IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
NEWPAGE CORPORATION, et al.,	:	Case No. 11-12804 (KG)
	:	(Jointly Administered)
Debtors.[1]	:	
	:	**Re: D.I. 16, 57 & 283, 339**

Hearing Date: Nov. 9, 2011, at 3:00 p m.
Objection Deadline: Oct. 25, 2011, at 5:00 p.m. (as to the AHFLN by agreement)

OBJECTION OF AD HOC FIRST LIEN NOTEHOLDERS TO MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS SEEKING RECONSIDERATION OF CASH MANAGEMENT ORDER

Certain unaffiliated institutions (the "Ad Hoc First Lien Noteholders" or "AHFLN")[2] who hold certain of the 11.375% Senior Secured Notes due 2014 (the "First Lien Notes") issued by NewPage Corporation (together with its above-captioned affiliated debtors and debtors in possession, the "Debtors"), by and through their undersigned counsel, hereby object (the "Objection") to the motion (D.I. 283, the "Reconsideration Motion"),[3] filed by the Official Committee of Unsecured Creditors (the "Committee"), pursuant to rule 9013-1(m)(v) of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, as applicable, are: Chillicothe Paper Inc. (6154), Escanaba Paper Company (5598), Luke Paper Company (6265), NewPage Canadian Sales LLC (5384), NewPage Consolidated Papers Inc. (8330), NewPage Corporation (6156), NewPage Energy Services LLC (1838), NewPage Group Inc. (2465), NewPage Holding Corporation (6158), NewPage Port Hawkesbury Holding LLC (8330), NewPage Wisconsin System Inc. (3332), Rumford Paper Company (0427), Upland Resources, Inc. (2996), and Wickliffe Paper Company LLC (8293). The Debtors' corporate headquarters is located at 8540 Gander Creek Drive, Miamisburg, OH 45342.

[2] Each of the Ad Hoc First Lien Noteholders represents no party other than itself and expressly disclaims any duties to any other holders of the First Lien Notes or other creditors or parties-in-interest in the above-captioned chapter 11 cases.

[3] Capitalized terms not defined herein shall have the meanings ascribed to them in the Reconsideration Motion, Cash Management Order (as defined below), or Final DIP Order (as defined below), as applicable.

the District of Delaware, seeking reconsideration of the Cash Management Order[4] entered by this Court.[5] In support of this Objection, the AHFLN respectfully state as follows:

PRELIMINARY STATEMENT

1. Under the Cash Management Order, the Court granted the Debtors' request for continued use of their prepetition cash management system (the "Cash Management System"), pursuant to which, inter alia, short term extensions of credit are made between and among the Debtors and their non-Debtor affiliates (the "Intercompany Transfers") and subsequently repaid in the ordinary course of business. Consistent with the Bankruptcy Code, the Cash Management Order grants administrative expense status, under section 364(b) of the Bankruptcy Code, to the claims that arise from the Intercompany Transfers (the "Intercompany Claims"). The Committee argues that this standard treatment of Intercompany Claims is somehow inadequate, notwithstanding the routine nature of the Cash Management System, the evidence submitted to this Court concerning the positive cash flow status of the Debtors, and the absence of any facts or circumstances requiring heightened protections in these cases.

2. On those rare occasions—necessitated by unique circumstances not present in these cases—where courts have authorized additional protections for intercompany claims, such extraordinary additional protections took the form of section 364(c)(3) liens that were **junior** to prepetition and postpetition liens. Here, the Committee demands that the Court grant the Intercompany Claims **senior priming liens** under section 364(d) of the Bankruptcy

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4 *Order (I) Authorizing Debtors to Continue Using Their Cash Management System, Including the Movement of Funds Between Debtor and Non-Debtor Affiliates, and Maintain Existing Bank Accounts and Business Forms, and (II) Waiving Compliance with the Deposit and Investment Requirements of Section 345 of the Bankruptcy Code* (D.I. 57, the "Cash Management Order").

5 On October 11, 2011, the Court entered an amended Cash Management Order (D.I. 339, the "Amended Cash Management Order"), which, among other things, provides the Committee with additional notice rights in connection with certain intercompany transfers.

Code, even though it has not alleged the existence of circumstances warranting any additional protections, nor has it demonstrated the statutory prerequisites for priming liens.

3. The sole justification proffered for the relief requested in the Reconsideration Motion is the Committee's unfounded concern that one Debtor will be unable to repay its affiliate borrower on account of an Intercompany Transfer. But that same concern is present in every case and, absent a risk of administrative insolvency (which is remote given the positive cash flow) or a specter of fraud (which has not been alleged), courts in this District and others routinely address such concerns by granting administrative expense status under section 364(b) of the Bankruptcy Code, and imposing on debtors an obligation of transparency and accurate record keeping. Indeed, the Amended Cash Management Order does both, and also includes a comprehensive oversight mechanism pursuant to which the Committee will receive enhanced access to reporting with respect to Intercompany Transfers, as well as advance notice of certain Intercompany Transfers to non-Debtors. The Committee makes no effort to explain why such protections are insufficient here.

4. Highlighting the truly unusual nature of the relief requested, the Committee has not identified a single case in which section 364(d) of the Bankruptcy Code was applied to Intercompany Claims. In addition, the Committee has not (and cannot) demonstrate that the statutory requirements for the section 364(d) priming liens they seek are met.[6] Importantly, each Debtor has determined that receipt of an administrative expense claim in exchange for an Intercompany Transfer is sufficient security. This fact renders the Committee unable to satisfy section 364(d), but begs the question: why should the Court disregard the Debtors' business judgment, and instead substitute it with that of the Committee. Clearly, each

[6] See 11 U.S.C. § 364(d).

Debtor's decision to continue to participate in the Cash Management System, and potentially extend unsecured intercompany credit thereunder, is an exercise of its business judgment that remains subject, in all instances, to each Debtor's duties as a fiduciary. The Committee has not shown that the Debtors' business judgment should not be given deference.

5. Moreover, the three decisions cited in the Reconsideration Motion are inapposite. In each case, the court authorized **junior liens** under **section 364(c)** of the Bankruptcy Code, and each involved circumstances warranting heightened protections that are not present in these cases: one case involved massive fraud; in the other two cases, the junior liens were granted in DIP orders to protect against a debtor repaying DIP loans when it received no benefit from the proceeds of the lending.

6. Finally, the relief sought by the Committee would undo critical aspects of the Final DIP Order, which was the product of extensive negotiations among the Debtors, the DIP Lenders, the First Lien Noteholders, the Second Lien Noteholders, and the Committee. As the Court recognized at the hearing on the Final DIP Order, absent "unusual" or "extraordinary" circumstances, the parties' negotiated resolution of issues related to the DIP loan and adequate protection should be honored.[7] No such unusual or extraordinary circumstances exist here. Because the extraordinary relief requested in the Reconsideration Motion is inconsistent with well established practice, unsupported by the facts and circumstances of these cases, and inconsistent with the Bankruptcy Code and case law precedent, it must be denied.

[7] See Hr'g Tr. 72:20–73:2, Oct. 4, 2011 ("[T]he first and second lien holders have negotiated and received consideration . . . for their permitting the DIP loan to proceed and I think that's entitled to great weight and I don't think that absent very unusual circumstances or extraordinary circumstances that a court should, sort of, break up that bargain and I think that's significant."), annexed hereto as Exhibit A.

BACKGROUND

A. Chapter 11 Cases

7. On September 7, 2011 (the "Petition Date"), each of the Debtors commenced a voluntary case (the "Chapter 11 Cases") under title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (as amended, the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases. On September 8, 2011, the Court entered an order consolidating the Chapter 11 Cases for procedural purposes only.

B. Cash Management Motion; Cash Management Order

8. On the Petition Date, the Debtors filed a motion for authority to continue to use their Cash Management System and related relief (D.I. 16, the "Cash Management Motion"). On September 8, 2011, following the hearing on the Debtors' first day pleadings, the Court entered the Cash Management Order. Among other things, the Cash Management Order (i) authorized the Debtors to obtain unsecured credit in the ordinary course of business in connection with the Cash Management System, and (ii) granted administrative expense status to Intercompany Claims pursuant to sections 503(b)(l) and 364(b) of the Bankruptcy Code.[8]

C. Appointment of Committee; Reconsideration Motion

9. On September 22, 2011, the United States Trustee for the District of Delaware appointed the Committee. No other official committees have been appointed or designated in the Chapter 11 Cases.

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[8] See Cash Management Order, at 3-4.

10. On October 3, 2011, the Committee filed the Reconsideration Motion, which requests that the Cash Management Order be modified to provide that, under section 364(d) of the Bankruptcy Code, Intercompany Claims be (i) secured by liens that prime all adequate protection and prepetition liens, and (ii) granted superpriority administrative expense status with priority over all other administrative expense claims, other than the superpriority claims of the DIP lenders.[9]

D. Final DIP Order; Committee Objection

11. On the Petition Date, the Debtors filed a motion (D.I. 29, the "DIP Motion") for authority to, among other things, (i) obtain up to $600 million in secured debtor-in-possession financing (the "DIP Financing") on a priming lien basis, (ii) utilize the First Lien Noteholders' cash collateral, and (iii) grant adequate protection liens to the First Lien Noteholders and the Second Lien Noteholders (together, the "Secured Noteholders").

12. On October 3, 2011, the Committee filed a limited objection to the DIP Motion, arguing, among other things, that the Secured Noteholders were not entitled to and should not be granted adequate protection liens (D.I. 265, the "DIP Objection").

13. On October 4, 2011, the Court held a hearing (the "Final DIP Hearing") to consider approval of the Final DIP Order. At the Final DIP Hearing, the Court overruled the DIP Objection, finding, among other things, that the Secured Noteholders negotiated their adequate

[9] See Reconsideration Motion, ¶ 14. The relief requested by the Committee could not be applied to Intercompany Transfers made to non-Debtor affiliates and should not be applied to transfers made from non-Debtor affiliates. As a threshold matter, the Court does not have jurisdiction to grant superpriority claims or priming liens against such non-Debtor affiliates. Additionally, the Committee does not have standing to represent the interests of creditors of non-Debtor affiliates, nor are such creditors members of the constituency to which the Committee owes fiduciary duties. Accordingly, to the extent the Reconsideration Motion seeks relief with respect to Intercompany Transfers made to or from non-Debtor affiliates, it must be denied.

protection in good faith, and should be given the benefit of the bargain they struck.[10] The Court entered an order on October 5, 2011, approving the DIP Motion on a final basis (D.I. 310, the "Final DIP Order").[11]

14. In the Final DIP Order, the Secured Noteholders were granted, as adequate protection for any diminution in value of their interest in the Noteholder Collateral, security interests in and liens upon each Debtor's assets (other than the proceeds of avoidance actions) pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code (the "Adequate Protection Liens"),[12] as well as superpriority administrative expense claims under section 507(b) of the Bankruptcy Code against each Debtor and its assets.[13]

E. Amended Cash Management Order

15. On October 11, 2011, the Court entered the Amended Cash Management Order, which includes a comprehensive Committee oversight protocol that resulted from negotiations between the Committee and the Debtors.

OBJECTION

I. Court Approved Protections For Intercompany Claims are Standard, Reasonable, and Appropriate; Committee Has Not Demonstrated They Are Insufficient

16. NewPage, like other large companies, utilizes a centralized cash

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10 See Hr'g Tr. 91:1-10, 84:6-18, Oct. 4, 2011.

11 See *Final Order (I) Authorizing Debtors (A) to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363 and (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364.*

12 Final DIP Order, at ¶ 14.

13 On October 18, 2011, the Committee filed a notice of appeal solely to the portion of the Final DIP Order that prohibits the charging of expenses of the estates, under Bankruptcy Code section 506(c), against the Noteholder Collateral, the Notes Collateral Trustees, the Notes Indenture Trustees or the Secured Noteholders. See *Notice of Appeal* (D.I. 358).

management system to streamline the collection, concentration, and disbursement of funds among its debtor and non-debtor subsidiaries and affiliates. As an integral function of the Cash Management System, Intercompany Transfers are made and subsequently repaid in the ordinary course of business.[14]

17. To provide the Committee with additional comfort on account of the unsecured creditors of a Debtor that may extend credit to another Debtor or non-Debtor affiliate under the Cash Management System, the Amended Cash Management Order requires the Debtors to do each of the following:

- Maintain records of all transfers within the Cash Management System;
- Maintain accounting procedures to track post-petition intercompany transactions;
- Provide the Committee with reasonable access to such records;
- Provide the Committee with financial reports with respect to Consolidated Water Power Company, a non-Debtor affiliate;
- Provide the Committee with five days prior notice of (a) intercompany transfers to the Debtors' Canadian non-Debtor affiliate, and (b) transfers to any non-Debtor affiliate outside the ordinary course; and
- Provide the Committee with five days prior notice of the settlement of any prepetition inter-Debtor transactions prohibited under the DIP documents.

18. In addition, the Amended Cash Management Order provides that (i) all Intercompany Claims shall be granted administrative expense status under section 364(b) of the Bankruptcy Code, and (ii) each Debtor making an intercompany transfer to a non-Debtor affiliate

[14] See *Declaration of George F. Martin in Support of the Debtors' First Day Motions and Applications* [D.I. 3], at ¶¶ 43 & 44.

shall have claims for contribution, indemnification, reimbursement, subrogation and/or otherwise for the fair value of the property transferred.

19. The Committee makes no showing as to why these protections are insufficient to address its concerns on behalf of unsecured creditors of Debtors that are lenders under the Cash Management System. Indeed, this set of protections goes beyond that which is required by the Bankruptcy Code, and is consistent with what is routinely granted by courts in this District and others. See In re Dallas Stars, L.P., Case No. 11-12935 (PJW) (Bankr. D. Del. Sept. 19, 2011) [D.I. 45] (authorizing continued use of cash management system without express protections for intercompany transfers); In re Solyndra LLC, Case No. 11-12799 (MFW) (Bankr. D. Del. Sept. 7, 2011) [D.I. 42]) (same); In re Chef Solutions Holdings, LLC, Case No. 11-13139 (KG) (Bankr. D. Del. Oct. 5, 2011) [D.I. 44] (requiring accurate record keeping of intercompany transfers, but granting no specific priority thereto); In re Graceway Pharmaceuticals., LLC,, Case No. 11-13036 (MFW) (Bankr. D. Del. Sept. 30, 2011) [D.I. 45] (same); In re Los Angeles Dodgers LLC, Case No. 11-12010 (KG) (Bankr. D. Del. June 28, 2011) [D.I. 41] (same); In re Signature Styles, LLC, Case No. 11-11733 (KG) (Bankr. D. Del. June 8, 2011) [D.I. 39] (same); In re Caribe Media, Inc., Case No. 11-11387 (KG) (Bankr. D. Del. May 5, 2011) [D.I. 37] (same); In re Pure Beauty Salons & Boutiques, Inc., Case No. 11-13159 (MFW) (Bankr. D. Del. Oct. 5, 2011) [D.I. 46] (granting administrative expense priority status for intercompany claims); In re Ambassadors International, Inc., Case No. 11-11002 (KG) (Bankr. D. Del. April 5, 2011) [D.I. 46] (same); In re SSI Group Holding Corp., Case No. 11-12917 (MFW) (Bankr. D. Del. Sept. 15, 2011) [D.I. 30] (authorizing debtors to incur unsecured intercompany credit under section 364(a) of the Bankruptcy Code); In re Real Mex Restaurants, Inc., Case No. 11-13122 (BLS) (Bankr. D. Del. Oct. 5, 2011) [D.I. 67] (granting administrative expense priority status to

intercompany claims under section 364(b) of the Bankruptcy Code); In re Hussey Copper Corp., Case No. 11-13010 (BLS) (Bankr. D. Del. Sept. 28, 2011) [D.I. 32] (same); In re Appleseed's Intermediate Holdings LLC, Case No. 11-10160 (KG) (Bankr. D. Del. Jan. 20, 2011) [D.I. 38] (same).[15]

20. At least one bankruptcy court stated recently that, in the absence of specific evidence showing that a particular debtor is administratively insolvent, a cash management system need provide nothing more than administrative expense priority status for intercompany claims. See Hr'g Tr. 29:17–20, In re The Great Atlantic & Pacific Tea Company, Inc., Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. June 14, 2011) ("Well I guess my issue is, I've heard no suggestion that any of the entities that would be getting this money from [the transferring debtor] is administratively insolvent. So why isn't there assurance that it would get repaid?") (overruling objection to proposed sale order by unsecured creditor seeking superpriority administrative expense status on intercompany claims to protect selling debtor's interests in sale proceeds, finding administrative expense status provided by cash management order sufficient to secure repayment of intercompany claims).[16]

21. The facts and circumstances of the Debtors' cases indicate that imposing unprecedented and burdensome restrictions on the functioning of the Cash Management System is unnecessary and inappropriate. Notably, the Debtors have submitted evidence in the form of a declaration by their Chief Financial Officer that the Debtors are cash flow positive[17] and have

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15 Additional orders granting similar relief are legion, and available upon request.

16 Annexed hereto as Exhibit B.

17 See *Declaration of Jay A. Epstein in Support of Debtors' Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363 and 364: (I) Authorizing Debtors to (A) Obtain postpetition 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 Prepetition Secured Parties; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief.* [D.I. 21], at ¶ 7.

asserted that each Debtor operating subsidiary is cash flow positive.[18] Indeed, upon information and belief, the Debtors' management considered the very issue raised in the Reconsideration Motion—whether a Debtor borrowing cash under the Cash Management System will be able to repay such amounts—and determined that administrative expense status under section 364(b) of the Bankruptcy Code provides appropriate protection for Intercompany Claims. Accordingly, treatment beyond that which is contemplated by the Amended Cash Management Order must be denied.

II. Secured Intercompany Claims Sought By Committee Are Extraordinary Remedy; Committee Has Not Demonstrated Need for Such Relief

22. The Committee has taken the position that the Debtors should not be permitted to continue to make use of the Cash Management System unless Intercompany Claims are (i) secured by liens that prime all adequate protection and prepetition liens, and (ii) granted superpriority administrative expense status with priority over all other administrative expense claims, other than the superpriority claims of the DIP lenders. Such relief is wholly unwarranted by the facts and circumstance of these cases and, in any event, the Committee has not and cannot satisfy the specific statutory requirements that must be met before a court may grant priming liens. Moreover, the Committee has failed to cite a single case in which Intercompany Claims resulting from a cash management system were granted section 364(d) relief, and diligent research has failed to uncover any such case in this District.

a. Committee Has Not Demonstrated Statutory Prerequisites and Requirements for Priming Liens

23. Section 364(d) of the Bankruptcy Code provides that, after notice and a hearing, a Court may:

[18] Cash Management Motion, ¶ 19.

> authorize the obtaining of credit or the incurring of debt secured by a **senior or equal lien** on property of the estate that is subject to a lien **only if**
> (A) the trustee is **unable** to obtain such credit otherwise; and
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d) (emphasis added). The plain language of section 364(d) makes clear that priming liens are only available if (i) the debtor is unable to obtain credit or financing on any other bases, and (ii) the loan to be subordinated is adequately protected. See Resolution Trust Corp. v. Swedeland Dev. Group (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 563-67 (3d Cir. 1994) (affirming that bankruptcy court cannot authorize debtor to obtain superpriority postpetition financing under section 364(d) of Bankruptcy Code, where such financing primes prepetition secured creditor without providing it with adequate protection). "Priming is extraordinary relief requiring a strong showing that the loan to be subordinated is adequately protected." In re LTAP US, LLLP, No. 10-14125, 2011 WL 67176, at *3 (Bankr. D. Del. Feb 18, 2011) (denying debtor's application to obtain postpetition financing on priming basis, where debtor had no unencumbered assets to provide as adequate protection); see also In re Seth Co., 281 B.R. 150, 153 (Bankr. D. Conn. 2002) ("The ability to prime an existing lien is extraordinary, and in addition to the requirement that the trustee be unable to otherwise obtain the credit, the trustee must provide adequate protection for the interest of the holder of the existing lien.") (citing 3 Collier on Bankruptcy ¶ 364.05 (15th Ed. Revised 2002).

24. The Committee cannot demonstrate that the requirements for providing priming liens to Intercompany Claims are met. First, the Committee must demonstrate that the borrowing Debtor cannot obtain such credit on an unsecured, non-priming basis. However, the Debtors have already stated their willingness to continue to extend intercompany credit on an unsecured basis under the Cash Management System. Accordingly, the Committee cannot show

the need or requirement for priming liens and superpriority claims on account of Intercompany Transfers.[19] See, e.g., In re Los Angeles Dodgers LLC, Case No. 11-12010, 2011 WL 2937905, at *2 (Bankr. D. Del. July 22, 2011) (denying debtors' motion to obtain postpetition financing on secured basis, where alternative lender was ready and able to extend financing on unsecured basis); In re Den-Mark Constr., Inc., 406 B.R. 683, 690-693 (E.D.N.C. 2009) (vacating bankruptcy court's granting of priming liens under § 364(d), where record failed to clearly indicate debtor was unable to obtain alternative financing on non-priming basis).

25. Second, absent consent of the Debtors' prepetition secured creditors, the Court cannot authorize priming liens unless a clear showing is made that all such secured creditors are adequately protected. For the avoidance of doubt, the AHFLN do not consent to any priming of their prepetition liens by Intercompany Claims. Since the Committee has made no showing of adequate protection on account of its proposed priming of the AHFLN's liens by the Intercompany Claims, the existing liens of the First Lien Noteholders cannot be primed. See Swedeland, 16 F.3d at 564 ("[T]he bankruptcy court may authorize post-petition financing supported by a superpriority lien only if there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.").

b. Committee Has Not Identified Any Authority for the Relief it Seeks

26. Not surprisingly, the Committee has not identified a single case where ordinary course intercompany claims under a cash management system were granted priming liens under section 364(d) of the Bankruptcy Code, and diligent research has failed to uncover an

[19] The same is true for liens granted pursuant to section 364(c) of the Bankruptcy Code, which are only available "[i]f the Trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense". See 11 U.S.C. § 364(c).

order providing for such relief that was entered in this District.[20] Instead, the Committee cited to three cases where, under unusual circumstances that plainly warranted heightened protections, intercompany claims were secured by **junior liens under section 364(c)** of the Bankruptcy Code.

27. In In re Enron Corp., for example, the cash management order granted junior liens to intercompany claims pursuant to section 364(c)(3) of the Bankruptcy Code, and did not prime the existing liens of secured creditors.[21] See In re Enron Corp., Case No. 01-16034 (Bankr. S.D.N.Y. Feb. 25, 2002) [D.I. 1666], at ¶ 5 (granting transferring debtor "a lien on all property of the [beneficiary debtor's] estate under section 364(c)(3) of the Bankruptcy Code"). Additionally, the relief granted in Enron was designed to resolve concerns raised by certain trade creditors that a particular debtor, which provided substantial cash flows to other debtors, would be harmed through its inclusion in the allegedly *fraudulent* cash management system. See *Response of Official Committee of Unsecured Creditors to Motion of Various Trading Creditors for Order Excepting Enron North America Corp. From Existing Centralized Cash Management System* at ¶1, In re Enron Corp., Case No. 01-16034 (Bankr. S.D.N.Y. Feb. 5, 2002) [D.I. 1309] (proposing that intercompany claims be secured by junior liens to address "legitimate concern" raised by certain trade creditors that cash management system was fraudulent). Such circumstances have not been alleged here, much less any facts or circumstances to justify elevating Intercompany Claims to a status beyond what was granted in

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[20] The Court recently authorized intercompany transfers to be protected with superpriority administrative expense claims, but provided that such claims were **junior** to prepetition and postpetition claims of senior lenders. See In re Friendly Ice Cream Corp., Case No. 11-13167 (KG) (Bankr. D. Del. Oct. 6, 2011) [D.I. 50].

[21] Compare 11 U.S.C. § 364(c)(3) (providing that court may authorize obtaining of credit secured by a "junior lien" on property of the estate that is already subject to a lien) with 11 U.S.C. § 364(d)(1) (providing that court may authorize obtaining of credit secured by a senior or equal lien on property of the estate that is already subject to a lien).

Enron.

28. Similarly, in In re Lernout & Hauspie Speech Products N.V. and In re The Babcock & Wilcox Company, the courts granted only junior liens pursuant to section 364(c)(3) of the Bankruptcy Code to secure certain intercompany claims. See In re Lernout & Hauspie Speech Products N.V., Case No. 00-0438 (Bankr. D. Del. Feb. 20, 2001) [D.I. 358], at ¶ 28; In re The Babcock & Wilcox Company, Case No. 00-10992 (Bankr. E.D. La. Mar. 24, 2000) [D.I. 245], at ¶ 26. Moreover, neither of these decisions addressed the extension of intercompany credit under a prepetition, ordinary course cash management system. Rather, the junior liens were granted, in DIP orders, to the extent that a debtor paid more to the DIP lender than such debtor received in loan proceeds.

III. The Court Should Defer to the Debtors' Business Judgment In Extending Unsecured Intercompany Credit

29. Each Debtor's decision to continue to participate in the Cash Management System, and potentially extend short-term intercompany credit on an unsecured basis, is an exercise of that Debtor's business judgment. Likewise, each Debtor's determination that an administrative expense claim is sufficient to protect its extensions of credit under the Cash Management System is an exercise of that Debtor's business judgment. At all times, such exercises of business judgment must be made by the Debtors in accordance with their fiduciary duties. The Committee fails to explain why such judgment should be undermined and supplanted by that of the Committee, particularly given the Debtors' positive cash flow and the comprehensive oversight and reporting contemplated by the Amended Cash Management Order.

IV. Requested Relief Would Eviscerate Adequate Protection Granted by This Court

30. The Reconsideration Motion appears to be a veiled attempt to re-litigate the adequate protection provided to the First Lien Noteholders pursuant to the Final DIP Order.

In connection with that order, (a) the Secured Noteholders authorized the Debtors to use the Noteholder Collateral, as applicable (including authorization by the First Lien Noteholders for the Debtors to use their cash collateral) and (b) the First Lien Noteholders agreed to be primed by a $600 million debtor in possession loan facility. As consideration for those significant concessions, and as required by the Bankruptcy Code, the Secured Noteholders were granted the Adequate Protection Liens, which are junior only to the DIP Liens. The Committee seeks to interpose intercompany liens between the Adequate Protection Liens and the DIP Liens. Such liens would undermine the value of the Adequate Protection Liens granted to the Secured Noteholders and approved by the Court, after a hearing during which the Committee's objections concerning various aspects of the adequate protection granted to the Secured Noteholders were overruled.

31. As the Court observed at the final DIP hearing, most of the Committee's arguments against approval of the Final DIP Order went to the adequate protection aspects of the proposed order.[22] In overruling the Committee's objections, the Court determined that the Secured Noteholders negotiated their adequate protection in good faith. See Hr'g Tr. 84:3–8, Oct. 4, 2011 ("In this particular case I am really struck by the concessions that the noteholders have made to put the case in the posture that it is today, and that is moving forward successfully thus far. They've made those concessions and have negotiated in good faith and expect the Court to support the bargain that they have struck here."). Moreover, the Court held that given such good faith negotiations and the significant concessions made by the Secured Noteholders, the Secured Noteholders are entitled to the adequate protection provided in the Final DIP

[22] Hr'g Tr. 90:24-25, Oct. 4, 2011.

Order.[23] Thus, the Court has already ruled that the adequate protection agreed to by the parties in good faith should not be disturbed based on the interests of junior creditors. Because the Committee has not, and cannot, justify its extraordinary request, the Reconsideration Motion should be denied.

[23] Hr'g Tr. 91:1-3, Oct. 4, 2011.

WHEREFORE, for the foregoing reasons, the Ad Hoc First Lien Noteholders respectfully request entry of an order (a) sustaining the Objection, (b) denying the Reconsideration Motion in its entirety, and (c) granting such other and further relief as the Court may deem just and proper.

Dated: October 25, 2011
Wilmington, Delaware

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EXHIBIT A

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

October 4, 2011
2:03 PM

B E F O R E:
HON. KEVIN GROSS
CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

but I will give them superpriority claims would be like a cruel joke because at the end of the day they grab their value in any event. And what we're asking Your Honor is for a carve-out of both, which is not unprecedented. It's been done many times in Delaware. So it's not like we're inventing new law here.

I talked about the recharacterization and I think that covers the points from our point of view, Your Honor.

THE COURT: All right. Thank you. Any response?

(No response)

THE COURT: Does anyone have the final DIP order at this point, so that I could look at some precise language? Let me just -- and let me tell you what my thinking is overall. We're talking about an awful lot of hypotheticals, that's the one, sort of, back -- yes. Thank you, Mr. Abelson -- background fact.

MR. DESPINS: We have not --

THE COURT: You haven't seen it either.

MR. DESPINS: No.

THE COURT: And we'll take a recess to give parties an opportunity to review it. But just in general my thoughts are that secondly the first and second lien holders have negotiated and received consideration and consideration for their permitting the DIP loan to proceed and I think that's entitled to great weight and I don't think that absent very unusual circumstances or extraordinary circumstances that a court

should, sort of, break up that bargain and I think that's significant.

Now I just want to make sure, on the avoidance liens, that I understand that the first and second noteholders, lien noteholders, are prepared to waive their entitled -- lien on the proceeds. Is that correct, Mr. Leblanc? I'm sorry but I had understood you to say that.

MR. LEBLANC: Your Honor, that's -- we could live with that.

THE COURT: Because that is something --

MR. LEBLANC: Provided we get -- provided we're entitled to a superpriority claim with respect to those proceeds. If that's carved out also, that's a very different world. If we're -- we can live without the liens --

THE COURT: Yes.

MR. LEBLANC: -- if Your Honor's uncomfortable with that and I know that there's -- that's an extraordinary term that needs disclosure in this court, as per local rule. And so we could live without the lien but not without the superpriority claim.

THE COURT: But then Mr. Despins argues that it's really --

MR. LEBLANC: It doesn't permit us to foreclose on the claim. It doesn't permit us to control the prosecution of the claim and, Your Honor, one other change that we've made that

arguments are very difficult and it's not easy all the time to make rulings.

In this particular case I am really struck by the concessions that the noteholders have made to put the case in the posture that it is today, and that is moving forward successfully thus far. They've made those concessions and have negotiated in good faith and expect the Court to support the bargain that they have struck here. And this is a very important case. It's a manufacturing case involving thousands, 6,000 at least, employees and with every ounce of my strength I am going to help you all to see this case to a successful conclusion. And I think that the, sort of, aura that's been set for the case, that the parties are operating in good faith and negotiating is something that I want to maintain.

So that is why I made the comments that I made before regarding the benefit of bargain and I think it's important and I think that that sort of good faith negotiating is going to help this case to succeed in the end.

Having said that, I don't know if people have specific comments that they want to make to language in the proposed order at this point or how you would like to proceed. Mr. Abelson?

MR. ABELSON: Yes, Your Honor. I just wanted to clarify that during the break there were two changes that were made to the order.

Vonnegut who really is the brains behind the whole operation on our side, will make it perfectly correct but this is, hopefully, just about correct. "In the event that the unsecured creditors' committee is granted standing by this Court to pursue Claims and Defenses against the second lien noteholders or the second lien collateral trustee, nothing herein shall prohibit it from requesting authority from this Court to use cash collateral with respect to such claims and defenses or any party's right to object thereto." Which is just another way of saying the 150 is the investigation cap but should Mr. Despins come to court and say I actually want to sue the second lien noteholders, nobody can say hah, hah the DIP order irrevocably deprived you of funds to do so but both the second lien noteholders and presumably everybody else, will have the right to come and say you shouldn't allow this frolic, this is a terrible use of, in the case of the first lien noteholders, our collateral and everybody can say what they want and hopefully I won't be here.

THE COURT: All right. Thank you, Mr. Huebner. Anyone else?

(No response)

THE COURT: Well, as I've indicated I am prepared to grant and enter the order as proposed. I do appreciate the committee's arguments. Most of the arguments go to, really, the adequate protection aspects of the proposed order. And as

I've said and indicated, I think the noteholders have made significant concessions which entitles them to the adequate protection described in the order. I think we've clarified the issue relating to avoidance actions and I know that it was not previously discussed but I certainly understand their position with respect to Section 548, Avoidance Actions, and I think that the liens should remain and apply to those avoidance actions.

So I will rule in their favor on that and with that I am prepared to enter the order.

Standing is not an issue today, is that correct? That's for another day as I understand it.

UNIDENTIFIED SPEAKER: Hopefully never.

THE COURT: Never. But to the extent -- that's right. But to the extent it is, that would be by separate motion from the committee.

MR. BIENENSTOCK: That's correct, Your Honor.

THE COURT: Very well.

MR. BIENENSTOCK: With that, Your Honor, that's the agenda.

THE COURT: So we have a little cleanup to do on the order and it will come over in due course.

MR. ABELSON: Your Honor, the order is actually marked, why don't you give us some time before Your Honor steps down, we'll see if we can get everyone to sign off on it and

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Lead Case No. 10-24549-RDD
Adversary Case No. 11-08213-RDD and 11-08239-RDD
- -x
In the Matter of:
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al.,
Debtors.
- -x
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. et al.,
Plaintiffs,
-against-
OFFICEMAX, INC.
Defendant.
- -x
UFCW LOCAL 342
Plaintiffs,
-against-
PATHMARK STORES, INC.
Defendant.
- -x

U.S. Bankruptcy Court

300 Quarropas Street

White Plains, New York

June 14, 2011

10:12 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

objections will be withdrawn.

So turning to the motions themselves; the first three are sales motions that are generally uncontested with the exception of one objection and that is from Southpaw who filed an objection having to do with the channeling of proceeds and reservations of rights in connection with claims, to the extent the proceeds are used by debtor entities outside of the Superfresh entities that are selling the assets. And there's also a DIP reservation -- a DIP facility reservation that they've proposed to make. We're contesting that objection and we can address that one now or later on.

THE COURT: Why don't we go through these in order?

MR. MAZZA: Sure. So the first of the motions that is up is, of the south store motions is the sale of the Westminster property back to the landlord for 425,000 dollars. At the auction we declared this bid to be the highest and best. We filed a blackline APA and sale order incorporating some changes from the landlord that we forwarded on to the court that were ministerial in nature and reservations of rights with respect to mechanics as to the closing, et cetera. So except for the pending objection from Southpaw this particular motion is uncontested and we'd ask that the order be entered.

THE COURT: Okay. Well, why don't we deal with the Southpaw objection? I appreciate that this is only one piece of it and their objection is prompted by the overall belief

that, in essence, the Superfresh debtor is --

MR. MAZZA: Right.

THE COURT: -- liquidating, essentially, its liquidatable assets.

MR. MAZZA: Right.

THE COURT: It's most meaningful assets and that therefore there's a risk that those assets be dissipated and to the extent it's "their debtor" they won't have -- they won't have the benefit of those assets.

MR. MAZZA: Right. So we did file a reply brief yesterday on this point and it's a simple response with respect to the use of the proceeds, which we would intend to use in the operation of the debtors' business, provided that the DIP lenders would be okay in not having to make a pay down and we're talking to the DIP lenders with respect to that. So if we're using the proceeds in the operation of the debtors' business we think the cash management order already covers the concerns raised by Southpaw in the sense that each debtor, to the extent that proceeds are used by other debtors in the operation of the overall enterprise, receives an administrative claim against the other entities. They've asked for a superpriority administrative claim --

THE COURT: Right.

MR. MAZZA: -- Your Honor, there's no basis in the law for that so we don't think that that should be granted.

And the other point is that the Superfresh entity doesn't necessarily own all the assets here, so it is a bit subjective as to whether or not assets are moving out of the Superfresh entity because a number of the leases were in fact held by the parent company, Great Atlantic & Pacific Tea Company, and that's where a lot of the value does --

THE COURT: Although I appreciate that but Superfresh doesn't have a lot of other assets that are going to generate proceeds, right?

MR. MAZZA: Well, Superfresh does -- there are still some Superfresh stores that are remaining in the portfolio.

THE COURT: Right.

MR. MAZZA: This wasn't an entire sale; it was just a sale of a geographic portion of the portfolio. But again, we think that the Southpaw entity who allegedly has a 503(b)(9) claim is covered by the cash management order, which is a final, unappealable order.

THE COURT: Right.

MR. MAZZA: And we think that --

THE COURT: But right now you're not going to use the proceeds or -- well, it's not clear, I guess. You're not -- you're planning not to use the proceeds to pay down a portion of the DIP loan?

MR. MAZZA: That would be the intent, subject to our discussions with the DIP lender.

THE COURT: All right. Because it does seem to me that if they were used to do that then the source of those proceeds, whether it's A&P or Superfresh, would be subrogated. But that's not being done.

MR. MAZZA: They made that argument as well and I think as to the subrogation argument, Your Honor, that -- I don't think that works either because the DIP lenders have a super -- they have a lien on all the assets and, you know --

THE COURT: Well, they'd be subrogated subject to the terms of the DIP order and I don't think -- I don't think that Southpaw is looking to prime the DIP.

MR. MAZZA: No, I don't think -- I don't think they a re but they're saying that to the extent that that entity didn't get a particular benefit from the DIP, its proceeds shouldn't be used to pay down the DIP first. But the way it would work is that the DIP lender can look to any debtor entity for a pay down.

THE COURT: Right.

MR. MAZZA: So there's no marshalling concept in the DIP.

THE COURT: Okay.

MR. MAZZA: Which I think is effectively what they're asking for.

THE COURT: All right. Is someone here from --

MR. MAZZA: I believe counsel is here for Southpaw.

THE COURT: -- for Southpaw.

MR. JIMENEZ: I am, Your Honor.

THE COURT: Okay. I guess the basic question I have is the debtors are reaffirming that, based on the cash management order and their tracking of these payments, the applicable debtor, whether it would be A&P or Superfresh, would have an administrative claim for the use of the funds by another debtor. Why isn't that the right result?

MR. JIMENEZ: Your Honor, first of all good morning. Pedro Jimenez of Jones Day on behalf of Southpaw Credit Opportunity Fund.

Your Honor, here's the concern and both Your Honor and Mr. Schrock crystallized the concern which is we're supportive of the sale, we're supportive of the efforts the debtors trying to make right now to reorganized and we would be completely behind them in the hopes that they can put together a plan that everybody gets behind and allows A&P to reorganize. But there's still a lot of work to be done and we don't know exactly what's going to happen in the future with respect to the debtors' reorganization efforts.

And right now the Superfresh entity has done a sale of assets, there's significant proceeds that are coming in. I don't know and in fact I haven't asked Mr. Mazza to tell me exactly how much of the proceeds represent assets that are owned by Superfresh. But in the event that this represents a

good portion of assets or value to which Superfresh creditors could look to, why should we be put in the position of being a forced lender to the other debtors. This is not your typical operations that are -- and monies that are flowing up to the parent and being covered by the cash management order. This is a, kind of, a non-recurring event, a one-time event in which significant proceeds are coming into the Superfresh estate. If they're going to go out and we're going to be put in the position of being a forced lender, why should we be given the same rights that the DIP lender is given? And I'm not asking to prime the DIP lender, Your Honor is correct. I know that we're behind the DIP loans but where is the prejudice to anybody in giving us superpriority administrative expense status to make sure that we can get that money back into the Superfresh estate in the event that these cases don't go the way that we all want them to go.

THE COURT: Well I guess my issue is, I've heard no suggestion that any of the entities that would be getting this money from Superfresh is administratively insolvent. So why isn't there assurance that it would get repaid?

MR. JIMENEZ: Your Honor, I agree. But I don't know that for certain. I can only get the assurance that right now it looks like the estates are not administratively insolvent but I don't know what's going to happen months down the line. And again, I haven't heard anything from the debtors that tell