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

In re

ACCIPITER COMMUNICATIONS, INC., dba  
ZONA COMMUNICATIONS.

Debtor.

Chapter 11

Case No. 2:14-bk-04372-GBN

**COMMITTEE'S OBJECTION TO THE  
EXTENT OF ADEQUATE PROTECTION  
LIENS**

Hearing Date: August 20, 2014  
Hearing Time: 9:30 a.m.  
Location: Courtroom #602  
230 N First Ave  
Phoenix, AZ 85003

The Official Committee of Unsecured Creditors ("**Committee**"), through counsel, hereby files its *Objection to the Extent of Adequate Protection Liens* on the grounds that, after the Committee has completed its due diligence, the Committee asserts that the Rural Utilities Service of the United States Department of Agriculture, and the Department of Agriculture (collectively "**RUS**") has overstated the extent of its perfected liens over Debtor's prepetition property. The resulting post-petition property of the Debtor should therefore remain unencumbered and not be subject to adequate protection liens. The Committee has reviewed the claimed liens and has determined that the Debtor's cash and accounts receivable were not cash collateral. This Objection is supported by the following Memorandum of Points and Authorities.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). The statutory predicates for this matter

1 are 11 U.S.C. §§ 363 and 552 and is governed by Fed. R. Bankr. P. 4001 and 9014.

2 **II. FACTUAL BACKGROUND**

3 2. On March 28, 2014 (the "**Petition Date**"), Accipiter Communications, Inc., dba Zona  
4 Communications (the "**Debtor**") filed in this Court a voluntary petition for relief under Chapter 11 of  
5 the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

6 3. On April 22, 2014, the Debtor filed its *Emergency Motion for Entry of Interim and*  
7 *Final Stipulated Orders Authorizing Use of Cash Collateral and Granting Adequate Protection* (DE  
8 #37, the "Cash Collateral Motion").

9 4. On May 16, 2014, this Court entered the *Stipulated Order Authorizing Use of Cash*  
10 *Collateral and Granting Adequate Protection* (Docket # 62, the "Stipulated Order").

11 5. The Stipulated Order purports to grant RUS replacement or Adequate Protection Liens  
12 on substantially all of Debtor's post-petition assets, premised upon the RUS assertion that RUS held a  
13 first priority perfected lien on all of Debtor's prepetition assets and properties except vehicles.

14 6. On July 9, 2014, the Court conducted a continued hearing on Debtor's Motion for Use  
15 of Cash Collateral. At such hearing, the parties presented agreements to extend use of cash collateral  
16 and deadlines for objecting to Lender's claimed prepetition liens and the adequate protection liens.

17 7. On July 14, 2014, the Court entered the *Second Stipulated Order Authorizing Use of Cash*  
18 *Collateral and Granting Adequate Protection* (Docket # 76). Such Second Stipulated Order contained  
19 provisions similar to the Stipulated Order.

20 8. The Second Stipulated Order and the grant of Adequate Protection Liens remains  
21 subject to the Committee's right to challenge Lender's prepetition liens, the resulting adequate  
22 protection liens and assert Claims, Defenses and Cash Collateral Claims, as those terms are defined, on  
23 or before August 22, 2014.

24 9. The Committee has completed its review of RUS's prepetition liens and determined  
25 that, contrary to RUS's assertions, RUS failed to perfect or acquire liens upon substantial bankruptcy  
26 estate property, and as a result such property remains outside of RUS's security interest and must be  
27 excluded from any adequate protection liens granted to RUS.  
28

1           10.     The Committee has prepared an adversary proceeding to avoid the RUS liens pursuant  
2 to Bankruptcy Rule 7001 (the "***Committee Complaint***") and is prepared to file such proceeding by the  
3 August 22, 2014 deadline.

4           11.     Each month during the pendency of the Chapter 11 case, Debtor has paid the current  
5 and full amount of interest due to RUS on all debts. At the end of July 2014, Debtor reported it  
6 maintained a balance in its bank account of \$496,311.97. (See, p. 17 of 24 of the July 2014 Interim  
7 operating report, Docket # 90.)

### 8     III.     **DISCUSSION**

9           This brief is intended to present a summary for purposes of the hearing scheduled on August  
10 20, 2014 at 9:30 a.m. The Complaint will be filed by the required date of August 22, 2014.

11          As set forth in more detail below, RUS failed to perfect prepetition security interests against the  
12 following property of Debtor (among others): deposit accounts, cash, accounts receivable, Universal  
13 Service Fund subsidies and vehicles (the "Excluded Categories").

14          As a result, significant portions of Debtor's post-petition property are neither encumbered nor  
15 proceeds of encumbered property. The Committee objects to the grant of a replacement lien or  
16 adequate protection lien over the unencumbered property of the Debtor to the extent RUS is requesting  
17 such lien to adequately protect use of property over which RUS does not have a perfected security  
18 interest.

#### 19           A.     SECURED LENDER FAILED TO PERFECT SECURITY INTERESTS IN 20                   SIGNIFICANT PROPERTY OF THE DEBTOR

21          The Stipulated Order, and the Second Stipulated Order, both granted the Committee standing to  
22 assert all Claims, Defenses and Cash Collateral Claims as those terms are defined in such Orders. The  
23 term "Cash Collateral Claim" includes the right to contest RUS's interest in Debtor's cash. Stipulated  
24 Order ¶ 7. The terms "Claims" and "Defenses" include avoidance powers, including, without  
25 limitation, 11 U.S.C. § 544.

26          RUS failed to perfect an interest in Debtor's cash and deposit accounts. As reflected in the loan  
27 agreements, RUS opted not to take a security interest in Debtor's cash and deposit accounts. Further,  
28 under Arizona law perfection of an interest in deposit accounts requires control. A.R.S. § 47-9104.

1 No control agreement exists perfecting an interest in deposit accounts. RUS did not have a perfected  
2 security interest in Debtor's cash or deposit accounts as of the petition date.

3 Debtor receives subsidies from the Universal Service Fund. Assuming for the moment that it is  
4 possible to perfect a security interest in these government subsidies, the granting language in the  
5 applicable security agreement fails to include Universal Service Fund subsidies. RUS did not have a  
6 perfected security interest in Universal Service Fund subsidies payments as of the petition date.

7 The granting language in the applicable security agreement includes the term "accounts".  
8 However, a parenthetical following that term appears designed to narrow the meaning and exclude a  
9 grant of account receivables. RUS does not have a perfected security interest in Debtor's accounts  
10 receivable as of the petition date.

11 RUS acknowledges that it did not have a perfected security interest in Debtor's vehicles as of  
12 the petition date.

13 Disputes regarding RUS's interest in the Excluded Categories is the subject of the Committee's  
14 Complaint and will be adjudicated pursuant to that adversary proceeding.

15 B. NO SECURITY INTERESTS ATTACHES TO DEBTORS UNENCUMBERED POST-  
16 PETITION PROPERTY

17 By the Stipulated Order, RUS seeks a replacement lien or adequate protection lien over "all  
18 currently owned or postpetition-acquired property and assets of the Debtor of any kind and all their  
19 proceeds, products, rents and profits . . . Stipulated Order ¶ 3(b).

20 Property within the Excluded Categories, acquired post-petition, including proceeds, products,  
21 offspring or profits of such property is not subject to RUS's prepetition security agreements. 11 U.S.C.  
22 § 552(a). Accordingly, such property and proceeds thereof do *not* constitute RUS's cash collateral  
23 under Bankruptcy Code § 363(a). In light of the facts of this case, it would be wholly inappropriate to  
24 grant replacement liens or adequate protection liens over the Excluded Categories of estate property  
25 pending final resolution of the adversary proceeding.

26 C. RUS IS ADEQUATELY PROTECTED BY CURRENT PAYMENT OF INTEREST

27 Despite the fact that RUS is not entitled to adequate protection liens in Debtor's post-petition  
28 assets and receivables, RUS has always been fully adequately protected under 11 U.S.C. §363(e).

1 RUS has received payment of the interest due, on a current basis, each month during the bankruptcy  
2 case, and the Debtor continues to be able to operate its business. Such payments meet adequate  
3 protection requirements under 11 U.S.C. §361(1). Debtor's operations have continued during the case,  
4 and all parties to this case consider the Debtor's officers to be very competent and reliable.

5 At the inception of this case, Debtor filed its Emergency Motion to Approve Interim and Final  
6 Orders Authorizing the Use of Cash Collateral (Docket # 10). That Motion, now withdrawn as the  
7 result of the initial Stipulated Order, detailed for the Court the Debtor's view that RUS had not properly  
8 perfected liens upon accounts receivable, and asked the Court to confirm that use of cash was  
9 permitted. Rather than incur the expense of litigating the lien issues at that time, the Debtor and the  
10 Department of Justice ("DOJ"), acting for RUS, agreed to settle the cash collateral differences. The  
11 Debtor was aware that the Committee had not had any opportunity to review the issues, and the estate's  
12 rights were tendered to the Committee in the initial Stipulated Order. The Committee reserved all  
13 rights.

14 The parties had hoped that material progress regarding negotiation of a consensual plan would  
15 be made between Debtor and RUS and the DOJ, but after over 120 days, no material progress has  
16 occurred on the negotiation of a repayment plan which would permit the continued responsible  
17 operation of Debtor's business. The Committee would encourage the filing of the Plan by the Debtor.

18 In the meantime, this Court may consider the lien avoidance issue and determine whether RUS  
19 is entitled to adequate protection liens, in addition to its continued receipt of interest payments. The  
20 Committee contends that RUS is not entitled to adequate protection liens as the result of the invalidity  
21 and avoidability of their pre-petition liens. But, in the meantime, there is no legitimate reason why  
22 Debtor's use of the post-petition cash flow stream for operation of the business should not continue in  
23 the ordinary course. RUS remains fully adequately protected by the interest payments.

24 **WHEREFORE**, the Committee requests that Debtor continue to be authorized to use its cash  
25 and accounts, and that any replacement or adequate protection liens granted to RUS pursuant to the  
26 Stipulated Order now be limited to only collateral in which RUS held a perfected prepetition security  
27 interest as to be determined by this Court, and for such other relief as is just in the circumstances.  
28

1 RESPECTFULLY SUBMITTED this August 18, 2014.

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