Oren B. Haker (OSB #130162) (admitted *pro hac vice*)
oren.haker@stoel.com
Mark E. Hindley (UTB #7222)
mark.hindley@stoel.com
STOEL RIVES LLP
Suite 1100, One Utah Center
201 South Main Street
Salt Lake City, Utah 84111
Telephone: (801) 328-3131
Facsimile: (801) 578-6999

Attorneys for Evergreen Aviation and Space Museum and
The Captain Michael King Smith Educational Institute

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re: The Falls Event Center LLC, Debtor.	Bankr. No. 18-25116 Chapter 11 Honorable Chief Judge R. Kimball Mosier

REPLY IN SUPPORT OF MOTION FOR RELIEF FROM STAY

Pursuant to Local Rule 4001-1(b) and Local Rule 9006-1(c), Evergreen Aviation and Space Museum and The Captain Michael King Smith Educational Institute (collectively, the "**Museum**") replies in support of its *Motion for Relief from Stay* (Dkt. Nos. 44 & 267) ("**Motion**"), and to the (1) *Trustee's Opposition to Motion for Relief From Stay* (Dkt. Nos. 59 & 296) ("**Trustee Opposition**") and (2) *Joinder and Objection of Official Committee of Unsecured Creditors to Motion for Relief from Stay* (Dkt. Nos. 61 & 298) ("**Committee Objection**," and together with the Trustee Opposition, the "**Objections**"). The crux of the Objections filed by the Trustee Opposition and the Committee Objection ignores the assignment by TFEC to TFM of its rights under the asset purchase transaction documents approved by the Bankruptcy Court for

the District of Oregon in the Michael King Smith Foundation chapter 11 case ("**MKSF Bankruptcy Case**"). Moreover, the Objections ignore the undisputed fact that the Museum held all rights to operate the Waterpark and collect its revenues at the time of the sale to TFEC and TFM, and the Debtors' purchase of those rights from the Museum as evidenced by the Financing Agreement.[1] In short, both the Trustee Opposition and Committee Objection appear to be playing a dangerous game by attacking aspects of the integrated transaction between the Museum, the MKSF, and TFEC/TFM that was approved by the Bankruptcy Court in the MKSF Bankruptcy Case. Ultimately if the Museum's security interest is avoided, the Museum submits that the entire transaction may be unwound, and all of TFM's assets will revert to the MKSF Bankruptcy Case.

I. The Museum was granted a security interest in the Waterpark's revenues, whether owned by TFEC or TFM

In connection with its purchase of the McMinnville Property in the MKSF Bankruptcy Case, TFM granted a security interest in the Waterpark revenues and income from hosting events on the Museum Campus to the Museum. To the extent TFM made fraudulent representations in connection with that transaction and did not own what it represented it owned, the Museum's asserted interests should be validated by the Court.

First, TFEC and TFM are signatories to the Financing Agreement, which imposed obligations of one on the other by its express terms. Thus, as a legal matter, the obligations of TFM in the agreement extended to TFEC as well. *See* Dkt. Nos. 47 & 270, Declaration of Oren Haker ("***Haker Decl***."), Ex. 6, § 38 ("The rights, ***liabilities*** and remedies provided in this Donation & Security Agreement shall extend to the subsidiaries, successors, assigns, heirs, legal representatives, directors, employees, and agents of the Parties.) (emphasis added)

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

Moreover, a corporate debtor "may be estopped to deny property rights in collateral if the true corporate owner, through acts or omissions, failed to notify the creditor of the identity of the true owner of the collateral." *Pontchartrain State Bank v. Poulson*, 684 F.2d 704, 707 (10th Cir. 1982). The requirement that the grantor has rights in the collateral "illustrates the general principal that 'one cannot encumber another man's property in the absence of *consent*, *estoppel*, or some other special rule.'" *Kinetics Tech. Int'l Corp. v. Fourth Nat. Bank of Tulsa*, 705 F.2d 396, 398 (10th Cir. 1983) (quoting *In re Pubs, Inc.*, 618 F.2d 432, 436 (7th Cir. 1980)).

Here, there is evidence of both consent and estoppel. Regarding consent, TFEC signed the Financing Agreement and is the sole member of TFM. Thus, TFEC consented to the grant. *See Pubs*, 618 F.2d at 438 ("The consent of the true owner of the collateral is enough to give the debtor rights in the collateral for purposes of [UCC] §9-203.")

Further, the Court should find estoppel on the facts here. The APA provides that "Buyer and the Museum have agreed that the Buyer will assume operation of the water park upon expiration of the current lease term on December 31, 2016." Haker Decl., Ex. 4 (APA at Recital C). "Buyer" is defined in the first paragraph as "The Falls Event Center LLC, a Utah limited liability company, or its ***affiliated assignee***." *Id.* (emphasis added). The recitals in the Financing Agreement establish that "TFEC assigned its rights under the APA to TFM and TFM accepted the assignment on August 16, 2016." Additionally, TFM warranted under the Security Agreement that it had a valid interest in the collateral and that it would not transfer or encumber the collateral without the Museum's consent. Haker Decl., Ex. 6, §13. *Matter of Pubs, Inc. of Champaign*, 618 F.2d 432, 438 (7th Cir. 1980) (upholding security interest due to estoppel and explaining that "[p]arties to an agreement are . . . estopped to deny the recitals contained in the agreement" as well as the substantive provisions).

Under Oregon law, there are five elements of estoppel. *See Day v. Advanced M & D Sales, Inc.*, 336 Or. 511, 518–19, 86 P.3d 678, 682 (2004). "To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the

other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it." *Id.* (internal citations and quotations omitted). Here, all elements of estoppel are met. TFM and TFEC both signed the Financing Agreement, which stated that TFM had rights in the collateral; to the extent this representation was untrue, both TFM and TFEC knew of this deception at the time it was made.

Moreover, the record is clear in the MKSF Bankruptcy Case that the Museum had a five year right to operate the Waterpark and collect for its own use the revenues from the operation of the Waterpark. TFEC's purchase of the Museum's rights was financed by the Museum through the Financing Agreement, which clearly was intended to grant to the Museum a security interest in the revenues it assigned to TFEC, which then assigned them to TFM. To the extent TFEC is now taking the position that TFM did not have ownership of the Waterpark and its revenues, TFM should be deemed to have sufficient rights in the collateral due to TFEC's consent and/or estoppel. *See Pubs*, 618 F.2d at 436 (explaining that debtors have sufficient "rights" in collateral where "the true owner of the collateral has agreed to the debtor's use of the collateral as security or if the true owner has become estopped to deny the creation or existence of the security interest"). Neither the Trustee nor the Creditors Committee should be allowed to profit from TFEC and TFM's duplicity.

Alternatively, if this Court were to find that TFM does not have sufficient rights in the revenue from the Waterpark and Museum-related events, and TFEC and TFM misrepresented TFM's rights to these funds in the Security Agreement, the entire Security Agreement (and the related APA provision) would be voidable as a fraudulent transfer. If voided, the Museum would be entitled to return to the status quo before the agreements and continue operating the Waterpark and collecting the revenues, as it was given the right to do in the Vintage Bankruptcy Case. Moreover, if the Museum does not have a valid security interest, the entire transaction that was approved by the Bankruptcy Court in the MKSF Bankruptcy Case (as evidenced by the

TFEC APA and the Prepetition Transaction Documents) may be subject to avoidance on the grounds that it was an integrated transaction,[2] and the MKSF Bankruptcy Case will need to be reopened because an operating asset and significant real property (*i.e.,* the Waterpark and Space Building) will need to be returned to the MKSF estate for additional administration in the Bankruptcy Court in Oregon.[3]

II. The Museum's security interest was properly perfected.

The Museum's security interest was perfected by the filing of UCC financing statements and the Trustee should be estopped from arguing that the Museum lacked control over the deposit accounts at TFEC in light of TFEC and TFM's execution of the control agreement.

A security interest in gross revenues from the Waterpark and events on the Museum campus is not the same as a security interest in a deposit account. Revenues, when received, may take the form of cash, accounts receivables, bank deposits, or other types of property. Thus, defining the Museum's security interest as solely an interest in a singular deposit account is

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[2] The Trustee argues that the Museum would not have a basis for avoiding the APA because it was not a party to that agreement. Dkt. #59 & 296 (Trustee Opposition) at 15, n.18. The Trustee is wrong. While not a signatory to the APA, the Museum transferred all of its rights to operate the Waterpark and collect the revenues to TFEC and TFM in connection with the consummation of the APA. Moreover, the Museum was clearly a third-party beneficiary of the APA and the Museum's support was critical to the success of TFEC's bid for the assets. *See* Haker Decl., Ex. 4 (APA at Recital C) ("It is Buyer's intent to work cooperatively with the [Museum] for the long-term benefit of the Museum and the communities of the City of McMinnville, Yamhill County and the State of Oregon. . . . Buyer will commit to make substantial ongoing donations to the Museum over the 30 years after closing."); Dkt. 46/269, Declaration of John Rasmussen ("***Rasmussen Decl***.") ¶¶ 20-22 (explaining how TFEC courted the Museum's support for its bid to buy the assets). Case law is clear that the Trustee and the Creditors Committee cannot cherry-pick arms and legs off of an otherwise integrated transaction.

[3] If the Trustee and the Creditors Committee continue arguing that TFM only purchased the real property from the MKSF Bankruptcy Case, the Museum submits that discovery will be necessary in connection with TFEC and TFM's actions in the MKSF Bankruptcy Case, because if the Museum was not granted a security interest in the revenues of the Waterpark, then the Museum was defrauded.

incomplete and inaccurate. Rather, the Museum's security interest encompasses many types of property that are defined in Article 9 including, but not limited to, accounts, deposit accounts, general intangibles, chattel paper, instruments and investment property. Most types of property, aside from deposit accounts, can be perfected by filing a UCC-1 statement. *See* ORS 79.0312(1).

Additionally, the Trustee should be estopped from arguing that the Museum did not perfect its security interest in TFM/TFEC's deposit accounts, given that both TFEC and TFM executed the Bank Directive Agreement and the Financing Agreement Amendment. Although the Trustee makes much of the fact that the Bank Directive Agreement was not signed by the Bank, the agreement was executed by the Museum and each of TFM and TFEC, and thus it should be binding on those parties and the Trustee should be estopped from arguing otherwise. *C.f. Wieck v. Hostetter*, 274 Or. App. 457, 474 (2015) (holding agreement was enforceable even where party withheld signature on final agreement). Further, the Amendment to the Financing Agreement required TFM to provide the Museum with online access to view activity in the Deposit Account and maintain such access for the Museum. *See* Haker Decl., Ex. 11 (Amendment) at §3. Thus it is clear that TFEC and TFM intended for the Museum to have sufficient control to perfect its interest in the grantor's deposit account; additionally, the Museum perfected all other aspects of its collateral through filing financing statements.

III. The Museum's security interest extends to post-petition revenues.

Under section 552(b)(1), a security interest will be effective against "proceeds, products, offspring or profits" of property to which the security interest attaches before the filing of the petition. Post-petition revenues generated by the Waterpark constitute proceeds under section 552(b)(1). Notwithstanding, the Museum submits that discovery will be necessary to determine whether revenues from the Waterpark were appropriately used by the Debtors for operation and

maintenance costs at the Waterpark, i.e., cycled back into the operation of the Waterpark, generating future proceeds of previous revenues and subject to the Museum's security interest.[4] Alternatively, discovery may uncover that the Museum's collateral has been illegally diverted by TFEC (notwithstanding representations made at the cash collateral hearing) for use on account of non-TFM estate expenses. The Museum reserves its rights to seek discovery from all potential recipients of such fraudulent transfers, including the professionals employed by TFEC in the TFEC Case.

IV. Expedited relief is necessary in the event the Museum decides to vacate the Space Building

As set forth in its Motion, and undisputed by the Trustee and the Creditors Committee in their Objections, the Museum seeks expedited stay relief so that it can declare a default under the Lease between TFM and the Museum, and terminate the Lease and vacate the Space Building in the event the Museum determines such action is in its best interest. Critically, the Museum has until April 1, 2019 to inform Yamhill County whether it intends to apply for a property tax exemption for 2020. The Museum will not seek an exemption if it intends to vacate the premises, and requests relief from stay prior to April 1, 2019 in connection with its decision out of an abundance of caution. To the extent the Museum does not request a property tax exemption, the Museum wants to avoid any allegation by the Creditors Committee or the Trustee that it has violated the automatic stay, insofar as such a decision will likely impose on TFM

[4] For example, in the TFEC case, the Debtor filed a Motion to Pay Certain Prepetition Claims of Critical Vendors, with the TFEC's cash on hand, which TFEC previously represented to the Court includes the Waterpark revenues. *See* Dkt. 198 (Critical Vendors Motion); Dkt. #35 (Audio of Final Hearing on the Cash Collateral Motion) at 12:09-13:09. These critical vendor payments, made with Waterpark revenues, were made to fix deterioration of the HVAC system at the Waterpark and to provide regular maintenance and replacement of certain filters in the pool and tub areas of the Waterpark. *See* Dkt. 198.

liability for all real property taxes and assessments under the Lease in the event a new tenant does not qualify for the property tax exemption going forward.

DATED: February 5, 2019

STOEL RIVES LLP

/s/ *Oren B. Haker*

Oren B. Haker (OSB #130162)
(*admitted pro hac vice*)
Mark E. Hindley (UTB #7222)

STOEL RIVES LLP
Suite 1100, One Utah Center
201 South Main Street
Salt Lake City, Utah 84111
Telephone: (801) 328-3131
Facsimile: (801) 578-6999

Attorneys for Evergreen Aviation and Space Museum and The Captain Michael King Smith Educational Institute

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 For Relief From Stay 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.

- James W. Anderson jwa@clydesnow.com, jritchie@clydesnow.com; atrujillo@clydesnow.com
- Megan K Baker baker.megan@dorsey.com, long.candy@dorsey.com
- David P. Billings dbillings@fabianvancott.com, jwinger@fabianvancott.com; mdewitt@fabianvancott.com
- Ryan C. Cadwallader rcadwallader@kmclaw.com, tslaughter@kmclaw.com
- Laurie A. Cayton laurie.cayton@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- Thomas E. Goodwin tgoodwin@parrbrown.com, nmckean@parrbrown.com
- Oren Buchanan Haker oren.haker@stoel.com, jennifer.lowes@stoel.com; daniel.kubitz@stoel.com; docketclerk@stoel.com; kc.harding@stoel.com
- Mark E. Hindley mehindley@stoel.com, rnoss@stoel.com; slcdocket@stoel.com
- Alan C. Hochheiser ahochheiser@mauricewutscher.com
- Mary Margaret Hunt hunt.peggy@dorsey.com, long.candy@dorsey.com
- Michael R. Johnson mjohnson@rqn.com, docket@rqn.com;dburton@rqn.com
- Peter J. Kuhn Peter.J.Kuhn@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- David H. Leigh dleigh@rqn.com, dburton@rqn.com;docket@rqn.com
- Ralph R. Mabey rmabey@kmclaw.com
- Jessica G. McKinlay mckinlay.jessica@dorsey.com, Segovia.Maria@dorsey.com
- Elaine A. Monson emonson@rqn.com, docket@rqn.com; pbrown@rqn.com
- John T. Morgan john.t.morgan@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov; Suzanne.Verhaal@usdoj.gov
- Ellen E Ostrow eeostrow@hollandhart.com, intaketeam@hollandhart.com; lahansen@hollandhart.com
- Chad Rasmussen chad@alpinalegal.com, contact@alpinalegal.com
- Michael S. Steck michael@clariorlaw.com
- Mark S. Swan mark@swanlaw.net
- Richard C. Terry richard@tjblawyers.com, cbcecf@yahoo.com
- Michael F. Thomson thomson.michael@dorsey.com, montoya.michelle@dorsey.com; ventrello.ashley@dorsey.com
- Michael F. Thomson thomson.michael@dorsey.com, UT17@ecfcbis.com; montoya.michelle@dorsey.com
- United States Trustee USTPRegion19.SK.ECF@usdoj.gov
- Brent D. Wride bwride@rqn.com, docket@rqn.com;pbrown@rqn.com

- Marlon L. Bates marlon@scalleyreading.net, jackie@scalleyreading.net
- Darwin H. Bingham dbingham@scalleyreading.net, cat@scalleyreading.net

DATED: February 5, 2019

René A. Alvin