

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

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In re:)	Chapter 11 Cases
)	
TOUSA, INC., <u>et al.</u> , ¹)	Case No. 08-10928-JKO
)	
Debtors.)	Jointly Administered
)	

**SUPPLEMENTAL OBJECTION OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF TOUSA, INC., ET AL., TO DEBTORS’
MOTION FOR AUTHORITY TO USE CASH COLLATERAL, AS SUPPLEMENTED**

The Official Committee of Unsecured Creditors (the “Committee”) of TOUSA, Inc., et al. (collectively, the “Debtors”), by and through its undersigned counsel, hereby files this supplemental objection (the “Supplemental Objection”) to the Debtors’ Motion for Authority to Use Cash Collateral [D.E. #880] (the “Initial Cash Collateral Motion), as supplemented by the Supplement to Debtors’ Motion for Authority to Use Cash Collateral [D.E. #999] (the “Supplemental Cash Collateral Motion” and, together with the Initial Cash Collateral Motion, the “Cash Collateral Motion”). In support of this Supplemental Objection, the Committee respectfully submits as follows:²

¹ The Debtors in these cases are: TOUSA, Inc.; Engle Homes Commercial Construction, LLC; Engle Homes Delaware, Inc.; Engle Homes Residential Construction, L.L.C.; Engle Sierra Verde P4, LLC; Engle Sierra Verde P5, LLC; Engle/Gilligan LLC; Engle/James LLC; LB/TE #1, LLC; Lorton South Condominium, LLC; McKay Landing LLC; Newmark Homes Business Trust; Newmark Homes Purchasing, L.P.; Newmark Homes, L.L.C.; Newmark Homes, L.P.; Preferred Builders Realty, Inc.; Reflection Key, LLC; Silverlake Interests, L.L.C.; TOI, LLC; TOUSA Associates Services Company; TOUSA Delaware, Inc.; TOUSA Funding, LLC; TOUSA Homes Arizona, LLC; TOUSA Homes Colorado, LLC; TOUSA Homes Florida, L.P.; TOUSA Homes Investment #1, Inc.; TOUSA Homes Investment #2, Inc.; TOUSA Homes Investment #2, LLC; TOUSA Homes Mid-Atlantic Holding, LLC; TOUSA Homes Mid-Atlantic, LLC; TOUSA Homes Nevada, LLC; TOUSA Homes, Inc.; TOUSA Homes, L.P.; TOUSA Investment #2, Inc.; TOUSA Mid-Atlantic Investment, LLC; TOUSA Realty, Inc.; TOUSA, LLC; and TOUSA/West Holdings, Inc.

² On May 21, 2008, the Committee filed its Objection to Debtors’ Motion for Authority to Use Cash Collateral, as Supplemented [D.E. # 1027] (the “Initial Objection”). This Supplemental Objection addresses certain unresolved issues raised in the Initial Objection, which is incorporated herein by reference as to the remaining issues of dispute.



PRELIMINARY STATEMENT

1. With the assistance of this Court's "inclinations" as noted on the record of the May 22, 2008 hearing, the Committee, the Debtors, and the First Priority Agents³ have negotiated a number of modifications to the Revised Cash Collateral Stipulation (as defined below) in order to limit the areas of dispute among the parties. As anticipated, the remaining open issues relate primarily to (a) the Pay-Down; (b) the disgorgement provisions applicable to the Pay-Down; (c) the limitation on the fees and expenses to be incurred by the Committee's professionals; and (d) the scope of the Adequate Protection Liens and Adequate Protection Claims (including, without limitation, provisions granting Adequate Protection Claims on Avoidance Proceeds). Thus, the purpose of this Supplemental Objection is to address the Committee's remaining objections to the entry of the revised cash collateral stipulation, which was filed with the Court on June 5, 2008 as Exhibit A (the "Revised Cash Collateral Stipulation") to the Debtors' Notice of Filing of Amended Cash Collateral Order and Statement of Remaining Issues Related to Debtors' Motion for Authority to Use Cash Collateral [D.E. #1129].⁴

SUPPLEMENTAL OBJECTION

A. The First Priority Lenders Are Not Entitled to the Pay-Down

- *The Pay-Down is Not Necessary to Protect Against Diminution in Value of the First Priority Lenders' Alleged Collateral*

2. The purpose of adequate protection is to protect a secured creditor from the risk associated with the potential diminution in the value of its collateral as a result of the imposition of the automatic stay or the debtor's use of such collateral during the pendency of a chapter 11

³ All capitalized terms used, but not otherwise defined herein, shall have the meanings ascribed to such terms in the Initial Objection or the Revised Cash Collateral Stipulation.

⁴ A modified version of the Revised Cash Collateral Stipulation is annexed hereto as Exhibit A reflecting the Committee's remaining objections. For the convenience of the Court, the Committee's modifications can be found at the following pages on the attached Exhibit A: 7, 20, 21, 23-26, 34-36, 42 and 47.

case. *See In re Karl A. Neise, Inc.*, 16 B.R. 600, 601 (Bankr. S.D. Fla. 1981) (noting that the “purpose of adequate protection is not to protect the secured creditor from loss *per se*, but to maintain the *status quo* and prevent any additional loss due to delay after a debtor files its petition in this Court.”). “Neither the legislative history nor the [Bankruptcy] Code indicate that Congress intended the concept of adequate protection to go beyond the scope of protecting the secured claim holder from a diminution in the value of the collateral securing the debt.” *In re Pine Lake Vill. Apartment Co.*, 19 B.R. 819, 824 (Bankr. S.D.N.Y. 1982); *see also In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984) (“when a creditor opposes a proposed use of cash collateral, the guiding inquiry is whether its security interests are ‘adequately protected’ absent the additional protection that the cash collateral would provide.”). Thus, a finding of adequate protection should be premised on facts, or on projections grounded on a firm evidentiary basis. *See In re Mosello*, 195 B.R. 277, 292 (Bankr. S.D.N.Y. 1996); *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 567 (3rd Cir. 1994) (admonishing bankruptcy courts in the Third Circuit to require adequate protection be demonstrated “tangibly”); *see also In re First South Sav. Ass’n.*, 820 F.2d 700, 710 (5th Cir. 1987) (noting that a court must be “particularly cautious” when viewing the evidentiary record to determine the presence or absence of adequate protection).

3. In order to ensure that a proposed form of adequate protection is consistent with the principles of the Bankruptcy Code, courts must be especially wary of “consensual” cash collateral arrangements in light of the limited negotiating leverage a debtor has with its prepetition secured lender. *See, e.g., In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992); *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting that “the court’s discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not

contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest”); *In re Tenney Vill. Co.*, 104 B.R. 567, 567-570 (Bankr. D.N.H. 1989) (noting that bankruptcy courts have not approved financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole (or primary) benefit of the lender).

4. The proposed Pay-Down is not justified by the facts of these cases or consistent with the adequate protection principles envisioned by Congress when it enacted the Bankruptcy Code. Indeed, the Debtors have not provided any evidence that the proposed Pay-Down is necessary to protect the First Priority Lenders from the potential diminution in the value of their alleged collateral. Rather, the uncontraverted testimony of John Boken, the Debtors’ Chief Restructuring Officer, makes clear that “although it’s styled as adequate protection, the \$175 million pay down is predicated simply on what the debtor has on hand, as opposed to what is needed to protect the banks from collateral diminution.” *See* May 22, 2008 Hearing Transcript at 228:10-15 (hereinafter May 22 Tr. at ___), applicable portions attached hereto as Exhibit B. Accordingly, the Debtors’ sole justification for the Pay-Down is the interest savings that may be realized. However, this *de minimis* benefit is significantly outweighed by the risk to be borne by the Debtors’ unsecured creditors in seeking to recover such amounts upon a successful Challenge to the Prepetition Secured Indebtedness. *See infra* at ¶¶ 11-23; *see also* Initial Objection at 13. A more viable alternative, as suggested by the Committee, would be for the Debtors to deposit an amount equal to the Pay-Down in an interest-bearing escrow account, subject to further order of the Court, which would provide the same “protection” for the First Priority Lenders as the Pay-Down – a fact that has not been disputed by the Debtors or the First Priority Agents.

5. As the Debtors have not and cannot provide any evidence to establish that the Pay-Down relates in any way to a corresponding diminution in value of the First Priority Lenders' collateral, this Court should not authorize the Pay-Down.

- ***Applicable Law Does Not Permit the Pay-Down***

6. In addition to the absence of any evidence that the Pay-Down is necessary to adequately protect the First Priority Lenders, there is no legal basis to authorize the Pay-Down at this stage of the Debtors' chapter 11 cases. In fact, applicable law dictates that creditors are entitled to receive distributions on their claims only after confirmation of a plan of reorganization, absent extraordinary circumstances.

7. For example, in *In re Conroe Forge & Mfg. Corp.*, the debtor's prepetition secured lender argued that in order for it to be adequately protected, the court must authorize the immediate payment to the lender of the net proceeds of the sale of the lender's collateral. 82 B.R. 781, 784 (Bankr. W.D. Pa. 1988). In analyzing the circumstances under which a debtor may sell its assets prior to confirmation, the *Conroe Forge* Court concluded that if the sale itself was permissible only in the most exigent circumstances, then distribution of the proceeds prior to confirmation of a plan would likewise require, at a minimum, a showing of exigent circumstances. *Id.* at 786.⁵

8. The *Conroe Forge* Court determined that it only needed to analyze one issue in connection with the request by the lender to be paid on its claim outside of a confirmed plan: "whether the best interests of all parties in interest will be served by the course of action requested." *Conroe Forge*, 82 B.R. at 787. Ultimately, the *Conroe Forge* Court concluded that because the lender's lien was transferred to the proceeds of the sale, which were being held in

⁵ As is the case here, there was also a question as to whether the lender's claim was allowed pursuant to Bankruptcy Rule 3021. *Id.* at 784.

escrow, in order to ensure that the best interests of all parties were protected, the lender would be required to await confirmation prior to receiving any payment on account of its claim. *Id.*; *see also In re Air Beds, Inc.*, 92 B.R. 419, 422 (B.A.P. 9th Cir. 1988) (noting “[t]he general rule is that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances.”).

9. The rationale for repayment of a debt outside of a plan becomes even more attenuated when the claim at issue is disputed. As noted in the Initial Objection, there is no provision in the Bankruptcy Code that authorizes the payment of a disputed claim outside of a plan of reorganization. Accordingly, unless and until the First Priority Lenders’ claims are determined by a final, non-appealable order to be allowed claims, no payments can be made on account thereof. *See* Fed. R. Bankr. P. 3021 (providing, in pertinent part, that “after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed”); *see also* 11 U.S.C. § 506(a)(1) (“an allowed claim . . . secured by a lien . . . is a secured claim”); *Conroe Forge*, 82 B.R. at 785 (noting that “Bankruptcy Rule 3021 provides that distribution pursuant to a Chapter 11 plan is authorized only with respect to *allowed* claims. The amount of [the lender’s] claim has not been determined and could depend on many factors including, *inter alia*, the terms of a proposed plan, whether or not the plan is accepted, and whether or not the case suffers conversion to a Chapter 7.”) (emphasis in original); *In re Macias*, 195 B.R. 659, 660-61 (Bankr. W.D. Tex. 1996) (holding in the same context that a secured creditor that has a disputed claim is not entitled to any distribution under a chapter 13 plan and noting the same principle would apply with respect to any chapter of the Bankruptcy Code).⁶

⁶ In order to ensure the proper balancing of the interests of all creditors and advance the basic tenets of chapter 11, the analysis for the payment of a secured claim outside of a plan should be no less stringent than that conducted when a debtor seeks to pay other prepetition claims prior to confirmation. Indeed, courts in this Circuit routinely give heightened scrutiny to the payment of prepetition claims prior to the effectiveness of a confirmed plan of reorganization. *See In re Fultonville Metal Prods. Co.*, 330 B.R. 305, 313 (Bankr. M.D. Fla. 2005) (holding that “it

10. As the Court is aware, the First Priority Lenders' claims are disputed claims. As authorized by this Court, the Committee will, in the near term, through special litigation counsel, commence the Fraudulent Transfer Action. In addition, shortly after the commencement of these chapter 11 cases, an ad hoc subordinated noteholder committee filed an objection the Prepetition Secured Parties' claims in accordance with the provisions of Bankruptcy Code section 502 and Bankruptcy Rule 3007. Thus, it is premature for the Debtors to repay any portion of the First Priority Indebtedness. Moreover, the Pay-Down may materially and adversely affect the Committee's ability to enforce any judgment it may obtain in connection with the Fraudulent Transfer Action, while providing no additional protection to the First Priority Lenders above that which would be provided by placing the amount of the Pay-Down into a segregated escrow account. As such there are no exigent circumstances present here that would require the immediate need for the Pay-Down, the Pay-Down is not in the best interests of all parties in interest but, rather, is designed solely to benefit the First Priority Lenders. Accordingly, the Court should not authorize the Pay-Down.

B. The Proposed Disgorgement Provisions Are Inadequate and Ineffective

11. If the Court is prepared to authorize the Pay-Down, it should only do so in the event that the estates are protected should the Pay-Down need to be recovered. The Debtors' proposed disgorgement language does not provide sufficient protection to the Debtors' estates in this regard. Indeed, the proposed language does not guarantee that the Committee will be able to

is clear that courts should view requests to pay 'critical vendors' with circumspection . . . to do the least damage possible to priorities established by contract and by other parts of the Bankruptcy Code.'"). The *Fultonville Metal* court went on to note that "[a] request to pay selected prepetition vendors is a clear departure from basic bankruptcy precepts. Consequently, such a request should be carefully scrutinized, and only granted when the circumstances establish that the selected payments are necessary to the reorganization case and will ultimately benefit all creditors of the estate." *Id.* at 313; *see also In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (holding that "a bankruptcy court's use of its equitable powers to permit the payment of pre-petition amounts to critical vendors should be exercised . . . only if the court finds that the disfavored creditors will be at least as well off as a result of the court's granting critical vendor status to the select vendors.").

enforce a remedy on account of any judgment that may be obtained in connection with the prosecution of the Fraudulent Transfer Action or other successful Challenge to the Prepetition Secured Indebtedness. There is no justification to allow t to suffer any unnecessary risk associated with the disgorgement of the Pay-Down.

12. The Debtors' limited disgorgement language contemplates that the First Priority Agents will be prohibited from disbursing to a First Priority Lender its pro rata share of the Pay-Down until delivery by any such lender of an acknowledgement (a) consenting to the personal jurisdiction of this Court, (b) agreeing to accept service of process for commencement and prosecution of the Fraudulent Transfer Action; and (c) providing proof of liquid assets exceeding 200% of the amount of any Pay-Down to be received. The Debtors' Chief Restructuring Officer testified at his deposition that he agreed to these limited disgorgement provisions despite not knowing how many institutions would be recipients of the Pay-Down, the extent to which such institutions are hedge funds as opposed to traditional commercial banks, and without asking the First Priority Agents for information concerning the domicile or creditworthiness of such institutions. *See* June 4, 2008 Boken Deposition Transcript at 48-51.⁷

13. Upon information and belief, a substantial portion of the First Priority Indebtedness is likely held by hedge funds and other financial institutions. As such, a simple review of recent events in the hedge fund market and financial markets generally, and the manner in which financial institutions structure the investment vehicles which hold their assets, illustrates that the Debtors' argument that their disgorgement provisions provide sufficient protections for the estates' recovery of the Pay-Down is not sound.

⁷ The Debtors have designated the June 4 deposition transcript as "Highly Confidential." Accordingly, the Committee will provide the Court with a copy of the above-cited pages from the June 4 deposition transcript at the hearing on the Cash Collateral Motion, which is currently scheduled for June 10, 2008.

14. First, hedge funds are open-ended investment vehicles which offer their investors liquidity through redemption rights (*i.e.*, the right to withdraw their investments). Such redemption rights are frequently exercisable annually or quarterly but can be as often as monthly or even daily.⁸

15. Second, many hedge funds utilize significant amounts of leverage in their investment operations. As such, hedge funds generally pledge some or all of their assets as collateral to prime brokers and other counterparties who would generally have a first priority security interest and lien in such assets pursuant to the applicable prime brokerage agreements and other account agreements. In the event the market moves against a hedge fund's position, additional collateral would need to be posted. If a fund cannot meet a margin call, it will be in default and its prime broker(s) or other counterparties typically will be entitled to sell the collateral and the hedge fund will remain liable for any remaining deficit.

16. Third, poor performance often leads to investor redemptions. This combination of events can lead to a scenario where a hedge fund will need to sell assets to redeem investors while simultaneously needing additional cash to meet increased margin calls. Since the credit crunch began in early 2007 many hedge funds have experienced liquidity problems and, as discussed below, some have ceased operations altogether while others are in the process of liquidation.

17. Any lender who receives the Pay-Down may at any given moment appear to meet the Debtors' proposed liquidity thresholds. If, however, such lender's investors begin exercising their redemption rights and/or such funds are faced with contemporaneous margin calls, any

⁸ Although some funds may limit redemptions through the use of mechanisms that limit the percentage of a fund's investor capital which may be redeemed as of any applicable redemption date (for example, no more than 25% or another percentage), this is by no means a universal practice.

liquidity could evaporate – too quickly for the Committee to take remedial action under the Debtors’ proposed notification procedures.

18. For example, it has become commonplace for hedge fund managers which at one point had substantial assets under management following substantial growth to see its hedge funds collapse after investors demanded the return of their money. Unfortunately for creditors and investors, these portfolios can include assets that are difficult to liquidate or value such as loans to private companies, credit derivatives and private equity investments. Given today's market volatility, valuing many of these private holdings is almost impossible. Indeed, commentators have noted that the portfolios of many funds are in debt and “included complicated structured financings and loans for which there is little clarity in value.” See Jody Shenn & Yalman Onaran, *Bear Stearns Plans \$3.2 Billion Hedge Fund Bailout* (June 22, 2007), <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid=amZ.IeL2pJHo> (discussing the collapse of Long Term Capital Management which lost \$4.6 billion in a little more than a single quarter in 1998); Gregory Zuckerman & Craig Karmin, *Rebounds by Hedge-Fund Stars Provide ‘It’s a Mulligan Industry’* (May 12, 2008), <http://online.wsj.com/article/SB121055428158584071.html> (discussing the \$6.6 billion of losses suffered by Amaranth Advisors in 2006).

19. Moreover, what appears to be liquidity, might not be liquidity at all. In many cases, hedge funds have multiple accounts at multiple brokerage firms and these firms often provide leverage to the funds on multiple layers, such that what looks to be an account with value in it may actually be pledged or otherwise locked up so as to have no net value. For example, in the U.S., Regulation T limits the maximum amount of credit a broker can extend in a margin account to its customer to 50% of the value of margin able securities. Hedge funds often maintain brokerage accounts with brokers outside the United States. Such brokers are not

subject to Regulation T and the amount of leverage obtainable at such brokers tends to be higher than from U.S. brokers.

20. The risks are further compounded when the offshore nature of many of these funds is considered. Many hedge funds that are active in the United States have their domicile in the Cayman Islands or in other non-U.S. jurisdictions, thereby creating significant jurisdictional hurdles to receiving and enforcing a judgment against such entities.

21. These risks do not apply only to holders of the First Priority Indebtedness that are hedge funds. Large, multinational financial institutions have seen their own share of financial distress with the recent write-downs and credit losses resulting from the sub-prime mortgage crisis – write-downs approaching hundreds of billions of dollars. Louise Story, *A Fear of Big Demand for Corporate Loans*, N.Y. Times (May 9, 2008), available at http://www.nytimes.com/2008/05/09/business/09loan.html?_r=1&scp=2&sq=hundreds+of+billions+of+dollars&st=nyt&oref=slogin.

22. The foregoing examples show just how fleeting the First Priority Lenders' proof of ample liquidity may be in the event a lender is faced with a "run on the banks" or other liquidity event. Indeed, there could well be no money left to go after. Thus, the Debtors' unsecured creditors could be left in a precarious situation – holding a valid judgment, only to find themselves behind the creditors of a lender that was prematurely repaid by the Debtors and fighting for assets that cannot be readily liquidated.

23. Based on the foregoing, the proposed liquidity requirements and disgorgement provisions do not provide sufficient protection to ensure that an adverse judgment against the First Priority Lenders in the Fraudulent Transfer Action will be satisfied in full. Accordingly, the Committee respectfully submits that, to the extent the Court authorizes the Pay-Down, each recipient of amounts in respect thereof must be able to guarantee the return of such amounts in

the event the Fraudulent Transfer Action or other Challenge to the First Priority Lenders' liens or claims is successful. The Committee respectfully submits that this can only be accomplished through the posting of an irrevocable letter of credit or similar security as contemplated by the Committee's proposed disgorgement provisions which are attached hereto as Exhibit C.

C. The Committee's Fees Should Not Be Capped

24. The Revised Cash Collateral Stipulation continues to limit inappropriately the fees of the Committee's professionals and prohibits the use of any Cash Collateral to pay fees and expenses related to the prosecution of the Fraudulent Transfer Action or any other Challenge. Though the Debtors have voiced their "objection" to this cap on Committee fees, their Chief Restructuring Officer testified that the Debtors ultimately capitulated to this demand by the First Priority Agents in order to reach overall agreement on the consensual use of cash collateral. *See* Exhibit B May 22 Tr. at 219:4-8.

25. As set forth in more detail in the Initial Objection, the Bankruptcy Code provides a carefully constructed statutory scheme whereby an official committee may retain professionals and have such professionals compensated by the debtor. The structure is in place to ensure that there is an adversary process in which the official committee can, among other things, (a) adequately monitor the debtor's actions; (b) guarantee the debtor's compliance with the Bankruptcy Code; and (c) fully participate in the chapter 11 case to acquit its statutory and fiduciary obligations in accordance with Bankruptcy Code sections 1102, 1103 and 1109.

26. The actions of the Committee's professionals in fulfilling their obligations to the Committee and the Debtors' unsecured creditor constituency should not be limited by the First Priority Agents. Permitting secured parties, through their control of the purse strings, to limit the ability of the Committee and its professionals in fully acquitting their fiduciary and statutory obligations would be an affront to the adversarial system, and should not be countenanced by this

Court. Indeed, it is imperative for the integrity of the bankruptcy process that the Committee's professionals be permitted to advocate on behalf of the interests of the Debtors' estates and their unsecured creditors without being subject to the control of third parties whose interests are adverse to those of the Debtors' estates. The Committee, therefore, requests that the arbitrary limits placed upon the amount of fees and expenses to be incurred by the Committee's professionals and the scope of services that can be compensated be deleted in their entirety.

D. The Debtors' Fees and Expenses In Respect of the Fraudulent Transfer Action Should Not Be Capped

27. In addition, the First Priority Agents should not be able to control, or otherwise influence, the degree of cooperation provided to the Committee by the Debtors in its prosecution of the Fraudulent Transfer Action. Paragraph 16(A)(II) of the Revised Cash Collateral Stipulation provides that it will be a Cash Collateral Termination Event in the event the Debtors' legal fees incurred in connection with the Fraudulent Transfer Action exceed \$1 million in any given month. This provision provides the First Priority Agents with undue control over the litigation and may limit the Debtors' ability to provide the necessary cooperation in connection with discovery, depositions and related matters in the event that the legal fees are approaching the fee cap. As the Debtors' cooperation in the prosecution of the Fraudulent Transfer Action will be vital, any attempt by the First Priority Agents to limit this cooperation is inappropriate and should be stricken.

E. The Scope of the Adequate Protection Liens and Adequate Protection Claims Are Overly Broad.

- **Adequate Protection Should Not Extend to Debtors that Are Not Liable on the Prepetition Secured Indebtedness**

28. The Revised Cash Collateral Stipulation continues to provide for the granting of Adequate Protection Liens and Adequate Protection Claims against all Debtors, without limitation. Paragraphs 7(a) and 7(b) of the Revised Cash Collateral Stipulation grant Adequate

Protection Liens on all of the assets of, and Adequate Protection Claims against, all of the Debtors, respectively, to the extent of diminution in the value of the Prepetition Collateral (including Cash Collateral). If it is determined that the Prepetition Secured Parties do not have valid prepetition claims and liens against certain of the Debtors (other than, potentially, TOUSA and TOUSA Homes, L.P.) (collectively, the “Conveying Subsidiaries”), then the Prepetition Secured Parties should not be permitted to have enforceable Adequate Protection Claims and Adequate Protection Liens against any such entities. To permit otherwise would have the perverse result of permitting the Prepetition Secured Parties to have post-petition security interests and super-priority claims against entities that they did not have any valid claims against pre-petition – secured or unsecured. It would also (a) nullify the proviso contained in paragraph 7(a) of the Revised Cash Collateral Stipulation that provides that the Adequate Protection Liens do not include liens on the Avoidance Actions (*i.e.*, the successful prosecution of the Avoidance Actions would eliminate the Prepetition Secured Parties’ liens at the Conveying Subsidiaries, only to have such liens reinstated as adequate protection) and (b) re-establish inappropriate priority over the applicable Conveying Subsidiary’s unsecured creditors. Thus, the Revised Cash Collateral Stipulation should explicitly limit the grant of any Adequate Protection Liens and Adequate Protection Claims solely to those entities against which the Prepetition Secured Parties held valid secured claims as of the Petition Date.

29. To the extent the Prepetition Secured Parties are concerned that they will be prejudiced by a post-petition transfer from a Debtor that they have a valid lien against to a Debtor against which they do not have a valid lien, the Prepetition Secured Lenders are adequately protected by the provisions of paragraph 19 of the Revised Cash Collateral Stipulation. In addition, to the extent the Prepetition Secured Parties are determined to have valid liens and claims against any particular Debtor (*i.e.*, TOUSA, Inc.), to the extent TOUSA,

Inc. transfers value to another Debtor during the pendency of the chapter 11 cases, the Prepetition Secured Parties also would be protected by the Adequate Protection Liens on the administrative claims granted to TOUSA, Inc. against the transferee Debtor under the Interim Cash Management Order and the final order entered in connection therewith.

- **Adequate Protection Claims Should Not Be Granted on Avoidance Proceeds**

30. Paragraph 7(b) of the Revised Cash Collateral Stipulation provides that the Adequate Protection Claims may be recoverable against Avoidance Action Proceeds to the extent necessary to reimburse the First Priority Secured Parties for the amount of Prepetition Collateral used to investigate, initiate and prosecute the Fraudulent Transfer Action or any tort actions. Paragraph 7(b) must be revised to eliminate any recovery of any Adequate Protection Claims from Avoidance Actions or the proceeds thereof. As set forth in the Initial Objection, Avoidance Actions are designed to ensure equality of distribution among unsecured creditors – not to secure recovery of prepetition debt. This has special importance in these cases where the enforceability of Prepetition Secured Indebtedness against the Conveying Subsidiaries is likely to give rise to the most significant Avoidance Proceeds. Moreover, if successful in prosecuting the Fraudulent Transfer Action, the funds used to prosecute the Fraudulent Transfer Action likely would not constitute Cash Collateral of the Prepetition Secured Lenders. For these reasons and as otherwise set forth in paragraphs 49-50 of the Initial Objection, the adequate protection for the Prepetition Secured Lenders should not extend to Avoidance Actions or Avoidance Proceeds.

CONCLUSION

WHEREFORE, for all the foregoing reasons and those set forth in the Initial Objection, the Committee respectfully requests that this Court (i) sustain this Supplemental Objection and (ii) grant the Committee such other relief as this Court deems just, proper, and equitable.

Dated: June 6, 2008

Respectfully submitted,

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

**STEARNS WEAVER MILLER WEISSLER
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-and-

We hereby certify that the undersigned attorneys are appearing pro hac vice in this matter pursuant to Court orders dated February 27, 2008 and March 3, 2008.

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