



necessary to do so. Now that the parties have supplied that information through post-trial submissions, the Court can complete the remedial portion of the adversary proceeding by issuing an order specifying the proper payment amounts.

In this motion and the accompanying proposed order, the Committee sets forth the amounts that it believes each party is required to pay or receive under the Remedial Order. Each of the components of the remedy identified in the Remedial Order is addressed and quantified. As described more fully below, the Committee relies principally on the information provided by the parties and their professionals and applies it to the Remedial Order with certain adjustments. These adjustments include:

- In accordance with the Court's conclusions of law, the Conveying Subsidiaries should receive prejudgment interest on all of the damages to which they are entitled. For the same reasons that the Remedial Order expressly provides for prejudgment interest in connection with some disgorgements, the Conveying Subsidiaries should be awarded prejudgment interest as to all disgorgements and damages in order to ensure that they are fully compensated.
- Prejudgment interest should be awarded through the date of the Court's order resolving the current motion and establishing the amount each party must ultimately pay or receive. Until the issuance of the requested order setting these final payment amounts, the judgment of this Court will not be final.
- The accounting filed by the First Lien Lenders<sup>2</sup> (Dkt. # 782) allocates a disproportionate amount of debtor-paid professional fees to the Revolver Lenders (who do not have to reimburse professional fees) rather than to the First Lien Lenders (who do have to reimburse professional fees). The amount of the First Lien Lenders' disgorgement should

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<sup>2</sup> Unless otherwise defined, capitalized terms in this motion have the same meaning as in this Court's findings of fact and conclusions of law (Dkt. # 722).

be increased to reflect a more accurate allocation of professional fees between the Revolver Lenders and the First Lien Lenders.

- The accountings filed by the Second Lien Lenders (Dkt. # 694, 738, 770) did not include certain professional fees paid by the debtors prior to the filing of the bankruptcy petition. The Second Lien Lenders' disgorgement should be increased based upon these pre-petition professional fees that were paid on their behalf.
- The Remaining Value Analysis filed by the debtors (Dkt. # 778), which allocates both assets and liabilities among various individual debtors, must be translated into a pure asset analysis (and adjusted to account for the debtors' receipt of court-ordered disgorgements) before it can be used to calculate the diminution in value of the Conveying Subsidiaries' liens between July 31, 2007 and October 13, 2009.

**I. The Debtors' Estates Are Entitled to Prejudgment Interest on Recovered Funds.**

A threshold issue that arises with respect to multiple components of the remedy is the inclusion of prejudgment interest. This Court concluded in its post-trial opinion that both state and federal law authorize the debtors to recover prejudgment interest, at a rate of 9%, for any period during which they were deprived of the use of funds that are rightfully theirs. See Dkt. #722 at 177–78 (citing N.Y.C.P.L.R. § 5001(a); *IBT Int'l Inc. v. Northern (In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 710 (11th Cir. 2005); *Feltman v. Warmus (In re Am. Way Serv. Corp.)*, 229 B.R. 496, 538 (Bankr. S.D. Fla. 1999)). The Remedial Order expressly provides for prejudgment interest on certain elements of the remedy—namely, the disgorgement by the Senior Transeastern Lenders and the disgorgement of preferential payments by the First Lien Lenders. See Dkt. # 729 ¶¶ 3, 7.

For the same reason that prejudgment interest is proper on those two payments, it is likewise proper for the other portions of the remedy where wrongly depleted funds are being

belatedly returned to the debtors' estates: the recovery of principal, interest, and fees paid to the First and Second Lien Lenders (see Dkt. # 729 ¶ 2); and the recovery of transaction costs, litigation costs, and compensation for the diminution in value of the Conveying Subsidiaries' liens (see *id.* ¶ 4).<sup>3</sup> The Committee therefore requests that the Court's final order setting payment amounts include prejudgment interest on those recoveries as well.

**II. The Debtors' Estates Are Entitled to Prejudgment Interest Through the Date of a Final Judgment.**

Prejudgment interest should run through the date of a final judgment. See *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co.*, 500 F. Supp. 2d 1079, 1082 (N.D. Ind. 2007) (“The majority view is persuasive: a final, appealable order must be in place before prejudgment interest ceases and postjudgment interest begins”); N.Y. C.P.L.R. § 5002 (right to interest “from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment”). The Remedial Order was not a final judgment, because it did not decide how certain aspects of the remedy would be calculated (see First Liens' Motion for Clarification, Dkt. # 696), and did not set amounts corresponding to various categories of damages. See Motion of the Official Committee to Stay Briefing or, in the Alternative, to Dismiss, Case 0:10-cv-60017-ASG (S.D. Fla.) (Dkt. #16), at 9–10.<sup>4</sup> The Committee therefore requests that prejudgment interest run

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<sup>3</sup> The prejudgment interest should run from the date on which the Conveying Subsidiaries suffered the relevant harm. See, *e.g.*, N.Y. C.P.L.R. § 5001(b). For all but one of the enumerated categories of damages, this will be the date on which the relevant funds left the debtors estates—*e.g.*, for the First and Second Lien Lenders' professional fees, the prejudgment interest would begin to accrue on the dates that those fees were paid by the debtors. For the diminution damages, the harm was suffered on October 13, 2009, the date on which the liens were returned to the Conveying Subsidiaries with a lesser value than when they were granted, giving rise to a need for make-whole damages.

<sup>4</sup> The Eleventh Circuit has indicated that an order lacks finality if it leaves open a damages-related issue that will require something more than “a simple, ministerial arithmetic calculation.” *S.E.C. v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (*per curiam*); *Dieser v. Continental Cas. Co.*, 440 F.3d 920, 923–24 & n.3 (8th Cir. 2006) (same); see also *Catlin v. United States*, 324 U.S. 229, 233 (1945).

through the date of the Court's decision establishing the final amounts that each defendant is required to pay.

**III. The Court Should Set Payment Amounts as Specified in the Accompanying Proposed Order.**

The remainder of this motion proceeds sequentially through the monetary components of the Court's judgment, describing how the proper amount for each of them should be calculated.

**A. Disgorgement of Principal, Interest, and Fees Paid to the First and Second Lien Lenders (Remedial Paragraph 2)**

The second paragraph of the Remedial Order requires the First and Second Lien Lenders to disgorge "to the Conveying Subsidiaries' estates any and all principal, interest, costs, expenses and other fees or amounts paid to, for the benefit of, on behalf of, the First and Second Lien Lenders or in respect of the First and Second Lien Lenders' asserted claims or obligations against the Conveying Subsidiaries' estates." Dkt. # 729 ¶ 2. The disgorgement is to be paid into an escrow account set up by the debtors, but the order makes clear that the ultimate recipients will be the Conveying Subsidiaries. See *ibid*.

Assigning a dollar value to this portion of the remedy requires separately valuing three different subcomponents: (1) the disgorgement of principal and interest payments received by the First Lien Lenders, (2) the disgorgement of professional fees received by the First Lien Lenders, and (3) the disgorgement of professional fees received by the Second Lien Lenders.

1. *Principal and interest payments received by the First Lien Lenders.* The First Lien Lenders have submitted an accounting of the principal and interest payments received by the First Lien Lenders originally appearing in this action. See Dkt. # 782 at 3. Since the First Lien Lenders' filing, additional lenders have joined the action and agreed to be bound by the Court's ruling, thereby increasing the total disgorgement amount. See Dkt. # 886. A chart

specifying the principal and interest payments made to each First Lien Lender, along with the dates such payments were made (and from which prejudgment interest should therefore run), is attached as Exhibit A to the accompanying Declaration of Kevin P. Clancy.

2. *Professional fees received by the First Lien Lenders.* According to the First Lien Lenders, the total fees and disbursements paid during the disgorgement period to the professionals that they retained was \$38,025,116.54. See Clancy Decl. Ex. I (November 20, 2009 Letter of Thomas Hall) at 3. The First Lien Lenders, however, relied on the same professionals as the Revolver Lenders and claim that much of these professionals' fees and disbursements should be attributed to the Revolver Lenders (and therefore not disgorged). In their accounting filed with the Court, the First Lien Lenders assert that the fees and expenses paid to their professionals for services attributable to the First Lien Lenders were only \$21,954,433.44. See Dkt. # 697 at 4. That apportionment seriously understates the amount of the professional fees that should be disgorged by the First Lien Lenders.

The First Lien Lenders' methodology in allocating such a large portion of the professional fees and disbursements to the Revolver Lenders is unsupportable. Some of the unduly aggressive positions taken in the First Lien Lenders' accounting for professional fees that need to be corrected include:

- The First Lien Lenders allocate 7/12 of the pre-petition professional fees to the Revolver on the theory that the maximum size of the Revolver facility was \$700 million, whereas the size of the Term Loans was \$500 million (\$200 million for the First Lien Term Loan and \$300 million for the Second Lien Term Loan). See Clancy Decl. Ex. I at 1. Not only is there no particular reason to believe that the amount of work done for each set of defendants was proportional to the size of the loan, the First Lien Lenders' methodology additionally ignores that

the *actual* borrowings on the Revolver for most of this time period were considerably less than half of the \$700 million cap. The Committee proposes a more reasonable methodology, which is simply to allocate 1/3 of the professional fees and expenses incurred pre-petition to each of the First Lien Lenders, Second Lien Lenders,<sup>5</sup> and Revolver Lenders.

- For the post-petition fees, the First Lien Lenders allocate to the Revolver Lenders all fees that they claim were incurred specifically on behalf of the Revolver Lenders, and then consider the remaining fees to be shared costs that must be apportioned between the Revolver Lenders and First Lien Lenders. See Clancy Decl. Ex. I at 1–2. Yet the First Lien Lenders make no effort similarly to identify fees incurred specifically on behalf of the First Lien Lenders, which likewise should be removed from the pool of shared costs.
- The First Lien Lenders allocate 60% of the “shared” professional fees to the Revolver Lenders, and 40% to the First Lien Lenders, based on the amount of money they claim was loaned under each agreement (\$300 million under the Revolver and \$200 million under the First Lien Term Loan). See Clancy Decl. Ex. I at 2. Although it would be reasonable to allocate *all* of these professional fees to the First Lien Lenders, since they would have incurred these costs even if they were the only defendants in the adversary proceeding, the Committee conservatively proposes allocating the shared professional fees on an equal 50/50 basis between the First Lien Lenders and the Revolver Lenders.
- The First Lien Lenders allocate 60% of the litigation fees to the Revolver even after September 17, 2008, the date that this Court initially dismissed the claims

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<sup>5</sup> The First Lien Lenders maintain that Chadbourne & Parke LLP also represented the Second Lien Lenders during the pre-petition period. See note 6 *infra*.

against the Revolver Lenders. See Clancy Decl. Ex. I at 2; No. 08-10928, Dkt. # 1877 (9/17/08 Tr.) at 96. The First Lien Lenders thus continue to allocate millions of dollars of professional fees to the Revolver Lenders until the formal dropping of the Revolver claims on February 4, 2009. See Clancy Decl. Ex. I at 2. Yet the Court had made clear on September 17 that few, if any, of the claims against the Revolver were likely to survive, and the First Lien Lenders already have segregated the fees uniquely attributable to the Revolver. The Committee proposes that all litigation fees incurred after September 17, 2008 be allocated to the First Lien Lenders.

- The First Lien Lenders separately identify the cost of the mediation and allocate 60% to the Revolver. See Clancy Decl. Ex. I at 2. Yet the Revolver Lenders had already been dismissed from the lawsuit by the time the mediation took place; they were not one of the parties ordered to undertake the mediation (see Dkt. # 278); and no time at the mediation was spent discussing the claims against the Revolver Lenders. The Committee proposes that the mediation fees be allocated entirely to the First Lien Lenders.
- The First Lien Lenders allocate all of the more than two million dollars paid to advisor Alvarez & Marsal (“Alvarez”) to the Revolver Lenders, even though Alvarez was also retained by the First Lien Lenders. Clancy Decl. Ex. I at 1. The Committee proposes that the Alvarez fees be allocated similarly to the other fees.

A detailed calculation of the professional fees of the First Lien Lenders reflecting these necessary adjustments is set out in the accompanying Clancy Declaration at Exhibit B. The total amount of professional fees that the First Lien Lenders are jointly and severally liable to

disgorge (before interest) is \$29,288,702. See Clancy Decl. Ex. B. That exhibit also sets forth the dates on which those fees were paid, and from which prejudgment interest should run. See *ibid.*

3. *Professional fees received by the Second Lien Lenders.* The Second Lien Lenders have submitted an accounting of their professional fees. See Dkt. # 770 at 2. That accounting, however, does not include any portion of certain pre-petition professional fees shared with the First Lien Lenders. See Dkt. # 694 at 2–3.<sup>6</sup> Nor does the Second Lien Lenders’ accounting include nearly one million dollars in pre-petition professional fees paid by the debtors to an ad hoc group of Second Lien Lenders. See Dkt. # 738 at 3. Once these pre-petition fees are added in, the total amount of professional fees that the Second Lien Lenders are jointly and severally liable to disgorge (before interest) is \$23,285,852. See Clancy Decl. Ex. C. The dates on which particular payments were made by the debtors (and thus from which prejudgment interest should run) are set forth in Exhibit C to the Clancy Declaration. See *ibid.*

**B. Disgorgement by the Senior Transeastern Lenders (Remedial Paragraph 3)**

The third paragraph of the Remedial Order requires the Senior Transeastern Lenders to disgorge \$403 million, plus prejudgment simple interest, into the debtors’ escrow account. Dkt. # 729 ¶ 3. A chart specifying how much is owed (not including interest) by each individual appearing Senior Transeastern Lender is attached as Exhibit D to the Clancy Declaration.

**C. Distribution of the Senior Transeastern Lenders’ Disgorged Funds (Remedial Paragraph 4)**

The fourth paragraph of the Remedial Order specifies that the funds disgorged by the Senior Transeastern Lenders “shall be distributed first to the Conveying Subsidiaries on account

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<sup>6</sup> The First Lien Lenders and the Second Lien Lenders each disclaim responsibility for this portion of the pre-petition fees. Compare Dkt. #694 at 2–3 and Dkt. #697 at 4–5. The Committee has allocated these fees to the Second Lien Lenders. But so long as the Conveying Subsidiaries are fully reimbursed for their costs, the Committee has no objection if the Court ultimately allocates them to the First Lien Lenders instead.

of (a) transaction costs incurred in connection with the consummation of the July 31 Transaction; (b) the costs incurred by the Debtors and the Committee in connection with prosecuting this adversary proceeding, including fees and expenses paid to attorneys, advisors, and experts; and (c) the diminution in value of the liens between July 31, 2007 and October 13, 2009; with any remaining funds to be distributed to the First and Second Lien Lenders.” Dkt. # 729 ¶ 4.

1. *Transaction Costs.* The transaction costs of the July 31 Transaction are the \$21,973,803.50 that the TOUSA entities paid on top of the \$500 million in loan proceeds, without which there would have been insufficient funds to pay all of the professional fees for the transaction. See Dkt. # 722 at 8 n.3; see also Tr. Ex. 136 (TOUSA’s flow of funds chart, specifying over \$31 million in transaction costs at line items 6, 8–24, and 39). Apportioning those transaction costs between the parent and the Conveying Subsidiaries requires an assessment of how much of the burdens of the transaction are allocable to each. The Court has already performed such an assessment in determining that \$403 million of the \$520 million of new debt associated with the transaction should be contingently allocated to the Conveying Subsidiaries for purposes of analyzing solvency. See Dkt. # 722 at 69. Applying the same ratio (403/520) to the transaction costs, the portion of those costs attributable to the Conveying Subsidiaries is \$17,029,697.71. See Clancy Decl. Ex. E.

2. *Debtors’ and Committee’s Litigation Costs.* The debtors and the Committee have submitted accountings of their litigation costs through October 13, 2009,<sup>7</sup> minus costs attributable to the Revolver litigation. See Dkt. # 929, 930, 931. The total amount to which the Conveying Subsidiaries are entitled as reimbursement for those costs (not including interest) is

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<sup>7</sup> Because the Committee’s and debtors’ litigation expenses have continued past October 13, 2009, updated accountings will be necessary once the Court resolves this motion.

\$34,624,419. See Clancy Decl. Ex. F. The dates on which those fees were paid (and thus from which prejudgment interest should run) are set forth in Exhibit F to the Clancy Declaration.

3. *Diminution in Lien Value.* According to the Court's findings of fact and conclusions of law, the diminution in the value of the liens is equal to "the amount of the Conveying Subsidiaries' obligations to the First and Second Lien Lenders" on July 31, 2007 (the day the liens were granted), minus the value of the lien property on October 13, 2009 (the day the liens were returned). See Dkt. # 722 at 175. The former value is equal to \$500 million, the amount of the Conveying Subsidiaries' obligations on the First and Second Lien Loans. See Dkt. # 722 at 175–76.<sup>8</sup> To help calculate the latter value, the Court ordered the debtors to submit an accounting of the value of their remaining assets, which they have now done. See Dkt. # 729 ¶ 5; Dkt. # 753, 778. However, several adjustments to that accounting are necessary in order for it to properly reflect the value of the Conveying Subsidiaries' property on October 13, 2009:

- The debtors' accounting includes the proceeds of a tax refund to which the debtors became entitled by virtue of legislation signed into law on November 6, 2009. See Dkt. # 778, Ex. A, App. at 17. Because the right to that refund did not yet exist on October 13, 2009—the date on which the liens were avoided—it must be excluded from any calculation of the value of the debtors' assets on that date. See Dkt. # 722 at 164.
- The debtors' accounting allocates some of the funds remaining from the debtors' 2007 tax refund to the Conveying Subsidiaries. See Dkt. # 778, Ex. A, Exs. at 6. This Court has concluded, however, that the proceeds of that tax refund belong solely to the parent. See Dkt. # 722 at 106. Accordingly, the

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<sup>8</sup> The defendants have disputed this valuation. See Dkt. # 696 at 3–4. However, for the reasons previously presented to this Court, the Committee believes that the value of the liens as of July 31, 2007 was \$500 million. See Dkt. # 731 at 4–5.

debtors' accounting must be corrected so that all of the the remaining tax refund monies—\$32.3 million in operating cash (see Dkt. # 778, Ex. A., App. at 25) and \$9.7 million in a “Paydown Account” (see *id.* at 28)—are allocated to the parent.

- The debtors' accounting allocates a negative amount of operating cash to the parent. See Dkt. # 778, Ex. A, Exs. at 6–7. That allocation is improper, because a cash asset cannot have a negative value. See Dkt. # 729 ¶ 5 (directing an accounting only of *assets*, not of assets *and liabilities*). The parent's cash allocation must therefore be adjusted upwards. Correspondingly, the operating cash allocated to the Conveying Subsidiaries, which was increased in the debtors' accounting to offset the negative amount of cash allocated to the parent, must be reduced.
- The debtors' accounting does not include the additional funds to which the Conveying Subsidiaries became entitled by virtue of this Court's October 13, 2009 decision—namely, the reimbursement of principal, interest, and fees by the First and Second Lien Lenders (see *supra* Part III.A); and the reimbursement of transaction costs and litigation costs by out of the Senior Transeastern Lenders' disgorgement (see *supra* Part III.C.1–2). These amounts (including prejudgment interest running from July 31, 2007 to October 13, 2009) must be added to the Conveying Subsidiaries' property value for purposes of determining how much the liens have diminished in value since July 31, 2007.

With these adjustments, the value of the Conveying Subsidiaries' property on October 13, 2009—and thus the value of the liens returned on that date—comes out to \$402,236,000. See

Clancy Decl. Ex. G. Subtracting that value from the liens' starting value of \$500 million yields a diminution of \$97,753,000 (not including interest), which should be reimbursed to the Conveying Subsidiaries. See *ibid.*

4. *Remaining funds.* Once the above three amounts have been distributed to the Conveying Subsidiaries, the Remedial Order provides that the First and Second Lien Lenders will receive the amount remaining from the Senior Transeastern Lenders' disgorgement. See Dkt. # 729 ¶ 4. The proposed order provides for this distribution of remaining monies to the agents for those lender groups.

**D. Remedial Paragraph 7: Refund of Preferential Payments to the First Lien Lenders.**

The seventh paragraph of the Remedial Order requires the First Lien Lenders to refund to Touse, Inc. all payments they received from Touse, Inc.'s \$207.3 million federal tax refund, plus 9% simple prejudgment interest for the time they had use of those funds. Dkt # 721 at 4. The First Lien Lenders have submitted an accounting of the amount of preferential payments made to those First Lien Lenders who originally appeared in this lawsuit. Dkt. # 697 at 3–4. A list of preference payments, and the dates on which they were made (and from which prejudgment interest should therefore run), is set forth as Exhibit H to the Clancy Declaration. See Dkt. # 722 at 106.

**CONCLUSION**

For the reasons stated herein, the Court should issue a final judgment requiring payments in the amounts specified in the accompanying proposed order.

Dated: March 16, 2010

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 in this Court set forth in Local Rule 2090-1(A)

/s/ Patricia A. Redmond

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I HEREBY CERTIFY that the undersigned attorneys are appearing *pro hac vice* in this matter pursuant to court order dated July 10, 2008 [D.E. 1360, 1362, 1363 in Ch. 11 No. 08-10928] and July 7, 2009 [D.E. 518]

/s/ Michael L. Waldman

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2010, I caused a true and correct copy of the Motion of the Official Committee of Unsecured Creditors to Set Payment Amounts to be served by e-mail on:

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