

Debtors' Lease (as defined below) of the West Hartford Facility (also as defined below) with NPA Hartford LLC; and (b) authority to hold, assert and, if necessary, waive the Privileges (as defined below). In support of this Motion, the Committee respectfully represents as follows:

JURISDICTION AND BASIS FOR RELIEF

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested in the Motion are sections 503(b)(3)(B), 1103(c)(5) and 1109(b) of Title 11, United States Code (the "Bankruptcy Code").

BACKGROUND

2. On June 14, 2015 (the "Petition Date"), each of the Debtors filed a voluntary petition with this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as Debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code. On June 16, 2015, this Court entered an order directing joint administration of the Debtors' chapter 11 cases for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Rule 1015-1.

3. On June 25, 2015, the Office of the United States Trustee for Region 3 (the "U.S. Trustee") appointed a statutory committee of unsecured creditors pursuant to section 1102(a)(1) of the Bankruptcy Code [D.I. 130], consisting of Wilmington Trust, National Association; Magpul Industries Corporation ("Magpul"); Stephen Nyhan and Jeana Walker-Nyhan; International Union, UAW; and Pension Benefit Guaranty Corporation. On August 12, 2015,

Magpul notified the U.S. Trustee of its resignation from the Committee, effective August 10, 2015.

PRELIMINARY STATEMENT

4. The Debtors are the historic manufacturers of some of the most iconic firearms in history. A critical issue in the Debtors' chapter 11 cases is resolution of the lease (the "Lease")² that Colt Defense LLC ("Colt Defense"), as tenant, has with NPA Hartford LLC, as landlord (the "Landlord" or "NPA Hartford"), for the facilities located in West Hartford, Connecticut from which Colt Defense and certain of the other Debtors operate a significant portion of their businesses (the "West Hartford Facility"). In fact, substantially all of the Debtors' manufacturing operations take place at the West Hartford Facility that Colt Defense leases from NPA Hartford. Barring an extension, renewal, or court-ordered relief, the Lease purportedly is currently scheduled to terminate by its terms on October 25, 2015, and allegedly may not provide Colt Defense with any renewal or extension rights.³ If Colt Defense is evicted, or otherwise dispossessed, from the West Hartford Facility and/or Colt Defense and certain of the other Debtors occupying the facility are forced to hastily vacate the premises, hundreds of jobs could be lost and hundreds of millions of dollars in value could potentially be destroyed.

5. The Committee has substantial concerns about unresolved issues, conflicts of interest, and potential claims and defenses relating to the Debtors' West Hartford Facility, and specifically, Colt Defense's Lease with NPA Hartford pursuant to which Colt Defense and

² A copy of the Lease is attached as an exhibit to the Proposed Complaint (as defined hereinafter) which is attached to this Motion as **Exhibit 3**.

³ The Committee believes the language in the Lease regarding the termination date is ambiguous and that, in fact, the termination date for the Lease may actually be October 31, 2015, or later, rather than the October 25, 2015 date that has been repeatedly referenced in pleadings filed in these chapter 11 cases. The Committee does not concede that the Lease will terminate on October 25, 2015, and expressly reserves all rights on this issue.

certain of the other Debtors occupy such facility. Because of these unresolved issues, conflicts of interest, and potential claims and defenses that are detailed in this Motion, the Committee respectfully requests that this Court grant it derivative standing on behalf of the Debtors, and for the benefit of the Estates, to file, prosecute, and settle (if determined appropriate by the Committee, and subject to Court approval in accordance with Bankruptcy Rule 9019) the Claims asserted in the Proposed Complaint against the Proposed Defendants (as defined hereinafter). The Committee further requests that this Court give it the authority to hold, assert and, if necessary, waive the Privileges as part of this process.

FACTS

6. The Landlord is affiliated with, and at all relevant times herein has been controlled by, the Debtors' equity sponsor, Sciens Capital Management LLC ("Sciens"). Prior to the Petition Date, the Landlord agreed to extend the Lease, with such agreement being contingent on Sciens's remaining in control of the Debtors. Although Sciens and the Landlord had contended that this agreement was not "exclusive" and would be open to third parties, the Landlord has since said that deal is no longer on the table and has imposed a myriad of conditions to considering a Lease extension or renewal to Colt Defense or a third party.

7. As of the Petition Date, affiliates of Sciens owned approximately 87% of the equity interests in Colt Holding Company LLC, and Daniel J. Standen ("Standen") and Ioannis (John) P. Rigas ("Rigas"), through their positions at Sciens, controlled such equity interests. Both Standen and Rigas sit on the governing board (the "Governing Board") of Colt Defense. (*Keith A. Maib's Declaration in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* [D.I. No. 17] (the "Maib Decl.") ¶ 47).

8. Standen and Rigas (through NPA Management) also own the single largest equity stake in NPA Hartford (approximately 30.16%). (Form 10-K/A dated May 7, 2015, at 120 (“Certain of the principals of Sciens Management and certain of our managers, (including Messrs. Rigas and Standen) have a direct and/or indirect ownership interest in NPA Hartford LLC.”); *Omnibus Objection of NPA Hartford LLC and Valnic Capital Real Estate Fund I LLC to Motions of Debtors, Consortium, and Official Committee of Unsecured Creditors for Examinations and Document Production Pursuant to Rule 2004* [D.I. 275] (the “NPA Hartford and Valnic 2004 Objection”), ¶ 6 (“Sciens (or, more accurately, its principals) own 30.16% of NPA.”)). NPA Management LLC (“NPA Management”) has historically acted and may continue to act as NPA Hartford’s managing member.⁴ (NPA Hartford and Valnic 2004 Objection ¶ 17).

9. NPA Management is owned and/or controlled by Standen and Rigas. (*Id.*). NPA Management has historically had authority to “unilaterally act for NPA [Hartford].” (*Id.*). Under NPA Hartford’s operating agreement, NPA Management has full and exclusive authority to manage and make business decision on behalf of NPA Hartford and can be replaced only upon the bankruptcy filing or liquidation of NPA Management. (Amended and Restated Limited Liability Company Operating Agreement of NPA Hartford LLC, dated as of October 25, 2005).

⁴ It should be noted that the Debtors represent that two of Sciens’s members are managing members in the Landlord. (*Debtors’ Motion, Pursuant to 11 U.S.C. §§ 105, 363, and 365, and Fed. R. Bankr. P. 2002, 6004, 6006, 9008 and 9014, for Entry of (A) an Order (I) Approving Bid Procedures in Connection with the Sale of Substantially All of the Debtors’ Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests, (II) Approving Procedures Related to the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling the Hearing to Consider Approval of Such Sale, and (V) Granting Certain Related Relief; and (B) an Order Approving the Sale of Substantially All of the Debtors’ Assets* [D.I. 13] ¶ 17).

Standen has historically acted as NPA Management's "Authorized Member." (Lease at 30; Amendment of Lease, dated as of October 25, 2012 (the "Lease Amendment"⁵), at 3).

10. Prior to the Debtors' filing for chapter 11 relief, Sciens caused Debtors Colt Defense and Colt Finance Corp., as issuers, to launch two expensive exchange/pre-pack offers⁶ that called for holders of the 8.75% Senior Notes due 2017 (the "Senior Notes") to take 70% or 55% discounts, respectively, on their claims, while equity was left unimpaired, in contravention of the "absolute priority" rule. When the holders did not readily accept these proposals, Sciens threatened to cause NPA Hartford to evict Colt Defense from the West Hartford Facility upon the alleged termination of the Lease. Thereafter, Sciens caused the Debtors to file for chapter 11 relief and allege that an emergency existed that mandated a rushed section 363 sale under circumstances that would have ensured the absence of competitive bidding and enabled Sciens to preserve its ownership of the Debtors, while wiping out the unsecured creditors. To facilitate this plan, Sciens caused the Landlord to offer a Lease extension inexorably intertwined with Sciens's stalking horse bid. This gambit was the second time in the weeks leading up to the Debtors' bankruptcy filings that Sciens had caused the Landlord to offer a Lease extension dependent on Sciens's retention of its equity interests in the Debtors, the first offer having been made in connection with the June 1st exchange/pre-pack proposal.

11. Sciens acknowledges that a substantial conflict of interest exists as a result of its control over both the Debtors and NPA Hartford. In a futile attempt to overcome this

⁵ A copy of the Lease Amendment is attached as an exhibit to the Proposed Complaint (as defined hereinafter) which is attached to this Motion as Exhibit 1.

⁶ Colt Defense and Colt Finance Corp., as the issuers of the Senior Notes, were the two entities actually offering to exchange such notes through the exchange offer. The other "Applicants" listed on the SEC application for qualification of indentures were Debtors Colt Defense Technical Services LLC; New Colt Holding Corp.; Colt's Manufacturing Company LLC; Colt Canada Corporation; and Colt International Coöperatief U.A. The only Debtors not listed as Applicants were thus Colt Security LLC; CDH II Holdco Inc.; and Colt Holding Company LLC.

conflict, Sciens has purportedly delegated full authority with respect to Lease extension matters to Valnic, a so-called “independent” member of NPA Hartford. (Maib Decl. ¶ 51; Sale Motion ¶ 17; Resolution of the Managing Member of NPA Hartford LLC, effective as of May 1, 2015 (the “NPA Hartford Resolution”).⁷ On information and belief, Sciens (controlled by Standen and Rigas), however, still has de facto control of the Landlord and is attempting to leverage the Lease to achieve its goal of preserving ownership and control of the Debtors, while jettisoning the unsecured debt, rather than maximizing the value of the Debtors for the benefit of their stakeholders based on the priorities established by applicable law. The actions of Sciens, Standen, and Rigas in causing the Landlord to refuse to extend the Lease, unless Sciens remains in control of the tenant (Colt Defense), constitute breaches of their fiduciary duties to the Debtors and their Estates to, among other things, maximize the value of the Company. Upon information and belief, the Landlord (and its members) are acting in concert with Sciens to enable it to achieve its goals, in breach of its fiduciary duties to the Debtors and their Estates.

12. Furthermore, upon information and belief, neither Sciens, Standen, nor Rigas used their positions of authority to cause Colt Defense and the other Debtors to implement any sort of contingency plan before the Petition Date regarding the approaching maturity of the stated Lease term. For example, they did not use their positions of authority to cause Colt Defense to secure an early Lease extension commitment from the Landlord or make arrangements for alternative space.

⁷ A copy of the NPA Hartford Resolution is attached as an exhibit to the Proposed Complaint, which is attached as an exhibit to this Motion.

13. In addition, the Landlord's conduct in assisting Sciens in its efforts to preserve its control over and economic interest in the Debtors while jettisoning the unsecured debt, by withholding from Colt Defense a Lease extension on economic terms it already has signified are acceptable, is being driven by a bad faith ulterior motive, in derogation of the Landlord's implied obligation of good faith and fair dealing regarding decisions implicating the Lease. For these and other reasons, the Debtors' Estates are entitled to injunctive relief preventing the Landlord from taking action in connection with the Lease that would result in the destruction of the Debtors' businesses, eliminating any prospect for a successful reorganization in these chapter 11 cases. The Estates are also entitled to be compensated by the Proposed Defendants (as defined below) for the injury their wrongful conduct already has inflicted on the Debtors.

14. Sciens, Standen, Rigas, NPA Hartford, NPA Management, Valnic, and Smallman (collectively, the "Proposed Defendants") should not be permitted to destroy the Debtors' businesses by immediately commencing proceedings to evict Colt Defense from the West Hartford Facility after the stated Lease term purportedly terminates on October 25, 2015. Rather, this Court should enter an order enjoining any such attempt by the Proposed Defendants to proceed to evict Colt Defense and the other Debtors from the West Hartford Facility and should ensure that the Debtors have adequate time to relocate their business in an orderly fashion.

15. On August 17, 2015, counsel for the Committee sent a letter to counsel for the Debtors in which the Committee advised the Debtors that it believes claims may exist against the Landlord relating to its acts and omissions in connection with the Lease (the "Landlord Derivative Standing Letter"), a true and correct copy of which is attached hereto as **Exhibit 1**. In

that letter, the Committee further advised the Debtors that it understands that Sciens (the Debtors' equity sponsor) holds an ownership interest in and may, directly or indirectly, still control the Landlord, as it indisputably did prepetition. In that letter, the Committee also advised the Debtors that it believes this relationship, in combination with the relationship between Sciens and the Debtors, creates a conflict of interest that has prevented and will prevent the Debtors from asserting claims against the Landlord related to the Lease. Given this conflict, the Committee requested in the Landlord Derivative Standing Letter that the Debtors immediately consent to the Committee's asserting these claims on behalf of the Debtors and for the benefit of the Estates against the Landlord. Because of the approaching purported termination date for the Lease, the Committee requested that the Debtors respond to the Landlord Derivative Standing Letter by no later than August 21, 2015. As of the date of filing of this Motion, the Committee has received no response from the Debtors regarding the Landlord Derivative Standing Letter.

16. Counsel for the Committee sent another letter dated August 17, 2015, to counsel for the Debtors informing them about potential claims against Sciens and the Debtors' current and former directors and officers (collectively, the "Directors and Officers") relating to acts and omissions of these parties (the "Sciens and D&O Derivative Standing Letter", and with the Landlord Derivative Standing Letter, sometimes collectively referred to hereinafter as the "Derivative Standing Letters"). A true and correct copy of the Sciens and D&O Derivative Standing Letter is attached hereto as **Exhibit 2**. In that letter, the Committee advised the Debtors of its belief that claims may exist against Sciens and the Directors and Officers relating to their acts and omissions in connection with the Debtors, including but not limited to, claims for breaches of duties to the Debtors or their constituents, claims for tortious interference and claims for avoidance and recovery of fraudulent transfers. Because of the relationship between Sciens

and the Directors and Officers, on the one hand, and the Debtors, on the other hand, the Committee stated its belief that the Debtors are operating under a conflict that has prevented and will continue to prevent the Debtors from asserting such claims. Because of this conflict, the Committee requested that the Debtors immediately consent to the Committee's asserting these claims on behalf of the Debtors and for the benefit of the Estates against Sciens and the Directors and Officers. Because of the upcoming sale-related deadlines in these chapter 11 cases, the Committee requested that the Debtors respond to the Sciens and Directors and Officers Derivative Standing Letter by no later than August 21, 2015. As of the date of filing of this Motion, the Committee has received no response from the Debtors regarding the Sciens and Directors and Officers Derivative Standing Letter.

RELIEF REQUESTED

17. Based on the foregoing, the Committee seeks derivative standing to bring an action against the Proposed Defendants for, among other things: (i) damages for injury caused by breaches of fiduciary duties and aiding and abetting breaches of fiduciary duties; (ii) avoidance of the transfer effected by the LLC Agreement Amendment (as defined in the Proposed Complaint, which is defined below) as a fraudulent transfer; (iii) injunctive relief, pursuant to section 105 of the Bankruptcy Code, grounded on principles of equitable estoppel and the implied obligation of good faith and fair dealing, prohibiting the Landlord from attempting to evict, or otherwise dispossess, Colt Defense, or its sub-lessee, Colt's Manufacturing Company LLC, for the period (inclusive of the option extension periods) set forth in the May 28th Lease Extension Letter (as defined in the Proposed Complaint), conditioned on Colt Defense's compliance with the basic economic terms set forth in that letter; and (iv) damages for tortious interference with the existing business relationship

between Colt Defense and the Landlord and the prospective business relationship between Colt Defense and the Landlord. Attached hereto as **Exhibit 3** is a copy of the draft complaint against the Proposed Defendants (the “Proposed Complaint”), in substantially the form in which the Committee proposes to file with this Court.⁸ The Committee respectfully submits that the Claims detailed in the Proposed Complaint represent viable and valuable assets of the Estates which, if successfully prosecuted, will, among other things, preserve the Lease for the benefit of the Debtors and their Estates and also provide a monetary recovery for the Estates, which will ultimately inure to the benefit of the unsecured creditors of the Debtors in these bankruptcy cases.

18. In connection with the grant of derivative standing, the Committee also seeks authority to hold, assert and, if necessary, waive the attorney-client privilege, the work product privilege, and any other applicable privileges of the Debtors and their Estates (collectively, the “Privileges”), solely for the benefit of, and on behalf of the Estates with regard to its assertion and pursuit of the Claims.⁹

19. The Committee further seeks in this Motion to be given the sole authority to settle (if determined appropriate by the Committee, and subject to Court approval in accordance with Bankruptcy Rule 9019) any of the Claims described in the Proposed Complaint to be filed against the Proposed Defendants.

⁸ Sciens and NPA Hartford have produced a myriad of documents to the Committee in response to Rule 2004 motions that the Committee filed. Counsel for the Committee is currently in the process of reviewing these documents. In addition, the Committee has attempted to schedule the Rule 2004 examinations of representatives of Sciens and NPA Hartford. Therefore, the Committee reserves the right to revise the Proposed Complaint based upon its review and analysis of the documents produced by Sciens and NPA Hartford and its examinations of these parties in connection with Rule 2004 discovery.

⁹ The Committee respectfully submits that any grant of derivative standing would necessarily vest the Committee with authority to hold, assert, and if necessary, waive the Privileges. *See Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). However, out of an abundance of caution, the Committee seeks entry of an order explicitly confirming the same.

20. Finally, in the event the Landlord commences eviction, or other similar proceedings against Colt Defense (notwithstanding the relief sought in the Proposed Complaint), the Committee should be granted derivative standing to oppose such relief, including asserting all Defenses available to Colt Defense in connection therewith.

BASIS FOR RELIEF

I. DERIVATIVE STANDING

21. The Bankruptcy Code makes clear that the role of a creditors' committee is intended to be broad and flexible and may involve virtually every issue relevant to the case. *See, e.g.*, 11 U.S.C. § 1103(c)(5) (the committee may “perform such other services as are in the interests of those represented.”); 11 U.S.C. § 1109(b) (providing that the creditors' committee is among the interested parties that “may appear and be heard on any issue in a [chapter 11] case.”); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 566 (3d Cir. 2003) (“Sections 1109(b) and 1103(c)(5), taken together, evince a Congressional intent for committees to play a robust and flexible role representing the bankruptcy estate, even in adversarial proceedings.”) Indeed, the Bankruptcy Code specifically contemplates that, in certain instances, the role of the creditors' committee will be large enough to require reimbursement of expenses incurred while taking actions that might otherwise have been taken by the debtor or trustee, such as recovering property of the estate. *See* 11 U.S.C. 503(b)(3)(B) (providing for the priority payment of expenses of a “creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor.”); *see also Cybergenics*, 330 F.3d at 567 (stating that section 503(b)(3)(B) “would be meaningless unless authority existed” for committees to pursue derivative claims on behalf of the estate.)

22. Based upon the broad and flexible role of a creditors' committee, numerous courts, including the Third Circuit, recognize that a creditors' committee may be vested with derivative standing to pursue claims of the estate under certain limited circumstances. *See Cybergenics*, 330 F.3d at 566 (finding that "bankruptcy courts can authorize creditors' committees to sue derivatively to avoid fraudulent transfers for the benefit of the estate"); *PW Enters., Inc. v. N.D. Racing Comm'n (In re Racing Servs., Inc.)*, 540 F.3d 892, 904 (8th Cir. 2008) (stating that derivative standing is available to creditors' committees); *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 100 (2d Cir. 2001) (same); *Canadian Pacific Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Grp., Inc.)*, 66 F.3d 1436, 1446 (6th Cir. 1995) (same); *Fogel v. Zell*, 221 F.3d 955, 965 (7th Cir. 2000) (same); *Liberty Mut. Ins. Co. v. Official Unsecured Creditors' Comm. of Spaulding Composites Co. (In re Spaulding Composites Co.)*, 207 B.R. 899, 903 (9th Cir. B.A.P. 1997) (same).

23. In the Third Circuit, a creditors' committee may be granted derivative standing upon a showing that: (a) the trustee or debtor-in-possession unjustifiably refuses a demand to pursue an action; (b) the creditor establishes a colorable claim or cause of action; and (c) the creditor seeks and obtains leave from the bankruptcy court to prosecute the action for and in the name of the trustee. *See Cybergenics*, 330 F.3d at 566.¹⁰

24. For the reasons set forth below, the Committee submits that it has satisfied each of these requirements.

¹⁰ Courts outside the Third Circuit have adopted similar tests. *See, e.g., Fogel*, 221 F.3d at 965-66 ("If a trustee unjustifiably refuses a demand to bring an action to enforce a colorable claim of a creditor, the creditor may obtain the permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee."); *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990); *Official Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 543 (W.D. Pa. 2005); *In re G-I Holdings, Inc.*, 313 B.R. 612, 628 (Bankr. D.N.J. 2004) (citing *Gibson Group*, 66 F.3d at 1446 (both requiring generally that (1) a colorable claim that would benefit the estate if successful exists; (2) a demand has been made upon the statutorily authorized party to take action; and (3) the demand is unjustifiably refused). Note that the *National Forge* court also required that "the creditors' committee [have] obtained permission from the bankruptcy court to initiate the action on behalf of the estate." *Nat'l Forge Co.*, 313 B.R. at 628.

A. Derivative Standing Letters Sent to the Debtors and Debtors' Unjustifiable Failure to Respond Thereto Consenting to Committee's Derivative Standing and Inherent Conflicts Present

25. As described above, the Committee delivered the Derivative Standing Letters to the Debtors on August 17, 2015. The Landlord Derivative Standing Letter attached hereto constitutes a formal request made to the Debtors by the Committee that the Debtors consent to the Committee's bringing on behalf of the Estates in the Proposed Complaint the Claims against the Landlord related to the Lease on behalf of the Estates. Further, in the event the Landlord commences eviction, or other similar proceedings against Colt Defense, notwithstanding the relief sought in the Proposed Complaint, the Committee should be granted derivative standing to oppose such relief, including asserting all Defenses available to Colt Defense against the Landlord related to the Lease. In this Motion, the Committee also requests that it be permitted to assert Claims related to the Lease against various parties affiliated with the Landlord, specifically NPA Management, Valnic, and Smallman.

26. The Sciens and Directors and Officers Derivative Standing Letter attached hereto constitutes a formal request made to the Debtors by the Committee that the Debtors consent to the Committee's bringing on behalf of the Estates various claims against Sciens and the Directors and Officers. For purposes of this Motion, the Committee is at this time only seeking to assert Claims on behalf of the Estates against Sciens and the Directors and Officers related to the Lease.¹¹

¹¹ Considering the urgency of the issues presented by the Lease and the upcoming purported termination thereof, the Committee has attempted to limit the relief sought in its Proposed Complaint to those claims that relate to the Lease. The Committee is not currently seeking derivative standing in order to assert other claims that it believes may exist against Sciens and some or all of the other Proposed Defendants. The Committee specifically reserves the right at a later date, if determined necessary and appropriate, to file another derivative standing motion to assert other potential causes of actions against Sciens and the other Proposed Defendants, as well as other parties. The Committee has not yet had the opportunity to investigate other possible causes of action against these parties;

27. The Debtors have failed to respond to the Derivative Standing Letters.

28. In determining whether a debtor unjustifiably refuses to pursue a claim, courts consider the following factors: (a) whether a conflict of interest exists between the debtor and the parties against whom the creditors' committee's derivative action will be brought; (b) whether the creditors' interests are protected despite the debtor's refusal; (c) whether allowing the creditors' committee to pursue the action on the debtor's behalf will benefit the estate; and (d) whether appointing a trustee and allowing the trustee, as opposed to the creditors' committee, to pursue the action or converting the Chapter 11 case to a Chapter 7 case would be more beneficial to the estate. *G-I Holdings*, 313 B.R. at 643.

29. The Debtors' failure to assert the Claims against the Proposed Defendants is unjustified. As noted above, Sciens controls the Debtors and Sciens controlled the Landlord prepetition and, upon information and belief, continues to control the Landlord. Under these circumstances, a clear conflict of interest exists between the Debtors and Sciens with respect to the Claims. *See id.* (debtor's inaction and failure to assert claim found unjustified where claim at issue involved avoidance action against debtor's subsidiary corporation because debtor was "operating under at least the influence of conflicts of interest"); *Nat'l Forge Co.*, 326 B.R. at 545 (failure to assert claim found unjustified where debtor would have declined to bring avoidance and breach of fiduciary duty claims against debtor's management).

30. Under these circumstances presented here, the Debtors' failure to respond to the Derivative Standing Letters and consent to the filing of the Proposed Complaint against the

however, because of the fast-approaching purported termination of the stated Lease term on October 25, 2015, the Committee is currently seeking in this Motion to be granted derivative standing to pursue claims and causes of action against Sciens and the other Proposed Defendants (including the Directors and Officers) for matters related to the Lease.

Proposed Defendants is unjustified within the meaning of applicable law. *See G-I Holdings, Inc.*, 313 B.R. at 643; *Nat'l Forge Co.*, 326 B.R. at 545.

31. Furthermore, courts have determined that satisfaction of this element is not necessary in situations where it is clear that the demand would be futile because it is being made to the debtor regarding insiders of the debtor or parties that the debtor has previously agreed not to sue (such as debtor-in-possession financing lenders in connection with DIP financing agreements approved by the court). *See, e.g., Nat'l Forge Co.*, 326 B.R. at 545 (bankruptcy court was justified in concluding that debtor would have declined to bring avoidance and breach of fiduciary duty claims when debtor's management also would have been named defendants, and "thus, would have been operating under a patent conflict of interest if faced with a demand to file suit" and therefore making demand would have been futile); *G-I Holdings, Inc.*, 313 B.R. at 630 (demand and refusal requirement deemed fulfilled when claims arose from transactions implemented by the debtor's executives, thus evidencing that any formal demand to prosecute claims would have been refused); *see also Infinity Investors Ltd. v. Kingsborough (In re Yes! Entm't Corp.)*, 316 B.R. 141, 145 (D. Del. 2004) (holding that bankruptcy court should have granted individual creditor derivative standing without citing any formal demand made on the debtor); *SouthTrust Bank N.A. v. Jackson (In re Dur Jac Ltd.)*, 254 B.R. 279, 286 (Bankr. M.D. Ala. 2000) (no demand on debtor was necessary where action to be asserted by individual creditor was against debtor's own children, thus evidencing that any formal demand to prosecute claims would have been refused).

32. The Debtors have the inherent conflicts vis-à-vis Sciens and the Landlord (and various parties affiliated with Sciens and the Landlord), as has been detailed previously in this

Motion. Accordingly, the Committee submits that it has satisfied the demand requirement in that demand would be futile.

B. Colorable Claims

33. To determine whether the Claims and the Defenses are colorable, the Court must determine whether the Committee has asserted claims that would survive a motion to dismiss. *See In re Racing Servs., Inc.*, 540 F.3d at 900 (relevant inquiry is whether asserted claims “would survive a motion to dismiss”); *In re Gen. Instrument Corp. Sec. Litig.*, 190 F.R.D. 527, 529 (N.D. Ill. 2000) (“Here, it must be said that plaintiffs’ derivative action is at least a colorable claim; it has withstood a motion to dismiss.”); *see also G-I Holdings, Inc.*, 313 B.R. at 631 (quoting *Unsecured Creditors Comm. of STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 905 (2d Cir. 1985)) (a colorable claim is a claim “for relief that on appropriate proof would support a recovery”).

34. The Committee has attached its Proposed Complaint as an exhibit to this Motion. A review of the Proposed Complaint clearly reveals that the Committee’s Claims against the Proposed Defendants and Defenses to any effort by the Landlord to terminate the Lease are not only colorable but also compelling and substantial.

35. Therefore, the Proposed Complaint against the Proposed Defendants and the Claims asserted therein are colorable.

C. Leave of the Court

36. By this Motion, the Committee seeks leave from the Court to prosecute the action against the Proposed Defendants for and in the name of the Debtors. The Committee submits that, should the Court grant the Motion, the Committee will have satisfied the requirement that

the Court grant it leave to file the Proposed Complaint, including asserting the Claims described therein.

II. AUTHORITY OF COMMITTEE TO HOLD AND WAIVE PRIVILEGES

37. In connection with the requested grant of derivative standing (which, as discussed above, is warranted under the circumstances), the Committee seeks to ensure that the Debtors and the Proposed Defendants cannot refuse to produce certain documents or other information relevant to the Proposed Complaint and the Claims asserted therein, including any documents or other information that otherwise could be withheld based on a claim of a privilege held by the Debtors. Therefore, to the extent the grant of derivative standing does not provide the Committee with the authority to hold, assert, and if necessary, waive the Privileges, the Committee respectfully submits that it is entitled, pursuant to the *Garner* Doctrine (as defined below), to be vested explicitly with such authority.

38. The fiduciary exception set forth in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (the “*Garner* Doctrine”) overrides any privilege the Debtors otherwise might hold with respect to documents or other information sought by the Committee in connection with the Proposed Complaint against the Proposed Defendants. The *Garner* Doctrine provides that:

[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of these interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

In re Gen. Instrument Corp. Sec. Litig., 190 F.R.D. 527, 529 (N.D. Ill. 2000) (quoting *Garner*, 430 F.2d at 1103-04). *Garner* has not been limited to shareholder derivative suits and has become a general “fiduciary” exception to the attorney-client privilege. See *Asian Vegetable Research & Dev. Ctr. v. Inst. of Int’l Educ.*, 1995 WL 491491, at *5 (S.D.N.Y. Aug. 17, 1995);

see also Gen. Instrument, 190 F.R.D. at 529 (terming the exception created by *Garner* a “fiduciary duty exception”); *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, 244 F.R.D. 412, 423 (N.D. Ill. 2006) (recognizing the validity of the *Garner* Doctrine and applying it to requests for discovery of privileged documents).

39. In *Official Committee of Asbestos Claimants of G-I Holdings, Inc. v. Heyman*, 342 B.R. 416 (S.D.N.Y. 2006), the court found the *Garner* Doctrine applicable to discovery sought by a creditors’ committee under circumstances similar to the present case. In *G-I Holdings*, the committee was vested by the bankruptcy court with standing to pursue and prosecute any and all claims and causes of action belonging to the debtor and/or its estate against the debtor’s former chairman and CEO relating to certain stock transfer transactions. *Id.* at 418. In the action brought by the committee, the defendants (including the debtor) asserted a claim of attorney-client privilege with respect to a number of documents the committee had requested. *Id.* The committee argued, among other things, that the *Garner* Doctrine defeated the defendants’ assertion of privilege with respect to documents and communications subject to the debtor’s attorney-client privilege. *Id.* at 420. Applying the *Garner* Doctrine to the facts of the case, the *G-I Holdings* court held that “good cause” existed to set the attorney-client privilege aside because “of the obvious and irreconcilable conflict presented to G-I by the Committee’s claims,” and as a result, required the debtors to produce the documents it withheld on the basis of the attorney-client privilege. *Id.* at 425.

40. Courts have set forth a detailed list of factors to determine whether “good cause” exists for applying the *Garner* Doctrine to overcome the attorney-client privilege: “whether the party has a colorable claim, whether the information sought is not available elsewhere, whether the information is related to past or present actions, and whether production of the information

may risk the revelation of trade secrets or other confidential business information.” *Gen.*

Instrument, 190 F.R.D. at 529; *see also Jaffe Pension Plan*, 244 F.R.D. at 423; *Chapman*, 1996 WL 238863, at *2 (applying similar tests).

41. Though the Committee asserts that it satisfies all the above criteria, each factor need not be proven individually in order for *Garner* to apply. These factors listed are “neither prerequisite or dispositive: they ‘may contribute’ to a finding of good cause.” *Gen. Instrument*, 190 F.R.D. at 529. For the following reasons, the Committee submits that good cause exists to apply the *Garner* Doctrine and set aside the Privileges in the present situation.

A. Colorable Claims

42. The first factor supports vesting the Committee with the authority to hold, assert or, if necessary, waive the Privileges, solely for the benefit of the Estates. As explained above, the Committee has shown that colorable claims may exist, and as a result, the Committee should be given the authority to pursue such Claims, which includes obtaining full access to documents and other information pertaining thereto in the context of discovery and otherwise.

43. Accordingly, prosecution of the Proposed Complaint by the Committee, unfettered by claims of privilege, is calculated to uncover strong evidentiary support for the viable Claims asserted by the Committee therein, the successful pursuit of which will preserve an extremely valuable asset—the Lease—for the benefit of the Debtors and their Estates which will certainly increase the probability of funds being available for distribution to unsecured creditors of the Debtors. Therefore, the Proposed Complaint has merit.

B. Information is not Available Elsewhere

44. The information the Committee seeks to discover in support of its pursuit of the Proposed Complaint is held in large part only by the Debtors and is unavailable elsewhere. For

this reason, the second factor supports the application of the *Garner* Doctrine to permit the Committee to hold, assert or, if necessary, waive the Privileges, solely for the benefit of the Estates.

C. Information is Related to Past Actions

45. The third factor cited by the *General Instrument* court supports granting the relief requested in this Motion because the documents and other information the Committee will seek to discover relate to past actions relevant to the Claims being pursued. *Id.* Furthermore, because the Proposed Complaint has not yet been filed, the documents and information requested will not concern advice about the litigation itself. Accordingly, this factor strongly supports vesting the Committee with the authority to hold, assert or, if necessary, waive the Privileges, solely for the benefit of the Estates.

D. Production of the Information Will Not Reveal Confidential Business Information

46. The concerns underlying the fourth factor set forth in *General Instrument* are not implicated by the Motion. The information requested does not concern trade secrets or other information the Debtors have an interest in keeping confidential for independent reasons. There is no protective order in place in these cases. *See id.* Furthermore, disclosure of privileged information to the Committee shall not constitute a waiver or abrogation of the applicable privilege with respect to any other party. As a result, the fourth factor supports application of the *Garner* Doctrine.

III. AUTHORITY OF COMMITTEE TO SETTLE CLAIMS

47. Finally, in connection with the grant of derivative standing, the Committee seeks authority from this Court to settle the Claims if and to the extent determined in its

discretion to be appropriate, with any such settlement being subject to Court approval in accordance with Bankruptcy Rule 9019. Similar type relief has been granted by a number of other courts in connection with conferring derivative standing upon a creditors' committee. *See In re Evergreen Solar, Inc.*, Order Granting Leave, Standing and Authority to the Official Committee of Unsecured Creditors of Evergreen Solar, Inc. to Commence, Prosecute, and Settle Claims on Behalf of the Debtor's Estate and Related Relief, No. 11-12590 (MFW) (Bankr. D. Del. Oct. 28, 2011) [D.I. 382] (granting derivative standing to unsecured creditors' committee and further providing that such committee "shall have the exclusive right and authority to negotiate and enter into settlements on behalf of the Debtor's estate" with respect to certain causes of action); *In re Dewey & LeBouef LLP*, Case No. 12-12321 (MG), 2012 WL 5985445, at *9 (Bankr. S.D.N.Y. Nov. 29, 2012) (approving unsecured creditors' committee's derivative standing motion, including request for authority to settle claims); *In re Majestic Capital, Ltd.*, Order (I) Authorizing the Official Committee of Unsecured Creditors to (A) Assert and Prosecute Certain Claims and Causes of Action in the Name of and on Behalf of the Debtors' Estates, and (B) Move for Authority to Compromise Any Such Claims and Causes of Action, and (II) Granting Related Relief, Chapter 11 No. 11-36225 (CGM) (Bankr. S.D.N.Y. Dec. 12, 2011) [D.I. 211] (granting derivative standing to unsecured creditors' committee and providing that it "shall have the exclusive right, without further order of the Court, to move for authority, pursuant to Bankruptcy Rule 9019, to compromise any of the Estate Claims" and "Debtors shall not undertake to compromise any of the Estate Claims, whether under Bankruptcy Rule 9019 or otherwise"); *In re Old Carco LLC*, Order Authorizing the Official Committee of Unsecured Creditors to Pursue Certain Claims on Behalf of the Estate of Debtor Old Carco LLC, No.

09-50002 (AG) (Bankr. S.D.N.Y. Aug. 13, 2009) [D.I. 5151] (granting creditors' committee derivative standing and leave to file complaint, including "**exclusive right to prosecute and settle these claims** on behalf of CarCo estate") (emphasis added).

48. For the foregoing reasons, the Committee respectfully requests that the Court grant it derivative standing to assert and pursue the Proposed Complaint against the Proposed Defendants, and in connection therewith assert the Claims on behalf of the Estates and creditors thereof, and that any order granting such relief expressly provide that the Committee is vested with the authority to hold, assert, and if necessary, waive the Privileges and settle the Claims that are the subject of the Proposed Complaint.

NO PRIOR REQUEST

49. No prior motion for the relief requested herein has been made to this or any other court.

NOTICE

50. Notice of this Motion will be given to the following parties: (i) the United States Trustee; (ii) counsel to the Debtors; (iii) counsel to the Prepetition Senior Loan Agent;⁴ (iv) counsel to the Term Loan Agent; (v) counsel to the Senior Notes Indenture Trustee; (vi) the DIP Term Loan Lender and Prepetition Term Loan Lender; (vii) counsel to the DIP Term Loan Lender and Prepetition Term Loan Lender; (viii) the DIP Senior Loan Lenders and Prepetition Senior Loan Lenders; (ix) counsel to the DIP Senior Loan Lenders and Prepetition Senior Loan Lenders; (x) counsel to Sciens; (xi) counsel to the Landlord; and (xii) any party that has requested notice pursuant to Bankruptcy Rule 2002(i). A copy of the motion is also available on the Debtors' case website at <http://www.kccllc.net/coltdefense>.

WHEREFORE, the Committee respectfully requests that this Court (a) grant this Motion; (b) grant the Committee standing to assert and prosecute the matters detailed in the Proposed Complaint (a copy of which is attached hereto as **Exhibit 3**) against the Proposed Defendants, and in connection therewith, assert the Claims on behalf of the Estates and creditors thereof, including revising the Proposed Complaint before filing, as determined necessary and appropriate, based upon the Committee's review and analysis of documents produced by Sciens and the Landlord and information obtained in connection with the Rule 2004 motions filed by the Committee and other parties in interest; (c) grant the Committee authority to hold, assert and waive the Privileges; (d) grant the Committee sole authority to settle the Claims, if and to the extent determined appropriate to do so by the Committee, and consistent with Federal Rule of Bankruptcy Procedure 9019; (e) grant the Committee derivative standing to assert Defenses on behalf of Colt Defense in the event the Landlord commences eviction, or other similar proceedings against Colt Defense, notwithstanding the relief sought in the Proposed Complaint; and (f) grant such other and further relief to the Committee as is appropriate under the circumstances.

Dated: August 28, 2015
Wilmington, Delaware

/s/ Domenic E. Pacitti

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