IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	§	Chapter 11
	§	
SHERWIN ALUMINA COMPANY, LLC, *et al.*,[1]	§	Case No. 16-20012 (DRJ)
	§	
Debtors.	§	(Jointly Administered)

OMNIBUS RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO (1) EMERGENCY MOTION OF SHERWIN ALUMINA COMPANY, LLC, ET AL., FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO (A) OBTAIN POSTPETITION SECURED FINANCING AND (B) UTILIZE CASH COLLATERAL, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) GRANTING ADEQUATE PROTECTION TO PREPETITION LENDER, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) SCHEDULING A PERMANENT FINANCE HEARING PURSUANT TO SECTIONS 105, 361, 362, 363, 364, AND 507 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 4001, AND 9014 AND (2) DEBTORS' MOTION FOR ENTRY OF AN ORDER (A) AUTHORIZING THE DEBTORS TO ENTER INTO AND PERFORM UNDER THE STALKING HORSE PURCHASE AGREEMENT, (B) APPROVING BIDDING PROCEDURES, (C) APPROVING CONTRACT ASSIGNMENT PROCEDURES, (D) APPROVING BID PROTECTIONS, (E) SCHEDULING BID DEADLINES AND AN AUCTION, AND (F) APPROVING THE FORM AND MANNER OF NOTICE THEREOF

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sherwin Alumina Company, LLC ("Sherwin") (2376); and Sherwin Pipeline, Inc. ("Sherwin Pipeline") (9047). The Debtors' service address is: 4633 Highway 361, Gregory, Texas 78359.

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The Official Committee of Unsecured Creditors (the "Committee") of Sherwin Alumina Company, LLC, *et al.* (collectively, the "Debtors") hereby files this Omnibus Response (the "Response") to the Debtors' (1) *Emergency Motion for Entry of Interim and Final Orders (i) Authorizing Debtors to (a) Obtain Postpetition Secured Financing and (b) Utilize Cash Collateral, (ii) Granting Liens and Providing Superpriority Administrative Expense Claims, (iii) Granting Adequate Protection to Prepetition Lender, (iv) Modifying the Automatic Stay, and (v) Scheduling a Permanent Finance Hearing Pursuant to Sections 105, 361, 362, 363, 364, and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, and 9014* [Docket No. 26] (the "Cash Collateral Motion")[2] and (2) *Motion for Entry of an Order (a) Authorizing the Debtors to Enter into and Perform Under the Stalking Horse Purchase Agreement, (b) Approving Bidding Procedures, (c) Approving Contract Assignment Procedures, (d) Approving Bid Protections, (e) Scheduling Bid Deadlines and an Auction, and (f) Approving the Form and Manner of Notice Thereof* [Docket No. 25] (the "Bid Procedures Motion"[3] and, together with the Cash Collateral Motion, the "Motions"), and respectfully represents:

I. INTRODUCTION

1. The Debtors and Glencore have attempted to paint themselves as "white knights" before this Court with the sole alleged goal of preserving the jobs of hundreds of the Debtors' employees. The Committee whole-heartedly agrees that preserving such jobs and the Debtors' ongoing business would be an ideal outcome in these cases, provided that value is also

[2] As amended by the terms of the *Proposed Final Financing Order* attached as Exhibit B-1 (the "Amended Cash Collateral Order") to *Debtors' Emergency Motion for Entry of an Order Scheduling (i) a Status Conference and (ii) Hearings and Objection Deadlines with Respect to Financing Motion and Bidding Procedures Motion* [Docket No. 345] (the "Scheduling Motion").

[3] As amended by the terms of the *Order (a) Approving Bidding Procedures, (b) Approving Contract Assignment Procedures, (c) Approving Bid Protections, (d) Scheduling Bid Deadlines and an Auction, and (e) Approving The Form and Manner of Notice Thereof* attached as Exhibit C-1 (the "Amended Bid Procedures Order" and, together with the Amended Cash Collateral Order, the "Amended Orders") to the Scheduling Motion.

maximized for the benefit of the Debtors' unsecured creditors. The Committee submits, however, that the Debtors' and Glencore's goal in these cases is more nefarious than they would have this Court believe. It appears that the Motions are the culmination of an orchestrated attempt by Glencore, the Debtors' corporate parent and sole equity owner (among other roles as discussed below), to preserve for itself the Debtors' business and assets while wiping clean all liabilities on the Debtors' balance sheet.

2. Over the past several years, Glencore—the Debtors' sole equity owner, second largest supplier, and largest customer—has taken various actions that appear designed to permit Glencore to "credit bid," as purported debt, equity or capital contributions made by Commodity Funding, LLC ("Commodity"), a wholly-owned subsidiary of Glencore for the "purchase" of the Debtors' assets. Among other things, Glencore: (i) caused the Debtors to enter into an agreement with Commodity pursuant to which Glencore would advance equity contributions to the Debtors masked as debt; (ii) caused the Debtors to "borrow" $95 million of equity funds from Commodity over the past twelve (12) months at a time when the Debtors were undercapitalized and unable to obtain funds from any non-insider third party lender; (iii) caused the Debtors to purchase at par (100%) a distressed $20 million loan issued by Noranda to a Glencore subsidiary; (iv) maintained control over the Debtors' board through overlapping directors and management; (v) engaged "new" counsel for the express purpose of conducting a so-called "investigation" into the validity of the Debtors' claims against Glencore and Commodity, which was intended to dissuade this Court of the legitimacy of such claims; and (vi) ultimately, caused the Debtors to commence these chapter 11 cases and file the Motions seeking an expedited sale of the Debtors' assets to Commodity for no cash other than a *de minimis* $250,000 payment to the Debtors' unsecured creditors.

3. If Commodity is permitted to credit bid such equity or capital contributions, it is likely that the Debtors' legitimate creditors will receive $0 on account of their claims. The evidence will show, however, that Commodity's purported secured claim is not valid and enforceable secured debt. The facts here evidencing, among other things, Glencore's control over the Debtors and intent to treat Commodity's advances as equity, are egregious and clearly support recharacterization and likely equitable subordination of Commodity's purported "claim" under well-established Fifth Circuit authority. As a consequence, the Debtors' request for the Court to grant "protections" to Commodity (including any ability to credit bid for the Debtors' assets) on the basis that Commodity has a lien on the Debtors' cash is premature and inappropriate.

4. This is not a traditional situation in which a true or bona fide secured lender must be compensated or protected in order for the Debtors to use cash collateral without such lender's absolute consent. Glencore *wants* the Debtors to use their cash (so that the Debtors' business remains viable when Glencore attempts to negotiate with Gregory Power Partners L.P. and Noranda Bauxite Ltd. on its supply chain contracts and, eventually, to credit bid Commodity's purported claim for the Debtors' assets). Glencore is not seeking protection in exchange for its consent to the Debtors' use of Glencore's collateral. Rather, Glencore is trying to use the Cash Collateral Motion as a "back door" way to obtain this Court's blessing of Commodity's purported claim. The Court cannot and should not "bless" Glencore's transparent strategy. Glencore and Commodity are not entitled to receive *any* protections in exchange for the Debtors using their cash.

5. When the Debtors originally filed the Motions on the Petition Date, they sought expedited Court approval of (i) a proposed debtor-in-possession financing (the "DIP Loan") from

Commodity, (ii) bidding procedures relating to a "fast track" sale (the "Sale") of all of the Debtors' assets to Corpus Christi Alumina LLC ("Corpus Christi Alumina") pursuant to a proposed stalking horse agreement (the "Stalking Horse Agreement"), and (iii) the terms governing the Debtors' use of Commodity's purported cash collateral. The Debtors no longer seek approval of the DIP Loan or the Stalking Horse Agreement. The Debtors are, however, asking the Court to approve various objectionable terms relating to the Debtors' use of Commodity's purported cash collateral, as well as bidding procedures for the Sale, prior to a determination by this Court of the validity and enforceability (or lack thereof) of Commodity's purported secured claim. The Court cannot and should not approve any "adequate protection" for Commodity when Commodity's claim is subject to legitimate challenge and Commodity's rights with respect to the Debtors' cash has not been established.

6. The Amended Orders have other objectionable provisions. Among other things, the Amended Cash Collateral Order provides that the Committee must file and litigate a "standing" motion (and, if successful, file a complaint, conduct discovery, and try a lawsuit with respect to the validity, amount and enforceability of Commodity's purported claim within the next month). The Committee does not need standing to object to and has objected to Commodity's Claim. While the Committee can comply with the proposed schedule, it can only do so if the Debtors and Commodity agree to cooperate in expedited discovery. To date, the Debtors have refused to even provide a privilege log. Furthermore, the Committee was forced to subpoena Thomas Russell (the Debtors' CEO) and file a motion to compel Daniel Goldberg before the Debtors and Glencore allowed the Committee to depose them. Additionally, (i) the Committee may only use $25,000 of estate funds to investigate and prosecute such challenge; (ii) Commodity may terminate the Debtors' use of cash if various "hair trigger" events of default

occur; (iii) Commodity and its affiliates (including Glencore) and all their officers, directors and professionals would receive broad releases for actionable prepetition conduct (including for avoidance action claims); (iv) Commodity would receive liens over the Debtors' chapter 5 avoidance action (including fraudulent transfer claims against Glencore) that should be vested in the Debtors' estates for the benefit of unsecured creditors; and (v) Commodity would be permitted to credit bid its purported secured debt.

7. Contemporaneous with the filing of this Response, the Committee has filed an objection to Commodity's claim. The burden is on the Debtors and Commodity to prove the validity, amount and priority of Commodity's purported claim. The Debtors and Commodity must establish that the Debtors' cash constitutes Commodity's collateral *before* the Court grants *any* protections to Commodity or Glencore. Moreover, because the transactions contemplated in the Motions were negotiated by hopelessly conflicted insiders and involve the Debtors' affiliates, the Motions must be analyzed with heightened scrutiny and the Debtors and Glencore have the burden of proof and must satisfy the "entire fairness" standard. The Debtors and Commodity cannot satisfy such standard.

II. BACKGROUND

A. BUSINESS OVERVIEW

9. The Debtors are indirect, wholly-owned subsidiaries of the Glencore p.l.c. group of companies (including, among others, Glencore p.l.c., Glencore Ltd. and Glencore International AG, together with all its affiliates, collectively, the "Glencore Group" or "Glencore"), the multinational commodity trading and mining enterprise. The Debtors own and operate an alumina plant in Gregory, Texas (the "Sherwin Facility") which produces aluminum oxide, or "alumina," from raw bauxite ore or by dissolving bauxite in a caustic solution. The Sherwin Facility is one of the few alumina plants in North America that can refine lower quality

(but significantly cheaper) Jamaican bauxite, which must be refined using higher temperatures and more energy than higher quality "sweetener" bauxite.

10. The Debtors' primary members of management are (i) Thomas Russell ("Russell"), the Debtors' CEO, and (ii) Kent Britton ("Britton"), the Debtors' CFO.

1. NORANDA RELATIONSHIP

11. [redacted]. Noranda filed for Chapter 11 bankruptcy protection on February 8, 2016. Noranda seeks to reject the Noranda Agreement. [redacted]

2. GREGORY POWER PARTNERS RELATIONSHIP

12. [redacted].

3. WORKFORCE ISSUES

a. Union

13. As of the Petition Date, Sherwin directly or indirectly employed approximately 575 individuals, with 160 full-time salaried employees. Approximately 455 individuals were previously subject to a collective bargaining agreement, dated as of February 9, 2011 (as amended and/or supplemented, the "CBA"), between Sherwin and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union on behalf of its Local Union No. 235A (the "United Steelworkers Union"). On October 11, 2014, the CBA expired and the Debtors instituted a "lockout." From October 2014 forward, the Debtors have been unable to reach a labor agreement with their unionized workforce and have, as a result, engaged independent contractors to operate the Sherwin Facility. On October 5, 2015 the National Labor Relations Board denied the Union's appeal, determining the Sherwin lockout was lawful.

14. Additionally, a Fair Labor Standards Act class action lawsuit brought on behalf of all current and former employees of the Debtors is pending against Sherwin in the United States District Court for the Southern District of Texas, Corpus Christi Division. The class action is captioned *Ortiz, et al. v. Sherwin Alumina Company, LLC*, No. 14-cv-00490. The plaintiffs seek to recover compensation for unpaid overtime wages, liquidated damages, attorneys' fees, and costs under the Fair Labor Standards Act. The Debtors have scheduled this class action claim as contingent, unliquidated, and disputed. Given that the potential class could include hundreds of former and current employees of Sherwin, this creates a significant potential liability for the Debtors.

b. PBGC

15. As of February 5, 2016, the Debtors have scheduled retirement plan claims of nearly $40 million as contingent.[4] The Debtors have indicated that Sherwin's non-debtor parent, Allied Alumina LLC, is the sponsor of these pension plans. The Pension Benefit Guaranty Corporation ("PBGC") has appeared in these cases and may file a claim seeking to hold Sherwin jointly and severally liable for the pension liability.

4. ENVIRONMENTAL ISSUES

16. The Debtors produce alumina from bauxite at the Sherwin Facility. The byproducts and waste from the refining process, if not disposed of and/or stored properly, cause certain environmental issues for which the Debtors could have potential liability. As of February 5, 2016, the Debtors have scheduled the Texas Commission on Environmental Quality's ("TCEQ") claims of over $5.69 million as contingent. *See* Sherwin, Sch. F [Docket No. 210]. Additionally, upon information and belief, a class action lawsuit alleging various environmental claims against Sherwin by neighboring residents and property owners near the Sherwin Facility is pending. The Debtors have not provided an estimate of the potential amount of the damages for which they could be held liable in this action.

B. DEBTORS' RELATIONSHIPS WITH GLENCORE AND ITS AFFILIATES

17. Over the years, Glencore has set up a fully integrated supply chain in the aluminum market. To increase the efficiency and profitability of that supply chain, Glencore acquired the Debtors in 2007. As a result, the Debtors became indirect, wholly-owned subsidiaries of Glencore. At all times since, the Debtors have been (and still are) a key cog in

[4] The Debtors Company Retirement Plan for Salaried Employees ($12.766 million) and The Debtors Company Retirement Plan for Hourly Employees ($25.31 million). *See* Sherwin, Sch. F [Docket No. 210].

the Glencore alumina/aluminum supply chain, and Glencore has controlled the Debtors' business to ensure that that business meets the needs of Glencore's supply chain.

8. More specifically:

[redacted]

- [redacted]

18. [redacted]

19. [redacted]

1. GLENCORE AS OWNER

20. Glencore, formerly known as Marc Rich & Co. AG, is the world's largest commodity trading company. Glencore was founded in 1974 by billionaire commodity trader Marc Rich who had fled the United States charged with tax evasion and illegal business dealings with Iran. Glencore and its subsidiaries are controlled from the tax haven of Switzerland. The corporate culture inherent in an organization founded by a fugitive from U.S. laws bespeaks much about its dealings with respect to the Debtors.[5]

21. In addition to Glencore and its affiliates being inextricably intertwined in business relationships with the Debtors (e.g., as the Debtors' sole equity owner, largest customer, second largest supplier and purported secured lender), Glencore and the Debtors also have overlapping members of management and as well as outside counsel.

22. [redacted]:

[redacted]

[5] Indeed, on February 22, 2016 after these cases were filed, Glencore was alleged to have participated in the manipulation of aluminum warehousing rates.

23. In addition, prior to October 2015, the Debtors and Glencore had the same outside counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis Mallet"). Curtis Mallet continues to represent the non-Debtor members of the Glencore Group (including Commodity and Corpus Christi Alumina) in these cases.

2. GLENCORE AS "LENDER"

24. [redacted]

25. [redacted]. The mailing address for Commodity set forth in the Debtor's bankruptcy Schedules is "Baaraermattstrasse 3, Baar, CH-6341, Swtizerland," Glencore's corporate headquarters. Like the Debtors, Commodity is a wholly-owned subsidiary of Glencore. [redacted]

Glencore and the Debtors allege that the obligations under the Funding Agreement are secured by a first-priority lien on, and security interest in, substantially all of the Debtors' real and personal property. [redacted]

26.

:

27.

[redacted]

28. [redacted]

[redacted]

3. GLENCORE AS SUPPLIER

29. [redacted]

[redacted]

4. GLENCORE AS PURCHASER

a. Direct Purchases

30. [redacted]

a. [redacted];[6]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[6] [redacted].

g. [redacted][7]

b. Indirect Purchases

31. [redacted]

C. **EVENTS LEADING UP TO BANKRUPTCY FILING**

1. DRAW DOWNS UNDER THE CAPITAL LINE

32. [redacted]

[7] As noted above, Glencore is the world's largest commodity trader. Commodity traders generally try to push risk to both the supplier and the end buyer so that the trader's exposure is minimal. However, when the trader and seller are part of the same corporate group and the seller is in a high tax jurisdiction (such as the U.S.), and the trader is in a low tax jurisdiction or haven (such as Switzerland), pressure is usually brought to bear by the trader on the seller to accept non arms-length (lower) prices.

33. [redacted]

34. [redacted]

35. [redacted]

2. THE NORANDA LOAN AND OTHER FRAUDULENT TRANSFERS

36. [redacted]

[redacted]

37. [redacted]

3. THE DEBTORS SEEK RESTRUCTURING COUNSEL

38. [redacted]

4. GLENCORE AND ITS OUTSIDE COUNSEL, CURTIS MALLET, CAUSE SHERWIN TO RETAIN CARR AND ENGAGE KIRKLAND & ELLIS.

39. [redacted]

[redacted]

5. KIRKLAND AND ELLIS "INVESTIGATES" THE GLENCORE-SHERWIN RELATIONSHIP

40. [redacted]

41. [redacted]

[redacted]

f. [redacted]

[redacted]

42. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted].

D. THE DEBTORS' CHAPTER 11 CASES

43. On January 11, 2016 (the "Petition Date"), the Debtors filed petitions for relief under chapter 11, title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Court"). On the Petition Date, the Debtors also filed the Motions, in which the Debtors originally sought to obtain approval of (i) the DIP Loan of up to $40 million from Commodity, (ii) the bidding procedures relating to the Sale of all of the Debtors' assets to Corpus Christi Alumina, and (iii) the terms governing the Debtors' use of Commodity's purported cash collateral. Other than a *de minimis* $250,000 payment to the Debtors' unsecured creditors, Commodity (and Glencore) would not pay *any* cash to acquire the Debtors' assets in the proposed Sale.

44. On February 5, 2016, the Debtors filed their Schedules of Assets and Liabilities [Docket No. 210] (the "Schedules"). In Schedule D thereof, the Debtors scheduled a purportedly secured claim in the amount of $95 million (the "Commodity Claim") in the name of Commodity. In the Schedules, the Debtors allege that Commodity holds a first lien security

interest over "[a]ll real and personal property of the Debtors." In the Schedules, the Debtors list Commodity's address as the same address as Glencore's.

45. [redacted]. On February 8, 2016, Noranda commenced chapter 11 cases of its own, also giving rise to a "termination right" under the DIP Loan and Stalking Horse Agreement. On February 8, 2016, Commodity and Corpus Christi Alumina served notices terminating the DIP Loan and Stalking Horse Agreement.

46. Between February 12, 2016 and March 3, 2016, counsel to the Committee deposed Carr, Britton, Russell and Goldberg. Counsel to the Committee also reviewed various documents produced by the Debtors in response to the Committee's discovery requests although many more were withheld under a claim of privilege. To date, no privilege log has been provided. Such discovery confirmed the Committee's concerns that the Debtors' chapter 11 cases were part of an overall scheme by Glencore to retain the value of the Debtors' business while absolving the Debtors' of their liabilities to unsecured creditors. Moreover, such discovery uncovered numerous facts supporting the Committee's belief that the Commodity Claim should properly be considered equity, rather than debt.

47. On February 26, 2016, the Debtors filed the Scheduling Motion and attached, as exhibits, the Amended Orders. Although, under the Amended Orders, the Debtors no longer seek approval of the DIP Loan or the Stalking Horse Agreement, the Debtors still seek various approvals by this Court that are inappropriate and would prejudice the Debtors' unsecured creditors, as noted previously and as discussed further below.

48. On March 4, 2016, the Debtors, the Committee, Glencore, Noranda and GPP participated in a mediation (the "Mediation") before the Honoable Marvin Isgur. The Mediation did not resolve the various concerns among the parties.

III. ARGUMENT

49. The Committee respectfully submits that the Motions cannot and should not be approved. The transactions subject to the Motions must be analyzed with heightened scrutiny under the "entire fairness" standard. More importantly, because the validity, amount and enforceability (or lack thereof) of Commodity's purported debt and/liens has not been established, the Debtors' request that the Court approve various protections for Commodity (including the right to credit bid and various adequate protections) is premature and inappropriate. Glencore and Commodity are attempting to use these Motions as a "back door" way to obtain this Court's blessing of the Commodity Claim. Commodity and Glencore should not be granted any protections as a consequence of Commodity's alleged debt and liens unless and until the Court determines in a final order that Commodity has a valid and enforceable secured claim against the Debtors.

A. THE MOTIONS SHOULD BE REVIEWED WITH HEIGHTENED SCRUTINY AND MUST SATISFY THE "ENTIRE FAIRNESS" STANDARD.

50. If a transaction is negotiated by parties with conflicts of interest, such parties are not entitled to any deference under the business judgment rule—their proposed course of action must be judged on an "entire fairness" standard, with the burden of proof as to both fair dealing and fair price on the parties proposing the transaction. *See Nixon v. Blackwell*, 626 A.2d 1366, 1375-76 (Del. 1993) (holding that transactions approved by managers who stood to benefit from such transactions and were, therefore, on both sides of the transactions were subject to the "entire fairness" test) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)); *In re Bidermann*

Indus. U.S.A., Inc., 203 B.R. 547, 552 (Bankr. S.D.N.Y 1997) (applying heightened scrutiny to transaction because chief executive officer was conflicted and finding debtors were "completely misguided" in asserting that the business judgment rule should apply in light of "manifest self-dealing"); *see also* 7 Collier on Bankruptcy ¶ 1108.07[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (noting the application of "the most searching standard of review" to "transactions in which there is a potential for managerial self-dealing").

51. Moreover, any transaction involving benefits to insiders (including releases) are subject to heightened scrutiny. *See, e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 498 (Bankr. S.D.N.Y. 1991) ("We subjected the agreement to closer scrutiny because it was negotiated with an insider…"); *see also In re Lafayette Hotel Partnership*, 227 B.R. 445, 454 (S.D.N.Y. 1998) (holding that because "there is an incentive and opportunity to take advantage," transactions with dominant shareholders and others insiders in a bankruptcy must be subject to rigorous scrutiny); *In re Summit Global Logistics, Inc.*, 2008 WL 819934 (Bankr. D.N.J. Mar. 26, 2008) ("heightened scrutiny [is] required by non-bankruptcy law for insider transactions"); *Matter of NuGelt Inc.*, 142 B.R. 661, 667 (Bankr. D. Del. 1992) ("[I]nsider transactions are subject to greater scrutiny than 'arms length' transactions").

52. The purpose for subjecting insider transactions to higher scrutiny is the increased risk that insiders will use their power to enrich themselves at the expense of creditors. *See, e.g., In re DBSD North America, Inc.*, 634 F.3d 79, 100 (2d Cir. 2011) ("Shareholders retain substantial control over the Chapter 11 process, and with that control comes significant opportunity for self-enrichment at the expense of creditors."); *see also Pepper v. Litton*, 308 U.S. 295, 306 (1939) (transactions between controlling insider and corporation are subject to rigorous

scrutiny to determine their fairness as arm's length bargains); *In re Wingspread Corp.*, 92 B.R. 87, 93 (Bankr. S.D.N.Y. 1988).

1. MEMBERS OF THE GLENCORE GROUP ARE STATUTORY INSIDERS

53. Glencore, Commodity and their affiliates are statutory insiders of the Debtors. As a threshold matter, as the sole equity owner of the Debtors, Glencore is clearly in "control" of the Debtors. In addition, Glencore, Commodity and their affiliates are also affiliates of the Debtors for purposes of Section 101 of the Bankruptcy Code. *See* 11 U.S.C. § 101(31)(B)(iii) and (E) (defining "insiders" to include a "person in control of the debtor" or "affiliate, or insider of an affiliate as if such affiliate were the debtor," respectively).

2. MEMBERS OF THE GLENCORE GROUP ALSO QUALIFY AS NON-STATUTORY INSIDERS

54. Even if Glencore, Commodity and its other members of the Glencore Group do not fall squarely within the definition of "insider" set forth in 11 U.S.C. § 101(31)(E), they each easily satisfy the test for a "non-statutory insider." Courts apply a multi-factor test in determining whether a creditor acted as a non-statutory insider for purposes of the Bankruptcy Code. These factors include whether a creditor:

a. attempted to influence decisions made by the debtor;
b. selected new management for the debtor;
c. had special access to the debtor's premises and personnel;
d. was the debtor's sole source of financial support; and
e. generally acted as a joint venture or prospective partner with the debtor rather than an arms-length creditor.

New Jersey Steel Corp., 1997 WL 716911, at *4-5 (S.D.N.Y. 1997).

55. As set forth herein, each of the foregoing factors supports the conclusion that Glencore and Commodity are, in addition to being statutory insiders, non-statutory insiders of the Debtors, as well.

B. THE CASH COLLATERAL MOTION SHOULD NOT BE APPROVED

56. The Debtors obviously need access to their cash in order to continue operating and for these cases to continue and to get to an ultimate sale of the company. Such cash, however, does not constitute Commodity's collateral unless and until there is a final ruling determining the validity, extent and priority of Commodity's purported secured claim and liens. As discussed at length herein, there are various grounds upon which Commodity's pre-petition claim and/or liens are subject to challenge, including, among other things: (i) recharacterization as equity; and/or (ii) equitable subordination to the claims of the Debtors' legitimate creditors. Any ruling that grants Commodity or Glencore any rights on the purported basis that Commodity has a valid and enforceable secured claim against the Debtors (including, among other things, the various "protections" proposed in the Amended Cash Collateral Order) is premature and inappropriate. Furthermore, cash is being used for the sole purposes of keeping the Sherwin Facility operating so that Glencore can negotiate with its supply chain.

57. The Committee has simultaneously herewith filed an objection to Commodity's purported claim, on both recharacterization and equitable subordination grounds. As a result, the burden of proving that Commodity has a valid and enforceable claim (and the amount thereof) is on the Debtors and/or Commodity. *See* 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."). The Third Circuit has stated as follows:

> If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, ***the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The burden of persuasion is always on the claimant.***

In re Allegheny Int'l Inc., 954 F.2d 167, 174 (3d Cir. 1992) (citations omitted) (emphasis added); *see also In re Kirkland*, 572 F.3d 838, 840-41 (10th Cir. 2009) (citing *Agricredit Corp. v.*

Harrison (In re Harrison), 987 F.2d 677, 680 (10th Cir. 1993) ("If objection is made to the proof of claim, the creditor has the ultimate burden of persuasion as to the validity and amount of the claim.")); *In re RML Dev., Inc.*, 528 B.R. 150, 156-57 (Bankr. W.D. Tenn. 2014) (holding that a disputed amount of the secured claim was enough to deny the secured creditor's right to credit bid the full amount of the claims and that therefore, the secured creditor could only credit bid up to the undisputed amount of its claim).

58. Unless and until there is a final ruling establishing that Commodity's purported pre-petition secured claim and liens are valid, the Amended Cash Collateral Order cannot be granted. It would be both premature and would severely prejudice the Debtors' unsecured creditors if this Court were to: (i) provide any "adequate protection" to Commodity; (ii) "bless" the validity of Commodity's debt; (iii) permit Commodity to credit bid; (iv) provide Commodity with numerous consent rights with respect to the Debtors' cash and other issues; and/or (v) grant Commodity and Glencore and other "Prepetition Lender Releasees" broad releases, prior to a final ruling that the Commodity Claim is valid and enforceable and not otherwise subject to attack. Moreover, even if Commodity's purported claim and liens were not objectionable, which they are, various provisions of the Cash Collateral Motion are unreasonable and should not be approved. Among other things, the Amended Cash Collateral Order seeks to:

(i) grant Glencore a "replacement" lien over chapter 5 causes of action (including claims against Glencore) and other claims which should inure to the benefit of the Debtors' unsecured creditors;

(ii) grant sweeping releases for pre-petition claims against Glencore and various other parties;

(iii) require that Commodity's (and Glencore's) counsel's fees and expenses be paid by the Debtors' estates as administrative claims without a reasonableness review or determination by this Court;

(iv) limit the Committee's budget and timeframe for investigating and challenging Glencore's debt and liens to a *de minimis* $25,000 (which would preclude the

Committee from performing its fiduciary duties to the Debtors' legitimate creditors); and

(iv) require the Committee to investigate, commence and litigate issues relating to the validity, amount and enforceability of Commodity's purported secured claim and liens within the next month.

1. THE COMMODITY "DEBT" IS SUBJECT TO RECHARACTERIZATION AS EQUITY.

59. The Commodity Claim should be recharacterized as equity in its entirety. "[B]ankruptcy courts have the power to recharacterize ostensible debt as equity . . . ." *In re Adelphia*, 365 B.R. at 74 (*citing In re Official Comm. of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225, 231 (4th Cir. 2006)); *see also In re Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1148 (9th Cir. 2013). This power stems from bankruptcy courts' equitable authority under Bankruptcy Code section 105(a) to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a); *see also In re BH S&B Holdings LLC*, 420 B.R. 112, 157 n.17 (Bankr. S.D.N.Y. 2009). Recharacterization is governed by state law. *In re Lothian Oil, Inc.*, 650 F.3d 539, 542 (5th Cir. 2011).

60. Recharacterization of debt as equity "is appropriate where the circumstances show that a debt transaction was actually an equity contribution *ab initio*." *In re BH S&B Holdings*, 420 B.R. at 157 (quotation marks omitted) (*citing In re Autostyle Plastics, Inc.*), 269 F.3d 726, 747–48 (6th Cir. 2001). Recharacterization differs from equitable subordination, in that recharacterization "turn[s] on whether a debt actually exists—not on whether the claim should be equitably subordinated or disallowed." *In re Adelphia*, 365 B.R. at 73. Recharacterization analysis thus focuses on the substance of the transaction rather than on the form. *See In re Fabricators, Inc.*, 926 F.2d 1458, 1469 (5th Cir. 1991) ("The ability to recharacterize a purported

loan emanates from the bankruptcy court's power to ignore the form of a transaction and give effect to its substance.").

61. The Fifth Circuit has recognized thirteen (13) factors as relevant to the inquiry of whether to recharacterize debt to equity, which are as follows:

> (1) name of the instrument memorializing the transaction;
> (2) definitiveness of maturity date;
> (3) source of payments;
> (4) right to enforce payment;
> (5) participation in management;
> (6) relationship of would be "creditors" to general creditors;
> (7) intent of the parties;
> (8) adequacy of capitalization;
> (9) identity of ownership;
> (10) source of interest payments;
> (11) ability of corporation to obtain loans elsewhere;
> (12) the extent to which the advance was used to acquire capital assets; and
> (13) the failure of the debtor to repay amounts on their due date or to seek a postponement.

See Jones v. United States, 659 F.2d 618, 622 n.12 (5th Cir. 1981) (examining whether hybrid notes should be treated as debt for tax purposes); *see also Slappey Drive Indus. Park v. United States*, 561 F.2d 572, 582 (5th Cir. 1977) (recharacterizing debt for tax purposes). None of the foregoing factors is by itself controlling, *Lothian Oil*, 650 F.3d at 544, and each case turns on its own facts, *Slappey Drive Indus. Park*, 561 F.2d at 581. The Court may consider events that occurred after the transactions were consummated. *In re Official Committee of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225, 235 (4th Cir. 2006) (utilizing subsequent events to understand the intent and purpose behind the instruments in question).

Factor 1: The Name of the Instruments Memorializing the Transaction Provide the Guise of a Loan

62. [redacted]

[redacted]

Factor 2: The Maturity Date Was Not Definitive

63. [redacted]

Factor 3: Repayment Was Dependent Solely on the Success of the Borrower's Business

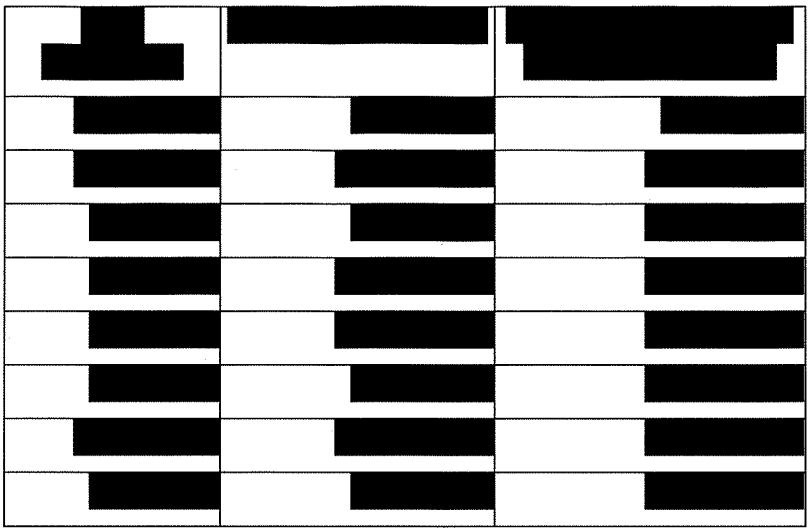
64. Courts have stated that "[i]f the expectation of repayment depends solely on the success of the borrower's business, the transaction has the appearance of a capital contribution" rather than true debt. *In re Autostyle*, 269 F.3d at 751; *see In re BH S&B Holdings*, 420 B.R. at 158. [redacted]

[redacted]

65. [redacted]

[redacted]

66. [redacted]



67. [redacted]

Factor 4: Glencore's "Right" to Enforce Payment of the Principal and Interest

68. [redacted]

Factor 5: Glencore Participated in Management and Controlled the Debtors'

69. [redacted]

[redacted]

70. [redacted]

71. [redacted]

72. [redacted]

[redacted]

73. [redacted]

74. Courts have also examined whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the debtor, directed work performance, and directed payment of the debtor's expenses. *In re Winstar Commc'ns*, 348 B.R. 234, 279 (Bankr. D. Del. 2005) (citing *ABC Elec. Serv. Inc. v. Rondout Elec., Inc. (In re ABC Elec. Serv. Inc.)*, 190 B.R. 672 (Bankr. M.D. Fla. 1995)).

75. In addition to Glencore's ownership of 100% of the Debtors' stock, Glencore's myriad roles and relationships vis-à-vis the Debtors evinces a sufficiently "close relationship" to make clear that the dealings between Glencore and the Debtors were not at "arms-length." Glencore had access to information and exercised influence over the Debtors to the extent indicative of an insider.

Factor 6: Relationship of Would Be "Creditors" to General Creditors

76. Subordination of advances to claims of all other creditors indicates that the advances are capital contributions. [redacted]

[redacted] Trade creditors did not understand Glencore's claim of priority and were "lulled" into continuing to supply to Sherwin because they viewed it as a Glencore entity. Therefore, this factor weighs in favor of recharacterization.

Factor 7: Intent of the Parties

77. [redacted]

Factor 8: The Debtors Did Not Have Adequate Capital

78. "Thin or inadequate capitalization is strong evidence that the advances are capital contributions rather than loans." *In re Autostyle*, 269 F.3d at 751. Capitalization is to be examined "at the time the transfer was made." *Id.* (citing *Roth Steel*, 800 F.2d at 630). Equitable subordination is particularly appropriate where there is "a conscious plan by one in a fiduciary or control position to undercapitalize a debtor by substituting debt funding for risk capital to defeat the interests of junior creditors." *In re CTS Truss, Inc.*, 868 F.2d 146, 149 (5th Cir. 1989). "If an insider makes a loan to an undercapitalized corporation, the combination of undercapitalization and the insider loan may allow the bankruptcy court to recharacterize the loan as a capital contribution." *In re Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). "Capitalization is also inadequate if, at the time when the advances were made, the bankrupt could not have borrowed a similar amount of money from an informed outside source." *Id.* at 132.

79. [redacted].

80. The Debtors themselves have made much of the "deteriorating" nature of the Debtors' market and business over the last few years (and, as of the Petition Date, the Debtors projected that they would incur a net operating loss of at least $42.13 million for the fiscal year ending December 31, 2015).

81. [redacted].

82. [redacted]

[redacted]

Factor 9: There is Complete "Identity of Ownership" Between Glencore and Commodity

83. An "identity of interest" between a shareholder and a lender "is a strong indication that the advances were capital contributions rather than loans." *In re Autostyle*, 269 F.3d at 751–52 (*citing Roth Steel*, 800 F.2d at 630–31). There could be no closer "identity of interest" than that between Glencore and Commodity. Commodity is a wholly-owned subsidiary of Glencore. Glencore owns the Debtors.

Factor 10: The Source of Interest Payments

84. [redacted] This has all the indicia of a capital contribution.

Factor 11: No Financing Was Ever Sought from Other Sources

85. Loans made by an insider when no arms' length third party would have done so, with full knowledge of the debtor's undercapitalization and insolvency, have the indicia of equity. *See In re Herby's Foods, Inc.*, 2 F.3d at 132. [redacted]

86. Additionally, in the First Day Declaration, the Debtors touted their relationship with Glencore by stating that "Sherwin's association with Glencore allows Sherwin to leverage Glencore's institutional relationships with financial institutions, vendors, and other contract counterparties." (emphasis added). *See* First Day Declaration, p. 11. That Glencore downstreamed to the Debtors funds from Glencore "financial institutions" indicates the true nature of the relationship.

Factor 12: Funds Were Used to Acquire Capital Assets

87. [redacted].

Factor 13: The Debtors Were Never Required to Repay Amounts on the Due Date or to Seek a Postponement

88. [redacted].

89. No single factor is determinative, and a court must look to the totality of the circumstances in each case. *See Roth Steel Tube Co. v. Commissioner of Internal Revenue*, 800 F.2d 625, 630 (6th Cir. 1986). Here, the thirteen (13) factors are more than sufficient to support

recharacterizing the purported debt to equity. Under principles of recharacterization, all claims asserted against the Debtors by, on behalf of, or for the benefit of Glencore or its affiliated entities, should be recharacterized as equity for all purposes in these cases.

2. COMMODITY'S "DEBT" MAY BE SUBJECT TO EQUITABLE SUBORDINATION

90. If the advances by Commodity are not recharacterized as equity, Commodity's purported loan nevertheless should be equitably subordinated. The doctrine of equitable subordination developed as a policy against fraud and the breach of the duties imposed on a fiduciary of the bankrupt. *Pepper*, 308 U.S. at 311. The doctrine is now codified at 11 U.S.C. § 510(c), which provides that a court may equitably subordinate an allowed claim where (i) the claimant engaged in inequitable conduct, (ii) the misconduct injured other creditors or conferred an unfair advantage, and (iii) the equitable subordination is not inconsistent with bankruptcy law. *In re Mobile Steel Co.*, 563 F.2d 692, 699-700 (5th Cir. 1977); *Citicorp Venture Capital v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 986–87 (3d Cir. 1998) (*citing United States v. Noland*, 517 U.S. 535, 116 S.Ct. 1524, 134 L.Ed.2d 748 (1996)). Equitable subordination requires a fact-intensive analysis. *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 69 (Bankr. S.D.N.Y. 2007).

91. The initial *Mobile Steel* factor may be satisfied by a wide range of inequitable conduct.[8] Such inequitable conduct includes fraud, illegality, breach of fiduciary duties, or undercapitalization. *Enron Corp. v. Springfield Assocs., LLC (In re Enron Corp.)*, 379 B.R. 425, 433 (S.D.N.Y. 2007)). [redacted]

[redacted]

[8] A creditor's conduct does not need to be illegal to be inequitable. *See In re Adelphia Commc'ns Corp.*, 365 B.R. at 68; *In re Verestar, Inc.*, 343 B.R. 444, 461 (Bankr. S.D.N.Y. 2006). Any inequitable conduct by a creditor that is "directed against the bankrupt or its creditors may be sufficient to warrant subordination" of such creditor's claim. *N.J. Steel Corp. v. Bank of N.Y.*, No. 95 CIV 3071 (KMW), 1997 WL 716911, at *5 (S.D.N.Y. Nov. 17, 1997) (citing *In re Mobile Steel*, 563 F.2d at 700).

[redacted] Glencore's lured trade creditors to continue extending credit to Sherwin. *See Herby's Foods*, 2 F.3d at 133-34 ("Both injury and unfair advantage may be established by proving that a specific creditor was deceived or lured into extending additional credit to the bankrupt.") (internal marks and citations omitted). [redacted]

92. Inequitable conduct also includes "unjust enrichment, not enrichment by bon chance, astuteness or business acumen, but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close or double dealing or foul conduct." *In re Tampa Chain Co.*, 53 B.R. 772, 779 (Bankr. S.D.N.Y. 1985). In addition, inequitable conduct may be found when the claimant used the debtors as a "mere instrumentality" or "alter ego." *In re Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991).

93. The second *Mobile Steel* factor provides that the alleged inequitable conduct must have caused injury to the other creditors or resulted in an unfair advantage to the claimant. *In re 80 Nassau Assocs.*, 169 B.R. 832, 840 (Bankr. S.D.N.Y. 1994). If the inequitable conduct harmed the entire creditor body, a party seeking equitable subordination need not "identify the injured creditors or quantify their injury, but need only show that the creditors were harmed in some general, concrete manner." *Id.* Indeed, it is enough to allege that creditors are less likely to collect their debts. *Id.*

94. The third *Mobile Steel* factor serves as "a reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party

who asserts the claim in good faith merely because the court perceives that the result is inequitable." *In re Enron Corp.*, 379 B.R. 425, 434 (S.D.N.Y. 2007). This prong "incorporate[s] the distinction between claims and interests such that creditors' claims may not be equitably subordinated to equity interests." *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 414 (3d Cir. 2009).

95. Equitable subordination is not limited to creditors that are insiders or fiduciaries of a debtor. *See, e.g., Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 29 B.R. 139, 169 (Bankr. E.D.N.Y. 1983). However, when the defendant is an insider, his conduct is subject to greater scrutiny. *See In re Herby's Foods*, 2 F.3d at 131; *see also In re AlphaStar Ins. Group Ltd.*, 383 B.R. 231, 276 (Bankr. S.D.N.Y. 2008). For insider defendants, less egregious conduct may support equitable subordination. *Herby's Foods*, 2 F.3d at 131. Insiders include both statutory insiders, and (ii) non-statutory insiders. *See Floyd v. Hefner*, 556 F. Supp. 2d 617, (S.D. Tex. 2008); *In re Winstar Commc'ns, Inc.*, 554 F.3d at 395-96.

(i) Glencore (and Commodity) Are "Insiders" of the Debtors

96. As discussed, above, Glencore and Commodity are both statutory and non-statutory insiders of the Debtors.

(ii) Glencore's Actions Constitute Inequitable Conduct

97. In light of Glencore's insider relationship with, and absolute control over, the Debtors, equitable subordination of Commodity's claims may be based simply on its conduct. *New Jersey Steel Corp.*, 1997 WL 716911, at *5 (S.D.N.Y. 1997). Through its 100% equity ownership, and myriad additional relationships with the Debtors, including through Commodity, Glencore undoubtedly has "used its power to control the debtor." *Exide*, 299 B.R. at 744. Such control has led directly to the present situation, in which Glencore seeks to retain the Debtors' business and value without paying anything to the Debtors' unsecured creditors. Clearly, the

terms of such proposed transaction are for Glencore's and Commodity's "own advantage or to the other creditors' detriment." *Id.*

98. Glencore was using the Debtors as a "mere instrumentality" or "alter ego." Courts consider the following factors in determining whether a party is an "alter ego" of another party:

a. disregard of corporate formalities;
b. inadequate capitalization;
c. intermingling of funds;
d. overlap in ownership, officers, directors, and personnel;
e. common office space, address and telephone numbers of corporate entities;
f. the degree of discretion shown by the allegedly dominated corporation;
g. whether the dealings between the entities are at arms-length;
h. whether the corporations are treated as independent profit centers;
i. payment or guarantee of the corporation's debts by the dominating entity; and
j. intermingling of property between the entities.

Arctic Ocean Intern., Ltd. v. High Seas Shipping Ltd., 622 F. Supp. 2d 46, 53-54 (S.D.N.Y. 2009). This list is not exhaustive, nor is there a minimum number of factors that must be satisfied. Rather, the guiding principle is whether piercing the corporate veil "would achieve an equitable result." *Budisukma Permai SDN BHD v. N.M.K. Products & Agencies Lanka (Private) Ltd.*, 606 F. Supp. 2d 391, 399-400 (S.D.N.Y. 2009).

99. The factors above support the conclusion that Glencore served as the "alter ego" of the Debtors. [redacted]

[redacted]. Moreover, due to the practical and operational control Glencore exercised over the Debtors—as their sole equity owner, largest customer, purported secured lender and significant supplier—the negotiations and transactions between Glencore and the Debtors could not plausibly be considered arms' length. Taken together, particularly given the terms of the Sale proposed by the Debtors, in which unsecured creditors stand to receive no recovery on their claims, finding that Glencore constituted an "alter ego" of the Debtors would be equitable and just under the circumstances.

(iii) Glencore's Actions Harmed the Debtors' Unsecured Creditors to Glencore's Benefit

100. The vast majority of the Debtors' unsecured claims pool consists of trade claims for goods and services that were extended on credit to the Debtors in the two months prior to the Petition Date. Such trade vendors would not have extended credit to the Debtors absent Glencore's and the Debtors' misrepresentations regarding the viability of the Debtors' business. Moreover, if Glencore's "debt" is not equitably subordinated (or otherwise disallowed or recharacterized) and Glencore is permitted to credit-bid such debt in the proposed Sale, the Debtors' unsecured creditors would not only be harmed, they would likely receive $0 recovery on account of their claims.

(iv) Equitably Subordinating Commodity's Claim Would Not Be Inconsistent with Bankruptcy Law

101. Equitable subordination of Commodity's claim would be both consistent with bankruptcy law and just under the present circumstances. Glencore (through Commodity) should not be allowed to unjustly enrich itself by maintaining ultimate ownership over the Debtors' business and assets while unsecured creditors (many of whom extended trade credit to the Debtors in the months prior to the Petition Date) receive nothing.

3. THE COURT SHOULD NOT GRANT LIENS ON AVOIDANCE ACTIONS

102. The Debtors' request that Commodity and Glencore be granted various forms of "adequate protection" prior to the Court's adjudication of issues relating to the validity, amount and enforceability of Commodity's purported secured claim is premature and inappropriate. Even if Commodity's claim were not in doubt (which it is), however, there are various provisions in the Amended Cash Collateral Order which are objectionable and should not be approved.

103. A secured party is not entitled to adequate protection absent a showing of the requisite cause; evidence that its collateral is declining a value. *See, e.g., Zink v. Vanmiddlesworth*, 300 B.R. 394, 402-03 (N.D.N.Y. 2003) ("[T]he initial burden of showing the need for adequate protection [is] upon the creditor having an interest in the property being used by the debtor. In order to meet this burden, the secured creditor must demonstrate that such relief is required by showing a likelihood that the collateral will decrease in value of establishing some other basis for the relief. The burden then shifts to the debtor to show that adequate protection is not needed or can be provided in a different manner.") (internal citations omitted); *In re Gunnison Ctr. Apartments, L.P.*, 320 B.R. 391, 396 (Bankr. D. Colo. 2005) ("The secured creditor 'must, therefore, prove this decline in value—or the threat of a decline—in order to establish a prima facie case.'" (quoting *In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994)); *In re Cont'l Airlines, Inc.*, 146 B.R. 536,539 (Bankr. D. Del. 1992) ("Post-Timbers courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral.").

104. Glencore does not have a valid and enforceable prepetition secured claim. As a consequence, Glencore is not entitled to any "adequate protection." Even if Glencore were entitled to adequate protection, however, granting Glencore liens on previously-unencumbered

assets of the estate, such as avoidance actions and other claims (including, among other things, claims for breaches of fiduciary duty), would be unnecessary and unreasonable. Avoidance actions are uniquely for the benefit of general creditors of the estate, not secured creditors, and are rarely encumbered in favor of secured lenders. The intent behind avoidance powers and a debtor's power to bring causes of actions is to allow the debtor-in-possession to gain recoveries for the benefit of all unsecured creditors. *See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship. IV,* 229 F.3d 245,250 (3d Cir. 2000); *In re Sweetwater*, 55 B.R. 724, 735 (D. Utah 1985) (avoiding powers are meant to benefit creditors generally and promote equitable distribution among all creditors).

105. To allow the Debtors, as conflicted fiduciaries, to assign the benefits of causes of action and related estate claims and proceeds to a member of the Glencore Group (which would otherwise be the defendant with respect to many of such claims), as opposed to true representatives of the estates for the benefit of unsecured creditors, turns bankruptcy law on its head. *See Tenney Village*, 104 B.R. at 568 (cash collateral and debtor in possession financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of the secured creditor).

4. GLENCORE (AND OTHER PARTIES) SHOULD NOT RECEIVE RELEASES

106. Under the terms of the Amended Cash Collateral Order, Glencore and various other parties defined by the Debtors' as "Prepetition Lender Releasees" would receive "general" releases from the Debtors for prepetition conduct. The releases are far too broad and entirely inappropriate. Particularly given the context of these cases, which appear to have been commenced as part of an orchestrated effort by Glencore to buy time to renegotiate deals with its supply chain vendors and ultimately retain the Debtors' business while ignoring the effect on

unsecured creditors. Glencore should not be permitted to "buy" releases for their pre-petition misconduct.

5. THE PROPOSED BUDGET AND "CHALLENGE PERIOD"

107. The Amended Cash Collateral Order provides for a $25,000 investigation and challenge budget, and 60-day challenge period, for the Committee to review and challenge Glencore's purported pre-petition debt. The Committee respectfully submits that there should not be any limit on the amount of funds that the Committee may use to investigate and challenge Glencore's debt and liens. Courts have been reluctant to limit creditors' committee budgets with respect to investigating lender claims. *See, e.g., In re TOUSA, Inc.*, Case No. 08-10928 (Bankr. S.D. Fla. Jan. 9, 2009) (Second Stipulated Final Order Authorizing Use of Cash Collateral) (Docket No. 2355) (providing for no cap on use of cash collateral to conduct investigation); *In re Quebecor World (USA) Inc.*, Case No. 08-10152 (Bankr. S.D.N.Y. Apr. 1, 2008) (providing for no restriction on the use of post-petition loan funds to conduct investigations into claims and defenses against pre-petition lenders). If the Court does set a limit on the Committee's budget, the limit must be reasonable and permit the Committee to satisfy its fiduciary duties. Moreover, the challenge budget should not apply to fees and expenses already incurred by the Committee and its advisors to date because of the expedited timeline proposed by, and stall tactics of, the Debtors and Glencore.

108. The Debtors have also proposed an expedited schedule for the Committee to investigate and prosecute challenges of Commodity's purported claim, asking the Court to require that such process take approximately one month. The Committee will obviously comply with any schedule set forth by this Court. The Committee respectfully submits, however, that the Debtors' proposed expedited schedule is another example of Glencore's and the Debtors' "nefarious" goal of using this chapter 11 process for Glencore's own ends.

6. THE ASSERTED STANDING "ROADBLOCK"

109. Under the Cash Collateral Motion (as amended), it is an "Event of Default" if the following "UCC Challenge Scheduling Order" is not followed:

a. Friday March 11, 2016, the date by which the Committee must file a motion for standing (including a substantially completed complaint setting forth possible claims and causes of action) (the "Committee Standing Motion");

b. Wednesday March 16, 2016, the date by which the Debtors and any other party in interest must file their respective objections or other respective responses to the Committee Standing Motion;

c. Thursday March 17, 2016, (or the next available date on the Court's calendar), the date by which the Court must commence a hearing to consider the Committee Standing Motion;

d. Monday March 21, 2016, the date by which the Committee must file its complaint if the Committee obtains standing to file such a complaint;

e. Thursday March 31, 2016, the date by which the Debtors and any other party in interest must file their respective responses to the Committee's complaint if the Committee obtains standing to file such a complaint;

f. Wednesday April 6, 2016, (or the next available date on the Court's calendar), the date by which the Court will commence a hearing to consider the Committee's complaint if the Committee obtains standing to file such a complaint;

g. Friday April 8, 2016, the date by which the Court must rule on the Committee's complaint if the Committee obtains standing to file such a complaint.

110. The Committee has standing to and has objected to Commodity's Claim. If the Debtors and Glencore are ordered to cooperate in an expedited discovery schedule and Chapter 5 causes of action against the Glencore Group are preserved for the benefit of unsecured creditors to be litigated another day, the schedule is achieveable.

B. THE BIDDING PROCEDURES SHOULD NOT BE APPROVED

111. The Bid Procedures Motion should also not be approved. Bankruptcy courts have held that bidding procedures should only be approved when they are designed to maximize the value of the estate. *See, e.g., In re Dura Automotive Sys., Inc.*, 2007 WL 7728109, at *90 (Bankr. D. Del. 2007) (citing *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy)*, 181 F. 3d 527, 535-37 (3d Cir. 1999); *see also In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998)); *see also In re John Joseph Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) ("[t]he purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.").

112. Bidding procedures must also be fair and reasonable for all of the parties. *See In re Am. Safety Razor Co., LLC*, No. 10-12351, at *132 (Bankr. D. Del. Sept. 30, 2010). Among other things, approval of bidding procedures may be withheld if a stalking horse bidder has too much control over the auction process. *See In re Thompson Publishing Holding Co., Inc.*, No. 10-13070 (Bankr. D. Del. Oct. 13, 2010)). Generally stated, bidding procedures in the context of bankruptcy sales should enhance competitive bidding. *See, e.g., In re Dura*, 2007 WL 7728109, at *90 (internal citations omitted).

113. Bankruptcy courts are particularly wary of, and disfavor, section 363 sale processes that are conducted on an "expedited" basis. *See, e.g., In re Bombay Co., Inc.,* No. 07-44061-DML-11, 2007 WL 2826071, at *3 (Bankr. N.D. Tex. Sept. 26, 2007) ("Certainly this court is most anxious to discourage any future debtor from considering imposing in a chapter 11 case a time line similar to that called for by the Motion . . . . At a minimum, if section 363(b)(1) is the means for effecting a debtor's disposition, the creditors should have the luxury of enough time for their representatives to assess fully the proposed transaction."); *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 427-28 (Bankr. S.D. Tex. 2009). Indeed, certain districts have imposed

specific "heightened" guidelines to govern section 363 sales that are proposed to occur on an expedited basis. *See, e.g.,* N.D. Tex. L.B.R. App. G.

114. The Bid Procedures proposed by the Debtors should not be approved because they are not fair and reasonable and were not designed to (and, in fact, will not) maximize the value of the Debtors' estates. Rather than facilitating "an open and fair public sale" and "enhancing competitive bidding," the Debtors' proposed Bid Procedures appear to have been expressly designed to ensure that Glencore recovers on account of its alleged pre-petition secured claim without regard to whether the Sale maximizes the value of the Debtors' estates or whether such a sale is in the best interests of the Debtors' unsecured creditors. Specifically, the term in the Bid Procedures that provides that Commodity may credit bid its purported secured claim should not be approved unless and until the Court rules on the Committee's objection.

115. The Committee has objected to the Commodity Claim, on the grounds that it should be (i) recharacterized as equity and/or (ii) equitably subordinated. To hold, at this time, that Commodity is entitled to credit bid in the Sale—prior to a determination of the amount, validity and enforceability of its claims and liens—would be premature and severely prejudice the Debtors' unsecured creditors. The Court should not allow Commodity to credit bid its purported debt at the Sale. Any approval of Commodity's ability to credit bid should not occur, if at all, until the Committee has a full and fair opportunity to challenge or otherwise contest Commodity's purported claim. Furthermore, should a member of the Glencore Group ultimately be the successful bidder, all Chapter 5 causes of action against it must be preserved.

IV. RESERVATION OF RIGHTS

116. The Committee expressly reserves its right to amend and/or supplement this Response, including, without limitation, to supplement this Response with additional facts and/or arguments learned through discovery.

V. CONCLUSION

117. For the reasons set forth herein, the Committee requests that the Court (i) deny the Motions, and (ii) grant the Committee such other relief as is just and necessary. If the Court grants the Motions, the Orders should expressly provide that all rights and protections granted to Commodity or Glencore will be vacated and reversed if the Court determines that Commodity does not have valid and enforceable secured debt.

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Respectfully submitted this 7th day of March, 2016.

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Certificate of Service

I certify that on March 7, 2016, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Robin Russell
Robin Russell