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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	Chapter 11
VISTA PROPPANTS AND LOGISTICS, LLC, et al.,	§	Case No. 20-42002-elm11
Debtors.[1]	§	(Jointly Administered)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1) AND 364(e) AND (B) UTILIZE CASH COLLATERAL OF PREPETITION SECURED ENTITIES, (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED ENTITIES, (III) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND 4001(c), AND (IV) GRANTING RELATED RELIEF

[1] The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Vista Proppants and Logistics, LLC (7817) ("Vista OpCo"); VPROP Operating, LLC (0269) ("VPROP"); Lonestar Prospects Management, L.L.C. (8451) ("Lonestar Management"); MAALT Specialized Bulk, LLC (2001) ("Bulk"); Denetz Logistics, LLC (8177) ("Denetz"); Lonestar Prospects, Ltd. (4483) ("Lonestar Ltd."); and MAALT, LP (5198) ("MAALT"). The location of the Debtors' service address is 4413 Carey Street, Fort Worth, TX 76119-4219.

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The Official Committee of Unsecured Creditors (the "Committee") of the above captioned debtors and debtors in possession (the "Debtors"), by and through its undersigned proposed counsel, Kilpatrick Townsend & Stockton LLP, hereby files this objection (the "Objection") to the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), and 364(e) and (B) Utilize Cash Collateral of Prepetition Secured Entities, (II) Granting Adequate Protection to Prepetition Secured Entities, (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c), and (IV) Granting Related Relief* [Dkt. No. 32] (the "DIP Motion" and the DIP financing facility contemplated therein, the "DIP Facility").[2] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT[3]

1. The DIP Lenders, who are largely one and the same as the Term Loan Secured Parties, are seeking to provide a DIP Facility as a means to reap all of the benefits and value in these Chapter 11 Cases, as well as end up as the new equity owners of the Reorganized Debtors pursuant to a fast-tracked chapter 11 plan process. As currently proposed, the Final Order would enable the DIP Lenders/Term Loan Secured Parties to, among other things, encumber all previously unencumbered assets on account of a variety of liens and claims, ***thereby leaving the Debtors' unsecured creditors with no remaining value to satisfy their claims.*** No principled reason exists to give away what little recovery may be available to general unsecured creditors to the DIP Lenders/Term Loan Secured Parties who have no choice but to provide the DIP Facility

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the DIP Motion.

[3] Capitalized terms used but not otherwise defined in the Preliminary Statement shall have the meanings ascribed to them below.

as a means to preserve the value of their collateral.

2. With respect to the proposed DIP liens and claims, such liens and claims should not encumber Avoidance Actions and Avoidance Action Proceeds (collectively, the "Excluded Assets"). With respect to the proposed adequate protection liens and superpriority claims granted to the Term Loan Secured Parties on account of any diminution in value, because the Term Loan Secured Parties agreed to prime themselves with the $11 million DIP Facility as a means to preserve the value of their collateral in an essentially mothballed business, such liens and claims should not encumber any unencumbered assets, including, but not limited to, the Excluded Assets. To do so would effectively guarantee, if this Court sides with certain (but not all) other courts interpreting diminution in value, that any unencumbered assets that otherwise exist for unsecured creditors' benefit today would instead go to the Term Loan Secured Parties, ***even*** if the value of the business at confirmation is exactly the same as it is ***today***.

3. Put simply, (a) the Excluded Assets should not be available to the DIP Lenders to satisfy their DIP liens and claims or the Term Loan Secured Parties to satisfy their adequate protection liens and claims; and (b) the Debtors' other unencumbered assets and proceeds thereof, including, but not limited to, the Excluded Assets, should not be available as adequate protection to the Term Loan Secured Parties for so-called diminution in value. In the event the Court nevertheless determines that any of the Debtors' unencumbered assets (including the Excluded Assets) should be available to satisfy adequate protection liens and claims on account of an alleged diminution in value, such liens and claims should not be granted unless allowance of such liens and claims is triggered only upon proof that the use of its cash collateral and priming of its liens caused the value of its collateral at confirmation to diminish from the foreclosure value of such

collateral as of the Petition Date.[4] Without these and other significant changes, unsecured creditors are clearly worse off if the Final Order is entered and the DIP Facility approved than if these Chapter 11 Cases were converted to chapter 7 today, in which case unsecured creditors would at least be able to share in the value of the Debtors' unencumbered assets.

4. The DIP Lenders and Term Loan Secured Parties also propose to use the DIP Facility and the Final Order to, among other things, (a) lock these cases into fast-paced, overly restrictive, and unrealistic milestones; (b) receive payment of all professional fees (currently budgeted at approximately $2 million, which is slightly less than 20% of the entire $11 million DIP Facility); (c) obtain sections 506(c), 552(b), and marshaling waivers; and (d) grant stealth adequate projection to the ABL Lender and MAALT Lender although they are not providing any value under the proposed DIP Facility. All of this relief, if granted, would be overreaching, unnecessary, and is clearly designed to run roughshod over unsecured creditors at lightning speed leaving the DIP Lenders/Term Loan Secured Parties with virtually all of the potentially significant upside to the business while unsecured creditors are left with, at most, a pocket full of sand. The

[4] *See In re Scotia Dev., LLC*, No. 07–20027, Hrg. Tr. 23:16-23 (Bankr. S.D. Tex. July 7, 2008) ("With non-cash property, the interest that secured creditor has a right to is the right to foreclose. Therefore, the case law suggests that the appropriate value to protect is the foreclosure value of the property and not the fair market value of the property."), *aff'd in part, In re SCOPAC*, 624 F.3d 274, 285–86 (5th Cir. 2010); *In re Ralar Distribs., Inc.*, 166 B.R. 3, 7 (Bankr. D. Mass. 1994) ("The value relevant for adequate protection purposes, however, is not book value. It is liquidation value realizable by the creditor."), *aff'd*, 182 B.R. 81 (D. Mass. 1995), *aff'd*, 69 F.3d 1200 (1st Cir. 1995); *United States v. Case (In re Case)*, 115 B.R. 666, 670 (9th Cir. BAP 1990) ("If we were attempting to value FmHA's interest in the property for adequate protection purposes, the possibility of forced liquidation would be assumed and a deduction for selling costs would be logical."); *La Jolla Mortg. Fund v. Rancho El Cajon Assocs.*, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982) ("In this regard, we must evaluate the collateral, being the adequate protection, in the hands of the claim holder. It is the creditors' expected costs to liquidate the property that is relevant, not those of the debtor."); *ABI – Commission to Study the Reform of Chapter 11 – 2012~2014 Final Report and Recommendations*, pg. 71-72, available at: https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1096&context=books ("The Commission agreed that, for purposes of determining adequate protection under section 361, a secured creditors' interest in the debtor's property should be determined based on the "foreclosure value" of such interest, instead of more commonly used valuation standards such as liquidation value and going concern value. The foreclosure standard is meant to capture the value of the secured creditor's interest as of the petition date (i.e., the value that a secured creditor's state law foreclosure efforts would produce if the automatic stay were lifted or the bankruptcy case had not been filed). The foreclosure value should be determined case by case based on the evidence presented at the adequate protection hearing, taking into account the realities of the applicable foreclosure markets and legal schemes.").

Court should slow this case down and stop this one-sided abuse of the chapter 11 process before it takes root.

5. Adding insult to injury, the Interim Order and the proposed Final Order also inappropriately restrict the Committee's ability to discharge its fiduciary duties by, among other things, providing an inadequate challenge period during which the Committee must not only (a) investigate the Prepetition Secured Parties'[5] liens and claims ***but also*** causes of action or claims ***against*** the Prepetition Secured Parties; and (b) seek and obtain standing to commence a challenge. These restrictions prevent the Committee from validating the Prepetition Secured Parties' position (which has been stipulated to by the Debtors) that they have enforceable and valid liens on substantially all of the Debtors' assets and asserting any claims or causes of action against the Prepetition Secured Parties.

6. For the reasons set forth herein, the Court should condition approval of the DIP Motion on a final basis upon the Debtors substantially revising the Final Order so as to address the serious concerns discussed in this Objection including: (a) the proposed encumbrance of the Excluded Assets; (b) the generous adequate protection package in favor of the Term Loan Secured Parties; (c) the truncated challenge period and related terms; (d) the restrictive, fast-paced case milestones; (e) the proposed section 506(c), 552(b), and marshaling waivers; (f) the special protections in favor of the ABL Lender and MAALT Lender (including absolving them from any bar date requirements and applying the challenge period to such lenders despite them not having consented to the use of their cash collateral, not having had their interests in property primed, and

[5] For the avoidance of doubt, the Committee understands the term "Prepetition Secured Parties" to mean, collectively, the Term Loan Secured Parties, the ABL Lender and the MAALT Lender, and uses "Prepetition Secured Parties" throughout this Objection consistent with that understanding.

not having provided any value in connection with the DIP Facility); and (g) the numerous other inappropriate and objectionable provisions discussed in more detail below.

BACKGROUND

7. On June 9, 2020 (the "Petition Date"), the Debtors commenced voluntary cases under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. On June 12, 2020, the Court entered its *Interim Order (I) Authorizing the Debtors to (A) Obtain Post-petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c), 364(d)(1) and 364(e) and (B) Utilize Cash Collateral of Prepetition Secured Entities, (II) Granting Adequate Protection to Prepetition Secured Entities, (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c), and (IV) Granting Related Relief* (the "Interim Order") [Dkt. No. 80].

9. On June 23, 2020, pursuant to Section 1102 of the Bankruptcy Code, the United States Trustee for the Northern District of Texas appointed the Committee [Dkt. No. 109]. The Committee consists of the following five members: (i) The Andersons, Inc.; (ii) MP Systems Co., LLC; (iii) Schlumberger Technology Corporation; (iv) Trinity Industries Leasing Co.; and (v) Twin Eagle Sand Logistics, LLC.

10. On June 24, 2020, the Committee selected Kilpatrick Townsend & Stockton LLP as its proposed counsel. On June 25, 2020, the Committee selected Province, Inc. as its proposed financial advisor.

11. The objection deadline for the DIP Motion was originally July 1, 2020 at 5:00 p.m. (CT). The Debtors agreed to extend the objection deadline for the Committee to July 3, 2020 at

5:00 p.m. (CT). A hearing to approve the DIP Motion on a final basis is scheduled for July 9, 2020 at 1:30 p.m. (CT).

12. Prior to filing this Objection, the Committee engaged in negotiations with the Debtors and the DIP Lenders in an attempt to resolve the Committees issues with the Final Order. While such negotiations hopefully remain ongoing, the parties were not yet able to agree to the form of a Final Order, which necessitated the filing of this Objection.

OBJECTION

13. Courts routinely recognize that "[d]ebtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a prepetition lien on cash collateral." *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (9th Cir. BAP 1992). As a result, courts are hesitant to approve financing terms that are considered harmful to an estate and its creditors. *See, e.g., In re Laffite's Harbor Dev. I, LP,* No. 17-36191-H5-11, 2018 WL 272781, at *3 (Bankr. S.D. Tex. Jan. 2, 2018) ("While certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender."); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting 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"). Thus, while certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts have not approved financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole (or

primary) benefit of the lender. *See, e.g.*, *Ames*, 115 B.R. at 38 (citing *In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989)) (holding that the terms of a postpetition financing facility must not "pervert the reorganizational process from one designed to accommodate all classes of creditors . . . to one specially crafted for the benefit" of one creditor).

14. The Interim Order and the proposed Final Order include a number of provisions that (a) prejudice the rights and powers that the Bankruptcy Code confers on the Court, the Debtors, and the Committee, (b) unjustifiably benefits the DIP Lenders/Term Loan Secured Parties at the expense of the Debtors' unsecured creditors, and (c) are likely to give the DIP Lenders/Term Loan Secured Parties undue control over these cases.

I. The DIP Liens and Superpriority Claims Should Not Encumber Avoidance Actions and Proceeds Thereof

15. The Committee objects to the granting of any DIP liens and superpriority claims on the Excluded Assets. To allow the Debtors, as fiduciaries, to capitulate and allow for the complete encumbering of all of their assets (including assets that were not previously encumbered) and to effectively assign the benefits of certain causes of action and related estate claims and proceeds to the DIP Lenders/Term Loan Secured Parties, as opposed to true representatives of the estates for the benefit of unsecured creditors, turns bankruptcy law on its head.

16. With respect to the proposed liens and claims on Avoidance Actions and Avoidance Action Proceeds, such relief is fundamentally at odds with the unique purposes served by Avoidance Actions. Avoidance actions are distinct creatures of bankruptcy law designed to benefit, and ensure equality of distribution among, general unsecured creditors. *See Cullen Ctr. Bank & Tr. v. Hensley (In re Criswell)*, 102 F.3d 1411, 1414 (5th Cir. 1997) (noting that avoidance powers under the Bankruptcy Code were created to "facilitat[e] the prime bankruptcy policy of equality of distribution among creditors of the debtor"); *Gaudet v. Babin (In re Zedda)*, 103 F.3d

1195, 1203 (5th Cir. 1997) ("A trustee's avoidance powers are intended to benefit the debtor's creditors, as such powers facilitate a trustee's recovery of as much property as possible for distribution to the [unsecured] creditors."); *McFarland v. Leyh (In re Tex. Gen. Petrol. Corp.)*, 52 F.3d 1330, 1335–36 (5th Cir. 1995) ("[T]he proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits."). The Debtors have not provided any justification for the extraordinary grant of liens on Avoidance Actions and Avoidance Action Proceeds, or for the potential payment of superpriority claims with the proceeds of avoidance actions. To the contrary, there is no legal basis for this Court to grant the DIP Lenders a lien on Avoidance Actions and Avoidance Action Proceeds. Accordingly, Avoidance Actions and Avoidance Action Proceeds should be wholly excluded from the DIP Collateral and reserved for the benefit of the Debtors' unsecured creditors.

II. The DIP Liens and Superpriority Claims Should be Satisfied First From Encumbered Assets

17. The DIP Lenders should be required to satisfy the DIP liens and superpriority claims from previously encumbered assets before looking to any unencumbered assets (other than the Excluded Assets, which they cannot look to at all). To allow otherwise would provide the DIP Lenders with the unfettered discretion to absorb the value of the Debtors' unencumbered assets, including assets that become unencumbered postpetition as a result of a successful challenge, on account of its DIP liens and claims. As the Debtors' unencumbered assets may be the only source of recovery for unsecured creditors in the cases, the DIP lenders should first look to previously encumbered assets in satisfying its DIP liens and claims.

III. The Adequate Protections Liens and Claims Must Be Limited

18. The Committee objects to the Term Loan Secured Parties being granted any adequate protection liens on and superpriority claims in any of the Debtors' unencumbered assets or proceeds thereof (including, but not limited to, the Excluded Assets). Despite the DIP Motion

stating that the Term Loan Secured Parties are deserving of adequate protection liens and claims to the extent of the diminution in value of their collateral, the reality is that the Term Loan Secured Parties are priming themselves on account of the $11 million DIP Facility, which priming is being done ***solely for their benefit.*** It cannot be that the Term Loan Secured Parties, who have no choice but to provide the DIP Facility to preserve the value of their collateral, also get the benefit of adequate protection liens and superpriority claims that have the effect of absorbing whatever residual value may be available to unsecured creditors on account of the Debtors' unencumbered assets and the proceeds thereof.[6] From the perspective of unsecured creditors, such a result would render the prospect of any meaningful recovery as highly unlikely, at best. Unsecured creditors are unwilling to give up $11 million of unsecured assets at this stage of the Chapter 11 Cases so that the Term Loan Secured Parties can use this chapter 11 process to preserve option value for recovery of their investment and leave nothing for unsecured creditors.

19. If the Court nevertheless determines that the Term Loan Secured Parties are entitled to adequate protection liens and superpriority claims against the non-Excluded Assets to the extent of diminution in value, if any, the Final Order must require that for purposes of determining diminution in value as part of any such motion (assuming the Term Loan Secured Parties are entitled to same), the test for the value on the Petition Date will be the amount the Term Loan Secured Parties could have obtained in foreclosure on the Petition Date. Utilizing Petition Date foreclosure value for purposes of calculating a diminution in value claim is especially appropriate here because the Debtors are barely operating. If the Court were to utilize going concern value in calculating a diminution in value claim, the Term Loan Secured Parties will almost certainly be

[6] Such a result would occur even if there is no decline in collateral value simply because of, and in an amount equal to, the $11 million priming if the Court adopts anything other than foreclosure value as the starting point for the diminution in value test.

entitled to an $11 million diminution in value claim, at a minimum. This would effectively guarantee that unsecured creditors do not see a penny on account of the Debtors' unencumbered assets and are better off immediately converting these chapter 11 case to cases under chapter 7. Additionally, any diminution in value claim of the Term Loan Secured Parties, if granted notwithstanding the arguments contained herein, should be filed fifteen (15) days in advance of any confirmation hearing so the Committee can take discovery and challenge any such claim.

IV. The DIP Milestones Must by Extended by at Least Forty-Five (45) Days

20. Instead of permitting the Debtors to pursue a proper chapter 11 process for the benefit of all stakeholders, the proposed DIP Facility mandates such aggressive milestones that it effectively forecloses the Committee from exercising its fiduciary duties. Specifically, the DIP Facility requires the chapter 11 process to progress along the following unrealistic and unnecessary milestones:

- **June 30, 2020**[7] (within 21 days following the Petition Date): the Debtors shall have filed a plan of reorganization and related disclosure statement acceptable to the DIP Lenders in their sole and absolute discretion as confirmed in writing by the DIP Agent;
- **July 29, 2020** (within 50 days following the Petition Date): the Court shall have entered an order approving the disclosure statement and plan solicitation procedures acceptable to the DIP Lenders;
- **August 28, 2020** (within 80 days following the Petition Date): the Court shall have entered an order acceptable to the DIP Lenders confirming an Acceptable Plan; and
- **September 9, 2020** (within 92 days following the Petition Date): the Acceptable Plan shall become effective.

See Interim Order ¶ 17.

21. The milestones are modeled on typical prepackaged plan milestones. However, these chapter 11 cases are not prepackaged and an expedited chapter 11 plan process that

[7] This milestone was extended to July 3, 2020 [Dkt. No. 143].

compresses the disclosure statement and plan filing without time for investigation and input from the Committee is not acceptable. The DIP Lenders have dictated an egregiously short Challenge Period in order to back into these restrictive milestones. Should the Court extend the Challenge Period (respectfully, as it should for the reasons discussed later in this Objection), the milestones simply will not work as the Challenge Period will inevitably bleed into the plan and confirmation milestones. Moreover, the Debtors sought, and received, an extension to file their schedules of assets and liabilities and statements of financial affairs through and including July 23, 2020, which is the same day the Committee's Challenge Period (as proposed by the DIP Lenders) is set to expire. Furthermore, the deadline to file schedules and statements of financial affairs is only six days before the disclosure statement order milestone, and likely after objections to the disclosure statement are due, giving the Committee and other parties in interest no time to review critical information contained in the Debtors' schedules and statements of financial affairs before the disclosure statement hearing. It is plainly apparent that the proposed milestones are simply unreasonable and unworkable with the other dates and deadlines related to this chapter 11 process.

22. Furthermore, the proposed milestones do not make sense in light of the Debtors' effectively shutting down operations with nearly all employees having been furloughed. Certain of the Debtors' sites are closed, while others are functioning at a minimal level to maintain them. Moreover, the Debtors filed ten separate motions to reject hundreds of contracts and leases on the Petition Date. With limited operations and costs associated therewith, the aggressive and unrealistic milestones are simply being used by the DIP Lenders as a means to an end: controlling these cases solely for their benefit by ensuring that all value, including previously unencumbered assets, ends up in the pockets of the DIP Lenders/Term Loan Secured Parties, while unsecured

creditors owed potentially over $100 million (when rejection damages are considered) get nothing.[8]

23. Contrary to the heavy-handed intent of the milestones that were conjured up by the DIP Lenders, the Committee, which was formed only ten days ago, should have an opportunity to, among other things, independently test the market for interest in the Debtors' assets; understand and analyze the go-forward business plan; perform a valuation analysis; investigate the Prepetition Secured Parties' alleged liens and claims; investigate potential claims against the Prepetition Secured Parties; understand the prepetition negotiations between the DIP Lenders and the Debtors; and analyze the terms of the Plan to be filed by July 3, 2020. *See In re Energy Future Holdings Corp*., (Bankr. D. Del. Nov. 4, 2014) (Case No. 14-10979) (CSS) Tr. at 20:16-20 (holding that "the proposed timelines must be stretched . . . to allow for sufficient time for any interested party to develop an alternative transaction . . . and the . . . committee to . . . get up to speed."). Accordingly, the milestones should be extended by a period of at least forty-five (45) days.

V. The Challenge Period and Related Terms Constrain the Committee's Ability to Appropriately Discharge its Fiduciary Duties

24. The DIP Facility contains substantial constraints on the Committee's ability to discharge its fiduciary duties. Specifically, the terms of the Interim Order and proposed Final Order limit the time during which the Committee may investigate a litany of liens and claims related to the Prepetition Secured Parties, file a motion to obtain standing, obtain the requisite standing, and commence a challenge, to thirty (30) calendar days after the appointment of the

[8] Any argument by the DIP Lenders/Term Loan Secured Parties that the milestones are set on their current schedule because funding under the DIP Facility will run out is simply a red herring. The DIP Lenders/Term Loan Secured Parties will own the reorganized Debtors upon emergence from these Chapter 11 Cases and will have to fund the reorganized company for the foreseeable future regardless of whether the Debtors are in chapter 11 or not.

Committee (the "Challenge Period")[9]. This timeframe is unacceptable and unworkable even more so because the Challenge Period applies not only to the liens and claims of the Prepetition Secured Parties (the "Prepetition Lien Matters"), ***but also*** any claims or causes of action that may be asserted ***against*** the Prepetition Secured Parties (*i.e.*, lender liability claims and claims related to a valuation of the Debtors' assets) (the "Prepetition Claim and CoA Matters"). Given that the Interim Order and proposed Final Order include a broad sweeping plan-like release of the Term Loan Secured Parties (and just about anybody that has ever had anything to do with them)[10], the Committee must have a reasonable amount of time to investigate whether such a release is appropriate or whether there are viable claims or causes of action against such parties.[11] *See* Interim Order ¶ 21.

25. The Committee also objects to the requirement that it obtain standing prior to the expiration of the Challenge Period if it wishes to pursue a challenge. *Id*. The process by which the Committee may obtain standing will likely take a reasonable amount of time and expense. As such, and given the proposed case milestones and thin investigation budget for the Committee, the Committee should not be required to expend the time and expense necessary to obtain standing prior to commencing a challenge. Indeed, courts have previously approved financing agreements

[9] The Committee was appointed on June 23, 2020. Thirty (30) calendar days from the appointment of the Committee is July 23, 2020. *See* Interim Order ¶ 21.

[10] The Debtors shall be deemed to have "released, waived, and discharged" each of the Term Loan Lenders and their respective "officers, directors, employees, agents, attorneys, professionals, affiliates, subsidiaries, assigns and/or successors." Interim Order ¶ 21.

[11] The Committee also objects to the proposed investigation budget, which is currently set at $25,000. Interim Order ¶ 21. This provision clearly seeks to shield the Term Loan Secured Parties, who are also the DIP Lenders, by unduly limiting the resources available to the Committee to investigate potential claims against such parties. Therefore, the Committee requests that an additional $100,000 be made available to the Committee for its analysis of Prepetition Lien Matters and that no cap be placed on the Committee's investigation into the Prepetition Claim and CoA Matters.

that grant standing to creditors' committees without the need for a standing motion. *See, e.g.*, *In re Phoenix Payment Sys., Inc.*, No. 14-11848 (Bankr. D. Del. Sept. 3, 2014); *In re Am. Safety Razor, LLC*, No. 10-12351 (Bankr. D. Del. Aug. 27, 2010) at ¶ 6; *see also In re Quebecor World (USA) Inc.*, No. 08-10152 (Bankr. S.D.N.Y. Apr. 1, 2008) ¶ 21; *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D.N.Y. Mar. 29, 2006) ¶ 25.[12]

26. In addition, the Challenge Period should not apply to the ABL Lender or MAALT Lender as neither are DIP Lenders and the Debtors are not seeking to prime any interest they have in collateral or use their cash collateral. As a result, the ABL Lender and the MAALT Lender are providing no consideration in exchange for the shortening of various statutes of limitations provided by a Challenge Period. Moreover, the Final Order should provide that (a) the Challenge Period can be extended by the Court for cause; and (b) in the event that these Chapter 11 Cases convert to cases under chapter 7 before the Challenge Period expires, any chapter 7 trustee should be permitted to conduct its own investigation of the obligations and liens under the Term Loan Documents, ABL Documents, and MAALT Documents, and should not be constrained by an unreasonably short challenge deadline. *Id.* ¶ 21.

27. In light of the foregoing, the Committee requests that the Final Order be revised such that: (a) the Challenge Period for the Prepetition Lien Matters be ninety (90) days from the appointment of the Committee; (b) the Challenge Period for the Prepetition Claim and CoA Matters be through and until the later of (i) ninety (90) days from the appointment of the Committee; and (ii) the hearing to confirm a chapter 11 plan; (c) the investigation budget be increased to $125,000 for Prepetition Lien Matters only and that no cap be placed on the

[12] In the event the Committee is required to obtain standing, the Challenge Period should be automatically tolled upon the filing of a standing motion until three (3) business days after this Court rules on such motion.

Committee's investigation into the Prepetition Claim and CoA Matters; (d) the Committee be granted automatic standing to commence a Challenge or, alternatively, that upon the filing of a standing motion, the Challenge Period be automatically tolled until three (3) business days after this Court rules on such motion; and (e) that the Challenge Period and its related restrictions not apply to the ABL Lender and MAALT Lender.

VI. The Waivers of 506(c), 552(b) and Marshaling are Unwarranted and Not Supported by the Record

28. The Debtors are seeking a waiver of the estates' right to surcharge collateral pursuant to section 506(c) of the Bankruptcy Code, as well as a marshaling waiver and a waiver of the estates' right under section 552(b) of the Bankruptcy Code. These waivers are entirely inappropriate at this time, and in any event, not justified by the record.

A. Surcharge Rights Under Section 506(c) Should Not be Waived

29. The Interim Order provides that subject to entry of the Final Order, neither the DIP Collateral nor Prepetition Collateral shall be subject to any surcharge pursuant to section 506(c) of the Bankruptcy Code. *See* Interim Order ¶ 32. Section 506(c) of the Bankruptcy Code is a rule of fundamental fairness for all parties in interest and provides that secured creditors shall share the burden of satisfying administrative expenses where funds are expended for the purpose of preserving and selling their collateral. Section 506(c) ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured recoveries. *See, e.g.*, *Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) (stating, "section 506(c) is designed to prevent a windfall to the secured creditor"). As such, the Debtors' unilateral waiver of Bankruptcy Code section 506(c) would eliminate a further avenue of recovery for the Debtors' estates and foist the costs of the Debtors' reorganization onto unsecured creditors.

30. By waiving the estates' section 506(c) rights, the Debtors are agreeing to pay for any and all expenses associated with the preservation and disposition of the collateral of the DIP Secured Parties and the Prepetition Secured Lenders. Here, such a waiver is highly inappropriate given that these cases are being run as a vehicle for the exclusive benefit of the Term Loan Secured Parties while the Debtors are barely operating. Indeed, the Term Loan Secured Parties will reap almost all of the benefit of these cases with unsecured creditors being relegated to no recovery. Courts have routinely rejected similar surcharge waivers under these circumstances. *See In re AFCO Enters., Inc.*, 35 B.R. 512, 515 (Bankr. D. Utah 1983) ("When the secured creditor is the only entity which is benefited by the trustee's work, it should be the one to bear the expense. It would be unfair to require the estate to pay such costs where there is no corresponding benefit to unsecured creditors."); *see also* Transcript of Hearing at 20-21, *In re Mortgage Lenders Network USA, Inc.*, No. 07-10146 (PJW) (Bankr. D. Del. Mar. 27, 2007) [Dkt. No. 346]; Transcript of Hearing at 212-13, *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. June 5, 2014) [Dkt. No. 3927]; *Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (B.A.P. 8th Cir. 1998).

31. While the Committee suspects that the Debtors are hopeful (or perhaps cautiously optimistic) that the budget captures all of the expenses that will be incurred in the administration of these cases, 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. Indeed, while at this early juncture the Committee professionals have not yet had an opportunity to fully analyze the DIP budget, the budget appears perilously tight. Furthermore, if an event of default is called under the DIP Facility,

the budgeted amounts that were incurred and not paid at such time could remain unpaid. For these reasons, the Court should not approve a section 506(c) waiver at this time.[13]

B. The Equities of the Case Exception Under 552(b) and Marshaling Rights Must be Preserved

32. The Debtors' willingness to waive their rights under section 552(b) is, at best, premature. *See* Interim Order ¶ L. The Court should also not permit a section 552(b) waiver before allowing parties in interest – including the Committee – to properly examine the "equities of the case". S*ee Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re TerreStar Networks, Inc.)*, 457 B.R. 254, 272-73 (Bankr. S.D.N.Y. 2011) (denying request for 552(b) waiver as premature because factual record was not fully developed). If unencumbered assets are used to increase the value of the secured creditors' collateral, unsecured creditors should be able to argue that such value inures to them, and not to secured creditors. *See In re Metaldyne*, No. 09-13412 (MG) 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) (holding, in the context of a proposed 552(b) waiver, that "the waiver of an equitable rule is not a finding of fact…and the Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make"); *see also In re iGPS Co. LLC*, No. 13-11459 (KG) 2013 WL 4777667, at *5 (Bankr. D. Del. July 1, 2013) (no waiver of the "equities of the case" exception with respect to creditors committee). In the alternative, any section 552(b) waiver should be subject in all respects to the Committee's challenge rights.

33. The Debtors also should not waive any rights with respect to the marshaling doctrine in the Final Order. *See* Interim Order ¶ 34(b). Such favorable treatment, which would

[13] In the event the Court grant's the requested waiver of section 506(c) of the Bankruptcy Code, the Final Order should make clear that in determining whether a plan complies with section 1129(a)(7), any section 506(c) waiver does not apply. Otherwise, the proposed waiver will have the effect of absorbing all unencumbered value in an extremely expensive hypothetical liquidation.

enable the Term Loan Secured Parties to "cherry pick" the collateral they want to liquidate most expeditiously is unwarranted under the circumstances of these cases where the DIP Lenders are receiving liens on assets previously unencumbered prepetition. Accordingly, marshalling rights should be preserved for the Committee.[14] *See, e.g., In re Newcorn Enters. Ltd.*, 287 B.R. 744, 750 (Bankr. E.D. Mo. 2002) (granting unsecured creditors' committee derivative standing to bring marshaling claim against secured lender, and thereby increase payout to unsecured creditors, where debtor refused to do so); *Official Comm. Of Unsecured Creditors v. Hudson United Bank (In re America's Hobby Ctr., Inc.)*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998) ("[S]tanding in the shoes of the debtor in possession, the Committee can assert [marshaling] claim.").

VII. Other Objectionable Provisions

34. The Committee also objects to the provisions referenced below and requests that the Final Order and DIP Credit Agreement be amended accordingly. The Committee notes that by objecting to these provisions in bullet point format, the Committee is by no means suggesting that these objections are either technical or minor in nature.

- DIP Budget. The DIP Lenders seek to inappropriately restrict the Committee's ability to discharge its fiduciary duties by limiting the fees and expenses of the Committee's counsel and financial advisor to $150,000 each. By comparison, per the DIP Budget, $3,800,000 is budgeted for the Debtors' professionals. On an aggregate basis, the pre-Carve-Out Trigger Notice professional fees budgeted for the Debtors' professionals are more than ***twelve times greater*** than those for the Committee's professional fees. The DIP Budget should be amended to include $1,500,000 for the Committee's professionals.

- Indemnity. The indemnity provisions in favor of the DIP Agent and other DIP Secured Parties needs to be limited to their respective capacities as such. *See* Interim DIP Order ¶ 8(a).

- Payment of DIP Fees and Expenses. The Committee must have the right to object to the reasonableness of the fees and expenses of the DIP Agent's professionals. *Id.*

[14] Irrespective of whether the Court allows the marshaling waiver, as noted above, the DIP Lenders should be required to look first to previously encumbered collateral before looking to any unencumbered assets (other than the Excluded Assets, which they cannot look to at all).

- Adequate Protection. The Committee has the following additional comments to the proposed Adequate Protection package and related terms:

    - The Committee must have the right to seek recharacterization of any fees or other payments paid to the Term Loan Agent based upon the valuation of the collateral. Such claims for recharacterization based upon the valuation of the Debtors' assets must not be subject to the Committee's Challenge Period.
    - The payment of professionals fees for the Term Loan Agent must be limited to the Term Loan Agent acting in its capacity as such.

- Credit Bidding. The Final Order should reflect that any credit bidding by the Term Loan Secured Parties, the ABL Lender and the MAALT Lender is subject to the Committee's Challenge Period and challenge rights. *Id*. at ¶ 18. The Final Order should also not limit the Committee's right to argue that any alleged credit bidding rights of the Term Loan Secured Parties, ABL Lender and MAALT Lender should be limited "for cause" pursuant to section 363(k) of the Bankruptcy Code. Moreover, any credit bidding provision in the Final Order should be without prejudice to the Committee's right to object to any credit bid.

- Events of Default in Final Order. The Interim Order provides two events of default in paragraph 19 which should be removed from the Final Order. *Id*. at ¶¶ 19(iv) and (xi). An event of default occurs if "(iv) entry of an order granting of relief from any stay of proceeding (including the automatic stay) so as to allow a third party to proceed with foreclosure (or granting of a deed in lieu of foreclosure) against any asset of the Debtors with a value in excess of $500,000 in the aggregate" or "(xi) any shareholder (or shareholder affiliate) shall challenge or contest in any respect the provisions of the DIP Credit Agreement." *Id.* Both of these actions by third parties may trigger events of default that are entirely out of the control of the Debtors and, accordingly, should be stricken from the Final Order.[15]

- Events of Default in DIP Credit Agreement. According to the DIP Credit Agreement, it is an Event of Default if the Loan Parties, any shareholder of the Loan Parties, the Committee, or any other party in interest files a complaint against, objects to the claims of, or seeks to avoid the liens of the DIP Agent or any of the DIP Lenders (not expressly limited to their capacities as such). DIP Credit Agreement at §10.01(dd). This Event of Default is not contained in the Interim Order or the Final Order. The Final Order also provides that if there is any inconsistency between the terms of the DIP Loan Documents and the Final Order, the Final Order governs. However, for the avoidance of doubt, the Committee

[15] With respect to the Event of Default related to the automatic stay, given the Debtors currently have no right to use the ABL Lender or MAALT Lender's collateral, the Debtors may want to allow relief from the automatic stay for assets with a value in excess of $500,000 for the ABL Lender or MAALT Lender. With respect to the Event of Default related to the shareholder challenge, such Event of Default grants the Debtors' shareholders with the absolute right to trigger an Event of Default and throw these cases into chaos by merely filing an objection. Such language cannot remain in the Final Order.

objects to an Event of Default being triggered in the event the Committee or any other party in interest in these chapter 11 cases takes any of the actions set forth in section 10.01 (dd) of the DIP Credit Agreement.

- Exercise of Remedies. The exercise of remedies by the DIP Agent and DIP Lenders, including the ability to foreclose, must be conditioned upon entry of an order for good cause shown, and the Debtors, the Committee, and the United States Trustee should be entitled to seek emergency relief from the exercise of remedies for any reason, not just whether an Event of Default has occurred. *See* Interim DIP Order at ¶ 20.

- Release. The Term Loan Secured Parties should only be released in their prepetition capacity, not postpetition. *Id*. at ¶ 21.

- Asset Dispositions. The DIP Loan is not a revolving loan; therefore, the DIP Obligations should not be immediately repaid in the event of any ordinary course asset sales and, as noted above, the DIP Lenders must first look to previously encumbered assets. As such, paragraph 23 of the Interim Order should be limited to proceeds from the disposition of assets ***outside*** the ordinary course of business, and only to extent such assets were subject to perfected and unavoidable prepetition liens as of the Petition Date *Id*. at ¶ 23.

- Proofs of Claim. The ABL Lender and MAALT Lender, whose interests in collateral are not being utilized or primed and who are not providing any DIP financing, should not be exempt from the requirement to file proofs of claim. *Id*. at ¶ 26.

- Insurance. The insurance provision should not apply to any director and officer insurance policies. *Id*. at ¶ 28.

- Information Rights. The Committee should receive all of the same reporting to the DIP Lenders as set forth in the Interim DIP Order at the same time.

- Section 503(b)(9) Claims. So as to ensure administrative solvency, the DIP Lenders should fund a segregate account not subject to the control or liens of the DIP Secured Parties, Term Loan Secured Parties, ABL Lender or MAALT Lender with funds sufficient to pay all allowed claims arising under section 503(b)(9) of the Bankruptcy Code.

RESERVATION OF RIGHTS

The Committee reserves its respective rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, and to raise additional objections during any further hearing on the DIP Motion. In addition, given the compressed timing between the Committee's selection of counsel and the impending objection deadline, the Committee has not yet reviewed the entire 130 page credit agreement that documents

the terms of the DIP Facility. To the extent the Committee has any additional objections to the DIP Facility based upon its review of the credit agreement, the Committee will supplement this Objection prior to the hearing on the DIP Motion.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) condition entry of an order approving the DIP Motion on a final basis unless the Final Order and DIP Credit Agreement are modified as requested in this Objection; and (ii) granting such other and further relief as the Court deems just and proper.

Dated: July 3, 2020
Dallas, Texas

/s/ Patrick J. Carew

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