Oren 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 The Evergreen Aviation and Space Museum and the Captain Michael King Smith Educational Institute

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

In re: THE FALLS AT MCMINNVILLE LLC, Debtor.	Chapter 11 Case No. 18-25492 Honorable Chief Judge R. Kimball Mosier

OBJECTION TO CHAPTER 11 TRUSTEE'S MOTION TO SUBSTANTIVELY CONSOLIDATE THE FALLS EVENT CENTER LLC WITH DEBTORS THE FALLS AT CLOVIS, LLC, THE FALLS AT FRESNO, LLC, THE FALLS AT GILBERT, LLC, THE FALLS AT MCMINNVILLE, LLC, THE FALLS AT ST. GEORGE, LLC, AND THE FALLS OF LITTLETON, LLC; AND NON-DEBTORS THE FALLS AT AUSTIN BLUFFS, LLC, THE FALLS AT CUTTEN ROAD, LLC, THE FALLS AT STONE OAK PARKWAY, LLC, THE FALLS AT BEAVERTON, LLC, AND THE FALLS AT ROSEVILLE, LLC

The Evergreen Aviation and Space Museum hereby objects to the above-titled motion ("**Motion**") to the extent the Chapter 11 Trustee ("**Trustee**") seeks to consolidate all of the assets and liabilities that comprise the bankruptcy estate of The Falls at McMinnville LLC ("**TFM**") with the bankruptcy estate of debtor The Falls Event Center LLC ("**TFEC**"), and in support, respectfully submits as follows:

I. Without Addressing Creditor Reliance, the Motion Applies the Ten-Factor Test in *Fish v. East* Like a Puppet Without Strings

The Museum does not contest the relevance to a substantive consolidation request of the ten factors set forth by this Circuit in *Fish v. East*. 114 F.2d 177 (10th Cir. 1940). They are, indeed, factors that should be present between two legal entities to justify such an extraordinary remedy as substantive consolidation. But these factors are not and cannot be dispositive to a substantive consolidation request without an understanding of the expectations of creditors of the debtor requesting substantive consolidation. *In re Owens Corning,* 419 F.3d 195, 211 (3d Cir. 2005) ("Too often the factors in a checklist fail to separate the unimportant from the important, or even to set out a standard to make the attempt. . . . Running down factors as a check list can lead a court to lose sight of why we have substantive consolidation in the first instance. . . .") They can only be dispositive if substantive consolidation is employed to achieve a result that ultimately benefits ***all*** creditors of ***each and every*** debtor entity affected by substantive consolidation. *Id.* ("While substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively. . . .")

This does not mean that each and every creditor must recover a distribution greater under substantive consolidation than it would recover if substantive consolidation of multiple debtor entities was not ordered. If that were the necessary result, then substantive consolidation would never be appropriate, because in most cases, one (1) plus one (1) usually will not equal three (3). What it does mean, however, is that, in the absence of "hopeless entanglement," this Court can

only order substantive consolidation if the movant is able to show creditor reliance on the consolidated enterprise. In *Owens Corning*, the Third Circuit adopted the "either/or" test of (i) creditor reliance on common enterprise or (ii) hopeless entanglement. *See In re Owens Corning,* 419 F.3d at 211 ("(i) prepetition they [debtors] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors").

Case law on substantive consolidation in the Tenth Circuit is not at odds with the Third Circuit's decision in *Owens Corning*. Certainly not the two decisions of the Tenth Circuit's Court of Appeals: *Fish v. East* and *Fed. Dep. Ins. Corp. v. Hogan*. While the Tenth Circuit affirmed the turnover of a subsidiary's assets to the parent in *Fish v. East*, the word "consolidation" was not even mentioned in the decision, and creditors of the subsidiary were given first priority to its assets (i.e. structural subordination was preserved), and thus complete consolidation did not occur. *Fish v. East*, 114 F.2d 177 (10th Cir. 1940). In *Fed. Dep. Ins. Corp. v. Hogan* (*In re Gulfco Inv. Corp*.), the Tenth Circuit acknowledged the existence of the *Fish v. East* factors among the debtors but ultimately vacated the trial court's order substantively consolidating the debtor entities. 593 F.2d 921, 929 (10th Cir. 1979) (notwithstanding presence of many of the *Fish v. East* factors to support consolidation, the District Court failed to determine who would benefit from the consolidation order). In *Gulfco*, the Tenth Circuit refused to bless the trial court's substantive consolidation order due, in part, to (i) a trial court record that did not indicate that the assets of the multiple entities were hopelessly commingled, (ii) extinguishment of creditor guarantees and creditor recourse to security resulting from the substantive consolidation, and (iii) absence of entity by entity valuation analysis. *Id.*, at 929-931. In other words, the two cases from this Circuit's Court of Appeals refused to bless substantive consolidation of debtor entities at the expense of and to the detriment of their creditors.

Recent case law on substantive consolidation in the Tenth Circuit confirms this approach, which again is consistent with the *Owens Corning* standard adopted by the Third Circuit. *See Helena Chemical Co. v. Circle Land and Cattle Co. (In re Circle Land and Cattle Corp.)*, 213 B.R. 870, 876 (Bankr. D. Kan. 1997) (denying substantive consolidation, and observing that "[t]he decisional focus has shifted from alter ego factors to the effect of the consolidation on the general unsecured creditors of the two entities."). Accordingly, notwithstanding differences among the Circuit Court of Appeals in how the standard for substantive consolidation is articulated, its application has been consistently applied. In fact, because substantive consolidation is so draconian---i.e., it does not ***restructure*** existing contractual relations but rather ***rewrites*** them and does so retroactively---courts throughout the United States will not grant substantive consolidation where the expectations of creditors of the affected debtor entities are gutted.

Here, the Motion must be denied *in toto* because the Trustee has failed to allege either hopeless entanglement or creditor reliance on the breakdown of the debtor entities.

II. The Museum Justifiably Relied on the Corporate Separateness of TFM, and Will Be Harmed By Substantive Consolidation

To be clear, the Museum has not and does not do business with any of TFEC's affiliates other than TFM, and so its objection is limited to the Motion's request to substantively consolidate the assets and liabilities of TFM into the TFEC estate.[1] Perhaps the Motion does not address creditor reliance because the Trustee cannot establish that the Museum relied on the credit-worthiness of TFM, TFEC, and its affiliates as one entity. In fact, the evidence shows that

[1]Notwithstanding, it is unsurprising that no creditor of TFEC's affiliates has requested substantive consolidation. After all, TFEC has no assets other than the equity in its affiliates and the income that it claims (legally or illegally) from the operations of certain of its subsidiaries.

the Museum almost exclusively on the corporate separateness of TFM, with TFEC as a guarantor back-stop to TFM's obligations.

First, the agreements entered into by and between the Museum and TFM, some of which included TFEC as a party ("**Museum/TFM Agreements**") in connection with TFEC's purchase of substantially all of the assets from the chapter 11 trustee ("**MKSF Sale Transaction**") in the *In re Michael King Smith Foundation* chapter 11 case ("**MKSF Case**") reflect the Museum's reliance on the corporate separateness of TFM from TFEC and its affiliates. At the time of the closing of the MKSF Sale Transaction, TFEC represented that it assigned all of its interests in the MKSF Sale Transaction to TFM. Rasmussen Decl., ¶ 11. Moreover, the Museum/TFM Agreements, which constituted transactions contemplated in connection with the MKSF Sale Transaction and approved by the Oregon Bankruptcy Court in the MKSF Case, reflect the Museum's reliance on TFM as a separate corporate and credit-worthy entity that is entirely justifiable. *See* Dkt. No. 47-5 in TFM Case, Haker Decl., Order Authorizing MKSF Sale Transaction, ¶ 3. Frankly, the Museum's reliance on TFM as a separate legal and credit-worthy entity was justifiable from the face of the MKSF Sale Transaction documents and the Museum/TFM Agreements, including:

- Asset Purchase Agreement refers to the Buyer as TFEC "or its affiliated assignee ("Buyer"); Haker Decl., Dkt. No. 47-4;
- TFEC represented that it assigned its interests under the Asset Purchase Agreement to TFM; Rasmussen Decl., ¶ 11;
- TFM represented in the Campus Use Agreement that it was an operating entity by seeking to host "TFM Events") (see Recital F, §§ 2.3.1, 5.1.2); Haker Decl., Dkt. No. 47-15;
- TFM and the Museum were the only parties to the Aircraft Loan & Display Agreement; *Id.*, Dkt. No. 47-16;

- TFM was obligated to make payments under the Financing Agreement to the Museum; *Id.*, Dkt. No. 47-6; and
- TFM was the assignee of the Waterpark Lease between MKSF and the Museum. *Id.*, Dkt. No. 47-17.

The fact that TFEC and its managers played a shell-game with the Museum once the MKSF Sale Transaction was approved by the Bankruptcy Court in Oregon should not now allow the Trustee, who stands in the shoes of TFEC's prior managers, further eviscerate the Museum's contractual rights against TFM by stripping TFM's assets from its estate for the benefit of TFEC. By virtue of its contractual rights against TFM, the Museum's claims are structurally senior to the claims of creditors of TFEC. Likewise, the Museum's claims against TFM, even if unsecured, must be paid prior to payment of the administrative expense claims of TFEC.[2] Because substantive consolidation would wipe out the Museum's claim against TFM and effectively subordinate its claims against TFEC (by virtue of the elimination of TFM), substantive consolidation of TFM into TFEC cannot be granted.

Moreover, the underlying Museum/TFM Agreements reflect TFM's purchase of the Waterpark ***subject to*** the Museum's five-year right to operate the Waterpark, which it was

[2] To the extent the Trustee intends to continue asserting that TFEC had a legal right to all income generated by TFM's assets, including the Waterpark and the hosting of events on the Museum Campus, notwithstanding contrary representations in the MKSF Sale Documents, the Museum will proceed with its fraud claim against TFEC and TFM. Frankly, the existence of a fraud claim against TFM warrants denial of the Motion with respect to TFM insofar as substantive consolidation would not only extinguish the Museum's claim against TFM ***but also inappropriately moot its claim against TFEC---inappropriately so, because the Museum has not had the opportunity to, even on a preliminary basis, establish the estimated value of its claim against TFEC***. Moreover, the Museum submits that certain material misrepresentations made by TFEC during the post-petition period, in particular by TFEC's bankruptcy counsel at the hearing on TFEC's motion to use cash collateral, were made in furtherance of the fraud perpetrated on the Museum by TFEC and TFM during the prepetition period.

guaranteed pursuant to a Bankruptcy Court order approving the Global Settlement Term Sheet ("**Vintage Settlement**") in the chapter 11 case of *In re Evergreen Vintage Aircraft* ("**Vintage Case**").[3] *See* Dkt. No. 47-4, Haker Decl., Recital C (Buyer and Museum agreement that Buyer will take over operation of the Waterpark from Museum and Buyer will make "donations" over 30 year period); §4.1.1 (Buyer's obligation to close the MKSF Sale Transaction expressly conditioned on "(x) use agreements[4] for Buyer's use of the Museum buildings including, without limitation the aviation building and theater building"; "(xv) Buyer shall have entered into all desired agreements with the Museum, including without limitation, the lease for the space museum building ***and acquisition of certain personal property from the Museum as is set forth in the Museum LOI***") (emphasis added). One of the "use agreements" is the Campus Use Agreement, which is between TFM and the Museum for the purpose, in part, of allowing TFM to host TFM Events on the Museum campus. TFM, as assignee of TFEC's rights under the Asset Purchase Agreement, was the counterparty to the Museum on the Museum/TFM Agreements that were critical to the closing of the MKSF Sale Transaction, which sale was subject to the Museum's five-year leasehold interest in the Waterpark's operations.[5] This Motion seeks to

---

[3] The Vintage Settlement enabled the free and clear sale of substantially all of the assets in the estate in the Vintage Case. The Museum's right to operate the Waterpark for a five-year period was critical, because the Vintage Settlement required the Museum to make monthly payments of $50,000 to lease the Aviation Building and Theater Building, and but for the income from the Waterpark, the Museum would have struggled to pay the monthly rent for the Aviation Building and Theater Building.

[4] One of these agreements is the Campus Use Agreement, which provides: "This Use Agreement becomes legally binding on the Parties only if the Parties have also entered into and signed other agreements, i.e., the Donation Agreement, the Waterpark Transition Agreement, the new Space Museum Lease, and the Aircraft Loan and Display Agreement."

[5] *See* Waterpark Transition Agreement, § 8.16 ("This [Waterpark] Transition Agreement becomes legally binding on the Parties only if Article 1 of this Agreement is satisfied and the Parties have also entered into and signed other commercial agreements, including the Donation Agreement, the Campus Use Agreement, the Lease, the Aircraft Loan and Display Agreement . .
(continued . . .)

rewrite the history of the Museum's agreements with TFEC and TFM to whitewash prepetition fraud.

At the same time, the Trustee's advancement of a narrative in support of substantive consolidation of TFM into TFEC is not entirely surprising. If the Trustee acknowledged that TFM should have taken an assignment of TFEC's rights in connection with the MKSF Sale Transaction, and further acknowledged that TFEC intentionally misled the Museum by failing to cause TFM to open a deposit account and actually perform in accordance with Museum/TFM Agreements, the Trustee would have to acknowledge TFM's fraud claim against TFEC and possibly return proceeds to TFM.

Second, after the MKSF Sale Transaction was approved by the Oregon Bankruptcy Court, the Museum continued to rely on the separate existence and credit-worthiness of TFM in its good faith negotiations with TFM and TFEC over the final form of the Museum/TFM Agreements negotiated in connection with the MKSF Sale Transaction, and also in its negotiations with TFM over a forbearance once TFM defaulted on the Financing Agreement. The Museum entered into multiple forbearance agreements with TFM and amendments to the Financing Agreement with TFM, all to its detriment.

Notwithstanding the evidence to the contrary, the Trustee's predecessor fiduciaries to TFEC have sought to rewrite history and the Trustee is now relying on inaccurate representations

---

(. . . continued)
. ."). Articles 1 and 2 provide that the sale of the Waterpark from the MKSF Debtor to TFM is subject to the Waterpark lease between the MKSF Debtor and the Museum. In other words, and contrary to the Trustee's representations in this Court, TFM, and not TFEC, purportedly took title to the Waterpark if the Museum/TFM Agreements accurately reflect the MKSF Sale Transaction. Moreover, the sale to TFM was subject to the Museum's right to operate the Waterpark through 2020, which right it obtained in the Vintage Chapter 11 Case, and which right it covenanted not to enforce beyond 2016 in consideration for the Financing Agreement, the Campus Use Agreement, the Lease, and the Aircraft Loan and Display Agreement.

in support of its Motion. For instance, TFM's Schedules of Assets and Liabilities represent: "***[a]ll personal property at the McMinnville facility is property of the Falls Event Center LLC***, which operates the McMinnville facility. ***The Debtor owns no personal property.***" (emphasis added). This representation is demonstrably false. In fact, TFM's own Statement of Financial Affairs ("**TFM SOFAs**") contradicts the representation that TFM owns no personal property. Dkt. No. 18 (#77 ("Certain items of personal property were purchased from the bankruptcy estate of The Michael King Smith Foundation . . . and title is held in the name of the Debtor herein.") In fact, the TFM SOFAs attach a schedule of automobiles, aircraft and accessories that was purchased by TFM from the Museum or the Michael King Smith Foundation estate. Dkt. No. 18, p. 17 (Ex. 1 to Bill of Sale, Assignment and Transfer). Moreover, TFM and TFEC disclosures before this Court have inappropriately ignored the transactions approved by the Oregon Bankruptcy Court in the Vintage Case and MKSF Case.

For the foregoing reasons, the Motion should be denied insofar as it seeks the substantive consolidation of TFM into TFEC, and this Court should appoint a different trustee for TFM if this Court determines that it has subject matter jurisdiction over TFM, or alternatively, this Court should dismiss TFM.

III. Substantive Consolidation Cannot Cure Jurisdictional Defects

The Motion seeks substantive consolidation to address "authority" issues and jurisdictional issues. This is an inappropriate use of substantive consolidation. *Circle Land and Cattle Corp.*, 213 B.R. at 877 (Bankr. D. Kan. 1997) (section 105 is not a jurisdictional grant and does not create substantive rights, nor does it broaden the bankruptcy court's jurisdiction over non-debtor entities.)[6] The Museum respectfully submits that this Court cannot, and should not,

[6] The Museum does not have an interest in certain non-Debtors that the Motion seeks to substantively consolidate with TFEC. Notwithstanding, to the extent TFEC is diverting income from the Waterpark to pay for its administration of certain non-Debtors, the Museum reserves all (continued . . .)

grant the Motion before it first determines whether it has jurisdiction over TFM. Because TFM was never authorized to file for chapter 11 protection, its case should be dismissed by this Court. The Museum acknowledges that dismissal will not solve TFM's governance paralysis, but once dismissal is ordered, creditors of TFM can exercise their contractual rights and rights under applicable law, including without limitation filing an involuntary petition under section 303 of the Bankruptcy Code or moving for the appointment of a receiver under Oregon law to preserve the value of TFM's assets.

For all the foregoing reasons, the Motion should be denied.

DATED: March 8, 2019

STOEL RIVES LLP

/s/ *Oren 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

(. . . continued)
rights under applicable law. It is not lost on the Museum that the Trustee is trying to operate TFEC's affiliates as if this Motion has already been granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2019 I filed a true and correct copy of the foregoing Objection To Chapter 11 Trustee's Motion To Substantively Consolidate The Falls Event Center LLC With Debtors The Falls At Clovis, LLC, The Falls At Fresno, LLC, The Falls At Gilbert, LLC, The Falls At Mcminnville, LLC, The Falls At St. George, LLC, And The Falls Of Littleton, LLC; And Non-Debtors The Falls At Austin Bluffs, LLC, The Falls At Cutten Road, LLC, The Falls At Stone Oak Parkway, LLC, The Falls At Beaverton, LLC, And The Falls At Roseville, LLC 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.

- Megan K Baker baker.megan@dorsey.com, long.candy@dorsey.com
- Marlon L. Bates marlon@scalleyreading.net, jackie@scalleyreading.net
- Darwin H. Bingham dbingham@scalleyreading.net, cat@scalleyreading.net
- Laurie A. Cayton laurie.cayton@usdoj.gov, James.Gee@usdoj.gov; Lindsey.Huston@usdoj.gov;Suzanne.Verhaal@usdoj.gov
- 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
- Mary Margaret Hunt hunt.peggy@dorsey.com, long.candy@dorsey.com
- Michael R. Johnson mjohnson@rqn.com, docket@rqn.com;dburton@rqn.com
- David H. Leigh dleigh@rqn.com, dburton@rqn.com;docket@rqn.com
- Jessica G. McKinlay mckinlay.jessica@dorsey.com, Segovia.Maria@dorsey.com
- Elaine A. Monson emonson@rqn.com, docket@rqn.com; pbrown@rqn.com
- Darren B. Neilson darren@neilsonlaw.co
- Ellen E Ostrow eeostrow@hollandhart.com, intaketeam@hollandhart.com; lahansen@hollandhart.com
- Chad Rasmussen chad@alpinalegal.com, contact@alpinalegal.com
- Jeffrey B. Smith jsmith@cgsattys.com
- Richard C. Terry richard@tjblawyers.com, cbcecf@yahoo.com
- Michael F. Thomson thomson.michael@dorsey.com, montoya.michelle@dorsey.com; ventrello.ashley@dorsey.com
- United States Trustee USTPRegion19.SK.ECF@usdoj.gov
- Brent D. Wride bwride@rqn.com, docket@rqn.com;pbrown@rqn.com

DATED: March 8, 2019

/s/ Kevin P. McKenzie
Kevin P. McKenzie, Practice Assistant