that matter, the Contingent Claims.

21. The Fee Claims arise from that certain Amended and Restated Expense Reimbursement Agreement dated November 16, 2009, between WS CM and certain of the Debtors (as amended from time to time, the "Expense Reimbursement Agreement"), pursuant to which WS CM agreed to provide to the Company certain ongoing financial management, strategic and business advisory services.[5] (Expense Reimbursement Agreement § 1.1.) In exchange, Ellett agreed to pay WS CM up to $750,000 for such services in any fiscal year as well as third party expenses to the extent of actual payments made (payments under sections 2.1 and 2.2, the "Fees"). (Expense Reimbursement Agreement §§ 2.1, 2.2.)

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[3] Although the Contract Indemnity Claims were filed as contingent and unliquidated claims, the Wellspring Creditors have incurred prepetition costs and expenses that are reimbursable under section 5.1 of the Expense Reimbursement Agreement. The Wellspring Creditors intend to file amended proofs of claim with respect to such claims no later than the General Bar Date.

[4] A sample proof of claim for each of the four sets of claims filed by the Wellspring Creditors—the Fee Claims, the Contract Indemnity Claims, the Other Indemnity Claims, and the 502(h) Claims—is attached as Exhibits B, C, D, and E, respectively.

[5] The Expense Reimbursement Agreement is attached to the sample proof of claim for the Fee Claims attached here as Exhibit B.

22. The Expense Reimbursement Agreement subjects Ellett's payment of the Fees to Ellett's ability to do so under Ellett's debt documents. Section 2.3 of the Expense Reimbursement Agreement (as amended from time to time, the "Inability to Make Payments Clause") provides as follows:

> To the extent any payment or portion thereof required to be made under Section 2.1 or 2.2 is prohibited by the terms of any credit agreement or other indebtedness of the Company, Ellett shall pay as much of such amount as permitted thereunder and shall pay any unpaid amount, together with interest thereon at the rate of 7% per annum from the required payment date, as soon as permitted thereunder or until such prohibition is no longer in effect.

23. In September 2012, Ellett and WS CM agreed to expressly subordinate the Fees (if any) that Ellett was prohibited from paying to the Company's Prepetition Secured Obligations. The First Amendment to the Expense Reimbursement Agreement accordingly added the following to the Inability to Make Payment Clause:

> Wellspring agrees that until such time as the obligations under the Senior Loan Agreement and Second Priority Loan Agreement are paid in full in cash and the commitments thereunder have been terminated, all obligations owing to Wellspring under Sections 2.1 and 2.2 are expressly subordinate to the obligations of the Company under the Senior Loan Agreement and the Second Priority Loan Agreement. Notwithstanding the foregoing, to the extent any payment or portion thereof required to be made under Section 2.1 or 2.2 is not prohibited by the terms of the Senior Loan Agreement, the Second Priority Loan Agreement, or any other credit agreement or other indebtedness of the Company, Ellett shall be permitted to pay as much of such amount as permitted thereunder and shall pay any unpaid amount, together with interest thereon at the rate of 7% per annum from the required payment date, as soon as permitted thereunder or until such prohibition is no longer in effect. Any payments under Section 2.1 or 2.2 received by Wellspring during a time when (A) such payments are not permitted to be made in accordance with the foregoing sentence, and (B) the obligations under both the Senior Loan Agreement and Second Priority Loan Agreement have not been paid in full in cash and the commitments thereunder have not been terminated, shall be held in trust and forthwith paid over to (i) the Senior Agent, if the obligations under the Senior Loan Agreement have not been paid in full, or (ii) the

> Second Priority Agent, if the obligations under the Senior Loan Agreement have been paid in full.

(First Am. to Expense Reimbursement Agreement (the "First Amendment") ¶ 1.)

24. Five years later, on May 2, 2017, the Debtors amended the Prepetition Term Loan Agreement to prohibit the Company from making any cash payments at all on account of Fees that accrued after that date until the Prepetition Secured Obligations were paid in full. The Company was previously allowed to pay the Fees under the Prepetition Term Loan Agreement because it was a permitted affiliate transaction. In 2017, to prevent cash payments on account of the Fees that came due after May 2017 until full repayment of the Prepetition Secured Obligations, section 9.2.4 of the Prepetition Term Loan Agreement was amended (the "Sixth Amendment") to provide as follows:

> Until Full Payment of all Obligations, each Obligor covenants that unless the Required Lenders have otherwise consented in writing, it shall not and shall not permit any Subsidiary to . . . [e]nter into, or be a party to any transaction with any Affiliate, except: . . . (iii) payments to Wellspring of fees and expense in accordance with the Expense Reimbursement Agreement as in effect on the Closing Date; provided, however, that (a) both before and after giving effect to such payments, no Default or Event of Default shall have occurred and be continuing, and (b) such payments shall not exceed $862,500 per annum plus any amount of such payments that were prohibited from being paid pursuant to the preceding subsection (a) and provided, further, that no such payments shall be made in cash from and after the Sixth Amendment Effective Date until all Obligations are indefeasibly paid in full (but such payments may continue to accrue in accordance with the Expense Reimbursement Agreement as in effect on the Closing Date); [and] (iv) payment of customary directors' fees and indemnities . . . .

25. Pursuant to the Expense Reimbursement Agreement, along with its agreement to pay Fees, the Company (which includes all of the Debtors)[6] also agreed to indemnify

[6] The Expense Reimbursement Agreement defines Company as Ellett together with SportCo Holdings, Inc. "and their respective subsidiaries." (Preamble to Expense Reimbursement Agreement.)

the Wellspring Creditors from, among other things, "any and all losses, claims, damages and liabilities, joint or several, to which any [Wellspring Creditor] may become subject, caused by, related to or arising out of the Services, the business and affairs of the Company, or any other advice or services contemplated by [the Expense Reimbursement Agreement] or the engagement of Wellspring pursuant to, and the performance by Wellspring of the Services contemplated by, [the Expense Reimbursement Agreement]" and to promptly reimburse the Wellspring Creditors for "all costs and expenses (including reasonable attorneys' fees and disbursements) . . . ." (Expense Reimbursement Agreement § 5.1.)

26. In sum, the Expense Reimbursement Agreement, First Amendment and the Sixth Amendment together: (a) obligate Ellett to pay WS CM the Fees owed through 2017 if it is permitted to do so under the Company's applicable debt documents; (b) render Ellett liable for any Fees that it cannot pay (whether accrued before or after 2017) because of restrictions in the Company's applicable debt documents, plus accrued interest; and (c) subordinate Ellett's obligation to pay the Fees to the Company's obligations on account of the Prepetition Secured Obligations until the Prepetition Secured Obligations are paid in full. In addition, the Company agreed to broadly indemnify the Wellspring Creditors from and against any losses (including attorneys' fees) related to the Expense Reimbursement Agreement or the Company's business more generally. The Contract Indemnity Claims are not subordinated to the Prepetition Secured Obligations or any other of the Company's debt.

27. As asserted in the Fee Claims, the Debtors owe the Wellspring Creditors the following liquidated amounts for accrued and unpaid Fees:

Section 2.1 Expenses:	
2015	$750,000
2016	$750,000
2017	$750,000
2018	$750,000
Total:	**$3,000,000**
Section 2.2 Third Party Expenses:	
2015	$190,917
2016	$168,927
2017	$ 99,875
2018	$ 26,630
Total:	**$486,259**

28. In addition, the Debtors are liable to the Wellspring Creditors for accrued and unpaid Contract Indemnity Claims, including substantial legal fees that the Wellspring Creditors have incurred and continue to incur.

D. <u>The Claim Objection</u>.

29. On September 10, 2019, the Committee filed the Claim Objection. The Committee argues, without support, that "Wellspring voluntarily agreed to subordinate the payment of *all* amounts owed under the Expense Reimbursement Agreement until the Debtors have paid in full all Prepetition Term Loan Claims. As a result, Wellspring *does not hold General Unsecured Claims* and is *not entitled to vote* on the Combined Plan." (Claim Objection ¶ 1 (emphasis added).)

30. For the reasons set forth below, the Claim Objection lacks merit. The Wellspring Creditors hold Class 4 General Unsecured Claims and are entitled to vote on the Plan, regardless of whether the Fee Claims are subordinated. In an effort to avoid unnecessary litigation and duplication of effort, counsel to the Wellspring Creditors reached out to the Committee's counsel to discuss a consensual resolution of the Wellspring Creditors' voting rights. While no global resolution was reached, the parties agreed to coordinate the Wellspring Creditors' response to the Claim Objection and the Rule 3018 Motion for briefing purposes.

31. On September 25, 2019, the Court entered the *Stipulated Scheduling Order Governing (A) The Committee's Objection to the Wellspring Creditors' Claims and (B) The Wellspring Creditors' Rule 3018 Motion* [Docket No. 421] (the "Scheduling Stipulation"). Pursuant to the Scheduling Stipulation, the Wellspring Creditors hereby file this Response and Motion to ask this Court to overrule the Claim Objection and to temporarily allow all of the Wellspring Claims for voting purposes only.

RELIEF REQUESTED

32. The Wellspring Creditors request that the Court enter an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order") (A) overruling the Claim Objection in its entirety and (B) temporarily allowing as Class 4 General Unsecured Claims for voting purposes only (i) all of the Fee Claims in their liquidated face amount and (ii) all of the Contingent Claims in the amount of $1.00 each.

ARGUMENT

I. The Claim Objection Lacks Merit And Should Be Overruled.

33. Relying on only the Inability to Make Payments Clause, the Committee asserts that the Wellspring Creditors "voluntarily agreed to subordinate the payment of all amounts owed under the Expense Reimbursement Agreement until the Debtors have paid in full all

Prepetition Term Loan Claims," and as a result, the Wellspring Creditors do "not hold General Unsecured Claims and [are] not entitled to vote on the Combined Plan." (Claim Objection ¶ 1.) Ignoring the fact that the Expense Reimbursement Agreement does not subordinate the Contract Indemnity Claims, let alone the other Contingent Claims (which do not arise under the Expense Reimbursement Agreement), the Committee then concludes that "[b]ecause the Wellspring Claims, to the extent based on the Expense Reimbursement [*sic*], are subordinated to the Prepetition Term Loan Deficiency Claims, the Wellspring Claims are also subordinated to General Unsecured Claims." (Claim Objection ¶ 16.)

34. The Committee's conclusion is contradicted by the governing documents. First, the Inability to Make Payments Clause only subordinates Ellett's pre-bankruptcy *payment* obligations to its payment of the Prepetition Secured Obligations. It does not subordinate the Wellspring Creditors' right to receive distributions on account of the Fee Claims in these Chapter 11 Cases to those of the Prepetition Secured Parties. Second, even if the Fee Claims were so subordinated, which they are not, the Fee Claims are only subordinated to the Prepetition Term Loan Deficiency Claims, *not* to *all* General Unsecured Claims. Accordingly, the Fee Claims are Class 4 General Unsecured Claims entitled to vote, even if subordinated. Finally, the Contract Indemnity Claims and the other Contingent Claims are *not* subordinated in any way, nor does the Committee suggest that they are. These claims are undisputed and have every right to vote as Class 4 General Unsecured Claims.

A. The Inability To Make Payments Clause Does Not Subordinate The Fee Claims In These Chapter 11 Cases.

35. Section 510(a) of the Bankruptcy Code provides that "[a] subordination agreement is enforceable in a case under this title *to the same extent* that such agreement is enforceable under applicable non-bankruptcy law." 11 U.S.C. § 510(a) (emphasis added). New

York law governs the Expense Reimbursement Agreement and as a result, the Court need not look "outside the four corners" of the document to determine the parties' intent. (Expense Reimbursement Agreement § 6.2); *see In re La Paloma Generating Co.*, 595 B.R. 466, 470 (Bankr. D. Del. 2018) (interpreting New York law governing a subordination clause).

36. The Inability to Make Payments Clause is clear: it expressly *and only* subordinates the "obligations owing to Wellspring *under Sections 2.1 and 2.2* [of the Expense Reimbursement Agreement]" to the Company's Prepetition Secured Obligations. (Expense Reimbursement Agreement § 2.3 (emphasis added).) Sections 2.1 and 2.2, in turn, obligate Ellett "*to pay to Wellspring*" the Fees. (*Id.* §§ 2.1, 2.2). Accordingly, only Ellett's *payment* obligations are subordinated to its obligations relating to the Prepetition Secured Obligations.

37. The Expense Reimbursement Agreement has no language subordinating the Wellspring Creditors' right to receive *recoveries* or *distributions* on account of the Fee Claims in these Chapter 11 Cases. Notably, Ellett's liability to the Wellspring Creditors continues to accrue with interest, regardless of whether Ellett is able to *pay* such amounts outside of bankruptcy. (*Id.*; *see also* Sixth Amendment § 1(h) ("[P]ayments may continue to accrue in accordance with the Expense Reimbursement Agreement . . . .").)

38. Nor does the very narrow turnover language in the Inability to Make Payments Clause change this result. The turnover provision is limited to *payments* that were *actually made* in violation of any contractual prohibition in effect at the time. (First Amendment ¶ 1.) As noted above, Ellett has not paid any Fees to Wellspring since 2015, so the turnover provision does not apply here. Nothing else in the Expense Reimbursement Agreement subordinates the Wellspring Creditors' right to distributions on account of the Fee Claims in these Chapter 11 Cases.

39. The Sixth Amendment proves equally clear and is consistent with this result: "from and after the Sixth Amendment Effective Date" only payments "made in *cash*" under the Expense Reimbursement Agreement are prohibited. (Sixth Amendment § 1(h).) Because "made in cash" is "clear, unequivocal and unambiguous," it must be "interpreted by its own language." *R/S Assocs.* v. *N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32 (N.Y. 2002) (citations and internal quotation marks omitted).

40. In *Doppelt* v. *Perini Corp.*, for instance, the District Court for the Southern District of New York, in applying the same rule of contractual interpretation under Massachusetts law, rejected as "without merit" an argument that, in a transaction involving the exchange of junior preferred stock for common stock, such distribution of common stock was either a "cash dividend" or "cash distribution" prohibited by the underlying documents. *See* No. 01 CIV. 4398 (LMM), 2002 WL 392289, at *5 (S.D.N.Y. Mar. 13, 2002), *aff'd*, 53 F. App'x 174 (2d Cir. 2002) ("Because the terms 'dividends' and 'distribution' are modified in this provision by the word 'cash,' [defendant] would have violated the terms of the Certificate of Vote *only if* it declared or paid 'cash' dividends or made a 'cash 'distribution . . . .") (emphasis added).

41. Under the terms of the Plan, holders of General Unsecured Claims (such as the Wellspring Creditors) do not receive a cash payment. Instead, such creditors receive "an interest in the Recoveries from the Type A Causes of Action and Type B Causes of Action," which recoveries are subject to the waterfall provisions described therein. (Plan § VII.A.4.c.) Nothing in the Expense Reimbursement Agreement, the Prepetition Term Loan Agreement, or any amendment or modification to either document subordinates the Wellspring Creditors' right to receive non-cash distributions on account of the Fee Claims. *See First Nat'l Bank of Hollywood* v. *Am. Foam Rubber Corp.*, 530 F.2d 450, 452 (2d Cir. 1976) (affirming ruling that "exchange of

debentures and notes for preferred stock did not constitute payment of these obligations, as that term was used in the subordination agreement").

42. The Committee's argument that *all of* the Wellspring Claims, to the extent based on the Expense Reimbursement Agreement, are subordinated to the Prepetition Term Loan Deficiency Claims in these Chapter 11 Cases should be overruled.

B. The Contractual Indemnity And Contingent Claims Are Not Subordinated To Any Other Claims.

43. For the reasons set forth above, the Fee Claims are not subordinated in these Chapter 11 Cases. But even if the Fee Claims are subordinated, the Inability to Make Payment Clause does not subordinate *all* claims arising under the Expense Reimbursement Agreement. As noted above, it affects only payments under Sections 2.1 and 2.2 and therefore has no effect on the Contract Indemnity Claims that arise under Section 5 of the Expense Reimbursement Agreement. No basis for arbitrarily extending the subordination language to Section 5 exists, and principles of contract interpretation under New York law do not support such a result. *See, e.g.*, *Saltini* v. *N. Sea Dev. LLC*, 2019 WL 4309624, at *4 (N.Y. Sup. Sept. 9, 2019) (refusing Plaintiffs' interpretation of subordination clause that was "inconsistent with the express terms of the Intercreditor Agreement"); *Kinville* v. *Jarvis Real Estate Holdings, LLC*, 38 A.D.3d 1225, 1227 (4th Dep't 2007) (refusing to extend benefits of subordination agreement to guarantor where subordination agreement "contain[ed] no reference" to guarantor). Similarly, because the Inability to Make Payment Clause affects obligations arising only under sections 2.1 and 2.2 of the Expense Reimbursement Agreement, the other Contingent Claims, which do not arise under the Expense Reimbursement Agreement at all, are wholly unaffected. As a result, the Contingent Claims are also not subordinated.

44. In short, the Contract Indemnity Claims and other Contingent Claims are not subject to contractual subordination, and the Claim Objection does not attempt to subordinate them on other grounds. The Wellspring Creditors should therefore be allowed to vote all their Contingent Claims as Class 4 General Unsecured Claims. To the extent the Objection suggests otherwise, it should be overruled.[7]

C. Even If The Fee Claims Are Subordinated To The Prepetition Term Loan Deficiency Claims, They Cannot Be Reclassified And Subordinated To All General Unsecured Claims Generally.

45. The Fee Claims cannot be subordinated to other General Unsecured Claims. The Expense Reimbursement Agreement and the Prepetition Term Loan Agreement say nothing about the relative priority of payments to WS CM on account of the Fees and the Debtors' *other* unsecured claimants. Nor does the turnover clause govern non-cash distributions received under the Plan on account of the Fee Claims. The Committee's blanket assertion that "[b]ecause the Wellspring Claims, to the extent based on the Expense Reimbursement [*sic*], are subordinated to the Prepetition Term Loan Deficiency Claims, the Wellspring Claims are also subordinated to General Unsecured Claims" has no basis in law or fact. (Claim Objection ¶ 16.)

46. The Inability to Make Payments Clause does not subordinate distributions under the Plan on account of the Fee Claims in these Chapter 11 Cases, and no turnover clause requires the Debtors to make those distributions to anyone but the Wellspring Creditors. As a result, the Plan cannot legally classify the Fee Claims as anything but General Unsecured Claims that share *pari passu* in recoveries along with all other General Unsecured Claims. The Claim Objection should be overruled.

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[7] Moreover, as discussed below, this Court need not resolve the ultimate allowance or validity of the Contingent Claims now. Instead, the Wellspring Creditors only seek what debtors in this district routinely grant to holders of contingent and unliquidated claims as a matter of courtesy and common practice: temporary allowance (for voting purposes only) in the amount of $1.00 for each claim.

D. Local Rule 3007-1(f)(iii) Should Prohibit All Additional Objections To The Wellspring Claims Without Any Reservation Of Rights.

47. Local Rule 3007-1(f)(iii) provides that "[a]n Objection based on substantive grounds, other than incorrect classification of a claim, shall include all substantive objections to such claims." For the reasons set forth above, the Court should overrule the Claim Objection. In addition, the Court should enforce Local Rule 3007-1(f)(iii) and prohibit any party from objecting to the Wellspring Claims for any other reason. At a minimum, the Court should strike the reservation of rights the Claim Objection asserts in favor of the Liquidation Trustee and Prospect.

48. The Claim Objection substantively objects to *all* of the Wellspring Claims. Among other things, the title of the Objection lists all proofs of claim filed by the Wellspring Creditors, and it defines "Wellspring Claims" to include all proofs of claim filed by the Wellspring Creditors. (Preamble to Claim Objection.) Additionally, Exhibit C to the Claim Objection (filed separately at Docket No. 374) lists all of the Wellspring Claims as "Subordinated to GUCs" and "Contractually Subordinated." Notably, even though the Inability to Make Payments Clause is the *sole* basis the Committee identifies for subordinating the Wellspring Claims and disenfranchising the Wellspring Creditors, and even though the clause only applies to the Fee Claims (if at all), the Committee chose to substantively object to each and every Wellspring Claim. As a result, all other grounds for objecting to the Wellspring Claims are waived and any future objections can only be made on a non-substantive basis in accordance with Local Rule 3007-1(d).

49. Additionally, the Committee's asserted reservation of rights in favor of the Liquidation Trustee and Prospect is inappropriate. As an initial matter, the Liquidation Trustee has not been formally appointed yet. But more critically, the Liquidation Trustee is not, to the best of the Wellspring Creditors' knowledge, represented in these Chapter 11 Cases by Committee's counsel, which has no authority to reserve rights on behalf of a party it does not represent. Even

if it did, Local Rule 3007-1(f)(iii) waives any additional arguments that the Liquidation Trustee or other representatives of the Debtors' estates may raise with respect to the Wellspring Claims. *See In re Stone & Webster, Inc.*, 335 B.R. 300, 302 n.2 (Bankr. D. Del. 2005) (noting that "[r]eservation of rights to assert additional substantive grounds for objections was common practice prior to this Court's adoption" of Local Rule 3007-1(f)(iii)).

II. The Wellspring Claims Should Be Temporarily Allowed For Voting Purposes.

50. The Wellspring Creditors respectfully move this Court to temporarily allow the Wellspring Claims for voting purposes. For the reasons set forth above, the Claim Objection should be overruled and the Fee Claims should be temporarily allowed as Class 4 General Unsecured Claims entitled to vote in the liquidated face amount of the Claims. No one has objected to the amount of the Fee Claims, and as a result, the proofs of claim are entitled to presumptive validity. *See* FED. R. BANKR. P. 3001(f) (a properly filed proof of claim is prima facie evidence of the validity and amount of the claim); *In re FKF Madison Park Grp. Owner, LLC*, 2013 WL 6455352, at *3 (Bankr. D. Del. Dec. 9, 2013) (overruling plan administrator's claim objection where he produced no evidence to negate the claims' *prima facie* validity).

51. In addition, the Wellspring Creditors ask this Court, pursuant to Bankruptcy Rule 3018, to temporarily allow the Contingent Claims in the amount of $1.00 each as Class 4 General Unsecured Claims for voting purposes.[8] The Bankruptcy Code defines a claim broadly to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable,

[8] Paragraph 9 of the Solicitation Order expressly incorporates Bankruptcy Rule 3018 and is therefore an independent basis for the Wellspring Creditors' requested relief. Although paragraph 9 provides a specific process and timeline for voting creditors to exercise their rights under Bankruptcy Rule 3018, it does not make clear whether a Rule 3018 motion is necessary where the Debtors have not formally objected to a creditor's contingent and unliquidated claims.

secured or unsecured." 11 U.S.C. § 101(5). As such, a "contingent claim is a claim for purposes of the Bankruptcy Code." *In re W.R. Grace & Co.*, 446 B.R. 96, 124 (Bankr. D. Del. 2011). Under section 1126(a) of the Bankruptcy Code, all holders of allowed claims are entitled to vote on a plan. The proper mechanism for reconciling the Contingent Claims is not disallowance, but estimation of the claim's value. *In re Fed.-Mogul Global, Inc.*, 330 B.R. 133, 154 (D. Del. 2005) ("The Bankruptcy Code states that estimation is necessary when liquidation outside of bankruptcy would unduly delay the administration of the case.").

52. Section 502(c) of the Bankruptcy Code provides that a bankruptcy court shall "estimate[] for purposes of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." Although section 502(c) refers to estimation for "purposes of allowance", a bankruptcy court may estimate (and temporarily allow) a claim for voting purposes only. *See, e.g.*, *In re Farley, Inc.*, 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992); *In re Cont'l Airlines Corp.*, 60 B.R. 903, 905 (Bankr. S.D. Tex. 1986). This statutory right is completed and reinforced by Bankruptcy Rule 3018, which expressly allows for estimation of claims for voting purposes by providing that "[n]otwithstanding objection to a claim or interest, the court . . . may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." FED. R. BANKR. P. 3018(a).

53. The principal purpose of Bankruptcy Rule 3018 is to "give all creditors, even those holding disputed claims, the opportunity to vote . . . ." *In re Century Glove, Inc.*, 88 B.R. 45, 46 (Bankr. D. Del. 1988). Indeed, allowing disputed claims the right to vote on proposed plans, even if some such claims "may be eventually disallowed for purposes of distribution, is more in keeping with the spirit of Chapter 11 which encourages creditor vot[ing] and participation

in the reorganization process." *In re Amarex, Inc.,* 61 B.R. 301, 303 (Bankr. W.D. Okla. 1985). Additionally, Bankruptcy Rule 3018 prevents "possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to claims of dissenting creditors." *Armstrong* v. *Rushton* (*In re Armstrong*), 294 B.R. 344, 354 (B.A.P. 10th Cir. 2004).

54. Bankruptcy courts have wide discretion to select an estimation methodology best suited to the particular circumstances of the case, so long as such procedure is consistent with the fundamental policy of chapter 11. *In re Adelphia Bus. Solutions, Inc.*, 341 B.R. 415, 422 (Bankr. S.D.N.Y. 2003). Accordingly, bankruptcy courts are not limited to nominal amounts when estimating a claim pursuant to Bankruptcy Rule 3018 for voting purposes. For example, in *In re Pacific Sunwear of Cal., Inc.*, this Court temporarily allowed for voting purposes a class claim in the amount of $5,000,000 and a claim under California's Private Attorneys General Act in the amount of $100,000 based on "legal analysis rather than evidence." 2016 WL 4250681, at *5 (Bankr. D. Del. Aug. 8, 2016). Similarly, in *In re Hydrox Chem. Co.*, the bankruptcy court temporarily allowed certain RICO claims at two-thirds of the amounts asserted based the claimants' "strong evidentiary case" that the court estimated had a "two-thirds probability of success." 194 B.R. 617, 628 (Bankr. N.D. Ill. 1996).

55. Of course, while "any estimation should ensure that the voting power is commensurate with the creditor's economic interests in the case," *In re Quigley Co.*, 346 B.R. 647, 654 (Bankr. S.D.N.Y. 2006), the bankruptcy court must be mindful that "the procedure is consistent with fundamental bankruptcy policies, which require speed and efficiency." *In re Pac. Sunwear*, 2016 WL 4250681, at *3. In light of the bankruptcy policies of speed and efficiency, bankruptcy courts in this district routinely allow contingent and/or unliquidated claims in nominal amounts for voting purposes. *See, e.g.*, *In re Panda Temple Power, LLC*, Case No. 17-10839

[Docket No. 242] (LSS) (Bankr. D. Del. June 29, 2017) (temporarily allowing such claims for voting purposes in the amount of $1.00); *In re FKF Madison Grp. Owner LLC*, Case No. 10-11867 [Docket No. 1078] (KG) (Bankr. D. Del. Feb. 24, 2012) (same); *In re Visteon Corp.*, Case No. 09-11786 [Docket No. 3491] (CSS) (Bankr. D. Del. June 28, 2010) (same).

56. To provide the Wellspring Creditors with a meaningful voice in the voting and confirmation process, each Contingent Claim filed by the Wellspring Creditors should be temporarily allowed in the amount of $1.00 for voting purposes. The Wellspring Creditors are not asking this Court to determine the ultimate validity or allowance of the Wellspring Creditors' Claims for any purposes other than voting under the Plan. Because nothing in the Solicitation Order, the accompanying Plan, or the Bar Date Order clarifies how Ballots that the Wellspring Creditors have submitted on account of their Contingent Claims will be tabulated for voting purposes (*i.e.*, the value ascribed to such votes), the Wellspring Creditors ask this Court to temporarily allow the Contingent Claims as Class 4 General Unsecured Claims for voting purposes in a nominal amount (*i.e.*, $1.00 each) and that its Ballots are therefore properly counted with respect to voting on the Plan.

57. The Wellspring Creditors, as significant general unsecured creditors, submit that this limited relief is appropriate to ensure that they have a meaningful voice in the Plan voting and confirmation process, while simultaneously preserving all rights of the Debtors, the Wellspring Creditors, and any other party in interest with respect to the Contingent Claims.

58. First, the Debtors requested, and this Court approved, specific procedures with respect to Bankruptcy Rule 3018. (*See* Solicitation Order ¶ 9.) Additionally, the Wellspring Creditors and the Committee agreed to the Scheduling Stipulation that provided that, among other things, the Wellspring Creditors would file this Rule 3018 Motion by no later than October 4,

2019, at 5:00 P.M. (ET). Notably, other than the meritless subordination-based objection discussed in Part I above, no one has objected to or disputed the Contingent Claims. As a result, the Solicitation Order entitles the Wellspring Creditors to vote these claims.

59. Second, the requested relief will not delay the administration of these Chapter 11 Cases. The Contingent Claims rest upon complex indemnification rights, common law claims, and claims under section 502(h), but this Rule 3018 Motion does not request—and the Court need not resolve at this time—the ultimate allowance of the Contingent Claims prior to the Confirmation Hearing. Indeed, full resolution of the Contingent Claims must await the outcome of the South Carolina Action, which, of course, is the primary asset of the Liquidation Trust under the proposed Plan.

60. Third, the temporary allowance of the Contingent Claims in the amount of $1.00 each is reasonable in light of precedent estimating contingent claims in substantially larger amounts for temporary allowance for voting purposes. Indeed, as noted above, the indemnification rights underlying the Contingent Claims include the right to be reimbursed for certain legal fees and expenses, which the Wellspring Creditors have already incurred (in substantial amounts) in connection with, among other things, the South Carolina Action and these Chapter 11 Cases. Nevertheless, it is neither necessary nor appropriate for this Court to engage in a protracted, contentious, and complex estimation process now. Instead, allowing each of the Contingent Claims in the amount of $1.00 for voting purposes ensures that the Wellspring Creditors' votes will be, at the very least, properly counted for numerosity purposes.

RESERVATION OF RIGHTS

61. The Wellspring Creditors hereby reserve their rights to (i) object to confirmation of the Plan on any grounds; (ii) amend, modify, or supplement this Response and

Motion in any manner; and (iii) raise additional defenses or arguments relating to any of the Wellspring Claims.

NOTICE

62. The Wellspring Creditors have served notice of this Rule 3018 Motion on: (a) counsel to the Debtors; (b) the Office of the United States Trustee for the District of Delaware; (c) counsel to the Committee; (d) counsel to the DIP Agent; (e) counsel to the Prepetition Term Loan Agent; and (f) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. The Wellspring Creditors submit that, in light of the nature of the relief requested herein, no other or further notice need be given.

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CONCLUSION

WHEREFORE, the Wellspring Creditors respectfully request that the Court enter the Proposed Order (A) overruling the Claim Objection in its entirety; (B) temporarily allowing as Class 4 General Unsecured Claims for voting purposes only (i) all of the Fee Claims in their liquidated face amount and (ii) all of the Contingent Claims in the amount of $1.00 each; and (C) grant such other and further relief as the Court deems just and proper.

Dated: October 4, 2019
Wilmington, Delaware

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