IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ABITIBIBOWATER INC. *et al.*	Case No. 09-11296 (KJC)
Debtors.	(Jointly Administered)
	Hearing: May 27, 2009 at 3:30 p.m. (ET)
	Ref. No. 256

OBJECTION OF THE ACTING AGENT ON BEHALF OF THE TERM LOAN LENDERS TO THE DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 105, 362(d), 363(b)(1), 363(c), 363(f), 363(l), 363(m), 364(c), 364(e) AND 365 OF THE BANKRUPTCY CODE (1) AUTHORIZING ENTRY INTO AN AMENDED AND RESTATED GUARANTEED RECEIVABLES PURCHASE FACILITY AND AUTHORIZING THE SALE OF RECEIVABLES AND RELATED RIGHTS THERETO, (2) AUTHORIZING ABITIBI CONSOLIDATED SALES CORPORATION TO CAUSE PAYMENT OF CERTAIN FEES PURSUANT TO THE ENGAGEMENT LETTERS, (3) MODIFYING THE AUTOMATIC STAY, (4) AUTHORIZING THE USE OF CASH COLLATERAL, (5) GRANTING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (6) GRANTING ADEQUATE PROTECTION, (7) SCHEDULING HEARINGS AND (8) GRANTING OTHER RELATED RELIEF

Certain of the lenders (collectively, the "Acting Agent")[1] party to that certain Credit and Guaranty Agreement dated as of April 1, 2008 (the "Term Loan Agreement") among Abitibi-Consolidated Company of Canada ("ACCC") and Abitibi-Consolidated Inc. ("ACI"), as borrowers, and certain subsidiaries and affiliates of ACI, as guarantors (together with ACCC and ACI, the "Loan Parties"), and the lenders from time to time party thereto (the "Term Loan Lenders"), as lenders, respectfully submit this objection (the "Objection"), on behalf of the Term Loan Lenders, to the Debtors' Motion for an Order Pursuant to Sections 105, 362(d), 363(b)(1), 363(c), 363(f), 363(l), 363(m), 364(c), 364(e) and 365 of the Bankruptcy Code (1) Authorizing

[1] The agent under the Term Loan Agreement resigned effective as of April 20, 2009. The Term Loan Lenders have chosen a successor agent; however, due to the refusal of the Debtors to sign a fee letter with the successor agent, the appointment of the successor agent has not yet become effective. As a result, pursuant to section 9.7(a) of the Term Loan Agreement, certain of the Term Loan Lenders constituting Required Lenders (as such term is defined in the Term Loan Agreement) have formed a steering committee and are serving as the Acting Agent.

Entry Into an Amended and Restated Guaranteed Receivables Purchase Facility and Authorizing the Sale of Receivables and Related Rights Thereto, (2) Authorizing Abitibi Consolidated Sales Corporation to Cause Payment of Certain Fees Pursuant to the Engagement Letters, (3) Modifying the Automatic Stay, (4) Authorizing the Use of Cash Collateral, (5) Granting Superpriority Administrative Expense Claims, (6) Granting Adequate Protection, (7) Scheduling Hearings and (8) Granting Other Related Relief (the "Motion").[2] In support of the Objection, the Acting Agent respectfully states as follows:

I. SUMMARY OF OBJECTION

1. By this Motion, the Debtors seek the entry of an "interim" order of this Court authorizing, among other things, the sale of accounts receivable of ACI[3] and ACSC that are admittedly subject to the valid, perfected and enforceable liens and security interests of the Term Loan Lenders, as well as the unfettered right to use the proceeds thereof for the benefit of the Abitibi Group (including, without limitation, the Chapter 15 Petitioners, ACI and ACCC) and the Donohue Group. In so doing, however, the Debtors have utterly failed to address the clear and unambiguous requirements of the Bankruptcy Code and applicable law that must be met in order for the relief requested to be granted. Among other things, the Debtors have failed to establish (nor can they establish) that the requirements of Section 363(f) of the Bankruptcy Code have been met so as to justify sales of accounts receivable free and clear of the Term Loan Lenders' liens and security interests. Nor have the Debtors offered to provide "adequate protection" sufficient to protect the Term Loan Lenders' interests against diminution in the value of their collateral resulting from, among other things, the use of cash collateral to fund operations and to

[2] Capitalized terms used herein that are not defined shall have the meaning set forth in the Motion.

[3] ACI is a Chapter 15 Debtor and therefore sections 361 and 363 of the Bankruptcy Code apply to ACI with respect to all of its assets located within the territorial jurisdiction of the United States. See 11 U.S.C. § 1520(a).

pay the exorbitant fees and expenses associated with the Amended and Restated Securitization Program. In fact, the Motion is completely devoid of any information that might allow this Court to assess (assuming the sale of the accounts receivable is permissible in the first instance) the Debtors' adequate protection proposal. Finally, while the Debtors pay "lip service" to the applicability of section 363 to Chapter 15 Petitioner, ACI, they thereafter disregard it on the baseless assertion that ACI has no assets within the territorial jurisdiction of the United States -- a statement patently false and belied by the Debtors own admissions in their Cash Management Motion.

2. Therefore, the Term Loan Lenders object to the relief requested in the Motion. Notwithstanding the foregoing, the Term Loan Lenders would be prepared to provide the necessary consents if the Debtors were to provide adequate protection in the form of: (i) current monthly payment of cash interest at the non-default rate (with a reservation of rights as to the entitlement to any default spread), (ii) replacement liens on the assets of the members of the Donohue Group of the same type as enjoyed by the Term Loan Lenders prior to the Petition Date, (iii) superpriority claims against the members of the Donohue Group, (iv) adequate protection liens having the highest priority available (after taking into account existing liens and charges) on all other assets of ACI, ACCC and the members of the Donohue Group, (v) current payment of the reasonable fees and expenses of the proposed Successor Agent (and prior to the effectiveness of the appointment of such Successor Agent, the Term Loan Lenders), including, without limitation, the reasonable fees and expenses of counsel (in both the United States and

Canada) and financial advisors, and (vi) compliance with a 13 week rolling cash flow budget reasonably acceptable to the Term Loan Lenders.[4]

II. FACTS

A. Term Loan Agreement

3. On March 13, 2009, the Debtors delivered to Goldman Sachs Credit Partners, L.P., in its capacity as Administrative Agent, a letter (the "Notice of Default") stating that as a result of the commencement by ACI and ACCC of certain proceedings under the Canadian Business Corporations Act (the "CBCA"), an Event of Default had occurred and was continuing under the Term Loan Agreement. A copy of the Notice of Default is annexed hereto as Exhibit A.[5] By operation of the Term Loan Agreement, and as expressly stated in the Notice of Default, all Obligations thereunder were accelerated and became immediately due and owing.[6]

4. As of the Petition Date, there was approximately $347 million in principal obligations plus accrued and unpaid interest and fees past due and owing under the Term Loan Agreement (the "Term Loan Obligations"). The Term Loan Obligations are secured by valid, enforceable, first priority liens on, among other things, the inventory and accounts receivable of the Abitibi Group and the Donohue Group and the proceeds thereof. The Term Loan Lenders have perfected their liens in accordance with applicable law both in the United States and Canada by, among other things, filing UCC-1 Financing Statements, and by entering into blocked account agreements with respect to certain bank accounts into which cash proceeds of accounts receivable sold to ACI Funding are deposited.

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[4] The Debtors have repeatedly taken the position that the Term Loan Lenders are oversecured. See, *infra*, III.D. The package of adequate protection requested by the Term Loan Lenders here is customary for oversecured creditors in cases such as these.

[5] Due to time constraints imposed by the objection deadline all exhibits hereto will be filed separately and after resolution with the Debtors of any issues relating to confidentiality.

[6] The Obligations under the Term Loan Agreement were scheduled to mature on March 30, 2009 in any event.

B. The Existing Securitization Program

5. Under the Existing Securitization Program, the Company monetizes accounts receivables generated by ACI and ACSC by selling them to Abitibi-Consolidated U.S. Funding Corp. ("ACI Funding"), a special-purpose, bankruptcy remote entity, pursuant to the Amended and Restated Purchase and Contribution Agreement dated as of January 31, 2008 (the "PCA") among ACI, ACSC and ACI Funding. ACI Funding, in turn, sells an interest in the purchased receivables to Citibank.

6. On the date immediately after the Petition Date, the Debtors sought and obtained emergency relief from this Court to permit ACI and ACSC to continue the Existing Securitization Program through June 1st, when that facility will expire by its terms.[7] The order authorizing the Donohue Group to continue selling receivables into the Existing Securitization Program is subject to certain adequate protection granted to the Term Loan Lenders on consent of the Donohue Debtors, the terms of which were set forth on the record at the first day hearings held on April 17, 2009.[8] A true and correct copy of the transcript of the April 17th hearing is attached hereto as Exhibit B. Despite the fact that ACI and the other members of the Abibiti Group are benefiting from the use of the Term Loan Lenders' cash collateral, they are not providing any adequate protection to the Term Loan Lenders.

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[7] The Debtors separately sought and obtained authority from the Canadian Court.

[8] At the April 17th hearing the Debtors agreed to memorialize the adequate protection granted to the Term Loan Lenders in a written order. However, despite repeated requests by the Term Loan Lenders, the Debtors never signed the written order. The Debtors description in the Motion of the adequate protection agreed to on April 17th hearing is not consistent with the record and therefore, to the extent it is relevant, the Term Loan Lenders respectfully submit that the transcript of the hearing should govern the terms of adequate protection - not the Debtors' restatement of it in the Motion.

C. <u>The Amended and Restated Securitization Financing</u>

7. On May 18th, the Debtors filed the Motion in this Court seeking emergency authority to enter into the Amended and Restated Securitization Program for up to 18 months.[9] Although the Amended and Restated Securitization Program is characterized as an "amendment and restatement" of the Existing Securitization Program, the substance of the new Securitization Program evidences that it is truly a new and different facility. While the agreements may be amended and restated as a matter of convenience and economy, the substance is clearly different: there are different lenders, substantial up front fees to Citibank and Barclays, syndication contingencies, a higher overall commitment amount, different terms for borrowing, new covenants, and a termination of (or at a minimum substantial reduction of) Citibank's existing commitment (coupled with a release for Citibank).[10] In addition, the Citibank and Barclays Engagement Letters contain various material conditions precedent that could prevent the Amended and Restated Securitization Program from ever becoming effective even if the Interim Order is entered. Notably, the Barclays commitment is subject to the following condition:

> it is a condition of the Barclays Commitment that the portion of the Facility not being provided by Barclays Bank shall be provided by the other Banks, with at least $200,000,000 being provided by two or more Persons other than Citi or Barclays Bank.

Barclays Engagement Letter (Exhibit 9 to the Motion), § 1. The Motion is conspicuously silent on the status of the syndication process, or whether this condition is expected to be satisfied by June 1st when the Existing Securitization Program expires.

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[9] The Canadian Debtors filed a motion seeking substantially identical relief on May 21st. The hearing on the Canadian motion is presently scheduled for May 25th. The Term Loan Lenders are requesting that the Canadian court adjourn that hearing until such time as this Court has ruled on the Motion and the Term Loan Lenders' motion for adequate protection filed against the Chapter 15 Petitioners.

[10] The Term Loan Lenders are unable to truly compare the existing agreements to the amended and restated ones that the Debtors intend to execute because the Debtors only attached to the Motion the Citibank and Barclays Engagement Letters and a term sheet for the Amended and Restated Securitization Program. The actual documentation has not been provided.

8. The costs related to the Amended and Restated Securitization Program are substantial and, one way or another, will be paid out of the Term Loan Lenders' cash collateral. According to the Zelin Declaration, the total cost of the Amended and Restated Securitization Program is $32.5 million, "all-in", and there is no compensation to the Term Loan Lenders for the use of their collateral to pay these costs. Of this amount, the proposed program contemplates the payment of fees to Citibank and Barclays, as the Administrative Agent and Syndication Agent, respectively, in the aggregate amount of $9.95 million. While the Debtors assert that these payments will be made by ACI Funding and not from property of the Debtors, that argument ignores the fact that any such payment by ACI Funding will reduce -- on a dollar for dollar basis -- the value of the Term Loan Lenders' collateral.[11] Further, the $32.5 million in fees is exclusive of the fee payable to the Debtors' Canadian financial advisor, BMO Nesbitt Burns Inc. ("BMO") of $6 million (2% of the facility commitment amount), which fee the Debtors failed to disclose to this Court. In addition, according to the Blackstone Engagement Letter filed as part of the Debtors' Application for an Order Approving the Retention and Employment of Blackstone Advisory Services L.P. as Financial Advisors to the Debtors and Debtors-in-Possession *Nunc Pro Tunc* to the Petition Date (the "Blackstone Retention Application") (D.E. 137), if the Debtors also retain Blackstone's services with respect to the replacement of the Existing Securitization Program, Blackstone would be entitled to a fee for such services of up to another $2,500,000.[12] See Exhibit B to Blackstone Retention Application (Blackstone Engagement Letter dated April 28, 2009), p. 3-4.

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[11] The Term Loan Lenders have a security interest in the equity of ACI Funding, which represents the residual value of the receivables in the securitization facility.

[12] The Blackstone Retention Application has not yet been approved by the Court.

9. Each and every one of these fees (amounting to as much as $40 million) -- which inure to the benefit of both the Abitibi Group and the Donohue Group -- are borne directly or indirectly by the Term Loan Lenders' through dissipation of their collateral. With respect to fees paid by ACI Funding, every dollar spent reduces the value of the Term Loan Lenders' security interest in their collateral. With respect to fees paid by the Debtors, such fees are paid out of the Term Loan Lenders' cash collateral (in the United States and Canada). The Debtors barely mention these fees, let alone explain how they will be allocated (if at all) between the Abitibi Group versus the Donohue Group, or how the Term Loan Lenders will be compensated or protected for the adverse impact on their collateral.

D. Intercreditor Agreement

10. The Term Loan Agent, Citibank, as Agent under the Existing Securitization Program, ACI Funding, ACI and ACSC are parties to that certain Intercreditor Agreement dated as of April 1, 2008 (the "Intercreditor Agreement"), which governs the interrelation of the Term Loan Agent's and Citibanks's rights with respect to the ACI and ACSC accounts receivables and the proceeds thereof. Prior to the commencement of the cases (and subsequent thereto solely by virtue of the consent of the Term Loan Lenders in return for interim adequate protection agreed to at the April 17th hearing), under the Intercreditor Agreement, as part of the Existing Securitization Program, ACI and ACSC were permitted to sell receivables to ACI Funding free and clear of the Term Loan Agent's liens in exchange for the Term Loan Agent's lien attaching to the proceeds of the sale (including by contract rights and by virtue of blocked account agreements).

11. In the Motion, the Debtors rely on the erroneous assumption that the Intercreditor Agreement will continue to be enforceable against the Term Loan Lenders so as to permit the

Debtors to sell receivables free and clear of liens under the Amended and Restated Securitization Program. As discussed herein, that is simply not the case.

E. Adequate Protection Proposal

12. The Motion includes a request to use the Term Loan Lenders' cash collateral and approval of certain terms that the Debtors assert would constitute adequate protection of the Term Loan Lenders interests in the cash collateral.[13] In sum, the adequate protection offered by the Debtors is comprised of: (i) replacement liens on US assets of the same type as existed as of the Petition Date, (ii) monthly cash deposits into a bank account at Wells Fargo Bank, N.A. equal to 43.4% of the interest accruing on the Obligations due and owing to the Term Loan Lenders, which account would be subject to a first priority lien in favor of the Term Loan Agent to secure the Term Loan Lenders against "Aggregate Diminution in Value" (subject to a credit of $11 million for the adequate protection payment the Debtors agreed to provide at the first day hearings), (iii) superpriority claims against the Donohue Group, and (iv) payment of reasonable post-petition fees and expenses of certain counsel for and advisors to the "ACCC Term Agent."[14] In addition, the Debtors have offered to deliver (but not comply with) monthly financial reports of a rolling 13-week cash flow forecast (collectively, the "Adequate Protection Proposal"). The Debtors argue that this adequate protection is sufficient because, among other reasons, the Term Loan Lenders are "undersecured" when the dollar amount of the Obligations is compared solely

[13] The offered adequate protection would only relate to the US Debtors' assets. The Debtors have not offered any adequate protection from the Chapter 15 Petitioners or their Canadian affiliates despite the fact that the Chapter 15 Petitioners and their affiliates are identified and specific beneficiaries of the proposed new Securitization Program and receive tens of millions of dollars, funded through bank accounts located in the territorial jurisdiction of the United States, from the sale of the ACI and ACSC accounts receivable. The Term Loan Lenders have objected to the Chapter 15 Petitioners' use of cash collateral without providing adequate protection in the Acting Agent's Motion to compel adequate protection filed in the Chapter 15 Petitioners' cases.

[14] Ironically, the Debtors have refused to execute the Fee Letter that would make effective the appointment of Wells Fargo Bank, N.A. as the successor ACCC Term Agent. As a result, no ACCC Term Agent (as such) currently exists.

to the value of the assets securing such Obligations and located in the United States.[15] No adequate protection is being offered from the Chapter 15 Petitioners or their affiliated CCAA debtors.

13. For the reasons set forth below, among others discussed later in this Objection, the Adequate Protection Proposal is not sufficient to protect the interests of the Term Loan Lenders in the accounts receivable or cash collateral.

14. First, as discussed more fully below, the aggregate amount of cash and the value of accounts receivable and inventory subject to the Term Loan Lenders' Liens has diminished considerably since the Petition Date. The Debtors' forecasts indicate that this decline will continue throughout the projection period.

15. Second, the Debtors or ACI Funding will incur fees and expenses of as much as $40 million in connection with the Amended and Restated Securitization Program, all of which will be paid for by the Term Loan Lenders' collateral.

16. Third, at the same time as the collateral is deteriorating and being adversely affected by fees and expenses related to the Amended and Restated Securitization Program, the amount of the Obligations is increasing due to the accrual of interest on the Obligations, as well as the incurrence of reimbursable costs, fees and expenses under the terms of the Term Loan Agreement, all of which are allowable under section 506(b) of the Bankruptcy Code. The

[15] It is noteworthy that, in connection with obtaining approval of a priming charge on the Term Loan Lenders' Canadian collateral for the benefit of the Canadian DIP Lender, even though the Canadian DIP only benefits the Canadian Abitibi Group, the Debtors argued that the Term Loan Lenders were *oversecured* based on the overall value of all of their collateral (US and Canada combined) and therefore the priming would not adversely affect them. Now, when it suits their needs, the Debtors take the exact opposite approach and contend that this Court should put on blinders and completely disregard the fact that the Obligations to the Term Loan Lenders are effectively joint and several liabilities of the Loan Parties and the Guarantors, cross borders, and cannot be analyzed in a vacuum. The Debtors approach is all the more egregious when viewed in light of the fact that the Abitibi Group in Canada is a principal beneficiary of the cross border new Securitization Program the Debtors are asking to put into place.

interest accrual alone is approximately $3.3 million per month (calculated at the non-default rate).

17. Based on the foregoing, each day the amount of the claim grows and the amount of the collateral shrinks, thus putting at substantial risk the Term Loan Lenders ultimate recovery. The Debtors' Adequate Protection Proposal does little to mitigate these risks, is completely inadequate, and instead is just a recipe for future time consuming and expensive litigation.

F. Deterioration of Debtors' Businesses Since Petition Date

18. Based on information provided to the Term Loan Lenders and their professionals, it is apparent that the Term Loan Lenders' collateral has already deteriorated in value and otherwise been adversely impacted since the Petition Date due to (among other things) reduced sales, funding of administrative and other expenses, the granting (at the Debtors' request and over the Term Loan Lenders' objection) of a $100 million priming charge on the Term Loan Lenders' Canadian collateral, and certain other factors. Now, the Debtors want to pay up to $40 million in fees for the Amended and Restated Securitization Program, which will be funded, directly or indirectly, from the collateral. As such, any request by the Debtors to use the Term Loan Lenders cash collateral must compensate for the diminution in value that has already occurred, plus the additional diminution that will occur by virtue of (among other things) the proposed Amended and Restated Securitization Program and further use of cash collateral.

19. The Debtors are experiencing a secular decline in their business as demand shrinks, resulting in volume and price declines. Indeed, from March 2008 through the Petition Date, the Debtors' cash balance declined by $63.6 million (39%).[16] In addition, inventory

[16] The Debtors' ending cash balance for the period ending March 31, 2008 was $161.9 million. See Debtors' 6-K for period ending March 31, 2008, a copy of which is attached hereto as Exhibit C. The amount of cash on hand on

declined by $156.8 million (31%) and accounts receivable declined by $61.7 million (16%) between March 2008 and March 2009.[17] Furthermore, since the Petition Date, the value of the Term Loan Lenders' collateral has continued its descent and, given recent performance and industry trends, is likely to continue to deteriorate. On the Petition Date, the Debtors had cash on hand in the amount of $98.3 million,[18] which cash was subject to the Term Loan Lenders' lien, but as of May 10th, the aggregate amount of cash on hand declined to $__ (a __% decline)[19] and the Debtors project it to further decline to $__ (a __% decline).[20] Similarly, the Debtors had gross receivables of $__ on the Petition Date, which has subsequently declined to $__ as of May 1, 2009, with further deterioration projected to bring gross receivables to $__ (a __% decline) as of September 6, 2009.[21] The Debtors do not project inventory and have made a simplistic assumption that the Term Loan Lenders' collateral value of inventory is assumed to remain constant throughout their projections. The Term Loan Lenders are skeptical at best of the validity of these assumptions given the historical trending decline in net inventory balances set forth above (and determined by review of historical operating performance data from the

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the Petition Date was $98.3 million. See Appendix G of Fifth Report of the Monitor dated May 13, 2009, a copy of which is attached hereto as Exhibit D.

[17] Compare Debtors' 6-K for the period ending March 31, 2008 (Exhibit C) and the Current Asset Amount Certificate for the Month Ended March 31, 2009, a copy of which is attached as Exhibit 2 to the Zelin Declaration.

[18] See Appendix G of Fifth Report of the Monitor dated May 13, 2009 (Exhibit D).

[19] Certain financial information has been redacted from this Objection due to confidentiality restrictions. If these restrictions are lifted by the Debtors, the Term Loan Lenders will file an amended Objection.

[20] See Debtors' ACI Weekly Cashflow Statement in 18 Week Cash Flow Model Beginning 4-May-09, a copy of which is attached hereto as Exhibit E (due to confidentiality restrictions, this exhibit will not be filed unless those restrictions are lifted).

[21] See ACI Securitization Schedule included in the 13 Week Cash Flow Model Beginning 20-Apr-09, a copy of which is annexed hereto as Exhibit F (due to confidentiality restrictions, this exhibit will not be filed unless those restrictions are lifted); ACI Securitization Schedule included in the 18 Week Cash Flow Model Beginning 4-May-09, a copy of which is annexed hereto as Exhibit G (due to confidentiality restrictions, this exhibit will not be filed unless those restrictions are lifted).

Debtors' electronic data room). These drops in value unequivocally demonstrate that the Term Loan Lenders' collateral is decreasing in value and the remaining collateral must be protected.

20. There is no question that the Term Loan Lenders' collateral position has deteriorated, and will continue to deteriorate, during the pendency of these cases. The Debtors, as a condition to use of the Term Loan Lenders' cash collateral, must provide compensation for that diminution in the form of sufficient adequate protection.

III. ARGUMENT

I. The Debtors Cannot Sell Receivables to ACI Funding Without the Term Loan Lenders' Consent

21. The Debtors seek an order authorizing them to "transfer Receivables to ACI Funding in accordance with the terms of the Amended and Restated Financing Agreements, without recourse, free and clear of liens, claims charges, encumbrances or other interests." See Motion, ¶ 27(b). Because the Term Loan Lenders' have a lien on the receivables (which is acknowledged by the Debtors in the Motion), pursuant to section 363(f) of the Bankruptcy Code, the receivables cannot be sold, transferred or otherwise disposed of without the Term Loan Lenders' consent (unless one of the other four conditions listed in section 363(f) is satisfied, which is not the case).[22] 11 U.S.C. § 363(f)(2); see In re Trans World Airlines, Inc., 322 F.3d 283, 290 (3rd Cir. 2003); In re Kellstrom Industries, Inc., 282 B.R. 787, 793 (Bankr. D. Del. 2002); In re Decora Industries, Inc., 2002 WL 32332377 at *4 (Bankr. D. Del. 2002); In re Elliot, 94 B.R. 343, 345 (E.D.Pa. 1988). The definition of Amended and Restated Financing

[22] Pursuant to section 363(f), without consent, the only other circumstances under which a debtor may sell assets free and clear of liens (and other interests) are if: (i) applicable nonbankruptcy law permits sale of such property free and clear of such interest (no such law is applicable here); (ii) the price at which such property is to be sold is greater than the aggregate value of all liens on such property (the proceeds of the sale of receivables is not greater than the aggregate value of the Term Loan Lenders' liens) , (iii) the lien is in bona fide dispute (the Debtors have acknowledged the Term Loan Lenders' liens on the receivables in the Motion and have not raised any issue as to the validity or perfection of such liens); or (iv) the secured creditor could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such lien (the Term Loan Lenders cannot be so compelled).

Agreements includes the Amended and Restated RPA, the Amended and Restated PCA and "other guarantee, security and other relevant documentation." Id. To the extent that there is any confusion as to what "other relevant documentation" may include, it unquestionably *does not* include a consent by the Term Loan Lenders to the transfer of receivables as part of the Amended and Restated Securitization Program. The Term Loan Lenders have not consented and will not consent to the sale of the receivables to ACI Funding without adequate protection of their interests.

22. To the extent that the Debtors intend to argue that the Intercreditor Agreement continues to be enforceable and therefore, the Term Loan Lenders' consent has been given, this argument is without merit.

23. First, due to the interdependency between the Term Loan Agreement and the other loan documents, including the Intercreditor Agreement, the default under the Term Loan Agreement due to the CBCA filing excuses the Term Loan Agent and Term Loan Lenders from any obligation to provide prospective performance under the terms of any of the term loan agreements, including the Intercreditor Agreement. Under New York law, which governs all of the term loan documents, if one party commits a material breach of an agreement, the non-breaching party is excused from further performance under the breached agreement *as well as any interdependent agreements*. Kamin v. Koren, 621 F. Supp. 444, 447 (S.D.N.Y. 1985) ("[S]eparate written agreements executed at the same time may be considered in law as one agreement, but only if the parties so intended.")(internal quotation marks omitted); accord In re Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 361 F. Supp. 2d 283, 295 (S.D.N.Y. 2005). Whether agreements are interrelated depends on the parties' intent. Kamin, 621 F. Supp. at 447. Here, the parties clearly intended the Term Loan Agreement and the related loan

documents to be interdependent on one another. This is evidenced by the fact that the documents were executed simultaneously on April 1, 2008 and by the fact that the Intercreditor Agreement incorporates by reference defined terms from the Term Loan Agreement, and therefore is unable to stand alone on its own. As a result, a material breach of the Term Loan Agreement excuses the Term Loan Lenders from any further performance under the Intercreditor Agreement.

24. Here, an Event of Default admittedly exists, as evidenced by the Notice of Default. Further, the Debtors have failed to pay the obligations notwithstanding the occurrence of the maturity date under the Term Loan Agreement. These are clearly a material breaches that excuse the Term Loan Lenders from further performance under any of the loan documents, including the Intercreditor Agreement.

25. This argument is further substantiated by the fact that after the occurrence of an Event of Default under the Term Loan Agreement, the Term Loan Collateral Agent may exercise rights and remedies against the collateral (subject only to the effect of section 362(a) of the Bankruptcy Code), including as against accounts receivable by notifying account debtors to make payments directly to the Collateral Agent. See, e.g., U.S. Pledge and Security Agreement dated as of April 1, 2008 between each of the Donohue Group and the Term Loan Agent, § 6.5(i). This right of the Term Loan Collateral Agent is not in any way constrained by or made subject to the Intercreditor Agreement. As a result, the Debtors cannot argue that the Term Loan Lenders remain perpetually bound by any consent provision contained in the Intercreditor Agreement.

26. Second, even if the Term Loan Lenders were not excused from performing (which they are), the Intercreditor Agreement will terminate by its own terms when the Existing Securitization Program expires. See Intercreditor Agreement, § 3.03 (requiring a new

intercreditor agreement if the existing program is refinanced, replaced or refunded). The Term Loan Lenders cannot be compelled to enter into a new agreement providing consent to the sale of receivables into the Amended and Restated Securitization Program given that Events of Default have occurred and are continuing, and the Term Loan Agreement has in any event expired.

27. To the extent that the Debtors argue that the replacement facility is merely a continuation of the existing facility, this argument is inconsistent with (and mutually exclusive of) the assertion that they need immediate access under the Interim Order to the full Purchase Limit (up to $300,000,000) under the Securitization Program in order to *repay* the claims under the Existing Securitization Program. See Motion, ¶ 33. If the facility were truly a continuation of the existing facility, there would be no concept of repayment.

28. Based on the foregoing, the Debtors' apparent reliance of the Intercreditor Agreement is misplaced, and the Debtors cannot satisfy the requirements of section 363(f) of the Bankruptcy Code to sell the accounts receivable free and clear of the Term Loan Lenders' liens.

II. The Debtors Cannot Use Cash Collateral Because They Have Not Provided the Term Loan Lenders with Adequate Protection of their Interest in the Cash Collateral

29. The Debtors seek authority to use any and all of the Term Loan Lenders' cash collateral, whether derived from Canadian or US receivables, based on the Adequate Protection Proposal, which, by the Debtors' own admission, only purports to provide adequate protection for use of cash collateral that represents proceeds of US receivables. "Adequate protection" is intended to protect against a decrease in the value of a creditor's collateral during the reorganization process. See U.S.C. § 361(1); United States Sav. Ass'n v. Timber of Inwood Forest Assocs., 484 U.S. 365, 370 (1988); In re Swedeland Dev. Group, Inc., 16 F.3d 552, 564 (3d Cir. 1994). The Debtors bear the burden of proving that the Term Loan Lenders' interest in their cash collateral will be adequately protected. See 11 U.S.C. § 363(p); see also In re

Swedeland Development Group, Inc., 16 F.3d 552, 564 (3d. Cir. 1994). As discussed in detail in section II.E., *supra*, the Debtors have failed to meet this burden.

30. For the reasons set forth below, the only way to adequately protect the Term Loan Lenders' interest in the cash collateral is by revising the Adequate Protection Proposal to provide as follows: (i) current monthly payment of cash interest at the non-default rate (with a reservation of rights as to the entitlement to any default spread), (ii) replacement liens on the assets of the members of the Donohue Group of the same type as enjoyed by the Term Loan Lenders prior to the Petition Date, (iii) superpriority claims against the members of the Donohue Group, (iv) adequate protection liens having the highest priority available (after taking into account existing liens and charges) on all other assets of ACI, ACCC and the members of the Donohue Group, (v) current payment of the reasonable fees and expenses of the proposed Successor Agent (and prior to the effectiveness of the appointment of such Successor Agent, the Term Loan Lenders), including, without limitation, the reasonable fees and expenses of counsel (in both the United States and Canada) and financial advisors, and (vi) compliance with a 13 week rolling cash flow budget reasonably acceptable to the Term Loan Lenders.

31. Only the foregoing will stem the tide of an ever increasing claim against diminishing collateral base while providing reasonable assurance that the Debtors operations are financially stable.

A. The Debtors Have Failed to Disclose Information Sufficient to Permit the Court to Evaluate the Adequate Protection Proposal.

32. To determine the appropriate amount of adequate protection to which the Term Loan Lenders are entitled the Court must determine the value of the collateral, the creditor's interest in the collateral, and the extent to which the value will decrease during the course of the bankruptcy case. See In re Gallegos Research Group, 193 B.R. 577, 584 (Bankr. D. Colo. 1995)

(citing In re Martin, 761 F.2d 472, 476-477 (8th Cir. 1985)). The total value of the creditor's interest ultimately determines the entitlement to adequate protection. See In re Megan-Racine Assocs. Inc., 202 B.R. 660, 663 (Bankr. N.D.N.Y. 1996). The requirement that the Debtors provide adequate protection here is admitted. Therefore, the only question is whether the adequate protection offered by the Debtors is sufficient to protect the Term Loan Lenders against the diminution in value that will result from granting the relief requested in the Motion.

33. Unfortunately, the Debtors have not quantified how much diminution in the value of their collateral the Term Loan Lenders are likely to suffer. Diminution in the value of the Term Loan Lenders' collateral will come from multiple sources. First, some amount of the cash used will be spent on restructuring costs or other overhead rather than being used to build new inventory or receivables (to which the Term Loan Lenders' lien would continue to attach). Second, some of the cash will potentially be used to build Canadian inventory, which according to the Debtors' theory that the Term Loan Lenders are only entitled to adequate protection on US collateral, would diminish the value of the US collateral. Third, the Amended and Restated Securitization Program increases the amount of receivables that ACI Funding may sell to the securitization lenders from $210 million (under the Existing Securitization Program) to $300 million, thus increasing the amount of cash available to the Debtors for use in funding their businesses and paying restructuring expenses. Fourth, up to $40 million in fees and costs related to the Amended and Restated Securitization Program will be paid, directly or indirectly, out of the Term Loan Lenders' collateral. The result of this will be to reduce the value of ACSC's equity in ACI Funding, thereby also diminishing the value of the Term Loan Lenders' collateral interest in such equity. Finally, as set forth above, the Debtors' business has been deteriorating in value since the Petition Date, as evidenced by the reduced cash on hand and the decline in

gross inventory and receivables. See paragraph 19 above. Moreover, in reviewing the Debtors' recent operating performance, inventory levels have actually been dropping, and, given falling demand for paper products and newsprint in particular, may well continue to drop. It is entirely speculative as to whether the Debtors will be able to reverse this decline and restore their business to profitability. As such, the future value of the Debtors' non-cash collateral cannot be relied upon to hold its value, much less increase in value, and therefore, adequate protection must come from cash payments and liens on assets that were not part of the prepetition collateral to compensate for the Debtors' consumption of the proceeds of accounts receivable. The aggregate value of the foregoing needs to be quantified by the Debtors.

34. Likewise, the Debtors have not quantified the value of the Adequate Protection Proposal except for the monthly cash deposits in the approximate amount of $1.44 million (43.4% of monthly interest accrual). What is clear is that the cash deposits are insufficient to adequately protect the Term Loan Lenders. The cash deposits are less than (56.6% less to be exact) the rate at which post-petition interest is accruing on the Term Loan Obligations, and do not even purport to compensate the Term Loan Lenders for the impact on their collateral caused by costs and expenses or the Amended and Restated Securitization Program. As such, the Term Loan Lenders' claim will be increasing month by month, while the value of their collateral will be decreasing, thereby eroding the relative value of the Term Loan Lenders' collateral over time. Without this information, it is impossible for the Court to evaluate the adequacy of the Debtors' Adequate Protection Proposal. See Gallegos, 193 B.R. at 585.

B. Adequate Protection Must Compensate For Total Diminution in Value

35. The Donohue Group and the Abitibi Group function as an integrated, cross-border business, and, on a cash flow basis, are inextricably intertwined by their cash management

system.[23] As described in the Debtors' Motion for an Order: (A) Authorizing the Continued Use of Existing Consolidated Cash Management System, Bank Accounts and Business Forms; (B) Authorizing the Continuation of Certain Intercompany Transactions; (C) Granting Administrative Priority Status to Postpetition Intercompany Claims; and (D) Granting a Limited and Interim Waiver of the Deposit Guidelines Set Forth in Section 345 of the Bankruptcy Code (the "Cash Management Motion") (D.E. 13), virtually all proceeds of the securitization program are deposited into an ACI concentration account held at Bank of America, which ACI uses "for purposes of managing cash flow within the United States and, ultimately, to Canada." See Cash Management Motion, ¶¶ 39, 47. As such, cash is essentially treated as fungible between and among the Abitibi entities and the Donohue entities. Therefore, in order to adequately protect the Term Loan Lenders, the adequate protection must protect from any diminution in value caused by any use of cash collateral, not just diminution arguably attributable to the assets of the Donohue Group.

36. The Debtors cannot seek approval of a fluid, cross-border securitization program that allows the Debtors to manage cash in the US and Canada at their discretion and then argue that the Term Loan Lenders should be treated as solely being creditors of the Donohue Group Debtors. In order to ensure that the Term Loan Lenders' are adequately protected in accordance with the Bankruptcy Code, this Court must require that the Debtors provide adequate protection to the Term Loan Lenders for all cash collateral usage. If the Donohue Group does not have the resources to provide this adequate protection, the Abitibi Group should seek the permission of the Canadian court to provide adequate protection. The precedent for doing this has already been

[23] It is noteworthy that although the Debtors seek to shield their Canadian affiliates' assets from being used to provide the Term Loan Lenders' with adequate protection, the Debtors make no representation that they will likewise make sure that no US cash collateral is used to benefit the Canadian Debtors, such as for payment of the BMO transaction fee.

set by the Debtors in the context of the Bowater DIP, which was conditioned on the Canadian Bowater entities providing adequate protection to the Bowater US based prepetition secured lenders. In that instance, in order to get the Bowater DIP done, the Canadian Bowater entities sought and obtained Canadian court approval to grant adequate protection to certain Bowater secured creditors.

37. If the Debtors' rigid view of their adequate protection requirements as divided by US and Canadian cash collateral were to prevail, it would follow that the Debtors' integrated cash management system, which circulates the proceeds of the Securitization Program between and among all entities, would have to be unwound to prevent any commingling of US and Canadian cash. The logical conclusion of this is that there would be no reason for the Amended and Restated Securitization Program, with its close to $40 million of attendant costs, to be approved now, as the facility would not be able to be accessed until the necessary changes to the cash management system to prevent commingling were complete.

C. Adequate Protection Must Be Provided by the Chapter 15 Petitioners

38. As demonstrated above, and in the Term Loan Lenders' Motion to Compel Adequate Protection from the Chapter 15 Petitioners (Case No. 09-11348, D.E. 33), pursuant to the Existing Securitization Program (and the amended and restated program, to the extent approved), the Chapter 15 Petitioners now have or will have in the future (as part of the Amended and Restated Securitization Program) substantial cash assets and contract rights within the territorial jurisdiction of the US. Furthermore, the Term Loan Lenders have a lien on all such assets. As such, the assertion by the Debtors that the Chapter 15 Petitioners have only $7 million in assets within the territorial jurisdiction of the US is without merit and the Chapter 15

Petitioners must provide adequate protection to the Term Loan Lenders pursuant to section 1520(a) of the Bankruptcy Code.[24]

D. The Term Loan Lenders Are Entitled to Current Cash Payment of Post-Petition Interest as Adequate Protection

39. The Debtors' assert that the only collateral relevant to determining whether the Term Loan Lenders are oversecured is collateral located in the US and belonging to the US Debtors. This argument is without merit. The determination of whether a creditor is oversecured and entitled to post-petition interest is governed by section 506(b) of the Bankruptcy Code, which provides that:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

11 U.S.C. § 506(b). The plain language of this section is broad enough to encompass any property pledged to secure a claim, no matter where located. It is in no way limited to property of the debtor or property located in the US. The Debtors have already made numerous representations to this Court and the Canadian court that the Term Loan Lenders are oversecured.

40. First, in the Motion, the Debtors acknowledge that (i) there is approximately $347 million in principal amount outstanding under the Term Loan Agreement (Motion, ¶ 13), (ii) the Term Loan obligations are the joint and several obligations of the Abitibi Group and the Donohue Debtors (Id., ¶ 11), and (iii) the Term Loan Obligations are secured by property located in the US and Canada with a value in excess of the principal amount outstanding (Id., ¶¶ 59 -

[24] The Term Loan Lenders hereby incorporate by reference their Motion to Compel Adequate Protection and will not repeat the substance of the arguments made therein in this pleading.

60). Second, in the CCAA Proceedings, the Debtors relied prominently on the fact that the Term Loan Lenders are oversecured to justify the imposition of a $100 million priming charge on the Term Loan Lenders' Canadian collateral for the benefit of the Canadian DIP facility. See Motion for Approval of a DIP Financing in Respect of the Abitibi Petitioners dated April 27, 2009, a copy of which is annexed hereto as Exhibit H, ¶ 63. Third, the Canadian Monitor has also represented in the CCAA Proceedings that the Term Loan Lenders are oversecured. See Third Report of the Monitor, dated April 27, 2009, a copy of which is annexed hereto a Exhibit I, ¶ 32. Therefore, there can be no dispute that pursuant to section 506(b), the Term Loan Lenders' are oversecured and entitled to an allowed claim for post-petition interest, and any reasonable fees, costs and charges.

41. The monthly accrual of post-petition interest at the contractual non-default rate is approximately $3.3 million. With each month's accrual, it eats into the Term Loan Lenders' equity cushion, which will suffer further impairment by the nearly $40 million in costs associated with the Amended and Restated Securitization Program. As such, the Term Loan Lenders claim for post-petition interest must be adequately protected. In this situation it is entirely appropriate for the Term Loan Lenders to receive current cash payments of post-petition interest at the contractual non-default rate as adequate protection of their interests so as to prevent the Term Loan Lenders' claim for increasing, thereby mitigating the effect of the diminishing value of their collateral. See Collier on Bankruptcy, ¶ 506.04[4] (15th ed. rev. 2008) (noting that current payment of postpetition interest, fees, costs and charges may be required as adequate protection under some circumstances).

III. <u>The US Debtors Have Not Demonstrated that They Exercised Reasonable Business Judgment in Entering Into Engagement Letters with Citibank and Barclays</u>

42. The Debtors filed the Motion on an emergency basis on extremely shortened notice without even providing the amended and restated documentation that will govern the Amended and Restated Securitization Program. Furthermore, the Debtors make no mention of the various conditions to the commitments provided by the Citibank and Barclays in the Engagement Letters. As such, the Term Loan Lenders reserve their right to object to the Amended and Restated Securitization Program after they are provided with definitive documentation for the program.

CONCLUSION

For the reasons set forth herein, the Acting Agent requests that the Court deny the relief requested in the Motion unless the Debtors revise the Adequate Protection Proposal as set forth herein and grant such other and further relief as the Court determines is necessary and just.

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