

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
(Owensboro Division)**

In re:) Chapter 11
)
Hartshorne Holdings, LLC, *et al.*,) Case No. 20-40133
)
Debtors.¹) (Jointly Administered)

**DEBTORS’ MOTION FOR ENTRY OF AN ORDER AUTHORIZING
THE DEBTORS TO SURCHARGE TRIBECA’S DIP COLLATERAL**

Hartshorne Holdings, LLC and its affiliated debtors and debtors-in-possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases, hereby move this Court for entry of an order, substantially in the form tendered contemporaneously with this motion (the “Proposed Order”), authorizing the expenses, fees and costs incurred by the Debtors in connection with the postpetition maintenance, marketing, auctioning and disposition of, and litigation relating to, the DIP Collateral,² as well as all other fees and expenses incurred for the benefit of Tribeca,³ to preserve and dispose of the DIP Collateral (collectively, the “Expenses”), currently estimated to be in an amount not less than \$14,670,699.15,⁴ to be surcharged against the DIP Collateral in

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: Hartshorne Holdings, LLC (3948); Hartshorne Mining Group, LLC (0063); Hartshorne Mining, LLC (1941); and Hartshorne Land, LLC (5582). The Debtors’ headquarters are located at 373 Whobry Road, Rumsey, Kentucky 42371.

² “DIP Collateral,” as defined in the Final DIP Order (defined below), means all present and after-acquired property (whether tangible, intangible, real, personal, or mixed) of the Debtors, wherever located, including, without limitation, all accounts, inventory, equipment, vehicles, capital stock in subsidiaries of the Debtors, investment property, instruments, chattel paper, real estate, leasehold interests, contracts, patents, copyrights, trademarks and other general intangibles, and all products and proceeds thereof.

³ “Tribeca” means, collectively, (a) Equity Trustees Limited, as trustee of the Tribeca Global Natural Resources Credit Fund, (b) Tribeca Global Natural Resources Credit Master Fund, (c) Tribeca Global Resources Credit Pty Ltd, (d) Global Loan Agency Services Australia Nominees Pty Ltd, and (e) any other affiliated entity associated with the following entities.

⁴ The Expenses are set forth on the charts collectively attached hereto as **Exhibit A**. The Debtors are still analyzing the expenses incurred in these chapter 11 cases and reserve their rights to modify the amount and type of Expenses sought in advance of any hearing or final determination on the surcharge amount owed by Tribeca. The Debtors have paid the majority of the Expenses, but neither section 506(c) of the Bankruptcy Code nor binding Sixth Circuit precedent limits a debtor’s right to seek and obtain surcharge only of unpaid Expenses.

accordance with section 506(c) of the Bankruptcy Code. In support of the motion, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. These chapter 11 cases were filed specifically for the benefit of Tribeca, the Debtors' prepetition and DIP lender, and have generated significant recoveries with respect to the Debtors' property comprising the DIP Collateral. Prior to the filing of these chapter 11 cases, Tribeca made clear to the Debtors that it wanted the Debtors to pursue a chapter 11 filing as the best means to maximize the value of the DIP Collateral for Tribeca's benefit. Tribeca also indicated that it would not provide any additional financial support to maximize the value of the Debtors' assets other than in a chapter 11 case in which the Debtors would pursue a sale process. Indeed, Tribeca directed the Debtors to (a) immediately pursue a section 363 sale of all of the Debtors' assets, including their valuable supply contracts, (b) sell a substantial portion of the DIP Collateral pursuant to *de minimis* asset sale procedures and various private sales, and (c) coordinate an auction for six real property tracts, which are part of the DIP Collateral.

2. The Debtors preserved, maintained and protected the DIP Collateral at all times to avoid any reduction in its value. And, notwithstanding the inability to find a buyer for substantially all of their assets, the Debtors have been successful in their orderly liquidation by obtaining greater recoveries from liquidation sales than Tribeca itself had expected to receive. In addition, the Debtors have negotiated with state and federal regulatory officials to minimize the environmental liabilities relating to the DIP Collateral.

3. Notably, after the Debtors were not able to consummate a sale of their mining properties or their supply contracts, Tribeca declined to consider obtaining stay relief to take possession of the DIP Collateral so as to satisfy its claims. Tribeca advised the Debtors that the

reason for its position was that it did not have sufficient available funds to pay the expenses to recover the property from the Debtors' location and to sell or otherwise monetize its collateral. As such, Tribeca specifically asked the Debtors to incur much of the very expenses that are the subject of this motion and that are associated with maintaining, preserving and disposing of the DIP Collateral for Tribeca's benefit.

4. Despite Tribeca's express requests associated with maintaining, preserving and disposing of the DIP Collateral and the Debtors' efforts in that regard, Tribeca has refused to even acknowledge the enormous burden it has put on the Debtors' estates, their creditors and professionals who incurred the Expenses. Tribeca actually has suggested that the estates should pay Tribeca millions of dollars with respect to their DIP Loan [Docket No. 200] (more cash than the Debtors even have on hand), despite the Debtors' successful efforts to preserve and dispose of the DIP Collateral and the fact that Tribeca's liens on the sale proceeds of the DIP Collateral should now be limited to the amount of the Expenses which are not surcharged. Tribeca ignores the fact that all of the Expenses were incurred specifically for Tribeca's benefit and largely at its direction.

5. The Debtors have filed this motion in order to permit the creditors who incurred substantial Expenses for Tribeca's benefit to be paid out of the DIP Collateral as permitted under section 506(c) of the Bankruptcy Code. As set forth below, the facts and circumstances of these cases amply justify surcharging the DIP Collateral with the Expenses. While Tribeca, without a doubt, will argue that because the efforts to complete the sale of substantially all of the Debtors' assets, as contemplated at the outset of the cases, was unsuccessful, Tribeca did not receive a sufficient benefit to justify a surcharge. But this ignores the case law and the incontrovertible fact that, at the time the Expenses were incurred, they were reasonably calculated to benefit Tribeca

and in many cases were in effect directed by Tribeca. At bottom, Tribeca must pay the Expenses because they preserved, monetized, and enhanced the value of its collateral.

BACKGROUND RELATING TO SALES AND EXPENSES

A. The DIP Loan, Carve-Out, and Postpetition Fee Escrow

6. At the inception of these cases, the Debtors obtained a secured postpetition loan provided by Tribeca in the aggregate amount of \$7.625 million (the “DIP Loan”) on the terms set forth in that certain Secured Debtor-In-Possession Loan Agreement attached as Exhibit A to the Final DIP Order (the “DIP Credit Agreement”), which was approved by the *Final DIP Order (A) Authorizing Postpetition Secured Financing, (B) Authorizing the Debtors to Use Cash Collateral, (C) Providing Adequate Protection to the Prepetition Secured Parties, (D) Modifying the Automatic Stay, and (E) Granting Related Relief* [Docket No. 228] (the “Final DIP Order”).⁵ The Final DIP Order establishes two primary sources of funding for postpetition administrative expenses incurred in the course of the bankruptcy cases, in addition to the Debtors’ right to seek a surcharge under section 506(c) of the Bankruptcy Code. The first is the “Postpetition Fee Escrow” which sets aside \$1.5 million for the payment of professional fees. The second is the \$3 million Carve-Out, as defined in the Final DIP Order, a separate fund which serves as a backstop for all administrative expenses not otherwise funded, including professional fees not paid by the Postpetition Fee Escrow. The Postpetition Fee Escrow was negotiated to separately ensure that a portion of the professionals’ fees and expenses would be paid to the Debtors’ and Committee’s advisors, while the Carve-Out was created to protect against administrative insolvency during the

⁵ As discussed in more detail below, the Final DIP Order did not waive the Debtors’ right to surcharge the DIP Collateral pursuant to section 506(c) of the Bankruptcy Code. Thus, Tribeca assumed the risk that the Debtors would seek to surcharge the DIP Collateral to pay administrative expenses incurred for their benefit.

course of these chapter 11 cases by ensuring that assets remain for the payment of administrative expense claims.

7. Tribeca has argued that the Postpetition Fee Escrow is somehow part of the \$3 million Carve-Out, and not a separate \$1.5 million escrow account. Thus, Tribeca asserts that the total amount of the Carve-Out and the Postpetition Fee Escrow is \$3 million, while the Debtors assert that the total amount in the Carve-Out is \$3 million and that the amount of the Postpetition Fee Escrow is \$1.5 million, for a total of \$4.5 million. Yet, the \$3 million Carve-Out was never intended to encompass all of the administrative expenses in these cases incurred for the benefit of Tribeca with respect to the DIP Collateral. Indeed, the initial budget attached as Exhibit B to the Final DIP Order only spanned from February 17, 2020 through July 17, 2020 – over four months ago. In short, the Final DIP Order provided the foundation for the administrative expenses to be paid in these cases and preserved the Debtors’ right to surcharge the DIP Collateral to recover the difference between the sum of the Carve-Out and Postpetition Fee Escrow and the remaining administrative expense claims. The time has come to exercise the Debtors’ right to surcharge.

B. The Debtors’ Right to Surcharge

8. Virtually all DIP financing arrangements in recent memory include a negotiated waiver of the Debtors’ rights under section 506(c) of the Bankruptcy Code. DIP lenders routinely require such a waiver as a condition of their providing postpetition financing. There is no such waiver in these cases because Tribeca expressly agreed to delete the waiver from the initially filed DIP Loan documentation.

9. Section 1.1(h)(iii) of the DIP Credit Agreement that was executed by Tribeca and the Debtors on February 20, 2020 and filed with the Bankruptcy Court [Docket No. 15, Exhibit A] provided that, subject to entry of the Final DIP Order, the Debtors waived their right to surcharge the DIP Collateral. Over the next month, the parties, including the Committee, negotiated the

final, binding terms of the DIP Loan. On March 30, 2020, the Court entered the Final DIP Order that reflected a compromise among the parties, including the elimination of the Debtors' waiver of their right to surcharge under section 506(c) of the Bankruptcy Code [Docket No. 228]. The deletion was bargained for in the event of administrative insolvency where the Debtors liquidated the DIP Collateral for Tribeca's benefit. The Debtors' rights under section 506(c) are also noted in the proposed *Joint Chapter 11 Plan of Liquidation for Hartshorne Holdings, LLC and Its Affiliated Debtors* [Docket No. 647] (the "Plan") and the *Disclosure Statement for Joint Chapter 11 Plan of Liquidation for Hartshorne Holdings, LLC and Its Affiliated Debtors* [Docket No. 648] (the "Disclosure Statement"). See Plan, § 7.5.1; Disclosure Statement § 11.4(a). Thus, the Debtors and their estates retained all of their rights under section 506(c) of the Bankruptcy Code.

C. Public Sale Process of the DIP Collateral

10. Beginning on the petition date of February 20, 2020 (the "Petition Date"), the Debtors pursued a four-month long public marketing and sale process with the goal to sell substantially all of the DIP Collateral through one or more sales [Docket No. 200] (the "Public Sale Process"). The Public Sale Process was a requirement of the Final DIP Order and was undertaken at Tribeca's demand during prepetition discussions on how Tribeca desired to best maximize its recovery.

11. After the Debtors failed to receive qualified bids for the DIP Collateral - other than one bid from Tribeca [Docket No. 409] – they cancelled the auction and started negotiating a private sale with Tribeca. The Debtors and Tribeca entered into a proposed asset purchase agreement dated as of June 29, 2020 for the sale of, among other things, two coal supply contracts [Docket Nos. 436, 473] (the "APA"). Louisville Gas and Electric and Kentucky Utilities ("LG&E-KU"), Indiana Kentucky Electric Company ("IKEC"), the Official Committee of Unsecured Creditors, Frontier-Kemper Constructors, Inc., and Fricke Management & Contracting, Inc. filed

several objections, responses, and replies in opposition to the APA [Docket Nos. 442, 446, 447, 448, 449, 466, 468, 502, 504, 510].

12. The Debtors took the lead on defending the APA and the sale to Tribeca. They filed two lengthy pleadings, a response and sur-reply, in support of the APA [Docket Nos. 454, 505] and conducted a complex three-day evidentiary hearing seeking Court approval of the sale. The Court denied approval of the APA, after which the Debtors incurred further expenses to appeal the order denying the sale [Docket No. 570] and to work within the confines of the order denying the sale motion to find a buyer who could supply acceptable coal to LG&E-KU and IKEC. The Debtors are now in the final stages of resolving their disputes with LG&E-KU and IKEC [Docket Nos. 717, 718, 719], which required the Debtors to prepare a 9019 settlement motion, two settlement agreements, an agreed order to dismiss the appeal, and a proposed order, a time-intensive and costly process. The Expenses incurred to manage the Public Sale Process directly benefitted Tribeca because of Tribeca's decision to expressly require the process to occur for its benefit. In addition, the Expenses the Debtors incurred were reasonable and calculated to benefit Tribeca.

D. Private Sale Process of the DIP Collateral

13. In addition to the Public Sale Process, the Debtors also marketed the DIP Collateral through several private sale transactions (collectively, the "Private Sale Process"). First, the Debtors have executed 28 different bills of sale with respect to the DIP Collateral, with proceeds totaling \$1,351,664.13 pursuant to the *Order Establishing Procedures to Sell, Transfer, or Abandon Certain De Minimis Assets* [Docket No. 538] (the "De Minimis Asset Sale Order"). Second, with respect to sales that exceeded \$250,000 in value, the limit for the Debtors to utilize the procedures described in the De Minimis Asset Sale Order, the Debtors have (a) closed a sale to Castlen Marine, LLC for an amount of \$435,000 for the Debtors' dock site equipment, raw coal

stacker, and clean coal stacker located in McLean County, Kentucky [Docket No. 586] (the “Dock Sale”) and (b) are currently seeking authority to close a \$4.5 million credit bid sale of the Debtors’ wash plant and associated property to Frozen Star Holdings II LLC, a Tribeca affiliate [Docket No. 683] (the “Wash Plant Sale”). The Office for the United States Trustee for Region 8 (the “U.S. Trustee”) [Docket No. 711] and the Official Committee of Unsecured Creditors (the “Committee”) [Docket No. 712] both objected to the Wash Plant Sale, requiring the Debtors to dedicate more resources to resolve the disputes with respect to the sale involving Tribeca’s DIP Collateral. The Debtors are also negotiating another private sale for a portion of the DIP Collateral. Third, because the Debtors did not receive any interest from a potential purchaser to acquire six tracts of real property (the “Real Property”), they retained Kurtz Auction and Realty Co. to sell the Real Property before the end of the year [Docket Nos. 695, 716]. Such retention required extensive negotiations with the auctioneer and Tribeca.

E. Tribeca’s Refusal to Pay for the Expenses

14. To date, Tribeca has been unwilling to pay a mutually agreeable share of the costs incurred to benefit and monetize its DIP Collateral, despite the clear benefits it has received. The Debtors believe that Tribeca has failed to honor its obligations, which has forced the Debtors to file this motion.

15. It would be unfair and inequitable for Tribeca to burden the Debtors and their creditors with the significant costs relating to the numerous sales of the DIP Collateral, when all of the Expenses benefitted Tribeca. Absent an agreement between the Debtors and Tribeca resolving Tribeca’s obligation to satisfy the Expenses, section 506(c) of the Bankruptcy Code provides an appropriate and fair mechanism to surcharge Tribeca’s DIP Collateral to satisfy these costs.

F. Surcharging the DIP Collateral With the Expenses is Appropriate

16. Surcharging Tribeca's DIP Collateral pursuant to section 506(c) of the Bankruptcy Code is appropriate because the Debtors have incurred reasonable and necessary administrative expenses, which benefited Tribeca, by preserving and maintaining the DIP Collateral and maximizing its value pursuant to the numerous sale transactions described above. *See e.g., In re Leek*, 1999 Bankr. LEXIS 247, at *5-6 (Bankr. N.D. Ohio Mar. 1, 1999) (noting that administrative expenses may be surcharged against a secured creditor's collateral pursuant to section 506(c) of the Bankruptcy Code, which permits a debtor to recover from the secured creditor's collateral). The Debtors incurred significant fees and expenses to market substantially all of their assets for four months from the Petition Date through June 15, 2020 [Docket No. 409], thereafter litigate and appeal the APA for Tribeca's benefit, and seek to obtain certain coal shipments for LG&E-KU to satisfy an APA issue. While approval of the APA was denied by this Court, the Expenses were incurred for the benefit of Tribeca, as the Debtors were seeking to dispose of Tribeca's DIP Collateral in the manner chosen by Tribeca. The Expenses were incurred with the goal of selling portions of the DIP Collateral for the highest and best price. In addition, the Debtors also incurred fees and costs in connection with the maintenance and storage of the DIP Collateral, fees incurred by the employee and professionals working on the sales, and other costs directly related to the maintenance and disposition of such collateral for the sole benefit of Tribeca.

17. Moreover, the Expenses the Debtors incurred with respect to the sale of DIP Collateral are likely much lower than Tribeca would have incurred outside of an orderly chapter 11 process. The DIP Collateral consists of a variety of coal-industry equipment, real property, fixtures, mechanical tools, machinery, buildings, plants, mines encumbered by certain real property encumbrances, environmental liabilities, and state and federal regulatory considerations. In order to preserve and sell the DIP Collateral under article 9 of the Uniform Commercial Code,

as applicable, Tribeca would have had to incur more than the Expenses the Debtors have incurred in these chapter 11 cases, because the Debtors' management, which is highly specialized and knowledgeable about their industry, was capable of maximizing value through targeted and speedy sales to purchasers with whom they already had relationships. Indeed, throughout these cases Tribeca has always looked to shift to the Debtors and their professionals the incurrence of expenses associated with maintaining, preserving and selling the DIP Collateral.

G. The Expenses Benefitted Tribeca and Can be Surcharged Against the DIP Collateral

18. The Expenses incurred by the Debtors' estates were reasonable and necessary to preserve and dispose of the DIP Collateral at the time they were undertaken and provided a direct benefit to Tribeca. The Debtors have expended great efforts to ensure that the Expenses are well-documented and clearly tied to the benefits conferred to Tribeca with respect to the sale of the DIP Collateral.

19. There are numerous categories of Expenses for which the Debtors seek a surcharge. The first category consists of the Debtors' internal administrative expenses related to employee wages and benefits, insurance, taxes, marketing, security, operations, and maintenance. The Debtors have estimated that the amount of these types of Expenses from March 1, 2020 through November 16, 2020 is equal to not less than \$11,009,598.00, as further described in Chart A attached hereto at **Exhibit A**.

20. In addition to the Debtors' internal administrative costs, the Expenses also include the Debtors' and Committee's professionals' fees and expenses related to the sale of the DIP Collateral which benefitted Tribeca. As it relates to the Debtors' and the Committee's professional fees incurred with respect to maintaining, preserving and maximizing the value of the DIP Collateral, the first interim fee applications, second interim fee applications, and staffing reports of (a) Squire Patton Boggs (US) LLP [Docket Nos. 399, 593], (b) Frost Brown Todd LLC [Docket

Nos. 401, 594], (c) FTI Consulting, Inc. [Docket Nos. 347, 349, 394, 464, 585, 622, 680], (d) Perella Weinberg Partners LP [Docket Nos. 403, 615], (e) Whiteford, Taylor & Preston LLP [Docket Nos. 398, 600], and (f) Dentons Bingham Greenebaum LLP [Docket Nos. 400, 615] provide the necessary details and evidence regarding such Expenses.⁶ The Expenses that may be surcharged against the DIP Collateral relating to the Debtors' and Committee's professionals' fees and expenses through August 31, 2020 are not less than \$3,411,101.15, as further described in Chart B attached hereto at **Exhibit A**.

21. Furthermore, the Debtors' initial estimate of the sale-related professional fees and expenses for September 2020, October 2020, and November 2020, exceeds \$250,000. Therefore, the Debtors' assert that the total amount of Expenses related to the Debtors' and Committee's professionals' fees and expenses is not less than \$3,661,101.15.

22. **Therefore, the total estimated amount of the Expenses to be surcharged as of the date hereof is not less than \$14,670,699.15.** The Debtors will continue to refine their analysis, as appropriate, and reserve all their rights in connection therewith.

JURISDICTION AND VENUE

23. This Court has jurisdiction to consider this motion pursuant to 28 U.S.C. §§ 157 and 1334. The Debtors are continuing to maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of title 11 of the United States Code (the "Bankruptcy Code"). This is a core proceeding under 28 U.S.C. § 157(b), and the Debtors consent to entry of a final order by the Court in connection with this motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

⁶ The Debtors' administrative advisors and notice and claims agent, Stretto, also incurred significant expenses for the benefit of Tribeca.

24. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

25. The bases for the relief requested herein are sections 105 and 506 of the Bankruptcy Code.

RELIEF REQUESTED

26. By the motion, the Debtors respectfully seek entry of the Proposed Order authorizing the Expenses, which are currently estimated to be not less than \$14,670,699.15, to be surcharged against the DIP Collateral.

BASIS FOR RELIEF

A. Application of Section 506(c) to the Expenses: Beneficial Test or Consent Test

27. In general, administrative expenses are paid out of the estate and not by secured creditors. *See, e.g., In re Grimland*, 243 F.3d 228, 233 (5th Cir. 2001); *IRS v. Boatmen's First Nat'l Bank of Kan. City*, 5 F.3d 1157, 1159 (8th Cir. 1993) (“Generally, administrative expenses are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral.”); *In re Parker*, 15 B.R. 980, 983 (Bankr. E.D. Tenn. 1981) (explaining that “[t]he holder of an allowed secured claim has not just a general claim but property which it is entitled to receive) (citation omitted). Section 506(c) of the Bankruptcy Code creates an exception to that general rule and authorizes a debtor to “recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.” 11 U.S.C. § 506(c). The underlying premise of this exception is that creditors should not be required to bear the costs of preserving a secured creditor’s collateral. *See In re Evanston Beauty Supply Inc.*, 136 B.R. 171, 175 (Bank. N.D. Ill. 1992).

28. Congress expressly noted that a debtor has the right to surcharge a secured creditors’ collateral. *See* 124 Cong. Rec. H11, 095 (daily ed. Sept. 28, 1978) (statement of Rep.

Edwards) (“Any time the trustee or debtor in possession expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.”). Bankruptcy courts in the Sixth Circuit have held that a secured creditor “may be surcharged when expenses to preserve its property have been incurred by the estate, or the creditor has caused or consented to such expense.” *In re Great Northern Forest Products, Inc.*, 135 B.R. 46, 62 (Bankr. W.D. Mich. 1991); *see also In re Staunton Industries, Inc.*, 74 Bankr. 501, 504 (Bankr. E.D. Mich. 1987) (same); *In re Wyckoff*, 52 Bankr. 164, 166 (Bankr. W.D. Mich. 1985) (same).

29. Generally, courts have applied one of two tests – the Consent Test and the Beneficial Test – to determine whether a debtor may surcharge a secured party's collateral. The Sixth Circuit Court of Appeals decision in *In re Ferncrest Court Partners*, 66 F.3d 778, 782 (6th Cir. 1995) is the controlling case with respect to the Consent Test in this circuit, and also held that the three-pronged Beneficial Test is available to impose a surcharge under section 506(c). Under the “Beneficial Test,” recognized and applied by the Sixth Circuit Court of Appeals and followed by numerous courts within the circuit, a debtor must satisfy three elements: “(1) the expense must be *necessary* for the preservation or disposal of the collateral, (2) the amount of the expense must be *reasonable*, and (3) the *secured creditor must benefit* from the expense.” *In re Great Northern Forest Products, Inc.*, 135 B.R. 46, 70 (Bankr. W.D. Mich. 1991) (emphasis added); *In re Ferncrest Court Partners*, 66 F.3d 778, 782 (6th Cir. 1995) (“As a general rule, in order to prevail on a § 506(c) claim, the claimant bears the burden of proving that the costs were reasonable, necessary, and a benefit to the secured party); *In re Crutcher Concrete Constr.*, 1998 Bankr. LEXIS 1192, at *7 (Bankr. W.D. Ky. Jan. 31, 1998) (same); *In re Daily Medical Equip., Inc.*, 150

Bankr. 205, 208 (Bankr. N.D. Ohio 1992) (same); *In re McLean Wine Co.*, 463 B.R. 838, 854-55 (Bankr. E.D. Mich. 2011) (explaining that the burden is on the party seeking to surcharge, by a preponderance of the evidence, that the expenses benefitted the secured lenders and its collateral); *In re Leek*, 1999 Bankr. LEXIS 247, at *5-6 (Bankr. N.D. Ohio Mar. 1, 1999) (same). As section 506(c) is equitable in nature, courts in the Sixth Circuit have recognized that section 506(c) “was designed to extract from a particular asset the cost of preserving or disposing of that asset.” *MW Capital Funding, Inc. v. Magnum Health & Rehab of Monroe LLC*, 2019 U.S. Dist. LEXIS 127463, at *16 (E.D. Mich. July 31, 2019) (internal citation omitted).

30. The second test, the “Consent Test,” requires a debtor to establish that the secured party “directly or impliedly consented or caused the expense.” See *In re Ferncrest Court Partners*, 66 F.3d 778, 782 (6th Cir. 1995); see also *In re Swann*, 149 Bankr. 137, 143 (Bankr. D.S.D. 1993) (citing *Matter of Great Northern Forest Products, Inc.*, 135 Bankr. 46, 62 (Bankr. W.D. Mich. 1991)); *In re Staunton Indus., Inc.*, 75 Bankr. 699, 702 (Bankr. E.D. Mich. 1987). The Sixth Circuit Court of Appeals ruled that two factors must be present to conclude that the secured lender consented to the collateral expense: (1) the *secured lender* “*stipulated in writing* to Debtor’s right to pursue a private sale” and (2) the *secured lender* “*failed to object to Debtor’s retention*” of professionals to assist with selling the collateral.⁷ *Ferncrest*, 66 F.3d at 782 (emphasis added).

31. Either the Beneficial Test or the Consent Test under section 506(c) may be utilized by a court to ensure that “a secured creditor [cannot] reap the benefit of actions taken to preserve the secured creditor’s collateral without shouldering the cost.” 4 Collier on Bankruptcy ¶ 506.05 (16th ed. 2015). To clarify, the Debtors only need to satisfy one, not both, tests. Here, the Debtors

⁷ In *Ferncrest*, the secured lender objected to the real estate broker’s expenses after being retained and having performed under the contract. *Id.* The *Ferncrest* court nevertheless held that the secured lender had consented to the expense by permitting the broker to sell the collateral (rather than, for example, lifting the automatic stay and selling the collateral itself).

satisfy both tests. At bottom, a court's decision to surcharge collateral is appropriate when the failure to do so can result in the unjust enrichment the statute aims to prevent. *See, e.g., In re Foremost Mfg. Co.*, 137 F.3d 919, 923 (6th Cir. 1998) ("The plain purpose of § 506(c) [is] to prevent unjust enrichment of secured creditors. . . .").

B. The Debtors Satisfy the Beneficial Test

32. Courts have held that certain expenses may be surcharged against a secured creditor's collateral pursuant to the Beneficial Test. Indeed, courts in various circuits have faced circumstances that are remarkably similar to the circumstances present here and held that the debtor satisfied the Beneficial Test. For example, in *In re Domistyle, Inc.*, 811 F.3d 691, 694 (5th Cir. 2015), the debtor sought to surcharge the secured lender's collateral for expenses the debtor incurred to preserve the collateral, which included "security, ad valorem taxes against the Real Property, repairs to any improvement or fixture, replacements of any improvement or fixture, and electricity." The secured lender objected, but the court overruled the objection and held that the expenses could be surcharged against the collateral because they (a) preserved the value of the collateral and (b) relieved the secured lender from directly incurring such costs. *Id.* at 695. The *Domistyle* Court held that "an expense incurred primarily to preserve or dispose of encumbered property meets the [surcharge] requirement[s] of the Beneficial Test." *Id.* at 698. If such expenses were not incurred by the debtor, the collateral's value would have been virtually destroyed by vandalism and weather-related damage. *Id.* at 700.

33. The Debtors' internal administrative expenses that were expended to preserve the value of the DIP Collateral (as outlined in Chart A in **Exhibit A**) are nearly identical to the expenses at issue in the *Domistyle* case: property taxes, property insurance, repair and maintenance, facilities expenses, security, and employment expenses associated with preserving

the DIP Collateral's value. All of these Expenses benefitted Tribeca substantially because they not only preserved but enhanced the value of the DIP Collateral.

34. Similarly, in *In re McCombs*, 436 B.R. 421 (Bankr. S.D. Tex. 2010), a trustee sought to sell two pieces of collateral free and clear of all liens, claims, and interests with the caveat that such liens would attach to the sale proceeds. *Id.* at 448. The trustee sought to surcharge the collateral to pay the costs incurred to sell the collateral, including the fees and expenses of the trustee's professionals. The Court found that the costs incurred to sell the collateral "were necessary to the administration of [the] case" because such sale (a) avoided the risk that any of the collateral would be abandoned to avoid maintenance expenses, (b) maximized the collateral's value for the benefit of the debtor's creditors, and (c) saved the secured lender the time and expense of seeking to modify the automatic stay and sell the property itself or buy back the collateral itself. *Id.* at 449. The *McCombs* Court noted that evidence regarding the nature or extent of the costs and expenses incurred in selling the collateral had to be presented to ensure that such costs were reasonable and to quantify the professional expenses. *Id.* 450.

35. The fees and expenses of the professionals for the Debtors and Committee (as presented in Chart B in **Exhibit A**) that were incurred to sell Tribeca's DIP Collateral are nearly identical to those that were approved for surcharge in *McCombs*. Here the Debtors (a) marketed and sold, in part, the DIP Collateral rather than abandon such property to reduce administrative expenses, (b) maximized the value of the DIP Collateral pursuant to the Private Sale Processes, (c) substantially reduced Tribeca's professional fees by relying on the Debtors' and Committee's professionals to document the sale transactions and resolve all corporate, environmental, and bankruptcy issues related to each DIP Collateral sale, and (d) have presented granular details regarding each professionals' fees and expenses associated with the DIP Collateral dispositions

pursuant to the staffing reports and the fee applications. Tribeca avoided paying any of these Expenses, while its DIP Collateral was preserved and enhanced by the work of the professionals, whose fees are therefore part of the Expenses.

i. The Expenses Were Necessary

36. An expenditure is necessary where the movant demonstrates that the expenditure was needed to preserve or increase the value of collateralized property, or to dispose of the property, *In re Domistyle, Inc.*, 811 F.3d 691, 698 (5th Cir. 2015), and draws the necessary connection between the expense and the collateral at issue. *See, e.g., In re K & L Lakeland, Inc.*, 128 F.3d 203, 210 (4th Cir. 1997) (noting the importance of identifying how the expenses were “incurred primarily to protect or preserve [the secured creditor’s] collateral”); *In re Cascade Hydraulics and Utility Service, Inc.*, 815 F.2d 546, 548 (9th Cir. 1987) (“To satisfy the benefit test of section 506(c), Cascade must establish in quantifiable terms that it expended funds directly to protect and preserve the collateral.”); *see also In re Towne, Inc.*, 536 Fed. App’x 265, 269 (3d Cir. 2013) (affirming bankruptcy court’s finding and explaining that the expenses must be targeted at the preservation of the secured lender’s collateral).

37. An expenditure is also considered necessary for section 506(c) purposes if it is associated with operating or maintaining the collateral. *See In re River Oaks Ltd. Partnership*, 166 B.R. 94 (E.D. Mich. 1994) (holding that costs associated with maintaining and operating the collateral were within the scope of section 506(c)); *In re TIC Memphis RI 13, LLC*, 498 B.R. 831, 836-37 (Bankr. W.D. Tenn. 2013) (“for an action to be necessary under § 506(c), the action must be required to preserve or dispose of the property securing the debt. Where actions are elective and forgo other viable actions and options, such actions are not, ipso facto, by nature necessary.”); *In re Williamson*, 1988 Bankr. LEXIS 2200, at *11 (Bankr. S.D. Ohio Dec. 5, 1988) (“Necessary’

costs appear to be those that are unavoidably incurred by the trustee or debtor in possession in the preservation or disposal of the secured property . . .”).

38. Here, the Debtors can establish that the Expenses did in fact benefit Tribeca, and were reasonable and necessary to protect, preserve and dispose of the DIP Collateral. Specifically, such Expenses include, but are not limited to, the following necessary expenses: (a) \$1,240,406 representing the allocation of employees’ and officers’ expenses for the activities directly related to the preservation and disposition of the DIP Collateral by cleaning, storing, and tracking each piece of collateral, (b) \$598,795 for such employee’s and officer’s payroll tax and health benefits that had to be paid while such employees and officers worked to protect, preserve and dispose of the DIP Collateral, (c) \$418,758 for insurance which was paid to preserve the DIP Collateral in the event an insurance claim was made on any piece of collateral, which preserved the value of the DIP Collateral, (d) \$7,092,547 for facility costs to maintain and prepare the DIP Collateral for sale and preserve such collateral’s going-concern value, (e) \$72,280 for security to protect the DIP Collateral for theft or vandalism, (f) \$188,934 to track and record the DIP Collateral through the Debtors’ information technology computer system, (g) \$1,187,877 in repair and maintenance costs for the upkeep of the DIP Collateral, (h) \$188,934 for tracking and recording the location and sale status of each piece of DIP Collateral, (i) \$210,000 in U.S. Trustee Fees incurred based on each DIP Collateral sale, and (j) \$3,411,101.15 representing the Debtors’ and Committee’s professionals’ fees and expenses incurred to market and sell the DIP Collateral and litigate the approval of such sales and processes to ensure that such sales complied with all state and federal laws and regulations. *See* Charts A and B in **Exhibit A** for details on each expense and amount.

ii. The Amount of the Expenses Is Reasonable

39. Courts measure reasonableness of expenses by analyzing the “totality of circumstances” of normal commercial considerations. *In re Senior-G & A Operating Co., Inc.*, 957 F.2d 1290, 1299 (5th Cir. 1992); *see also In re Second Pa. Real Estate Corp.*, 192 B.R. 663, (Bankr. W.D. Pa. 1995) (holding that the fees and expenses that the debtors sought to surcharge was reasonable “in light of the effort expended and result achieved”).

40. Although reasonableness may be measured against the total costs and expenses a secured creditor would otherwise have incurred in foreclosing on the property itself, the relevant costs may be more than simple foreclosure costs if repairs are required, or if, for example, disputes must be resolved or other action must be taken in order to ready the property for sale. 4 Collier on Bankruptcy ¶ 506.05[5] (16th ed. 2015).

41. Examples of expenditures that courts have consistently found to be reasonable are expenses directly related to preserving the value or disposition of collateral, including, but not limited to, insurance costs, maintenance and repair costs, employee salaries, and costs related to the sale and marketing of the collateral. *See In re Domistyle, Inc.*, 811 F.3d at 696 (holding that costs for “security, repairs to the roof and electrical system, mowing, landscaping, utilities, and insurance premiums” were reasonable and necessary); *In re Tollenaar Holsteins*, 538 B.R. 830, 834 (Bankr. E.D. Cal. 2015) (finding that expenses to preserve the value of the collateral is a reasonable expense); *In re McCombs*, 436 B.R. 421, 449 (Bankr. S.D. Tex. 2010) (“[a]s such, the Ivy Run Property and the Ivy Run Lot—and, now, the Excess Proceeds—constitute ‘property securing an allowed secured claim,’ and the Trustee may recover out of the Excess Proceeds his costs and expenses incurred in preserving, or disposing of, such property pursuant to Section 506(c)”; *In re Trim-X, Inc.*, 695 F.2d 296, 302 (7th Cir. 1982) (finding that the debtors should

note why the expenses were reasonable during the calculation of the expenses they seek to surcharge). These are the same types of expenses the Debtors incurred in preserving and monetizing the DIP Collateral, as described in Paragraph 38 above and in **Exhibit A**.

42. Here, the amount of each of the Expenses is demonstrably reasonable because they were largely determined either by (a) the relevant commercial and market realities applicable to the Debtors' assets and property or (b) an established, and commercially reasonable process (with which Tribeca expressly agreed) for marketing, selling, or disposing of the DIP Collateral for the best and highest price. For example, the Debtors had no choice but to pay the market rate to insure and secure the DIP Collateral. The Debtors have not incurred unnecessary expenses or taken unreasonable financial risks which they are seeking to shift to Tribeca.

iii. The Expenses Benefitted Tribeca

43. “[E]xpenses recoverable under Section 506(c) from a secured creditor’s collateral must also have bestowed a ‘benefit’ on the secured creditor with respect to the creditor’s collateral.” 4 Collier on Bankruptcy ¶ 506.05[6] (16th ed. 2015). That requirement is met when the expense is “incurred in order to preserve or dispose of the secured creditor’s property.” *In re Florence Discount Ctr.*, 175 B.R. 939, 941 (Bankr. S.D. Ohio 1994) (internal citation omitted); *In re Mobile Air Drilling Co.*, 53 B.R. 605, 609 (Bankr. N.D. Ohio 1985) (same); *see also* 4 Collier on Bankruptcy ¶ 506.05 (16th ed. 2015) (“[A] secured creditor receives a ‘benefit’ within the meaning of section 506(c) if the relevant expense preserved or increased the value of its collateral”). For example, in *In re Lamont Gear Co.*, 1997 Bankr. LEXIS 979, at *21 (Bankr. E.D. Pa. July 9, 1997), the court held that the storage and preservation expenses of the secured creditor’s collateral could be surcharged under section 506(c) because if the debtor had not incurred these

costs, the secured creditor “would have had to incur some storage expense in order to protect its collateral.”

44. Furthermore, when costs and expenses solely involve the disposition of collateral, such expenditures “would generally be found to relate to preservation or disposition and benefit the holder of the secured claim.” *In re SpecialCare, Inc.*, 209 B.R. 13, 19-20 (Bankr. N.D. Ga. 1997) (internal citation omitted). For example, the *SpecialCare* Court held that the “payroll of employees directly and solely involved with the disposition of the subject property,” which in this case was an employee determining insurance claims for the collection of accounts receivable, are expenses that may be surcharged against a secured lender’s collateral. *Id.* at 19. Here, the Debtors spent millions of dollars to preserve, protect, maintain, and repair the DIP Collateral (including \$1,240,406 paid to employees and officers, \$91,096 for postpetition payroll tax and \$507,699 for employee health benefits) and incurred additional fees and other costs to efficiently sell the DIP Collateral through a Court-approved and Tribeca-dictated process (including, for example \$1,187,877 paid for repair and maintenance and \$7,092,547 paid for costs associated with maintaining and preparing the DIP Collateral for sale). Thus, as in the *Lamont Gear* and *SpecialCare* cases, these Expenses benefitted the DIP Collateral and therefore may be surcharged under section 506(c).

45. When continued operation of the debtors’ business is integral to maximizing value in disposing of the collateral, the debtor may also surcharge costs incurred to run the business. *See In re Domistyle*, 811 F.3d at 700-01 (holding surcharge benefitted lender because absent maintenance and care of the collateral, it would have “been left trying to sell a vacant building damaged by vandalism, filled with overgrown weeds, and saddled with a leaking roof”); *In re Strategic Labor, Inc.*, 467 B.R. 11, 22 (Bankr. D. Mass. 2012) (holding that when “the debtor’s

continued operations preserve or enhance the value of the secured creditor's collateral, items that may qualify as 'necessary' expenses chargeable against the collateral include the debtor's payroll costs, insurance costs, workers' compensation expenses, and post-petition administrative taxes Since it is clear that the continued operation of the debtor's business was a prerequisite to the sale" (quoting 4 Collier on Bankruptcy ¶ 506.05[4] (16th ed. 2015)); *In re AFCO Enterprises, Inc.*, 35 B.R. 512, 516 (Bankr. D. Utah 1983) (holding that operating costs spent maintaining a resort as a going-concern could be surcharged because maintaining the resort reduced startup cost for the buyers, which would have been reflected in a lower purchase price).⁸

46. Here, the Debtors maintained, marketed, and sold the DIP Collateral while managing the day-to-day operations of their business in the first months of these cases. The Expenses were necessary and reasonable to preserve and dispose of the DIP Collateral in the most value-maximizing manner under the circumstances. The Public Sale Process followed by the Private Sale Process was the best way to maximize the DIP Collateral's value and was determined by Tribeca or with Tribeca's consent, such that the ensuing Expenses necessary to generate the Debtors' sale results are within the scope of section 506(c). The Debtors' management, led by President David Gay, ensured that the sales that have closed to date were accomplished in a highly efficient manner and for the highest and best price because of Mr. Gay's extensive expertise in the coal industry and the Debtors' disciplined and thorough marketing and sale process.

47. On the other hand, Tribeca, an Australian private equity fund, has in essence no industry experience: Tribeca would have had to hire third-party professionals with no prior specific

⁸ The fact that other creditors may also have benefitted from the sale of the DIP Collateral does not mean that Tribeca's DIP Collateral should not be surcharged to pay the Expenses. Whether another creditor may have tangentially benefitted from the Expenses is of no import to the Court's examination of the Expenses' propriety. Such an assertion would be "dubious and unsupported" and "misread[] the test to determine chargeability under 506(c)." *Senior-G&A Operating Co., Inc.*, 957 F.2d at 1300. Instead, this Court must determine if the Expenses were reasonable, necessary, and of benefit to Tribeca, all of which are satisfied in these cases.

knowledge of the DIP Collateral. A Tribeca-led process likely would have been prohibitively costly and likely would have generated less proceeds than what was obtained by the Debtors, harming all of the estates' parties-in-interest in the process. Indeed, this is why Tribeca refused to accept its collateral in satisfaction of its debt – it would have had to come out of pocket to pay the expenses which it refused to do. Moreover, the appraisal commissioned by Tribeca to estimate the value of the DIP Collateral pales in comparison to what the Debtors have actually generated. As of November 16, 2020, the Debtors have received approximately \$1,786,664.13 in cash proceeds from DIP Collateral sales. This is approximately 17% more than the appraised value of such property according to the Forced Liquidation Appraisal (the "Appraisal") prepared by Equipment Consultants Company LLC at Tribeca's request. The Appraisal will be filed under seal.

48. Accordingly, the sales that the Debtors have achieved through the Private Sale Process generated value that directly benefitted Tribeca by monetizing a portion of their DIP Collateral at values that exceeded Tribeca's expectations and without Tribeca having to come out of pocket for a dollar. *See In re Strategic Labor, Inc.*, 467 B.R. at 23 (approving surcharge of expenses related to the sale of certain assets and compensation for management where "the record of this case has been consistent and unambiguous from the outset that the primary beneficiary of the debtor's efforts to sell its assets on a going-concern basis in chapter 11 would be the [Lienholder]"); *In re Phoenix Pipe and Tube, L.P.*, 174 B.R. 688, 692 (E.D. Pa. 1994) (finding that payroll expenses, CEO salary, and other employee and administrative expenses directly benefitted secured creditor because "[a] company does not run itself"). At bottom, each of the Expenses was necessary to achieve the stated goal of selling the DIP Collateral, it was reasonable in amount, and beneficial to Tribeca because it achieved the highest and best offer for the DIP Collateral even in

the currently depressed coal industry market. Accordingly, the Debtors have satisfied the Beneficial Tests and the DIP Collateral should be surcharged for the Expenses.

C. The Debtors Satisfy the Consent Test

49. The Debtors also satisfy the Consent Test, such that the Expenses should be surcharged against the DIP Collateral. In *In re Ferncrest Court Partners*, 66 F.3d 778, 782 (6th Cir. 1995), while the court stated that “a finding of consent ‘is not to be lightly inferred,’” it explained that if the secured creditor “stipulated in writing to Debtor’s right to pursue a private sale” and thereafter “failed to object” to the retention of a professional benefitting the collateral, then the secured lender will be found to have consented to the sale-related costs. In *Ferncrest*, a postpetition commission to a broker associated with the sale of the collateral was surcharged pursuant to section 506(c) because the lender consented to the commission. *Id.* at 783. Similarly, in these cases, the Debtors incurred fees and expenses to retain professionals, such as Kurtz Auction and Realty Co., to sell the DIP Collateral for the benefit of Tribeca. Before these professional expenses were incurred, however, the Debtors first received written consent from Tribeca to proceed with the sale. It is also crucial to note that Tribeca never objected to the retention of the Debtors’ professionals.

50. In other words, the *Ferncrest* holding is dispositive with respect to the facts in these cases because Tribeca has (a) stipulated in writing (via emails) to the Debtors’ right to pursue all of the sales via the Public Sale Process and Private Sale Process and (b) did not object to the retention of the Debtors’ or Committee’s professionals. Thus, according to the Sixth Circuit Court of Appeals, the Debtors have satisfied the Consent Test by demonstrating that Tribeca consented to the Expenses and are permitted to surcharge the Expenses against the DIP Collateral. Therefore, both of the factors enumerated in *Ferncrest*, binding precedent in the Sixth Circuit, are met and the Debtors satisfy the Consent Test. In addition, as detailed in Chart B in **Exhibit A**, the

professionals in these cases have provided substantial detail in their invoices, applications, and staffing reports of the DIP Collateral sale-related Expenses, which are in an amount no less than \$3,411,101.15 and may properly be surcharged against the DIP Collateral.

51. Under the Consent Test, a court may surcharge not only the professionals' fees and expenses against the collateral, but also the expenses related to preserving and maintaining the going-concern value of the collateral. *See In re Tollenaar Holsteins*, 538 B.R. 830 (Bankr. E.D. Cal. 2015). The *Tollenaar* Court faced a similar situation than the one in these cases: the debtor/trustee incurred internal expenses and third-party fees and expenses related to the preservation, maintenance, and sale of substantially of the secured lenders' collateral. *Id.* at 832, 833. These expenses included labor intensive processes of caring, feeding, maintaining, transporting, and selling dairy cow herds, which comprised the collateral, along with preserving the ranch collateral to ensure that the collateral remained a "wet" dairy that could operate as a dairy farm for a potential purchaser and preserve its going-concern value. *Id.* at 840-43. Upon holding that both secured lenders consented to the fees and expenses, by allowing the trustee to incur expenses "to maintain the dairy operations to prevent the potential loss of operating permits which it feared would adversely affect the value of the real property," the court surcharged such operating expenses against the collateral proceeds. *Id.* at 834-35, 841-43. Here, as detailed in Chart A in **Exhibit A** and in Paragraph 38 in this motion, the Debtors incurred at least \$11,009,598 of internal expenses to preserve, maintain, and sell the DIP Collateral for its highest and best going-concern value. Because Tribeca provided the Debtors with written consent to proceed with each sale and never objected to the retention of the professionals in these cases, the Debtors' internal expenses described in Chart A can be surcharged, as in the *Tollenaar* case.

52. Tribeca unequivocally consented to the Debtors incurring the Expenses relating to the Public Sale Process and Private Sale Process. *See In re Ferncrest Court Partners*, 66 F.3d 778, 782 (6th Cir. 1995); *see also In re Swann*, 149 Bankr. 137, 143 (Bankr. D.S.D. 1993) (citing *Matter of Great Northern Forest Products, Inc.*, 135 Bankr. 46, 62 (Bankr. W.D. Mich. 1991)). Tribeca provided consent for each of the sale processes employed by the Debtors and each proposed sale. First, Tribeca not only consented to, but directed the Debtors to engage in, the Public Sale Process and was itself the proposed purchaser in the APA. Second, Tribeca consented in writing and did not object to the procedures outlined in the De Minimis Asset Sale Order. In addition, before closing each of the 28 bills of sale of portions of the DIP Collateral totaling \$1,351,664.13 pursuant to the De Minimis Asset Sale Order, Tribeca provided written approval, through its counsel, of each proposed sale. Third, Tribeca agreed in writing that the Debtors could pursue the Dock Sale and Wash Plant Sale (as to which a Tribeca organized entity is a party) and did not object to either sale. Fourth, Tribeca again provided the Debtors with written consent to pursue the auction of the Real Property.

53. The case law in Sixth Circuit is clear: because Tribeca affirmatively consented to all of the sale processes employed by the Debtors, did not object to any sale, and failed to object to the retention of any of the professionals, the Debtors satisfy the Consent Test. Therefore, the Debtors are authorized under section 506(c) of the Bankruptcy Code to surcharge the Expenses against the DIP Collateral.

NOTICE

54. Notice of this motion has been given to: (a) the U.S. Trustee; (b) the Environmental Protection Agency; (c) the Kentucky Energy and Environment Cabinet; (d) the Office of the Kentucky Attorney General; (e) the Internal Revenue Service; (f) the Debtors' prepetition secured

parties; (g) Dentons Bingham Greenebaum LLP and Whiteford Taylor & Preston LLP, counsel to the Committee; and (h) all parties who have requested service pursuant to Bankruptcy Rule 2002.

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WHEREFORE, the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as is just.

DATED: November 20, 2020

FROST BROWN TODD LLC

By: /s/ Edward M. King

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– and –

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Exhibit A

Expense Charts

Chart A

Preliminary Estimate of Debtors' Internal Postpetition Expenses Eligible to be Surcharged Against DIP Collateral Proceeds⁹		
Employee and Executive Compensation	Employee-related compensation, including estimate of all employees directly related to the sale of the DIP Collateral (<i>e.g.</i> , maintenance, marketing, and additional operational support). Since the Petition Date, the Debtors have had up to approximately 125 employees who regularly serviced, maintained, marketed, and repaired the DIP Collateral. Cost includes a portion of executive compensation and prepetition compensation and employee-related claims required to be paid to preserve, market, and sell the DIP Collateral. The Debtors estimate that at least 30% of the management's time was devoted to these items. The remaining employment categories included in this chart incorporate this 30% assumption.	\$1,240,406¹⁰
Postpetition Payroll Tax	Accrued claims, including deferred social security liability tax.	\$91,096
Employee Health Benefits	Estimated cost associated with employees health benefits.	\$507,699
Facilities	Facilities expense includes costs associated with maintaining and preparing the DIP Collateral for sale, which is required to preserve the DIP Collateral's going-concern value.	\$7,092,547
Security	Security costs associated with protecting the DIP Collateral.	\$72,280

⁹ The Debtors are continuing to analyze the Expenses incurred in these chapter 11 cases and reserve their rights to modify the amount and type of Expenses sought in advance of any hearing or final determination on the amount owed by Tribeca. Of note, the Debtors will have additional internal fees and expenses from the Petition Date through and including February 29, 2020 to add to the total Expense amount.

¹⁰ The total amount of employee and executive compensation has been estimated at approximately \$4.1 million.

Information Technology	IT that is used by the Debtors to track, market, sell, and record the DIP Collateral sales and proceeds.	\$188,934
Property Insurance	Represents estimated portion of property and casualty insurance that is incurred on account of the DIP Collateral.	\$418,758
R&M	Repair and maintenance associated with the upkeep of the DIP Collateral.	\$1,187,877
US Trustee Fees	Allocation of U.S. Trustee fees in connection with the chapter 11 cases calculated based on proceeds of the DIP Collateral available for distribution.	\$210,000
TOTAL EXPENSES SOLELY RELATED TO DEBTORS' INTERNAL EXPENSES		\$11,009,598

Chart B

Preliminary Estimate of Professionals' Expenses Eligible to be Surcharged Against DIP Collateral Proceeds¹	
SQUIRE PATTON BOGGS (US) LLP²	
First Interim Fee Application [Dkt. 399]	\$105,899.00
Second Interim Fee Application [Dkt. 593]	\$653,998.00
FROST BROWN TODD LLC³	
First Interim Fee Application [Dkt. 401]	\$15,310.75
Second Interim Fee Application [Dkt. 594]	\$49,216.38
PERELLA WEINBERG PARTNERS LP⁴	
First Interim Fee Application [Dkt. 403]	\$490,304.64
Second Interim Fee Application [Dkt. 615]	\$1,450,073.70⁵
FTI CONSULTING, INC.⁶	
Staffing Report [Dkt. 347]	\$81,081.00
Staffing Report [Dkt. 349]	\$61,783.00

¹ The Debtors are still analyzing the expenses incurred in these chapter 11 cases and reserve their rights to modify the amount and type of Expenses sought in advance of any hearing or final determination on the surcharge amount owed by Tribeca.

² The Applications show the total number of fees for matter 3 (Asset Dispositions) in the First Interim Fee Application and for matter 3 (Asset Dispositions) and matter 23 (Litigation) in the Second Interim Fee Application.

³ In both Interim Fee Applications, 100% of the amounts in the Asset Disposition category was included, but only 25% of the Financing, Lien Rights, and Cash Collections category was included because this category relates only to certain sale matters.

⁴ All of the fees and expenses in both Interim Fee Applications were included because such costs were related to sale transactions.

⁵ The Court has taken this matter under advisement and has not yet entered an order regarding what amount of fees and expenses Perella Weinberg Partners LP is entitled to [Docket No. 704]. Once an order is entered, the Debtors will revise the amount of the Expenses accordingly.

⁶ The Debtors conservatively accounted for only 25% of FTI Consulting Inc.'s fees and expenses from each staffing report, despite the multitude of sales conducted in these cases. Upon further review by the Debtors, a higher percentage may be allocated and the Debtors reserve all their rights in connection therewith.

Staffing Report [Dkt. 394]	\$56,490.00
Staffing Report [Dkt. 464]	\$57,344.00
Staffing Report [Dkt. 585]	\$55,754.00
Staffing Report [Dkt. 622]	\$56,775.00
STRETTO⁷	
February Invoice	\$5,001.06
March Invoice	\$19,395.93
April Invoice	\$7,229.94
May Invoice	\$11,576.05
June Invoice	\$32,680.56
July Invoice	\$40,910.72
August Invoice	\$19,374.42
WHITEFORD, TAYLOR & PRESTON LLP⁸	
First Interim Fee Application [Dkt. 398]	\$18,340.50
Second Interim Fee Application [Dkt. 600]	\$50,362.00
DENTONS BINGHAM GREENEBAUM LLP⁹	
First Interim Fee Application [Dkt. 400]	\$4,945.00
Second Interim Fee Application [Dkt. 615]	\$67,255.50
TOTAL EXPENSES SOLELY RELATED TO PROFESSIONALS	\$3,411,101.15

⁷ Invoices for February, March, April, May, and August were reduced by 80% to conservatively include only sale-related or DIP Collateral-related matters, while June and July invoices were included in full to reflect the litigation relating to the APA.

⁸ The Applications show the total number of fees for Asset Dispositions in the First Interim Fee Application and the Second Interim Fee Application.

⁹ The Applications show the total number of fees for Asset Sales, Other Disposition of Assets in the First Interim Fee Application and for Asset Sales, Other Disposition of Assets and Litigation and Contested Matters in the Second Interim Fee Application.

Exhibit B

Appraisal

(TO BE FILED UNDER SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will serve notice on all parties registered to receive notice in this case.

/s/ Edward M. King _____

Edward M. King

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
(Owensboro Division)**

In re:) Chapter 11
)
Hartshorne Holdings, LLC, *et al.*,) Case No. 20-40133
)
Debtors.¹) (Jointly Administered)

**ORDER AUTHORIZING THE DEBTORS
TO SURCHARGE TRIBECA'S DIP COLLATERAL**

Upon the motion (the "Motion")² of the above-captioned Debtors for entry of an order authorizing (a) the Expenses, which are currently estimated to be at least \$14,670,699.15, to be surcharged against the DIP Collateral and (b) limiting Tribeca's liens on the proceeds of the DIP Collateral in the full amount of the Expenses not surcharged as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and venue being proper before this Court under 28 U.S.C. §§ 1408 and 1409; and consideration of the Motion and the relief requested therein being a core proceeding as defined in 28 U.S.C. § 157(b); and due and proper notice having been given to the parties listed in the Motion, and it appearing that no other or further notice need be provided; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interest of the Debtors, their estates, creditors and equity security holders; and upon all of the proceedings had before the Court and upon due deliberation and sufficient cause appearing thereof,

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: Hartshorne Holdings, LLC (3948); Hartshorne Mining Group, LLC (0063); Hartshorne Mining, LLC (1941); and Hartshorne Land, LLC (5582). The Debtors' headquarters are located at 373 Whobry Road, Rumsey, Kentucky 42371.

² Capitalized terms used not otherwise defined herein shall have the meaning ascribed to them in the Motion.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Debtors are hereby allowed and awarded a surcharge under section 506 of the Bankruptcy Code against Tribeca for the amount of the Expenses in an amount not less than \$14,670,699.15 (the “Surcharge”) without prejudice to any future potential surcharge for any subsequent period as may be established at a hearing on the Motion.

2. The Debtors shall pay the Surcharge no later than 14 calendar days after entry of this Order.

3. In addition to all other rights and remedies, the Surcharge shall constitute a senior lien and encumbrance against the DIP Collateral until paid, which lien and encumbrance shall be senior in priority to all liens against the DIP Collateral, and the Surcharge and related lien and encumbrance shall bear interest at the rate of five percent (5%) per annum until paid in full.

4. This order shall constitute a perfected lien against the DIP Collateral to secure the Surcharge, and the Debtors may record or file such other document or instrument as may be advisable to evidence the perfected lien.

5. The Surcharge, the related lien, and other provisions of this Order shall survive the dismissal of the Debtors’ chapter 11 cases unless the order dismissing the cases expressly provides otherwise.

6. Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens.

7. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of the Bankruptcy Rules are satisfied by such notice.

8. Notwithstanding any Bankruptcy Rule to the contrary, the terms and conditions of this Order are immediately effective and enforceable upon its entry.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

10. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Tendered by:

FROST BROWN TODD LLC

/s/ Edward M. King

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