Docket #200 Date Filed: 2/21/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
AVAYA INC., *et al.*,[1]	)	Case No. 23-90088 (DRJ)
Debtors.	)	(Jointly Administered)
	)	(Emergency Hearing Requested)

DEBTORS' SUPPLEMENTAL
EMERGENCY MOTION FOR ENTRY
OF INTERIM AND FINAL ORDERS (I) AUTHORIZING
THE DEBTORS TO (A) OBTAIN POST-PETITION FINANCING
AND (B) UTILIZE CASH COLLATERAL, (II) GRANTING LIENS AND
SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) GRANTING
ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES, (IV)
MODIFYING THE AUTOMATIC STAY, AND (V) GRANTING RELATED RELIEF

Emergency relief has been requested. Relief is requested not later than 9:00 a.m. (prevailing Central Time) on February 23, 2023.

If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

A hearing will be conducted on this matter on February 23, 2023, at 9:00 a.m. (prevailing Central Time) in Courtroom 400, 4th floor, 515 Rusk Street, Houston, Texas 77002. You may participate in the hearing either in person or by an audio and video connection.

Audio communication will be by use of the Court's dial-in facility. You may access the facility at (832) 917-1510. Once connected, you will be asked to enter the conference room number. Judge Jones's conference room number is 205691. Video communication will be by use of the GoToMeeting platform. Connect via the free GoToMeeting application or click the link on Judge Jones's homepage. The meeting code is "JudgeJones". Click the settings icon in the upper right corner and enter your name under the personal information setting.

Hearing appearances must be made electronically in advance of both electronic and in-person hearings. To make your appearance, click the "Electronic Appearance"

[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at http://www.kccllc.net/avaya. The location of Debtor Avaya Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 350 Mount Kemble Avenue, Morristown, New Jersey 07960.

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link on Judge Jones's homepage. Select the case name, complete the required fields and click "Submit" to complete your appearance.

The above-captioned debtors and debtors in possession (collectively, the "Debtors"),[2] state the following in support of this emergency motion (this "Supplemental Motion").[3] In support of this Supplemental Motion, the Debtors submit: (a) the *Declaration of Eric Koza, Chief Restructuring Officer of Avaya Holdings Corp. and Certain of Its Affiliates and Subsidiaries, in Support of the Debtors' Supplemental Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Post-petition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* (the "Supplemental Koza Declaration"), filed contemporaneously herewith; (b) the *Declaration of Evan Levine in Support of the Debtors' Supplemental Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Post-petition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* (the "Supplemental Levine Declaration"), filed contemporaneously herewith; and (c) the First Day Declaration (together with

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the First Day Declaration (as defined herein), the Plan, the DIP ABL Credit Agreement (as defined herein), the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors (A) to Obtain Post-petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(b), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e), and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, 364, 503, 506(c) and 507(b), (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) and (IV) Granting Related Relief* [Docket No. 47] (the "First DIP Motion"), or the Second Interim Order (as defined herein), as applicable.

[3] The Debtors, together with their non-Debtor affiliates (collectively, "Avaya" or the "Company"), are a leading provider of mission-critical, real-time communication applications. The facts and circumstances supporting this Supplemental Motion are set forth in the *Declaration of Eric Koza, Chief Restructuring Officer of Avaya Holdings Corp. and Certain of Its Affiliates and Subsidiaries, in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 4] (the "First Day Declaration") and are incorporated by reference herein.

the Supplemental Koza Declaration and Supplemental Levine Declaration, the "Supplemental DIP Declarations"). In further support of this Supplemental Motion, the Debtors state the following:

Preliminary Statement

1. As part of the Debtors' goal to swiftly emerge from these Chapter 11 Cases, prior to the Petition Date, the Debtors obtained a commitment for a new money debtor in possession asset-based revolving credit facility in the amount of approximately $128 million (the "DIP ABL Facility") that will convert into a senior secured asset-based revolving credit facility (the "Exit ABL Facility") upon emergence. While the Court authorized the Debtors to enter into the DIP-to-Exit ABL Commitment Papers pursuant to the First Interim Order, the DIP-to-Exit ABL Commitment Papers expire this Friday, February 24, 2023. If the Debtors are unable to secure the relief sought in this Supplemental Motion, the Debtors will lose access to the DIP ABL Facility and, by extension, lose access to supplemental liquidity and exit financing that put the Debtors on a path to emerging with a right-sized capital structure. Supp. Koza Decl. ¶14. As a result, the Debtors file this Supplemental Motion on an emergency basis to incur the DIP ABL Facility and obtain the benefits from such facility described herein.

2. ***First***, incurrence of the DIP ABL Facility will free up cash on hand. Pursuant to the First Interim Order, and as discussed at the hearing to consider entry of that order, the DIP Term Loan Lenders agreed to cash collateralize certain prepetition letters of credit, understanding that the Debtors would quickly finalize the terms of the DIP ABL Facility and seek emergency relief granting authority to "de-cash collateralize" these amounts. While a helpful accommodation in the short-term, the Debtors' use of proceeds from the DIP Term Loan Facility to cash collateralize (*i.e.*, secure) such prepetition letters of credit has inefficiently tied up critical cash on hand. Pursuant to the DIP ABL Credit Agreement and the Second Interim Order, the Debtors will use the proceeds from the DIP ABL Facility to "de-cash collateralize" these letters of credit,

securing them instead under the DIP ABL Facility and freeing up approximately $43 million of cash on hand to fund the administration of these Chapter 11 Cases and the Debtors' ordinary course operations. *See* Supp. Koza Decl. ¶ 10.

3. ***Second***, the DIP ABL Facility will increase the Debtors' incremental liquidity by de-risking certain Cash Management Banks'[4] inter-day exposure with respect to certain foreign exchange and ACH transactions involved in conducting the Debtors' day-to-day global business operations. Rather than imposing onerous, cash-draining collateral requirements upon the Debtors to secure these inter-day transactions (as is the current practice with certain Cash Management Banks), the DIP ABL Facility will collateralize such transactions and other cash management obligations. As a result, the DIP ABL Facility will allow the Debtors to access additional liquidity to satisfy ordinary course obligations throughout these Chapter 11 Cases and instill confidence in vendors and the market as a whole with respect to the certainty of the Debtors' liquidity position upon emergence. *See* Supp. Koza Decl. ¶ 11.

4. ***Third***, as discussed in the Supplemental Levine Declaration, the DIP ABL Facility is an important component of the overall consensual restructuring contemplated in the RSA. *See* Supp. Levine Decl. ¶ 13. The RSA and the Plan both contemplate the incurrence of an ABL Facility that converts to an exit facility at exit. The DIP ABL Facility accomplishes precisely that goal. *See* Supp. Levine Decl. ¶ 16.

5. ***Fourth***, the DIP ABL Facility provides comfort and clarity to the Debtors' operational and financial stakeholders that emergence comes with the certainty of being

[4] "Cash Management Banks" shall have the meaning ascribed to it in the *Debtor's Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue Using the Cash Management System, (B) Maintain Existing Bank Accounts and Business Forms and Books and Records, and (C) Continue Using the Investment Account and the Investment Policy, (II) Authorizing Continued Intercompany Transactions, (III) Granting Administrative Expense Status to Post-petition Intercompany Transactions, and (IV) Granting Related Relief* [Docket No. 46].

well-capitalized and avoids the need to raise more costly exit financing during the Debtors' short stay in chapter 11. *See* Supp. Levine Decl. ¶ 17.

6. Accordingly, the relief requested by this Supplemental Motion is necessary to de-risk the Debtors' operations, consummate a comprehensive restructuring transaction, and emerge from chapter 11 successfully. For the reasons set forth in this Supplemental Motion, the First DIP Motion, and the Supplemental DIP Declarations, the Debtors firmly believe that approval of the DIP ABL Facility will maximize value for all of the Debtors' stakeholders and is an exercise of the Debtors' sound business judgment. Accordingly, the Debtors respectfully request that the Court approve the relief requested herein and enter an interim order (the "Second Interim Order") and a final order (the "Final Order," and together with the First Interim Order[5] and the Second Interim Order, the "DIP Orders").

Jurisdiction and Venue

7. The United States Bankruptcy Court for the Southern District of Texas (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157 (b). The Debtors confirm their consent to the entry of a final order by the Court.

8. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The bases for the relief requested herein are sections 105, 361, 362, 363, 364, 503, and 507 of title 11 of the United States Code (the "Bankruptcy Code"), rules 2002 and 4001 of the

[5] "First Interim Order" means the *Interim Order (I) Authorizing the Debtors (A) to Obtain Post-petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(b), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e), and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, 364, 503, 506(c) and 507(b), (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) and (IV) Granting Related Relief* [Docket No. 77], entered by this Court on February 15, 2023.

Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and rules 4002-1 and 9013-1(b) of the Bankruptcy Local Rules for the Southern District of Texas (the "Bankruptcy Local Rules").

Relief Requested

10. The Debtors seek entry of the Second Interim Order and the Final Order:[6]

a. authorizing Avaya Inc., in its capacity as borrower (the "Borrower") to obtain a $128.125 million senior secured post-petition asset-based financing on a superpriority basis, including (i) a $100 million letter of credit sub-facility and (ii) a $15 million swing line sub-facility (the "DIP ABL Facility," and all amounts extended under the DIP ABL Facility, the "DIP ABL Loans"), and for Avaya Holdings Corp. ("HoldCo") and Debtors other than the Borrower and HoldCo (collectively, the "Subsidiary Guarantors," and together with HoldCo, the "Guarantors," and collectively with the Borrower and HoldCo, the "Loan Parties") to guarantee the Borrower's obligations in connection with the DIP ABL Facility, consisting of a senior secured post-petition asset-based revolving credit facility pursuant to the terms and conditions set forth in that certain *Superpriority Secured Debtor-in-Possession ABL Credit Agreement*, substantially similar to the form attached hereto as **Exhibit A**, by and among the Borrower, the Guarantors, Citibank, N.A., as administrative agent and collateral agent (in such capacities, the "DIP ABL Agent"), for and on behalf of itself, and the lenders party thereto (collectively, including the DIP ABL Agent, the "DIP ABL Lenders") (as amended, supplemented or otherwise modified from time to time in accordance with the terms hereof and thereof, together with the schedules and exhibits attached thereto, the "DIP ABL Credit Agreement") and the other agreements (including an intercreditor agreement), documents, instruments, and/or amendments executed and delivered in connection therewith (collectively with the DIP ABL Credit Agreement and the DIP-to-Exit ABL Commitment Papers, the "DIP ABL Documents");

b. authorizing the Loan Parties to execute and enter into the DIP ABL Documents and to perform all such other and further acts as may be required in connection therewith;

c. authorizing the Loan Parties, effective immediately upon the Closing Date under the DIP ABL Credit Agreement, to deem (i) the outstanding letters of credit originally issued by Citibank, N.A., as L/C Issuer (as defined in the Prepetition ABL Credit Agreement) pursuant to the Prepetition ABL Credit Agreement and currently secured by a Cash Collateral Account (as defined in the Second Interim Order) (the "Existing Citi L/Cs") to be issued under the DIP ABL Credit Agreement and to constitute DIP ABL Obligations and (ii) obligations in respect of outstanding Secured Hedging Agreements with Citibank, N.A., as Hedge Bank pursuant to the

[6] The Debtors will file the form of Final Order prior to the Final Hearing (as defined herein).

Prepetition ABL Credit Documents and currently secured by a Cash Collateral Account (the "Existing Citi Hedging Obligations") to be Secured Hedging Obligations under the DIP ABL Credit Agreement and to constitute DIP ABL Obligations (as defined in the Second Interim Order).

d. authorizing, upon the deemed issuance of the Existing Citi L/Cs as DIP ABL Obligations and the deemed designation of the Existing Citi Hedging Obligations as DIP ABL Obligations as described in the Second Interim Order, the Debtors to release the cash held in the Cash Collateral Accounts securing the applicable Existing Citi L/Cs and Existing Citi Hedging Obligations in accordance with the DIP ABL Documents and the Second Interim Order;[7]

e. authorizing the Loan Parties to use the proceeds of the DIP ABL Facility in accordance with the terms of the Second Interim Order, the DIP ABL Documents and the DIP Budget (as defined in the Second Interim Order), (i) for working capital and general corporate purposes of the Debtors, (ii) to pay obligations arising from or related to the Carve Out (as defined in the Second Interim Order), (iii) to pay Allowed Professional Fees (as defined in the Second Interim Order), (iv) to pay Adequate Protection Obligations (as defined in the Second Interim Order), and (v) to pay fees and expenses incurred in connection with the transactions contemplated hereby;

f. authorizing the Debtors to grant the DIP Obligations the respective superpriority liens and claims, in each case subject to the Carve Out and the relative priorities among the DIP Obligations as set forth in Exhibit 1 to the Second Interim Order;

g. vacating and modifying the automatic stay imposed by section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP ABL Documents and the DIP Orders, with actions against the Collateral requiring at least five calendar days' notice to the Debtors, the U.S. Trustee, and any official committee;

h. waiving any applicable stay, including (to the extent applicable) under Bankruptcy Rule 6004, to provide for immediate effectiveness of the Second Interim Order;

i. scheduling a date for a hearing on this Supplemental Motion to consider entry of the Final Order (the "Final Hearing"); and

j. granting related relief.

[7] For the avoidance of doubt, the DIP ABL Agent may establish Hedging Reserves in respect of the Existing Citi Hedging Obligations in accordance with the terms of the DIP ABL Credit Agreement.

Concise Statement of the Material Terms of the Interim Order Pursuant to Bankruptcy Rule 4001 and the Procedures for Complex Cases in the Southern District of Texas

11. The following chart contains a summary of the material terms of the proposed Second Interim Order, together with references to the applicable sections of the Second Interim Order and other relevant source documents, including the DIP ABL Credit Agreement, as required by Bankruptcy Rules 4001(b)(1)(B) and 4001(c)(1)(B) and the *Procedures for Complex Chapter 11 Cases in the Southern District of Texas* (the "Complex Case Procedures").[8]

SUMMARY OF MATERIAL TERMS OF PROPOSED DIP ABL FACILITY	
Bankruptcy Rule	**DIP ABL Facility**
Parties to the DIP ABL Facility Bankruptcy Rule 4001(c)(1)(B)	**Borrower**: Avaya Inc. a Delaware corporation and a debtor and debtor-in-possession under chapter 11 of the Bankruptcy Code (the "Borrower"). **Guarantors**: (a) HoldCo, (b) each Domestic Subsidiary (other than an Excluded Subsidiary) that provides the Guarantee on the Closing Date, which in any event will include all Subsidiaries that are Debtors on the Closing Date, or becomes a party to the Guarantee after the Closing Date pursuant to the DIP ABL Credit Agreement or otherwise (including becoming a Debtor in the Chapter 11 Cases unless waived) and (c) the Borrower (other than with respect to its own Obligations). **DIP Lenders**: The lending institutions from time to time party to the DIP ABL Credit Agreement. **Administrative Agent and Collateral Agent**: Citibank, N.A. *See* DIP ABL Credit Agreement, Preamble; § 1.1, "Defined Terms."
Term Bankruptcy Rule 4001(b)(1)(B)(iii) 4001(c)(1)(B)	"Maturity Date" shall mean with respect to any Loans, Revolving Credit Commitments and any Swing Line Loan, the earliest to occur of: (a) August 15, 2023, or if the Conversion Date has occurred, the third anniversary of the Conversion Date (or if such day shall not be a Business Day, the next succeeding Business Day); (b) the date that is 45 days after the Petition Date if the Final Order has not been entered prior to the expiration of such 45-day period, unless otherwise extended by the Required Lenders; (c) the Consummation Date;

[8] The summaries contained in this Supplemental Motion are qualified in their entirety by the provisions of the documents referenced. To the extent anything in this Supplemental Motion is inconsistent with such documents, the terms of the applicable documents shall control. Capitalized terms used in this summary chart but not otherwise defined have the meanings ascribed to them in the DIP ABL Documents or the Second Interim Order, as applicable.

SUMMARY OF MATERIAL TERMS OF PROPOSED DIP ABL FACILITY	
Bankruptcy Rule	**DIP ABL Facility**
	(d) the acceleration of the Loans and the termination of the Commitments with respect to the Facilities in accordance with the DIP ABL Credit Agreement; (e) the consummation of a sale of all or substantially all of the assets of the Borrower (or the Borrower and the Guarantors) pursuant to section 363 of the Bankruptcy Code; and (f) the termination of the Restructuring Support Agreement. *See* DIP ABL Credit Agreement, § 1.1, "Defined Terms."
Commitments Bankruptcy Rule 4001(c)(1)(B)	The DIP ABL Facility commitments total $128.125 million. *See* DIP ABL Credit Agreement, "Recitals."
Conditions of Borrowing Bankruptcy Rule 4001(c)(1)(B)	The Second Interim Order and the DIP ABL Credit Agreement include conditions to closing that are customary and appropriate for similar debtor-in-possession financings of this type. *See* DIP ABL Credit Agreement § 6.2, "Collateral."
Interest Rates Bankruptcy Rule 4001(c)(1)(B)(ii)	The DIP ABL Loans will bear interest at a rate equal to: (i) for Term SOFR Loans, Adjusted Term SOFR *plus* 3.00% and (ii) for ABR Loans, ABR *plus* 2.00%. *See* DIP ABL Credit Agreement, § 2.8, "Interest."
Use of Proceeds and Cash Collateral Bankruptcy Rule 4001(b)(l)(B)(ii)	The Borrower will use the Letters of Credit issued on the Closing Date to backstop or replace the Closing Date Existing Letters of Credit and/or any letters of credit issued to the Borrower or any Subsidiary prior to the Closing Date. The Borrower will, after the Closing Date, use the proceeds of the Credit Extensions for working capital and general corporate purposes. *See* DIP ABL Credit Agreement, § 9.13, "Use of Proceeds."
Parties with an Interest in Cash Collateral Bankruptcy Rule 4001(b)(1)(B)(i)	The Prepetition ABL Secured Parties and the Prepetition Secured Parties. *See* Second Interim Order ¶ 4(j).
Milestones Bankruptcy Rule 4001(c)(1)(B)	The Borrower shall comply with the following Milestones (collectively, the "Milestones"): • The Final Order shall have been entered by no later than forty-five (45) days after the Petition Date. • The Rights Offering (as defined in the Restructuring Support Agreement) shall have been commenced by no later than ten (10) days after the Petition Date. • The 2023 PBGC Settlement shall have been approved by the Bankruptcy Court no later than confirmation of the Plan. • The Plan and related disclosure statement (the "Disclosure Statement") shall have been filed no later than one (1) day after the Petition Date.

SUMMARY OF MATERIAL TERMS OF PROPOSED DIP ABL FACILITY	
Bankruptcy Rule	**DIP ABL Facility**
	• The order approving the adequacy of the Disclosure Statement, in form and substance acceptable to the Debtors and the Required Lenders, shall have been entered no later than sixty (60) days after the Petition Date. • The order confirming the Plan, in form and substance acceptable to the Debtors and the Required Lenders (the "Confirmation Order"), shall have been entered by no later than sixty (60) days after the Petition Date. • The substantial consummation of the Plan shall have occurred no later than ninety (90) days after the Petition Date. *See* DIP ABL Credit Agreement, § 9.16, "Milestones."
Liens and Priority Bankruptcy Rule 4001(c)(1)(B)(i)	As security for the DIP Obligations, subject and subordinate in all respects to the Carve Out and the lien priorities set forth on Exhibit 1 of the Second Interim Order, effective and perfected upon the entry of the First Interim Order or the Second Interim Order (as applicable) and without the necessity of the execution, recordation or filing by the Loan Parties, the DIP Agents or any DIP Lender of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or the possession or control by the DIP Agents of, or over, any DIP Collateral, the following security interests and liens are hereby granted to the DIP Agents for their own respective benefit and the benefit of the DIP Lenders, subject only to the Carve Out and the Permitted Liens (all such liens and security interests granted to the DIP Agents, for their respective benefit and for the benefit of the respective DIP Lenders, pursuant to the Second Interim Order and the DIP Documents, the "DIP Liens"): (a) First Lien on Unencumbered Property. Pursuant to Bankruptcy Code section 364(c)(2), and subject and subordinate in all respects to the Carve Out, valid, binding, continuing, enforceable, fully-perfected first priority senior security interests in and liens upon all DIP Collateral, to the extent such DIP Collateral is not subject to valid, perfected and non-avoidable liens as of the Petition Date or valid and non-avoidable liens in favor of third parties that were in existence immediately prior to the Petition Date that are perfected as permitted by Bankruptcy Code section 546(b) ("Unencumbered Property"), with the relative priorities among the DIP Obligations as set forth on Exhibit 1 attached to the Second Interim Order; (b) Liens Junior to Certain Other Liens. Pursuant to Bankruptcy Code section 364(c)(3), and subject and subordinate in all respects to the Carve Out, valid, binding, continuing, enforceable, fully perfected junior security interests in and liens on the DIP Collateral, to the extent such DIP Collateral is subject to (i) valid, perfected and non-avoidable liens as of the Petition Date or (ii) valid and unavoidable liens in favor of third parties that were in existence immediately prior to the Petition Date that are perfected as permitted by Bankruptcy Code section 546(b), in each case other than the Prepetition First-Priority Liens, with the relative priorities among the DIP Liens as set forth on Exhibit 1 attached to the Second Interim Order; and (c) Priming Liens. Pursuant to Bankruptcy Code section 364(d)(1), and subject and subordinate in all respects to the Carve Out, a valid, binding, continuing, enforceable, fully perfected priming senior security interests in and liens upon the Prepetition Collateral, which security interests and liens shall prime the Primed

SUMMARY OF MATERIAL TERMS OF PROPOSED DIP ABL FACILITY	
Bankruptcy Rule	**DIP ABL Facility**
	Liens to the extent and in accordance with the priorities shown on Exhibit 1 attached to the Second Interim Order. The DIP Liens securing the DIP ABL Obligations (the "DIP ABL Liens") are valid, automatically perfected, non-avoidable, senior in priority, and superior to any security, mortgage, collateral interest, lien, or claim to any of the DIP Collateral, except that the DIP ABL Liens shall be subject to the Carve Out in all respects and shall otherwise be junior only to (i) as to the DIP ABL Priority Collateral (as such term shall be defined in the DIP ABL Intercreditor Agreement), the Permitted Liens,[9] (ii) as to the DIP Term Priority Collateral (as such term shall be defined in the DIP ABL Intercreditor Agreement) that was Prepetition Collateral, (A) the Permitted Liens, (B) the DIP Term Loan Liens, (C) the Prepetition First Lien Adequate Protection Liens and (D) the Prepetition First-Priority Liens and (iii) as to the DIP Term Priority Collateral that was Unencumbered Property, (A) the Permitted Liens, (B) the DIP Term Loan Liens and (C) the Prepetition First Lien Adequate Protection Liens. The DIP Liens securing the DIP Term Loan Obligations (the "DIP Term Loan Liens") are continuing, valid, automatically perfected, non-avoidable, senior in priority, and superior to any security, mortgage, collateral interest, lien, or claim to any of the DIP Collateral, except that the DIP Term Loan Liens shall be subject to the Carve Out in all respects and shall otherwise be junior only to (i) as to the DIP Term Priority Collateral, the Permitted Liens and (ii) as to the DIP ABL Priority Collateral, (A) the Permitted Liens and (B) the DIP ABL Liens. In the event of an enforcement of remedies in respect of the DIP Facilities and the application of the DIP Collateral, such DIP Collateral shall be applied as specified on Exhibit 1 attached to the Second Interim Order. *See* Second Interim Order ¶¶ 10–11.
Carve-Out Bankruptcy Rule 4001(c)(1)(B)	The Second Interim Order provides a "Carve-Out" of certain statutory fees and allowed professional fees of the Debtors pursuant to section 1103 of the Bankruptcy Code. *See* Second Interim Order ¶ 14.
Challenge Period Bankruptcy Rule 4001(c)(l)(B)	The Second Interim Order provides for a challenge period no later than the earlier of (w) the commencement of a hearing to consider confirmation of a chapter 11 plan and (x) sixty (60) days after the Petition Date (the "Challenge Period"); *provided* that any Trustee appointed prior to the expiration of the Challenge Period will have the longer of (y) the remaining Challenge Period or (z) forty-five (45) days from the date of the Trustee's appointment to commence a Challenge; *provided*, *further* that so long as the Tolling Conditions are met, the Challenge Period shall be tolled with respect to the Creditors' Committee and, upon the failure of the Tolling Conditions, the Creditors' Committee will have sixty (60) days from the date of such failure to bring any Challenge. *See* Second Interim Order ¶ 31(a).

[9] For the avoidance of doubt, nothing in the Second Interim Order shall limit the rights of the DIP Secured Parties (as defined in the Second Interim Order) to the extent Permitted Liens (as defined in the Second Interim Order) are not permitted under the DIP Documents (as defined in the Second Interim Order).

SUMMARY OF MATERIAL TERMS OF PROPOSED DIP ABL FACILITY	
Bankruptcy Rule	**DIP ABL Facility**
Events of Default Bankruptcy Rule 4001(c)(1)(B)	The DIP ABL Facility contains events of default that are usual and customary for debtor-in-possession financings, including without limitation, the failure to timely comply with any of the Milestones. *See* DIP ABL Credit Agreement, §11, "Events of Default."
Waiver/Modification of the Automatic Stay Bankruptcy Rule 4001(c)(1)(B)(iv)	Pursuant to the Second Interim Order, the automatic stay provisions of Bankruptcy Code section 362(a) of the Bankruptcy Code shall be modified to the extent necessary to implement and effectuate the terms of the Second Interim Order. *See* Second Interim Order ¶¶ 7, 22.
Indemnification Bankruptcy Rule 4001(c)(1)(B)(ix)	The DIP ABL Facility contains indemnification provisions ordinary and customary for financings of this type. *See* DIP ABL Credit Agreement § 12.7, "Indemnification."
Section 506(c) and 552(b) Waiver Bankruptcy Rule 4001(c)(l)(B)(x)	Upon entry of the Second Interim Order, the DIP ABL Secured Parties are subject to certain waivers of 506(c) of the Bankruptcy Code, and subject to and effective upon the entry of the Final Order, the Prepetition Secured Parties are subject to certain waivers of any "equities of the case" exception under section 552(b) of the Bankruptcy Code. *See* Second Interim Order, ¶¶ 16–17.

Statement Regarding Significant Provisions

12. The DIP Orders, as applicable, contain certain of the provisions (the "Significant Provisions")[10] identified in Section C, paragraph 8 of the Complex Case Procedures. The Significant Provisions included in the DIP Orders are as follows: [11]

a. ***Plan and Disclosure Statement-Related Milestones***. The DIP ABL Credit Agreement provides milestones for (i) filing a plan of reorganization and a disclosure statement of no later than one (1) day after the petition date and

[10] Significant Provisions refer to those provisions that: (a) grant cross-collateralization protection (other than replacement liens or other adequate protection) to prepetition secured creditors; (b) deem prepetition secured debt to be post-petition debt or that use post-petition loans from a prepetition secured creditor to pay part or all of that secured creditor's prepetition debt, other than as provided in section 552(b) of the Bankruptcy Code; (c) bind the bankruptcy estates or any parties in interest with respect to the validity, perfection, or amount of the secured creditor's prepetition lien or debt or the waiver of claims against the secured creditor; (d) waive or limit the estate's rights under section 506(c) of the Bankruptcy Code; (e) grant prepetition secured creditors liens on the debtor's claims and causes of action arising under chapter 5 of the Bankruptcy Code; (f) impose deadlines for the filing of a plan or disclosure statement; and (g) grant an administrative claim.

[11] The summaries contained in this Supplemental Motion are qualified in their entirety by the provisions of the documents referenced. To the extent anything in this Supplemental Motion is inconsistent with such documents, the terms of the applicable documents shall control. Capitalized terms used in this "Statement of Significant Provisions Section" but not otherwise defined have the meanings ascribed to them in the Second Interim Order.

(ii) obtaining confirmation of the Plan no later than sixty (60) days after the Petition Date (*see* DIP ABL Credit Agreement § 9.16, "Milestones");

b. ***No-Cross Collateralization***. The DIP Orders do not authorize, and the DIP ABL Facility does not provide for, any cross-collateralization of the Debtors' funded debt;

c. ***No Requirement that Post-petition Loans Be Used to Repay Prepetition Debt***. The Second Interim Order does not authorize, and the DIP ABL Facility does not provide for, the refinancing of prepetition debt;

d. ***Liens on Proceeds of Avoidance Actions***. The Final Order, but not the Second Interim Order, grants the DIP Secured Parties liens on the proceeds of claims and causes of action arising under chapter 5 of the Bankruptcy Code (the "Avoidance Action Proceeds"), excluding the actual claims or causes of action arising under chapter 5 of the Bankruptcy Code (collectively, "Avoidance Actions"); *provided* that the DIP Superpriority Claims may be collected out of Avoidance Actions Proceeds only after the holder of such DIP Superpriority Claims has made commercially reasonable efforts to exhaust all other sources of recovery for such claims (*see* Second Interim Order ¶ 9);

e. ***Default Provisions and Remedies***.

i. The Debtors shall promptly provide notice to the DIP Agents and the Prepetition First Lien Agents and their respective advisors (with a copy to counsel of the Akin Ad Hoc Group and counsel to the PW Ad Hoc Group) of the occurrence of any DIP Termination Date or of any Event of Default under the DIP Documents. Upon the occurrence and during the continuation of any DIP Termination Date or Event of Default under the DIP Documents, the DIP Agents (at the direction of the Required DIP Lenders in accordance with the applicable DIP Documents) shall be required to provide five (5) business days' written notice (such period, the "Remedies Notice Period" and such notice, a "Termination Declaration") to the Debtors, counsel to any Creditors' Committee (if appointed), counsel to the Prepetition First Lien Agents, counsel of the Akin Ad Hoc Group, counsel to the PW Ad Hoc Group, counsel to any other DIP Agent and the U.S. Trustee of the applicable DIP Agent's intent to exercise its rights and remedies, prior to the exercise of any of the following rights: (1) declaring all DIP Obligations, including any and all accrued interest, premiums, fees and expenses constituting the DIP Obligations owing under the DIP Documents, to be immediately due and payable; (2) declaring the commitment of each DIP Lender to make DIP Loans to be terminated, whereupon such commitments and obligation shall be terminated to the extent any such commitment remains under the applicable DIP Facility; (3) the

termination of the applicable DIP Facility and the DIP Documents as to any future liability or obligation of the DIP Secured Parties, but without affecting any of the DIP Liens or the DIP Obligations; (4) termination and/or revocation of the Debtors' right, if any, under the Second Interim Order and the DIP Documents to use any Cash Collateral of the DIP Secured Parties; (5) charging of interest at the default rate under the DIP Facilities; (6) freezing of monies or balances in the DIP Proceeds Account;[12] (7) enforcing any and all rights against the DIP Collateral in possession of the applicable DIP Agent, including, without limitation, disposition of the DIP Collateral, solely for the application towards the Carve Out and the DIP Obligations in accordance with their respective priorities; and (8) taking any other actions or exercise any other rights or remedies permitted under the Second Interim Order, the DIP Documents, or applicable law; *provided* that the DIP Lenders shall not be obligated to make any DIP Loans or advances under the applicable DIP Facility following the occurrence of an Event of Default thereunder or the occurrence of the DIP Termination Date. A DIP Agent may provide a Termination Declaration, notwithstanding the provisions of Bankruptcy Code section 362, without any application, motion or notice to, hearing before, or order from the Court (*see* Second Interim Order ¶ 25);

ii. Upon delivery of a Termination Declaration, each of the DIP Agents, the DIP Lenders, the Debtors, the Creditors' Committee, and the applicable Prepetition Secured Parties consents to a hearing on an expedited basis to consider (a) whether a DIP Termination Date or Event of Default has occurred and (b) any appropriate relief (including, without limitation, the Debtors' non-consensual use of Cash Collateral). During the Remedies Notice Period, notwithstanding anything to the contrary set forth in paragraph 25 of the Second Interim Order, the Debtors shall continue to have the right to use Cash Collateral in accordance with the terms of the Second Interim Order, solely to pay necessary expenses set forth in the DIP Budget to avoid immediate and irreparable harm to the Debtors' estates. At the end of the Remedies Notice Period, unless the Court has entered an order to the contrary or otherwise fashioned an appropriate remedy, including whether DIP Termination Date or Event of Default has occurred, the Debtors' right to use Cash Collateral shall immediately cease, unless otherwise provided

[12] "DIP Proceeds Account" shall have the meaning ascribed to it in the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue Using the Cash Management System, (B) Maintain Existing Bank Accounts and Business Forms and Books and Records, and (C) Continue Using the Investment Account and the Investment Policy, (II) Authorizing Continued Intercompany Transactions, (III) Granting Administrative Expenses Status to Post-petition Intercompany Transactions, and (IV) Granting Related Relief* [Docket No. 46] (the "Cash Management Motion").

herein, and the DIP Agents and DIP Lenders shall have the rights set forth immediately below, and the DIP ABL Agent shall have the right to, without the necessity of seeking relief from the automatic stay, immediately (a) freeze monies or balances in the Debtors' accounts that are subject to the control of the DIP ABL Agent or any of the DIP ABL Secured Parties, (b) set off any and all amounts in accounts maintained by the Debtors with, or that are subject to the control of, the DIP ABL Agent or any of the DIP ABL Secured Parties against the DIP ABL Obligations solely to the extent such amounts are DIP ABL Priority Collateral and (c) apply proceeds received into a lockbox, collection or other account maintained by such DIP ABL Secured Party to repay the DIP ABL Obligations solely to the extent such amounts are DIP ABL Priority Collateral (*see* Second Interim Order ¶ 26); and

iii. During the Remedies Notice Period, prior to the exercise or enforcement of any rights against the DIP Collateral (other than as set forth in paragraph 26 of the Second Interim Order), the applicable DIP Agent (at the direction of the Required DIP Lenders in accordance with the DIP Documents) shall be required to file an emergency motion with the Court or file the appropriate written notice in accordance with the applicable Court procedures on five (5) Business Days' notice (the "Stay Relief Hearing") to determine whether a DIP Termination Event or Event of Default has occurred (and the Loan Parties and the Creditors' Committee, if any, shall not object to the shortened notice with respect to such Stay Relief Hearing). In the event the Court determines during a Stay Relief Hearing that a DIP Termination Date or Event of Default has occurred, the Court may fashion an appropriate remedy, which may include, inter alia, the exercise of any and all rights or remedies available to the DIP Secured Parties under the Second Interim Order, the DIP Documents or applicable law against the DIP Collateral; *provided* that the rights of the Debtors to contest such relief are expressly preserved; *provided, further*, that in the event that a party challenges the applicable DIP Agent's assertion that a DIP Termination Event or Event of Default has occurred or has occurred and is continuing and the Court is unavailable for a hearing during the Remedies Notice Period, the automatic stay pursuant to Bankruptcy Code section 362 shall remain in effect as to all actions other than those expressly identified in paragraph 26 of the Second Interim Order until the Court has an opportunity to rule on such challenge (*see* Second Interim Order ¶ 27);

f. ***Section 506(c) and Section 552 Waivers***.

i. Except to the extent of the Carve Out, no costs or expenses of administration of the Chapter 11 Cases or any future proceeding that

may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral pursuant to Bankruptcy Code section 506(c) or any similar principle of law, as such pertains to the DIP Secured Parties or the DIP Obligations without the prior written consent of the DIP Agents and no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Agents or the DIP Lenders, and nothing contained in the Second Interim Order shall be deemed to be a consent by the DIP Agents or the DIP Lenders, or the Prepetition ABL Secured Parties or the Prepetition Secured Parties, to any charge, lien, assessment or claim against the DIP Collateral under Bankruptcy Code section 506(c) or otherwise. Subject only to and effective upon entry of the Final Order, except to the extent of the Carve Out, no costs or expenses of administration of the Chapter 11 Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Prepetition Collateral (including Cash Collateral) pursuant to Bankruptcy Code section 506(c) or any similar principle of law, without the prior written consent of the Prepetition First Lien Agents, as the case may be, and no such consent shall be implied from any other action, inaction, or acquiescence by the Prepetition Secured Parties, and nothing contained in the Second Interim Order shall be deemed to be a consent by the Prepetition Secured Parties to any charge, lien, assessment or claim against the Prepetition Collateral under Bankruptcy Code section 506(c) or otherwise (*see* Second Interim Order ¶17); and

ii. Subject only to and effective upon the entry of the Final Order, none of the DIP Collateral, the DIP Term Lenders, the DIP Term Loan Agent, the DIP ABL Lenders, the DIP ABL Agent, the Prepetition Collateral, the Prepetition First Lien Adequate Protection Liens or the Prepetition Secured Parties shall be subject to the equitable doctrine of "marshaling" or any other similar doctrine, and all proceeds thereof shall be received and used in accordance with this Second Interim Order; *provided* that solely with respect to the exercise of remedies by the DIP ABL Agent or the DIP ABL Lenders with respect to DIP ABL Priority Collateral, the foregoing waiver shall be effective immediately upon entry of the Second Interim Order but without prejudice to any provisions of the Final Order. Further, subject only to and effective upon entry of the Final Order, in no event shall the "equities of the case" exception in Bankruptcy Code section 552(b) apply to the secured claims of the Prepetition Secured Parties (*see* Second Interim Order ¶ 16);

g. ***Limitations on the Use of Cash Collateral Other than General "Carve-Outs" to Pay Approved Fees and Expenses of Advisors to Official Committees or Future Trustees***. Notwithstanding anything in the Second Interim order or in any other order of this Court to the contrary, none of the DIP Facilities (including any disbursements set forth in the DIP Budget or obligations benefitting from the Carve Out), the DIP Collateral, the Prepetition Collateral, any Cash Collateral or the Carve Out (other than the Investigation Budget (as defined herein)) may be used to (a) investigate, analyze, commence, prosecute, threaten, litigate, object to, contest, or challenge in any manner or raise any defenses to, the validity, perfection, priority, extent or enforceability of any amount due under the DIP Documents, the Prepetition ABL Credit Documents or the Existing Agreements or the liens or claims granted under the First Interim Order or the Second Interim Order, the DIP Documents or the Existing Agreements, including the Primed Liens, the Cash Collateral Liens and the DIP Liens, or any mortgage, security interest, or lien with respect thereto, or any other rights or interests or replacement liens with respect thereto or any other rights or interests of any of the DIP Agents, the other DIP Secured Parties, the Prepetition Term Loan Agent, the Prepetition ABL Secured Parties, or the Prepetition Secured Parties, (b) assert any Claims and Defenses, including any Avoidance Actions, or any other causes of action against the DIP Agent, the DIP Lenders, the Prepetition ABL Secured Parties, the Prepetition Secured Parties or, in each case, their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys or advisors, (c) prevent, hinder, or otherwise delay the DIP Agents' or the Prepetition First Lien Agents' assertion, enforcement, or realization on the Prepetition Collateral or the DIP Collateral, in accordance with the DIP Documents, the Existing Agreements, the First Interim Order or the Second Interim Order, the exercise of rights by the DIP Agents or the Prepetition Secured Parties once an Event of Default has occurred and is continuing, or any other rights or interest of any of the DIP Agents, the DIP Lenders, the Prepetition ABL Secured Parties or the Prepetition Secured Parties following the occurrence of a DIP Termination Date and after the Remedies Notice Period, (d) seek to subordinate (other than to the Carve Out or as set forth in the Second Interim Order) or recharacterize the DIP Obligations or any of the Prepetition First Lien Obligations, or to disallow or avoid any claim, mortgage, security interest, lien, or replacement lien or payment thereunder, (e) seek to modify any of the rights granted to the DIP Agents, the DIP Lenders, or any of the Prepetition First Lien Agents hereunder or under the DIP Documents or the Existing Agreements, in the case of each of the foregoing clauses (a) through (d), without such party's prior written consent, (f) pay any amount on account of any claims arising prior to the Petition Date unless such payments are approved by an order of this Court or otherwise permitted under the DIP Documents, (g) file any motion seeking approval of a sale of any DIP Collateral without the consent of the Required DIP Lenders, other than a sale that indefeasibly satisfies the DIP

Obligations in full in cash, (h) challenge the Escrow Release or the Escrow Payment or seek to transfer any portion of the Escrow Cash to the Debtors' estates, or (i) pay Allowed Professional Fees, disbursements, costs or expenses incurred by any person, including, without limitation, the Creditors' Committee (if any), in connection with any of the foregoing; *provided*, that paragraph 34 of the Second Interim Order (including, for the avoidance of doubt, the Investigation Budget) shall not limit (or be deemed to limit) the Loan Parties' rights to challenge the claims of any creditor who received payment pursuant to such repurchase, redemption or other satisfaction by any Debtor entity of the HoldCo Convertible Notes with the proceeds of the Tranche B-3 Term Loans or otherwise prior to the Petition Date. The "Investigation Budget" means a cap of $125,000 with respect to Allowed Professional Fees to be incurred by the Creditors' Committee under the investigation budget (*see* Second Interim Order ¶ 34(a));

h. ***Priming Liens***. Pursuant to Bankruptcy Code section 364(d)(1), and subject and subordinate in all respects to the Carve Out, a valid, binding, continuing, enforceable, fully perfected priming senior security interests in and liens upon the Prepetition Collateral, which security interests and liens shall prime the Primed Liens in accordance with the priorities shown on Exhibit 1 attached to the Second Interim Order (*see* Second Interim Order ¶ 10(c)); and

i. ***No Limitation on the Ability of Estate Fiduciaries to Fulfill their Duties***.

i. The DIP Orders bind the Debtors, and subject to certain challenge rights, all parties in interest, with respect to the validity, perfection, and amount of the liens and debt of the DIP Secured Parties and Prepetition Secured Parties, and the waiver of the Debtors' claims against the DIP Secured Parties and Prepetition Secured Parties (*see* Interim Order ¶ 31); and

ii. The DIP Orders impose limitations on the use of Cash Collateral to, among other things, investigate or finance the prosecution of claims and causes of action against the DIP Secured Parties, the Prepetition Secured Parties (each in their capacities as such), and other related parties related to the DIP Obligations, the Prepetition Obligations, the DIP Liens, or the Prepetition Liens, *provided*, *however*, that such limitations shall not apply to investigations of the Creditors' Committee (if any), in an aggregate amount not to exceed $125,000 (*see* Second Interim Order ¶ 34(a)).

13. As required by Section C, paragraph 8 of the Complex Case Procedures, the inclusion of each of the applicable Significant Provisions in the DIP ABL Facility is appropriate and necessary to permit the Debtors' access to the DIP ABL Facility. The terms and

conditions of each of the Significant Provisions included in the DIP Orders are the result of arm's-length and hard-fought negotiations between the Debtors and the DIP ABL Lenders. The DIP ABL Lenders are unwilling to provide the DIP ABL Facility absent the inclusion of these provisions, and no other existing stakeholder or third party has presented a lower cost or otherwise better proposal. As set forth herein and in the Supplemental DIP Declarations, preventing the DIP-to-Exit ABL Commitment Letters from expiring and granting the relief requested pursuant to the Second Interim Order will provide the Debtors with incremental liquidity to assist with the continued operation of the Debtors' businesses and permit the Debtors to emerge successfully from these Chapter 11 Cases on a go-forward basis. In light of the foregoing, the Debtors submit that the Significant Provisions in the DIP Orders are appropriate and necessary under the facts and circumstances of these Chapter 11 Cases and should be approved.

The DIP ABL Facility

I. The Debtors' Need for the DIP ABL Facility.

14. The Debtors entered these Chapter 11 Cases with approximately $45 million in cash on hand, which was gravely insufficient to meet the Debtors' liquidity needs both in the near-term and throughout these Chapter 11 Cases. The Court's approval of the DIP Term Loan Facility and the Debtors' entry into the DIP-to-Exit ABL Commitment Papers provided the Debtors necessary incremental liquidity to, among other things, meet their payroll obligations and reassure other stakeholders, including channel partners, landlords, customers, and employees, that the Debtors have sufficient funds to emerge from chapter 11 while continuing to operate in the ordinary course. Although the Court authorized the Debtors to enter into the DIP-to-Exit ABL Commitment Papers pursuant to the First Interim Order, the Debtors require the relief sought by this Supplemental Motion (*i.e.*, approving, among other things, the Debtors' incurrence of the DIP ABL Facility)

because the DIP-to-Exit Commitment Papers expire this Friday, February 24, 2023. Allowing the DIP-to-Exit Commitment Papers will result in immediate and irreparable harm to the Debtors.

15. ***First***, the DIP ABL Facility provides the Debtors with access to additional cash on hand that would otherwise remain needlessly tied up collateralizing certain letters of credit and cash management obligations. Pursuant to the First Interim Order, the Debtors used proceeds from the DIP Term Loan to cash collateralize certain letters of credit, significantly diminishing accessible incremental liquidity. The DIP ABL Facility will "de-cash collateralize" these letters of credit and secure them under the DIP ABL Facility, along with certain other cash management obligations, freeing up approximately $43 million of liquidity. Supp. Koza Decl. ¶ 10.

16. ***Second***, by leveraging the DIP ABL Facility to secure such obligations, the Debtors can decrease the inter-day risk exposure of certain of their Cash Management Banks, such as Citibank, who would otherwise require excessive cash collateral to support the Debtors' day-to-day ordinary course transactions (*e.g.*, foreign exchange and ACH transactions) in connection with the Debtors' satisfaction of operational obligations, including payroll and inventory expenses. *See* Supp. Koza Decl. ¶¶ 11.

17. ***Third***, as discussed in the Supplemental Levine Declaration, the DIP ABL Facility is an important component of the overall RSA. *See* Supp. Levine Decl. ¶¶ 11, 13.

18. ***Fourth***, the DIP ABL Facility will pave the way for the Debtors to access post-emergence liquidity on better terms than they would be able to obtain without first incurring the DIP ABL Facility. Absent incurrence of the DIP ABL Facility, the Debtors likely would have to access post-emergence liquidity at a considerably higher cost and heightened risk profile, pursuant to an exit facility negotiated later in these Chapter 11 Cases or on a post-emergence basis. The Debtors and their advisors were able to leverage their extensive prepetition marketing process

to "lock in" exit financing under favorable terms, and incurrence of the DIP ABL Facility is a required first step toward obtaining such exit financing. Further, the DIP ABL Facility's excess borrowing base allows for flexibility such that the facility can be upsized if other lenders become interested in funding in the near term. This flexibility will allow the Debtors to remain adaptive to their global business environment and operational liquidity needs. *See* Supp. Levine Decl. ¶ 17.

19. ***Finally***, the DIP ABL Facility will not prejudice or otherwise harm any of the Debtors' stakeholders. Rather, the DIP ABL Facility will provide the Debtors with additional liquidity to continue to satisfy their ordinary course obligations and reassure their stakeholders that the Debtors can emerge from these Chapter 11 Cases with a right-sized capital structure and well-developed go-forward business plan, as contemplated by the RSA.

20. In light of the ticking clock of the DIP-to-Exit Commitment Papers' impending expiration, the relief requested in this Supplemental Motion will enable the Debtors to secure additional incremental liquidity and continue on their path to emergence in an expeditious and value-maximizing manner.[13] *See* Supp. Koza Decl. ¶ 15; *see also* Supp. Levine Decl. ¶ 19.

III. Alternative Sources of Financing Are Not Available on Better Terms.

21. To evaluate alternatives to the proposed DIP ABL Facility, Evercore initiated a marketing process for post-petition financing. As part of this process, Evercore solicited interest from six sources of financing within the Debtors' capital structure and eight sources of financing outside of the Debtors' capital structure. The potential third-party lenders Evercore contacted for DIP ABL financing included various institutions that routinely provide post-petition financing, including both well-known commercial banks and specialty lenders. From that group of potential

[13] The First Interim Order approved the Adequate Protection to be provided to Prepetition Secured Parties. The Debtors are not requesting any substantive changes or modifications to the Adequate Protection approved in the First Interim Order.

lenders, eight executed confidentiality agreements and received access to non-public information, and three submitted proposals for post-petition ABL financing. After evaluating the options, the Company eventually determined that all ABL proposals were either not actionable or inferior to the current DIP ABL Facility with respect to their economic and structural terms. Supp. Levine Decl. ¶ 14.

22. As a result, it became clear to the Debtors that their best path to financing their Chapter 11 Cases was through financing facilities from their existing lenders. As discussed in the First DIP Motion, Evercore solicited a DIP ABL proposal from Citibank on behalf of a syndicated group of lenders and a new money term loan proposal from the Ad Hoc Groups. Over the course of multiple weeks, the Debtors and their advisors engaged in various conversations and extensive negotiations with Citibank and the Ad Hoc Groups to achieve the best possible terms for the DIP Term Loan Facility and the DIP ABL Facility, respectively. *See* Supp. Levine Decl. ¶ 15. Further, as discussed in the Supplemental Levine Declaration, the DIP ABL Facility provides a cheaper source of incremental liquidity upon emergence than obtaining later exit or post-emergence financing in the form of term loans from the market. *See* Supp. Levine Decl. ¶ 17.

IV. The DIP ABL Facility Is Necessary to Preserve the Value of the Debtors' Estates.

23. The relief requested in this Supplemental Motion is necessary to avoid the immediate and irreparable harm that would ensue should the DIP-to-Exit ABL Commitment Papers expire on February 24, 2023.

Basis for Relief

I. The Debtors Should Be Authorized to Obtain Post-petition Financing Through the DIP ABL Loan Facility Documents.

A. Entry into the DIP ABL Loan Facility Documents Is an Exercise of the Debtors' Sound Business Judgment.

24. The Court should authorize the Debtors, as an exercise of their sound business judgment, to enter into the DIP ABL Documents, obtain access to the DIP ABL Facility, and continue using cash collateral. Section 364 of the Bankruptcy Code authorizes a debtor to obtain secured or superpriority financing under certain circumstances discussed in detail below. Courts grant a debtor in possession considerable deference in acting in accordance with its business judgment in obtaining post-petition secured credit, so long as the agreement to obtain such credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code. *See, e.g.*, *In re N. Bay Gen. Hosp., Inc.*, No. 08-20368 (Bankr. S.D. Tex. July 11, 2008) (order approving post-petition financing on an interim basis as exercise of debtors' business judgment); *In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving a post-petition loan and receivables facility because such facility "reflect[ed] sound and prudent business judgment"); *In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender."); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[C]ases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party in interest.").

25. To determine whether the business judgment standard is met, a court need only "examine whether a reasonable business person would make a similar decision under similar

circumstances." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006); *see also In re Curlew Valley Assocs.*, 14 B.R. 506, 513–14 (Bankr. D. Utah 1981) (noting that courts should not second guess a debtor's business decision when that decision involves "a business judgment made in good faith, upon a reasonable basis, and within the scope of the debtor's authority under the [Bankruptcy] Code").

26. In considering whether the terms of post-petition financing are fair and reasonable, courts consider the terms in light of the relative circumstances of both the debtor and the potential lender. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003) (while many of the terms favored the DIP lenders, "taken in context, and considering the relative circumstances of the parties," the court found them to be reasonable); *see also Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Elingsen McLean Oil Co., Inc.)*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986) (recognizing a debtor may have to enter into "hard bargains" to acquire funds for its reorganization).

27. The Debtors' determination to move forward with the DIP ABL Facility is an exercise of their sound business judgment following an arm's-length process and careful evaluation of available alternatives.

28. During these Chapter 11 Cases, the DIP ABL Facility will provide the Debtors with the ability to "de-cash collateralize" certain letters of credit and de-risk certain Cash Management Banks' inter-day exposure to free up liquidity supplied by the DIP Term Loan Facility. *See* Supp. Koza. Decl. ¶¶ 9-10. Further, the DIP ABL Facility will provide the Debtors with a path to emergence by allowing the Debtors to implement the restructuring contemplated by the RSA and the Plan and obtain exit financing on favorable terms. *See* Supp. Levine Decl. ¶ 16. The Debtors negotiated the DIP ABL Facility and other DIP ABL Documents with the DIP ABL Lenders in

good faith, at arm's length, and with the assistance of their respective advisors, and the Debtors believe that they have obtained the best financing available under the circumstances. *See* Supp. Levine Decl. ¶ 15. Accordingly, the Court should authorize the Debtors' entry into the DIP ABL Credit Agreement, as it is a reasonable exercise of the Debtors' business judgment.

B. The Debtors Should Be Authorized to Grant Liens and Superpriority Claims to the DIP Lenders.

29. The Debtors propose to obtain financing under the DIP ABL Facility by providing security interests and liens as set forth in the DIP ABL Documents pursuant to section 364(c) of the Bankruptcy Code. Specifically, the Debtors propose to provide to the DIP Lenders post-petition security interest in and liens on the DIP Collateral (as defined in the Second Interim Order) and Prepetition Collateral that are valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination immediately upon entry of the Second Interim Order.

30. The statutory requirement for obtaining post-petition credit under section 364(c) of the Bankruptcy Code is a finding, made after notice and hearing, that a debtor is "unable to obtain unsecured credit allowable under Section 503(b)(1) of [the Bankruptcy Code]." 11 U.S.C. § 364(c). *See In re Crouse Grp., Inc.,* 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987) (secured credit under section 364(c) of the Bankruptcy Code is authorized, after notice and hearing, upon showing that unsecured credit cannot be obtained). Courts have articulated a three-part test to determine whether a debtor is entitled to financing under section 364(c) of the Bankruptcy Code. Specifically, courts look to whether:

a. the debtor is unable to obtain unsecured credit under section 364(b) of the Bankruptcy Code, *i.e.*, by allowing a lender only an administrative claim;

b. the credit transaction is necessary to preserve the assets of the estate; and

c. the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and proposed lenders.

See In re Ames Dep't Stores, 115 B.R. 34, 37–40 (Bankr. S.D.N.Y. 1990); *see also In re St. Mary Hosp.*, 86 B.R. 393, 401–02 (Bankr. E.D. Pa. 1988); *Crouse Grp.*, 71 B.R. at 549.

31. The Debtors meet each part of this test. As described above, no lenders were willing to provide sufficient post-petition financing on a junior lien or an unsecured or administrative priority basis. Supp. Levine Decl. ¶ 14. The DIP ABL Lenders will not fund the DIP ABL Facility on any other terms, and no other existing stakeholder or third party has presented a higher or otherwise better debtor-in-possession financing proposal. Absent the DIP ABL Facility, which will provide certainty that the Debtors will have sufficient liquidity to administer these Chapter 11 Cases and comfort to their employees and vendor constituencies that business will continue in the ordinary course, the value of the Debtors' estates would be impaired to the detriment of all stakeholders. Given the Debtors' circumstances, the Debtors believe that the terms of the DIP ABL Facility, as set forth in the DIP ABL Documents are fair, reasonable, and meet the standard for obtaining post-petition financing.

32. In the event that a debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, section 364(c) of the Bankruptcy Code provides that a court "may authorize the obtaining of credit or the incurring of debt (a) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of [the Bankruptcy Code]; (b) secured by a lien on property of the estate that is not otherwise subject to a lien; or (c) secured by a junior lien on property of the estate that is subject to a lien." 11 U.S.C. § 364(c). As described above, the Debtors are unable to obtain unsecured credit. Therefore, approving, subject in each respect to the Carve Out and priorities outlined in Exhibit 1 attached to the Second Interim Order, (a) a superpriority claim in favor of the DIP ABL

Lenders, (b) liens in favor of the DIP ABL Lenders on unencumbered property of the estate, and (c) junior liens in favor of the DIP ABL Lenders on encumbered property of the estate is reasonable and appropriate.

33. Section 364(d) of the Bankruptcy Code provides that a debtor may obtain credit secured by a senior or equal lien on property of the estate already subject to a lien, after notice and a hearing, where the debtor is "unable to obtain such credit otherwise" and "there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." 11 U.S.C. § 364(d)(1). The Debtors may incur "priming" liens under the DIP ABL Facility if either (a) the Prepetition Secured Parties have consented or (b) the Prepetition Secured Parties' interest in collateral are adequately protected. *See Anchor Savs. Bank FSB v. Sky Valley, Inc.,* 99 B.R. 117, 122 (N.D. Ga. 1989) ("[B]y tacitly consenting to the superpriority lien, those [undersecured] creditors relieved the debtor of having to demonstrate that they were adequately protected.").

34. Further, section 364(d) provides that a debtor may obtain credit secured by a senior or equal lien on property of the estate already subject to a lien where the debtor is "unable to obtain such credit otherwise" and "there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." 11 U.S.C. § 364(d)(1). Accordingly, the Debtors may incur "priming" liens under the DIP ABL Facility if they are unable to obtain unsecured or junior secured credit and either (a) the Prepetition Secured Parties have consented or (b) the Prepetition Secured Parties' interests in collateral are adequately protected.

35. Here, the Prepetition Secured Parties have affirmatively consented to the DIP Facilities and the Adequate Protection and actively participated in facilitating the

DIP Facilities. As set forth more fully herein and in the Second Interim Order, the Debtors propose to provide a variety of adequate protection to protect the interests of the Prepetition Secured Parties. Therefore, the relief requested pursuant to section 364(d)(1) of the Bankruptcy Code is appropriate.

C. No Comparable Alternative to the DIP ABL Facility Is Reasonably Available on More Favorable Overall Terms.

36. A debtor need only demonstrate "by a good faith effort that credit was not available without" the protections afforded to potential lenders by sections 364(c) of the Bankruptcy Code. *In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir. 1986); *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992). In circumstances where only a few lenders likely can or will extend the necessary credit to a debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom. Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989); *see also In re Snowshoe Co.*, 789 F.2d 1085, 1088 (4th Cir. 1986) (demonstrating that credit was unavailable absent the senior lien by establishment of unsuccessful contact with other financial institutions in the geographic area); *In re Stanley Hotel, Inc.*, 15 B.R. 660, 663 (D. Colo. 1981) (finding that two national banks refused to grant unsecured loans was sufficient to support conclusion that section 364 requirement was met); *In re Ames Dep't Stores*, 115 B.R. at 37–39 (explaining that a debtor must show that it made reasonable efforts to seek other sources of financing under section 364(a) and (b)).

37. As noted above, the Debtors do not believe that more favorable alternative post-petition financing is reasonably available given the realities imposed by the Debtors' existing capital structure and the Debtors' solicitation of alternative financing proposals. Additionally, the Debtors' overall restructuring is closely tied to the successful transaction described in the RSA.

Furthermore, as set forth in the Supplemental Levine Declaration, the Debtors engaged with certain stakeholders and third parties regarding potential financing for a chapter 11 process and entered into non-disclosure agreements with respect to potential financing for a chapter 11 process, but ultimately the Debtors did not receive any offer or combination of offers superior to the DIP Facilities. *See* Supp. Levine Decl. ¶¶ 14–15. Simply put, the DIP Facilities provide the Debtors with the liquidity they need at the lowest cost available while simultaneously placing the Debtors on an optimal path for a successful restructuring and emergence from chapter 11. Thus, the Debtors have determined that the DIP ABL Facility provides the most favorable terms because it offers the most efficient transaction costs while reducing execution risks and is an integral piece of the debt reduction included in the RSA and is provided on reasonable terms under the circumstances. *See* Supp. Levine Decl. ¶ 15. Therefore, the requirement of section 364 of the Bankruptcy Code that alternative credit on more favorable terms be unavailable to the Debtors is satisfied.

II. The Scope of the Carve Out Is Appropriate.

38. The proposed adequate protection is subject to the Carve Out contained in the DIP Orders. Without the Carve Out, the Debtors and other parties in interest may be deprived of certain rights and powers because the services for which professionals may be paid in these Chapter 11 Cases would be restricted. *See In re Ames Dep't Stores*, 115 B.R. at 40 (observing that courts insist on carve outs for professionals representing parties in interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced"). The Carve Out does not directly or indirectly deprive the Debtors' estates or other parties in interest of possible rights and powers. Additionally, the Carve Out protects against administrative insolvency during the course of these Chapter 11 Cases by ensuring that assets remain for the payment of the Clerk of the Court, U.S. Trustee fees, and professional fees of the Debtors and any

statutory committee appointed under section 1102 of the Bankruptcy Code in these Chapter 11 Cases.

III. The DIP Lenders Should Be Deemed Good-Faith Lenders Under Section 364(e).

39. Section 364(e) of the Bankruptcy Code protects a good-faith lender's right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Section 364(e) of the Bankruptcy Code provides that:

> The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

40. As explained herein, the DIP ABL Documents are the result of: (a) the Debtors' reasonable and informed determination that the DIP ABL Lenders provided the best post-petition financing alternative available under the circumstances and (b) extended arm's-length, good-faith negotiations between the Debtors and the DIP ABL Lenders. The terms and conditions of the DIP ABL Documents are reasonable under the circumstances, and the proceeds of the DIP ABL Facility will be used only for purposes that are permissible under the Bankruptcy Code. Further, the Debtors market-tested the terms of the DIP ABL Facility before determining that the DIP ABL Facility provided the best terms available. Accordingly, the Court should find that the DIP Lenders are "good faith" lenders within the meaning of section 364(e) of the Bankruptcy Code and are entitled to all of the protections afforded by that section.

IV. The Automatic Stay Should Be Modified on a Limited Basis.

41. The proposed Second Interim Order provides that the automatic stay provisions of section 362 of the Bankruptcy Code will be modified to allow the DIP ABL Lenders to file any financing statements, security agreements, notices of liens, and other similar instruments and documents in order to validate and perfect the liens and security interests granted to them under the Second Interim Order. The proposed Second Interim Order further provides that the automatic stay is modified as necessary to permit the Debtors to grant liens to the DIP ABL Lenders and the Prepetition Secured Parties and to incur all liabilities and obligations set forth in the Second Interim Order. The automatic stay should be modified to allow the Debtors and the DIP ABL Lenders to effectuate the terms of the Second Interim Order.

V. Failure to Obtain Immediate Interim Access to the DIP ABL Facility Would Cause Immediate and Irreparable Harm.

42. Bankruptcy Rules 4001(b) and 4001(c) provide that a final hearing on a motion to obtain credit pursuant to section 364 of the Bankruptcy Code or to use cash collateral pursuant to section 363 of the Bankruptcy Code may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the Court may conduct a preliminary, expedited hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to a debtor's estate. *See* Bankruptcy Rule 4001(c)(2). Furthermore, the Complex Case Procedures provide that "on motion by the debtors, a hearing will routinely be conducted as a first day hearing to consider either cash collateral and/or interim debtor-in-possession financing." Complex Case Procedures ¶ 23.

43. The relief requested in this Supplemental Motion is necessary to avoid the immediate and irreparable harm that would ensue should the DIP-to-Exit ABL Commitment Papers expire on February 24, 2023.

Emergency Consideration

44. The Debtors request emergency consideration of this Supplemental Motion pursuant to Bankruptcy Rule 6003, which empowers a court to grant relief within the first twenty-one days after the commencement of a chapter 11 case "to the extent that relief is necessary to avoid immediate and irreparable harm." An immediate and orderly transition into chapter 11 is critical to the viability of the Debtors' operations. The relief requested in this Supplemental Motion is necessary to avoid the immediate and irreparable harm that would ensue should the DIP-to-Exit ABL Commitment Papers expire on February 24, 2023. The Debtors have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 and request that the Court approve the relief requested in this Supplemental Motion on an emergency basis.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

45. The Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the fourteen-day stay period under Bankruptcy Rule 6004(h).

Reservation of Rights

46. Nothing contained herein or any actions taken pursuant to such relief requested is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Supplemental Motion or any order granting the relief requested by this Supplemental Motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code;

(f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in this Supplemental Motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended, and should not be construed as, an admission as to the validity of any particular claim or a waiver of the Debtors' or any other party in interest's rights to subsequently dispute such claim.

Notice

47. The Debtors have provided notice of this Supplemental Motion to the following parties or their respective counsel: (a) the U.S. Trustee; (b) the Holders of the thirty largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to the Akin Ad Hoc Group; (d) counsel to the PW Ad Hoc Group; (e) the ABL Agent and counsel thereto; (f) the Term Loan Agent and counsel thereto; (g) the Legacy Notes Trustee and counsel thereto; (h) the Secured Exchangeable Secured Notes Trustee and counsel thereto; (i) the HoldCo Convertible Notes Trustee and counsel thereto; (j) the DIP Term Loan Agent and counsel thereto; (k) the DIP ABL Agent and counsel thereto; (l) Office of the United States Attorney for the Southern District of Texas; (m) the state attorneys general for states in which the Debtors conduct business; (n) the Internal Revenue Service; (o) the Securities and Exchange Commission; (p) the Environmental Protection Agency; (q) other governmental agencies having a regulatory or statutory interest in

these cases; and (r) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, no other or further notice is required.

The Debtors request that the Court enter the Second Interim Order and the Final Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas
Dated: February 21, 2023

/s/ *Matthew D. Cavenaugh*

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Certificate of Accuracy

I certify that the foregoing statements are true and accurate to the best of my knowledge. This statement is being made pursuant to Bankruptcy Local Rule 9013-1(i).

/s/ Matthew D. Cavenaugh
Matthew D. Cavenaugh

Certificate of Service

I certify that on February 21, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Matthew D. Cavenaugh
Matthew D. Cavenaugh

Exhibit A

Form DIP ABL Credit Agreement

[Forthcoming]