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Unsecured Creditors*

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

In re:

RED ROSE, INC.

- ☐ Affects Beachhead Roofing and Supply, Inc.
- ☐ Affects California Equipment Leasing Association, Inc.
- ☐ Affects Beachhead Roofing and Supply, Inc.
- ☐ Affects Fences 4 America, Inc.
- ☐ Affects James Petersen Industries, Inc.
- ☐ Affects PD Solar, Inc.
- ☐ Affects Petersen Roofing and Solar LLC
- ☐ Affects Petersen-Dean, Inc.
- ☐ Affects PetersenDean Hawaii LLC
- ☐ Affects PetersenDean Roofing and Solar Systems, Inc.
- ☐ Affects PetersenDean Texas, Inc.
- ☐ Affects Red Rose, Inc.
- ☐ Affects Roofs 4 America, Inc.
- ☐ Affects Solar 4 America, Inc.
- ☐ Affects Sonoma Roofing Services, Inc.
- ☐ Affects TD Venture Fund, LLC
- ☐ Affects Tri-Valley Supply, Inc.
- ☒ Affects All Debtors

Debtors.

Case No.: 20-12814-mkn

Jointly Administered with

Case No. BK-S-20-12815-mkn  
Case No. BK-S-20-12816-mkn  
Case No. BK-S-20-12818-mkn  
Case No. BK-S-20-12819-mkn  
Case No. BK-S-20-12820-mkn  
Case No. BK-S-20-12821-mkn  
Case No. BK-S-20-12822-mkn  
Case No. BK-S-20-12823-mkn  
Case No. BK-S-20-12824-mkn  
Case No. BK-S-20-12825-mkn  
Case No. BK-S-20-12826-mkn  
Case No. BK-S-20-12827-mkn  
Case No. BK-S-20-12829-mkn  
Case No. BK-S-20-12831-mkn  
Case No. BK-S-20-12833-mkn

Chapter 11

**OBJECTION OF OFFICIAL  
COMMITTEE OF UNSECURED  
CREDITORS TO DEBTORS'  
MOTION FOR APPROVAL OF  
COMPROMISE, PURSUANT TO FED.  
R. BANKR. P. 9019, BY AND AMONG  
TD VENTURE FUND, LLC, JAMES P.  
PETERSEN, TRICIA YEH PETERSEN  
AND ACF FINCO I, LP**

Hearing Date: September 17, 2020  
Hearing Time: 9:30 a.m.

**TO THE HONORABLE MIKE NAKAGAWA, UNITED STATES BANKRUPTCY JUDGE, THE DEBTORS AND THEIR COUNSEL, AND TO THE OFFICE OF THE UNITED STATES TRUSTEE:**

The Official Committee of Unsecured Creditors (the “Committee”) of TD Venture Fund, LLC (“TD Venture”) and the above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), respectfully submits this objection (this “Objection”) to the *Debtors’ Motion for Approval of Compromise, Pursuant to Fed. R. Bankr. P. 9019, by and Among TD Venture Fund, LLC, James P. Petersen, Tricia Yeh Petersen and ACF Finco I, LP* [ECF 739] (the “Motion”).<sup>1</sup> In support of the Objection, the Committee submits the *Declaration of Seth Freeman in Support of Objection of Official Committee of Unsecured Creditors to Debtors’ Motion for Approval of Compromise, Pursuant to Fed. R. Bankr. P. 9019, by and Among TD Venture Fund, LLC, James P. Petersen, Tricia Yeh Petersen and ACF Finco I, LP* (the “Freeman Declaration”) filed contemporaneously with this Objection.

In further support of this Objection, the Committee represents as follows:

**PRELIMINARY STATEMENT**

No party will be heard to argue that these chapter 11 cases have been easy. Since the first day hearing (or more accurately, the hearing before the first day hearing), parties including the Debtors’ prepetition lender, ACF, have gone to great lengths protecting their interests while maintaining a cautious, forward-looking approach in these cases. In some respects, those efforts have paid off.

Despite ongoing operational issues and cash flow disruption, the Debtors and ACF agreed to, and the Court entered an order authorizing, use of cash collateral on a final basis,

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<sup>1</sup> Capitalized terms not otherwise defined in this Objection will have the meaning set forth in the Motion.

1  
2 the Debtors received approval for a critical vendor program intended to boost receivables,  
3 and, when receivables still lagged, entered into a factoring arrangement that provided  
4 advances to the Debtors' estates on which the Debtors are currently operating.

5 Now, the Motion suggests that we are back to square one. According to the Debtors,  
6 the extreme actions Debtor TD Venture must take, disposing of potentially valuable assets  
7 in favor of ACF, is necessary to allow for the consensual use of cash collateral and to resolve  
8 expensive pending contested matters and litigation, allowing the Debtors to move toward a  
9 reorganization. To be specific, as part of this settlement, the Debtors propose to assign to  
10 ACF an estate on the island of Maui, Hawaii, which the Committee estimates, based on a  
11 recent appraisal, a value between \$8.4 million and \$9.25 million.  
12

13 Notwithstanding the transfer of such a valuable asset to ACF, the Settlement  
14 Agreement does not appear to provide any benefit to the Debtors. In fact, the entire rationale  
15 posed by the Debtors to approve this settlement is counter factual. The Debtors ignore the  
16 existing order allowing the consensual use of cash collateral and the order approving  
17 advances under a factoring arrangement that negates the need for future use of cash  
18 collateral. As a result, there is no proposed additional use of cash collateral in the settlement  
19 or the Motion, nor is there any evidence as to the necessity of same. Similarly, no pending  
20 contested matters or other pending litigation between the Debtors and ACF are identified  
21 that would be resolved as a result of this agreement. It is unclear, then, what, if anything, is  
22 being resolved between ACF and the Debtors.  
23  
24

25 The Debtors (other than TD Venture) are not parties to the settlement. The  
26 Settlement Agreement (as defined herein) clearly states that the parties entered into the  
27 agreement "for the purpose of resolving the Guaranteed Obligations and any other alleged  
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1  
2 claims or causes of action between [TD Venture], [Mr. and Mrs. Petersen], and [ACF].” By  
3 its own terms, the Settlement Agreement does nothing the Debtors contend it accomplishes.  
4 There is no discussion of how the assigned property would reduce the balance of the  
5 Debtors’ prepetition obligation to ACF. In reality, the Settlement Agreement allows ACF  
6 to take control of assets and release claims TD Venture may have against it before any  
7 potential causes of action are raised challenging the validity of ACF’s interest in TD  
8 Venture’s property.  
9

10 As part of its investigation throughout these cases, the Committee has found that  
11 ACF’s rights in and to TD Venture’s property are likely subject to avoidance. In the brief  
12 time the Committee has been appointed in the TD Venture chapter 11 case,<sup>2</sup> it has uncovered  
13 evidence that the proceeds TD Venture used to acquire its property came from, at least in  
14 part, other Debtors, even though TD Venture is wholly owned by James and Tricia Petersen.  
15 This discovery could provide an avenue for other Debtors to obtain value from TD  
16 Venture’s assets if they are not assigned to ACF as the Debtors intend under the Settlement  
17 Agreement. With its broad releases, the Settlement Agreement would foreclose any  
18 opportunity for TD Venture to take appropriate action to preserve value for its own estate  
19 as well as potentially the estates of other Debtors. Removing one of the few potential  
20 sources of unencumbered value from the estate prematurely may have the unintended  
21 consequence of harming the Debtors’ ability to reorganize rather than assisting in it as the  
22 Debtors claim.  
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27 <sup>2</sup> The Committee was appointed in the TD Venture chapter 11 case on August 26, 2020. *See Amended Notice*  
28 *of the Official Committee of Unsecured Creditors for the Estates of all Captioned Debtors* [ECF 811].

1  
2 As there are currently no pending disputes that require resolution between the  
3 Debtors and ACF, and the Debtors continue to operate on the advances from their factoring  
4 arrangement, there is no urgency to bless this so-called settlement. The Committee should  
5 be permitted to complete its investigation and TD Venture should have time to weigh  
6 possible actions to preserve value for its estate and affiliated Debtor estates before the  
7 Settlement Agreement can be approved. Accordingly, the Motion to approve the Settlement  
8 Agreement should be denied at this time.  
9

### 10 **BACKGROUND**

11 1. On June 11, 2020 (the “Petition Date”), each of the Debtors filed a voluntary  
12 petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy  
13 Court for the District of Nevada (the “Court”), commencing the Debtors’ chapter 11 cases  
14 (the “Chapter 11 Cases”). The Debtors continue to operate their businesses and manage  
15 their properties as debtors in possession pursuant to sections 1107 and 1108 of the  
16 Bankruptcy Code.  
17

18 2. On June 27, 2020, the United States Trustee for the District of Nevada (the  
19 “U.S. Trustee”) formed the Committee in the Chapter 11 Cases appointing the following  
20 parties as members of the Committee: (i) ABC Supply Company, Inc.; (ii) Beacon Sales  
21 Acquisition, Inc.; (iii) DJ Roof and Solar Supply, LLC; (iv) Export Development Canada /  
22 Exportation et Développement Canada; (v) Fabian Covarrubias as Class Action  
23 Representative; (vi) National Union Fire Insurance Company of Pittsburgh, Pa.; and (vii)  
24 Sterling National Bank [ECF 151].  
25  
26  
27  
28

**A. The Prepetition Loan Agreement.**

3. On June 29, 2017 Debtor Petersen-Dean, Inc. (“PDI”) and its subsidiary Debtors, California Equipment Leasing Association, Inc.; Fences 4 America, Inc.; PD Solar, Inc.; PetersenDean Roofing and Solar Systems, Inc.; PetersenDean Texas, Inc.; Red Rose, Inc.; Roofs 4 America, Inc.; Solar 4 America, Inc.; Sonoma Roofing Services, Inc.; and Tri-Valley Supply, Inc. (collectively, the “Initial Borrowing Debtors”) and ACF Finco I, LP (“ACF” or the “Lender”) entered into that certain Loan and Security Agreement (the “Loan Agreement”) providing the Initial Borrowing Debtors a revolving credit facility of no greater than \$30 million. TD Ventures was not an Initial Borrowing Debtor.

4. The Borrowing Debtors’ obligations under the Loan Agreement was secured by the Initial Borrowing Debtors’ personal property<sup>3</sup> and that certain Collection Account Agreement dated June 16, 2017 between ACF and the Initial Borrowing Debtors. As of June 30, 2020, outstanding obligations under the Loan Agreement were approximately \$28.4 million, making ACF the largest secured creditor of the Debtors. *See* Declaration of Jeffrey C. Perea in Support of Debtors’ Motion for Approval of Compromise, Pursuant to Fed. R. Banks. P. 9029, by and Among TD Venture Fund. LLC, James P. Petersen, Tricia Yeh Petersen and ACF Finco I, LP [ECF 740] (the “Perea Declaration”) at ¶ 9.

5. On or about June 22, 2018, James Petersen, as a result of a covenant violation on a personal loan and in exchange for a reduction in the interest rate and an extension on

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<sup>3</sup> While the personal property of the Initial Borrowing Debtors on which ACF asserts a security interest includes commercial tort claims, neither the Loan Agreement nor any supporting documents properly provides a schedule of commercial tort claims to satisfy the particularity requirement to properly attach liens to such claims. *See* U.C.C. § 9-108(e). If ACF does not agree that its prepetition liens do not extend to commercial tort claims, the Committee intends to challenge those liens.

1  
2 the maturity date under the Loan Agreement<sup>4</sup> entered into that certain Amended and  
3 Restated Continuing Guaranty (the “Petersen Guaranty”). Mr. Petersen is the founder and  
4 majority shareholder of PDI. Under the Petersen Guaranty, Mr. Petersen guaranteed the  
5 Initial Borrowing Debtors’ obligations under the Loan Agreement. The Petersen Guaranty  
6 is secured by certain deeds of trusts for real property owned Mr. Petersen located in Truckee,  
7 CA and Aptos, CA.

8  
9 6. According to TD Venture’s Statement of Financial Affairs [ECF 351], TD  
10 Venture is not a subsidiary of PDI. Rather, TD Venture is affiliated with the Initial  
11 Borrowing Debtors through the 50% ownership interest in TD Venture. *See* Statement of  
12 Financial Affairs, p. 5 of 6. The Committee is currently investigating the source of funds  
13 used by TD Venture to purchase the Hawaii Property. At present, the Committee has found  
14 that a significant portion of the funds used to purchase the Hawaii Property may have come  
15 from other Debtors. *See* Freeman Declaration at ¶ 10. The Committee’s investigation is  
16 ongoing.

17  
18 7. On November 15, 2018, TD Venture executed that certain Continuing  
19 Guaranty (the “TD Venture Guaranty”) whereby TD Venture agreed to guarantee and  
20 become jointly and severally liable for all outstanding obligations under the Loan  
21 Agreement. The TD Venture Guaranty is secured by that certain Mortgage Assignment of  
22 Rents, Security Agreement and Fixture Filing, dated November 15, 2018, granted by TD  
23 Venture in favor of ACF (the “Hawaii Mortgage”) encumbering a five-acre residential estate  
24 in Hawaii owned by TD Venture (the “Hawaii Property”).<sup>5</sup> The Committee received a  
25

26  
27 <sup>4</sup> Modifications to the Loan Agreement were memorialized in that certain Amendment Number One to the  
Loan and Security Agreement dated June 21, 2018.

28 <sup>5</sup> TD Venture also owns a membership interest in the Calistoga Ranch Club (the “Membership Interest”). TD

1  
2 recent appraisal, which valued the Hawaii Property in excess of \$9 million. *See* Freeman  
3 Declaration at ¶ 12. In addition to the purported lien on the Hawaii Property as a result of  
4 the Hawaii Mortgage, there are further, senior priority encumbrances on the Hawaii  
5 Property of approximately \$3.5 million. *See id.* at ¶ 10. At the time TD Venture executed  
6 the TD Venture Guaranty, outstanding obligations under the Loan Agreement exceeded the  
7 value of the Hawaii Property and the other assets of TD Venture. *See id.*

8  
9 8. TD Venture executed the TD Venture Guaranty in conjunction with the  
10 Initial Borrowing Debtors and the Lender entering into that certain Amendment Number  
11 Two to Loan and Security Agreement dated November 22, 2018 (the “Second  
12 Amendment”). The Second Amendment increased the maximum commitments of the  
13 revolving credit facility from \$30 million to \$35 million. The Second Amendment also  
14 added Debtor PetersenDean Hawaii, LLC (the “New Borrowing Debtor” and together with  
15 the Initial Borrowing Debtors, the “Borrowing Debtors”), though a Joinder to Loan  
16 Documents (the “Joinder”), as a new borrower under the Loan Agreement. Through the  
17 Joinder, the New Borrowing Debtor provided the Lender a security interest in all its personal  
18 property. TD Venture was still not included as a Borrowing Debtor and remains the only  
19 Debtor that is not a borrower under the Loan Agreement but provides a guaranty to ACF.  
20

21 **B. Cash Collateral and DIP Factoring.**

22 9. On June 16, 2018, the Court entered an interim order [ECF 55] authorizing  
23 the Borrowing Debtors use of the Lenders’ cash collateral. In exchange for the use of cash  
24 collateral, ACF received a generous adequate protection package, including liens on  
25  
26

27 \_\_\_\_\_  
28 Venture holds no other material assets.



1  
2 substantially all assets of the Debtors, superpriority claims, and adequate protection  
3 payments of \$35,000 per business day. On July 31, 2020, the court entered a final order  
4 [ECF 601] authorizing the Borrowing Debtors use of ACF's cash collateral.

5 10. Not long into these Chapter 11 Cases, it became apparent that the Debtors  
6 would not be able to rely solely on cash collateral for operations. On the same date the  
7 Court authorized the use of cash collateral on a final basis, the Court entered an interim  
8 order [ECF 600] authorizing a postpetition factoring arrangement between certain Debtors  
9 (excluding TD Venture) and LS DE LLC and LSQ Funding Group, L.C. (together, "LSQ").  
10 Under the Factoring Arrangement, LSQ advances funds to the applicable Debtors against  
11 qualifying receivables it purchases from the Debtors. It is the Committee's understanding  
12 that the Debtors are operating solely off the advanced proceeds provided by LSQ under the  
13 factoring arrangement and no longer utilizes ACF's cash collateral. On September 3, 2020,  
14 the Court entered a final order [ECF 914] (the "Final DIP Factoring Order") approving the  
15 factoring arrangement. Upon entry of the Final DIP Factoring Order, the adequate  
16 protection payments to ACF ceased. *See* Final DIP Factoring Order at ¶ 12(d).

17 11. As a condition precedent to entering into the factoring arrangement, ACF  
18 required that the Debtors and LSQ agree to enter into a plan support agreement with LSQ.  
19 *Id.* at ¶ J. As of the filing of this Objection, the Debtors have not made any plan support  
20 agreement public or taken any affirmative steps toward reorganization.<sup>6</sup>

21  
22  
23  
24  
25 <sup>6</sup> The Committee has reviewed the terms of the plan support agreement on a confidential basis. It is clear to  
26 the Committee that the plan support agreement, in its current form, has little hope of achieving a  
27 reorganization, which is likely why it has not been made public nor have the Debtors have taken affirmative  
28 steps toward implementing a reorganization on its terms. The Committee is in ongoing negotiations with the  
Debtors and ACF to reach a global resolution that, if successful, will likely result in a successful reorganization  
or alternative transaction. The relief sought in this Motion only serves to cripple such negotiations.

1  
2 **C. The Settlement Agreement.**

3 12. On August 19, 2020, the Debtors filed the Motion. The Motion seeks  
4 approval of a settlement agreement (the “Settlement Agreement”) by and among TD  
5 Venture, Mr. Petersen, and ACF. The Settlement Agreement seeks to resolve obligations  
6 under the Petersen Guaranty and TD Venture Guaranty. The Settlement Agreement requires  
7 TD Venture to take the following actions:

- 8
- 9 • Provide a deed in lieu of foreclosure of the Hawaii Property to ACF;
  - 10 • Transfer the Membership Interest to ACF;
  - 11 • Provide a note for \$2.5 million payable should Mr. Petersen and/or his  
12 spouse, Patricia Petersen, directly or indirectly own a roofing or solar  
13 business with gross revenue exceeding \$50 million on or before December  
14 31, 2024; and
  - Enter a mutual release of claims with ACF and Mr. and Mrs. Petersen.

15 While the mutual release of claims is not included in the Settlement Agreement filed with  
16 the Court, the Settlement Agreement states that the parties are entering into the agreement  
17 “for the purpose of resolving the Guaranteed Obligation and any other alleged claims or  
18 causes of action between [TD Venture], [Mr. and Mrs. Petersen], and [ACF].” Settlement  
19 Agreement at § 4.

20  
21 13. The Debtors stated justifications to enter into the Settlement Agreement are  
22 as follows:

- 23
- 24 • the Lender will permit the consensual use of cash collateral to “allow [the  
Debtors] to proceed towards a plan of reorganization;”
  - 25 • divesting the Hawaii Property and Membership Interest will reduce the  
outstanding obligations under the Loan Agreement; and
  - 26 • the Settlement Agreement will resolve pending contested matters between  
27 the Debtors and ACF, preventing the expenditure of considerable litigation  
28 costs, destroying the Debtors’ ability to reorganize.

1  
2 See Perea Declaration at ¶¶ 19-20. It is not evident from the Motion that any of these  
3 justifications can withstand scrutiny.

#### 4 **OBJECTION**

5 14. Upon motion and after a hearing on notice to creditors, “the court may  
6 approve a compromise or settlement.” Fed. R. Bankr. P. 9019. According to the Supreme  
7 Court, a bankruptcy court considering whether to approve a settlement in a bankruptcy case  
8 should:  
9

10 apprise [itself] of all facts necessary for an intelligent and objective  
11 opinion of the probabilities of ultimate success should the claim be  
12 litigated. Further, the judge should form an educated estimate of the  
13 complexity, expense, and likely duration of such litigation, the  
14 possible difficulties in collecting on any judgment which might be  
15 obtained, and all other factors relevant to a full and fair assessment  
16 of the wisdom of the proposed compromise.

17 *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S.  
18 414, 424 (1968). Under Bankruptcy Rule 9019, a court should only approve a settlement if  
19 it is “in the best interest of the Estate . . . and is fair and equitable for the creditors.” *Schmitt*  
20 *v. Ulrich (In re Schmitt)*, 215 B.R. 417, 424 (9th Cir. BAP 1997); *see also In re Mickey*  
21 *Thompson Entm't Grp., Inc.*, 292 B.R. 415, 420 (B.A.P. 9th Cir. 2003) (“Although the  
22 bankruptcy court has great latitude in authorizing a compromise, it may only approve a  
23 proposal that is fair and equitable to the creditors.”) (internal quotations omitted).

24 15. Here, the Settlement Agreement is neither in the best interests of the Debtors’  
25 Estates nor is it fair and equitable to creditors. Rather, the Settlement Agreement only serves  
26 to benefit ACF, and arguably, Mr. And Mrs. Petersen, without providing any value or case  
27 resolution for any other creditors in these Chapter 11 Cases. Accordingly, for the reasoning  
28

1  
2 set forth below, the Settlement Agreement should not be approved, and the Motion should  
3 be denied.

4 **I. The Settlement Agreement Is Not In The Best Interests Of The Debtors’**  
5 **Estates.**

6 16. When determining what is in the best interests of a debtor’s estate, parties in  
7 interest, where possible, should aim towards reorganization of the debtor. *See In re Exide*  
8 *Techs.*, 607 F.3d 957, 962 (3d Cir. 2010) (“The policy behind Chapter 11 of the Bankruptcy  
9 Code is the ‘ultimate rehabilitation of the debtor.’”) (quoting *Nicholas v. U.S.*, 384 U.S. 678,  
10 687 (1966)); *see also In re Liberate Techs.*, 314 B.R. 206, 212 (Bankr. N.D. Cal. 2004)  
11 (“The key aim of Chapter 11 of the Code . . . is avoidance of liquidation.”) (quoting *In re*  
12 *Johns-Manville Corp.*, 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984)).

14 17. Despite the Debtors’ overtures to the contrary, the Settlement Agreement  
15 does not provide the Debtors with a greater ability to reorganize. The Debtors are already  
16 supposed to have entered into a plan support agreement with LSQ, but the Debtors have not  
17 taken any noticeable steps toward a reorganization. There is nothing in the Settlement  
18 Agreement that places any obligations on ACF, TD Venture, or any of the Debtors in  
19 achieving a successful reorganization. That is not the stated purpose of the Settlement. In  
20 fact, like the prospect of a reorganization, each of the Debtors’ justifications for entering  
21 into the Settlement Agreement, as set forth in the Perea Declaration, are completely  
22 illusory.  
23

24 18. *First*, the Debtors assert that entering into the Settlement Agreement will  
25 allow for ACF to agree to the consensual use of cash collateral. The Debtors conveniently  
26 ignore that a final order for use of cash collateral has already been entered by the Court.  
27  
28

1  
2 Moreover, the Debtors no longer use cash collateral, operating on advances from LSQ under  
3 the factoring arrangement.

4 19. *Second*, the Debtors assert that divesting the Hawaii Property and  
5 Membership Interest will reduce the prepetition obligations under the Loan Agreement.  
6 While this is true, the Settlement Agreement provides no value on the Hawaii Property and  
7 TD Venture's other assets, leaving the amount of the reduction of the loan obligations  
8 uncertain and misleading. There is also no obligation on ACF to take all necessary steps to  
9 maximize the value of the Hawaii Property, which, according to the Committee's appraisal  
10 and after senior encumbrances are satisfied, could result in a net value of more than \$5.5  
11 million. *See* Freeman Declaration at ¶ 12.

12  
13 20. More importantly, even if ACF realizes the maximum value of the Hawaii  
14 Property, use of such proceeds to reduce the prepetition obligations under the Loan  
15 Agreement currently provides no benefit to the Debtors' estates. There are no fees or  
16 interest payments made to ACF under section 506(b) of the Bankruptcy Code, all adequate  
17 protection payments have ceased, and ACF would still remain the largest secured creditor  
18 in these Chapter 11 Cases. Instead of unnecessarily disposing assets piecemeal throughout  
19 these cases solely for the benefit of ACF, the Debtors' estates and their other creditors would  
20 be better served by realizing value from the Hawaii Property and dealing with their  
21 prepetition debt through a plan.

22  
23 21. *Third*, the Debtors allege that the Settlement Agreement will result in  
24 significant cost savings by resolving pending contested matters and litigation between the  
25 Debtors and ACF. The Debtors rely on *Martin v. Kane (In re A&C Props.)*, 784 F.2d 1377  
26 (9<sup>th</sup> Cir. 1986) to establish that the Settlement Agreement is fair and equitable. *See* Motion  
27  
28

1  
2 at pp. 14-15. Of the four factors provided in *A&C*, the Debtors primarily rely on the third  
3 factor, complexity of the litigation, in seeking approval of the Motion. *See In re A&C*  
4 *Props.*, 784 F.2d at 1381. Vexingly, there are no pending contested matters, adversary  
5 proceedings, or other litigation between the Debtors and ACF. Because there is no pending  
6 litigation between ACF and the Debtors, any reliance on *A&C*, especially the cost and  
7 complexity of any pending litigation, is in error and unwarranted.

8  
9 22. Moreover, the Settlement Agreement does nothing to resolve any pending  
10 litigation or disputes between the Borrowing Debtors and ACF. The mutual releases in the  
11 Settlement Agreement are only between Mr. and Mrs. Petersen, ACF, and TD Venture. The  
12 Borrowing Debtors are not party to any releases and may be subject to any current or future  
13 disputes involving the Loan Agreement or the use of cash collateral.

14  
15 23. Any benefit in this settlement arrangement belong only to ACF and Mr. and  
16 Mrs. Petersen. Indeed, the “mutual” releases under the Settlement Agreement are not fully  
17 mutual. Upon approval of the Settlement Agreement, TD Venture will have to provide a  
18 \$2.5 million note to ACF as protection for Mr. and Mrs. Petersen’s non-compete clause. In  
19 other words, the Settlement Agreement requires TD Venture to provide a new guaranty to  
20 protect ACF against the actions of Mr. and Mrs. Petersen, over which TD Venture has no  
21 control.

22  
23 24. TD Venture will also be required to provide a full release of all causes of  
24 action against ACF, including all chapter 5 causes of action. As set forth in greater detail  
25 below, the Committee believes the TD Venture Guaranty and the Hawaii Mortgage are  
26 suspect and may be subject to avoidance. Entry of the Settlement Agreement will, therefore,  
27  
28

1  
2 preclude TD Venture from pursuing those causes of action to the detriment of TD Venture's  
3 estate and, quite possibly, the estates of other Debtors as well.

4       25. Ultimately, the Settlement Agreement does nothing to aid in the Debtors  
5 ability to achieve a reorganization. Rather, the Settlement Agreement unnecessarily  
6 disposes of assets without receiving any attributable value that will benefit any creditors  
7 other than ACF. Moreover, the Settlement Agreement does nothing to resolve any pending  
8 litigation with ACF as no such pending litigation exists. Further, the Settlement Agreement  
9 does not prevent any future disputes between ACF and the Borrowing Debtors. Finally,  
10 despite the releases, TD Venture will still need to provide a \$2.5 million guaranty to ACF  
11 subject to the actions of Mr. and Mrs. Petersen completely outside TD Venture's control.  
12 Accordingly, the Settlement Agreement provides no benefit to the Debtors' estates nor is it  
13 fair and equitable. The Motion should be denied.  
14

15  
16 **II. The Lender's Rights In The Hawaii Property Is Suspect And Subject To**  
17 **Challenge.**

18       26. Underlying ACF's ability to recover the Hawaii Property, and to a lesser  
19 extent the Membership Interest, is the TD Venture Guaranty and Hawaii Mortgage, both  
20 executed for the benefit of ACF. However, as part of its investigation during these Chapter  
21 11 Cases, the Committee determined that the TD Venture Guaranty and Hawaii Mortgage  
22 are likely fraudulent transfers subject to avoidance.

23       27. Pursuant to section 548 of the Bankruptcy Code, the trustee may avoid  
24 transfer made within two years of the bankruptcy filing as a constructive fraud if the debtor  
25 "received less than a reasonably equivalent value in exchange for such transfer or  
26 obligation" and was either insolvent or made insolvent at the time of the transfer. 11 U.S.C.  
27 § 548(a)(1)(B)(i), (ii).  
28

1  
2       28.     At the time TD Venture entered the TD Venture Guaranty and the Hawaii  
3 Mortgage, TD Venture was insolvent or made insolvent as a result of those transfers. *See*  
4 Freeman Declaration at ¶ 10. The TD Venture Guaranty makes TD Venture jointly and  
5 severally liable for all outstanding obligations under the Loan Agreement. At the time TD  
6 Venture entered into the TD Venture Guaranty, the obligations under the Loan Agreement  
7 far exceeded the value of TD Venture’s assets, specifically the Hawaii Property and the  
8 Membership Interest.  
9

10       29.     TD Venture also did not receive reasonably equivalent value in exchange for  
11 providing the TD Venture Guaranty and Hawaii Mortgage. *See Senior Transeastern*  
12 *Lenders v. Official Committee of Unsecured Creditors (In re TOUSA, Inc.)*, 680 F.3d 1298,  
13 1311 (11<sup>th</sup> Cir. 2012) (voiding transfers of liens on their assets granted by subsidiaries to  
14 secure the debt of a parent corporation where the “costs of the transaction far outweighed  
15 any perceived benefits” and “the potential benefits were nowhere close to its expected  
16 costs”); *In re Aeta Resources, Inc.*, 2018 WL 101050993, at \*12 (Bankr. D. Colo. Dec. 14,  
17 2018) (recognizing that “the use of one debtor’s funds to pay the debts of another debtor  
18 may be the proper subject of constructive fraudulent transfer claims”). Because TD Venture  
19 was solely a guarantor and not a borrower, the value received in exchange for the sizable  
20 obligations it guaranteed could not be reasonably equivalent.  
21

22       30.     The Eleventh Circuit’s decision in *TOUSA* is instructive here. In *TOUSA*,  
23 the parent debtor, TOUSA, paid a settlement to its lenders with loan proceeds primarily  
24 secured by the assets of several of the debtor’s subsidiaries who were not borrowers but  
25 only guarantors of the underlying debt. The settlement payment helped TOUSA avoid a  
26 default and possible bankruptcy filing. Six months after making the settlement payment,  
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1  
2 TOUSA and its subsidiaries ultimately filed for bankruptcy. Thereafter, the committee of  
3 unsecured creditors sought to avoid the settlement payment on the grounds that the  
4 subsidiaries did not receive reasonably equivalent value for the settlement payment. *Id.* at  
5 1301. The bankruptcy court agreed with the committee and avoided the transfer, finding  
6 that the subsidiaries did not receive reasonably equivalent value for the settlement payment  
7 in protecting its corporate parent. *Id.* On appeal, the district court reversed, finding that  
8 even the potential benefit of avoiding bankruptcy constituted reasonably equivalent value.  
9  
10 *Id.*

11         31. On appeal to the Eleventh Circuit, the court reversed the decision again,  
12 finding that the bankruptcy court did not err in determining that the subsidiaries did not  
13 receive reasonably equivalent value for the transfer. Specifically, the court determined that  
14 the bankruptcy court did not err in its finding that the costs of the settlement payment to the  
15 subsidiaries far outweighed any perceived benefits, including the prevention of its parent  
16 from going into default and preventing bankruptcy. *Id.* at 1311.

17  
18         32. Here, under TOUSA's rationale, there can be no doubt that TD Venture did  
19 not receive reasonably equivalent value executing the TD Venture Guaranty and the Hawaii  
20 Mortgage. TD Venture has an even more tangential relationship to the Borrowing Debtors  
21 than the subsidiaries in *TOUSA* to its borrowing parent. While TD Venture is affiliated to  
22 PDI and the other Borrowing Debtors, it is not a subsidiary of PDI or any other Borrowing  
23 Debtor. In that sense, there is no benefit, direct or indirect, for TD Venture to guaranty the  
24 Borrowing Debtors' debt. In fact, the issue may not be that TD Venture did not receive  
25 reasonably equivalent value, but that it received no value at all. *See Nisselson v. Emptyrean*  
26 *Inv. Fund, L.P. (In re MarketXT Holdings Corp.)*, 376 B.R. 390, 421 (Bankr. S.D.N.Y.  
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1  
2 2007) (“[s]ince no value was received, the Debtor could not have received reasonably  
3 equivalent value”).

4       33.     Should the TD Venture Guaranty and Hawaii Mortgage successfully be  
5 avoided and recovered by ACF, the net value of the Hawaii Property, potentially in excess  
6 of \$5.5 million, may benefit more than the TD Venture estate. As noted above, the  
7 Committee has reason to believe that at least part of the funding for the purchase of the  
8 Hawaii Property came directly from other Debtors. Without ACF’s encumbrance on the  
9 Hawaii Property, the estates of those Debtors’ who may have provided funds and their  
10 unsecured creditors may ultimately benefit should they recover those funds or take other  
11 action. Allowing the Settlement Agreement to go forward at this time will forever foreclose  
12 the ability of TD Venture to avoid the TD Venture Guaranty and the Hawaii Mortgage, and  
13 other Debtors will forever lose the ability to seek to recover any value from the Hawaii  
14 Property, potentially harming general unsecured creditors irreparably.  
15  
16

17       34.     There also does not appear to be any exigency in having to approve the  
18 Settlement Agreement. As explained in greater detail above, there are no pending contested  
19 matters, adversary proceedings, or other proceedings that need resolution, nor do the  
20 Debtors currently require the need for cash collateral. As a result, there does not appear to  
21 be any harm to the Debtors or ACF in denying approval of the Motion and the Settlement  
22 Agreement at this time. By contrast, approval of the Settlement Agreement now could  
23 irreparably harm TD Venture and other Debtors from realizing value from the Hawaii  
24 Property. The Committee should be allowed necessary time to finish its investigation and  
25 allow TD Venture to take any necessary actions to preserve the value in its estate before  
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1  
2 being precluded by releases in the Settlement Agreement. Accordingly, the Motion to  
3 approve the Settlement Agreement should be denied.

4 **RESERVATION OF RIGHTS**

5 35. The Committee reserves all their rights, objections, claims, defenses, and  
6 remedies, including, without limitation, the right to amend, modify, or supplement this  
7 Objection, to seek discovery, and to raise additional objections during any hearing on the  
8 Motion.  
9

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**CONCLUSION**

WHEREFORE, for all of the reasons set forth above, the Committee respectfully requests its Objection be granted and the Court (i) deny the Motion approving the Settlement Agreement and (ii) grant any other relief the Court deems just and proper.

Dated September 9, 2020.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via REGULAR  
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