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
	:	**RE: Docket No. 29**

LIMITED OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 361, 362, 363 AND 364 SEEKING FINAL ORDER (I) AUTHORIZING DEBTORS TO (A) OBTAIN POST-PETITION FINANCING, (B) GRANT SENIOR LIENS, JUNIOR LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE PRIORITY; (II) APPROVING USE OF CASH COLLATERAL; AND (III) GRANTING ADEQUATE PROTECTION TO CERTAIN PREPETITION SECURED PARTIES

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 proposed counsel, hereby files this limited objection (the "Objection") to the *Debtors' Motion for Interim and Final Orders Pursuant To 11 U.S.C §§ 361, 362, 363 and 364: (I) Authorizing Debtors to (A) Obtain Post-Petition Financing and (B) Grant Senior Liens, Junior Liens and Superpriority Administrative Expense Priority; (II) Approving Use of Cash Collateral; (III) Granting Adequate Protection to Certain Pre-Petition Secured Parties; (IV) Scheduling a*

[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).

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Final Hearing; and (V) Granting Related Relief [Docket No. 29] (the "DIP Motion").[2] In support of the Objection, the Committee respectfully states as follows:

I.
PRELIMINARY STATEMENT

1. The Committee represents holders of unsecured claims amounting to hundreds of millions of dollars in these cases, including bond debt, trade claims, employees and pension claimants. The Committee believes that an orderly, properly managed reorganization has the potential to stabilize the Debtors' businesses, right-size their debt load, reduce operating costs, and generate upside value for the creditors. It has been suggested that there may be no value for unsecured creditors in these cases; the Committee believes it is very premature to reach such a conclusion.

2. The Committee has no fundamental objection to the DIP financing itself, which is critical to the initial goals of stabilizing the business and providing the liquidity necessary to effectuate the restructuring required. Indeed, following extensive negotiations, the Administrative Agent for the DIP Lenders has consented, at the request of the Committee, to a number of changes and clarifications in the proposed form of Final Order that have resolved a host of issues and concerns related to the DIP Motion and the proposed Final Order as it pertains to the DIP Lenders. Several issues remain, however, regarding the proposed adequate protection for the Prepetition Secured Noteholders, thus necessitating this limited objection.

3. This is *not* a typical chapter 11 case. Only the Prepetition Revolver Lenders hold a first lien on the Debtors' cash collateral – and they are being repaid in full from the proceeds of the DIP Credit Facility. The Prepetition First Lien Noteholders have only a **second lien** on the Debtors' cash collateral, and the Prepetition Second Lien Noteholders have **no lien** at all on that

[2] Capitalized terms that are not otherwise defined in this Objection have the meanings ascribed to them in the DIP Motion.

cash collateral. These noteholders are secured by the Debtors' plants, property, and equipment ("PP&E"), which the Debtors will continue to maintain, insure, and repair as part of their regular business activities. *None* of the prepetition secured lenders in this case will be primed by the proposed DIP Financing. Finally, the Debtors have already represented to the Court that they are cash flow positive.

4. In an extraordinary case such as this – a case where secured lenders face no or very little risk of diminution in the value of their collateral as shown more fully in our discussion below – the Court should be wary of any attempt by prepetition secured creditors to improve their position at the expense of unsecured creditors. Yet that is precisely what is happening here. Since the Debtors filed the DIP Motion, the Debtors and the Prepetition Secured Noteholders have negotiated an interim order and final order that would grant "adequate protection liens" on unencumbered assets ostensibly to maintain the value of the Prepetition Secured Noteholders collateral, while also granting these secured creditors the benefit of a waiver of the trustee's right to surcharge their collateral under section 506(c) of the Bankruptcy Code for the benefit of the estates.

5. On the Petition Date, there appears to have been certain unencumbered assets in the Debtors' estates, including but not limited to, Avoidance Actions, a regulated non-debtor power company in Wisconsin (Consolidated Water Power Co.), and a valuable piece of equipment the Debtors refer to as "Paper Machine #35." The Prepetition Secured Noteholders should not be allowed to obtain new liens on these assets or their proceeds. The Prepetition Secured Noteholders are effectively trying to preclude unsecured creditors from sharing in the value of these unencumbered assets, while using assets in which they have no lien to fund the maintenance and preservation of their collateral.

6. For all of these reasons, as well as the reasons described in greater detail below, the Committee requests that the Court condition the relief requested in the DIP Motion by modifying the proposed Final Order consistent with this Objection.

II.
BACKGROUND

7. On September 7, 2011 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code. 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.

8. On September 21, 2011, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code. That same day, the Committee met and retained Paul Hastings LLP as its bankruptcy counsel.

Overview of Debtors' Prepetition Secured Indebtedness

A. Prepetition Revolving Credit Facility

9. Prior to the Petition Date, the Debtors entered into an asset-based revolving credit facility (the "Prepetition Revolver"), which had a total commitment of $500 million. As of the Petition Date, approximately $131 million of borrowings (excluding of letters of credit totaling approximately $101 million) remained outstanding. Each of the Debtors (other than NewPage Group, Inc.) and NewPage Port Hawkesbury Corp., a non-debtor subsidiary of NewPage, are obligors under the Prepetition Revolver (collectively, the "ABL Obligors"). To secure their obligations under the Prepetition Revolver, NewPage and each of the ABL Obligors granted the lenders under the Prepetition Revolver a first priority security interest in, and lien against,

present and future cash, deposit accounts, accounts receivable, inventory, and intercompany debt (the "ABL Collateral").

B. First Lien Notes

10. NewPage is also the issuer of 11.375% senior secured first lien notes due 2014 (the "Prepetition First Lien Notes," and the holders of such notes, the "Prepetition First Lien Noteholders") in the aggregate face amount of $1.77 billion, which were guaranteed by NewPage and each of its wholly owned direct and indirect subsidiaries (the "Subsidiary Guarantors") other than Consolidated Water Power Company ("CWPCo"). The Debtors assert that the obligations of NewPage and each of the Subsidiary Guarantors under the Prepetition First Lien Notes are secured by a first-priority lien against substantially all their respective assets other than the ABL Collateral (the "Fixed Collateral"), including property, plants & equipment ("PP&E") of the Debtors, and by a second priority lien on the ABL Collateral.

C. Second Lien Notes

11. NewPage also issued second lien notes (the "Prepetition Second Lien Notes," the holders of such notes, the "Prepetition Second Lien Noteholders" and, together with the First Lien Noteholders, the "Prepetition Secured Noteholders"), consisting of (a) $806 million face amount of 10% fixed rate senior secured second lien notes, and (b) $225 million face amount of floating rate senior secured second lien notes. The Prepetition Second Lien Notes were guaranteed by NewPage and the Subsidiary Guarantors, and their obligations were allegedly secured by a second-priority lien on the Fixed Collateral. The Prepetition Second Lien Notes were not secured by the ABL Collateral.

DIP Motion

12. On the Petition Date, the Debtors filed the DIP Motion seeking, among other things, (i) use of cash collateral ("Cash Collateral"), and (ii) authority to enter into a postpetition

debtor-in-possession credit facility (the "DIP Credit Facility") consisting of a (a) $350 million superpriority senior secured revolving credit facility (the "DIP Revolving Facility"), and (b) a $250 million superpriority senior secured term loan facility (the "DIP Term Loan Facility"). On September 8, 2011, the Court entered an interim order [Docket No. 80] (the "Interim Order") granting the DIP Motion as set forth therein and scheduling a final hearing for October 4, 2011 at 2:00 p.m. to consider entry of an order approving the DIP Credit Facility on a final basis (the "Final Order").

13. Pursuant to the Interim Order, the Debtors were permitted to obtain $245 million under the DIP Revolving Facility and $250 million under the DIP Term Loan Facility. The Debtors were authorized to use such proceeds to fully repay all obligations under the Prepetition Revolver.[3] As a result of this repayment, the liens on the ABL Collateral securing the Debtors' obligations under the Prepetition Revolver will be released.[4] The Debtors propose to simultaneously grant new liens on the ABL Collateral to the lenders under the DIP Credit Facility (the "DIP Lenders") to secure the Debtors' obligations thereunder. The liens granted to the DIP Lenders will have the same priority on the ABL Collateral as the liens which secured the Prepetition Revolver.[5] Therefore, according to the DIP Motion, the relative priorities of the liens of the First Lien Noteholders and Second Lien Noteholders will not be affected in any manner by the DIP Credit Facility. The First Lien Noteholders will maintain a second-priority lien on the ABL Collateral and a first-priority lien on the Fixed Collateral, while the Second Lien Noteholders will continue to have a second-priority lien on the Fixed Collateral.

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3 *See* Interim Order ¶ 5(a).
4 DIP Motion ¶ 40.
5 *Id.*

III.
OBJECTION

14. The Final Order should not be entered in its proposed form. The proposed "adequate protection" for the Prepetition Secured Noteholders improves their position with postpetition liens and superpriority administrative expense claims that siphon all of the unencumbered value of the estates away from unsecured creditors.

15. Financing approved under section 364 should not allow secured creditors to undo the level "playing field" contemplated by the Bankruptcy Code. For this reason, courts have emphasized that they must guard against proposals that threaten to tilt a case in favor of one group over another and prejudice a party's rights at an early stage:

> Acknowledging that Congress, in Chapter 11 delicately balanced the hope of debtors to reorganize and the expectations of creditors for payment, the courts have focused their attention on proposed terms that would tilt the conduct of the bankruptcy case; prejudice, at an early stage, the powers and rights that the Bankruptcy Code confers for the benefit of all creditors; or leverage the Chapter 11 process by preventing motions by parties-in-interest from being decided on their merits.[6]

A. Unencumbered Property of the Estates Should be Protected

16. Based on the information available to the Committee at this time, the Debtors' unencumbered assets appear to include *at least* the Avoidance Actions (and any proceeds therefrom), any proceeds from the sale of the Debtors' interest in CWPCo, and potential proceeds from the sale or other disposition of a valuable paper making machine located at the Debtors' mill in Stevens Point, Wisconsin ("Paper Machine #35"). The Committee's preliminary analysis suggests that these unencumbered assets have significant value.

17. The Committee objects to providing the Prepetition Secured Noteholders with adequate protection liens on and superpriority claims against unencumbered assets or their

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[6] *In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 37; *see also In re Tenney Vill. Co., Inc.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989).

proceeds, particularly where, as is the case here, the Prepetition Secured Noteholders are not being primed *and* they are seeking waivers of any surcharge against their existing collateral under section 506(c). Furthermore, the Prepetition Secured Lenders are not providing any new money in exchange for these grants of additional security. Rather, these prepetition lenders are simply stripping distributions otherwise available to unsecured creditors so that they can enhance their collateral position.

i. The Proceeds of Avoidance Actions Should be Preserved for Unsecured Creditors

18. Paragraphs 14(a) and 14(b) of the proposed Final Order grant fully perfected junior-priority security interests in and liens upon the Collateral granted to the DIP Lenders (including the proceeds of the Avoidance Actions), to the Prepetition Secured Noteholders. The circumstances presented here do not justify granting liens on the proceeds of avoidance actions to the Prepetition Secured Noteholders, nor should those proceeds be available to satisfy super-priority administrative expense claims asserted by the Prepetition Secured Noteholders. Rather, Avoidance Actions and their proceeds should be preserved for the benefit of the Debtors' unsecured creditors.

19. Avoidance actions are distinct creatures of bankruptcy law designed to ensure equality of distribution among general unsecured creditors. Courts severely restrict a debtor-in-possession's ability to pledge avoidance actions as security[7] because avoidance actions are not property of the Debtors' estate.[8] Similarly, courts in this district regularly exclude proceeds of

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[7] *See, e.g., Official Comm. of Unsecured Creditors v. Goold Electronics Corp. (In re Goold Electronics Corp.)*, No. 93 C 4196, 1993 WL 408366, *3-4 (N.D. Ill. Sept. 22, 1993) (vacating bankruptcy court order approving post petition financing to the extent that the order assigns to the bank a security interest in the debtor's preference actions).

[8] *See Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics, Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000) (avoidance actions are not property of estate, but are essentially rights held by estate for benefit of creditors).

causes of action under chapter 5 of the Bankruptcy Code from adequate protection packages.[9] As Judge Shannon once remarked, "With respect to the liens on avoidance actions, again, it's no secret that they are not welcome in this jurisdiction or they're not lightly granted. Our Local Rules try to make this pretty clear."[10] The same logic should apply to proceeds of avoidance actions. Prohibiting the Prepetition Secured Noteholders from taking the proceeds of avoidance actions is even more appropriate where such secured lenders are also asking for a waiver of section 506(c) surcharge claims.[11]

20. Because chapter 5 causes of action are not property of the Debtors' estates, there is no legal basis for the Court to grant the Prepetition Secured Noteholders rights in Avoidance Actions or the proceeds thereof. More fundamentally, it is unfair to allow the Prepetition Secured Noteholders to get a waiver of section 506(c) surcharge rights while at the same time getting a lien on assets which were previously unencumbered, such as the Avoidance Actions. Therefore, the Final Order should (a) expressly exclude the Avoidance Actions (and any proceeds therefrom) from any adequate protection liens granted to the Prepetition Secured Noteholders, and (b) expressly exclude the proceeds from any Avoidance Actions from the scope of the Notes Superpriority Claims.

ii. Liens Should Not Attach to the Capital Stock of CWPCo (Directly or Indirectly)

21. In addition, broadly granting liens in the "Collateral" to the Prepetition Secured Noteholders (and the grant of a super-priority administrative expense claim against all Debtors to

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9 *See, e.g., In re G.I. Joe's Holding Corp.*, Case No. 09-10713 (Bankr. D. Del. Apr. 2, 2009); *In re Boscov's, Inc.*, Case No. 08-11637 (Bankr. D. Del. Aug. 29, 2008); *In re Mervyn's Holdings, LLC*, Case No. 08-11586 (Bankr. D. Del. Aug. 26, 2008); *In re Goody's Family Clothing, Inc.*, Case No. 08-11133 (Bankr. D. Del. July 16, 2008); *In re Sharper Image Corp.*, Case No. 08-10322 (Bankr. D. Del. Mar. 7, 2008).

10 *See In re Ascendia Brands, Inc.*, Case No. 08-11787 (Bankr. D. Del.), Hr'g Tr. 76:9–12, Sept. 3, 2008. A copy of the relevant portion of the transcript is attached hereto as Exhibit A.

11 *In re Motor Coach Indus. Int'l, Inc.*, Case No. 08-12136 (Bankr. D. Del.), Hr'g Tr. 120:15–19, Oct. 17, 2008 (Judge Shannon stated "and as a practical matter, I cannot recall a case . . . where I have approved this kind of relief, that being liens on avoidance actions and a 506(c) waiver, over a committee objection."). A copy of the relevant portion of the transcript is attached hereto as Exhibit B.

such secured creditors) would also encompass all capital stock of all Subsidiaries of the Debtors, including CWPCo (or any proceeds from the sale of such stock). CWPCo is a non-debtor affiliate and a regulated public utility which provides electricity to the Debtors' mills located in central Wisconsin, as well as to a small number of residential, light commercial, and light industrial customers. The Committee understands that CWPCo was not a guarantor under the Prepetition Revolver or under the First Lien Notes or the Second Lien Notes. The assets of CWPCo, including its capital stock, are currently unencumbered by any liens granted in connection with the Debtors prepetition financing agreements.

22. It is an open legal question whether the adequate protection liens granted to the Secured Noteholders can attach to the capital stock of a regulated utility. If the adequate protection liens are found to attach to CWPCo's stock, the Prepetition Secured Noteholders would be granted a replacement lien in assets (CWPCo's stock) which are not part of their prepetition collateral package. Even if this is not the case, the Notes Superpriority Claims given to the Prepetition Secured Noteholders would reach *the proceeds* from the sale of the CWPCo stock. As with the proceeds of Avoidance Actions, this unencumbered asset should not be subject to a lien going forward, nor should it be available to satisfy super-priority administrative expense claims. Rather, it should be preserved for the benefit of the Debtors' unsecured creditors. Therefore, the Final Order should (a) expressly exclude the capital stock of CWPCo (and any proceeds therefrom) from any adequate protection liens granted to the Prepetition Secured Noteholders, and (b) expressly exclude the proceeds from any sale of disposition involving CWPCo from the scope of the Notes Superpriority Claims.

iii. Liens Should Not Attach to Paper Machine #35

23. Likewise, the broad grant of adequate protection liens over all unencumbered property (or Notes Superpriority Claims) will deprive unsecured creditors of the value of Paper

Machine #35. That equipment, valued at approximately $150 million, is allegedly owned by Stora Enso Oyj, a party that owns approximately 20% of the equity in the Debtors, pursuant to a sale-leaseback transaction with the Debtors.[12] Consistent with its fiduciary and statutory duties, the Committee intends to investigate the sale-leaseback transaction concerning Paper Machine #35. To the extent a successful challenge to the "ownership" by Stora Enso Oyj of such asset can be brought, it should not be for the benefit of Prepetition Secured Noteholders who could attempt to "capture" the value of Paper Machine #35 through the Notes Superpriority Claims.

24. In addition, as noted above, the Notes Superpriority Claims threaten to do indirectly what a lien would do directly – *i.e.* deprive unsecured creditors of the value of this unencumbered asset. To prevent such a result, the Final Order should also expressly exclude the proceeds from any sale of disposition involving Paper Machine #35 from the scope of the Notes Superpriority Claims.

B. Replacement Liens in New PP&E and Other Unencumbered Assets Are Inappropriate

25. Section 363(e) of the Bankruptcy Code provides that, upon request of an entity that has an interest in collateral that is to be used, sold or leased by a debtor, "the court, with or without a hearing, shall prohibit or condition such use, sale, or lease ***as is necessary to provide adequate protection of its interest.***"[13] Thus, by its terms, section 363 mandates that "adequate protection" is limited to protecting against the diminution in value of the prepetition lien as a result of the debtor's use of that collateral.[14] Following the Supreme Court's decision in

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12 *See* Hr'g Tr. 125:11–25; 126:1–2 (Unofficial Hr'g Tr. Sept. 8, 2011). A copy of the relevant portion of the transcript is attached hereto as Exhibit C.

13 *See* 11 U.S.C. § 363(e) (emphasis added).

14 *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest, Assocs., Ltd.*, 484 U.S. 365, 370 (1988); *In re Continental Airlines, Inc.*, 154 B.R. 176, 180 (Bankr. D. Del. 1993) (providing that creditors only entitled to adequate protection for any decline in value of their collateral).

Timbers, "courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral."[15]

26. Under the adequate protection scheme worked out between the Debtors and the Prepetition Secured Noteholders, these secured creditors will receive, as adequate protection against the risk of diminution in the value of their prepetition collateral, a host of benefits, including (i) current payment of attorneys' fees and other fees and expenses, (ii) superpriority claims, and (iii) replacement liens on the Collateral. The Prepetition First Lien Noteholders are also receiving current payment of prepetition accrued and postpetition interest at the non-default rate under the First Lien Notes. But replacement liens should not attach to any new PP&E the Debtors may acquire postpetition, capital stock of CWPCo, or Paper Machine #35.

27. As noted above, the Prepetition Secured Noteholders are not being primed by the DIP Credit Financing. Indeed, the financing proposed here will aid the Debtors in their efforts to maintain, insure and preserve the collateral of these secured lenders. Moreover, the preservation of the Prepetition Secured Noteholders' collateral will be *free of charge* because the Debtors are executing section 506(c) waivers. Under these circumstances, there is no cause for granting replacement liens in new, postpetition plant, property and equipment that the Debtors may acquire because the security interests of the Prepetition Secured Noteholders will not be prejudiced.

28. Furthermore, there is no reason to believe that the value of the existing PP&E collateral will diminish. The Debtors' acknowledge in their memorandum of law in support of

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[15] *In re Continental Airlines*, 146 B.R. 536, 539 (Bankr. D. Del. 1992); *see also The Bank of N.Y. v. Epic Resorts-Palm Springs Marquis Villas, LLC (In re Epic Capital Corp.)*, 290 B.R. 514, 526 (Bankr. D. Del. 2003); *In re Integrated Health Servs., Inc.*, 260 B.R. 71, 74 (Bankr. D. Del. 2001).

the use of cash collateral[16] that the "Prepetition Secured Lenders' Collateral value will not decrease due to the Debtors' postpetition operations."[17] And even if it were diminishing in value, the First Lien Noteholders are scheduled to receive regularly scheduled interest payments. To grant the these creditors *both* replacement liens in new PP&E and current interest payments during the pendency of these chapter 11 cases is grossly unnecessary to protect the Secured Noteholders against a hypothetical diminution in the value of their collateral. Rather, the value of new PP&E should be preserved for the benefit of unsecured creditors of the Debtors' estates.

C. In Any Event, the Waiver of Section 506(c) In Favor of the Prepetition Secured Noteholders Should Contain a Carve-Out For the Use of Unencumbered Assets by the Debtors

29. In addition to the relief requested regarding the adequate protection liens or claims granted to the Prepetition Secured Noteholders, the Court should condition the waiver of section 506(c) sought by the Prepetition Secured Noteholders on a clear and unequivocal carve-out for situations where the Debtors use unencumbered assets to finance their operations. Indeed, the Committee has identified certain unencumbered assets, and to the extent these assets (or proceeds thereof) are used to finance the Debtors' operations, neither the Debtors nor the Committee should be precluded from attempting to surcharge the Prepetition Secured Noteholders for the use of such funds. The Prepetition Secured Noteholders would obviously be free to argue that the use of such funds did not improve or preserve their collateral, but that is a matter to be determined by the Court at the time, if the surcharge request is made by the Debtors or the Committee.

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16 Memorandum of Law in Support of Debtors' Motion, dated September 7, 2011, for Order Authorizing Use of Cash Collateral Pursuant to Bankruptcy Code Section 363(c)(2) [Docket No. 20].

17 *See* Cash Collateral Memorandum ¶ 8.

D. The Final Order Must Be Clarified to Reflect that the Second Lien Notes Are Not Secured by the ABL Collateral

30. The Prepetition Second Lien Noteholders do not hold a lien on the Debtors' ABL Collateral (*i.e.* cash, inventory, and accounts receivable). Nevertheless, the proposed Final Order gives the Prepetition Second Lien Noteholders consent rights and other rights consistent with the holder of a security interest in that collateral. In numerous instances, the Final Order restricts the use of cash collateral to investigate and challenge the Prepetition Second Lien Notes, and requires the consent of the Prepetition Second Lien Noteholders, the Second Lien Group, and/or the Indenture Trustee for the Second Lien Notes to take certain actions with respect to the ABL Collateral.[18] At no point does the proposed Final Order attempt to make necessary distinctions to reflect the fact that the Prepetition Second Lien Noteholders do not have a lien on ABL Collateral.

31. Viewed in its proper context, the Final Order should not contain any limitations on the use of cash collateral to investigate or challenge to the Second Lien Notes or prosecute any such challenge. Similarly, waivers of section 506(c) surcharge rights should not benefit the Prepetition Second Lien Noteholders as far as the ABL Collateral is concerned. For example, despite the obvious distinction between the security given the various secured creditors, the Final Order purports to waive the estates' rights to recover expenses from ABL Collateral "without the prior written consent of . . . the Second Lien Notes Collateral Trustee . . . ."[19] These provisions are inappropriate and must be modified.

E. The Proposed Carve-out Limits Are Inappropriate

32. While the DIP Lenders have agreed to subordinate their liens, security interests and claims to the Carve-Out, which totals $7.5 million in aggregate, the proposed Final Order

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[18] *See* Final Order ¶¶ 7(b), 10, 25(b), and 27(a).

[19] *See* Final Order ¶ 10.

caps the amount of the Carve-Out available to reimburse the fees and expenses of the Committee's advisors at $1.5 million in the aggregate (including the reimbursement of out-of pocket expenses of the committee members).[20] This allocation is unreasonable and unwarranted, and all estate professionals should ratably participate in the total amount of the Carve-Out.

33. The purpose of the Carve-Out is to provide a "reasonable amount . . . for payment of the fees of debtor's and the committees' counsel and possible trustee's counsel in order to preserve the adversary system. Absent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced."[21] Consistent with this principle, this Court has approved postpetition facilities providing for the professionals of the creditors' committee and the debtors to participate *pro rata* in any carve-out.[22]

34. There is no legal basis to apply a separate, arbitrary cap on the Committee's professionals' access to the Carve-Out, and the Committee (and all unsecured creditors) would be unfairly prejudiced by limiting its access to sufficient funds to reimburse its professionals in the event these cases liquidate.

F. The Proposed Limits on the Committee's Investigation Are Inappropriate

35. The proposed Final Order provides that (i) the Committee has just sixty (60) days from the formation of the Committee (*i.e.,* until November 20, 2011) to investigate and challenge the validity, enforceability, priority or extent of the liens granted under the Debtors' prepetition financing agreements, and (ii) its use of cash collateral to conduct such an investigation is limited to $100,000.[23] The 60-day review period does not provide a sufficient opportunity for the Committee and its professionals to ascertain whether the prepetition liens are valid and/or

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[20] *See* Final Order ¶ 7(b).

[21] *See Ames Dep't Stores*, 115 B.R. at 38.

[22] *See, e.g., Perkins and Marie Callender's Inc.*, Case No. 11-11795 (KG) [Docket No. 211] (Bankr. D. Del. July 12, 2011) ¶ 5.

[23] *See* Final Order ¶ 26-27.

properly perfected. The Committee is currently in the process of requesting documents from the Debtors relevant to a fulsome review and analysis of the prepetition liens. Given the complexity of the Debtors' prepetition capital structure and other immediate challenges in the chapter 11 cases, it is unreasonable to expect the Committee's investigation could be completed by the deadline set forth in the proposed Final Order.

36. Moreover, the Debtors have not yet filed their Schedules of Assets and Liabilities and Statements of Financial Affairs, and are requesting an extension of an additional forty-five (45) days by which they are statutorily required to do so. That means that the Debtors' Schedules and Statements will not be filed until November 21, 2011 – one day *after* the expiration of the Committee's investigation period. Thus, the Committee has no way of knowing the extent of the Debtors' assets at this juncture. It is unreasonable to expect that the Committee will be in a position to review and fully analyze the nature, extent, and validity of the prepetition liens within 60 days of its appointment, and prior to the filing of the Debtors' Schedules and Statements. The period proposed by the Debtors is also unreasonable when measured against the investigative periods established in other recent complex chapter 11 cases administered by this Court.[24]

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[24] *See In re AbitibiBowater Inc.*, Case No. 09-11296 (Bankr. D. Del. June 4, 2009) (providing for 120 days after formation of creditors' committee to assert claims and defenses against prepetition lenders); *In re Muzak Holdings LLC*, Case No. 09-10422 (Bankr. D. Del. Mar. 12, 2009) (providing for 105 days after formation of the creditors' committee to assert claims and defenses against prepetition lenders); *In re Fedders N. Am.*, Inc., Case No. 07-11176 (Bankr. D. Del. Oct. 5, 2007) (providing for 118 days after entry of the final order approving post-petition financing to assert claims and defenses against prepetition lenders).

37. In addition, the Committee's budget of $100,000 to conduct the lien investigation is far too stringent when compared against other cases administered before this Court.[25] Accordingly, the Committee requests that the Final Order provide (a) an extension of the lien investigation period of an additional sixty (60) days to provide the Committee, for a total of 120 days from its appointment to complete its lien investigation, and (b) an increase of $50,000 (for a total of $150,000) to the budget for conducting such an investigation.

G. The Committee Should Receive Copies of All Reports Given to the Lenders

38. The Debtors are proposing to provide the advisors to the Prepetition Secured Noteholders with copies of all reports provided to the administrative agent for the DIP Lenders.[26] The Committee, as the statutory representative to all unsecured creditors, should also receive copies of such reports.

H. The Committee Should Have Standing to Commence Causes of Action

39. The proposed Final Order should expressly grant the Committee standing to challenge the prepetition liens or bring other claims and causes of action against the Prepetition Secured Lenders without the need to file a motion for standing at a later date. Committee standing is particularly appropriate where, as here, Cerberus controls the Debtors and their

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25 *See In re Aleris Int'l, Inc.*, Case No. 09-10478 (Bankr. D. Del. Mar. 18, 2009) (allowing for the use of up to $300,000 in post-petition loan funds to perform the investigations into any prepetition lender claims); *In re Muzak Holdings LLC*, Case No. 09-10422 (Bankr. D. Del. Mar. 12, 2009) (allowing for use of up to $150,000 in cash collateral to perform investigations into prepetition lender claims); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (Bankr. D. Del. Feb. 23, 2009) (allowing for use of up to $250,000 in post-petition loan funds to perform investigations into any prepetition lender claims); *In re Fedders N. Am., Inc.*, Case No. 07-11176 (Bankr. D. Del. Oct. 5, 2007) (providing for no limitation on use of cash collateral to conduct investigation into claims and defenses against prepetition lenders).

26 *See* Final Order ¶ 33.

advisors, and, while exercising such control, Cerberus has been involved on both sides of the fence (i.e. as a lender and as the Debtor's controlling shareholder).[27]

40. Section 1103(c)(5) of the Bankruptcy Code provides that the Committee may "perform such other services as are in the interests of those represented."[28] Similarly, section 1109(b) of the Bankruptcy Code provides that the Committee is among the interested parties that "may appear and be heard on any issue in a [chapter 11] case."[29] These statutory provisions, taken together, "evince a Congressional intent for committees to play a robust and flexible role representing the bankruptcy estate, even in adversarial proceedings."[30] In addition, section 503(b)(3)(B) of the Bankruptcy Code allows for the priority payment of expenses of a "creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor."[31] This section "would be meaningless unless authority existed" for

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27 *See* NewPage Annual Report (Form 10-K) for year ended Dec. 31, 2010, at 92. In pertinent part, the Debtors' Annual Report discloses that:

> Cerberus retains consultants that specialize in operations management and support and who provide Cerberus with consulting advice concerning portfolio companies in which funds and accounts managed by Cerberus or its affiliates have invested. From time to time, Cerberus makes the services of these consultants available to Cerberus portfolio companies, including NewPage. We believe that the terms of these consulting arrangements are materially consistent with those terms that would have been obtained in an arrangement with an unaffiliated third party. Activity related to Cerberus' monitoring of their equity investment, such as non-independent director fees and expenses, are not charged to the Company. Cerberus also provides certain services free of charge, including chairman and company director fees and expenses. **We have commercial arrangements with other entities that are owned or controlled by Cerberus. Commercial Finance LLC, an affiliate of Cerberus, is a lender under our revolving credit facility.** We believe that these transactions are on arms'-length terms and are not material to our results of operations or financial position.

Id. (emphasis added). The terms of the DIP Credit Agreement also illustrate the control exercised by Cerberus in this case. Subject to certain conditions, Section 6.05(b) of the DIP Credit Agreement allows for the payment of "Restricted Junior Payments" in an amount not to exceed $2.5 million in any Fiscal Year. As defined in the DIP Credit Agreement, these Restricted Junior Payments include management and similar fees payable to Cerberus and its affiliates.

28 11 U.S.C. § 1103(c)(5).

29 11 U.S.C. § 1109(b).

30 *Official Comm. of Unsec. Cred. of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 566 (3d Cir. 2003).

31 11 U.S.C. § 503(b)(3)(B).

committees to pursue claims on behalf of the estate.[32] The ability of the Committee to obtain standing is critical to the preservation of estate assets and serves important interests in chapter 11 reorganizations.[33]

41. In the alternative, in the event the Committee is required to file a motion to seek standing to challenge any prepetition secured party's liens, the lien review period should be automatically extended to accommodate the motion practice involved in seeking such standing.

I. Professional Fee Payments for Prepetition Secured Noteholders Must be Conditioned to Prevent Excessive and Unwarranted Costs

42. As proposed, an *ad hoc* group of First Lien Noteholders and an *ad hoc* group of Second Lien Noteholders will receive payment of professional fees and other expenses.[34] Because there is no contractual basis for such "groups" (in contrast to the indenture trustees) to have their fees and expenses paid (which presents the risk of the Debtors having to pay for additional advisors for the Indenture Trustees themselves), the Court should condition these payments as follows:

a. The Committee should be provided with a written representation that the members (each of whom should be identified in the written representation) of these first and second lien groups actually hold more than 50% of the respective series of notes represented by such *ad hoc* groups;

b. The Committee should receive a monthly update to such representations that the groups continue to hold more than 50% of the respective series of notes and, to the extent that a group holds less than 50% of those respective series of notes, the benefits received by the group(s) under the Final Order should be subject to challenge by the Committee; and

c. The Final Order should expressly provide that the fees and expenses of the indenture trustees for the respective first lien and second indentures will not include the fees and expenses of financial advisors other than the financial advisors retained by the *ad hoc* groups.

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32 *Cybergenics*, 330 F.3d at 567.

33 *Official Comm. of Unsec. Cred. of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 542 (W.D. Pa. 2005).

34 *See* Final Order ¶¶ 16, 19.

J. The Final Order Should Be Clarified to Provide For Disgorgement of Adequate Protection Payments

43. The proposed Final Order preserves the rights of all parties to assert that payments made by the Debtors to satisfy adequate protection obligations on account of the First Lien Notes and the Second Lien Notes "constitute and may be recharacterized as principal repayments."[35] The Final Order needs to be clarified, however, to also provide for the disgorgement of those payments, if appropriate. This relief would be essential in the event that a successful challenge is filed against the liens giving rise to such obligations.

K. The Final Order Should Not Grant Rights to Credit Bid That Do Not Exist Under Applicable Law

44. Paragraph 29 of the proposed Final Order purports to preserve rights of the First Lien Notes Collateral Trustee and the Second Lien Notes Collateral Trustee to credit bid either pursuant to a plan of reorganization or a sale under section 363(b) of the Bankruptcy Code. The Committee believes that this provision is overbroad in light of recent developments in this Circuit regarding the rights of secured creditors to credit bid.[36] In order to address these concerns, the Committee requests that the Court modify the first proviso of paragraph 29 by adding "(if any)", as set forth below:

> *provided,* that solely with respect to the Pre-Petition PP&E Collateral, such right of the Administrative Agent is without prejudice to and subject to any similar rights **(if any)** of the First Lien Notes Collateral Trustee and the Second Lien Notes Collateral Trustee, which rights are subject to the terms and conditions of the CTA; . . . .

L. The Fee Review Provisions Are Unduly Restrictive

45. The Committee requires fifteen (15) business days to review fees and expenses that are reimbursable under the Final Order. Paragraph 23(d) of the Final Order currently

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35 *See* Final Order ¶¶ 23(a), (b).

36 *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010).

provides ten (10) business days. The Committee requests that the Court extend that review period by five (5) business days.

IV.
RESERVATION OF RIGHTS

46. The Committee expressly reserves the right to supplement and amend this Objection, seek discovery with respect to the same, and introduce evidence at any hearing relating to the DIP Motion and this Objection. Further, the Committee reserves the right to respond to, further object to, join in, or amend any objection herein with respect to any argument or objection made by any person relating to the DIP Motion.

V.
CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) condition the relief requested in the DIP Motion by modifying the proposed Final Order, as set forth herein, and (ii) grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: Wilmington, Delaware
October 3, 2011

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Proposed Co-Counsel to the
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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Case No. 08-11787 (BLS)
ASCENDIA BRANDS, INC., et al.,	
Debtors.	824 Market Street Wilmington, DE 19901
	September 3, 2008
	3:25 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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and they are the section 506(c) waiver and the liens on avoidance actions.

Starting with the 506(c) waiver, I don't -- I view this type of case as the reason that 506(c) is in existence and I would -- I cannot see that it would be likely for me under the circumstances of this case as I understand them, that I would approve and authorize a section 506(c) waiver in the context of this final DIP financing.

With respect to the liens on avoidance actions, again, it's no secret that they are not welcome in this jurisdiction or they're not lightly granted. Our Local Rules try to make this pretty clear. Judge Walsh's letter, I think, to parties made it equally clear and that's largely been embodied in our Local Rules.

But I actually would be prepared to entertain further discussion on that question. Again, I think that a lender seeking that relief has a tough row to hoe, but it seems to me at least plausible as a threshold matter that -- and Mr. Kramer touched on this -- that really all of the money that's gone out that may be avoidable transfers really is the money advanced by the lenders.

And I don't know whether that is or isn't the case, and I know that there are certain statutory bases for saying that that really doesn't make a -- that doesn't make any difference. But this case does present a somewhat different

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	)	Case No. 08-12136(BLS)
	)	Jointly Administered
MOTOR COACH INDUSTRIES INTERNATIONAL, INC., et al.,	)	Chapter 11
	)	Courtroom 1
	)	824 Market Street
Debtors.	)	Wilmington, Delaware 19801
	)	
	)	October 17, 2008
	)	9:09 A.M.

TRANSCRIPT OF DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS AUTHORIZING DEBTORS TO OBTAIN POST PETITION FINANCING, UTILIZE CASH COLLATERAL, GRANTING LIENS, PROVIDE SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, SCHEDULING INTERIM AND FINAL HEARING (DOCKET 10). DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING DEBTORS TO PERFORM UNDER RESTRUCTURING AGREEMENT, AUTHORIZING DEBTORS TO PAY CERTAIN ASSOCIATED FEES TO AND REIMBURSEMENT OF CERTAIN EXPENSES OF BACKSTOP PARTY, GRANTING RELATED RELIEF (DOCKET 57). MOTION OF DEBTORS AND DEBTOR IN POSSESSION FOR ENTRY OF AN ORDER AUTHORIZING DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS UNDER CUSTOMER PROGRAMS AND AUTHORIZING AND DIRECTING FINANCIAL INSTITUTIONS TO HONOR ALL RELATED CHECKS AND ELECTRONIC PAYMENT REQUESTS (DOCKET 9).
BEFORE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

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among the parties, and I don't see that in the revised form of order today. So, there are some items that are probably agreed to or are noncontroversial, but that I may need to deal with.

In ruling, I will focus on those elements that were raised by the committee. And to the extent that I don't raise or address a specific objection, I am overruling that objection.

First, as a threshold matter, I will not approved liens on avoidance actions and Section 506(c) waiver in the context of this case. I am concerned that there is not a sufficient record to justify what our local rules identify as relief that is almost never appropriate on day one, and for which a party seeking that relief requires a substantial evidentiary showing. And I think the easiest way to put it is that these remedies are not favored. And as a practical matter, I cannot recall a case, although someone would certainly cite it back to me, where I have approved this kind of relief, that being liens on avoidance actions and a 506(c) waiver, over a committee objection.

I will approve the requested roll-up subject to my comments on the record regarding remedies in the event that the liens are unwound.

And the committee objections regarding the appropriate challenge period, they -- the committee identified that period as being too short. And I simply note that that

EXHIBIT C

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 11-12804(KG)

- -x

In the Matter of:

NEWPAGE CORPORATION, et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

September 8, 2011

9:12 AM

B E F O R E:

HON. KEVIN GROSS

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

and so it's not being primed by anything here, whether it's now a junior DIP lien and in fact, you know, prior to the first or second lien so it's PP&E on a particular paper machine.

So a little background as to why I care and this gentleman who represents Wells Fargo trustee cares. One paper machine -- obviously this company makes paper. It makes that paper on huge paper machines that Your Honor may have seen --

THE COURT: Yes.

MS. GRANFIELD: -- or may have seen in other cases.

THE COURT: yes.

MS. GRANFIELD: One of those paper machines, paper machine 35 in Stevens Point, Wisconsin, at the Stevens Point plan, basically is owned by the trust. That a sale lease back trust was put in place relating to this paper machine actually back in 1997, if you can believe it.

There are a number of parties that have an interest in the trust. Wells Fargo is trustee for some secured certificate holders who you might say have, kind of, maybe a first interest in what's going on in the trust. There's an owner participant. There's an owner trustee which is Wilmington. But for these purposes, in terms of what's happening with the DIP, the parties that are interested in the trust would say, you know, the trust owns the machine and the trust leases it to NewPage as a piece of equipment. And part of this whole package was also that the trust got a ground lease on the little piece of

real estate that's underneath the machine. And so there's this package of rights that go with, you know, paper machine 35.

Now, Stora Enso, well you'd say what does Stora Enso have anything to do with anything? Stora Enso is, kind of, a legacy issue relating to a prior company, actually has an outstanding guaranty relating to this trust structure. And depending on what happens with the lease, what happens with the guaranty, you know, Stora may come in as the subrogated party or there may be other things that are worked out about paper machine 35. But at least with respect to what's going on in the DIP, you know, there's a couple things that are important to all the parties that have an interest in this trust and paper machine 35, which is, first and foremost, obviously when the DIP order says, whether it's for DIP liens or adequate protection liens, that, you know, all interests in property of the debtor are being liened in these different ways, that obviously those liens can only attach to the property interest that the debtor has. So if that interest is as a lessee, maybe they can grant some contract rights or other things, but obviously if they don't have the ownership interest they can't grant a lien in the ownership interest.

Also, it's important that with respect to this structure, as is normally done and is regular practice, belt and suspenders, that when you believe you have a lease, just in case somebody would try to recharacterize it or say no it's not