IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
NEWPAGE CORPORATION, *et al.*,	:	**Case No. 11-12804 (KG)**
Debtors.	:	**(Jointly Administered)**
	:	**Hearing Date: July 9, 2012 at 2:00 p.m. (ET)** **Objection Deadline: July 2, 2012 at 4:00 p.m. (ET)**

MOTION FOR ORDER UNDER BANKRUPTCY CODE SECTIONS 105, 1103, AND 1109 AUTHORIZING OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO COMMENCE AND PROSECUTE CERTAIN CLAIMS ON BEHALF OF DEBTORS' ESTATES AGAINST (A) CERBERUS AND (B) THE PM35 PARTIES

The Official Committee of Unsecured Creditors (the "Committee") of NewPage Corporation ("NewPage") and its affiliated debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") hereby files this motion (the "Motion") for entry of an order authorizing the Committee to commence and prosecute certain claims on behalf of the Debtors' estates against (a) Cerberus Operations and Advisory Company, LLC ("COAC"), Cerberus Partners, L.P. ("Cerberus Partners"), and Cerberus Capital Management, LP ("Cerberus Capital" and, together with COAC and Cerberus Partners, "Cerberus") and (b) Wilmington Trust Company ("Wilmington Trust") and CPI 1997 (collectively, the "PM35 Parties"). In support of this Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. By this Motion, the Committee seeks standing to commence and prosecute actions against Cerberus and the PM35 Parties (collectively, the "Proposed Defendants"). These are colorable causes of action that would, if successful, greatly benefit the Debtors' estates and unsecured creditors. The Committee's attempts to persuade the Debtors to assert causes of

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action against Cerberus have been rebuffed. Further, the Debtors' positions on the PM35 Parties demonstrate that demand upon the Debtors would be futile. Accordingly, the Committee respectfully requests that the Court grant it derivative standing to commence and prosecute actions against the Proposed Defendants.

Causes Of Action Against Cerberus

2. The Committee seeks standing to commence and prosecute preference and fraudulent transfer claims against Cerberus. Specifically, on the eve of bankruptcy, NewPage paid to Cerberus more than $2 million of fees and expenses accrued under an advisory agreement. Further, during the year prior to the bankruptcy filing, NewPage paid another $1 million to Cerberus for purported management fees.[1]

3. These payments to Cerberus are avoidable as preferential and/or fraudulent transfers. The Committee has requested that the Debtors seek the return of these payments. The Debtors, however, have thrown up delay after delay, and ultimately failed to respond to the Committee's demands. Since these are colorable causes of action that would, if successful, benefit the estates, the Committee is requesting that the Court grant it standing to commence and prosecute causes of action to avoid these payments to Cerberus.

[1] The Committee continues to investigate the Debtors' transactions with insiders and the claims described herein do not represent the entire universe of potential claims against Cerberus. For example, on June 6, 2012, the Debtors amended their schedules and statements of financial affairs to, among other things, identify payments made in the one year prior to the Petition Date to two affiliates of Stora Enso Oyj. Specifically, Corenso North America Corp. ("Corenso") received payments totaling $12,486,141.97, and Thiele Kaolin received payments totaling $23,200,934.51 in the one-year period. As affiliates of Stora Enso Oyj (itself the owner of approximately twenty percent of the equity of NewPage Group Inc.), Corenso and Thiele Kaolin are also insiders of the Debtors, and these payments are potentially subject to avoidance. The Committee has just commenced its investigation into these two series of payments.

In addition, the Committee has filed a motion for derivative standing to assert causes of action arising out of the Debtors' highly leveraged acquisition of Stora Enso Oyj's North American operations in 2007. [Docket No. 1530]. The factual allegations contained in the complaint attached thereto may give rise to

Causes Of Action Against PM35 Parties

4. The Committee seeks standing to file a complaint to recharacterize a so-called "Lease Agreement" (as amended, the "Financing Agreement") governing the use of a specialty coated paper machine, known as "Paper Machine 35," by debtor NewPage Wisconsin System Inc. ("NewPage Wisconsin") as a financing arrangement. The Committee also seeks a determination by the Court that the PM35 Parties' interest in Paper Machine 35 is unperfected.

5. The Committee has already filed objections to the PM35 Parties' proofs of claim relating to the Financing Agreement [Docket No. 1307 and 1331] (together, the "Committee Objections"). On June 21, 2012, this Court entered an Order denying the Committee Objections *without prejudice* [Docket No. 1844] (the "PM35 Order"), and stated that, should the Committee seek standing to bring an adversary proceeding, this Court might view the matter differently."[2]

6. The Committee is now seeking standing to bring an adversary proceeding against the PM35 Parties. Any demand upon the Debtors to file a complaint against the PM35 Parties would be futile. The Debtors have already stated their unequivocal position that the Committee lacks standing to bring these claims, and that the Committee's actions impair the Debtors' administration of their chapter 11 cases and their exclusivity rights.[3] In addition, the Debtors advised the Committee that they have reached the parameters of a "settlement" with *Stora Enso Oyj* ("Stora") – *not* the PM35 Parties – with respect to Paper Machine 35. To date, however, the

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additional causes of action against Cerberus who, at all times, controlled the Debtors. The Committee reserves all rights with respect thereto.

[2] In dicta, the Court also commented that the "Debtors have eliminated any harm from payments…by obtaining agreement from WC and WF for repayment." PM35 Order, at 3. The Committee respectfully disagrees. The Debtors' letter agreement regarding the January payment was solely with Stora – *not* Wilmington Trust or Wells Fargo, and the Debtors make "lease" payments to Wilmington Trust, *not* Stora. Further, efforts to cause Wilmington Trust or Wells Fargo to disgorge the January payment or future payments will be difficult at best, because such funds will have already been disbursed to numerous holders of the underlying indenture certificates. Accordingly, the Committee submits that the risk to unsecured creditors has not been eliminated by the Debtors.

Debtors have not filed a motion seeking court approval of this "settlement," and the Committee understands critical terms of such "settlement" remain open. This "settlement" may never come to fruition, but in any event, this development illustrates that any demand upon the Debtors would be futile. Since these are colorable causes of action that would, if successful, benefit the estates, the Committee requests that the Court grant it standing to commence and prosecute these causes of action against the PM35 Parties. The Committee understands that if and when the Debtors submit their "settlement" the Court will compare it to what benefit the proposed litigation provides, but the Committee cannot stay in "limbo" awaiting the contents and timing of such settlement.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

8. On September 7, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

9. 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 in these cases. These chapter 11 cases are jointly administered and have been consolidated for procedural purposes only.

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[3] *See* Debtors' Response to Committee Objections, at 2-3.

10. On September 21, 2011, the United States Trustee for the District of Delaware appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code. The Committee represents the interests of all of the unsecured creditors of the Debtors.

FACTUAL BACKGROUND TO CLAIMS AGAINST CERBERUS

11. Cerberus Capital owns approximately 80% of the common stock of NewPage Group Inc. ("NewPage Group"), the direct or indirect parent of each of the Debtors. At all relevant times, through its board seats and embedded professionals, Cerberus controlled the Debtors.[4] Because Cerberus Capital is the controlling shareholder of the Debtors, Cerberus Capital as well as its affiliates, Cerberus Partners and COAC, are insiders of the Debtors pursuant to sections 101(31)(B)(iii) and (E) of the Bankruptcy Code.

12. Pursuant to that certain Master Consulting and Advisory Services Agreement dated as of October 31, 2008 (the "Advisory Agreement") between NewPage and COAC, various Cerberus employees provide "consulting" and "advisory" services to NewPage. The Advisory Agreement provides that all service fees thereunder are to be billed to NewPage on a monthly basis and to be paid by NewPage not later than 30 days after the due date set forth in the applicable invoice.[5]

13. The Committee has investigated certain payments made to Cerberus that, on their face, appear to have been made in connection with certain services performed by Cerberus employees. According to the Statements of Financial Affairs of NewPage Corporation (as amended, the "SOFA"), NewPage made the following payments to Cerberus entities within 1 year of the Petition Date:

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[4] *See, e.g.*, NewPage Corp., Annual Report For Year Ended December 31, 2012 (Form 10-K) at 15, 92, 103-06, 128, n.1, 129-30 (the "NewPage Annual Report").

[5] *See* Advisory Agreement §§ 5.1, 5.2.

- payments made by NewPage to Cerberus Partners, which are described as "Services Performed" in the SOFA (the "August/September Cerberus Payments")::
    - $1,712,153.06 on August 1, 2011,
    - $221,584.77 on August 23, 2011,
    - $148,667.97 on August 25, 2011, and
    - $159,636.35 on September 6, 2011.
- payments made by NewPage to Cerberus Partners, which are described as "Services Performed" that were paid on "various" dates within one year prior to the Petition Date in the aggregate amount of $3,325,096.53 (the "One Year Cerberus Payments," and, together with the August/September Cerberus Payments, the "Cerberus Payments").

14. Upon information and belief, the Debtors incurred consulting and advisory fees and related expenses from September 2010 through September 2011 under the Advisory Agreement. Upon information and belief, Cerberus selected the individuals that would provide services to NewPage under the Advisory Agreement.

15. The August/September Cerberus Payments were made less than six weeks prior to the Petition Date, and were paid on account of the amounts due under the Advisory Agreement.

16. The monthly fees and expenses charged by COAC were for the services provided by ten individual advisors. In several instances, the amounts charged for the services provided by individual consultants during the year prior to the Petition Date exceeded the annual base salaries of NewPage's key officers. For example, COAC charged NewPage for the services of one consultant, amounts that well exceeded the annual base salary of NewPage's President and Chief Executive Officer and NewPage's Senior Vice President and Chief Financial Officer.

17. Upon information and belief, one Cerberus advisor was brought in to assist in the preparation of NewPage Port Hawkesbury Corp.'s ("NPPH") filing under Canada's Companies Creditors Arrangement Act (R.S.C., 1985, c. 36) (the "CCAA"). At this time, NewPage was

seeking to divest itself of NPPH and negotiating a purported settlement of issues between NewPage and NPPH prior to these entities' commencing their respective chapter 11 and CCAA cases. Upon information and belief, the Cerberus advisor was deeply involved on both sides of the transaction, notwithstanding the conflicting interests of NewPage, NPPH, and Cerberus. As such, any "advice" that NewPage received from this Cerberus advisor likely served only Cerberus' interests and did not benefit NewPage or its stakeholders.

18. On April 3, 2012, the Committee sent a letter to the counsel to the Debtors demanding that the Debtors bring an action for preferential and fraudulent transfers with respect to the Cerberus Payments. On April 17, 2012, counsel to the Debtors responded that it would advise the Committee by April 30, 2012 as to whether the Debtors will proceed by litigation or settlement. Counsel to the Debtors also noted that it had been in touch with Cerberus' attorneys about this matter. The Debtors did not respond by April 30, 2012. Further inquiries to Debtors' counsel about this matter have been ignored. The proposed complaint setting forth the causes of action against Cerberus is attached hereto as Exhibit B (the "Cerberus Complaint").

FACTUAL BACKGROUND TO CLAIMS AGAINST PM35 PARTIES

19. Paper Machine 35 is housed at the Debtors' paper mill location in Stevens Point, Wisconsin. It stands three stories high, is roughly equivalent in length to a football field, and has the capacity to produce 90,000 tons of specialty coated paper per year. Paper Machine 35 was manufactured specifically for use at the Stevens Point mill by NewPage Wisconsin's predecessor in interest, Consolidated Papers, Inc. ("Consolidated Papers").

20. Consolidated Papers acquired Paper Machine 35 in 1997 pursuant to a sale and leaseback arrangement. As a sale and leaseback, Paper Machine 35 was nominally purchased from Consolidated Papers by Wilmington Trust, and then leased back from Wilmington Trust to

Consolidated Papers, the original "lessee" under the Financing Agreement. Wilmington Trust funded this transaction with an equity investment from an owner participant, and debt issued by Wilmington Trust, in its role as owner trustee under the Trust Indenture Agreement dated as of December 23, 1997, to the lenders under the Trust Indenture Agreement.

21. On November 15, 2002, Stora Enso Oyj ("Stora") executed a guaranty agreement (the "SEO Guaranty") for the benefit of, among others, Wilmington Trust for the lessee's obligations (now NewPage Wisconsin's obligations) under the Financing Agreement.

22. After the Petition Date, on February 2, 2012, Wilmington Trust filed proof of claim nos. 2222 and 2234 (the "WT Proofs of Claim")[6] and Wells Fargo Bank Northwest, N.A. ("Wells Fargo") filed proof of claim no. 2323 (the "WF Proof of Claim") with the Court, each in connection with the Financing Agreement and Paper Machine No. 35.

23. From the outset of these cases, the Committee has opposed any postpetition payments to Wilmington Trust under the Financing Agreement. Despite that opposition, the Debtors made a postpetition payment to Wilmington Trust in face of the Committee's and the second lien noteholders informal committee's opposition (the "January Payment") pursuant to letter agreement dated December 29, 2011 between NewPage Wisconsin and Stora (to which the PM35 Parties *are not* a party).

24. The January Payment was made after only perfunctory consideration of the objecting parties' concerns. The January Payment showed that the Debtors had accepted the incorrect conclusion asserted by the PM35 Parties that the Financing Agreement is a true lease or, at the very least, that the Debtors were satisfied with the *status quo*.

[6] The WT Proofs of Claim are identical.

25. Because the next payment under the Financing Agreement is due in July 2012, the Committee could not sit idly by in the hopes that the Debtors will take action in this matter. As such, on March 21, 2012, the Committee filed an objection to the WT Proofs of Claim [Docket No. 1307] and, on March 26, 2012, the Committee, though Delaware counsel, filed an objection to the WF Proof of Claim [Docket No. 1331], arguing, among other things, that Wells Fargo is not a creditor of the Debtors. Further, on March 26, 2012, the second lien noteholders informal committee filed a joinder to the Committee's objection to the WT Proofs of Claim [Docket 1332].

26. In response, on April 18, 2012, Wilmington Trust, Wells Fargo and Stora filed a joint response to the Committee Objections [Docket No. 1419]. Also, on April 18, 2012, the Debtors filed their response to the Committee Objections [Docket No. 1423]. The Committee filed its reply to these responses on April 23, 2012 [Docket No. 1440].

27. On April 25, 2012, the Court held a hearing on the Committee Objections. On June 21, 2012, this Court entered the PM35 Order denying the Committee Objections *without prejudice* to the Committee's ability to seek standing to file an adversary proceeding against the PM35 Parties. Accordingly, the Committee is filing this Motion seeking derivative standing to do so. The proposed complaint setting forth the causes of action against the PM35 Parties is attached hereto as Exhibit C (the "PM35 Complaint").

RELIEF REQUESTED

28. The Committee respectfully requests the entry of an order, substantially in the form attached hereto as Exhibit A, pursuant to sections 105(a), 1103(c)(5) and 1109(b) of the Bankruptcy Code granting the Committee standing to commence and prosecute actions against (a) Cerberus and (b) the PM35 Parties, substantially in the form of the draft complaints attached hereto as Exhibit B and Exhibit C, respectively.

BASIS FOR RELIEF

29. Congress specifically authorized official committees to "investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or the formulation of a plan."[7] Further, section 1103(c)(5) provides that a committee may perform such other services as are in the interest of those represented.[8] Section 1109(b) provides that a party-in-interest (explicitly referencing a creditors' committee) may raise and may appear and be heard on any issue in a case under chapter 11.[9] These powers were provided to official creditors' committees in order to aid the exercise of their fiduciary duty to maximize recoveries for unsecured creditors.

30. Pursuant to sections 1103 and 1109 of the Bankruptcy Code, the Committee should be granted standing to commence and prosecute causes of action against the Proposed Defendants on behalf of the Debtors' estates. In the first instance, a debtor has standing to prosecute claims on behalf of its estate.[10] However, the Third Circuit has recognized that a "straightforward application" of a bankruptcy court's equitable powers allows for a grant of standing upon creditors' committees to sue derivatively for the benefit of the estate. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568, 580 (3d Cir. 2003) (en banc) (holding that bankruptcy court can authorize creditors' committees to pursue avoidance actions); *Infinity Investors Ltd ex rel. Yes! Entm't Corp. v. Kingsborough (In re Yes! Ent'mt Corp.)*, 316 B.R. 141, 145 (D. Del. 2004) (same).

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7 11 U.S.C. § 1103(c)(2).

8 11 U.S.C. § 1103(c)(5).

9 11 U.S.C. § 1109(b).

10 *See* 11 U.S.C. §§ 323, 1107, 544.

Many other courts have found that an official creditors' committee has an implied right to sue on behalf of a bankruptcy estate pursuant to sections 1103 and 1109 of the Bankruptcy Code.[11]

31. Generally, derivative standing requires: (1) the existence of a colorable claim; (2) the debtor's unjustifiable refusal to pursue the claim (or, alternatively, a showing that a demand that the debtor pursue the claim would be futile); and (3) the permission of the bankruptcy court to initiate the action. *See Yes! Entm't*, 316 B.R. at 145. In determining whether a debtor's refusal (or presumed refusal) to bring an action is unjustified, courts examine whether the claim is likely to benefit the estate but are not to conduct a "mini-trial." *Id.*

A. Committee Has Asserted Colorable Claims

32. The first element requires a court to determine whether a party seeking derivative standing has asserted a colorable claim or claims for relief that on appropriate proof would support a recovery. In Delaware, courts have eschewed line-by-line or claim-by-claim analysis of proposed complaints in favor of a more general analysis of the import of what has been alleged. See, e.g., *Transcript of Proceedings* at 6, 44, *In re Distributed Energy Systems, Corp.*, Case No. 08-11101 (KG) (Bankr. D. Del. July 30, 2008) (noting that the colorability standard is less than a Rule 12(b)(6) standard and requires only plausibility and that the claims be not "without merit").[12] Here, the Committee's prospective claims, at a minimum, surpass the plausibility requirement.

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[11] *See Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000); *In re Gibson Group, Inc.*, 66 F.3d 1436, 1445 (6th Cir. 1995); *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988).

[12] *See also Transcript of Proceedings*, at 97, *In re Fedders North America, Inc.*, Case No. 07-11176 (BLS) (Bankr. D. Del. Mar. 24, 2008), ECF No. 933 (noting that "the sufficiency of the allegations simply cannot be [held] to a Rule 12(b)(6) standard, because we haven't even filed the complaint yet"); *Adelphia*

(i) Committee Has Asserted Colorable Claims Against Cerberus

33. As alleged in the Cerberus Complaint, the Committee's asserted claims for the avoidance of the Cerberus Payments as preferential transfers and/or as fraudulent transfers, at a minimum, satisfy the colorability requirement.[13]

34. *First*, the Cerberus Payments of approximately $3.3 million for "Services Performed" are avoidable as preferential transfers. By making the August/September Cerberus Payments, the Debtors paid an entire year's worth of fees and expenses accrued under the Advisory Agreement within a period of less than *six weeks* before the Petition Date. NewPage was unquestionably insolvent at the time these transfers were made to Cerberus on account of an antecedent debt, all within six weeks of the Petition Date.[14] Therefore, the payment of these fees on the eve of bankruptcy is *prima facie* avoidable as a preference pursuant to section 547(b) of the Bankruptcy Code. Moreover, the entirety of the One Year Cerberus Payments is avoidable as preferential transfers. The proper reach-back period is one year prior to the Petition Date, because Cerberus, as controlling shareholder, is an insider of the Debtors. See 11 U.S.C. §§ 101(31), 547(b)(4)(B). The Committee submits that NewPage was insolvent during the year prior to the Petition Date.

35. Nor can Cerberus avail itself of any of the defenses under section 547(c). Most notably, the ordinary course of business defense is not available to Cerberus because these payments were not made in the ordinary course of NewPage's business nor made according to

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Commc'ns Corp. v. Bank of America (In re Adelphia Commc'ns Corp.), 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005) (noting that the burden of showing a colorable claim is a "relatively easy one").

[13] In addition, the Cerberus Complaint seeks, (a) the disallowance of any claim asserted by the defendants against the Debtors pursuant to section 502(d) of the Bankruptcy Code, and (b) to preserve the Debtors' rights of setoff and recoupment against any of the defendants.

[14] Based on the Schedules of Assets and Liability for NewPage [D.I. 672], NewPage had assets of approximately $1.87 billion and liabilities of approximately $3.67 billion as of the Petition Date. In any

ordinary business terms.[15] Rather, the fees for "Services Rendered" by the controlling shareholder were billed and became due on a monthly basis,[16] but were paid on the eve of the Debtors' bankruptcy filing to the very insiders who likely selected the timing of the bankruptcy filing. Therefore, the Cerberus Payments are likely avoidable as preferential transfers.

36. *Second*, the Cerberus Payments in the aggregate amount of approximately $3.33 million, as well as possibly other payments made to Cerberus under the Advisory Agreement within four years prior to the Petition Date,[17] are also likely avoidable as fraudulent transfers pursuant to sections 544 and 548 of the Bankruptcy Code, because NewPage did not receive reasonably equivalent value in management services for these payments. For example, during the twelve months leading up to the Petition Date, COAC charged NewPage for the services of one of its consultants in an amount that *exceeds* the annual base salary of NewPage's President & Chief Executive Officer, Mr. George F. Martin and its Senior Vice President and Chief Financial Officer, Mr. Jay A. Epstein. Certain of the Cerberus consultants were specifically brought in to assist NewPage in its restructuring efforts and the preparation of filings under chapter 11 of the Bankruptcy Code, while other Cerberus consultants were specifically brought in to assist in the preparation of NewPage Port Hawkesbury's ("NPPH") filing under Canada's Companies' Creditors Arrangement Act (the "CCAA"). At the time the Cerberus Payments were made, however, NewPage was insolvent. Moreover, in the months leading up the chapter 11 filing, NewPage was seeking to divest itself of NPPH, purportedly negotiating a settlement of issues

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event, NewPage is presumed to have been insolvent during the 90 days immediately preceding the Petition Date. *See* 11 U.S.C. § 547(f).

15 *See* 11 U.S.C. § 547(c)(2).

16 *See* Advisory Agreement §§ 5.1, 5.2,

17 Delaware's fraudulent transfer law provides for a four-year reach-back period. *See* 6 Del. C. § 1309.

between NewPage and NPPH prior to launching their respective chapter 11 and CCAA cases.[18] One consultant, in particular, was deeply involved on both sides of the transaction, notwithstanding that the interests of NewPage, NPPH and Cerberus (as controlling shareholder of NewPage) were very much in conflict. Indeed, any "advice" that NewPage received from Cerberus employees likely served only Cerberus' interests and did not benefit NewPage or its stakeholders.[19] Therefore, the Cerberus Payments, as well as other payments made to Cerberus under the Advisory Agreement within the four years prior to the Petition Date, are subject to challenge as constructive and/or intentional fraudulent transfers.

37. The factual allegations contained in the Cerberus Complaint concerning the Cerberus Payments are not "without merit" and are sufficient to satisfy the very low bar that Delaware courts have set for colorability.

(ii) Committee Has Asserted Colorable Claims With Respect to Paper Machine 35

38. As alleged in the PM35 Complaint, the Committee's claims that the Financing Agreement is a financing arrangement and not a true lease, and that the PM35 Parties' interest in Paper Machine 35 is unperfected, satisfy the colorability requirement.

39. *First*, the intent of the parties at the outset demonstrates that the Financing Agreement is not a true lease. At the time of the execution of the Financing Agreement, Consolidated Papers had no intention of ever returning Paper Machine 35 to Wilmington Trust or CPI 1997. At all times, Consolidated Paper conducted itself as the owner of Paper Machine 35. While Consolidated Papers was in possession of Paper Machine 35, it made repairs and updates

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[18] *See* Declaration of George F. Martin in Support of Debtors' First Day Motions and Applications [D.I. 3] ¶ 38.

[19] Nor can there be any argument that these charges relate to any other services that Cerberus may have provided to the Debtors. According to NewPage's most recent 10-K, "[a]ctivity related to Cerberus' monitoring of their equity investment, such as nonindependent director fees and expenses, **are not charged**

consistent with the view that it owned Paper Machine 35, and this course of conduct was continued by Stora when it acquired Consolidated Papers, and thereafter by the Debtors. Several millions of dollars in maintenance, upgrades and improvements have been spent on Paper Machine 35 since the inception of the Financing Agreement.

40. *Second*, the terms of the Financing Agreement demonstrate that it is a financing arrangement. NewPage Wisconsin has no right to terminate the Financing Agreement during the term of the Financing Agreement unless NewPage Wisconsin pays every dollar owed plus all additional amounts required to make Wilmington Trust and its investors whole, including principal and interest. Further, the purported rights under the Financing Agreement to return Paper Machine 35 is illusory, because such return right is subordinate to Wilmington Trust's right, among other things, to force NewPage Wisconsin to renew the Financing Agreement. In addition, the Financing Agreement contains an end of term disguised purchase option, which is indicative of a financing arrangement and not a true lease.

41. *Third*, the economic reality of this transaction reveals that Wilmington Trust could not have reasonably intended to repossess Paper Machine 35 at any time and that NewPage Wisconsin never intended to return Paper Machine 35. By the end of the Financing Agreement, it would make no economic sense for NewPage Wisconsin to return Paper Machine 35 to Wilmington Trust because NewPage Wisconsin (a) will have already paid more than the value of Paper Machine 35, (b) will have paid millions in maintenance costs and upgrades, and (c) would need to pay millions just to crate and freight Paper Machine 35 at the end of the Financing Agreement.

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to the Company. Cerberus also provides certain services **free of charge**, including chairman and company director fees and expenses." NewPage Annual Report at 92 (emphasis added).

42. *Lastly*, the PM35 Parties' interest in Paper Machine 35 is unperfected. Wilmington Trust, as it should have, filed a Uniform Commercial Code ("UCC") financing statement against Consolidated Papers on January 2, 1998, but Wilmington Trust failed to continue this financing statement, and it lapsed five years later on January 2, 2003. There is no current UCC filing by Wilmington Trust with respect to Paper Machine 35. If someone were to search the name of the debtor listed in the 1998 UCC filing in the UCC database of the Wisconsin secretary of state, the 1998 UCC filing would not appear on such search because the 1998 UCC filing is "inactive."

43. At bottom, the factual allegations contained in the PM35 Complaint are far from being "without merit" and therefore satisfy the "colorability" bar established by Delaware courts.

B. Demand Upon Debtors Would Be Futile

44. Derivative standing is generally granted where a debtor unjustifiably or unreasonably refuses to pursue claims that the bankruptcy court finds would benefit the estate.[20] A committee is not required to demand formally that a debtor take action where it is "plain from the record that no action on the part of the debtor would have been forthcoming."[21] Further, in order to determine whether a debtor's refusal (or constructive refusal) to bring an action is unjustified, a court will perform a cost-benefit analysis of the claim. If the benefit to the estate is

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[20] *See Cybergenics*, 33 F.3d at 568. *See also Jefferson Bd. of Cnty. Comm'rs v. Voinovich (In re The V Cos.)*, 292 B.R. 290, 294 (B.A.P. 6th Cir. 2003).

[21] *See Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 544 (W.D. Pa. 2005) (finding formal request of debtor to bring action waived under DIP financing orders would have been futile as debtor could not have "seriously entertained the idea"); *see also, e.g., Louisiana World Exposition, Inc. v. Fed. Ins. Co. (In re Louisiana World Exposition, Inc.)*, 832 F.2d 1391, 1397-98 (5th Cir. 1987) (court would not remand so that committee could make formal demand upon debtor where conflicts would likely prevent debtor from pursuing litigation adverse to its directors and officers).

likely to outweigh the cost of pursuing the action, the court may authorize a party in interest to pursue the claim.[22]

45. The Committee's attempts to persuade the Debtors to assert causes of action against Cerberus have been rebuffed. Further, the Debtors state that the Committee lacks standing to bring claims against the PM35 Parties, and that the Committee's actions impair the Debtors' administration of their chapter 11 cases and their exclusivity rights.[23] Accordingly, demand upon the Debtors would be futile.

46. The benefit to the estates of asserting these claims, however, is clear. A successful avoidance action against Cerberus could bring more than $3 million into the Debtors' estates. While the DIP Order provides the DIP Lenders with first priority liens on, among other things, proceeds of Avoidance Actions (as defined in the DIP Order), there is no evidence that the DIP Lenders will not be paid in full or that they will need to look to such proceeds for satisfaction of the DIP obligations. Nor is there any evidence that the collateral of the first and second lien noteholders has suffered a diminution in value, such that either group they would have an administrative superpriority claim that could be satisfied from the proceeds of Avoidance Actions. Therefore, the recoveries from the foregoing avoidance actions would accrue to the benefit of unsecured creditors of these estates. As for the costs, in the ordinary course of its diligence efforts, the Committee has already investigated the foregoing claims against Cerberus. The incremental costs of prosecuting a garden-variety avoidance action therefore are likely to be minor when balanced against the potential recovery from Cerberus for a successful avoidance action.

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22 *See Nat'l Forge*, 326 B.R. at 548.

23 *See* Debtors' Response to Committee Objections (as defined below), at 2-3.

47. In addition, should the Financing Agreement be determined to be a financing arrangement and not a true lease, the PM35 Parties would not be entitled to any postpetition administrative expense payments. At most, they will be unsecured prepetition creditors of the estates. At bottom, the relief sought by the Committee, if granted, would save the estates millions of dollars – which begs the question of why the Debtors are so opposed to it. As mentioned above, the Debtors have informed the Committee that they have now reached a "settlement" with *Stora – not* the PM35 Parties – but no motion seeking court approval of this "settlement" has been filed and the exact terms of the "settlement" remain unclear. Ultimately, to date, the Debtors' actions do little more than protect Stora – a statutory insider of the Debtors – from having to pay on the SEO Guaranty. Indeed, absent the Debtors' protection, the PM35 Parties would seek and obtain payment in full from Stora, leaving Stora with whatever prepetition claims for reimbursement it may have (if any) against the estate.

C. Committee Is Seeking Prior Court Approval

48. Finally, the Committee is seeking permission from this Court to pursue the forgoing avoidance claims against the Proposed Defendants. Since these claims are colorable and the Debtors have unjustifiably refused to pursue these claims and/or demand upon the Debtors is futile, the Court should grant derivative standing to the Committee to commence and prosecute these claims.

CONCLUSION

49. Courts have reasoned that unsecured creditors' committees are likely the best-suited party to pursue derivative suits on behalf of bankruptcy estates, given that they are the

parties whose interests avoidance actions serve to protect.[24] Here, granting derivative standing to the Committee to prosecute claims against the Proposed Defendants squarely serves the equitable concerns articulated by the Third Circuit and will protect the interests of the Debtors' unsecured creditors.

NOTICE

50. Notice of this Application has been provided to: (i) the Office of the United States Trustee for the District of Delaware, (ii) counsel for the Debtors, (iii) counsel for J.P. Morgan Chase Bank, N.A., (iv) counsel to Cerberus, (v) counsels to the PM35 Parties, and (vi) all parties who have filed a notice of appearance and requested service of pleadings in these chapter 11 cases.

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[24] *Cybergenics*, 330 F.3d at 573. *See also Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, at 7, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000) (reasoning that interpretation of Congress' mandate is often guided contextually by who "is the most obvious party" empowered by the provision at issue).

WHEREFORE, the Committee respectfully requests that this Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein, and granting the Committee such other relief as this Court deems just and proper.

Dated: June 22, 2012
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Michael S. Neiburg

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Co-Counsel to the
Official Committee of Unsecured Creditors

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
NEWPAGE CORPORATION, *et al.*, [1]	:	**Case No.: 11-12804 (KG)**
Debtors.	:	**(Jointly Administered)**
	:	**Hearing Date: July 9, 2012 at 2:00 p.m. (ET)** **Objection Deadline: July 2, 2012 at 4:00 p.m. (ET)**

NOTICE OF MOTION

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE, (II) COUNSEL FOR THE DEBTORS, (III) COUNSEL FOR J.P. MORGAN CHASE BANK, N.A., (IV) COUNSEL TO CERBERUS, (V) COUNSELS TO THE PM35 PARTIES, AND (VI) ALL PARTIES WHO HAVE FILED A NOTICE OF APPEARANCE AND REQUESTED SERVICE OF PLEADINGS IN THESE CHAPTER 11 CASES

PLEASE TAKE NOTICE that the Official Committee of Unsecured Creditors (the "Committee") of NewPage Corporation ("NewPage") and its affiliated debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors") has filed the attached **Motion for Order Under Bankruptcy Code Sections 105, 1103, and 1109 Authorizing Official Committee of Unsecured Creditors to Commence and Prosecute Certain Claims on Behalf of Debtors' Estates Against (A) Cerberus and (B) The PM35 Parties** (the "Motion").

PLEASE TAKE FURTHER NOTICE that responses, if any, to the Motion must be filed with the United States Bankruptcy Court for the District of Delaware, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **July 2, 2012** (the "Objection Deadline"). At the same time, you must serve a copy of your response upon the Committee's proposed undersigned counsel.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON **JULY 9, 2012 AT 2:00 P.M. (ET)**, BEFORE THE HONORABLE KEVIN GROSS, CHIEF UNITED STATES BANKRUPTCY JUDGE, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 6TH FLOOR, COURTROOM NO. 3, WILMINGTON, DELAWARE 19801.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Chillicothe Paper Inc. (6154), Escanaba Paper Company (5598), Luke Paper Company (6265), NewPage Canadian Sales LLC (5384), NewPage Consolidated Papers Inc. (8330), NewPage Corporation (6156), NewPage Energy Services LLC (1838), NewPage Group Inc. (2465), NewPage Holding Corporation (6158), NewPage Port Hawkesbury Holding LLC (8330), NewPage Wisconsin System Inc. (3332), Rumford Paper Company (0427), Upland Resources, Inc. (2996), and Wickliffe Paper Company LLC (8293).

PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: Wilmington, Delaware
June 22, 2012

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Michael S. Neiburg

M. Blake Cleary (No. 3614)
Jaime Luton Chapman (No. 4936)
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Co-Counsel for the Official Committee of Unsecured Creditors of NewPage Corp., et al.

Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
NEWPAGE CORPORATION, *et al.*,	:	**Case No.: 11-12804 (KG)**
Debtors.	:	**(Jointly Administered)**

ORDER UNDER BANKRUPTCY CODE SECTIONS 105, 1103, AND 1109 AUTHORIZING OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO COMMENCE AND PROSECUTE CERTAIN CLAIMS ON BEHALF OF DEBTORS' ESTATES AGAINST (A) CERBERUS AND (B) THE PM35 PARTIES

Upon consideration of the motion (the "Motion")[1] of the Official Committee of Unsecured Creditors (the "Committee") of NewPage Corporation ("NewPage") and its related debtors and debtors in possession (collectively, the "Debtors") for entry of an order authorizing the Committee to commence and prosecute certain claims of the Debtors' estates against the Proposed Defendants; and it appearing that the Court has jurisdiction to consider the Motion and the relief requested therein; and due notice of the Motion having been provided, and it appearing that no other or further notice be provided; and after due deliberation and sufficient cause appearing therefore; it is hereby ORDERED THAT:

1. The relief requested in the Motion is hereby GRANTED.

2. The Committee is granted derivative standing and authorized to initiate an action and to prosecute the claims set forth in the draft Cerberus Complaint substantially in the form attached as Exhibit B to the Motion.

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

3. The Committee is granted derivative standing and authorized to initiate an action and to prosecute the claims set forth in the draft PM35 Complaint substantially in the form attached as Exhibit C to the Motion.

4. Nothing in the Order or the Motion shall in any way affect the Committee's rights to seek standing to bring any other or additional causes of actions against the Proposed Defendants or any other party.

5. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2012
Wilmington, Delaware

_____
Kevin Gross
Chief United Stated Bankruptcy Judge

Exhibit B

Cerberus Complaint

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
NEWPAGE CORPORATION, *et al.*,	:	**Case No.: 11-12804 (KG)**
Debtors.	:	**(Jointly Administered)**
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF NEWPAGE CORPORATION, *et al.*, for and on behalf of the bankruptcy estates of Debtors, NewPage Group Inc., NewPage Holding Corporation, NewPage Corporation, Chillicothe Paper Inc., Escanaba Paper Company, Luke Paper Company, NewPage Canadian Sales LLC, New Page Consolidated Papers, Inc., NewPage Energy Services LLC, NewPage Port Hawkesbury Holding LLC, NewPage Wisconsin System, Inc., Rumford Paper Company, Upland Resources, Inc., and Wickliffe Paper Company, LLC,	:	
Plaintiff,	:	**Adv. Proc. No. _____**
v.	:	
CERBERUS OPERATIONS AND ADVISORY COMPANY, LLC, CERBERUS PARTNERS, L.P., AND CERBERUS CAPITAL MANAGEMENT, LP,	:	
Defendants.	:	

COMPLAINT TO AVOID AND RECOVER PREFERENTIAL AND FRAUDULENT TRANSFERS

Plaintiff, the Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of NewPage Corporation ("NewPage") and its affiliated debtors and debtors in possession (together with NewPage, the "Debtors"), by and through its undersigned counsel,

brings this action on behalf of the Debtors' estates against Defendants Cerberus Operations and Advisory Company, LLC ("COAC"), Cerberus Partners, L.P. ("Cerberus Partners"), and Cerberus Capital Management, LP ("Cerberus Capital" and, together with COAC and Cerberus Partners, collectively, "Cerberus").[1] Plaintiff respectfully alleges as follows:

NATURE OF THE ACTION

1. Pursuant to sections 547, 548, and 550 of the Bankruptcy Code (as defined below), this action is brought to avoid and recover from Defendants certain transfers made by NewPage to Defendants. Specifically, on the eve of bankruptcy, NewPage paid to Cerberus more than $2 million, representing approximately one year's worth of fees and expenses accrued under an advisory agreement. In addition, during the year prior to the bankruptcy filing, NewPage paid approximately another $1 million to Cerberus for purported management fees without receiving reasonably equivalent value in return. These payments are avoidable as preferential and/or fraudulent transfers.

PARTIES

2. On September 7, 2011, (the "Petition Date"), the Debtors filed voluntary petitions for relief (the "Bankruptcy Cases") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Committee was formed in the Bankruptcy Cases by the United States Trustee for the District of Delaware on September 21, 2011, pursuant to section 1102(a) of the Bankruptcy Code. On [_____], 2012, the Committee filed a motion seeking, among other things,

[1] The Committee continues to investigate the Debtors' transactions with insiders and the claims described herein do not represent the entire universe of potential claims against Cerberus.

authority to prosecute this action on behalf of the Debtors' estates pursuant to sections 105, 1103, and 1109 of the Bankruptcy Code (such motion, the "Derivative Standing Motion"). On [____], 2012, the Court granted the Motion and permitted the Committee to prosecute this action.

4. Defendant Cerberus Capital is the controlling shareholder of the Debtors by virtue of its ownership of approximately 80% of the common stock of NewPage Group Inc., the direct or indirect parent of each of the Debtors.

5. Defendant COAC is an affiliate of Cerberus Capital and is party to that certain Master Consulting and Advisory Services Agreement, dated as of October 31, 2008 (the "Advisory Agreement") with NewPage.

6. Defendant Cerberus Partners is an affiliate of Cerberus Capital.

JURISDICTION

7. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this Court under 28 U.S.C. § 1409.

8. The statutory bases for the relief requested herein are sections 547, 548, and 550 of the Bankruptcy Code and Rule 7001 *et seq.* of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

STATEMENT OF FACTS

9. Cerberus Capital owns approximately 80% of the common stock of NewPage Group Inc. At all relevant times, through its board seats and embedded professionals, Cerberus Capital controlled the Debtors.

10. Pursuant to the Advisory Agreement between NewPage and COAC, various Cerberus employees purported to provide consulting and advisory services to NewPage. The

Advisory Agreement provided that all service fees accrued thereunder were to be billed to NewPage on a monthly basis and to be paid by NewPage no later than 30 days after the due date set forth on the applicable invoice.

11. According to the Statements of Financial Affairs (as amended, the "SoFA") filed by NewPage, NewPage made several payments to Cerberus for certain services performed by Cerberus employees:

(a) payments made by NewPage to Cerberus Partners, which are described as "Services Performed" in the SoFA (the "August/September Cerberus Payments"):

(i) $1,712,153.06 on August 1, 2011,

(ii) $221,584.77 on August 23, 2011,

(iii) $148,667.97 on August 25, 2011, and

(iv) $159,636.35 on September 6, 2011; and

(b) payments made by NewPage to Cerberus Partners, which are described as "Services Performed" that were paid on "various" dates within one year prior to the Petition Date in the aggregate amount of $3,325,096.53 (the "One Year Cerberus Payments," and, together with the August/September Cerberus Payments, the "Cerberus Payments").

The SoFA entries respecting the Cerberus Payments are excerpted on Exhibit A attached hereto and incorporated herein in their entirety.

12. Upon information and belief, the Debtors incurred consulting and advisory fees and related expenses from September 2010 through September 2011 under the Advisory Agreement in the aggregate amount of $REDACTED. Upon information and belief, Cerberus selected the individuals that would provide services to NewPage under the Advisory Agreement.

13. Upon information and belief, the August/September Cerberus Payments listed above and detailed on Exhibit A were made less than six weeks prior to the Petition Date, and were paid on account of the amounts due under the Advisory Agreement.

14. The monthly fees and expenses charged by COAC were for the services provided by ten individual advisors. In several instances, the amounts charged for the services provided by individual consultants during the year prior to the Petition Date *exceeded* the annual base salaries of NewPage's key officers. For example, COAC charged NewPage over $REDACTED for the services of one consultant, which well exceeds the annual base salary of NewPage's President and Chief Executive Officer and NewPage's Senior Vice President and Chief Financial Officer. In addition, the total amount COAC charged for advisors' travel and expense fees exceeded $REDACTED for the year prior to the Petition Date.

15. Upon information and belief, one Cerberus advisor was brought in to assist in the preparation of NewPage Port Hawkesbury Corp.'s ("NPPH") filing under Canada's *Companies Creditors Arrangement Act* (R.S.C., 1985, c. 36) (the "CCAA"). At this time, NewPage was seeking to divest itself of NPPH and negotiating a purported settlement of issues between NewPage and NPPH prior to these entities' commencing their respective chapter 11 and CCAA cases. Upon information and belief, the Cerberus advisor was deeply involved on both sides of the transaction, notwithstanding the conflicting interests of NewPage, NPPH, and Cerberus. As such, any "advice" that NewPage received from this Cerberus advisor likely served only Cerberus' interests and did not benefit NewPage or its stakeholders.

COUNT I

Avoidance and Recovery of Cerberus Payments Pursuant to 11 U.S.C. §§ 547 and 550

16. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs.

17. Section 547(b) of the Bankruptcy Code empowers a debtor in possession, for the benefit of the estate, to avoid a transfer to or for the benefit of a creditor of an interest in the property of the debtor in possession if the requirements set forth therein are met.

18. Pursuant to section 547(b) of the Bankruptcy Code, a debtor in possession may avoid any transfer of an interest in the property of the debtor in possession (a) to or for the benefit of a creditor, (b) for or on account of an antecedent debt owed by the debtor in possession before such transfer was made, (c) made while the debtor in possession was insolvent, (d) made on or within 90 days or, in the case of an insider, within one year before the filing of the petition, and (e) that enables such creditor to receive more in satisfaction of its claims than it would receive in a case under chapter 7 of the Bankruptcy Code if the transfer had not been made and the creditor had received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

19. Because Cerberus Capital is the controlling shareholder of the Debtors, Cerberus Capital as well as its affiliates, Cerberus Partners and COAC, are insiders of the Debtors pursuant to sections 101(31)(B)(iii) and (E) of the Bankruptcy Code.

20. Each of the Cerberus Payments was a transfer of an interest of NewPage in property of the Debtors' estates.

21. Each of the Cerberus Payments was made to or for the benefit of Defendants, who were creditors of NewPage at the time the subject transfers were made, and Defendants were either (a) the initial transferee of the Cerberus Payments, (b) the entities for whose benefit the Cerberus Payments were made, or (c) immediate or mediate transferees of an initial transferee.

22. Each of the Cerberus Payments was made on account of antecedent debts owed by NewPage to Defendants before such transfers were made due to Defendants' provision of services under the Advisory Agreement.

23. NewPage was insolvent on the dates on which it transferred each of the Cerberus Payments to Defendants. Moreover, pursuant to section 547(f) of the Bankruptcy Code,

NewPage is presumed to have been insolvent on and during the 90 days immediately preceding the Petition Date.

24. NewPage (a) transferred each of the August/September Cerberus Payments to Defendants within less six weeks prior to the Petition Date and (b) transferred each of the One Year Cerberus Payments to Defendants during the one-year period prior to the Petition Date. Thus, NewPage transferred the entirety of the Cerberus Payments to Defendants, each of which is an insider, within one year of the Petition Date.

25. Receipt of the Cerberus Payments enabled Defendants to recover more on their antecedent debts than they would have received if (a) the Cerberus Payments had not been made, (b) NewPage's chapter 11 case were a case under chapter 7 of the Bankruptcy Code, and (c) Defendants received payment of their antecedent debts to the extent provided by the provisions of the Bankruptcy Code.

26. The Cerberus Payments should be avoided as preferential transfers and the value of the Cerberus Payments recovered from Defendants.

COUNT II

Avoidance and Recovery of Cerberus Payments Pursuant to 11 U.S.C. §§ 548(a)(1)(A) and 550

27. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs.

28. NewPage voluntarily transferred the Cerberus Payments within two years prior to the Petition Date, for the benefit of its majority equity holder, Cerberus.

29. NewPage transferred the Cerberus Payments with actual intent to hinder, delay, or defraud its creditors, and, as such, these transfers are avoidable pursuant to section 548(a)(1)(A) of the Bankruptcy Code as an intentional fraudulent transfer.

30. The following badges of fraud, among others, demonstrate NewPage's actual intent to hinder, delay, or defraud its creditors:

(a) Due to Cerberus Capital's control over the Debtors, Cerberus Capital as well as its affiliates, Cerberus Partners and COAC, are insiders of the Debtors pursuant to sections 101(31)(B)(iii) and (E) of the Bankruptcy Code.

(b) NewPage was hopelessly insolvent during the period in which it made the Cerberus Payments.

(c) The amounts charged by Cerberus for "consulting" and "advisory" services far exceeded the value of the services rendered by Cerberus employees under the Advisory Agreement. In certain instances, COAC charged NewPage more for an advisor's services than NewPage paid to its own senior executives in annual base salary.

(d) The services rendered by Cerberus employees pursuant to the Advisory Agreement served only Cerberus' interests and did not benefit NewPage or its stakeholders. For example, upon information and belief, one Cerberus advisor was deeply involved in both sides of NewPage's prepetition negotiations with NPPH despite the conflicting interests of NewPage, NPPH, and Cerberus. As such, NewPage did not receive reasonably equivalent value in exchange for making the Cerberus Payments.

31. The value of the Cerberus Payments should be avoided as intentional fraudulent transfers and the value of the Cerberus Payments recovered from Defendants.

COUNT III

Avoidance and Recovery of Cerberus Payments Pursuant to 11 U.S.C. §§ 548(a)(1)(B) and 550

32. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs.

33. NewPage's transfer of each of the Cerberus Payments is avoidable pursuant to section 548(a)(1)(B)(i), (ii)(I), and (ii)(IV) as a constructively fraudulent transfer.

34. NewPage was insolvent when it transferred each of the Cerberus Payments to and for the benefit of Cerberus.

35. In exchange for the transfer of the Cerberus Payments, NewPage did not receive reasonably equivalent value because of the excessively high fees charged by Cerberus and Cerberus' self-interested position. For example, NewPage paid more for the services of one Cerberus advisor than it paid for the annual base salary of certain senior executives. Further, upon information and belief, one Cerberus advisor was deeply involved in both sides of NewPage's prepetition negotiations with NPPH despite the conflicting interests of NewPage, NPPH, and Cerberus.

36. The Cerberus Payments should be avoided as constructively fraudulent transfers and the value of the Cerberus Payments recovered from Defendants.

COUNT IV

Disallowance of a Claim Against Debtors Pursuant to Bankruptcy Code Sections 502(d)

37. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs.

38. The Defendants are entities from which property is recoverable under section 550 of the Bankruptcy Code and are transferees of transfers avoidable under section 547 or 548 of the Bankruptcy Code.

39. None of the Defendants has filed any proofs of claims against the Debtors, and the Debtors' schedules do not identify a claim by any of the Defendants. Nonetheless, to the extent that any Defendant files a late proof of claim and/or the Debtors amend their schedules of assets and liabilities to add claims by one or more Defendants, such claims would be subject to disallowance.

40. Accordingly, pursuant to section 502(d) of the Bankruptcy Code, any claims of Cerberus against the Debtors should be disallowed until such time as Defendants return to the Debtors' estates an amount equal to the aggregate amount of the avoided Cerberus Transfers.

COUNT V

Setoff and Recoupment

41. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs.

42. Pursuant to general principles of setoff and recoupment, the Debtors may offset a debt owing by the Debtors to Defendants by an amount equal to any debt owing by Defendants to the Debtors.

43. To the extent that Defendants assert any claim against the Debtors, such claim must be disallowed up to the value of the avoided Cerberus Transfers pursuant to general principles of set-off and recoupment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of the Debtors' chapter 11 estates, prays for relief and judgment as follows:

A. That the Cerberus Payments be avoided;

B. That judgment be entered in favor of Plaintiff and against Defendants, in an amount not less than the Cerberus Payments; and

C. That Plaintiff be granted such other and further relief as is just and proper.

Dated: June 22, 2012
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Michael S. Neiburg

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Co-Counsel to the
Official Committee of Unsecured Creditors

EXHIBIT A

Excerpt of Certain Information from NewPage's Statements of Financial Affairs

In re NewPage Corp.
Case No. 11-12804

Exhibit SOFA Question 3b
Payments to Creditors

Name of Creditor	Address 1	Address 2	City	State	Zip	Country	Payment Date	Amount paid	Expense Type	Check Number/Payment Indicator
CERBERUS PARTNERS, L.P.	299 PARK AVE, FL 21		NEW YORK	NY	10171		8/1/2011	$1,712,153.06	SERVICES PERFORMED	WIRE [2]
CERBERUS PARTNERS, L.P.	299 PARK AVE		NEW YORK	NY	10171		8/23/2011	$221,584.77	SERVICES PERFORMED	WIRE [1, 2]
CERBERUS PARTNERS, L.P.	299 PARK AVE		NEW YORK	NY	10171		8/25/2011	$148,667.97	SERVICES PERFORMED	WIRE [2]
CERBERUS PARTNERS, L.P.	299 PARK AVE		NEW YORK	NY	10171		9/6/2011	$159,636.35	SERVICES PERFORMED	WIRE [2]

[1] An additional payment of $63,799.05 was made in error during the one-year period, which was later reversed
[2] All invoices and payments were for services performed by specific individuals (plus related travel expenses) – there were no invoices for general management fees.

Exhibit SOFA Question 3c
Payments to Insiders

Name of creditor who were insider	Address	Expense Type	Relationship To Debtor	Check Number/Payment Indicator	Date	Amount
CERBERUS PARTNERS, L.P.	299 PARK AVE., FL 21, NEW YORK, NY 10171	SERVICES PERFORMED	EQUITY HOLDER	EFT	VARIOUS	3,325,096.53 [1]

[1] An additional payment of $63,799.05 was made in error during the one-year period, which was later reversed. All invoices and payments were for services performed by specific individuals (plus related travel expenses) – there were no invoices for general management fees.

Exhibit C

PM35 Parties Complaint

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
NEWPAGE CORPORATION, *et al.*,	:	**Case No. 11-12804 (KG)**
Debtors.[1]	:	**Jointly Administered**
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	:	
Plaintiff,	:	
v.	:	**Adv. Pro. No. _____**
WILMINGTON TRUST COMPANY, not in its individual capacity, but solely as Owner Trustee	:	
- and -	:	
CPI 1997,	:	
Defendants.	:	

COMPLAINT (A) FOR DECLARATORY JUDGMENT PURSUANT TO 28 U.S.C. §§ 2201 AND 2202 AND BANKRUPTCY RULES 3012 AND 7001 (I) RECHARACTERIZING PURPORTED EQUIPMENT LEASE AS FINANCING AGREEMENT AND (II) DETERMINING THAT DEFENDANTS' INTEREST IN THE EQUIPMENT IS UNPERFECTED OR, ALTERNATIVELY, VALUING COLLATERAL AND (B) OBJECTING TO CERTAIN CLAIMS FILED BY WILMINGTON TRUST COMPANY

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Chillicothe Paper Inc. (6154), Escanaba Paper Company (5598), Luke Paper Company (6265), NewPage Canadian Sales LLC (5384), NewPage Consolidated Papers Inc. (8330), NewPage Corporation (6156), NewPage Energy Services LLC (1838), NewPage Group Inc. (2465), NewPage Holding Corporation (6158), NewPage Port Hawkesbury Holding LLC (8330), NewPage Wisconsin System Inc. (3332), Rumford Paper Company (0427), Upland Resources, Inc. (2996), and Wickliffe Paper Company LLC (8293).

The Official Committee of Unsecured Creditors (the "Plaintiff" or the "Committee") in the chapter 11 cases of the debtors and debtors-in-possession referenced above (collectively, the "Debtors"), alleges for its Complaint the following:

PRELIMINARY STATEMENT

1. This adversary proceeding presents an important question about whether a so-called "Lease Agreement" (as amended, the "Financing Agreement") is nothing more than a financing arrangement disguised as a true lease which should be recharacterized. The Financing Agreement governs the use and possession of a specialty coated paper machine, known as "Paper Machine 35," by debtor NewPage Wisconsin System Inc. ("NewPage Wisconsin"). Although drafted to look like a lease, the terms of the Financing Agreement disguise what is really a financed sale because the economic realities of those terms force NewPage Wisconsin to become the owner of Paper Machine 35. As such, Wilmington Trust Company ("Wilmington Trust"), the purported lessor under the "lease," does not retain a true reversionary interest under the Financing Agreement. Specifically, as set forth in greater detail below, recharacterization of the Financing Agreement is appropriate because:

- NewPage Wisconsin has no right to terminate the Financing Agreement, unless NewPage Wisconsin pays every dollar owed under the Financing Agreement.
- At the end of the 28-year Financing Agreement, NewPage Wisconsin would have paid almost $REDACTED million or approximately REDACTED% of the original purchase price for Paper Machine 35. Along the way, NewPage Wisconsin would have paid millions more for insurance, maintenance and upgrades to Paper Machine 35.
- Unless NewPage Wisconsin decides to become the owner of Paper Machine 35, NewPage Wisconsin must spend millions to "crate" this gigantic machine and ship at its own cost (which would entail spending millions more) *anywhere* in the world designated by Wilmington Trust *plus* lose all revenue associated with Paper Machine 35 at its Stevens Point

mill for several months while it disassembles the machine for crating and eventual shipment.

- Wilmington Trust could not reasonably intend to ever take possession of Paper Machine 35 because its options, at the end of the term of the 28-year Financing Agreement, are (i) to receive $REDACTED million in liquidated damages (pursuant to a disguised purchase option) or (ii) to take back a machine that, upon information and belief, is only worth between $2 and $10 million today.

2. The implication for the estates of the determination requested here is critical: if the "lease" is a financing, Wilmington Trust does not have an allowed administrative expense claim entitling it to receive millions of dollars of payments during these cases. The Financing Agreement will only give rise to unsecured, prepetition claims, to be treated as such under an eventual plan of reorganization. This is because neither Wilmington Trust nor CPI 1997 properly perfected any purported lien on Paper Machine 35.[2] To that end, the Committee also objects to the allowance of proofs of claim nos. 2222 and 2324 (together with the claim scheduled by the Debtors and all other claims, contingent or otherwise, asserted by Wilmington Trust related to the Financing Agreement, the "Wilmington Trust Claims")[3] filed by Wilmington Trust as a contingent secured claim.

3. Alternatively, even if Wilmington Trust or CPI 1997 properly perfected a lien in Paper Machine 35, those parties should be treated as mere undersecured creditors based on the current value of Paper Machine 35. To that end, the Committee seeks a valuation of the "collateral" pursuant to Bankruptcy Rule 3012 to determine the amount of the secured claim, if any, held by either Wilmington Trust or CPI 1997.

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[2] As explained more fully in Count IV of this Complaint, Wilmington Trust has an *unsecured* interest in Paper Machine 35.

[3] The Wilmington Trust Claims appear to be duplicative and identical.

JURISDICTION AND VENUE

4. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334.

5. This matter is a core proceeding under 28 U.S.C. § 157(b)(2).

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. This Complaint initiates an adversary proceeding within the meaning of Bankruptcy Rule 7001 and seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Bankruptcy Rule 3012.

THE PARTIES

8. On September 21, 2011, the United States Trustee for the District of Delaware appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code.

9. Defendant Wilmington Trust is a Delaware corporation. Wilmington Trust is the purported lessor of Paper Machine 35 under the Financing Agreement.

10. Defendant CPI 1997 is a business trust within the meaning of the Delaware Business Trust Act, 12 Del. C. c. 38. CPI 1997 purports to hold title to Paper Machine 35 pursuant to a certain Trust Agreement, dated as of December 22, 1997, by and between Wilmington Trust and Chrysler Capital Corporation (including any successors in interest, the "Owner Participant").

BACKGROUND

General

11. On September 7, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses as debtors-in-possession pursuant to section 1107 and 1108 of the Bankruptcy Code.

Initial Purchase Of Paper Machine 35 And Sale-Leaseback Transaction

12. Paper Machine 35 is housed at the Debtors' paper mill location in Stevens Point, Wisconsin. It stands three stories high, is roughly equivalent in length to a football field, and has the capacity to produce 90,000 tons of specialty coated paper per year. Paper Machine 35 was manufactured specifically for use at the Stevens Point mill by NewPage Wisconsin's predecessor in interest, Consolidated Papers, Inc. ("Consolidated Papers"). Photos of the Stevens Point Mill and Paper Machine 35 are attached hereto as Exhibit A and Exhibit B, respectively.[4]

13. The Financing Agreement relates to a 1997 transaction involving Paper Machine 35 that was structured as a sale and leaseback arrangement. Consolidated Papers and Wilmington Trust entered into the Financing Agreement on or about December 23, 1997. A true and correct copy of the Financing Agreement, as well as the definitions and rules of usage relating to the Financing Agreement, are attached hereto as Exhibit C and are incorporated here by reference. In addition, a demonstrative chart regarding the terms of the Financing Agreement is attached hereto as Exhibit D.

14. As a sale and leaseback, Paper Machine 35 was nominally purchased from Consolidated Papers, by Wilmington Trust, for approximately $REDACTED million, and then leased back from Wilmington Trust to Consolidated Papers, the original "lessee" under the Financing Agreement.

15. Wilmington Trust funded this transaction with approximately $REDACTED million in equity investment from the Owner Participant, and approximately $REDACTED

[4] At the request of the Debtors, the Committee has concurrently filed a motion to be authorized to file under seal an unredacted version of the Complaint, which unredacted version includes all amounts and exhibits which have been redacted from the publicly filed version of the Complaint. The Debtors believe that the redacted information reflect confidential and commercially sensitive information.

million in debt issued by Wilmington Trust, in its role as owner trustee under the Trust Indenture Agreement, to the lenders under the Trust Indenture Agreement.

16. The debt issued to the lenders by Wilmington Trust is reflected in certain indenture certificates with a coupon rate of REDACTED% *per annum* (the "Debt Certificates"). The Debt Certificates have a stated maturity of July 1, 2025, subject to potential prepayment, purchase or refinancing on January 1, 2014.

17. The transactions involving Paper Machine 35 were memorialized in the Financing Agreement and certain other agreements, including the Trust Indenture Agreement, and a Participation Agreement (as amended, the "Participation Agreement"), dated as of December 23, 1997, by and among the Owner Participant, Consolidated Papers, Wilmington Trust, and First Security Bank, National Association (later succeeded by Wells Fargo Bank Northwest, N.A. ("Wells Fargo").

Initial Intent Of "Lessee" At Time Of Execution Of Financing Agreement

18. At the time of the execution of the Financing Agreement, Consolidated Papers had no intention of ever returning Paper Machine 35 to Wilmington Trust or CPI 1997, whether at the conclusion of the initial term of the Financing Agreement, which ends on January 1, 2014 (the "Initial Term"), or at the conclusion of the renewal term from January 1, 2014 to January 1, 2026 (the "Renewal Term").

19. In fact, shortly before executing the Financing Agreement, Consolidated Papers had entered into a number of acquisitions and executed a number of significant capital investments and acquisitions in prior years, which effectively limited the tax benefits that would have been derived from "owning" Paper Machine 35. Accordingly, Consolidated Papers elected to pass those tax benefits to CPI 1997 and Wilmington Trust in exchange for obtaining a lower

rate of interest under the Financing Agreement. In addition, because of these acquisitions, Consolidated Papers was significantly leveraged and was incentivized to have a balance sheet that was not overburdened with debt, but that also allowed it to maintain functional ownership over Paper Machine 35.

20. At all times, Consolidated Paper conducted itself as the owner of Paper Machine 35. While Consolidated Papers was in possession of Paper Machine 35, it made repairs and updates consistent with the view that it owned Paper Machine 35, and this course of conduct was continued by Stora Enso Oyj ("Stora") when it acquired Consolidated Papers, and thereafter by the Debtors.

21. Several millions of dollars in maintenance, upgrades and improvements have been spent on Paper Machine 35 since the inception of the Financing Agreement.

22. Approximately three years after the Financing Agreement was executed, Stora, a Finnish corporation, acquired Consolidated Papers and changed the name of Consolidated Papers to Stora Enso North America Corp. ("SENA"). The Debtors acquired their interest in Paper Machine 35 in connection with the acquisition of SENA from Stora in 2007.

23. At that time, Stora also acquired approximately 20% of the equity interests in NewPage Group Inc., which, in turn, is the direct or indirect parent of the other Debtors in these Chapter 11 cases.

24. Today, NewPage Wisconsin (formerly known as Stora Enso North America Corp. and the successor in interest to Consolidated Papers) is the purported lessee under the Financing Agreement.

25. In addition, Stora executed a Guaranty Agreement, dated as of November 15, 2002, and guaranteed the lessee's performance under the Financing Agreement. Stora is,

therefore, liable to Wilmington Trust for NewPage Wisconsin's performance of its obligations under the Financing Agreement.

Terms Of Financing Agreement Demonstrate That It Is A Financing Arrangement

26. The Financing Agreement is governed by New York law. (Financing Agreement at § 26(d).)

27. NewPage Wisconsin is obligated to make two "Basic Lease Rent" payments per year, specifically, on January 1 and July 1 of each year. (*See* Financing Agreement at Ex. B-1 thereto.) The amount of each payment is expressed as a percentage of the initial purchase price of $REDACTED.

28. All payments made by NewPage Wisconsin under the Financing Agreement, including purported rent, termination payments and/or purchase option payments, must be in an amount that is equal to or greater than the principal and interest due on the Debt Certificates. (Financing Agreement at § 3(e).)

29. Payments made during the Initial Term of the Financing Agreement, which commenced on December 23, 1997 and ends on January 1, 2014, are equivalent to payments of interest only on a note bearing interest at REDACTED% for the $REDACTED million purchase price, which is exactly the interest rate on the Debt Certificates.

30. For example, in January 2012, the Basic Lease Rent purportedly due and owing under the Financing Agreement was REDACTED% of the initial purchase price, or approximately $REDACTED million, and the Debtors in fact made this payment notwithstanding the Committee's objections.

31. The obligation to pay the purported rent is "absolute and unconditional." (Financing Agreement at § 5(a).)

32. The Financing Agreement also purports to be a "net" lease, and therefore NewPage Wisconsin must perform maintenance on, and insure, Paper Machine 35 at its own expense. (Financing Agreement at §§ 7(a) and 9.) NewPage Wisconsin also bears all risk of loss and/or damage to Paper Machine 35. (Financing Agreement at § 13(a).)

33. At the conclusion of the Initial Term, assuming all Basic Lease Rent payments are made when due, NewPage Wisconsin will have paid $REDACTED in Basic Lease Rent, or REDACTED% of the purchase price for Paper Machine 35.

Initial Term And Renewal Term Under Financing Agreement

34. NewPage Wisconsin has no right to terminate the Financing Agreement during the Initial Term unless NewPage Wisconsin pays every dollar owed during the Initial Term (or approximately $REDACTED million), plus all additional amounts required to make Wilmington Trust and its investors whole, including principal and interest.

35. If the Financing Agreement is renewed for the Renewal Term, from January 1, 2014 to January 1, 2026, NewPage Wisconsin will have paid almost $REDACTED million, or approximately REDACTED% of the original purchase price for Paper Machine 35 at the end of this 28-year Financing Agreement. Along the way, NewPage Wisconsin will have paid millions more for insurance, maintenance and upgrades to Paper Machine 35.

36. What's more, unless NewPage Wisconsin decides to become the owner of Paper Machine 35, NewPage Wisconsin must spend millions to "crate" this gigantic machine and ship at its own cost (which would entail expenditure of millions more) *anywhere* in the world designated by Wilmington Trust *plus* lose all revenue associated with Paper Machine 35 at its Stevens Point mill for several months while it disassembles the machine for crating and eventual shipment.

37. Furthermore, Wilmington Trust could not reasonably intend to ever take possession of Paper Machine 35 because its options, at the end of the Renewal Term, are (i) to receive $REDACTED million in liquidated damages (pursuant to a disguised purchase option (as explained further below)) or (ii) to take back a machine that is only worth between $2 and $10 million today.

Purported Termination Rights Are Illusory

38. NewPage Wisconsin has no effective rights of termination during or at the end of the Initial Term of the Financing Agreement.

39. Although the Financing Agreement purports to allow NewPage Wisconsin to terminate the Financing Agreement on or after the seventh anniversary of the commencement date if it determines that Paper Machine 35 has become obsolete or uneconomic to operate (Financing Agreement at § 12(a)), it can only exercise that right if (i) it is able to find a buyer for Paper Machine 35, and even if a buyer is found, NewPage Wisconsin must contribute money to sale proceeds if the sale is insufficient to pay all principal and interest owed to Wilmington Trust and to the Owner Participant on account of its equity investment (the "Alternative Buyer Option") or (ii) the Owner Participant and the lenders agree, "***in their discretion***," to accept a replacement paper machine as a form of substitute collateral for the financing provided under the Financing Agreement (the "Replacement Collateral Option"). (Financing Agreement at § 12(b), (c) and (d).)

40. Moreover, if NewPage Wisconsin wants to terminate the Financing Agreement it cannot simply decide to return Paper Machine 35 to Wilmington Trust in order to terminate its obligations under the Financing Agreement.

41. Rather, Wilmington Trust has the right, ***in its sole discretion***, to take possession of Paper Machine 35, in which case NewPage Wisconsin would still be obligated, among other

things, to pay Wilmington Trust and the lenders "Supplemental Lease Rent" pursuant to section 12(e)(iii) of the Financing Agreement, which includes the payment of principal and interest under the Debt Certificates and the cost to crate and freight Paper Machine 35. (Financing Agreement at § 12(e)(iii) (emphasis added).)

42. If neither the Alternative Buyer Option nor the Replacement Collateral Option is allowed to be exercised by NewPage Wisconsin – then the Financing Agreement continues in full force and effect. (Financing Agreement at § 12(d) and (g).).

43. In other words, these convoluted provisions merely state the obvious: NewPage Wisconsin can get out of the Financing Agreement only if Wilmington Trust is paid in full or consents by either agreeing to take possession or agreeing, together with its investors, to accept a replacement machine. That is not a "real" termination right.

Right To Return Paper Machine 35 Is Illusory

44. At the end of the Initial Term, NewPage Wisconsin must either purchase Paper Machine 35 for $REDACTED (Financing Agreement at § 14(a)(i) and Ex. D thereto) or it will be deemed to have elected to return Paper Machine 35 to Wilmington Trust. (Financing Agreement at § 14(c).) **NewPage Wisconsin's right to return Paper Machine 35 is illusory, however, because such return right is subordinate to Wilmington Trust's right, among other things, to force NewPage Wisconsin to renew the Financing Agreement through January 1, 2026.** (Financing Agreement at § 14(b).)

45. In addition, in the event that Wilmington Trust agrees to accept return of Paper Machine 35, NewPage Wisconsin must "crate and freight" Paper Machine 35, and upon any breach of this obligation by NewPage Wisconsin, Wilmington Trust may elect to transfer Paper Machine 35 to NewPage on an "as-is, where-is" basis and NewPage must pay to Wilmington

Trust at least $REDACTED in liquidated damages. Again, regardless of the legal structure, this only means that NewPage Wisconsin has no right to return Paper Machine 35 at the end of the Initial Term unless Wilmington Trust agrees.

46. Exercise of the purchase option at the end of the Initial Term results in payments to Wilmington Trust that total $REDACTED, more than REDACTED the original purchase price. These payments also reflect full satisfaction of the Debt Certificates, including principal and interest, generating a return on investment consistent with a financing transaction for the Debt Certificates and generating a return on investment for the Owner Participant's equity investment.

47. Based on these choices, there is no chance that Wilmington Trust would ever agree to take back possession of Paper Machine 35 at the end of the Initial Term of the Financing Agreement. NewPage Wisconsin would either seek and obtain new financing on better terms than those offered under the Financing Agreement so that it could exercise the purchase option, or else Wilmington Trust would force NewPage Wisconsin to renew the Financing Agreement through 2026.

48. Assuming Wilmington Trust elects to renew the Financing Agreement (*i.e.*, extend the "lease"), NewPage Wisconsin must arrange for a "Loan Extension." As defined in the Financing Agreement, a Loan Extension means that the lenders either agree to retain their Debt Certificates at an interest rate that is reset to current market conditions, new lenders agree to purchase some or all of the Debt Certificates, and/or NewPage Wisconsin purchases up to REDACTED% of the outstanding Debt Certificates (*i.e.* $REDACTED) to effectuate a Loan Extension. Assuming that NewPage Wisconsin purchases REDACTED% of the Debt Certificates, it would presumably receive the same proportion of the payments due on account of

the Debt Certificates (*i.e.* $REDACTED). In that event, during the Renewal Term NewPage Wisconsin will pay $REDACTED, an amount equal to (i) the total rent due during the Renewal Term ($REDACTED), minus (ii) payments received on account of Debt Certificates held by NewPage Wisconsin ($REDACTED), plus (iii) the cost of purchasing REDACTED% of the outstanding Debt Certificates ($REDACTED). This amount is approximately REDACTED% of the original purchase price.

49. Even if the lenders elect to retain their Debt Certificates, the total amount NewPage Wisconsin will have paid from the commencement of the Financing Agreement through January 1, 2026 will be $REDACTED, an amount equal to the Basic Lease Rent paid during the Initial Term ($REDACTED) plus the Basic Lease Rent paid during the Renewal Term ($REDACTED). **Accordingly, NewPage Wisconsin will pay approximately REDACTED% of the original purchase price by the end of the Financing Agreement in 2026.** And in the event that NewPage Wisconsin is required to make an additional $REDACTED million payment at the conclusion of the Renewal Term, as set forth below, NewPage Wisconsin will have paid approximately $REDACTED million, or approximately REDACTED% of the of the original purchase price.

End Of Term Disguised Purchase Option

50. The Financing Agreement does not contain a specific purchase option at the conclusion of the agreement. This is designed to avoid the appearance that the Financing Agreement is what it really is, a financing arrangement. However, there is a provision that is located in the remedies for default section of the Financing Agreement (Ex. A at §18(a)) which provides that, if NewPage Wisconsin fails to "crate and freight" the mammoth machine at the end of the Renewal Term, NewPage Wisconsin is in default and must pay "liquidated damages,"

but thereafter becomes the owner of Paper Machine 35. Therefore, despite the best efforts by the drafters of the Financing Agreement to make it appear as if there is no option to purchase Paper Machine 35 at the conclusion of the agreement, that option exists practically under the terms of the Financing Agreement, and that result is compelled by the economic realities.

51. To "crate and freight" Paper Machine 35, *i.e.* dismantle it, package it, and ship it to wherever Wilmington Trust directs it to be shipped (Financing Agreement at § 16(b)), NewPage Wisconsin must disassemble and package, in original packaging, a machine the size of a football field, standing three stories high. And, upon completing this monumental task, NewPage Wisconsin must "crate all Parts in a safe and secure fashion (identifying each crate and the relevant parts of [Paper Machine 35] contained therein so as to facilitate the reinstallation of the [Paper Machine 35]), and deliver the same to a rail head ***or other site designated by the Lessor*** . . . ." (Financing Agreement at § 16(b).)

52. In other words, NewPage Wisconsin must deliver the entire paper machine to *any site* in the World designated by Wilmington Trust at NewPage Wisconsin's own cost or expense, including, by way of example, India or Mexico. These two examples are not far-fetched. In the last several years used paper machines of this size that have been sold in the United States were sold for export to countries such as Mexico and India, where the demand for paper products remains strong and operational costs are substantially lower than in the United States.

53. Performance of the crate and freight obligations would be economically impractical and logistically impossible. Even if Wilmington Trust selected a reasonable destination for Paper Machine 35 – and Wilmington Trust has no contractual obligation to make a reasonable selection – it would cost millions for NewPage Wisconsin to crate and ship this

paper machine. In addition, NewPage Wisconsin would have to close or at least partially shut down the Stevens Point mill through this process.

54. If NewPage Wisconsin fails to crate and freight Paper Machine 35 at the conclusion of the Renewal Term, thereby "breaching" the obligation, Wilmington Trust can transfer ownership of Paper Machine 35 on an "as is where is" basis to NewPage Wisconsin in exchange for payment of $REDACTED as "liquidated damages." (*See* Financing Agreement at § 18(a).) This is no more than a disguised, economically compelled balloon payment.

55. To be sure, Wilmington Trust also may elect other remedies under section 18 of the Financing Agreement. Specifically, Wilmington Trust may attempt to force compliance with the "crate and freight" provision. (Financing Agreement § 18(c).) Alternatively, Wilmington Trust may attempt to sell Paper Machine 35 in a commercially reasonable manner. (Financing Agreement § 18(d).) But in reality, Wilmington Trust would never elect either of these remedies, because the liquidated damages available under section 18(a) of the Financing Agreement upon breach of the "crate and freight" provision at the conclusion of the Renewal Term greatly exceed the value of either alternative.

56. And in any event, the terms of the Financing Agreement make plain that Wilmington Trust had no intention of maintaining, and did not in fact maintain, a meaningful reversionary interest in Paper Machine 35. The present value of all Basic Rent payments for the Initial Term and the Renewal Term, which was reasonably ascertainable by the original parties to the Financing Agreement at the inception of the Financing Agreement, exceeds the value of Paper Machine 35 at that time, bolstering the conclusion that Wilmington Trust retained no equity in the machine.

Useful Life Of Paper Machine 35

57. Alternatively, if the Court does not conclude that NewPage Wisconsin is compelled to buy Paper Machine 35 at the end of the Renewal Term pursuant to the provisions described above, the Court may conclude that there will be little, if any, value remaining at the conclusion of the Renewal Term. Specifically, IRS Publication 946 at Appendix B, Table B-2, listing paper manufacturing under asset class 26.1, "Manufacture of Pulp and Paper," concludes that the useful life of assets like Paper Machine 35 is 13 years. The Initial Term of the Financing Agreement is more than 16 years.

58. Even if the useful life of Paper Machine 35 were assumed to be 20 years, Wilmington Trust can force renewal of the Financing Agreement for a total term of more than 28 years.

59. At bottom, the Financing Agreement is not a true lease under New York law. The present value of payments made under the Financing Agreement exceeds the original cost of Paper Machine 35, and the aggregate return on the total purchase price paid by Wilmington Trust to purchase Paper Machine 35 is approximately REDACTED%. This rate is similar to the return on investment that a lender would expect from a loan, and in fact *that is* the interest paid to holders of the Debt Certificates.

60. Moreover, the payments described above do not include maintenance and upgrade costs, both of which are borne solely by NewPage Wisconsin for the duration of the Financing Agreement. Regular maintenance and upgrade of Paper Machine 35 is critical to its ongoing usefulness, especially because paper machines quickly become technologically obsolete unless they are upgraded every 5 years or so.

Economic Reality Of This Transaction Reveals That Wilmington Trust Could Not Have Reasonably Intended to Repossess Paper Machine 35

61. The economic reality of this transaction reveals that Wilmington Trust could not have reasonably intended to repossess Paper Machine 35 at any time and that NewPage Wisconsin never intended to return Paper Machine 35.

62. At the end of the Initial Term, Wilmington Trust will not take possession of Paper Machine 35 because it can force NewPage Wisconsin to renew the Financing Agreement for another 14 years unless NewPage Wisconsin agrees to pay the purchase option for the machine. At the end of the Renewal Term, it would not make any economic sense for Wilmington Trust to take possession of Paper Machine because, even if NewPage Wisconsin pays to crate and freight Paper Machine 35, Wilmington Trust would then take possession of a machine that is only worth between $2 and $10 million today (and much less than that in 2026). In short, it would make no economic sense for Wilmington Trust to decline receiving $REDACTED million in liquidated damages in order to pursue a resale process which would, today, yield between $2-$10 million dollars.

63. Furthermore, it would make no economic sense for NewPage Wisconsin to return Paper Machine 35 to Wilmington Trust because NewPage Wisconsin (a) will have already paid almost $REDACTED million for Paper Machine 35, (b) will have paid millions in maintenance costs and upgrades, and (c) would need to pay millions just to crate and freight Paper Machine 35 at the end of the Financing Agreement. NewPage Wisconsin would also experience several months of lost revenue at its Stevens Point mill due to down time during the disassembly of Paper Machine 35. Furthermore, NewPage Wisconsin would then be faced with operating its Stevens Point mill at half capacity unless a replacement machine is installed.

64. In light of the facts set forth above, Wilmington Trust has no meaningful reversionary interest in Paper Machine 35. The economic realities of the transactions set out in the Financing Agreement are such that NewPage Wisconsin is the true owner of Paper Machine 35, and Wilmington Trust and its investors are in the economic position of a lender rather than a lessor.

Wilmington Trust's Alleged Security Interest In Paper Machine 35 Is Unperfected

65. On February 2, 2012 Wilmington Trust filed the Wilmington Trust Claims against debtor NewPage Wisconsin. The Wilmington Trust Claims allege a secured interest in Paper Machine 35 in the event the Financing Agreement is recharacterized. (*See*, *e.g.*, Proof of Claim No. 2222 at p. 8 ("In the event of any successful attempt to recharacterize the PM 35 Lease as a financing, such financing is secured by first-priority pre-petition security interests in PM 35 that are valid, perfected and unavoidable. Such pre-petition liens have been properly perfected and validly recorded in the state of Wisconsin with respect to PM35 by the filing of required back-up UCC financing statements.").)

66. These allegations, however, are unsupported by citation or reference to the particular UCC filing or filings upon which Wilmington Trust relies, or the precise dates of such filings and any renewals. Indeed, Wilmington Trust, as it should have, filed a Uniform Commercial Code ("UCC") financing statement against Consolidated Papers on January 2, 1998, but Wilmington Trust failed to continue this financing statement, and it lapsed five years later on January 2, 2003.

67. There is, however, no current UCC filing by Wilmington Trust with respect to Paper Machine 35. Indeed, if someone were to search the name of the debtor listed in the 1998 UCC filing in the UCC database of the Wisconsin secretary of state, the 1998 UCC filing would not appear on such search because the 1998 UCC filing is "inactive."

68. Moreover, to the extent that Wilmington Trust purports to rely on subsequent financing statements filed by Wells Fargo (as it appears they are, *see* Proof of Claim No. 2222 at p. 12-13 (referencing UCC Financing and Continuation statements from 2003 and 2007 without noting that such statements were filed by Wells Fargo rather than Wilmington Trust)), the filings by Wells Fargo are ineffective against NewPage Wisconsin (and its predecessors in interest) because, under the governing documents, neither NewPage Wisconsin (and its predecessors in interest) nor Wilmington Trust authorized the filing and because the filing misidentifies Wells Fargo as the secured party.

69. Wells Fargo is a secured creditor of Wilmington Trust, not NewPage Wisconsin or its predecessors in interest. The fact that Wilmington Trust collaterally assigned (for security purposes) its interest in the Financing Agreement to Wells Fargo does not change that basic fact.

COUNT I

(Declaratory Relief That The Financing Agreement Is, Per Se, A Financing Transaction And Security Agreement Under N.Y. U.C.C. Law § 1-201(37), And Bankruptcy Rule 7001(2) and (9))

70. The Committee incorporates by reference all prior paragraphs of this Complaint.

71. The Financing Agreement is governed by New York Law.

72. A court must look to state law in order to determine whether an agreement is a true lease or a financing arrangement for purposes of the Bankruptcy Code.[5] Here, New York law applies. (Ex. A at § 26(d).)

73. Article 2A of the New York UCC states that a lease is "a transfer of the right to possession and use of goods for a term in return for consideration, but a sale . . . or retention or

[5] *See, e.g.*, *In re Uni Imaging Holdings, LLC*, 423 B.R. 406, 414 (Bankr. N.D.N.Y. 2010); *In re Gateway Ethanol, LLC*, 415 B.R. 486, 498 (Bankr. D. Kan. 2009); *WorldCom Inc. v. Gen. Elec. Global Asset Mgmt. Servs. (In re WorldCom, Inc.)*, 339 B.R. 56, 63 (Bankr. S.D.N.Y. 2006).

creation of a security interest is not a lease."[6] Accordingly, "the definition of a lease expressly excludes security interests."[7]

74. Section 1-201(37) of the New York UCC provides a bright line test to determine whether an agreement creates a security interest or a lease:

> (a) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:
>
> (i) the original term of the lease is equal to or greater than the remaining economic life of the goods,
>
> (ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,
>
> (iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, ***or***
>
> (iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.[8]

75. Thus, under New York law, if NewPage Wisconsin does not have the right to terminate the Financing Agreement, and any one of the four factors enumerated above are met, the Financing Agreement is a financing arrangement as a matter of law.[9] In addition, even if the

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6 N.Y. U.C.C. Law § 2-A-103(1)(j) (McKinney 2011).

7 *Duke Energy Royal, LLC v. Pillowtex Corp. (In re Pillowtex, Inc.),* 349 F.3d 711, 717 (3d Cir. 2003).

8 N.Y. U.C.C. Law § 1-201(37) (McKinney 2011) (emphasis added).

9 *See Pillowtex*, 349 F.3d at 717 (applying the "bright-line" test under New York law to equipment lease).

transaction is not a disguised security agreement *per se*, a court "must then look at the specific facts of the case to determine whether the economics of the transaction suggest such a result."[10]

76. As described above, NewPage Wisconsin cannot terminate the Financing Agreement. Rather, the Financing Agreement only allows NewPage Wisconsin to find a buyer for Paper Machine 35 (and assure that the lenders are repaid in full by making up any deficiency in the sale price), or NewPage Wisconsin can provide a replacement paper machine as new collateral *if* the Owner Participant and lenders agree *in their sole discretion*.

77. In all events, NewPage Wisconsin must make Wilmington Trust and all other investors whole – that is, NewPage Wisconsin can only "terminate" the Financing Agreement by paying the full amount owed on the Debt Certificates plus interest or providing an acceptable replacement machine. Thus, the so-called termination rights under the Financing Agreement are illusory. In reality, the Financing Agreement cannot be terminated, and thus the first prong of the "bright-line" test is satisfied.[11]

78. The Financing Agreement also satisfies the second half of the bright-line test. Specifically, section 1-201(37)(a)(iv) is met, notwithstanding considerable efforts by the drafters of the Financing Agreement to disguise the effect of these provisions at the conclusion of the Renewal Term by shrouding the purchase of Paper Machine 35 in the language of breach and default. Because the "crate and freight" obligation is economically impracticable *for all parties*, NewPage Wisconsin is compelled to "breach" the agreement by failing to "crate and freight" the machine.

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[10] *Id.* at 717-18 (quoting *Banterra Bank v. Subway Equip. Leasing Corp. (In re Taylor)*, 209 B.R. 482, 484 (Bankr. S.D. Ill. 1997) and citing *In re Murray*, 191 B.R. 309, 315 (Bankr. E.D. Pa. 1996); *Moore v. Emery (In re Am. Steel Prod., Inc.)*, 203 B.R. 504, 506-07 (Bankr. S.D. Ga. 1996)).

[11] *See PSINet, Inc. v. Cisco Sys. Capital Corp. (In re PSINet, Inc.)*, 271 B.R. 1, 44 (Bankr. S.D.N.Y. 2001) ("[The debtor] cannot terminate its obligations pursuant to the . . . [a]greement without incurring an obligation to [the lessor] for the full cost of the equipment. Therefore, the first part of the statutory test is satisfied.").

79. Likewise, Wilmington Trust is economically compelled to accept the $REDACTED million payable under section 18(a) of the Financing Agreement at that time rather than elect the other available remedies, each of which would impose significant costs on Wilmington Trust while providing very little or no benefit given the market for paper machines and the age, useful life, and cumbersome shipping requirements of Paper Machine 35. The reason for disguising this balloon payment in the language of breach – as opposed to, for example, providing a basic buyout provision – is borne out in section 1-201(37)(a)(iv) itself; namely, the section requires that the lessee "become the owner of the goods for no additional consideration or nominal additional consideration upon ***compliance*** with the lease agreement."[12] Here, it is not through compliance, but breach, that the "lessee" becomes owner, thus nominally evading the statutory test. But the very fact that a breach of a purported "lease" gives rise to ownership by the "lessee" sufficiently demonstrates that section 1-201(37)(a)(iv) is satisfied substantively, if not literally.

80. Alternatively, as set forth above (at ¶ 59), the useful life of Paper Machine 35 is less than the Initial Term according to objective tax guidance. Moreover, even if the useful life of Paper Machine 35 were deemed to be longer than the 16-year Initial Term, Wilmington Trust can force renewal of the Financing Agreement for a total term of more than 28 years, well beyond the useful life of such machines.

81. This feature likewise satisfies section 1-201(37)(a)(ii). Specifically, the Financing Agreement purports to allow the return of Paper Machine 35 at the conclusion of the Initial Term (assuming of course that NewPage Wisconsin does not buy the machine), but the ability to return the machine ***is subordinate to Wilmington Trust's right, among other things, to***

[12] N.Y. U.C.C. Law § 1-201(37)(a)(iii) (McKinney 2011) (emphasis added).

force NewPage Wisconsin to renew the Financing Agreement through January 1, 2026. (Financing Agreement at § 14(b).) The only option unilaterally available to NewPage Wisconsin is the outright purchase of Paper Machine 35 at the conclusion of the Initial Term. Otherwise, NewPage Wisconsin is bound to renew the Financing Agreement at Wilmington Trust's election. As such, NewPage Wisconsin "is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods."[13]

82. By reason of the foregoing, the Committee seeks a judgment declaring and ordering that (a) the Financing Agreement does not constitute a "true lease" but is instead, per se, a financing arrangement or security agreement under N.Y. U.C.C. 1-201(37) such that Wilmington Trust has no rights as a personal property lessor of Paper Machine 35, in connection with the Debtors' bankruptcy cases or otherwise; (b) that any claim made by Wilmington Trust related to the Financing Agreement does not qualify for treatment as administrative expense, whether under section 365 of the Bankruptcy Code or otherwise; and (c) that any claim made by Wilmington Trust relating to the Financing Agreement constitutes a general unsecured claim or partially secured claim to the extent that the Defendants have any valid and enforceable lien on Paper Machine 35.

COUNT II

(Declaratory Relief That The Economic Realities Of The Financing Agreement Reflect A "Disguised" Financing Transaction And Security Agreement Rather Than A True Lease)

83. The Committee incorporates by reference all prior paragraphs of this Complaint.

84. It is well established that "where none of the four factors set out in section 1-201(37) are present, courts are to consider the economic reality of the transaction in order to determine, based on the particular facts of the case, whether the transaction is more fairly

[13] *Id.* § 1-201(37)(a)(ii).

characterized as a lease or a secured financing arrangement."[14] In these circumstances, "courts will look to various factors in evaluating the economic reality of the transaction . . . in determining whether there has been a sale or a true lease . . . including the following: [a] whether the purchase option is nominal; [b] whether the lessee is required to make aggregate rental payments having a present value equaling or exceeding the original cost of the leased property; and [c] whether the term covers the total useful life of the equipment."[15] But consideration of these factors also may be distilled to one central inquiry—namely, does the purported "lessor" retain a meaningful reversionary interest in the property subject to the purported "lease," or, rather, did the lessor, upon execution of the agreement, transfer title to the goods in substance if not in form?[16] Unless the lessor retains a meaningful reversionary interest in the subject property the agreement cannot be a "true lease."

85. The economic realities surrounding the Financing Agreement demonstrate that Wilmington Trust has not retained a meaningful reversionary interest in Paper Machine 35.

86. The alleged "rent" is not measured by the fair market value for the *use* of Paper Machine 35, as a true lease would be, but instead it is measured by the amount of money financed by the lenders under the Debt Certificates.

87. The "hell or high water" clause (*i.e.* the rent obligation is absolute and unconditional) demonstrates the lack of connection between the rental value and NewPage Wisconsin's financial obligation. NewPage Wisconsin does not receive any abatement of rent or credit for improvements and upgrades to Paper Machine 35 during the term of the Financing

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14 *Pillowtex*, 349 F.3d at 719.

15 *Id.* at 719 (internal citations and quotations omitted).

16 *Pillowtex*, 349 F.3d at 723; *WorldCom*, 339 B.R. at 72; *see also In re Grubbs Constr. Co.*, 319 B.R. 698, 715 (Bankr. M.D. Fla. 2005) ("The central feature of a true lease is the reservation of an economically meaningful interest to the lessor at the end of the lease term.").

Agreement, which is indicative of the economic reality that NewPage Wisconsin's obligations are for the value of the money borrowed rather than the economic value of Paper Machine 35.

88. In addition, the only way that NewPage Wisconsin can avoid entering into a Renewal Term is to pay off the principal and interest due on the Debt Certificates. This payment terminates all obligations, as would be expected with a loan. By contrast, in a true lease, a prepayment of rent assures the lessee of its use of the equipment through the end of the term. At that time, possession would typically revert back to the lessor.

89. Under the Financing Agreement, NewPage Wisconsin bears all risks of ownership of Paper Machine 35, including the risk of destruction of Paper Machine 35.

90. NewPage Wisconsin must make aggregate rental payments having a present value equal to or exceeding the original cost of Paper Machine 35.

91. Alternatively, and as set forth above (at ¶ 38), Paper Machine 35 may have little value in any event because the term of the Financing Agreement covers the useful life of Paper Machine 35. Indeed, the Financing Agreement may be renewed, at Wilmington Trust's election, for a total term of 28 years, more than doubling the useful life of a paper machine according to the Internal Revenue Service. (*See* ¶ 38, *supra*.) And finally, the payments due and owing under the Financing Agreement drastically exceed the value of Paper Machine 35 and in fact bear little relation to the market value of the machine.

92. If paid through the Renewal Term, the Financing Agreement calls for "rent" equal to approximately REDACTED% of the original purchase price of a depreciating asset. This amount increases to REDACTED% of the original purchase price if Wilmington Trust forces NewPage Wisconsin to pay it liquidated damages upon breach of the crate and freight provision. These payments are calculated to generate a specific return on investment in the Debt

Certificates and the equity purchased by the Owner Participant in 1997. At every turn, the Financing Agreement is drafted to provide financing returns irrespective of the condition of the Paper Machine or the circumstances of the "lessee."[17]

93. The economic incentives of the parties also indicate the Financing Agreement is a financing agreement. From the perspective of NewPage Wisconsin, paying $REDACTED million upon "breach" of the "crate and freight" provision of the Financing Agreement is far superior than paying the much larger cost of removing and reinstalling Paper Machine 35, especially when NewPage Wisconsin has already incurred millions of dollars in sunk costs related to Paper Machine 35. From the perspective of Wilmington Trust, the sale of Paper Machine 35 would provide the best economic outcome. Wilmington Trust would receive $REDACTED million in contrast with the paltry sum it would receive if it attempted to repossess and sell Paper Machine 35 at that time.

94. For these reasons, the Committee is entitled to a judgment declaring and ordering that (a) the Financing Agreement does not constitute a "true lease" but instead constitutes a disguised financing arrangement or security agreement under New York law such that Wilmington Trust has no rights as a personal property lessor of Paper Machine 35, in connection with the Debtors' bankruptcy cases or otherwise; (b) that any claim made by Wilmington Trust related to the Financing Agreement does not qualify for treatment as an administrative expense, whether under 365 of the Bankruptcy Code, or otherwise; and (c) that any claim made by Wilmington Trust relating to the Financing Agreement constitutes a general unsecured claim or

[17] *See, e.g.,* Financing Agreement 3(e) ("Notwithstanding anything contained in this Lease to the contrary, (i) each installment of Basic Lease Rent payable on each Rent Payment Date . . . shall be in an amount which is at least equal to the aggregate amount of principal and interest (other than by way of acceleration) due and payable on the [Debt Certificates] then outstanding on such date . . . .").

partially secured claim to the extent that the Defendants have any valid and enforceable lien on Paper Machine 35.

COUNT III

(Declaratory Relief That Section 365(d) Is Inapplicable, As The Financing Agreement Is Not A True Lease)

95. The Committee incorporates by reference all prior paragraphs of this Complaint.

96. It is well established that a lease must be a "true lease" in order for the provisions of section 365 of the Bankruptcy Code to apply.[18]

97. Because the financing Agreement is not a "true lease," the Committee requests that the Court enter an order declaring that Section 365(d)(5) of the Bankruptcy Code does not apply to the Financing Agreement or any claims asserted by Defendants in connection with the Financing Agreement.

COUNT IV

(Declaration That Any Lien Is Unperfected)

98. The Committee incorporates by reference all prior paragraphs of this Complaint.

99. Wilmington Trust never filed a financing statement with respect to its interest in Paper Machine 35, although Wilmington Trust's secured creditor, Wells Fargo, purported to file a financing statement with respect to Paper Machine 35. Accordingly, Wilmington Trust failed to perfect any lien it might have against Paper Machine 35. Neither did the Trust perfect any lien it might have against Paper Machine 35.

100. The filing by Wells Fargo is ineffective against NewPage Wisconsin (and its predecessors in interest) because, under the governing documents, neither NewPage Wisconsin

[18] *See, e.g., Liona Corp. v. PCH Assocs. (In re PCH Assocs.)*, 804 F.2d 193, 200 (2d Cir. 1986).

nor Wilmington Trust authorized the filing and because the filing misidentifies Wells Fargo as the secured party.

101. The Committee requests that the Court declare that any purported secured interest of Wilmington Trust is therefore unperfected under Article 9 of the New York UCC.

COUNT V

(Objection To Wilmington Trust Claims As Secured Claims)

102. The Committee incorporates by reference all prior paragraphs of this Complaint.

103. For the reasons set forth in Count IV, any lien Wilmington might have against Paper Machine 35 is invalid. Because Wilmington Trust does not have a valid secured claim, Wilmington Trust's proof of claim should be classified as a general unsecured claim.[19] The Committee therefore objects to Wilmington Trust's proof of claim to the extent that it asserts a secured claim.

COUNT VI

(Avoidance of Any Lien Asserted By Wilmington Trust Pursuant to Section 544(a)(1) of the Bankruptcy Code)

104. The Committee incorporates by reference all prior paragraphs of this Complaint.

105. Pursuant to section 544(a)(1) of the Bankruptcy Code, the bankruptcy estate has the rights and powers of, and may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.

106. The Committee exercising the powers of a trustee for the benefit of the estates can avoid all security interests that were not perfected under applicable state law.

[19] *See In re PSINet, Inc.*, 271 B.R. at 31.

107. For the reasons set forth in Count IV, any lien Wilmington Trust might have against Paper Machine 35 is unperfected, and Wilmington Trust's liens can be voided under applicable state law, and pursuant to section 544(a)(1) of the Bankruptcy Code.

108. The Committee therefore submits that any lien asserted by Wilmington Trust is unperfected and void under applicable state law and section 544 of the Bankruptcy Code.

COUNT VII

(In The Alternative, Valuation Of Collateral Pursuant To Bankruptcy Rule 3012)

109. The Committee incorporates by reference all prior paragraphs of this Complaint.

110. Alternatively to Count IV, if and to the extent Wilmington Trust or CPI 1997 has a valid, perfected, enforceable lien on Paper Machine 35, the Committee seeks a determination of the value of those parties' secured claim pursuant to Bankruptcy Rule 3012 and Bankruptcy Rule 7001(2).

111. Bankruptcy Rule 3012 provides that "[t]he court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after hearing on notice to the holder of the secured claim and any other entity as the court may direct."

112. The replacement value for Paper Machine 35 is not more than $10 million and could be substantially less than $10 million.

113. The Committee requests that the Court fix the value of Wilmington Trust's and CPI 1997's secured claim by declaring that the replacement value of Paper Machine 35 is the value established at trial.

WHEREFORE, the Committee requests that the Court enter declaratory judgments and grant relief as set forth herein, and award the Committee such other and further relief as this Court may deem just, proper and equitable.

Dated: June 22, 2012
Wilmington, Delaware

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Exhibit A

Filed Under Seal[1]

[1] At the request of the Debtors, the Committee has concurrently filed a motion to be authorized to file under seal an unredacted version of the complaint, which unredacted version includes all amounts and exhibits which have been redacted from the publicly filed version of the complaint. The Debtors believe that the redacted information reflect confidential and commercially sensitive information.

Exhibit B

Filed Under Seal[2]

[2] At the request of the Debtors, the Committee has concurrently filed a motion to be authorized to file under seal an unredacted version of the complaint, which unredacted version includes all amounts and exhibits which have been redacted from the publicly filed version of the complaint. The Debtors believe that the redacted information reflect confidential and commercially sensitive information.

Exhibit C

Filed Under Seal[3]

[3] At the request of the Debtors, the Committee has concurrently filed a motion to be authorized to file under seal an unredacted version of the complaint, which unredacted version includes all amounts and exhibits which have been redacted from the publicly filed version of the complaint. The Debtors believe that the redacted information reflect confidential and commercially sensitive information.

Exhibit D

Filed Under Seal[4]

[4] At the request of the Debtors, the Committee has concurrently filed a motion to be authorized to file under seal an unredacted version of the complaint, which unredacted version includes all amounts and exhibits which have been redacted from the publicly filed version of the complaint. The Debtors believe that the redacted information reflect confidential and commercially sensitive information.