

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 at McMinnville LLC, Debtor.	Bankr. Case No. 18-25492 Chapter 11 Honorable Chief Judge R. Kimball Mosier
--	---

**MOTION FOR RELIEF FROM STAY AND
MEMORANDUM IN SUPPORT OF MOTION**

Pursuant to Local Rule 4001-1(a) and 9013-1, Evergreen Aviation and Space Museum and The Captain Michael King Smith Educational Institute (collectively, the “*Museum*”), by and through its undersigned counsel, hereby submits this motion (the “*Motion*”) for an order (i) granting the Museum relief from the automatic stay, pursuant to sections 362(d)(1) and (d)(2) of title 11 of the United States Code (the “*Bankruptcy Code*”), to exercise its rights and remedies under its lease with The Falls at McMinnville, LLC (“*TFM*”), and further, to mitigate ongoing harm and damages caused by The Falls Event Center, LLC’s (“*TFEC*”) and TFM’s breach and ongoing failure to comply with certain agreements entered into by and between the parties prior to July 26, 2018 (“*TFEC Petition Date*”) in connection with the Museum Campus and

Waterpark, and (ii) (a) requiring an accounting by the chapter 11 trustee (“*Trustee*”) of TFEC and TFM’s operations of the Wings & Waves Waterpark (the “*Waterpark*”) and ongoing use of the Museum Campus¹ to host revenue-generating events, and (b) requiring the Trustee to segregate all income derived from the foregoing operations in TFM’s debtor-in-possession account (“*TFM DIP Account*”) pending further relief from this Court in the chapter 11 bankruptcy cases (the “*Bankruptcy Cases*”) of TFM and TFEC (collectively, the “*Debtors*”).

¹ The Museum Campus is defined in the Introduction below.

TABLE OF CONTENTS

I. INTRODUCTION 4

II. SUMMARY OF RELIEF, AND BASIS FOR, RELIEF REQUESTED 6

III. FACTUAL BACKGROUND..... 9

A. The Vintage Chapter 11 Case & the Museum’s Waterpark Rights 9

B. The MKSF Chapter 11 Case & TFM’s Acquisition of Substantially All of MKSF Assets 10

C. Debtors’ Secured Obligations to the Museum..... 12

D. The Bank Directive Agreement & Deposit Account for Collateral..... 13

E. Debtors’ Defaults of the Financing Agreement, Forbearance Agreement, and Amendment 14

F. Debtors’ Continuing Default of the Financing Agreement & State Court Suits..... 16

G. TFM’s Defaults Under the Lease..... 17

H. Museum’s Collateral Value; Claims Secured by Museum’s Collateral and by Space Building and Waterpark 18

I. TFEC’s Use of the Museum’s Cash Collateral Has Not Been Authorized by the Bankruptcy Court in the TFEC Chapter 11 Case..... 19

IV. LEGAL AUTHORITY AND ARGUMENT 22

A. Pursuant to Section 362(d)(1), this Court Should Terminate the Stay to Allow the Museum to Exercise Its Rights with Respect to Revenue Generated From TFM’s Assets..... 22

B. An Accounting of All Cash Proceeds from TFM’s Assets Is Necessary and Future Proceeds Should be Deposited in the TFM DIP Account 26

C. Relief from the Automatic Stay Pursuant to Section 362(d)(2) Is Warranted Because Neither TFEC Nor TFM Have Equity in the Museum Collateral, and the Museum Collateral Is Not Necessary to a Reorganization of TFM or TFEC 26

V. CONCLUSION..... 30

I. INTRODUCTION

The Museum is an aviation and space museum that displays military and civilian aircraft, most notably the Hughes H-4 Hercules, which is commonly known as the Spruce Goose, and provides educational programs and artifacts to the community.² Established in 1991, the Museum is located approximately an hour's drive south of Portland, Oregon, in McMinnville. Declaration of John Rasmussen ("*Rasmussen Decl.*") ¶1. Each year, the Museum attracts approximately 80,000 visitors to the Museum grounds to explore and learn about its collection.³ *Id.* ¶4. The Museum offers educational programs to students between the ages of 8 and 18 and has partnerships with a number of educational entities to promote the STEM education program (Science, Technology, Engineering & Mathematics) in the Willamette Valley. *Id.* ¶1.

The Museum leases three buildings---commonly known as the Space Building, the Theater Building, and the Aviation Building that, together with real property adjacent to these buildings constitutes the Museum Campus. Adjacent to the Museum Campus is the Waterpark, Chapel and certain farmland. A map of the Museum Campus and Waterpark is attached to the Declaration of Oren B. Haker ("*Haker Decl.*"), Ex 1. The Museum occupies the Theater Building and the Aviation Building pursuant to a lease with a non-debtor landlord unrelated to and unaffected by these Bankruptcy Cases. The Museum's lease with the Space Building is a different story, however, as TFM is the landlord on the Museum's lease ("*Lease*").

In connection with the Museum's entry into the Lease with TFM, the Museum entered into the following four agreements with TFEC and/or TFM related to the Museum Campus and the parties' mutual obligations and rights in connection with operations on the Museum Campus:

² The Museum's mission is: "To Inspire and Educate, to Promote and Preserve Aviation and Space History, and To Honor the Patriotic Service of Our Veterans."

³ In this way, what is good for the Museum is good for the restructuring efforts of the Debtors, as the Debtors' business ventures on the Museum campus benefit from traffic at the Museum. The Museum reserves the right to supplement this motion with additional financial information, filed under seal, demonstrating that the Museum's success tangibly benefits the value of TFM's assets.

- the Gift Donation and Security Agreement between TFEC, TFM and the Museum, dated August 16, 2016 (“*Financing Agreement*”), pursuant to which the Museum relinquished its rights to the Waterpark revenues through 2020 to TFEC (which then assigned all of its rights to TFM) in exchange for monthly payments in which the Museum was granted a security interest; the Museum was also granted a security interest in the events hosted by TFM; *see* Haker Decl. Ex. 6.
- a confidential arrangement between TFM and the Museum pursuant to which TFM could use the Museum Campus to host revenue-generating events (“*Museum Campus Use Agreement*”);
- an agreement between TFM and the Museum pursuant to which the Museum loaned TFM certain aircraft for display at the Museum Campus (“*Aircraft Loan Agreement*”); and
- a transition agreement between the Museum, TFM and TFEC in connection with TFM’s acquisition of the Waterpark from the Michael King Smith Foundation (“*MKSF*”, and the “*Waterpark Transition Agreement*,” and together with the Financing Agreement, Aircraft Lease Agreement, Museum Campus Use Agreement, and Lease, the “*Prepetition Transaction Documents*”).⁴

The Prepetition Transaction Documents reflect the culmination of agreements negotiated over the course of almost three (3) years involving two (2) prior bankruptcy cases in the Bankruptcy Court for the District of Oregon: *In re Evergreen Vintage Aircraft, Inc.*, No. 14-36770 (“*Vintage Chapter 11 Case*”), and *In re The Michael King Smith Foundation*, Case No. 16-30233-rld11 (“*MKSF Chapter 11 Case*”). As of the TFEC Petition Date, TFM and/or TFEC were in material

⁴ Due to confidentiality, the Museum Campus Use Agreement, Aircraft Loan Agreement and Waterpark Transition Agreement will be filed with the Court under seal. *See* Haker Decl. Ex. 15-17; Motion for Leave to File Certain Confidential Agreements Under Seal, filed concurrently with this Motion.

default on the Prepetition Transaction Documents.

II. SUMMARY OF RELIEF, AND BASIS FOR, RELIEF REQUESTED

The Museum seeks entry of an order that grants it the following forms of relief:

- **First**, relief from the automatic stay to foreclose on the revenue stream generated from the Waterpark's operations and the TFM-hosted events pursuant to a Financing Agreement between the Museum as lender and TFM as borrower that enabled TFM to purchase the Waterpark (and the revenue stream that had been assigned to the Museum in the Vintage Bankruptcy) from the chapter 11 trustee of the MKSF Bankruptcy;
- **Second**, relief from the automatic stay to foreclose on the revenues generated by TFM's use of the Museum Campus to host events thereon;
- **Third**, relief from the automatic stay so that the Museum can properly advise the Yamhill County Tax Assessor by April 1, 2019 (as required by Oregon law) of its intention to seek tax exemption status for the Space Building for the year 2020;
- **Fourth**, relief from the automatic stay to mitigate damages caused by TFM and TFEC's breach of the Prepetition Transaction Documents entered into between the Museum and TFM/TFEC in connection with the Museum Campus and Waterpark;
- **Fifth**, an accounting by the Trustee, by no later than February 28, 2019, of all receipts and disbursements by TFEC relating to revenues generated by, and costs of operating, the Waterpark, and the same for the revenue-generating events hosted by TFEC/TFM on the Museum's Campus since the TFEC Petition Date; and
- **Sixth**, segregation by the Trustee of (i) net income generated from the operations of Waterpark in the TFM DIP Account and (ii) revenues generated from TFM's hosting of events on the Museum Campus in the TFM DIP Account.

Timely relief from the automatic stay is particularly necessary for the Museum in light of its Board of Directors' ("***Museum Board***") fiduciary obligations as a non-profit entity. The Museum Board's fiduciary duties include a duty of care to make well-informed decisions that are

in the best interests of the Museum and promote the Museum's charitable, scientific, and educational missions. Rasmussen Decl. ¶ 2. Importantly, the Museum's future is a matter of public interest as the artifacts are held in the public trust and the Oregon Department of Justice Charitable Activities Section oversees the Museum's activities (as part of Oregon DOJ's oversight responsibility of all non-profits in Oregon). As the Space Building tenant, the Museum also has certain reporting and filing obligations, including addressing a filing deadline of April 1, 2019 to apply for a property tax exemption in connection with its obligations under its Lease with TFM for the Space Building.

The Museum's Board, in its exercise of its fiduciary duties, regularly assesses the ongoing operations of the Museum in light of its financial condition. *See id.* It should surprise no one that these Bankruptcy Cases--and in particular, TFEC and TFM's breach of its contractual obligations to the Museum and the uncertainty over the Museum's Lease with TFM--have cast a long shadow over the Museum's operations. The Museum's financial health is inextricably linked to a well-operated Waterpark and an event hosting operator that respects the Museum's charitable, scientific and educational mission. As a result, the Museum Board and its leadership must, in furtherance of its fiduciary duties, explore all of the Museum's options, including an operational restructuring that includes reducing its footprint by vacating one or more of its leased premises.⁵ Relief from the automatic stay to allow the Museum Board to faithfully exercise its fiduciary duties is therefore necessary at this time.

Not only is the Museum's success linked to a well-run Waterpark and responsible operator of the event hosting business on the Museum Campus, but the inverse is also true: TFEC and TFM have benefitted in material and significant ways from the Museum's presence on the Museum Campus, as further discussed herein. Unfortunately, material defaults by TFEC and

⁵ Vacating any of the buildings would eliminate the property tax exemption for that particular building.

TFM under the Lease and the other Prepetition Transaction Documents have caused the Museum significant distress and damage since TFM purchased the Waterpark and Space Building from the trustee in the MKSF Bankruptcy in 2016. The urgency of this motion cannot be over-emphasized, as it seeks relief from the automatic stay so as to enable the Museum to take greater control of the Museum Campus to mitigate its damage claims against TFEC and TFM, as well as to ensure that the value of the Museum Campus – including the value of the TFM-owned assets – do not further deteriorate during the Bankruptcy Cases.⁶

In addition, a timely accounting of receipts and disbursements relating to the operation of the Waterpark and hosting of events by TFEC on the Museum Campus since the TFEC Petition Date, and segregation of all net income generated by the Waterpark in the TFM DIP Account and of all revenues generated by TFM from event hosting on the Museum Campus in the TFM DIP Account, is appropriate for two reasons. First, the Museum has a valid, properly-perfected security interest on all the revenues generated from the Waterpark and all the revenues generated by TFM's use of the Museum Campus for event hosting. Accordingly, cash generated from the Waterpark's operations and use of the Museum Campus to host events constitutes the Museum's cash collateral, and TFEC's ongoing use of the Museum's cash collateral cannot be allowed unless TFEC provides the Museum with adequate protection.

Second, this Court's entry of a final order approving TFEC's use of cash collateral was predicated on material misrepresentations at the cash collateral hearing that TFEC was the rightful owner of revenues generated from the operation of the Waterpark. As the Museum will show, TFEC purchased the Waterpark from the chapter 11 trustee in the MKSF Chapter 11 Case and immediately assigned its rights under the purchase agreement to TFM, including the right to

⁶ To the extent TFEC and TFM made material misrepresentations in connection with TFM's purchase of the Waterpark and Space Building from the trustee in the MKSF Chapter 11 Case, the Museum reserves its rights to move to reopen the MKSF Chapter 11 Case in the Bankruptcy Court for the District of Oregon, if necessary.

receive revenues from the Waterpark through 2020, which the Museum relinquished in connection with the sale. Accordingly, all revenue generated from the Waterpark and all revenue from the event-hosting business belongs in the TFM DIP Account, and this Court's cash collateral order did not authorize TFEC to use the Museum's cash collateral.

For the foregoing reasons, the Trustee should be required to account for all past uses of the Museum's cash collateral; otherwise, the Museum has no way to determine whether TFEC should be required to make adequate protection payments to the Museum on account of TFEC's ongoing use of the Museum's cash collateral since the TFEC Petition Date. The Museum's request for an accounting, as opposed to demanding certain adequate protection payments from the TFEC estate, is a responsible first step to determine the extent of the harm to the Museum as a result of TFEC's administration of the Bankruptcy Cases to date.⁷

III. FACTUAL BACKGROUND

A. The Vintage Chapter 11 Case & the Museum's Waterpark Rights

Evergreen Vintage Aircraft, Inc. ("*Vintage*"), a for-profit company owned by Delford Smith, filed for bankruptcy in Oregon on December 11, 2014. Rasmussen Decl. ¶¶ 11-12. At the time of the Vintage Chapter 11 Case, it owned two buildings on the Museum campus: the Theater Building and the Aviation Building. *Id.* ¶ 13. At that same time, the Museum occupied the Aviation Building on a rent-free basis pursuant to a long-term lease agreement. *Id.* ¶15. The Theater and Aviation buildings were sold to Affordable Mid-Coast Homes ("*AMC*") as part of a

⁷ For the avoidance of doubt, the Museum does not consent to TFEC's ongoing use of its cash collateral for administrative expenses incurred by the Trustee in the TFEC case. Whether the Museum will consent to certain expenses of the estate being paid by the Trustee from its cash collateral upon entry of a modified cash collateral order that adequately protects the Museum's interests is not a question currently before this Court. The Museum reserves the right to seek adequate protection payments to the extent of any diminution in its cash collateral, which it will only be able to determine once an accounting is completed by the Trustee. Moreover, to the extent certain transfers were made, or obligations incurred, by TFM to or for the benefit of TFEC for which TFM did not receive reasonably equivalent value in return, the Museum reserves all its rights with respect to those transfers made and obligations incurred.

mediated resolution in the Vintage Chapter 11 Case.⁸ *Id.* ¶13.

In connection with the sale of the Theater Building and the Aviation Building to AMC, the Museum and AMC entered into a 20-year lease pursuant to which the Museum leased the Theater Building and the Aviation Building from AMC for monthly lease payments totaling \$50,000. *Id.* ¶ 15. The Museum's ability to make these monthly payments to AMC was contingent on its retention of the revenues from its operation of the Waterpark, which the Museum was leasing from MKSF. *Id.* ¶ 16. Pursuant to the final order approving AMC's purchase of the Theater Building and the Aviation Building in the Vintage Chapter 11 Case, the Museum retained the right to operate the Waterpark and retained ownership of all income generated from its operation for the period 2016 through 2020. *See* Haker Decl., Ex. 2 (Global Settlement Agreement); Ex. 3 (Order Approving Settlement). But for the Museum's retention of the revenue stream generated by the Waterpark through 2020, the Museum would not have entered into the lease with AMC. Rasmussen Decl. ¶ 17.

B. The MKSF Chapter 11 Case & TFM's Acquisition of Substantially All of MKSF Assets

MKSF was also established by Delford Smith as an irrevocable trust, for the purpose of acquiring, maintaining, preserving, and facilitating the display of historical aircraft and to provide facilities to the Museum to support its mission. MKSF operated as a non-profit, tax-exempt organization. Rasmussen Decl. ¶ 19. On January 26, 2016, MKSF filed a petition for chapter 11 protection in the Bankruptcy Court for the District of Oregon. MKSF owned a number of assets, including the Waterpark and the Space Building on the Museum Campus. Rasmussen Decl. ¶ 19. At the time of the MKSF Chapter 11 Case, the Museum was leasing and occupying the Space Building on a no-rent basis. *Id.*

⁸ The third building on the Museum campus, the Space Building, was not an asset of Vintage's estate, as it was owned by MKSF, which, subsequent to the Vintage Chapter 11 Case, filed for chapter 11 protection in 2016, as discussed in greater detail below. Similarly, the Waterpark, which is right next door to, and affiliated with, the Museum, was owned by MKSF.

It was during the MKSF Chapter 11 Case when TFEC and TFM first entered the picture. On June 22, 2016, TFEC entered into the Asset Purchase Agreement (“*TFEC APA*”) with the chapter 11 trustee in the MKSF Chapter 11 Case to purchase substantially all of MKSF’s assets, including the Space Building, the Waterpark, and a third building---the Chapel---now referred to as the “Lodge.” *See* Haker Decl., Ex. 4 (APA). The TFEC APA also provided that TFEC or its affiliated assignee⁹ would acquire the Museum’s right to operate the Waterpark through 2020 and all income generated from its operation in connection with the consummation of the TFEC APA, which right the Museum had obtained in connection with the Global Settlement Agreement approved by the Bankruptcy Court in the Vintage Chapter 11 Case. *See id.* at Recital C; Haker Decl., Ex 2. As consideration for its purchase of the Museum’s right to operate the Waterpark and retain all income generated therefrom, TFEC (*or its affiliated assignee*) agreed to “make substantial ongoing donations to the Museum over the 30 years after closing” to be memorialized in a final agreement. *Id.* By assigning its right to operate the Waterpark to TFEC (which then assigned that right to TFM at the sale closing in August, 2016), the Museum essentially financed TFEC’s purchase of the Waterpark; the “donations” referred to in the Financing Agreement were effectively repayments on account of the Museum’s financing of the TFEC APA. But for the assignment by the Museum of significant income generated by the Waterpark and the TFM-hosted events on the Museum Campus, TFEC would not have had the funds necessary to purchase the Waterpark.¹⁰

⁹ “Buyer” was defined in the first paragraph as “The Falls Event Center LLC, a Utah limited liability company, or *its affiliated assignee*.” Haker Decl., Ex. 4 (APA) (emphasis added).

¹⁰ Importantly, during the MKSF Chapter 11 Case, TFEC was not the only party interested in purchasing substantially all of MKSF’s assets, and TFEC courted the Museum’s support for its bid to buy the assets. Rasmussen Decl. ¶¶20-22. The Museum’s financial support of TFEC’s bid for MKSF’s assets was conditioned on the Museum receiving monthly “donation” payments from TFEC as consideration for the Museum releasing its right to the 5-year revenue stream from the Waterpark’s operations that the Museum had negotiated for in the Vintage Chapter 11 Case. *See id.* at ¶22.

The TFEC APA was approved by the bankruptcy court in the MKSF Chapter 11 Case on July 8, 2016. Haker Decl, Ex. 5. Contemporaneously with the sale closing, TFEC assigned its rights under the TFEC APA (including the Museum’s right to operate and retain revenues through 2020 from the Waterpark) to TFM. *See id.* Ex. 6, Recital C.

In accordance with the TFEC APA and as further set forth in the Prepetition Transaction Documents, the Museum currently rents the Space Building pursuant to a lease with TFM. *See* Haker Decl., Ex. 14 (Lease). Those same documents show that TFM owns the Waterpark, and on the Museum’s belief, TFM illegally transferred to TFEC the revenues generated from the operation of the Waterpark, notwithstanding the fact that TFM granted the Museum a security interest in these revenues pursuant to the Financing Agreement, and moreover, that TFEC and TFM were contractually obligated to use a portion of these revenues to make monthly payments to the Museum, as discussed more fully below.

C. Debtors’ Secured Obligations to the Museum

In exchange for the Museum surrendering its rights to operate and retain revenues from the Waterpark and host for-profit events on the Museum grounds, TFM, TFEC, and the Museum entered into the Financing Agreement, effective August 16, 2016. Haker Decl., Ex. 6, Recital C-D & §1. The Financing Agreement provides that TFM will make two categories of payments to the Museum:

- A \$1.68 million irrevocable payment obligation, paid in monthly installments of \$70,000 to the Museum beginning on January 1, 2017 and continuing until December 1, 2018 (appropriately referred to as the “***Irrevocable Payment Obligation***”), and
- \$300,000 per year to the Museum for thirty years beginning in 2019, provided TFM, TFEC or an affiliated company “continue[s] to conduct operations” on the Museum campus or in certain specified buildings.

See Haker Decl., Ex. 6, §§2-3 & Exs. A-B. In consideration and exchange for the “donations,” the Museum agreed not to enforce the rights it bargained for in the Vintage Chapter 11 Case, namely to operate the Waterpark and host revenue-generating events on the Museum Campus.

TFM was also granted certain naming rights, advertising opportunities, and publicity. *Id.* §§7-10.

The Museum relied on the monthly “donation” payments from TFM to fund its continued presence on the Museum Campus in its current capacity, including its continued presence in the Space Building. *Id.* ¶ 57. The Museum also helped to ensure that the transition of the Waterpark to TFM was successful, providing guidance, support and approximately \$150,000 worth of property, including a Boeing 747 airplane located on top of the Waterpark, Waterpark pool supplies, and other assets that were necessary to operate the Waterpark. *Id.* ¶¶ 38, 90.

The Financing Agreement explicitly provides that TFM’s obligation to make the installment payments was secured by a first-priority security interest in TFM’s revenues:

To secure the [Irrevocable Payment Obligation] for the year 2017 in the amount of \$840,000, *TFM assigns and grants to the Museum a continuing lien and security interest in gross revenue (cash proceeds) earned from TFM’s operation of the Waterpark and TFM-hosted events on the Museum Campus beginning on and after January 1, 2017, and such gross revenue/cash proceeds earned shall act as collateral for the [Irrevocable Payment Obligation] for the year 2017 (“Collateral”).* This Donation & Security Agreement shall, upon execution, immediately create a security interest in the Collateral and attach a lien to such Collateral which shall be a first priority lien over any and all other claims to the Collateral.

Id. §12 (emphasis added). TFM warranted under the Security Agreement that it had a valid interest in the Collateral and that it would not transfer or encumber the interest without the Museum’s consent. Haker Decl., Ex. 6, §13. The Museum perfected this interest by filing UCC-1 statements against each of TFM and TFEC. Haker Decl., Ex. 7 & 8.

D. The Bank Directive Agreement & Deposit Account for Collateral

The obligations of the Debtors under the Financing Agreement were further evidenced by a bank directive agreement drafted by the parties in late 2017 and signed by each of TFEC, TFM

and the Museum (the “**Bank Directive Agreement**”).¹¹ Haker Decl., Ex. 9. The Bank Directive Agreement provided that the Museum’s Collateral under the Financing Agreement would be “deposited into [a Deposit Account] held by US Bank NA” and required TFM “and its officers, directors, employees, representatives, agents, and assigns” to deposit all “Waterpark revenue and Special Event revenue into the Deposit Account.” The Bank Directive Agreement further provided that TFM “shall not take or approve any actions to initially deposit the Waterpark revenue or Special Event revenue into any account other than the Deposit Account without the Museum’s express written consent.” *Id.* at §§ 6, 7. Hindsight suggests that TFM never intended to use the income from the Waterpark to repay the Museum, as evidenced by representations made in the Bankruptcy Cases that the Collateral belongs to TFEC and the Debtors’ complete failure to even acknowledge the Museum’s security interest in its schedules of assets and liabilities. The reality is, income from the Waterpark was likely commingled with income from other sources, and it is not too imaginative to surmise that Waterpark revenues constituting the Museum’s cash collateral were diverted by TFEC’s managers to other creditors and possibly to shareholders and unaffiliated entities of TFEC and/or TFM. Discovery will be necessary to determine where the cash went, and on this issue, the Museum reserves its rights to seek discovery from all potential recipients of such fraudulent transfers.

E. Debtors’ Defaults of the Financing Agreement, Forbearance Agreement, and Amendment

The Financing Agreement provides that if TFM fails to make a required payment after the Museum sends a reminder notice, then TFM is in default. Haker Decl., Ex. 6, §§14, 15. After eighteen (18) days of continuous default, the Financing Agreement requires TFM to initiate an electronic transfer of the Collateral into a “pre-designated Museum account.” *Id.* §17. If TFM

¹¹ Although TFM, TFEC, and the Museum all signed the Bank Directive Agreement in 2017, US Bank refused to sign the agreement. Upon information and belief, the Deposit Account was initially established with US Bank and subsequently moved by TFEC to the Bank of the West in the summer of 2018. *See* Haker Decl., Ex. 11 (Amendment) at Recital C & E.

still fails to cure its default by electronic transfer of the Collateral, the Museum may then require TFEC to obtain a payment bond. *Id.* §25. The Financing Agreement further provides that upon default, the Museum has the right to foreclose on the Collateral and use the proceeds “without judicial process.” *Id.* §16; *see also* §21 (providing the Museum may use self-help remedies to obtain the Collateral).

TFM has repeatedly defaulted under the Financing Agreement since its formation. Rasmussen Decl. ¶ 38. TFM defaulted no less than six (6) times in the first year. *Id.* At the end of 2017, the Museum threatened to sue TFM for being \$210,000 in arrears in its monthly installments as of January 1, 2018, and for misusing the cash collateral that should be reserved for the installment payments. *Id.* ¶ 42. To avoid suit, the parties entered into a forbearance agreement, dated January 2, 2018, to address TFM and TFEC’s ongoing breach of the Financing Agreement and the Bank Directive Agreement (the “*Forbearance Agreement*”). Haker Decl., Ex. 10. The Forbearance Agreement provides that other than a limited one-time exception to use the revenues to pay \$45,000 in payroll expenses, “TFM/TFEC will pay all funds in its Deposit Account and collected going forward from the Wings & Waves Waterpark operations *solely* to the Museum until the balance of the Delinquent Gift obligations are paid in full.” *Id.* §1 (emphasis added).

The Financing Agreement was amended in March of 2018 (the “*Amendment*”) to conform with the Forbearance Agreement. Haker Decl., Ex. 11. The Amendment changed the payment schedule and method of the Irrevocable Payment Obligation under the Financing Agreement. *See id.* The Amendment requires that TFM pay to the Museum all of the funds in the Deposit Account (containing Waterpark and event revenues) as of the first of each month until the \$70,000 monthly gift obligation is fully paid. *Id.* Then and only after such obligation is paid in full would TFM be entitled to use the revenue from the Waterpark and Museum-related events to pay other obligations. *Id.* This arrangement was binding through 2018:

Commencing as of March 1, 2018 and continuing until the 2018 donation payments are paid in full, TFM will pay the first \$70,000 in the Deposit Account each month to the Museum by wire transfer and will not pay any other obligations from the Deposit Account until the applicable monthly donation amount is paid in full. If the Deposit Account does not contain sufficient funds on the 1st day of the month to pay that month's donation payment in full, TFM will wire all funds then in the Deposit Account and make weekly wire transfers to the Museum from the Deposit Account thereafter until the applicable donation payment is paid in full.

Id. at §2. The Amendment also required TFM to provide the Museum with online access to view activity in the Deposit Account and maintain such access for the Museum. *Id.* §3; *see also* Haker Decl., Ex. 12 (John Neubauer Decl. at ¶4) (Manager of TFM, stating: “The primary change to the [Security] Agreement under the Amendment was to change the mode of making payments and to provide [the Museum] with direct view only access to the Deposit Account.”).

In April 2018, TFM again defaulted on its payments to the Museum. Rasmussen Decl. ¶ 40. TFM and TFEC claimed that they were unable to cover operation overhead or payroll at TFEC without using the Waterpark revenue that was supposed to be paid to the Museum, and diverted at least \$125,000 in the Museum’s cash collateral in violation of the Amendment to meet these obligations. *Id.*

F. Debtors’ Continuing Default of the Financing Agreement & State Court Suits

In April 2018, the Museum commenced a lawsuit by filing a complaint in the Oregon Circuit Court for Yamhill County against TFM and TFEC for failure to pay the April monthly installment as required by the amended Agreement and for converting the Museum’s cash collateral.¹² Rasmussen Decl. ¶40. Even after the April lawsuit was filed, TFM and TFEC continued to breach their obligations under the Amendment and improperly divert the Museum’s cash collateral through additional transfers of approximately \$160,000 from the Deposit Account in violation of the Forbearance Agreement and Amendment. *Id.* ¶ 41. The Museum sent a cease

¹² *Evergreen Aviation and Space Museum and The Captain Michael King Smith Educational Institute v. The Falls a McMinnville, LLC, et. al.*, Yamhill Co. Case No. 18cv13584 (the “**April Lawsuit**”).

and desist letter to TFM and TFEC on July 11, 2018 about misuse of the Collateral and subsequently filed a separate lawsuit in July, 2018 based on TFM's failure to pay the July installment due under the Amendment (and future payments) and for misusing the Collateral.¹³ *Id.* ¶¶ 40-42.

To date, the Debtors have failed to make monthly installments for each month from July 2017 to present and they are now in arrears by \$445,000. *Id.* On July 11, 2018, TFEC filed for chapter 11 protection, and on July 27, 2018, TFM filed for chapter 11 protection. The **principal amount** of TFEC and TFM's indebtedness to the Museum continues to increase on a monthly basis **by \$25,000** (exclusive of interest, fees and costs).

G. TFM's Defaults Under the Lease

In addition to defaulting under the Financing Agreement, TFM has also defaulted under its Lease with the Museum for the Space Building, which provides in part:

- TFM is required to maintain insurance as required under the Agreement, including insurance "for and during all After-Hour Events it hosts or hold on the Premises . . . and in conducting administrative and marketing activities on the Premises," which insurance must name the Museum "as an additional insured."¹⁴ Haker Decl., Ex. 14 (Lease § 10.8);
- TFM is required to notify the Museum of any liens that it intends to place on the property. *Id.* (Lease § 7.3) ("If Lessor uses the Property or Premises or parts thereof as security for a debt, financial obligation or commitment owed by Lessor to a third party, including any government agency, then Lessor shall notify Lessee of its

¹³ *Evergreen Aviation and Space Museum and The Captain Michael King Smith Educational Institute v. The Falls a McMinnville, LLC, et. al.*, Yamhill Co. Case No. 18cv30154.

¹⁴ The latest Debtor monthly financial report filed in the TFM Case, discloses that a \$94 million insurance policy may have expired in December. Dkt. #251 To the extent this report indicates that Debtors are not maintaining insurance related to the Space Building that names the Museum as an additional secured, then TFM is in breach of Section 10.8.

intention to take such action at least fourteen (14) days prior to entering into such transaction.”).¹⁵

A material default by TFM under the Lease gives the Museum “the option to terminate the Lease” *Id.* (Lease § 12.3.1).

H. Museum’s Collateral Value; Claims Secured by Museum’s Collateral and by Space Building and Waterpark

1. Value of Museum Collateral

The Museum’s collateral is comprised of gross revenue from 2017 to the present for the Waterpark, and revenue from TFM-affiliated events hosted on the Museum Campus. When the Museum managed the Waterpark prior to transitioning it to TFM on January 1, 2017, the Waterpark generated approximately \$1.25 million to \$1.4 million dollars in *net revenue* each year. Rasmussen Decl. ¶26. Based on its historical performance, the net revenue to date from TFM’s operation of the Waterpark for the past ten (10) months, including during the profitable summer and Spring Break seasons, should have been approximately \$1 million. *See id.* Moreover, the net revenue from TFM-affiliated events hosting on the Museum grounds from 2017 to the present is conservatively estimated to be \$200,000. *Id.* ¶33. The Museum records indicate that since January of 2017, TFM has hosted over 275 events at the Museum Campus, many of which are held in the Aviation Building, the Space Building, and the Theater Building. *Id.*

2. Claims Secured By Museum Collateral

It cannot be disputed that TFEC lacks equity in the Museum’s cash collateral because it was never entitled to it in the first place. Even if TFEC was entitled to the receipts from

¹⁵ Excluding the Museum, four creditors have filed documentation in the TFM case showing that TFM/TFEC issued them a Deed of Trust encumbering the Space Building property. *See* TFM Bankr. Claims 6-1, 7-1, 8-1; Dkt. #35 (Liu Motion) at 11-69. TFM did not provide the Museum with notice of any of these liens, as required under the Lease. Rasmussen Decl. ¶ 51. Moreover, TFM’s Schedules identify liens on the Space Building securing approximately \$12 million of indebtedness.

operating the Waterpark and event hosting on the Museum Campus, there are approximately \$500,000 in delinquent payments that are currently outstanding under the Financing Agreement, and every month the Bankruptcy Cases remain in chapter 11 protection, the outstanding amount of delinquent payments increases by \$25,000 a month. Because the Museum's claim is secured by a first-position lien, its claim must be included in the analysis regarding whether TFEC or TFM have any equity in the Museum's collateral. Moreover, there are anywhere between \$6,574,479.17 and \$12,106,763 in claims potentially secured by the Museum's collateral, plus an additional \$1,165,804 claim asserted by Yamhill County. *See* TFEC Dkt. No. 129; TFM Dkt. No. 18. In fact, from TFEC's Schedules, it appears that TFEC cross-collateralized its secured indebtedness with the Waterpark's revenues and the revenues generated by TFM from hosting events on the Museum Campus.

There is perhaps a more alarming development that warrants timely relief: not only is the Museum's secured claim increasing materially on a monthly basis (by \$25,000 in additional principal past due), but Yamhill Count's secured claim for \$1,165,804.13, which is "based on 2016-2018 real and personal property taxes, plus interest" (*see* Proof of Claim 10-1), continues to accrue interest at the rate of 16% annually (*i.e., interest of more than \$60,000 has accrued just since the Bankruptcy Cases were filed, and it continues to accrue at over \$10,000 per month*).¹⁶ *Id.*

I. TFEC's Use of the Museum's Cash Collateral Has Not Been Authorized by the Bankruptcy Court in the TFEC Chapter 11 Case

The Museum is aware that most, if not all, of its cash collateral has either been spent by TFEC or otherwise commingled with funds from other sources at TFEC, notwithstanding material misstatements made by TFEC at the final hearing in connection with TFEC's Emergency Motion for Order Authorizing Use of Cash Collateral and Provision of Adequate

¹⁶ Yamhill County can claim default post-petition interest to the extent its claim is oversecured. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

Protection (“*Cash Collateral Motion*”). See TFEC Chapter 11 Case, Dkt. #6 (requesting use of “cash from operations of the Operating Event Centers”). At that final hearing, TFEC made the following representations to this Court: *first*, that it held less than \$40,000 in cash and that all of those funds had already been spent (*Id.*, Dkt.#35 (Audio of Final Hearing on the Cash Collateral Motion) at 2:38-2:42, 3:33-3:44); *second*, that each of TFEC’s subsidiaries, including TFM, did not have employees or even a bank account (*Id.* at 11:42-12:06); and *third*, that the Waterpark is owned by TFEC and all proceeds from the Waterpark are deposited in TFEC accounts (*Id.* at 12:09-13:09).¹⁷ *Id.* This Court expressed concern that income generated from the Waterpark might have an impact on the TFM bankruptcy. *Id.* at 12:06-13:40. In response, TFEC incorrectly advised this Court that TFEC owns all such revenues from the Waterpark (*Id.* at 12:06-13:38), a representation that---based on the Prepetition Transaction Documents---is demonstrably false.¹⁸ Based on this material misrepresentation, this Court concluded that the TFM estate would not be impacted by TFEC’s use of Waterpark and event revenues. *Id.* at 13:18-13:40.

Coupled with (i) TFEC and TFM’s blatant refusal to acknowledge in each of the Debtor’s Schedules and SOFAs that the Museum is a secured creditor of TFEC and TFM (albeit, presumably, a creditor with a disputed claim), and (ii) TFEC’s failure to provide the Museum proper notice of the Cash Collateral Motion (*see* TFEC Dkt. No. 6) filed on July 13, 2018, the Museum believes that TFEC and TFM continued to engage in deceptive and fraudulent behavior after the TFEC Petition Date. It is undisputed that TFEC’s Cash Collateral Motion failed to comply with FRBP 4001(b), which *requires* that a motion to use cash collateral *must* be served

¹⁷ This financial relationship was echoed by TFM’s representative at the 341 Meeting of Creditors for this case, held on August 28, 2018. See Haker Decl., Ex. 13 (341 Meeting Transcript). At that time, TFM’s representative explained that TFM has no revenue and all cash is held by TFEC. *Id.*

¹⁸ These representations are inaccurate because, as explained above, TFM accepted an assignment of TFEC’s rights under the TFEC APA, and one of those rights was the right that the Museum had to operate the Waterpark and receive the revenues therefrom. See Haker Decl., Exs. 2, 3, 4, 5.

on “any entity with an interest in the cash collateral” and that notice of the hearing to approve such motion shall be given to any party upon which the debtor must serve the motion.

Thus, it appears most, if not all, of the Museum’s cash collateral was held in accounts by TFEC, notwithstanding that such revenue belonged with the wholly-owned subsidiary, TFM. That the Prepetition Transaction Documents evidence TFM’s ownership of the receipts from the Waterpark’s operation and hosting of events on the Museum Campus was not disclosed to the Court. Nor did TFEC disclose to this Court (neither at the hearing on the Cash Collateral Motion or in the Debtors’ Schedules) that the Museum had properly perfected its consensual security interest against TFEC and TFM by filing UCC financing statements, notwithstanding TFEC and TFM knew of the Financing Agreement and the grant by TFEC and TFM of a security interest to the Museum.¹⁹

While the appointment of the Trustee should clear the cloud over TFEC and TFM’s mismanagement, such appointment does not moot the fraudulent movement of cash from TFM to TFEC. Moreover, while the Waterpark remains open and TFM-related entities still host for-profit events on the Museum grounds, these Bankruptcy Cases have cast a long shadow over the Museum Campus and Waterpark, and interest in TFM-hosted events has dwindled due to poor management. Rasmussen Decl. ¶34.

////

////

////

////

////

¹⁹ At the 341 Meeting of Creditors for this case, in response to questioning from the Museum’s counsel, TFM’s representative explained his understanding of the Financing Agreement as: “The first \$70,000 of revenue that came from the Waterpark was used to, effectively as a donation to the museum each month.” See Haker Decl., Ex. 13 (341 Meeting Transcript).

IV. LEGAL AUTHORITY AND ARGUMENT

A. Pursuant to Section 362(d)(1), this Court Should Terminate the Stay to Allow the Museum to Exercise Its Rights with Respect to Revenue Generated From TFM’s Assets.

1. “Cause” for Material Misrepresentations and Omissions

“Cause” exists under Section 362(d)(1) to provide relief from the automatic stay based on TFEC’s misrepresentations to the Court. *See In re Gledhill*, 76 F.3d 1070, 1081 (10th Cir. 1996) (holding “cause” for relief from stay under 11 U.S.C. § 362(d)(1) existed where debtor acted in bad faith). A creditor should “receive an exemption from the automatic stay when a debtor has committed acts of active malfeasance.” *In re Kolberg*, 199 B.R. 929, 934 (W.D. Mich. 1996). Further, “bad faith and, thus, ‘cause’ may exist when a debtor has acted improperly in some way toward the movant-creditor during the prepetition period” *In re Vessa*, No. 03-21712, 2004 WL 2640350, at *4 (B.A.P. 10th Cir. Nov. 18, 2004). *In re Kolberg* is illustrative. There, the Court held the debtors’ malfeasance in attempting to avoid a creditor’s lien in crops “exempted” the creditor from the stay. *Id.* at 934. Because the “evidence indicate[d]” that the debtors took steps to “circumvent the lien” on their property, relief from the automatic stay was retroactively granted to the creditor, who had already foreclosed on its collateral. *Id.* at 933.

Here, like *In re Kolberg*, bad faith exists because TFEC improperly diverted the Museum’s cash collateral in the prepetition period and TFEC failed to disclose to the Court the Museum’s interest in the cash collateral in its Cash Collateral Motion. Moreover, TFEC failed to even serve the Cash Collateral Motion on the Museum. TFEC’s failure, coupled with TFEC and TFM’s refusal to acknowledge in their respective Schedules the undisputed facts that: (1) each debtor granted the Museum a security interest in revenues from the Waterpark and TFM-hosted events on the Museum Campus prior to the TFEC Petition Date, and (2) the Museum perfected its security interest granted by TFEC and TFM prior to the TFEC Petition Date, constitutes “cause” to lift the stay.

The underlying facts warrant a walk through. ***First***, TFM and TFEC represented to the Museum during the prepetition period that TFM was the party with an interest in the Waterpark revenues. ***Second***, based on this representation, the Museum agreed to give up its right to operate the Waterpark and for-profit events on the Museum Campus, in exchange for a security interest in gross revenue from TFM's operation of the Waterpark and TFM-sponsored events. Haker Decl., Ex. 6, § 24 (explaining the Museum "reasonably relie[d]" on these representations in entering "into contracts with TFEC, TFM, and other entities" and in agreeing to "not enforce the Museum's rights to operate the Waterpark"). In fact, all of the Prepetition Transaction Documents clearly evidence an assignment of all revenues relating to the Waterpark and TFM-hosted events on the Museum Campus from TFEC to TFM, as do the Forbearance Agreement and Amendment that predated the TFEC Petition Date by only a few months.

Third, merely a few days after TFEC filed for chapter 11 protection, it sought emergency relief from this Court to use cash collateral, did ***not*** serve the Cash Collateral Motion on the Museum, did ***not*** represent in the Motion that TFEC had granted the Museum a prepetition security interest that the Museum had properly perfected, and represented in open court that TFEC owned the revenues that presumably were being upstreamed to TFEC well before the TFEC Petition Date. In fact, when this Court explicitly asked counsel to confirm "on the record . . . [that] the income that is generated [from the Waterpark] doesn't have any cash collateral or budget implications for the Falls at McMinnville,"²⁰ TFEC failed to inform the Court of TFEC's assignment of its interest in the cash collateral to TFM or of the Museum's security interest in the cash collateral. TFEC represented to this Court that TFM has no rights to the Waterpark revenue, even though under the Financing Agreement, TFM explicitly warranted that it had such rights. See Haker Decl., Ex. 6, §13. These material misstatements and material omissions

²⁰ TFEC Bankr., Dkt.#35 (Audio of Final Hearing on the Motion for Use of Cash Collateral) at 12:07-12:42.

directly contradict the prepetition agreements between the parties,²¹ including the Financing Agreement identified on TFM's Schedules ***but not identified on TFEC's Schedules even though TFEC was a party to the Financing Agreement.***

Fourth, a few weeks later TFM filed for chapter 11 protection, and at its 341 meeting, Mr. Pickering testified under penalty of perjury that TFM never had a deposit account during the prepetition period. *See* Haker Decl., Ex. 13. To make matters worse, neither TFEC nor TFM's respective Schedules reflected material agreements entered into by and between the Museum on the one hand and TFM and TFEC on the other hand, including a common use agreement pursuant to which the Museum granted TFM access to the Aviation Building and Theater Building to host its events, as well as the Waterpark Transition Agreement that actually reflected TFM's assumption of all of TFEC's rights under the TFEC APA that was approved by the Bankruptcy Court in Oregon. *See* Haker Decl. Exs. 15 & 17. That this duplicity extended well into the post-petition period provides only further support for termination of the stay and dismissal of the TFM case so that the Museum can exercise its rights under the Prepetition Transaction Documents.²²

In sum, despite this Court identifying the exact issue the Museum now faces at the hearing on the Cash Collateral Motion, TFEC did not disclose the interest of TFM and its creditors, especially the Museum, in the cash collateral at issue. TFEC Bankr., Dkt.#35 at 13:17 (***“My concern, or what I wanted to clarify, is if the affiliate is the one operating and generating the cash, then that would raise issues in that case . . .”***) (emphasis added). The

²¹ As part of the Financing Agreement, TFM accepted an assignment of TFEC's rights under the TFEC APA, one of those rights being operating the Waterpark and receiving the revenues therefrom. *Id.* Recital ¶B.

²² In addition to relief from stay to exercise its rights under the Prepetition Transaction Documents, the Museum has filed a Motion to Dismiss the TFM case (***“Motion to Dismiss”***). A hearing on the Motion to Dismiss was scheduled for January 22, 2019. The Museum has continued the hearing on the Motion to Dismiss so that it can be heard at the first hearing on this Motion.

Museum had no knowledge or notice that TFEC was making such representations and disavowing TFM's interest in the cash. Thus, the Museum was deprived of any opportunity to protect its interest under the Bankruptcy Code due to TFEC and TFM's omissions of material fact to the Court.

2. "Cause" for Lack of Adequate Protection

The Museum is experiencing irreparable harm from the missed payments by the Debtors and the diversion of its Collateral. The Debtors currently are in arrears for more than \$445,000 under the Financing Agreement and their obligations to the Museum continue to accrue. Rasmussen Decl. ¶43. The Museum's operations rely on the receipt of monthly installment payments from the Debtors. *Id.* ¶44. If the Museum does not acquire relief for the Debtors' non-payment, the Museum will be unable to meet all of its financial obligations in 2019 under the current budget which, as a non-profit, it has a fiduciary obligation to do. *Id.* ¶45. In other words, if the Museum is not provided with relief from stay to exercise its rights and remedies under the Lease and the other Prepetition Transaction Documents, the Museum Board may be faced with the choice of either violating the automatic stay or operating the Museum at a financial loss in breach of its fiduciary duties. *Id.* Replacement liens at this point are insufficient to remedy the harm done to the Museum from TFM and TFEC's failure to make the installment payments, in light of TFEC's conversion of TFM's assets and use of same for other purposes, including the administration of the TFEC estate.

To compound this problem, TFM's failure to make the monthly payments is publicly known, and negatively affects the Museum's fundraising – which is another critical component to the Museum's ongoing viability and success. *Id.* ¶¶ 49-51. And if the Museum were unable to continue attracting visitors, undoubtedly, these Debtors' estates will suffer. Thus, the stay should be lifted for the Museum to realize upon its cash collateral and mitigate damages in connection with the day-to-day operations of the Museum Campus.

B. An Accounting of All Cash Proceeds from TFM’s Assets Is Necessary and Future Proceeds Should be Deposited in the TFM DIP Account

This Court has already ordered that the Museum is entitled to adequate protection to the extent its security interest in revenues generated from the Waterpark’s operations and the event-hosting business on the Museum Campus is not avoided.²³ In fact, the order granting the Cash Collateral Motion (“*Cash Collateral Order*”) in the TFEC case provides that any secured creditor with a valid perfected lien in the cash collateral will be entitled to adequate protection in the form of replacement liens. *See* TFEC Bankr., Dkt. #34 (granting “any . . . party . . . holding a valid, perfected and unavoidable lien on or other interest in Cash Collateral . . .[a] valid, automatically perfected post-petition replacement lien[], pursuant to 11 U.S.C. § 361, on the Debtor’s post-petition cash and accounts receivable.”). However, because that relief was granted based on a misrepresentation by TFEC’s counsel regarding the interest of TFM in that cash,²⁴ there has been a significant prejudicial effect of the Cash Collateral Order on the Museum for which replacement liens are inadequate---namely, that TFEC has continued to intentionally defraud the creditors of TFM by diverting TFM’s cash to TFEC for its own use, *including presumably to enable it to pay for all the administrative expenses incurred by TFEC in its chapter 11 case to date. This must stop immediately.*

In fact, the Cash Collateral Order neither requires TFEC to account for the income that has been upstreamed by TFM to TFEC, nor segregate TFM income from other funds in its deposit accounts. As a result, part of the relief this Motion seeks is to remedy the harm caused by the misrepresentations made to this Court that TFEC was legally entitled to the proceeds from

²³ To the extent interested parties in these Bankruptcy Cases assert claims to avoid the Museum’s security interest, then the entire transaction that was approved by the Bankruptcy Court in the MKSF Chapter 11 Case (as evidenced by the TFEC APA and the Prepetition Transaction Documents) is subject to avoidance, and the MKSF Chapter 11 Case may need to be reopened because an operating asset and significant real property (i.e., the Waterpark and Space Building) may be returned to the MKSF estate for additional administration in the Bankruptcy Court in Oregon.

²⁴ *See generally* TFEC Bankr., Dkt.#35 (Final Hearing on the Motion for Use of Cash Collateral) at 12:06-13:40.

the Waterpark's operation and TFM's event-hosting business. An accounting of receipts and disbursements made by TFEC since the TFEC Petition Date will provide the Museum with the information necessary to determine whether TFEC should make adequate protection payments for its ongoing use of the Museum's cash collateral, and furthermore, all income generated from the Waterpark and Museum campus should be segregated in the TFM DIP Account to avoid improper use going forward.

C. Relief from the Automatic Stay Pursuant to Section 362(d)(2) Is Warranted Because Neither TFEC Nor TFM Have Equity in the Museum Collateral, and the Museum Collateral Is Not Necessary to a Reorganization of TFM or TFEC

Section 362(d)(2) provides that a court shall grant relief from the automatic stay with respect to property if (1) the debtor does not have equity in the property; and (2) the property is not necessary to an effective reorganization. The debtor has the burden of proof on all issues related to relief from the stay other than the debtor's equity in the property. 11 U.S.C. § 362(g); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76 (1988); *In re Canal Place Ltd.*, 921 F.2d 569, 576 (5th Cir. 1991). In this case, the Museum will carry its burden to prove that the Debtors lack any equity in the Collateral, while the Debtors cannot carry their burden to show that it has a reasonable possibility of a successful reorganization within a reasonable time using the Waterpark revenues and TFM-hosted events on the Museum Campus. Notably, it is Debtors, not the Museum, that has the burden here on the issue of its prospect of reorganizing.

1. The Debtors Have No Equity in the Museum Collateral

Debtors' lack of equity in the collateral is not in serious dispute. Equity is simply the value of a property above all secured liens. *Stewart v. Gurley*, 745 F.2d 1194, 1196 (9th Cir. 1984). The Museum's Collateral comprises approximately \$1.4 to \$1.6 million per year. The Waterpark earns approximately \$1.25 million to \$1.4 million dollars net each year. Rasmussen Decl. ¶26. And Museum's records reflect and suggest that TFEC has earned about \$200,000 annually in revenue for hosting special events on the Museum Campus. *Id.* ¶32. Most, if not all

of this revenue has been spent. In fact, TFEC represented to this Court months ago that it held less than \$40,000 in cash and that all of those funds had already been spent. TFEC Bankr., Dkt.#35 (Audio of Final Hearing on the Motion for Use of Cash Collateral) at 2:38-2:42, 3:33-3:44. Moreover, TFEC has no equity in the collateral because it has no right to the collateral.

Even if the cash were not already spent, the evidence shows that Debtors are overextended on any incoming cash or receivables. As of the end of 2018, the Museum's claim for unpaid, irrevocable donations totaled \$420,000 and the Museum also listed the following additional damages in its proof of claim:

- o Contingent secured claim for damages of \$6,000,000 pursuant to section 3 of the Financing Agreement for payments due beginning in 2019, along with fees and costs.
- o Damages in an amount to be determined for Debtors' breach of section 13(b) of the Financing Agreement, which prohibits Debtor from, among other things, encumbering Creditor's collateral without Creditor's prior written consent.

See Proof of Claim 4-1 at 4-5. Moreover, taking into consideration the claims of other secured lenders of Debtors,²⁵ both Debtors are underwater on the Collateral, irrespective of whether the additional damages owed to the Museum are taken into account. Thus, TFM and TFEC have no equity in the Collateral (i.e., incoming receipts from the Waterpark and events hosted on Museum-grounds).²⁶

²⁵ Including only the creditors mentioned at the cash collateral hearing in the TFEC case, there are at least two companies that were promised all future income earned by TFEC and one company that was promised 15% of all future income. All three of these companies -- GTR Source LLC, Richmond Capital Group LLC, and Richmond Funding -- were granted a security interest in TFEC's future receivables (i.e., the Cash Collateral). *See* TFEC Bankr., Dkt. #6 at 3-6.

²⁶ The Museum intends to take limited discovery of the secured creditors and their claims to determine whether certain of the secured creditors were not granted a security interest in the Debtors' revenues from TFM and diversion of those revenues to TFEC.

2. Debtors Cannot Carry Their Burden To Demonstrate the Collateral Is Necessary to an Effective Reorganization

Debtors must show that the collateral is necessary for an effective reorganization. See 11 U.S.C. § 362(d)(2). To carry its burden, Debtors must demonstrate not only that the property is essential to a reorganization that is “in prospect,” but also that there is a “reasonable possibility of a successful reorganization within a reasonable time.” *Timbers*, 484 U.S. 376 (internal quotation marks and citation omitted) (allocating burden of proof on feasibility prong to debtor).

This burden cannot be carried by a proposed plan that fails to take into account the actual market and economic conditions. See *In re Pegasus Agency, Inc.*, 101 F.3d 882, 887 (2d Cir. 1996) (“[T]here is no evidence in the record demonstrating that Hochman personally, or others on his behalf, have performed the kind of research, analysis and projections, generally referred to as due diligence, required to make any reliable assessment of the financial feasibility of any plan to develop the Property.”). The Debtors must offer more than conclusory statements that reorganization is possible; they must offer credible assumptions and projections that provide a basis grounded in fact that a confirmable plan is “in prospect.” *In re Anderson Oaks (Phase I) Ltd. P’ship*, 77 B.R. 108, 110 (Bankr. W.D. Tex. 1987). In short, speculative plans of reorganization do not meet the second prong of section 362(d)(2) as a matter of law. *In re Kent Terminal Corp.*, 166 B.R. 555, 562 (Bankr. S.D.N.Y. 1994) (plan predicated on “mere conjecture” and “debtor’s euphoria” not sufficient; “an effective reorganization would not require a single undersecured creditor to bear the brunt of such speculation”); *In re Tejal Inv., LLC*, No. BR 12-28606, 2012 WL 6186159, at *3 (Bankr. D. Utah Dec. 12, 2012) (finding no reasonable possibility of a successful plan where the only evidence presented by the Debtor in support of the plan was “vague and speculative”).

Here, the Bankruptcy Cases filed by TFM and TFEC have been pending since July 2018, and yet Debtors have not attempted to negotiate a confirmable plan in the six (6) months since the petitions were filed. Further, they have not undergone the market analysis and due diligence necessary to put together a confirmable plan, and thus a plan likely will not be confirmed for the

foreseeable future. To the extent the Trustee intend to argue that this Motion is premature, courts have recognized that the Debtors' burden to prove that a confirmable plan is in prospect is higher after the expiration of the exclusivity period. *See In re Sun Valley Newspapers, Inc.*, 171 B.R. 71, 75 (B.A.P. 9th Cir. 1994) ("After the expiration of the exclusivity period, the debtor must offer sufficient evidence to indicate that a successful reorganization within a reasonable time is assured." (internal quotation marks and citation omitted)). The exclusivity period has expired in both cases.²⁷ Debtors, therefore, carry a high burden in opposing this Motion and must show a confirmable plan is "probable" within a reasonable time frame. *In re Tejal Inv., LLC*, 2012 WL 6186159, at *3. They cannot do so. Relief from the stay is, therefore, appropriate under section 362(d)(2).

V. CONCLUSION

Because the Museum's cash collateral is not adequately protected and the Museum has been deprived of repayments under the Financing Agreement that may require the Museum to implement an operational restructuring, the Museum should be granted an order under Sections 362(d)(1) and 362(d)(2) modifying the automatic stay to permit the Museum (i) to exercise its rights and remedies under the Prepetition Transaction Documents, including without limitation the Lease and the Financing Agreement; (ii) to mitigate damages in connection with the day-to-day operations and activities of TFEC and/or TFM on the Museum Campus; and (iii) to inform Yamhill County that the Museum may need to vacate the Lease and thus will not be applying for a property exemption by April 1, 2019.

////

////

////

²⁷ The exclusivity period lasts until 120 days after the bankruptcy petition is filed. 11 U.S.C. § 1121(b). This period expired in the TFEC case on November 8, 2018, and in the TFM case on November 26, 2018.

In addition, the relief granted by this Court should require the Trustee to provide an accounting of all receipts and disbursements from the Waterpark and TFEC activities on the Museum campus and segregate all income going forward in the TFM DIP Account.

DATED: January 15, 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 15th day of January, 2019 I filed a true and correct copy of the foregoing Motion For Relief From Stay And Memorandum In Support Of Motion 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
- 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; rene.alvin@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 mjohanson@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, intaketteam@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

I further certify the below parties who are not on the list to receive email notice/service for this case were served by U.S. First Class mail the 15th day of January, 2019.

Richard N. Bauer
1789 Bella Lago Drive
Clermont, FL 34711-4634

Albert B Clark
696 East 1220 North
Orem, UT 84097

Richard W. Johnston
6855 S. Havana St. #275
Centennial, CO 80112-3813

Meilin Liu
2601 Blanding Avenue, C307
Alameda, CA 94501-1579

State of Oregon
Department of Revenue
955 Center St NE
Salem, OR 97301-2555

The Claro Group, LLC
711 Louisiana Street, Suite 2100
Houston, TX 77002

DATED: January 15, 2019



René A. Alvin