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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In re: The Falls at McMinnville LLC, Debtor.	Case No. 18-25492 Chapter 11 Honorable Chief Judge R. Kimball Mosier
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REPLY IN SUPPORT OF MOTION TO DISMISS CHAPTER 11 CASE

Evergreen Aviation and Space Museum and the Captain Michael King Smith Educational Institute (the “**Museum**”), replies in support of its *Motion to Dismiss Chapter 11 Case* (the “**Motion**”) filed by the Museum on October 24, 2018, and to the (1) *Trustee’s Opposition to the Motion to Dismiss Chapter 11 Case* (Dkt. #58) (“**Trustee Opposition**”) and (2) *Joinder and Objection of Official Committee of Unsecured Creditors to Motion to Dismiss* (Dkt. #60) (“**Committee Objection**,” and together with the Trustee Opposition, the “**Objections**”). The Objections are unavailing for three reasons: *first*, the Trustee has not cured the unauthorized filing by the above-captioned debtor (“**TFM**”) commencing this case (“**TFM Case**”), because he

cannot; *second*, the Museum has standing to file the Motion seeking dismissal; and *third*, the record before this Court warrants dismissal of the TFM Case *sua sponte*.

I. The Unauthorized Filing of the TFM Case Has Not Been Cured, Nor Can It Be Cured

Neither of the Objections to the Motion respond substantively to the Museum's argument that TFM had no authority to file for chapter 11 protection. Given the evidence in the record in the chapter 11 case of *In re The Falls Event Center, LLC*, case number 18-25116 ("**TFEC Case**"), absent evidence put forward by the Trustee and the Official Committee of Unsecured Creditors ("**Creditors' Committee**") at the hearing on February 12th that the TFM Case was properly commenced, this Court should grant the Motion. *See In re Zaragosa Props.*, 156 B.R. 310, 313 (Bankr. M.D. Fla. 1993) (it is the debtor's burden to show that the filing was authorized).

Moreover, the remedies proposed by the Trustee and the Creditors' Committee to the unauthorized filing---substantive consolidation and ratification---are unavailing because (i) neither has occurred, (ii) substantive consolidation is an extraordinary remedy that is unavailable to TFM if an objecting creditor can show resulting harm, and (iii) the Trustee cannot cure the unauthorized filing.

First, it is undisputed that, as of the date of this filing, neither substantive consolidation of TFM's estate into the estate of The Falls Event Center, LLC ("**TFEC**") nor ratification have occurred. *See Price v. Gurney*, 324 U.S. 100, 106 (1945) ("It is not enough that those who seek to speak for the corporation may have the right to obtain that authority."). The fact remains that the unauthorized filing has not been corrected, nor have any corrective actions been taken to even attempt to resolve the unauthorized filing.

Second, to the extent secured creditors of TFEC's debtor and non-debtor subsidiaries object to the substantive consolidation of their counterparty's estate into the estate of TFEC due

to resulting harm, this Court cannot grant substantive consolidation. The Museum reserves its right to object to a motion to substantively consolidate TFM's estate into TFEC's estate, which motion is not currently before this Court. Other creditors may object to, to the extent they determine that substantive consolidation will dilute their recoveries or otherwise abridge their valid and enforceable contractual rights.

Third, the Trustee, who is a creature of the Bankruptcy Code, cannot cure or ratify the unauthorized chapter 11 filing by TFM, and thus this Court must dismiss the unauthorized filing. *In re Mid-S. Bus. Assocs., LLC*, 555 B.R. 565 (Bankr. N.D. Miss. 2016) (managing member of LLC lacked authority; case dismissed for lack of jurisdiction); *In re Arkco Properties, Inc.*, 207 B.R. 624 (Bankr. E.D. Ark. 1997) (petitions of parent and subsidiary entities dismissed); *In re Zaragosa Properties, Inc.*, 156 B.R. at 313 (explaining that "post-action ratification can not cleanse the initial impropriety of the Act" of filing the petition).

As set forth in the Museum's Motion, Oregon law requires member consent to authorize TFM's decision to file for chapter 11 protection. That TFEC never consented to TFM's decision to file for chapter 11 is incurable insofar as TFEC is now managed by a Court-appointed fiduciary, i.e., the Trustee, whose authority derives wholly from the Bankruptcy Court, and not state governance law. Because the Bankruptcy Court does not have jurisdiction over an unauthorized debtor, this Court's appointed fiduciary of the unauthorized debtor's member does not have the power to ratify the subsidiary's chapter 11 filing. In short, the TFM Case must be dismissed because this Bankruptcy Court does not have the power to ratify an unauthorized chapter 11 filing.¹

¹ Importantly, this Court's decision that the members of TFEC ratified TFEC's unauthorized chapter 11 filing by remaining silent during the post-petition period is inapplicable here. There, the members' rights to ratify derived under state law, both prepetition and post-petition, and the members of TFEC were at both relevant times members of TFEC whose rights derived from applicable state law. Here, TFM's member was already a debtor-in-possession at
(continued . . .)

Furthermore, ratification should not be allowed at this point in the case, as creditors of TFM like the Museum have already been hurt by the unauthorized filing of the petition, which occurred over six months ago, and by the ongoing absence of a fiduciary acting for the benefit of TFM and its creditors. *See Town of Nasewaupee v. City of Sturgeon Bay*, 251 N.W.2d 845, 948 (Wis. 1977) (“Ordinarily, a subsequent ratification relates back to the time of the original transaction. However, that rule is not applicable when the rights of others have intervened by the passage of time.”).

II. The Museum Has Standing to Bring this Motion

Under the Bankruptcy Code, any “party in interest, including ... a creditor ... may raise and [] appear and be heard on any issue in a case under [Chapter 11].” 11 U.S.C. § 1109(b). While the Creditors Committee correctly points out that some courts have held that a creditor lacks standing to challenge the authority of a corporation’s actions, other courts have held in the opposite. *See, e.g., In re Abijoe Realty Corp.*, 943 F.2d 121, 124–25 (1st Cir. 1991); *In re Bay Club Partners-472, LLC*, No. BR 14-30394-RLD11, 2014 WL 1796688, at *4 (Bankr. D. Or. May 6, 2014) (acknowledging split in authority on creditor standing and explaining that courts who allow creditors to bring motions to dismiss “basically have applied § 1109(b) according to

(. . . continued)

the time of TFM’s filing, and the record is clear that TFEC, as a debtor-in-possession, did not have the ability to authorize anything at the time of TFM’s filing because it did not have a manager whose appointment predated TFEC’s chapter 11 filing. The appointment by this Court of the Trustee as a fiduciary of TFEC, in an effort to cure the governance defect at TFEC, does not somehow spring into existence rights that derive first and foremost under applicable state law. Authorization to file for chapter 11, and ratification of an unauthorized filing, are governed by applicable state law. This Court does not have the power to ratify an unauthorized filing under applicable state law by appointing a Trustee to manage the member whose consent is necessary to authorize the chapter 11 filing of the subsidiary, and the Trustee in turn does not have the right to ratify the unauthorized filing insofar as his rights are merely derivative and residual of this Court’s authority.

the plain meaning of its terms”); *see also In re Consol. Auto Recyclers, Inc.*, 123 B.R. 130, 137 (Bankr. D.Me. 1991).

The Museum submits that so long as a creditor has a sufficient economic stake in the case, it should be afforded the opportunity to assert its Motion. *See In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985); *Consol. Auto Recyclers*, 123 B.R. at 138; *see also In re Giggles Rest., Inc.*, 103 B.R. 549 (Bankr.D.N.J. 1989). Here, the Museum is a creditor with a large stake in this case. Not only does it have a contingent secured claim for damages of \$6,000,000 as well as claims for additional damages, *see* Proof of Claim 4-1 at 4-5, the Museum also has business relations that are highly intertwined with TFM’s operations. The Museum is thus “in a far different position than a general creditor of the estate who is otherwise a stranger to the debtor entities.” *See Consol. Auto Recyclers*, 123 B.R. at 138. The Museum, therefore, has a sufficient stake and a pecuniary interest in this case and therefore this Court should hold that it has standing to pursue its motion to dismiss.

III. The Record Warrants Dismissal of the TFM Case Sua Sponte

Assuming *arguendo* the Museum lacks standing to bring this Motion, this Court should dismiss the TFM Case on its own motion, in light of the overall mismanagement of the TFEC Case and TFM Case and, more troublingly, a record of misrepresentations before this Court and misstatements and material omissions in certain filings made by TFEC and TFM in its respective cases.

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For all of the foregoing reasons, as further addressed in the Motion and in the record, the Museum respectfully requests that the Court grant the Motion and dismiss the TFM Case.

DATED: February 5, 2019

STOEL RIVES LLP

/s/ Oren B. Haker

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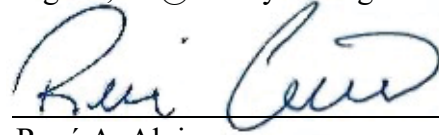
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2019 I filed a true and correct copy of the foregoing Reply In Support Of Motion To Dismiss Chapter 11 Case with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF Users.

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DATED: February 5, 2019

A handwritten signature in blue ink, appearing to read "René Alvin", written over a horizontal line.

René A. Alvin