IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
STARRY GROUP HOLDINGS, INC., *et al.*,	)	Case No. 23-10219 (KBO)
Debtors.[1]	)	(Jointly Administered)
	)	**Related to Docket No. 18**

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING, (II) AUTHORIZING DEBTORS TO USE CASH COLLATERAL, (III) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of Starry Group Holdings, Inc. and its debtor affiliates (collectively, the "Debtors") hereby submits this limited objection and reservation of rights (the "Limited Objection") to the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 18] (the "Motion").[2] In support of the Limited Objection, the Committee respectfully states as follows:

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are: Starry Group Holdings, Inc. (9355); Starry, Inc. (9616); Connect Everyone LLC (5896); Starry Installation Corp. (7000); Starry (MA), Inc. (2010); Starry Spectrum LLC (N/A); Testco LLC (5226); Starry Spectrum Holdings LLC (9444); Widmo Holdings LLC (9028); Vibrant Composites Inc. (8431); Starry Foreign Holdings Inc. (3025); and Starry PR Inc. (1214). The Debtors' address is located at 38 Chauncy Street, Suite 200, Boston, Massachusetts 02111.

[2] Docket No. 18. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

PRELIMINARY STATEMENT

1. The Committee recognizes that the Debtors require postpetition financing to, among other things, finance their operations, pay their employees, and protect the value of their assets. Thus, the Committee does not object to the Debtors' obtaining postpetition financing per se. However, the reality is that only $24,000,000 of this facility is actually debtor in possession financing. This fact, combined with certain provisions of the proposed DIP Facility, the Interim Order, and the proposed Final Order ultimately will result in the improper siphoning of significant value from the Debtors' estates for the benefit of the Prepetition Secured Parties and DIP Lenders at the expense of the Debtors' unsecured creditors.

2. The Committee's advisors have engaged in arm's-length, good faith negotiations with advisors to the Debtors, the DIP Agent, and the Prepetition Agent in an effort to narrow the Committee's issues with respect to the proposed Final Order. Although the parties have reached resolution on certain items, there are a number of important issues that the parties have been unable to resolve to date, necessitating the filing of the Limited Objection. The Committee anticipates continuing negotiations in order to further narrow the list of issues.

3. Through the RSA and DIP Facility, the Debtors effectively have agreed to cede control of these cases to their secured lenders. The Committee, however, stands ready to exercise its fiduciary duty and assure that maximum value for unsecured creditors is preserved. The Committee's ability to do so must not be impaired by any provision of the DIP Facility. The DIP Facility, as currently structured, contains (i) premature, unnecessary, and unwarranted waivers of certain of the Bankruptcy Code's important creditor protections; and (ii) myriad other objectionable provisions. The remaining disputed issues are set forth below:

a. No Liens/Claims on Unencumbered Assets. The Final Order should clearly state that no assets of the Debtors that were unencumbered as of

the Petition Date (including, without limitation, the proceeds of Avoidance Actions) shall be subject to: (i) the DIP Liens; (ii) the DIP Superpriority Claims; (iii) the Adequate Protection Liens; or (iv) the Adequate Protection Claims.

b. Milestones. The chapter 11 milestones imposed under the DIP Facility do not provide a realistic amount of time between entry of the disclosure statement order and plan confirmation. The milestones should be adjusted to allow the Committee ample time and opportunity to fulfill its statutorily-imposed duties.

c. No 506(c), 552(b) or Marshaling Waiver. At this point in these cases, there is no basis for waiving any of these important protections.

d. The Delaware LLC Act. With respect to the five debtors that are limited liability companies organized under the laws of the State of Delaware, the Final Order should include a stipulation and agreement from each of the Prepetition Secured Parties that none of them will raise as a defense in connection with any Challenge the ability of creditors to file derivative suits on behalf of limited liability companies. The Final Order also should deem the LLC Agreement of each limited liability company Debtor amended so as to permit a Challenge or any adversary proceeding or contested matter against a Prepetition Secured Party to be commenced by the Committee.

BACKGROUND

4. The Debtors commenced these voluntary cases on February 20, 2023 (the "Petition Date"), and the cases are being jointly administered pursuant to Bankruptcy Rule 1015 and Local Rule 1015-1. The Debtors continue to operate their businesses and manage their properties as debtors in possession, and no trustee or examiner has been appointed.

5. On March 3, 2022, the United States filed a *Notice of Appointment of Official Committee of Unsecured Creditors* appointing the Committee in these cases,[3] and on March 8, 2023, the Committee selected the law firm McDermott Will & Emery LLP as its counsel (subject to Court approval). Since being appointed, the Committee and its advisors have been working around the clock to get up to speed on the Debtors' affairs, the proposed DIP financing and use

[3] Docket No. 99.

of cash collateral, the sale process and prepetition marketing efforts, and numerous other issues in these cases.

6. The Debtors filed for chapter 11 with a restructuring support agreement (the "RSA")[4] already in hand, and the RSA is supported by 100% of the Prepetition Secured Parties. In broad terms, the RSA contemplates the confirmation of a chapter 11 plan that will result in the Prepetition Secured Parties receiving all of the Debtors' reorganized equity with an uncertain recovery for unsecured creditors (the "Restructuring"). The RSA also contemplates that the Debtors will run a sale process to establish whether the Restructuring represents the best outcome under the circumstances. To fund this process, the Prepetition Secured Parties agreed, as part of the RSA, to provide the Debtors with the DIP Facility. *See* RSA, Recitals.

7. The Debtors filed the Motion on the Petition Date.[5] On February 23, 2023, the Court entered an order approving the Motion on an interim basis (the "Interim Order").[6] The DIP Facility consists of the following: (i) $12,000,000 to be available immediately upon entry of the Interim Order, (ii) $12,000,000 is proposed to be available upon entry of the Final Order, and (iii) $19,000,000 is proposed to be available upon the occurrence of the earlier of entry of an order by the Court (x) approving the sale of all or substantially all of the Debtors' assets or (y) confirming a plan of reorganization in these cases. Thus, in reality, the DIP Lenders are only providing $24,000,000 of new money financing during the pendency of the bankruptcy cases. In exchange for providing the DIP Facility, the Debtors propose giving the DIP Lenders liens on all assets of the Debtors, including previously unencumbered property such as the proceeds of chapter 5 avoidance actions. *See* Interim Order ¶ 7 (describing the "DIP Collateral"). The DIP

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4 The RSA is attached as Exhibit B to Docket No. 23.

5 Docket No. 18.

6 Docket No. 72.

Facility, Interim Order, and proposed Final Order also (i) include waivers of certain of the Bankruptcy Code's important creditor protections, including those set forth in Bankruptcy Code sections 506(c) and 552(b), and (ii) limit the Court's ability to apply the equitable remedy of marshaling. The Prepetition Secured Parties also are receiving stipulations and waivers in their favor that, subject to challenge by the Committee or one of certain other specified parties, will bind the Debtors and their estates. Interim Order ¶¶ E and 11. The Interim Order gives the Committee 75 calendar days from the entry of the Interim Order (the "Challenge Period") to seek to avoid, object to, or otherwise challenge the validity, enforceability, extent, priority, or perfection of the Prepetition Secured Parties' liens and claims. Interim Order ¶ 11. The Challenge Period expires on May 9, 2023. *Id*.

8. In support of the Motion, the Debtors submitted the declarations of (i) their investment banker, Michael Schlappig of PJT Partners LP [Docket No. 18-2] (the "PJT Declaration") and (ii) their chief executive officer, Chaitanya Kanojia [Docket No. 41] (the "First Day Declaration").

9. A hearing to approve the Motion on a final basis is scheduled for March 31, 2023 at 10:00 a.m. (Eastern) (the "Final Hearing").[7]

LIMITED OBJECTION

10. The Committee requests the Court enter a Final Order only after it has been modified substantially to ensure that the DIP Facility, as approved, is fair and reasonable and does not unduly prejudice the Debtors' unsecured creditors and other parties in interest.

[7] *See* Docket No. 158.

A. ***The Final Order Should Not Improperly Encumber the Proceeds of Avoidance Actions and Other Previously Unencumbered Assets.***

11. Avoidance Actions, commercial tort claims, claims against the Debtors' directors and officers, and any other claims that may be covered by the Debtors' insurance policies—none of which the Committee has had the opportunity to investigate at this early stage—may be some of the Debtors' most valuable unencumbered assets and, thus, a crucial source of value for unsecured creditors. However, the Interim Order provides for a transfer of that value to the DIP Lenders and Prepetition Secured Parties. Specifically, the Interim Order grants, among other things: (a) allowed superpriority administrative expense status to all of the DIP Obligations against each of the Debtors' estates (the "DIP Superpriority Claims"), payable from all prepetition and postpetition property of the Debtors and all proceeds thereof, including, without limitation, any Avoidance Action Proceeds; (b) DIP Liens against Avoidance Action Proceeds, insurance proceeds, commercial tort claims, and other Previously Unencumbered Property; and (c) Adequate Protection Liens on all DIP Collateral and, upon entry of the Final Order, all proceeds or property recovered from Avoidance Actions. Interim Order ¶¶ 6, 7(a)–(b), 8(a). These provisions constitute an improper windfall for the DIP Lenders and Prepetition Secured Parties at the expense of the unsecured class.

12. Indeed, numerous courts have refused to grant liens on and claims against avoidance actions and other valuable assets. *See, e.g.*, *In re Excel Maritime Carriers, Ltd.*, No. 13-23060 (RDD) (Bankr. S.D.N.Y. Aug. 6, 2013) [Docket No. 133] (excluding avoidance actions and proceeds from property that could be used to pay superpriority claims under §507(b) and from the scope of adequate protection liens); *In re Sportsman's Warehouse, Inc.*, No. 09-10990 (CSS) (Bankr. D. Del. April 16, 2010) [Docket No. 175] (same); *In re Adams*, 275 B.R. 274, 283 (Bankr. N.D. Ill. 2002) ("[T]he grant of a superpriority claim to a prepetition secured

creditor violates the Code's policy of equality of distribution, particularly where there is no showing that such a grant will benefit the debtors' bankruptcy estate."); *see also Majestic Star Casino, LLC v. Barden Dev., Inc. (In re the Majestic Star Casino, LLC)*, 716 F.3d 736, 761 n.26 (3d Cir. 2013) ("A debtor is not entitled to benefit from any avoidance . . . and 'courts have limited a debtor's exercise of avoidance powers to circumstances in which such actions would in fact benefit the creditors, not the debtors themselves'" (quoting *Off. Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000))); *Buncher v. Off. Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245 (3d Cir. 2000) ("The purpose of fraudulent conveyance law is to make available to creditors those assets of the debtor that are rightfully part of the bankruptcy estate, even if they have been transferred away. When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer.") (citations omitted); *Bethlehem Steel Corp. v. Moran Towing Corp. (In re Bethlehem Steel Corp.)*, 390 B.R. 784, 786-87 (Bankr. S.D.N.Y. 2008) ("Avoidance actions . . . never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession . . . ."); *McCarthy v. Navistar Fin. Corp. (In re Vogel Van & Storage, Inc.)*, 210 B.R. 27, 33 (N.D.N.Y. 1997), *aff'd*, 142 F.3d 571 (2d Cir. 1998) (noting that "the Code allows only the trustee or debtor-in-possession to sue on a preference because only that trustee or debtor-in-possession represents the interests of all creditors in maximizing the value of the debtor's estate") (citations omitted). As set forth in the well-known open letter from Judge Peter J. Walsh to Delaware bankruptcy counsel, dated April 2, 1998,

"[a]bsent exigent circumstances, neither the loan documents nor the [DIP financing] order should give the [DIP] lender a lien on avoidance actions."[8]

13. As the cited cases reflect, courts are loath to (i) award secured creditors the value of claims do not comprise their collateral outside of bankruptcy and (ii) transform assets that are created by law for the benefit of unsecured creditors as a class into the asset of a specific creditor or creditors. Given that encumbering the Avoidance Actions Proceeds and other Previously Unencumbered Property risks depriving the unsecured creditors of perhaps the most critical source of potential recoveries, the Final Order should not allow the Debtors to grant a lien on or claims against these assets. In the same vein, Adequate Protection Liens, if granted, should not: (i) extend to the DIP Collateral to the extent that the DIP Liens include Previously Unencumbered Property; or (ii) extend to Avoidance Action Proceeds, commercial tort claims, claims against the Debtors' directors and officers, or any other claims under the Debtors' insurance policies to the extent such claims are unencumbered, or any proceeds or product of the foregoing.

B. ***The Plan Milestones Are Inappropriate.***

14. The proposed DIP Facility mandates overly aggressive milestones regarding the chapter 11 plan process (the "Plan Milestones"). *See* Motion at 16–17. Instead of permitting the Debtors to pursue a proper chapter 11 process for the benefit of all stakeholders, the proposed Plan Milestones require the Debtors to, among other things, achieve confirmation of their chapter 11 plan on or before the date that is eighty days after the Petition Date. This confirmation Milestone and the other Plan Milestones limit the Committee's ability to exercise its statutory

[8] *See* Judge Peter J. Walsh, "Open Letter from Judge Peter J. Walsh to the Delaware Bankruptcy Bar Regarding First-Day DIP Financing Order" (Apr. 2, 1998) attached hereto as **Exhibit A**.

duties, and the entire timeline will prevent parties in interest from performing the diligence and investigations they otherwise might.

15. Specifically, the Plan Milestones propose the following timeline:

Date	**Milestone**
March 30	On or before the day that is thirty-five (35) days after the Petition Date, entry of the Final Order.[9]
April 9	On or before the day that is forty-five (45) days after the Petition Date, entry of an order approving the Debtors' disclosure statement.
May 14	On or before the day that is eighty (80) days after the Petition Date, entry of an order confirming the Debtors' chapter 11 plan.

16. In order to provide the Committee with sufficient time to perform its statutory duties, the Committee requests a 30-day adjournment of the Plan Milestones related to confirmation of the Debtors' plan. *See, e.g.*, Nov. 4, 2014 Hr'g Tr. at 20:16-20, *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Nov. 4, 2014) (holding that "the proposed timelines must be stretched . . . to allow for sufficient time for any interest party to develop an alternative transaction . . . and the . . . committee to . . . get up to speed"). As it stands now, as the Committee works to get its arms around acceptable terms of a Final Order, it also will need to complete an investigation to determine potential sources of recovery and formulate a letter to creditors for the Debtors to include with their solicitation package explaining the Committee's views regarding the Debtors' proposed chapter 11 plan, which was formulated without the Committee's input and to its detriment.[10] 11 U.S.C. § 1103(c)(3). All of this is being done with without the benefit of a confirmed business plan or even Schedules of Assets

[9] This Milestone was extended so as to allow the hearing on final approval of the Motion to take place on March 31, 2023.

[10] The Committee also has filed an objection to the Debtors' motion to approve its disclosure statement and related dates and procedures. *See* Docket No. 197.

and Liabilities and Statements of Financial Affairs. *See Motion of Debtors for Entry of Order (I) Extending Time to File Schedules and Statements of Financial Affairs and (II) Granting Related Relief* [Docket No. 159] (requesting an extension of the deadline for filing Schedules of Assets and Liabilities and Statements of Financial Affairs to April 3, 2023).

C. *The Section 506(c) Waiver Should Not Apply.*

17. The Court should not approve a waiver of the estates' rights under Bankruptcy Code section 506(c). Section 506(c) ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured recoveries, providing that an estate "may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit" to the secured creditor. 11 U.S.C. § 506(c). Section "506(c) is designed to prevent a windfall to the secured creditor . . . [as it] understandably shifts to the secured party . . . the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate." *Precisions Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995).

18. Such waivers, because they are binding upon all parties in interest, should not be granted absent compelling reasons. *See Hen House, Harford Underwriters Ins. Co. v. Union Planters Bank N.A. (In re Hen House Interstate Inc.)*, 530 U.S. 1, 11–12 (2000) (holding that a debtor-in-possession "is obliged to seek recovery under [Bankruptcy Code Section 506(c)] whenever his fiduciary duties do require"); *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 872 (8th Cir. 1998) (holding that a section 506(c) waiver was "unenforceable"), *vacated on other grounds*, 177 F.3d 719 (8th Cir. 1999); *In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993) (concluding that a section 506(c) waiver was "against public policy and unenforceable per se"); *McAlpine v. Comerica*

BankDetroit (In re Brown Bros. Inc.), 136 B.R. 470, 474 (W.D. Mich. 1991) (finding that a section 506(c) waiver was "not enforceable"); *In re Colad Grp., Inc.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (determining there was no basis to "ignore" 506(c)).

19. Indeed, some courts will not approve section 506(c) waivers absent Committee consent. *See, e.g.*, Hr'g Tr. 21:7–13, *In re Mortg. Lenders Network USA, Inc.*, No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) [Docket No. 346] (court stating: "Well, let me tell you what the law in this Court's been for at least the last five years. If the Committee doesn't agree with the waiver, it doesn't happen."); *see also* Hr'g Tr. at 120:8-19, *In re Motor Coach Indus. Int'l, Inc.*, No. 08-12136 (BLS) (Bankr. D. Del. Oct. 17, 2008) [Docket No. 282] (court declined to approve Section 506(c) waiver over committee objection, stating: "I cannot recall a case . . . where I have approved this kind of relief, that being liens on avoidance actions and a 506(c) waiver, over a committee objection."); Hr'g Tr. at 212:8-22, *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Jun. 5, 2014) [Docket No. 3927] (disapproving 506(c) waiver "based primarily . . . on the fact that it's not fully consensual"); Hr'g Tr. at 63:9-13, *In re Loot Crate, Inc.*, No. 19-11791 (BLS) (Bankr. D. Del. Sept. 3, 2019) [Docket No 129] ("I would struggle, I guess, to find a situation where I have approved a 506(c) waiver over a committee objection, and particularly in a situation where the pre-petition priority claims under 503(b)(9) for vendors are not provided for"); Hr'g Tr. at 101:7-9, 108:2-4, *In re NEC Holdings Corp.*, No. 10-11890 (PJW) (Bankr. D. Del. July 13, 2010) [Docket No. 224] (noting that "you don't give a 506 waiver over an objection by the committee," and further stating that "I need some evidence that there's a probability that admin claims are going to get paid in full, including 503(b)(9) claims or I won't approve the financing.").

20. Here, by having waived the estates' section 506(c) rights without qualification (subject to entry of the Final Order), the Debtors agreed to pay for any and all expenses associated with the preservation and disposition of the collateral of the DIP Lenders and the Prepetition Secured Parties. But "the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs." *In re Codesco Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982).

21. A section 506(c) waiver is wholly inappropriate absent the payment of all administrative expenses. There can be no assurance at this early juncture that the administrative expenses of these cases will be paid by the Debtors in the ordinary course. As such, the proposed 506(c) waiver is premature and should not be included in a Final Order unless it is clear that it applies only in the event that the DIP Secured Parties agree to pay all budgeted amounts incurred prior to the delivery of a Carve-Out Trigger Notice.

D. *The Section 552(b) Waiver Should Not Be Permitted.*

22. The Interim Order also waives, subject to entry of the Final DIP Order, the "equities of the case" exception under Bankruptcy Code section 552(b), which would otherwise allow the Debtors, the Committee, or other parties in interest to assert that equitable considerations warrant the exclusion of postpetition proceeds from the collateral securing the Debtors' prepetition debt. "The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which normally would go to general creditors) to cause the appreciated value." *In re Muma Servs.*, 322 B.R. 541, 558–59 (Bankr. D. Del. 2005) (quoting *In re Tower Air, Inc.*, No. 00-1280 (RJN), 2002 Bankr. LEXIS 102, at *11 (Bankr. D. Del. Feb. 11, 2002)); *see also Sprint Nextel Corp. v. U.S. Bank N.A. (In re TerreStar Networks, Inc.)*, 457 B.R. 254, 270 (Bankr. S.D.N.Y. 2011) ("[T]he equities of the

case exception is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code . . . .” (citing *In re Patio & Porch Sys. Inc.*, 194 B.R. 569, 575 (Bankr. D. Md. 1996))); *In re Barbara K. Enters.*, No. 08-11474 (MG), 2008 Bankr. LEXIS 1917, at *32–33 (Bankr. S.D.N.Y. Jun. 16, 2008).

23. Courts have “decline[d] to waive prospectively an argument that other parties in interest may make” as to the equities of the case and have retained “discretion” to determine whether an exception to liens over postpetition proceeds is warranted. *See In re Metaldyne Corp.*, No. 09-13412 (MG), 2009 Bankr. LEXIS 1533, at *20 (Bankr. S.D.N.Y. June 23, 2009) (“If, in the event, the Committee or any other party [in] interest argues that the equities of the case exception should apply to curtail a particular lenders’ rights, the Court will consider it.”); *see also In re iGPS Co. LLC*, No. 13-11459 (KG) (Bankr. D. Del. July 1, 2013) [Docket No. 225] (refusing to allow a waiver of the “equities of the case” exception with respect to the creditors’ committee); *In re Namco, LLC*, No. 13-10610 (PJW) (Bankr. D. Del. Mar. 24, 2013) [Docket No. 5] (same); *In re Chemtura Corp.*, No. 09-11233 (REG) (Bankr. S.D.N.Y. Apr. 29, 2009) [Docket No. 281] (refusing to allow a waiver of the “equities of the case” exception).

24. The Court cannot possibly ascertain the “equities of the case” at this early stage. *See TerreStar Networks*, 457 B.R. at 272–73 (Bankr. S.D.N.Y. 2011) (holding that a request for a second 552(b) waiver was premature because the factual record was not fully developed). Thus, the Committee requests that the status quo be preserved, and that issues about extending liens over proceeds not be prejudged at this early stage. All parties should retain all rights concerning these issues, and the Court should retain discretion to determine what relief, if any, should be granted under section 552(b).

E. ***The Marshaling Waiver Should Not Be Permitted.***

25. Marshaling requires a "senior secured creditor to first collect its debt against the collateral other than that in which the junior secured creditor holds an interest, thereby leaving that collateral for the junior secured creditor's benefit." *In re Advanced Marketing Servs., Inc.*, 360 B.R. 421, 427 n.8 (Bankr. D. Del. 2007). Marshaling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." *Meyer v. United States*, 375 U.S. 233, 236 (1963). Marshaling can be pursued by Committees for the benefit of unsecured creditors. *See, e.g.*, *In re America's Hobby Ctr., Inc.*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998) ("Because a debtor in possession has all the rights and powers of a trustee . . . [the Committee] standing in the shoes of the debtor in possession . . . can assert this [marshaling] claim.").

26. Under the DIP Facility, the Debtors seek to limit the Court's ability to apply marshaling. The DIP Lenders have liens on a diverse pool of assets, and at this early stage in the case there is no basis to waive this important doctrine. At minimum, the Court should require both the DIP Lenders and the Prepetition Secured Parties to satisfy their claims or adequate protection claims, if any, from the proceeds of assets subject to their Prepetition Liens before they can look to the proceeds of assets on which they did not have liens prepetition.

F. ***Issues Presented by the Delaware LLC Act.***

27. According to the First Day Declaration, all of the Debtors other than Starry (MA), Inc. are organized under the laws of the state of Delaware, including the five Debtors that are limited liability companies. First Day Declaration ¶ 17. With respect to any Challenge brought by a third party, including the Committee, this raises an issue under the holding of the Delaware Supreme Court in *CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011). Under *Bax*, "[o]nly members or assignees of LLC interests have derivative standing to sue on behalf of an LLC—creditors do

not." 28 A.3d at 1043. The Delaware Supreme Court based its holding on two provisions of the Delaware LLC Act, which provide that the "[p]roper plaintiff" in "an action . . . in the right of a limited liability company to recover a judgment in its favor . . . must be a member or an assignee of limited liability company interest at the time of bringing the action." 6 Del. Code §§ 18-1001, 18-1002.

28. *Bax* has created a conundrum in the bankruptcy context, where lender releases routinely are granted on the first day of the case with no creditors (other than those who will benefit from the releases) in the room. *See, e.g.*, *In re Furie Operating Alaska, LLC, et al.*, No. 19-11781 (LSS) (Bankr. D. Del. Dec. 27, 2019) [Docket No. 442] (letter from Court to counsel outlining issues related to *Bax*). The Committee assumes that neither the Debtors nor the DIP Lenders intend for the Challenge Period or any lawsuit or contested matter stemming therefrom or in connection therewith to be illusory. As such, the Final Order should include a stipulation and agreement from each of the Prepetition Secured Parties that none will raise as a defense related to the ability of creditors to file derivative suits on behalf of limited liability companies in connection with any Challenge or in any adversary proceeding or contested matter brought in connection with the Prepetition Credit Agreement, the Prepetition Obligations, the Prepetition Liens, and/or the Prepetition Collateral. Moreover, the Final Order should make clear that with respect to the Debtors that are limited liability companies, each of their respective LLC agreements shall be deemed amended so as to provide the Committee standing to bring derivative claims on behalf of those Debtors. Other courts within this District have required similar provisions to be included in DIP orders to avoid rendering a challenge period illusory. *See, e.g.*, *In re Phoenix Services Topco, LLC*, Case No. 22–10906 (MFW) (Bankr. D. Del. Nov. 2, 2022) [Docket No. 237] ("The Prepetition Secured Parties stipulate and agree that each of the

Prepetition Secured Parties will not raise as a defense in connection with any Challenge the ability of creditors to file derivative suits on behalf of limited liability companies under the Delaware Limited Liability Company Act."); *In re The Collected Group, LLC*, Case No. 21-10663 (LSS) (Bankr. D. Del. May 14, 2021) [Docket No. 146] (same).

RESERVATION OF RIGHTS

29. The Committee reserves the right to supplement the Limited Objection or to raise additional or further objections to the Motion and any other ancillary issues on any grounds and to respond to any reply of the Debtors, the Prepetition Secured Parties, or any other party in interest, either by further submission to this Court, at oral argument or by testimony to be presented at the Final Hearing or any other hearing.

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CONCLUSION

WHEREFORE, for the reasons stated, the Committee respectfully requests that the Court (i) condition entry of a Final Order on resolutions of the objections raised herein being incorporated into a revised proposed final order that is acceptable to the Committee; and (ii) grant the Committee such other and further relief as the Court deems just and proper.

Dated: March 24, 2023
Wilmington, Delaware

MCDERMOTT WILL & EMERY LLP

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Proposed Counsel to the Official Committee of Unsecured Creditors

Exhibit A

Walsh Letter

UNITED STATES BANKRUPTCY COURT
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JUDGE PETER J. WALSH

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April 2, 1998

RE: First Day DIP Financing Orders

Dear Delaware Bankruptcy Counsel:

This is a follow-up to our session of March 11, 1998, where, at the prompting of Judge McKelvie, we discussed the need for improving the DIP financing orders being submitted at first day hearings. At that meeting, I gave a number of examples of provisions in several orders that I thought were either unnecessary, overreaching, or just plain wrong. In an effort to improve the content of first day DIP financing orders, I volunteered to comment in writing on the forms and to identify a number of terms or provisions in those orders that I believe should be avoided.

The following items, in no particular order of priority (except as to the first item), are not intended as immutable rules that I have on the matter, and certainly I have no authority to speak for the other judges on these matters, but I thought if we could shorten and eliminate some of the more objectionable features of proposed first day DIP financing orders, we could improve the first day proceeding. Needless to say, however, I think it is not practicable to have a blanket set of prohibitions, given the numerous variations in the lending arrangements and the prepetition relationships between the debtor and the lender(s).

1. Many of the proposed orders are just too verbose and cover unnecessary matters. It is not necessary for the order to recite, even in summary fashion, the major provisions of the loan documents. For example, the following is a portion of a paragraph included in a recent DIP financing order, which obviously paraphrases what the loan document says on this particular matter:

> All advances and other extensions of credit and financial accom[m]odations shall be made solely on the terms and conditions of, and pursuant to, the Postpetition Loan Agreement and the other Postpetition Loan Documents, shall be evidenced by the Lenders' books and records, and shall be due and payable as provided in those agreements. The Lenders shall have no commitment to make any advances or other extensions of credit or financial accom[m]odations, and may, at any time, refuse to make advances, extensions of credit, or other financial accom[m]odations and may exercise their rights and remedies pursuant to the Prepetition Loan Agreement, the Postpetition Loan Agreement, and this Order upon an Event of Default as provided in the Postpetition Loan Agreement, including, without limitation, the incurrence by the Debtors of any liabilities above those approved in the "Budget" (as defined herein) appended hereto as Exhibit B.

If the DIP financing order authorizes the debtor to enter into the financing pursuant to the loan documents, it is simply not necessary for the order to restate a lot of the major terms of the financing. (Indeed, most of the above-quoted statement states the obvious for the type of loan transaction that we see on the first day.) The motion itself should spell out the terms that are essential to an understanding of the deal: maximum borrowing, interim borrowing limit, borrowing conditions (e.g., percentage of inventory value), interest rate, maturity, events of default, use of funds limitations, collateral, and/or priority, etc.; but I do not see that it is necessary to get into a lot of details on these

in the order. Of course, the order should identify those sections of the Bankruptcy Code designed to protect the estate and/or creditors generally that are being limited or abridged in any manner by the terms of the loan documents.

2. Do not incorporate into the order specific sections of the loan documents without a statement of the section's import. In a recent case the proposed order contained a decretal paragraph regarding events of default that specifically referenced about a dozen particular sections of the loan agreement and tied them into the issue covered by the decretal paragraph. It is simply unrealistic to expect that I can fully read and digest all the provisions of the loan documents in the few hours those documents are in my possession leading up to the first day hearing. Reciting specific ties between the terms of the order and particular terms or provisions of the loan agreement is something that under most circumstances on the first day I cannot comfortably append my signature to.

3. Given the limited amount of time we have to review the first day motions prior to the hearing and given the substantial amount of paperwork presented, particularly the DIP financing motion with the loan documents and the related order, it is not realistic to have a provision in the order that recites that the Court has "examined" all the loan documents, or that the Court "approves" all the terms and provisions of the loan documents, or language of similar import. An egregious example in this regard reads: "The provisions of the Postpetition Loan Agreement and other Postpetition Loan Documents are hereby approved and by this reference incorporated herein as a part of this Order." Remember, the Court is authorizing the debtor to borrow money on basic terms that appear reasonable under the expedited circumstances; it is not placing its imprimatur on the multiple terms and conditions of the loan documents.

4. Many of the proposed orders contain lengthy recitations of findings that are preambles to the decretal portion of the order. Given the fact that at most first day hearings only the debtor is heard, it is somewhat presumptuous, and in many cases unduly aggressive, for counsel to hand up an order that sets forth detailed, and in many cases nonessential, findings by the Court

regarding prepetition deals, relationships, and understandings of the parties. Most of these findings are based on lengthy recitations in the motion papers. It seems to me, given the limited nature of the first day hearing, that most of these "findings" would better be recited under a heading of "stipulations" between the debtor and the lender. Please note, if the stipulation approach is used, do not put further back in the order a decretal statement that says something to the effect that all the terms and provisions of the subject order constitute an order of the Court. By its nature the order will be acknowledging the stipulations, and of course, appropriate court findings will be a part of the order.

5. The order should not state that parties in interest have been given "sufficient and adequate notice" of the motion. Nine times out of ten this is simply not true. Rule 4001(c)(2) contemplates an expedited hearing with little or no notice (at least not the type of notice that would be sufficient to prepare for an effective participation by third parties). Consequently, the order should simply recite that the hearing is being held pursuant to the authorization of Rule 4001(c)(2) and recite to whom and when the notice was given.

6. Given the limited nature of the hearing on the first day, the findings that are necessary for the § 364(e) protection afforded the lender can appropriately be expressed in language such as: "Based on the record presented to the Court by the Debtor, it appears that . . . ."

7. Absent exigent circumstances, neither the loan documents nor the order should give the lender a lien position on avoidance actions.

8. While, in order to give the prepetition/postpetition creditor protection typically demanded, it is appropriate for the debtor to acknowledge the validity, perfection, enforceability, and nonavoidability of the prepetition indebtedness and perhaps waive any lender liability claims, this provision should preferably be in the form of a stipulation and should be limited to the debtor so that it is not binding on the estate, the committee, or a trustee.

As discussed below, a time limit with respect to nondebtor challenges to the prepetition secured position may be appropriate.

9. Where a DIP financing facility includes the use of the prepetition creditors' cash collateral, adequate protection in the form of a substitute lien on postpetition collateral is appropriate to the extent there is a diminution in the value of the prepetition collateral, but such a provision should not include language such as the following: "[T]he Debtors' use of cash collateral pursuant to this Order or otherwise is hereby deemed to result in a dollar-for-dollar decrease in the value of the Prepetition Collateral . . . ."

10. The debtor's obligation to reimburse the lender for costs and expenses, including attorneys' fees, etc., should be expressed in terms of "reasonable" costs and expenses and such reimbursement obligation should not apply to the lender's defense to challenges by a committee to the lender's prepetition security position.

11. Carveouts for professional fees should not be limited to the debtor's professionals, but should include the professionals employed by any official committee. While the carveout for professionals of any official committee may appropriately exclude work related to the prosecution of an objection to the prepetition secured position of the lender, that exclusion should not encompass any prechallenge investigative work by the professionals.

12. The carveout for committee professionals and the limited period to challenge the lender's prepetition secured position is important. In my view it is the price of admission to the bankruptcy court to obtain the benefits of preserving the assets of the estate, which preservation typically first benefits secured parties.

13. The period of time during which the creditors' committee should have the right to challenge the lenders' prepetition position should generally be at least sixty days from the appointment of the committee. Unless the case is on a fast track, this period should be ninety days.

14. The following provision is patently objectionable:

> Nothing contained in this Order shall be deemed a finding with respect to adequate protection (as that term is described in Section 361 of the Code) of the interest of the Lenders in the Prepetition Collateral, but shall [sic] the Lenders' and security interests in the Prepetition Collateral require adequate protection, Lenders shall be deemed to have requested and shall be deemed to have been granted such adequate protection as of the Petition Date or such later date when such liens or security interests first were not adequately protected. [Emphasis added.]

15. The following provision is also patently objectionable:

> Notwithstanding anything to the contrary contained in this Order or in any of the Postpetition Agreements, the commitment of the Lenders to make loans, extend credit, and grant other financial accommodations to the Debtors shall terminate immediately and automatically, without notice of any kind, upon the institution by any person or entity of any action seeking to challenge the validity or priority of (or to subordinate) any of the Lenders' liens or security interests on any of the Prepetition Collateral. [Emphasis added.]

16. I know of no basis for including in a financing order a finding (recently proposed) such as the following: "The Debtor's other secured creditor(s) is/are adequately protected from any adverse consequences which might result from the consummation of the proposed post-petition secured financing between the Debtor and Lender."

17. In reciting the protection afforded the lender by § 364(e), verbose and redundant provisions such as the following are to be avoided. Furthermore, in the following quoted material the underscored language suggests to me that prepetition debt was intended to be afforded the § 364(e) protection. No such effect would be proper.

> If any or all of the provisions of this Order or the DIP Financing Agreement are hereafter modified, vacated or stayed by subsequent order of this Court or by any other court, such stay, modification, or vacation shall not affect the validity of <u>any debt</u> to Lender that is or was incurred pursuant to this Order <u>or that is or was incurred prior to the effective date of such stay, modification, or vacation</u>, or the validity and enforceability of any lien, security interest or priority authorized or created by this Order or the DIP Financing Agreement and notwithstanding such stay, modification, or vacation, any obligations of the Debtor pursuant to this Order or the DIP Financing Agreement arising prior to the effective date of such stay, modification or vacation shall be governed in all respects by the original provisions of this Order and the DIP Financing Agreement, and the validity of any such credit extended or lien granted pursuant to this Order and the DIP Financing Agreement is subject to the protections afforded under 11 U.S.C. § 364(e). [Emphasis added.]

18. Provisions that operate expressly or as a practical matter to divest the debtor, or any other party in interest, of any discretion in the formulation of a plan are not viewed with favor. I believe the lender can appropriately protect itself without attempting to dictate what may happen with respect to a plan. For example, the lender can certainly include a loan provision calling for repayment in full on the plan's effective date.

19. I often find that the record established at the hearing, either by affidavit or live testimony, is rather thin relative to the detailed findings that the Court is called upon to make. It is important that the affidavit or the live witness (either by testimony or, if appropriate, by proffer) offered in support of the motion be specific and complete regarding the findings required with respect to §§ 364(c) and (e) and Rule 4001(c)(2).

20. The lifting of the § 362 automatic stay upon the event of a default should be conditioned upon providing three to five business days' notice to the debtor, the U.S. Trustee and any official committee.

21. The order should be worded in a manner that makes it clear that, whatever the terms of the interim order, the Court is not precluded from entering a final order containing provisions inconsistent with or contrary to any of the terms of the interim order, subject, of course, to the lender's § 364(e) protection with respect to monies advanced during the interim period. Just by way of example, should the Court deem it appropriate, given a strong showing at the first day hearing, to allow a waiver of § 506(c), if the subsequently appointed committee presents a persuasive argument, the Court should revisit the matter and be guided by what it hears at the final hearing.

The items discussed above are not intended to be a complete list of the matters that need to be addressed on the issue of first day DIP financing orders. For the most part, they are derived from the latest four or five first day DIP financing orders that I have had before me. If I were to go back over the last few years and review other such orders, I am sure that I could pick out additional provisions that could be considered objectionable.

In any event, I hope that this communication will serve to give counsel sufficient incentive to make the proposed DIP financing orders more palatable while at the same time preserving those elements of the orders that the lending institutions

reasonably believe are essential. Perhaps further dialogue on the matter would be appropriate at a gathering similar to that of the March 11 session.

Very truly yours,

Peter J. Walsh

PJW:vw

cc: Chief Judge Joseph J. Farnan, Jr.
Judge Sue L. Robinson
Judge Roderick R. McKelvie
Patricia A. Staiano, United States Trustee