IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1]	)	Case No. 20-10343 (LSS)
	)	(Jointly Administered)
Debtors.	)	

JOINT MOTION OF THE OFFICIAL TORT CLAIMANTS' COMMITTEE AND FUTURE CLAIMANTS' REPRESENTATIVE FOR ENTRY OF AN ORDER GRANTING STANDING AND AUTHORIZING THE PROSECUTION OF CERTAIN CHALLENGE CLAIMS ON BEHALF OF THE BANKRUPTCY ESTATES

The Official Tort Claimants' Committee (the "Tort Committee"), and James L. Patton Jr., as Legal Representative for Future Claimants (the "FCR" and together with the Tort Committee, the "Challenge Parties"), in the chapter 11 cases commenced by the above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby move this Court for entry of an order granting standing and authorizing the Challenge Parties to prosecute certain challenge claims on behalf of the bankruptcy estates, among other related relief (this "Motion"). In support of this Motion, the Challenge Parties respectfully state as follows:

PRELIMINARY STATEMENT

1. The Challenge Parties seek standing to pursue, prosecute, and resolve, on behalf of the Debtors' estates, the following claims set forth in the complaint attached hereto as **Exhibit 1** (as it may be amended) (the "Proposed Complaint"): (i) declaratory judgment that the Intercompany Note (as defined below) should be recharacterized as an equity or capital contribution made by Boy Scouts of America ("BSA") to Arrow WV, Inc. ("Arrow") or, in the

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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alternative, avoiding certain fraudulent transfers made under the Intercompany Note by BSA to Arrow, (ii) declaratory judgment that certain property of the Debtors is not subject to the liens or security interests granted to JPMorgan Chase Bank, N.A., in its capacity as lender, collateral agent, and bondholder ("JPM" or the "Prepetition Lender"); (iii) avoidance of certain unperfected liens and security interests asserted by the Prepetition Lender against certain property of the Debtors; and (iv) an order reversing (or otherwise reserving for further investigation) certain of the other acknowledgements and agreements of the Debtors set forth in the Final Cash Collateral Order (as defined below).

2. This Motion is filed consistent with paragraph 19 of the Final Cash Collateral Order. The filing of this Motion tolls the Challenge Period pending a resolution hereof under paragraph 19(iv) of the Final Cash Collateral Order. The Proposed Complaint also constitutes an objection, pursuant to section 502 of title 11 of the U.S. Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") and Rules 3007 and 7001 of the Federal Rules of Bankruptcy Procedure, to the liens and claims asserted by the Prepetition Lender against the Debtors to the extent set forth herein.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this action under 28 U.S.C. §§ 157(a) and 1334. This Motion is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this Motion is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicates for the relief requested herein are sections 105(a), 1103(c), and 1109(b) of the Bankruptcy Code. This Motion is also filed pursuant to paragraph 19 of the Final Cash Collateral Order.

BACKGROUND

5. On February 18, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue in possession of their property and are operating and managing their businesses as debtors in possession pursuant to the provisions of sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

6. On March 5, 2020, the Office of the United States Trustee appointed the Tort Committee (and, on the same date, also appointed an official committee of unsecured creditors) pursuant to section 1102 of the Bankruptcy Code. *See* Docket Nos. 141 and 142.

7. On April 24, 2020, the Court entered an order (the "FCR Order") appointing the FCR to represent the interests of holders of Future Claimants (as defined in the FCR Order). *See Order Appointing James L. Patton Jr., as Legal Representative for Future Claimants, Nunc Pro Tunc to the Petition Date* [Docket No. 486].

A. The Debtor's Prepetition Relationship with the Prepetition Lender

i. *2010 Revolving Credit Facility*

8. On August 11, 2010, BSA entered into that certain *Credit Agreement* (as amended or modified, together with any security, pledge, and guaranty agreements, the "2010 RCF Agreement"), pursuant to which the Prepetition Lender made term loans to BSA in an aggregate amount of $25,000,000 and agreed to make revolving loans to BSA and issue letters of credit on behalf of BSA in an aggregate amount of up to $75,000,000.

9. As of the Petition Date, BSA has stipulated that it is liable to the Prepetition Lender under the 2010 RCF Agreement in the amount of $11,250,000 in respect of term loans made to BSA, $25,212,317 in respect of revolving loans made to BSA, and

$44,299,743 in respect of letters of credit issued on behalf of BSA, if such letters of credit are ultimately drawn.

ii. *2010 Bond Issuance (Arrow)*

10. On November 5, 2010, BSA and its non-Debtor related party, Arrow, entered into that certain *Bond Purchase and Loan Agreement* with The County Commission of Fayette County, West Virginia (the "Issuer") and JPM, as a purchaser (as amended or modified, the "2010 Bond Agreement") pursuant to which the Issuer issued *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2010A* in an aggregate principal amount of $50,000,000 and a similar *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2010B* in an aggregate principal amount of $50,000,000 (collectively, the "2010 Bonds"), the proceeds of which were loaned to BSA. The loans from the Issuer to BSA were evidenced by that certain *Promissory Note - 2010A* executed by BSA and payable to the order of the Issuer in the original principal amount of $50,000,000 and that certain *Promissory Note - 2010B* executed by BSA and payable to the order of the Issuer in the original principal amount of $50,000,000. Each of those notes was pledged and assigned by the Issuer to the Prepetition Lender to secure the repayment of the 2010 Bonds.

11. As addressed further below, Arrow owns certain real property in West Virginia spanning roughly 10,000 acres that is used as a high adventure scouting camp known as the Summit Bechtel Family National Scout Reserve (the "Summit Property"). The proceeds of the 2010 Bonds and other borrowings and donations available to BSA were used for purposes of acquiring and improving the Summit Property.

12. The Series 2010A Bonds were paid off on November 5, 2015. As of the Petition Date, BSA has stipulated that it remains liable to the Issuer in the amount of $40,137,274 under the Promissory Note - 2010B. The Prepetition Lender is the pledgee and assignee of this promissory note and the Prepetition Lender has confirmed that it has physical possession of such note.

iii. *2012 Bond Issuance (Arrow)*

13. On March 9, 2012, BSA and Arrow entered into that certain *Bond Purchase and Loan Agreement* with the Issuer and JPM, as a purchaser (as amended or modified, the "2012 Bond Agreement", and together with the 2010 Bond Agreement, the "Bond Agreements") pursuant to which the Issuer issued *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2012* in an aggregate principal amount not to exceed $175,000,000 (the "2012 Bonds"), the proceeds of which were loaned to BSA. The loans from the Issuer to BSA are evidenced by that certain *Promissory Note - 2012* executed by BSA and payable to the order of the Issuer in the original principal amount of $175,000,000. This note too was pledged and assigned by the Issuer to JPM to secure the repayment of the 2012 Bonds.

14. As of the Petition Date, BSA has stipulated that it is liable to the Issuer in the amount of $145,662,101 under the Promissory Note - 2012. The Prepetition Lender is the pledgee and assignee of this promissory note and the Prepetition Lender has confirmed that it has physical possession of such note.

iv. *2019 Revolving Credit Facility*

15. On March 21, 2019, BSA entered into that certain *Credit Agreement* (as amended or modified, together with any security, pledge, and guaranty agreements, the "2019

RCF Agreement", and together with the 2010 RCF Agreement, the "Credit Agreements"), pursuant to which the Prepetition Lender agreed to make revolving loans to BSA and issue letters of credit on behalf of BSA in an aggregate amount of up to $71,500,000.

16. The proceeds of the 2012 Bonds were also used for purposes of improving the Summit Property

17. As of the Petition Date, BSA has stipulated that it is liable to the Prepetition Lender under the 2019 RCF Agreement in the amount of $61,542,720 in respect of a letter of credit issued on behalf of BSA for the benefit of Old Republic Insurance Company, if such letter of credit is ultimately drawn. BSA has also stipulated that it holds a segregated deposit account at the Prepetition Lender with funds at least equal to the face amount of this letter of credit.

18. BSA's obligations under the 2010 RCF Agreement, 2010 Bonds, 2012 Bonds, and the 2019 RCF Agreement are collectively referred to herein as the "Prepetition Obligations." Together, the 2010 RCF Agreement, 2010 Bonds, 2012 Bonds, and the 2019 RCF Agreement (as amended or modified, together with any security, pledge, and guaranty agreements) are referenced herein as the "Prepetition Loan Documents."

v. *Prepetition Security Documents*

19. The Prepetition Obligations are secured, in relevant part, pursuant to the terms of that certain *Third Amended and Restated Security Agreement* dated as of March 21, 2019, by and among BSA and Arrow,[2] as debtors, the Prepetition Lender, as the secured party,

[2] Although Arrow is a guarantor of the Prepetition Obligations, just prior to the Petition Date, on February 17, 2020, the Debtors and the Prepetition Lender entered into that certain *Limited Waiver*, waiving certain existing and prospective events of default with respect to Arrow under the Credit Agreements.

and the Issuer.[3] Further, the Prepetition Lender has the benefit of certain mortgages. The Prepetition Collateral (as defined in the Final Cash Collateral Order) is described further below.

B. Unencumbered and Unperfected Assets

20. Pursuant to the Prepetition Loan Documents, the Prepetition Collateral is limited to certain identified assets of the Debtors consisting solely of: (a) Accounts (and certain property relating to such Accounts), certain Deposit Accounts, certain Securities Accounts, Investment Property, certain pledged Promissory Notes, and the Proceeds of each of the foregoing, (b) mortgages against three high adventure sites owned by BSA, and (c) a deed of trust against BSA's headquarters property (but not the scouting museum facility that is adjacent to BSA's headquarters property).

21. Pursuant to the Final Cash Collateral Order, the Prepetition Collateral securing the Prepetition Obligations expressly excludes any assets of the Debtors comprised of (i) "Restricted Amounts" under the Final Cash Collateral Order, or (ii) "Excluded Property" under the Prepetition Loan Documents.

22. Pursuant to the Prepetition Loan Documents, the Prepetition Collateral securing the Prepetition Obligations does not include the following assets of the Debtors and any Proceeds thereof: (a) Goods (including Inventory, Equipment and artwork), (b) General Intangibles (including intellectual property and causes of action), (c) Commercial Tort Claims, (d) motor vehicles and watercraft, (e) membership dues payable to or received by BSA; (f) owned real estate (other than the three high adventure sites referenced in paragraph 19 above); (g) leased real estate; (h) Money; and (i) any insurance policies. The foregoing assets described in subparagraphs (a) through (i) are the "Unencumbered Assets."

[3] The Prepetition Lender executed the security agreement on behalf of the Issuer, as its attorney in fact.

23. Notwithstanding the Prepetition Loan Documents, the Prepetition Lender does not have a perfected or otherwise enforceable security interest in the following assets of the Debtors: (x) Deposit Accounts maintained at any bank other than JPM and (y) any Prepetition Collateral acquired by the Debtors after the Petition Date. The foregoing assets described in subparagraphs (x) and (y) are the "Unperfected Assets."

C. BSA Intercompany Note with Arrow; Avoidable Deed of Trust on Summit Property

24. The Prepetition Lender is the pledgee and assignee of an *Amended and Restated Promissory Note* dated March 21, 2019, in the principal amount of $350 million made by Arrow, as the obligor, and payable to BSA, as the obligee (the "Intercompany Note").

25. The Intercompany Note is secured by a *First Amendment to Credit Line Deed of Trust* dated March 21, 2019 (the "Intercompany Deed of Trust") recorded against the Summit Property.

26. The Intercompany Note and the Intercompany Deed of Trust were pledged as security to the Prepetition Lender pursuant to a *Collateral Assignment of Promissory Note and Credit Line Deed of Trust* dated March 21, 2019. The Prepetition Lender has confirmed that it is in possession of the Intercompany Note.

27. Arrow was formed in 2009 to acquire and develop the Summit Property for the exclusive support and benefit of BSA. The board of directors of Arrow is appointed solely by BSA. Upon its liquidation or dissolution, all property and assets of Arrow after the payment of its debts and obligations are distributable solely to BSA. Arrow, thus, is effectively owned and controlled by BSA.

28. Arrow owns the real property and improvements that comprise the Summit Property and leases the Summit Property to BSA for a nominal consideration pursuant to

that certain *Shared Services Agreement and Lease of Premises* dated February 13, 2017 (the "Arrow Agreement"). Under the Arrow Agreement, BSA provides the necessary services required to operate the Summit Property, including, among other things, payments to third parties on Arrow's behalf such as utility services, taxes, construction, and maintenance costs.

29. The original Intercompany Note was made in June 2010 in the amount of $50 million. The original Intercompany Note had no maturity date, but was due and payable within 30 days of written demand by BSA.

30. Over time, as BSA funded the acquisition, development, and operation of the Summit Property, the intercompany balance between Arrow and BSA grew significantly. In fiscal year 2011, the intercompany balance was roughly $77 million. By 2012, the balance exceeded $200 million. In each fiscal year between 2013 and 2018, the balance exceeded $300 million. Before March 2019, BSA never demanded that the original note be revised to match the then current amount of intercompany borrowings, nor did BSA ever demand payment on the note.

31. In March 2019, the Intercompany Note was amended to increase the outstanding principal balance to $350 million. The amended Intercompany Note has a maturity date of March 31, 2029, and an interest rate of 0% per annum. The amended Intercompany Note does not provide for any principal or interest payments prior to maturity. The basis for the principal amount outstanding under the Intercompany Note, or the reasons why it was amended from $50 million to $350 million, lacks detailed support.

32. Upon information and belief, Arrow has few, if any, assets aside from the Summit Property and no ability to repay the Intercompany Note absent a disposition or refinancing of the Summit Property.

33. BSA did not receive fair consideration, or reasonably equivalent value, in exchange for the transfers made to Arrow to acquire, develop, and operate the Summit Property although it incurred the material financial and other obligations on account of such transfers and was required to make principal and interest payments to the Prepetition Lender based on the debt incurred to make such transfers.

34. The transfers made by BSA to Arrow to acquire, develop, and operate the Summit Property occurred while BSA was, or caused BSA to be rendered, insolvent, undercapitalized, or unable to pay its debts as they came due.

35. To the extent Arrow is an affiliate of BSA, the ostensible debt due under the Intercompany Note should be recharacterized as a contribution of capital by BSA to Arrow and the Intercompany Deed of Trust would, accordingly, cease to secure an enforceable debt. Alternatively, to the extent Arrow is not an affiliate of BSA, the transfers made by BSA to Arrow pursuant to the Intercompany Note should be avoided as fraudulent transfers and BSA should recover the value of such transfers, or the Summit Property, for the benefit of its estate.

D. The Final Cash Collateral Order, Challenge Period, and Reserved Matters

36. On April 15, 2020, the Court entered the *Final Order (I) Authorizing the Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (II) Granting Adequate Protection to the Prepetition Secured Party Pursuant to 11 U.S.C. §§ 105(a), 361, 362, 363 and 507; and (III) Granting Related Relief* [Docket No. 433] (the "Final Cash Collateral Order"). The Final Cash Collateral Order, among other things, set a Challenge Period expiring on July 3, 2020, for the Challenge Parties to assert a Challenge Proceeding as to the Debtors' Stipulations and the other admissions, agreements and releases contained in the Final Cash Collateral Order

in favor of the Prepetition Lender. The Challenge Period has since been extended by agreement of the Prepetition Lender through March 12, 2021.

37. The Challenge Parties hereby assert a Challenge Proceeding as to those items identified as Unencumbered Assets and Unperfected Assets above and also seek the recharacterization of, or avoidance and recovery of the transfers made under, the Intercompany Note. The Challenge Parties submit that there is no evidentiary basis for a finding that the Prepetition Lender has a valid, perfected lien, claim, or interest in any of the Unencumbered Assets or Unperfected Assets and any inconsistent finding should be stricken from the Final Cash Collateral Order.

38. In addition, the Challenge Parties seek a declaration that their rights to contest the following matters are fully reserved (together, the "Reserved Matters"): (a) the allowance of any interest (or default rate interest) paid or accrued under the Prepetition Loan Documents; (b) the accuracy of the calculation of the amount of any principal, interest, fees, costs, or charges paid or accrued under the Prepetition Loan Documents; (c) the reasonableness pursuant to section 506(b) of the Bankruptcy Code of the amounts of any fees, costs or charges that may be asserted by the Prepetition Lender to the extent provided for under the Prepetition Loan Documents; and (d) any adequate protection or diminution claim that may be asserted by the Prepetition Lender against the Debtors' estates.

39. The Challenge Parties submit that none of the Debtors' various acknowledgments, waivers, and stipulations in the Final Cash Collateral Order should have any impact on any rights, claims, defenses, offsets, or causes of action that the Challenge Parties or any of the Debtors' estates may have against the Prepetition Lender with respect to the Reserved Matters.

40. The Challenge Parties object to the liens and claims asserted by the Prepetition Lender to the extent inconsistent with the foregoing. The Challenge Parties have proposed a stipulation to preserve and defer resolution of the items identified above to the Prepetition Lender. However, no agreement has been reached. The Challenge Parties therefore file this Motion, and seek standing to file the Proposed Complaint (as it may be amended), in order to preserve their rights under the Final Cash Collateral Order.

RELIEF REQUESTED

41. By this Motion, pursuant to sections 105, 1103(c), and 1109 of the Bankruptcy Code, the Challenge Parties seek entry of an order granting standing and authorizing them, on behalf of the Debtors' estates, to pursue, prosecute, and/or resolve the causes of action set forth in the Proposed Complaint (as it may be amended) and granting related relief.

BASIS FOR RELIEF

A. Legal Standard to Establish Standing

42. The Bankruptcy Code provides that a committee may investigate the assets and liabilities of the debtor and "perform such . . . services as are in the interest of those represented." 11 U.S.C. § 1103(c)(2), (5). The Bankruptcy Code also allows a party in interest, including a creditors' committee, to be heard on any issue in a chapter 11 case. *See* 11 U.S.C. § 1109(b). Moreover, section 105(a) empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. *See* 11 U.S.C. § 105(a).

43. The Third Circuit, in common with the majority of circuits reaching the issue,[4] has held that derivative standing is available to a creditors' committee to pursue estate

[4] Cases from the following circuits support the bankruptcy court's authority to grant derivative standing: *Smart World Techs., LLC v. Juno Online Servs. Inc. (In re Smart World Techs., LLC),* 423 F.3d 166, 176 (2d Cir. 2005);

claims when it shows that a debtor in possession "unreasonably refuses" to do so. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) (*en banc*) (derivative standing appropriate if the debtor unreasonably refuses to pursue a fraudulent transfer action); *accord Infinity Investors Ltd. v. Kingsborough (In re Yes! Entm't Corp.),* 316 B.R. 141, 144-45 (D. Del. 2004) ("The Third Circuit expressed its agreement with approaches taken by the Second and Seventh Circuits;" denial of derivative standing reversed); *Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.),* 326 B.R. 532 (W.D. Pa. 2005) (retroactive approval of derivative standing and adversary proceeding by committee).

44. To establish derivative standing, the Challenge Parties must show that the Debtors unreasonably refuse to bring an action that would benefit the estate. *Cybergenics,* 330 F. 3d at 568. Although the Third Circuit has not specified procedural requirements for allowing derivative standing, it expressed approval of the approaches taken by the Second and Seventh Circuits. *Cybergenics,* 330 F. 3d at 566-67. These courts and others have generally recognized derivative standing upon a showing that: (1) the claims are colorable; (2) the debtor has unjustifiably refused to pursue the claim, and (3) the bankruptcy court has granted permission to initiate the action on behalf of the estate. *In re Yes! Entm't Corp.,* 316 B.R. at 145 (citing recognized factors); *In re Nat'l Forge Co.,* 326 B.R. at 543 (same).

45. As set forth below, the Challenge Parties satisfy each of the foregoing elements.

Louisiana World Exposition v. Federal Ins. Co., 858 F. 2d 233, 247-52 (5th Cir. 1988); *Canadian Pac. Forest Prods. Ltd. v. J.D. Irving Ltd. (In re Gibson Group, Inc.),* 66 F. 3d 1436, 1440-46 (6th Cir. 1995); *Fogel v. Zell,* 221 F. 3d 955, 965 (7th Cir. 2000); *PW Enterprises, Inc. v. North Dakota Racing Comm. (In re Racing Servs., Inc.),* 540 F. 3d 892, 898 (8th Cir. 2008); and *Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.),* 199 F. 3d 1029, 1031 (9th Cir. 1999).

B. The Challenge Parties Have Colorable Claims for Declaratory Relief and Avoidance That Will Benefit the Estates

46. Whether a party has asserted a colorable claim for purposes of derivative standing is a legal question, requiring the same analysis that would be undertaken upon a motion to dismiss. The Court must accept all well-pleaded facts as true, draw all inferences from such facts in the light most favorable to the plaintiff, and determine as a matter of law whether a claim is sufficiently pled. *Walnut Creek Mining Co. v. Cascade Inv., LLC (In re Optim Energy, LLC),* 527 B.R. 169, 173 (D. Del. 2015) (derivative standing review; quoting *Twombly* for the proposition that there is no probability requirement at the pleading stage but there must be sufficient facts to expect that discovery will reveal supporting evidence of claims).

47. Notwithstanding the Debtors' acknowledgments, waivers, and stipulations in the Final Cash Collateral Order, the Challenge Parties have investigated and concluded that the Prepetition Collateral under the Prepetition Loan Documents does not include, and/or the Prepetition Lender has failed to perfect its asserted interest liens, claims, and interests in the Unencumbered Assets and the Unperfected Assets. The Challenge Parties seek declaratory relief regarding, and avoidance of, the asserted liens.

48. The Challenge Parties further submit that the Intercompany Note is not a legitimate debt of Arrow to BSA. The Intercompany Note should be recharacterized as an equity or capital contribution because, among other things: (a) the interest rate under the Intercompany Note is 0% per annum; (b) there are no repayment requirements under the Intercompany Note pending maturity; (c) the maturity date of the note is so far into the future that it reflects an illusory repayment obligation; (d) for extended periods of time, the Arrow intercompany balance was not memorialized in any instrument; (e) Arrow has no viable source of repayment; (f) Arrow and BSA have an identity of interests; (g) Arrow has no independent ability to obtain financing

on its own from lending institutions; and (h) Arrow used BSA's funds to acquire capital assets or make capital improvements. As a result of the recharacterization of the Intercompany Note, the Prepetition Lender has no allowable claim against Arrow and the Summit Property is free and clear of any lien or security interest of the Prepetition Lender under the Intercompany Deed of Trust.

49. Alternatively, the Intercompany Note reflects transfers of BSA property and/or interests in property under section 548 of the Bankruptcy Code (and other applicable fraudulent transfer law) for the benefit of Arrow. BSA did not receive fair consideration, or reasonably equivalent value, in exchange for the transfers that funded Arrow's acquisition of the Summit Property. Accordingly, all such transfers should be avoided for the benefit of BSA's estate.

50. The Challenge Parties further submit that none of the Debtors' various acknowledgments, waivers, and stipulations in the Final Cash Collateral Order, including findings set forth at Recital D thereof, should have any impact on any rights, claims, defenses, offsets, or causes of action that the Challenge Parties or any of the Debtors' estates may have against the Prepetition Lender with respect to the Reserved Matters.

51. The Challenge Parties object to the liens and claims asserted by the Prepetition Lender against the Debtors or their estates to the extent inconsistent with the foregoing. These are colorable claims that are asserted after substantial time and resources have been devoted by the Challenge Parties and their professionals to due diligence.

C. <u>The Debtors Have Unjustifiably Refused to Bring the Claims</u>

52. As the Third Circuit emphasized, the critical inquiry is whether the Debtors have unreasonably or unjustifiably refused to bring the claims. *Cybergenics,* 330 F. 3d at 553 ("We believe that …bankruptcy courts' equitable powers enable them to authorize such

[derivative] suits as a remedy in cases where a debtor-in-possession unreasonably refuses to pursue an avoidance claim."); 330 F. 3d at 568 ("The problem at bar is that the intended system broke down. The Debtor refused to bring an action that the Bankruptcy Court found would benefit the estate, and thereby violated its fiduciary duty to maximize the estate's value.").

53. Here, pursuant to the Final Cash Collateral Order, the Debtors have irrevocably conceded that the Prepetition Lender has liens on, or security interests in, some or all of the Unencumbered Assets and the Unperfected Assets. The Challenge Parties dispute these stipulations and should be permitted to assert a proper challenge with respect thereto.

54. The Challenge Parties propose declaratory relief and avoidance claims that preserve substantial assets for the benefit of these estates. The Challenge Parties have already proposed a stipulation to the Prepetition Lender in an effort to resolve such claims, but no resolution has been reached. The Challenge Parties will continue to endeavor to resolve the claims asserted in the Complaint or to pursue such claims as efficiently as possible. Derivative standing is warranted because the Debtors have relinquished their ability to assert the claims proposed herein.

55. The Final Cash Collateral Order specifically contemplates that an objection to the liens and claims of the Prepetition Lender may be asserted during the Challenge Period. The Challenge Parties are fulfilling their statutory duties consistent with the Bankruptcy Code and the Final Cash Collateral Order. Further, the potential of preserving the Unencumbered Assets, the Unperfected Assets, and the Summit Property for the benefit of tort claimants outweighs any possible prejudice or delay to the Prepetition Lender.

D. The Challenge Parties Seek Court Authority for Derivative Standing

56. Under *Cybergenics,* a committee may be granted derivative to pursue claims on behalf of the bankruptcy estate where the debtor has unreasonably refused to bring

such claims. Derivative standing is conditioned upon the bankruptcy court's permission, based on its equitable powers and ability to implement flexible remedies. *Cybergenics,* 330 F. 3d at 568-69 (Congress anticipated court's use of equitable powers as a gatekeeper when the trustee [or debtor] is delinquent).

57. The Challenge Parties bring this Motion to invoke the Court's equitable authority and request derivative standing to bring claims for the benefit of the estates.

CONCLUSION

58. Based upon the foregoing, the Challenge Parties should be granted standing, on behalf of the Debtors' estates, to pursue, prosecute, and/or resolve the claims set forth in the Proposed Complaint (as it may be amended).

NO PRIOR REQUEST

59. No prior request for the relief sought in this Motion has been made to this or any other Court.

WHEREFORE, the Challenge Parties respectfully request that this Court: (i) enter an order granting standing and authorizing the Challenge Parties to prosecute the causes of action set forth in the Proposed Complaint and (ii) grant such other and further relief to the Challenge Parties as the Court may deem proper.

Dated: March 12, 2021

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James E. O'Neill

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Dated: March 12, 2021

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1] Debtors.	Chapter 11 Case No. 20-10343 (LSS) Jointly Administered

Objection Deadline: March 26, 2021 at 4:00 p.m. (ET)
Hearing Date: April 15, 2021 at 10:00 a.m. (ET)

NOTICE OF JOINT MOTION OF THE OFFICIAL TORT CLAIMANTS' COMMITTEE AND FUTURE CLAIMANTS' REPRESENTATIVE FOR ENTRY OF AN ORDER GRANTING STANDING AND AUTHORIZING THE PROSECUTION OF CERTAIN CHALLENGE CLAIMS ON BEHALF OF THE BANKRUPTCY ESTATES

PLEASE TAKE NOTICE that on March 12, 2021, the official committee of tort claimants (consisting of survivors of childhood sexual abuse) (the "Tort Claimants' Committee") and James L. Patton Jr., as Legal Representative for Future Claimants (the "FCR"), appointed in the above-captioned cases, filed the attached *Joint Motion of the Official Tort Claimants' Committee and Future Claimants' Representative for Entry of an Order Granting Standing and Authorizing the Prosecution of Certain Challenge Claims on Behalf of the Bankruptcy Estates* (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801 (the "Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that any response or objection to the Motion must be filed with the Bankruptcy Court on or before **March 26, 2021 at 4:00 p.m. prevailing Eastern Time**.

PLEASE TAKE FURTHER NOTICE that at the same time, you must also serve a copy of the response or objection upon: (i) the Office of the United States Trustee for the

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

District of Delaware: United States Trustee, J. Caleb Boggs Federal Building, 844 North King Street, Suite 2207, Lockbox #35, Wilmington, DE 19801 (Attn: David L. Buchbinder, Esq. (david.l.buchbinder @usdoj.gov) and Hannah Mufson McCollum, Esq. (hannah.mccollum@usdoj.gov)); (ii) counsel to the Tort Claimants' Committee: Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, P.O. Box 8705, Wilmington, DE 19899-8705 (Courier 19801) (Attn: James I Stang, Esq. (jstang@pszjlaw.com) and James E. O'Neill, Esq. (joneill@pszjlaw.com)); and (iii) counsel to the FCR: Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 N. King Street, Wilmington, DE 19801 (Attn: Robert S. Brady (rbrady@ycst.com), Edwin J. Harron (eharron@ycst.com), Sharon M. Zieg (szieg@ycst.com), Sara Beth A.R. Kohut (skohut@ycst.com)).

PLEASE TAKE FURTHER NOTICE THAT IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

PLEASE TAKE FURTHER NOTICE THAT A HEARING TO CONSIDER APPROVAL OF THE MOTION WILL BE HELD ON **APRIL 15, 2021 AT 10:00 A.M. PREVAILING EASTERN TIME** BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN, UNITED STATES BANKRUPTCY JUDGE, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 6TH FLOOR, COURTROOM NO. 2, WILMINGTON, DELAWARE 19801.

[Signature on next page.]

Dated: March 12, 2021

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James E. O'Neill

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Counsel for the Tort Claimants' Committee

-and-

Dated: March 12, 2021

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EXHIBIT 1

Proposed Complaint

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1] Debtors.	Chapter 11 Case No. 20-10343 (LSS) (Jointly Administered)
OFFICIAL TORT CLAIMANTS' COMMITTEE AND JAMES L. PATTON, JR., AS FUTURE CLAIMANTS' REPRESENTATIVE Plaintiff, -against- JPMORGAN CHASE BANK, N.A., BOY SCOUTS OF AMERICA, AND ARROW WV, INC., Defendants.	Adv. Pro. No. ________

COMPLAINT FOR DECLARATORY RELIEF, AVOIDANCE OF TRANSFERS AND RECOVERY OF MONEY OR PROPERTY, AND OBJECTION TO CLAIMS

The Official Tort Claimants' Committee ("Tort Committee"), and James L. Patton Jr., as Legal Representative for Future Claimants (the "FCR" and together with the Tort Committee, "Plaintiffs"), in the chapter 11 cases commenced by the above-captioned debtors and debtors in possession (collectively, the "Debtors"), derivatively on behalf of the Debtors, and as Plaintiffs in the above-captioned adversary proceeding, hereby allege upon knowledge, information, and belief as follows:

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

NATURE OF ACTION

1. This adversary proceeding seeks the entry of a judgment (i) declaring that the Intercompany Note (as defined below) should be recharacterized as an equity or capital contribution made by Boy Scouts of America ("BSA") to Arrow WV, Inc. ("Arrow") or, in the alternative, avoiding certain fraudulent transfers made under the Intercompany Note by BSA to Arrow, (ii) declaring that certain property of the Debtors is not subject to the liens or security interests granted to JPMorgan Chase Bank, N.A., in its capacity as lender, collateral agent, and bondholder ("JPM" or the "Prepetition Lender"); and (iii) avoiding certain unperfected liens and security interests asserted by the Prepetition Lender against certain property of the Debtors.

2. This adversary proceeding also seeks to preserve Plaintiffs' ability to further challenge certain acknowledgements and agreements made by the Debtors under the Final Cash Collateral Order (as defined below).[2] To the extent such acknowledgments and agreements might be construed to preclude Plaintiffs from reviewing the amount, or precisely computing the components, of the claims asserted by the Prepetition Lender (such as claims for interest, fees, costs and other charges), Plaintiffs seek the entry of a judgment declaring that such matters are preserved for all purposes, including for purposes of the Challenge Period under the Final Cash Collateral Order.

3. This adversary proceeding is filed consistent with paragraph 19 of the Final Cash Collateral Order. This adversary proceeding also constitutes an objection, pursuant to

[2] Each capitalized term that is not otherwise defined in this Complaint has the meaning ascribed to such term in the Final Cash Collateral Order or the Uniform Commercial Code adopted in the State of Texas as in effect from time to time, as applicable.

section 502 of title 11 of the U.S. Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") and Rules 3007 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to the liens and claims asserted by the Prepetition Lender against the Debtors.

JURISDICTION AND VENUE

4. The Court has jurisdiction over this action under 28 U.S.C. §§ 157(a) and 1334. This adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this adversary proceeding is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory and legal predicates for the relief requested herein are sections 502, 544, 547, 548, 550, and 551 of the Bankruptcy Code, 28 U.S.C. §§ 2201 and 2202, and Bankruptcy Rules 3007 and 7001.

6. Pursuant to Rule 7008-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, Plaintiffs consent to the entry of a final order or judgment by the Court if it is determined that the Court, absent consent of the parties, cannot enter a final order or judgment in this proceeding consistent with Article III of the United States Constitution.

PARTIES

7. On February 18, 2020 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware (the "Court"). The Debtors continue in possession of their property and are operating and managing their businesses as debtors in

possession pursuant to the provisions of sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

8. On March 5, 2020, the Office of the United States Trustee appointed the Tort Committee (and, on the same date, also appointed an official committee of unsecured creditors) pursuant to section 1102 of the Bankruptcy Code. *See* Docket Nos. 141 and 142.

9. On April 24, 2020, the Court entered an order (the "FCR Order") appointing the FCR to represent the interests of holders of Future Claimants (as defined in the FCR Order). *See Order Appointing James L. Patton Jr., as Legal Representative for Future Claimants, Nunc Pro Tunc to the Petition Date* [Docket No. 486].

10. Plaintiffs are vested with, among other things, the powers described in section 1103 of the Bankruptcy Code, including the power to investigate the acts, conduct, assets, liabilities and financial condition of the Debtors.

11. Plaintiffs bring this action on behalf of the estates of the Debtors pursuant to the Court's *Order Granting Motion of the Official Tort Claimants' Committee and Future Claimants' Representative for Entry of an Order Authorizing the Prosecution of Certain Lien Challenge Claims on Behalf of the Bankruptcy Estates* entered on [______], 2021 [Docket No. [__]] (the "Standing Order").

12. Defendant JPM is an asserted secured creditor of the Debtors with respect to the Prepetition Obligations (as defined below).

13. Defendant BSA is a non-profit corporation founded in 1910 and chartered by an act of Congress enacted in 1916 pursuant to Section 30901 of Title 36 of the United States Code. BSA is one of the Debtors in these chapter 11 cases.

14. Defendant Arrow is a non-member, non-stock, non-profit corporation organized under the laws of West Virginia on or about June 12, 2009. Arrow is not one of the Debtors in these chapter 11 cases, but is effectively owned and controlled by BSA. Arrow owns certain real property in West Virginia spanning roughly 10,000 acres that is used as a high adventure scouting camp known as the Summit Bechtel Family National Scout Reserve (the "Summit Property"). The capital used by Arrow to acquire, develop and operate the land comprising the Summit Property was provided by BSA.

STATEMENT OF FACTS

15. Plaintiffs bring this action to dispute the validity, priority, and extent of certain liens and security interests asserted by the Prepetition Lender notwithstanding contrary admissions and waivers made by the Debtors under the Final Cash Collateral Order.

16. Plaintiffs also seek to determine the nature of certain transfers made by BSA to Arrow or, alternatively, the proper ownership of the Summit Property. Unless these transfers or the proper ownership of the Summit Property are remedied, the value thereof will be outside the reach of BSA's tort claimants.

A. <u>The Debtor's Prepetition Relationship with the Prepetition Lender</u>

i. *2010 Revolving Credit Facility*

17. On August 11, 2010, BSA entered into that certain *Credit Agreement* (as amended or modified, together with any security, pledge, and guaranty agreements, the "2010 RCF Agreement"), pursuant to which the Prepetition Lender made term loans to BSA in an aggregate amount of $25,000,000 and agreed to make revolving loans to BSA and issue letters of credit on behalf of BSA in an aggregate amount of up to $75,000,000.

18. As of the Petition Date, BSA has stipulated that it is liable to the Prepetition Lender under the 2010 RCF Agreement in the amount of $11,250,000 in respect of term loans made to BSA, $25,212,317 in respect of revolving loans made to BSA, and $44,299,743 in respect of letters of credit issued on behalf of BSA, if such letters of credit are ultimately drawn.

ii. *2010 Bond Issuance (Arrow)*

19. On November 5, 2010, BSA and its non-Debtor related party, Arrow, entered into that certain *Bond Purchase and Loan Agreement* with The County Commission of Fayette County, West Virginia (the "Issuer") and JPM, as a purchaser (as amended or modified, the "2010 Bond Agreement") pursuant to which the Issuer issued *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2010A* in an aggregate principal amount of $50,000,000 and a similar *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2010B* in an aggregate principal amount of $50,000,000 (collectively, the

"2010 Bonds"), the proceeds of which were loaned to BSA. The loans from the Issuer to BSA were evidenced by that certain *Promissory Note - 2010A* executed by BSA and payable to the order of the Issuer in the original principal amount of $50,000,000 and that certain *Promissory Note - 2010B* executed by BSA and payable to the order of the Issuer in the original principal amount of $50,000,000. Each of these notes was pledged and assigned by the Issuer to the Prepetition Lender to secure the repayment of the 2010 Bonds.

20. The Series 2010A Bonds were paid off on November 5, 2015. As of the Petition Date, BSA has stipulated that it remains liable to the Issuer in the amount of $40,137,274 under the Promissory Note - 2010B. The Prepetition Lender is the pledgee and assignee of this promissory note and the Prepetition Lender has confirmed that it has physical possession of such note.

iii. *2012 Bond Issuance (Arrow)*

21. On March 9, 2012, BSA and Arrow entered into that certain *Bond Purchase and Loan Agreement* with the Issuer and JPM, as a purchaser (as amended or modified, the "2012 Bond Agreement", and together with the 2010 Bond Agreement, the "Bond Agreements") pursuant to which the Issuer issued *The County Commission of Fayette County (West Virginia) Commercial Development Revenue Bond (Arrow WV Project), Series 2012* in an aggregate principal amount not to exceed $175,000,000 (the "2012 Bonds"), the proceeds of which were loaned to BSA. The loans from the Issuer to BSA are evidenced by that certain *Promissory Note - 2012* executed by BSA and payable to the order of the Issuer in the original

principal amount of $175,000,000. This note too was pledged and assigned by the Issuer to JPM to secure the repayment of the 2012 Bonds.

22. As of the Petition Date, BSA has stipulated that it is liable to the Issuer in the amount of $145,662,101 under the Promissory Note - 2012. The Prepetition Lender is the pledgee and assignee of this promissory note and the Prepetition Lender has confirmed that it has physical possession of such note.

iv. *2019 Revolving Credit Facility*

23. On March 21, 2019, BSA entered into that certain *Credit Agreement* (as amended or modified, together with any security, pledge, and guaranty agreements, the "2019 RCF Agreement", and together with the 2010 RCF Agreement, the "Credit Agreements"), pursuant to which the Prepetition Lender agreed to make revolving loans to BSA and issue letters of credit on behalf of BSA in an aggregate amount of up to $71,500,000.

24. As of the Petition Date, BSA has stipulated that it is liable to the Prepetition Lender under the 2019 RCF Agreement in the amount of $61,542,720 in respect of a letter of credit issued on behalf of BSA for the benefit of Old Republic Insurance Company, if such letter of credit is ultimately drawn. BSA has also stipulated that it holds a segregated deposit account at the Prepetition Lender with funds at least equal to the face amount of this letter of credit.

25. BSA's obligations under the 2010 RCF Agreement, 2010 Bonds, 2012 Bonds, and the 2019 RCF Agreement are collectively referred to herein as the "Prepetition Obligations." Together, the 2010 RCF Agreement, 2010 Bonds, 2012 Bonds, and the 2019 RCF

Agreement (as amended or modified, together with any security, pledge, and guaranty agreements) are referenced herein as the "Prepetition Loan Documents."

v. *Prepetition Security Documents*

26. The Prepetition Obligations are secured, in relevant part, pursuant to the terms of that certain *Third Amended and Restated Security Agreement* dated as of March 21, 2019, by and among BSA and Arrow,[3] as debtors, the Prepetition Lender, as the secured party, and the Issuer.[4] Further, the Prepetition Lender has the benefit of certain mortgages. The Prepetition Collateral (as defined in the Final Cash Collateral Order) is described further below.

B. Unencumbered and Unperfected Assets

27. Pursuant to the Prepetition Loan Documents, the Prepetition Collateral is limited to certain identified assets of the Debtors consisting solely of: (a) Accounts (and certain property relating to such Accounts), certain Deposit Accounts, certain Securities Accounts, Investment Property, certain pledged Promissory Notes, and the Proceeds of each of the foregoing, (b) mortgages against three high adventure sites owned by BSA, and (c) a deed of trust against BSA's headquarters property (but not the scouting museum facility that is adjacent to BSA's headquarters property).

28. Pursuant to the Final Cash Collateral Order, the Prepetition Collateral securing the Prepetition Obligations expressly excludes any assets of the Debtors comprised of

[3] Although Arrow is a guarantor of the Prepetition Obligations, just prior to the Petition Date, on February 17, 2020, the Debtors and the Prepetition Lender entered into that certain *Limited Waiver*, waiving certain existing and prospective events of default with respect to Arrow under the Credit Agreements.

[4] The Prepetition Lender executed the security agreement on behalf of the Issuer, as its attorney in fact.

(i) "Restricted Amounts" under the Final Cash Collateral Order, or (ii) "Excluded Property" under the Prepetition Loan Documents.

29. Pursuant to the Prepetition Loan Documents, the Prepetition Collateral securing the Prepetition Obligations does not include the following assets of the Debtors and any Proceeds thereof: (a) Goods (including Inventory, Equipment and artwork), (b) General Intangibles (including intellectual property and causes of action), (c) Commercial Tort Claims, (d) motor vehicles and watercraft, (e) membership dues payable to or received by BSA; (f) owned real estate (other than the three high adventure sites referenced in paragraph 19 above); (g) leased real estate; (h) Money; and (i) any insurance policies. The foregoing assets described in subparagraphs (a) through (i) are the "Unencumbered Assets."

30. Notwithstanding the Prepetition Loan Documents, the Prepetition Lender does not have a perfected or otherwise enforceable security interest in the following assets of the Debtors: (x) Deposit Accounts maintained at any bank other than JPM and (y) any Prepetition Collateral acquired by the Debtors after the Petition Date. The foregoing assets described in subparagraphs (x) and (y) are the "Unperfected Assets."

C. BSA Intercompany Note with Arrow; Avoidable Deed of Trust on Summit Property

31. The Prepetition Lender is the pledgee and assignee of an *Amended and Restated Promissory Note* dated March 21, 2019, in the principal amount of $350 million made by Arrow, as the obligor, and payable to BSA, as the obligee (the "Intercompany Note").

32. The Intercompany Note is secured by a *First Amendment to Credit Line Deed of Trust* dated March 21, 2019 (the "Intercompany Deed of Trust") recorded against the Summit Property.

33. The Intercompany Note and the Intercompany Deed of Trust were pledged as security to the Prepetition Lender pursuant to a *Collateral Assignment of Promissory Note and Credit Line Deed of Trust* dated March 21, 2019. The Prepetition Lender has confirmed that it is in possession of the Intercompany Note.

34. Arrow was formed in 2009 to acquire and develop the Summit Property for the exclusive support and benefit of BSA. The board of directors of Arrow is appointed solely by BSA. Upon its liquidation or dissolution, all property and assets of Arrow after the payment of its debts and obligations are distributable solely to BSA. Arrow, thus, is effectively owned and controlled by BSA.

35. Arrow owns the real property and improvements that comprise the Summit Property and leases the Summit Property to BSA for a nominal consideration pursuant to that certain *Shared Services Agreement and Lease of Premises* dated February 13, 2017 (the "Arrow Agreement"). Under the Arrow Agreement, BSA provides the necessary services required to operate the Summit Property, including, among other things, payments to third parties on Arrow's behalf such as utility services, taxes, construction, and maintenance costs.

36. The original Intercompany Note was made in June 2010 in the amount of $50 million. The original Intercompany Note had no maturity date, but was due and payable within 30 days of written demand by BSA.

37. Over time, as BSA funded the acquisition, development, and operation of the Summit Property, the intercompany balance between Arrow and BSA grew significantly. In fiscal year 2011, the intercompany balance was roughly $77 million. By 2012, the balance exceeded $200 million. In each fiscal year between 2013 and 2018, the balance exceeded $300 million. Before March 2019, BSA never demanded that the original note be revised to match the then current amount of intercompany borrowings, nor did BSA ever demand payment on the note.

38. In March 2019, the Intercompany Note was amended to increase the outstanding principal balance to $350 million. The amended Intercompany Note has a maturity date of March 31, 2029, and an interest rate of 0% per annum. The amended Intercompany Note does not provide for any principal or interest payments prior to maturity. The basis for the principal amount outstanding under the Intercompany Note, or the reasons why it was amended from $50 million to $350 million, lacks detailed support.

39. Upon information and belief, Arrow has few, if any, assets aside from the Summit Property and no ability to repay the Intercompany Note absent a disposition or refinancing of the Summit Property.

40. BSA did not receive fair consideration, or reasonably equivalent value, in exchange for the transfers made to Arrow to acquire, develop, and operate the Summit Property although it incurred the material financial and other obligations on account of such transfers and was required to make principal and interest payments to the Prepetition Lender based on the debt incurred to make such transfers.

41. The transfers made by BSA to Arrow to acquire, develop, and operate the Summit Property occurred while BSA was, or caused BSA to be rendered, insolvent, undercapitalized, or unable to pay its debts as they came due.

42. To the extent Arrow is an affiliate of BSA, the ostensible debt due under the Intercompany Note should be recharacterized as a contribution of capital by BSA to Arrow and the Intercompany Deed of Trust would, accordingly, cease to secure an enforceable debt. Alternatively, to the extent Arrow is not an affiliate of BSA, the transfers made by BSA to Arrow pursuant to the Intercompany Note should be avoided as fraudulent transfers and BSA should recover the value of such transfers, or the Summit Property, for the benefit of its estate.

D. Final Cash Collateral Order, Challenge Period, and Reserved Matters

43. On April 15, 2020, the Court entered the *Final Order (I) Authorizing the Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; (II) Granting Adequate Protection to the Prepetition Secured Party Pursuant to 11 U.S.C. §§ 105(a), 361, 362, 363 and 507; and (III) Granting Related Relief* [Docket No. 433] (the "Final Cash Collateral Order"). The Final Cash Collateral Order, among other things, set a Challenge Period expiring on July 3, 2020, for Plaintiffs to assert a Challenge Proceeding as to the Debtors' Stipulations and the other admissions, agreements and releases contained in the Final Cash Collateral Order in favor of the Prepetition Lender. The Challenge Period has since been extended by agreement of the Prepetition Lender through March 12, 2021.

44. Plaintiffs hereby assert a Challenge Proceeding as to those items identified as Unencumbered Assets and Unperfected Assets above and also seek the recharacterization of,

or avoidance and recovery of the transfers made under, the Intercompany Note. Plaintiffs submit that there is no evidentiary basis for a finding that the Prepetition Lender has a valid, perfected lien, claim, or interest in any of the Unencumbered Assets or Unperfected Assets and any inconsistent finding should be stricken from the Final Cash Collateral Order.

45. In addition, Plaintiffs seek a declaration that their rights to contest the following matters are fully reserved (together, the "Reserved Matters"): (a) the allowance of any interest (or default rate interest) paid or accrued under the Prepetition Loan Documents; (b) the accuracy of the calculation of the amount of any principal, interest, fees, costs, or charges paid or accrued under the Prepetition Loan Documents; (c) the reasonableness pursuant to section 506(b) of the Bankruptcy Code of the amounts of any fees, costs or charges that may be asserted by the Prepetition Lender to the extent provided for under the Prepetition Loan Documents; and (d) any adequate protection or diminution claim that may be asserted by the Prepetition Lender against the Debtors' estates.

46. Plaintiffs submit that none of the Debtors' various acknowledgments, waivers, and stipulations in the Final Cash Collateral Order should have any impact on any rights, claims, defenses, offsets, or causes of action that Plaintiffs or any of the Debtors' estates may have against the Prepetition Lender with respect to the Reserved Matters.

47. Plaintiffs object to the liens and claims asserted by the Prepetition Lender to the extent inconsistent with the foregoing. Plaintiffs have proposed a stipulation to preserve and defer resolution of the items identified above to the Prepetition Lender. However, no

agreement has been reached. Plaintiffs therefore file this adversary proceeding in order to preserve their rights under the Final Cash Collateral Order.

CAUSES OF ACTION

COUNT 1

Declaratory Judgment for Recharacterization of Intercompany Note or, Alternatively, Avoidance of Transfers Under Intercompany Note
28 U.S.C. §§ 2201 and 2202
11 U.S.C. §§ 544, 548, 550, and 551

48. Plaintiffs repeat and reallege the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

49. In 2009, BSA formed Arrow for the principal purpose of acquiring the Summit Property for the benefit of BSA. Subsequently, BSA made transfers to Arrow of monies borrowed from the Prepetition Lender, as well as other corporate opportunities, donations, and goodwill, to fund the purchase, development, and operation of the Summit Property. The foregoing transfers are memorialized by the Intercompany Note.

50. The Intercompany Note is not a legitimate debt of Arrow to BSA. The Intercompany Note should be recharacterized as an equity or capital contribution because, among other things: (a) the interest rate under the Intercompany Note is 0% per annum; (b) there are no repayment requirements under the Intercompany Note pending maturity; (c) the maturity date of the note is so far into the future that it reflects an illusory repayment obligation; (d) for extended periods of time, the Arrow intercompany balance was not memorialized in any instrument; (e) Arrow has no viable source of repayment; (f) Arrow and BSA have an identity of interests; (g) Arrow has no independent ability to obtain financing on its own from lending

institutions; and (h) Arrow used BSA's funds to acquire capital assets or make capital improvements.

51. As a result of the recharacterization of the Intercompany Note, the Prepetition Lender has no allowable claim against Arrow and the Summit Property is free and clear of any lien or security interest of the Prepetition Lender under the Intercompany Deed of Trust.

52. Accordingly, an actual, substantial, and justiciable controversy exists between Plaintiffs, the Prepetition Lender, BSA, and Arrow concerning the character of the Intercompany Note. Such a controversy is sufficient to warrant the issuance of a declaratory judgment consistent with Plaintiffs' allegations herein that (a) the Intercompany Note is not debt but reflects a contribution of capital and (b) the Prepetition Lender accordingly has no allowable claim against Arrow and the Summit Property is free and clear of any lien or security interest of the Prepetition Lender under the Intercompany Deed of Trust.

53. Alternatively, the Intercompany Note reflects transfers of BSA property and/or interests in property under section 548 of the Bankruptcy Code (and other applicable fraudulent transfer law) for the benefit of Arrow.

54. BSA did not receive fair consideration, or reasonably equivalent value, in exchange for the transfers that funded Arrow's acquisition of the Summit Property.

55. BSA's transfers to Arrow for the acquisition of the Summit Property occurred while BSA was, or caused BSA to be rendered, insolvent, undercapitalized, or unable to pay its debts as they came due.

56. Accordingly, (a) Arrow's ownership of the Summit Property should be avoided and the property should be conveyed to BSA free and clear of any liens or claims of the Prepetition Lender, in accordance with sections 544, 548, 550, and 551 of the Bankruptcy Code and under other applicable fraudulent transfer law, or (b) the transfers made by BSA to fund the acquisition, development, and operation of the Summit Property should be recovered from Arrow in accordance with sections 544, 548, 550, and 551 of the Bankruptcy Code and under other applicable fraudulent transfer law.

COUNT 2

Declaratory Judgment Concerning Unencumbered Assets
28 U.S.C. § 2201 and 2202

57. Plaintiffs repeat and reallege the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

58. The Prepetition Collateral under the Prepetition Loan Documents does not include any of the Unencumbered Assets.

59. In the Final Cash Collateral Order, the Debtors stipulated that the Prepetition Lender has liens on or security interests in some or all of the Unencumbered Assets. Plaintiffs dispute these stipulations as they relate to the Unencumbered Assets.

60. Accordingly, an actual, substantial, and justiciable controversy exists between Plaintiffs and the Prepetition Lender concerning the validity, priority, or extent of the Prepetition Lender's liens, claims and interests.

61. Such a controversy is sufficient to warrant the issuance of a declaratory judgment consistent with Plaintiffs' allegations herein that the Prepetition Lender has no lien or security interest in the Unencumbered Assets.

<u>COUNT 3</u>

Objection to Claims Concerning Unencumbered Assets
11 U.S.C. § 502 and Bankruptcy Rules 3007 and 7001

62. Plaintiffs repeat and reallege the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

63. The Prepetition Collateral under the Prepetition Loan Documents does not include any of the Unencumbered Assets.

64. In the Final Cash Collateral Order, the Debtors stipulated that the Prepetition Lender has liens on or security interests in some or all of the Unencumbered Assets. Plaintiffs dispute these stipulations as they relate to the Unencumbered Assets.

65. Accordingly, Plaintiffs object to the liens and claims of the Prepetition Lender against the Debtors or their estates to the extent inconsistent with the foregoing.

66. Pursuant to the applicable provisions of the Bankruptcy Code, including without limitation section 502 and Bankruptcy Rules 3007 and 7001, each of the claims of the Prepetition Lender should be disallowed to the extent set forth herein.

COUNT 4

Avoidance of Liens Concerning Unperfected Assets
11 U.S.C. §§ 544, 550, and 551

67. Plaintiffs repeat and reallege the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

68. Pursuant to sections 544(a)(1) and (2) of the Bankruptcy Code and the Standing Order, Plaintiffs (acting on behalf of the Debtors' estates), as of the Petition Date, and without regard to any knowledge of the Debtors, any trustee, or any other creditors, have the rights and powers of, or may avoid any transfer of property of the Debtors or any obligation incurred by the Debtors that is voidable by:

> (1) A creditor that extends credit to a debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists; or
>
> (2) A creditor that extends credit to a debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against a Debtor that is returned unsatisfied at such time, whether or not such a creditor exists.

69. In this case, the Prepetition Collateral under the Prepetition Loan Documents does not include, and/or the Prepetition Lender has failed to perfect its asserted liens, claims, and interests in, the Unperfected Assets.

70. Because the Prepetition Lender does not have properly perfected liens on, or security interests in, the Unperfected Assets, any and all liens on and security interests in the Unperfected Assets should be avoided pursuant to section 544(a) of the Bankruptcy Code, and

such property or the value of such property, if previously transferred, should be recovered by the Debtors' estates pursuant to section 550(a) of the Bankruptcy Code and/or automatically preserved for the benefit of the Debtors' estates pursuant to section 551 of the Bankruptcy Code.

COUNT 5

Declaratory Judgment Concerning Reserved Matters
28 U.S.C. § 2201 and 2202

71. Plaintiffs repeat and reallege the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

72. None of the Debtors' various acknowledgments, waivers, and stipulations in the Final Cash Collateral Order, including findings set forth at Recital D thereof, should have any impact on any rights, claims, defenses, offsets, or causes of action that Plaintiffs or any of the Debtors' estates may have against the Prepetition Lender with respect to the Reserved Matters.

73. In the Final Cash Collateral Order, the Debtors stipulated that no party in interest could object to any of the Prepetition Obligations on any grounds, including the Reserved Matters. Plaintiffs dispute these stipulations as they relate to the Reserved Matters.

74. Accordingly, an actual, substantial, and justiciable controversy exists between Plaintiffs and the Prepetition Lender concerning the ability of Plaintiffs to further challenge the Prepetition Obligations based on the Reserved Matters.

75. Such a controversy is sufficient to warrant the issuance of a declaratory judgment consistent with Plaintiffs' allegations herein that Plaintiffs' ability to further challenge

the Prepetition Obligations based on the Reserved Matters is preserved for all purposes, including for purposes of the Challenge Period under the Final Cash Collateral Order.

WHEREFORE, by reason of the foregoing, Plaintiffs request that the Court enter an order and judgment:

(1) recharacterizing the Intercompany Note as a capital or equity contribution and, as a result thereof, the Prepetition Lender has no lien or claim against Arrow or the Summit Property under the Intercompany Deed of Trust or, in the alternative, avoiding certain fraudulent transfers made under the Intercompany Note by BSA to Arrow;

(2) determining that certain property of the Debtors is not subject to liens or security interests asserted by the Prepetition Lender pursuant to the Final Cash Collateral Order;

(3) determining that certain liens or security interests asserted by the Prepetition Lender on certain property of the Debtors are unperfected and should be avoided;

(4) reversing certain of the other acknowledgements and agreements of the Debtors set forth in Recital D of the Final Cash Collateral Order; and

(5) granting Plaintiffs such other and further relief as the Court deems just, proper, and equitable, including the costs and expenses of this action.

Dated: __________, 2021

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1]	)	Case No.: 20-10343 (LSS)
	)	(Jointly Administered)
Debtors.	)	

ORDER GRANTING STANDING TO THE OFFICIAL TORT CLAIMANTS' COMMITTEE AND FUTURE CLAIMANTS' REPRESENTATIVE AND AUTHORIZING THE PROSECUTION OF CERTAIN CHALLENGE CLAIMS ON BEHALF OF THE BANKRUPTCY ESTATES

Upon the motion (the "Motion")[2] of the Official Tort Claimants' Committee (the "Tort Committee"), and James L. Patton Jr., as Legal Representative for Future Claimants (the "FCR" and together with the Tort Committee, the "Challenge Parties"), of the above-referenced Debtors for entry of an order granting standing and authorizing the Challenge Parties to prosecute certain lien challenge claims on behalf of the bankruptcy estates and granting related relief; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this matter being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and venue of this proceeding and the Motion in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having reviewed the Motion and having heard the

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

[2] All capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the Motion.

statements in support of the relief requested therein; and all objections, if any, to the Motion having been withdrawn, resolved or overruled; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The Challenge Parties are granted standing and authorized, on behalf of the Debtors' estates, to pursue, prosecute, and resolve the causes of action set forth in the Proposed Complaint (as it may be amended).

3. The Challenge Period is deemed tolled through the date of filing of the Proposed Complaint so long as such complaint is filed within five (5) business days from the date of entry of this Order.

4. The terms and conditions of this Order are immediately effective and enforceable upon its entry.

5. The Challenge Parties are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

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

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

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1] Debtors.	Chapter 11 Case No. 20-10343 (LSS) Jointly Administered

CERTIFICATE OF SERVICE

I, James E. O'Neill, hereby certify that on the 12th day of March, 2021, I caused a copy of the following document(s) to be served on the individual(s) on the attached service list(s) in the manner indicated:

Notice of Joint Motion of the Official Tort Claimants' Committee and Future Claimants' Representative for Entry of an Order Granting Standing and Authorizing the Prosecution of Certain Challenge Claims on Behalf of the Bankruptcy Estates

Joint Motion of the Official Tort Claimants' Committee and Future Claimants' Representative for Entry of an Order Granting Standing and Authorizing the Prosecution of Certain Challenge Claims on Behalf of the Bankruptcy Estates

[Proposed] Order Granting Standing to the Official Tort Claimants' Committee and Future Claimants' Representative and Authorizing the Prosecution of Certain Challenge Claims on Behalf of the Bankruptcy Estates

/s/ James E. O'Neill
James E. O'Neill (DE Bar No. 4042)

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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2002 Service List EMAIL AND FCM
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Document No. 230362.1
007 – First Class Mail
230 – Emails

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