SIDLEY AUSTIN LLP
Charles M. Persons
State Bar No. 240604113
Juliana Hoffman
State Bar No. 24106103
2021 McKinney Avenue
Suite 2000
Dallas, TX 75201
Telephone: 214.981.3300
Facsimile: 214.981.3400

Dennis M. Twomey (admitted *pro hac vice*)
Julia Philips Roth (*pro hac vice* pending)
One South Dearborn Street
Chicago, Illinois 60603
Telephone: 312.853.7000
Facsimile: 312.853.7036

Attorneys for Ares Capital Corporation

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*.,[1]	§	Case No. 20-42002-elm11
	§	
Debtors.	§	(Jointly Administered)

REPLY OF ARES CAPITAL CORPORATION IN SUPPORT OF DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (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

Ares Capital Corporation (the "DIP Agent"), in its capacity as administrative agent under

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: Vista Proppants and Logistics, LLC (7817) ("Vista HoldCo"); 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.

the proposed debtor-in-possession financing facility of the above captioned debtors and debtors in possession (the "Debtors"), by and through its undersigned counsel, Sidley Austin LLP, hereby submits this reply (the "Reply") in support of 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* [Docket No. 32] (the "DIP Motion")[2] and in response to the objection of the Official Committee of Unsecured Creditors (the "Committee") to the DIP Motion [Docket No. 157] (the "Objection"). In support of this Reply, the DIP Agent respectfully states as follows:

PRELIMINARY STATEMENT

1. As described more fully at the First Day Hearing, these are particularly difficult bankruptcy cases. The ABL Lender, which has a first-priority security interest in the Debtors' accounts receivable and finished sand inventory, has refused to permit the Debtors to use its priority cash collateral to help fund the chapter 11 cases. Moreover, the Debtors have scaled back their operations significantly and will therefore generate little cash from operations during these cases. Consequently, the proposed $11.0 million of debtor-in-possession financing (the "DIP Financing") and the Term Loan Secured Parties' cash collateral will fund ***virtually every aspect of these chapter 11 cases***.

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

2. Without access to the Term Loan Secured Parties' cash collateral and the DIP Lenders' $11.0 million of new money DIP Financing, there is no money to fund these chapter 11 cases. These two sources of liquidity are the only realistic path by which the Debtors can reorganize rather than liquidate, thereby preserving over fifty North Texas jobs and an opportunity for these businesses to scale up their operations in the future when industry conditions improve.

3. The Debtors asked the DIP Lenders and Term Loan Secured Parties to provide this needed liquidity despite facing a far more uncertain situation than is typical in many complex chapter 11 cases. Notwithstanding this uncertainty, the DIP Lenders and Term Loan Secured Parties provided reasonable, commercial financing terms in exchange for use of cash collateral and $11.0 million of new money. They did not seek a roll-up of any prepetition debt. The company was offered the same interest rate (9.5%) on the DIP Facility that it paid under the 2017 Term Loan Facility when the company had an inarguably superior credit profile. Nonetheless, the DIP Lenders proactively offered these favorable terms from the outset of these cases, long before the appointment of the Committee.

4. In addition, the DIP Facility has already provided significant benefits to the Debtors' estates, and more specifically the unsecured creditors. Of the $3.5 million of DIP Financing provided on an interim basis, among other expenditures, the Debtors earmarked approximately (i) $1.24 million for insurance policies that benefit the estates; (ii) $560,000 for payroll and benefits; (iii) $343,000 for utility providers; (iv) $277,000 for operating disbursements; and (v) $150,000 for critical vendors. Further, the DIP Budget contemplates approximately $4.5 million of operating disbursements over the course of these cases—disbursements that benefit many of the Committee's constituents. Meanwhile, the DIP Facility has accrued approximately $8,000 in interest.

5. The Committee's Objection fails to account for both the benefits conferred by the DIP Financing and agreed use of cash collateral, as well as the dire financial condition of the Debtors and corresponding risks assumed by the DIP Lenders in extending $11.0 million. Notwithstanding the Committee's contrary assertions, the relevant legal standard is not whether the DIP Lenders have a "choice" about whether to provide such a sizable DIP Facility or allow the use of cash collateral under these circumstances.[3] It is whether the Debtors can satisfy the legal standards under the Bankruptcy Code for entry into this DIP Facility. Indeed, of all the cases cited by the Committee in its Objection, not one speaks to whether the Debtors may grant liens on unencumbered assets to their DIP lenders. The answer to that question is unequivocally "yes." The Bankruptcy Code itself specifically provides for such liens, stating that "the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt . . . secured by a lien on property of the estate that is not otherwise subject to a lien . . . ."[4] And contrary to the Committee's unsupported position that granting liens to DIP Lenders on previously unencumbered assets on account of a new money loan is "extraordinary,"[5] courts within the Fifth Circuit and other districts throughout the country have granted such liens countless times.[6]

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[3] Objection ¶ 1. Certainly, the ABL Lender's refusal to allow the Debtors to use cash collateral or propose an alternative debtor-in-possession financing demonstrates a very real alternative to the "choice" to provide the DIP Facility on reasonable, commercial terms.

[4] 11 U.S.C. § 364(c)(2).

[5] Objection ¶ 16.

[6] *See, e.g., In re Legacy Reserves Inc., et al.*, Case No. 19-33395 (Bankr. S.D. Tex.) [Dkt. No. 255] (Final DIP order granting DIP lenders liens on avoidance action proceeds on a final basis); *In re Templar Energy*, Case No. 20-11441 (Bankr. D. Del.) [Dkt. No. 149] (same); *In re BeavEx Holding Corp., et al.*, Case No. 19-10316 (Bankr. D. Del) [Dkt. No. 143] (same); *In re Borden Dairy Co., et al.,* Case No. 20-10010 (Bankr. D. Del.) [Dkt. No. 374] (authorizing the use of cash collateral on a final basis, which were subject to liens on avoidance actions and avoidance action proceeds in favor of lenders); *In re Dura Auto. Sys., LLC*, *et al.*, Case No. 19-12378 (Bankr. D. Del.) [Dkt. No. 340] (granting DIP lenders superpriority liens on, *inter alia*, avoidance actions proceeds); *In re Avaya Inc.*, Case No. 17-10089 (Bankr. S.D.N.Y) [Dkt. No. 230] (same).

6. Similarly, the Committee attempts to label routine provisions often included in debtor-in-possession financings as "highly inappropriate"[7]—including a waiver the "equities of the case" exception under section 552(b) and a waiver of the right to surcharge the Prepetition Collateral or DIP Collateral under 506(c).[8] Again, the Committee fails to produce a single case arguing that the Debtors are not permitted to provide DIP Lenders these (typically uncontroversial) protections on account of new money. The DIP Lenders and Term Loan Secured Parties have not asked for these protections as some sort of special favor from the Debtors. These protections are reasonable, commercial inducements to allow use of prepetition cash collateral and lend $11.0 million of new money to the Debtors, and the Term Loan Secured Parties and DIP Lenders are reasonable in requiring these market terms.

7. The DIP Lenders and Term Loan Secured Parties recognize that the Committee has a role to play in these cases. However, the Committee's demands simply do not reflect the Debtors' economic realities. The timeline for these cases is relatively expeditious, but necessarily so, given that the Debtors are generating little revenue and have no access to the ABL Lender's cash collateral. The DIP Budget provides for the payment of reasonable costs incurred by the Committee's professionals – but again reflecting the fact that the DIP Lenders must fund all of those costs through the DIP Facility. In order to facilitate the Committee's investigation and other

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[7] Objection ¶ 30.

[8] *See, e.g., In re GGI Holdings, LLC, et al.*, Case No. 20-31318-hdh-11 (Bankr. N.D. Tex.) [Dkt. No. 214] (final DIP order granting waiver of 506(c) surcharge rights, 552(b) "equities of the case" exception, and marshaling doctrine); *In re SAS Healthcare, Inc., et al.*, Case No. 19-40401-MXM-11 (Bankr. N.D. Tex.) [Dkt. No. 116] (final DIP order granting waiver of 506(c) surcharge rights, equitable marshaling doctrine, or "any similar doctrine"); *In re Forest Park Medical Ctr. at Southlake, LLC*, Case No. 16-40273-rfn-11 (Bankr. N.D. Tex.) [Dkt. No. 96] (final DIP order granting waiver of 506(c) surcharge rights, 552(b) "equities of the case" exception, and marshaling doctrine); *In re Pioneer Energy Services Corp., et al.*, Case No. 20-31425 (Bankr. S.D. Tex.) [Dkt. No. 186] (same); *In re Legacy Reserves Inc., et al.*, Case No. 19-33395 (Bankr. S.D. Tex.) [Dkt. No. 255] (same); *In re Halcón Resources Corp., et al.*, Case No. 19-34446 (Bankr. S.D. Tex.) [Dkt. No. 222] (same); *In re Vanguard Nat. Res., Inc., et al.*, Case No. 19-31786 (Bankr. S.D. Tex.) [Dkt. No. 241] (same); *In re BeavEx Holding Corp., et al.*, Case No. 19-10316 (Bankr. D. Del.) [Dkt. No. 143] (same).

tasks, the Debtors and Term Loan Secured Parties have provided and will continue to provide requested information quickly.

8. However, the DIP Lenders cannot agree to blank-check funding for the Committee, with such funding backed by little or no additional collateral from the Debtors.[9] The DIP Lenders cannot agree to fund expensive forays by the Committee's professionals that offer no potential returns to the Debtors' stakeholders – such as "independently test[ing] the market for interest in the Debtors' assets" and "perform[ing] a valuation analysis." The practicality of such expensive exercises is nonexistent given the current state of the Debtors' scaled-down operations and approximately $370 million owed to the Term Loan Secured Parties.[10] The Debtors and the DIP Lenders have been, and will remain, in discussions with the Committee in an effort to resolve the Committee's issues with the proposed DIP Financing.[11] But in the meantime, the Committee has not proposed alternative financing or any other solutions to the challenges facing the Debtors; rather, the only alternative cited by the Committee is a liquidation.[12]

9. The Term Loan Secured Parties have no obligation to provide use of cash collateral. The DIP Lenders have no obligation to fund $11.0 million of new money. Their willingness to

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[9] Unsurprisingly, the Debtors have been unable to identify any potential lenders willing to provide financing on such terms, including any members of the Committee.

[10] Objection ¶ 23. The Committee has already demonstrated its willingness to waste estate resources with unnecessary professional fees, objecting broadly to Debtors' various motions to reject executory contracts [Dkt. Nos. 12-20] by complaining that, ". . . the Committee is unable to adequately determine at this juncture whether the relief sought in the Motions is in the best interests of the Debtors' estates." The Committee seems to believe it is in the best interests of the Debtors and the estates for it to expend professional fees double-checking whether the Debtors exercised proper business judgment in rejecting hundreds of contracts—a waste of this Court's time and, ultimately, the Debtors' estates; all while inviting additional, unnecessary administrative expenses if the Debtors delay in exercising their right to reject contracts.

[11] The Debtors, DIP Lenders, and Term Loan Secured Parties expect to file a proposed Final DIP Order in advance of the July 9 hearing on this matter that will incorporate a number of the Committee's formal and informal comments and requests.

[12] The Term Loans Secured Parties were owed approximately $370 million as of the Petition Date. In a liquidation, the Term Loan Secured Parties' deficiency claim is expected to greatly exceed the combined value of all other unsecured claims.

fund ***every aspect of these cases in full***, to the benefit of the Debtors' estates, is conditioned on the fair, reasonable, and commercial terms of the proposed Final DIP Order. The terms of the proposed Final DIP Order and the DIP Financing are in the Debtors' best interests and should be approved.

REPLY

10. Courts have articulated a three-part test to determine whether a debtor is entitled to financing pursuant to section 364(c) of the Bankruptcy Code. Specifically, courts look to whether: (a) the debtor is unable to obtain unsecured credit under section 364(b) of the Bankruptcy Code; (b) the credit transaction is necessary to preserve the assets of the estate; and (c) the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and proposed lenders.[13] The Debtors have met their burden with respect to these factors.[14]

11. The Committee asserts that the terms of the DIP Credit Agreement will be "harmful to the estate" and are designed to benefit only the DIP Lenders and Term Loan Lenders.[15] The record does not support this assertion.[16] As described above, borrowings approved under the Interim DIP Order were earmarked for a variety of creditors, including many of the Committee's constituents. Further, the DIP Budget contemplates approximately $4.5 million of "Operating Disbursements" during the course of these cases—all intended for parties other than the DIP Lenders.

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

[14] *See generally, Declaration of Gary Barton in Support of the Debtors' Chapter 11 Petitions and First Day Motions* [Dkt. No. 36] at ¶¶ 6-12; *see generally also* First Day Hearing Tr. 46:4-53:20.

[15] Objection ¶ 13.

[16] *See* First Day Hearing Tr. 53:17-20 (Mr. Gary Barton, Chief Financial Officer to the Debtors, describing the proposed DIP Facility as "in the best interests of the Debtors, their estates, and creditors").

12. As discussed further below, the provisions of the proposed Final DIP Order (as modified) are fair, reasonable, and customary, especially in light of the circumstances surrounding these cases, and the Term Loan Agent and DIP Agent respectfully request that the Final DIP Order be approved by the Court.

I. The Debtors May Grant Liens on Avoidance Actions and Avoidance Actions Proceeds to Secure DIP Financing

13. The Committee's Objection with respect to the granting of any DIP liens and superiority claims on the Avoidance Actions and Avoidance Actions Proceeds is entirely without merit. As an initial matter, the Objection portrays the liens on the Avoidance Actions and Avoidance Actions Proceeds as an "extraordinary" remedy. However, courts throughout the Fifth Circuit and throughout the country have routinely approved liens on avoidance actions and the proceeds of avoidance actions in favor of DIP lenders.[17] Here, as in other cases, the DIP Lenders require these liens as a necessary condition to extending the new money financing. This not an "extraordinary" feature.

14. Nor would granting the liens on Avoidance Actions or Avoidance Action Proceeds be inconsistent with the policy of equal distribution underpinning the Bankruptcy Code, as the Committee contends. To the contrary, the granting of liens on unencumbered assets is customary and necessary when, as here, the DIP Lenders are funding the entire case.

15. Further, the cases cited by the Committee are entirely distinguishable on the facts, and do not stand for the propositions for which they are cited. The Committee's reference to *In re*

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[17] *See In re Borden Dairy Co., et al.,* Bankr. D. Del. Case No. 20-10010, March 3, 2020 Tr. 28:4 – 16 (C.J. Sontchi) ("And committees often argue that since those actions are creatures of the Bankruptcy Code and are, by definition, post-petition, they are not subject to any preexisting liens, so they're available for unsecured creditors . . . I'm not sure I agree with that . . . My primary thought when I think about it is, whose money was it that you're clawing back? It's the collateral of your prepetition lenders. So, why shouldn't it be their collateral when it comes back into the estate, as opposed to available for unsecured creditors?"); *see also*, cases cited *supra* note 6.

Criswell,[18] is cited for the proposition 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.'"[19] However, this cite taken from *Criswell* was a direct quote from a House Report, which stated in full, "the *preference provisions* facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment *than others of his class* is required to disgorge so that all may share equally."[20] This quote suggests that equality of distribution means that no creditor shall take more than those in his class, or those similarly situated. One cannot argue that General Unsecured Creditors are entitled to the same distribution as the DIP Lenders, who sit in an entirely different class and who are explicitly elevated by the Bankruptcy Code to priority creditors.[21] Additionally, this quote was cited in *Criswell* in the context of the court's analysis of whether a third party representative could obtain a successful recovery that would benefit the debtor's estate and unsecured creditors *to impose standing on the representative to pursue the preference claim* – a point entirely irrelevant to the issue before the Court here.

16. Likewise, *In re Zedda*[22] is distinguishable, as it involved a question of whether the undoing of a simulated sale of real property was the "transfer of an interest of the debtor in property" as that phrase is used in §§ 547 and 548. Not only was this case inconsistent with

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[18] *Bank & Tr. v. Hensley* (*In re Criswell*), 102 F.3d 1411, 1414 (5th Cir. 1997).

[19] Objection ¶ 16.

[20] H.Rept. 95-595, supra note at 177-78 (emphasis added).

[21] *See* 11 U.S.C. § 364(c)(1).

[22] *Gaudet v. Babin* (*In re Zedda*), 103 F.3d 1195, 1203 (5th Cir. 1997)

Supreme Court and Fifth Circuit precedent, it largely involved issues of Louisiana state law, and has been widely distinguished within the Fifth Circuit and others.[23]

17. Finally, the Committee cites to *McFarland v. Leyh* (*In re Tex. Gen. Petrol. Corp*.), 52 F.3d 1330, 1335–36 (5th Cir. 1995) for the proposition that Avoidance Action Proceeds must be utilized to satisfy the claims of priority and general unsecured creditors before the debtor benefits.[24] However, *In re Texas General Petroleum Corp*. involved an appeal of a decision that a liquidating trustee had standing to assert a fraudulent conveyance action post-confirmation upon a finding that the confirmation order was ambiguous. The issue presented was whether a party other than a debtor in possession or trustee had *standing* to pursue a fraudulent transfer claim. The facts here are distinguishable, where the DIP Lenders are requesting a lien on Avoidance Action Proceeds in exchange for postpetition financing. This is not a question of standing under section 1123 to pursue these Avoidance Actions, but rather a fundamental right of the DIP Lenders to obtain a lien on the Avoidance Action Proceeds in exchange for funding these chapter 11 cases.

II. The Standard for Approval of the DIP Financing under the Bankruptcy Code Does Not Include a "Best Interest of the Creditors" Test

18. The Committee seems to contemplate that, if the DIP Financing disadvantages ***any*** party, it must fail. Courts have specifically overruled such objections, noting:

> Nowhere in the text of § 364(c) is there any mention of a best interests of the creditors test for financing. Obviously it would be in the general interests of prepetition unsecured creditors, as well as the debtor, to have an unencumbered estate. That is not always possible, however. . . . Congress had the ability to graft a 'best interests of the creditors test' onto § 364, as it has done in several other Bankruptcy Code provisions, but failed to do so.[25]

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[23] *See, e.g., In re Gutpelet*, 137 F.3d 748 (3d Cir. 1998); *Ingalls v. Beutel*, 2008 WL 11429308 (W.D. Tex. May 1, 2008); *In re Ballard*, 238 B.R. 610 (Bankr. M.D. La. 1999).

[24] Objection ¶ 16.

[25] *In re Catholic Bishop of Northern Alaska*, 2008 WL 8652366, *1 (Bankr. D. Alaska Nov. 26, 2008).

19. The Committee's position is entirely inconsistent with case law, which asks courts to consider whether the proposed financing agreement is in the best interest of the Debtors' ***estates***.[26] Moreover, if debtors were required to ensure that each and every unsecured creditor individually benefitted under a proposed debtor-in-possession financing, as the Committee seems to suggest, this requirement would prevent DIP lenders from ever obtaining liens on previously unencumbered assets; such new liens necessarily reduce the amount of prepetition unencumbered collateral immediately available to satisfy general unsecured creditors. Such a result is not only unsupported by case law, it is unambiguously incongruous with Bankruptcy Code § 364(c)(2).[27]

III. Waivers of the Section 552(b) "Equities of the Case" Exception, the Right to Surcharge Pursuant to Bankruptcy Code Section 506(c), and Marshaling are Appropriate and Customary for Debtor-In-Possession Facilities of this Type

20. The Committee also fails to substantiate its attack of the requested 552(b) and marshalling waivers and, in some instances, attempts to rely on authority that bears no resemblance to the requested 552(b) and marshalling waivers at issue. For example, the Committee mischaracterizes the court's decision in *TerreStar*, incorrectly stating that the court denied a 502(b) waiver request when, in fact, the court denied a motion for summary judgment on a 552(b) claim.[28]

21. Similarly, the cases the Committee cites relating to marshalling rights have a tenuous connection, at best, to the issue at hand. These cases address the question of whether a

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[26] *See Ames Dep't Stores*, 115 B.R. 37-39; *see also In re Vanguard Diversified, Inc.*, 31 B.R. 364, 365 (Bankr. E.D.N.Y. 1983) (approving DIP financing as reasonable when, as here, the debtor would in all likelihood cease operating and be forced to liquidate without it, leaving the unsecured creditors without any distribution from the debtor's estate).

[27] 11 U.S.C. § 362(c)(2) (". . . after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—secured by a lien on property of the estate that is not otherwise subject to a lien . . .").

[28] *Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re TerreStar Networks, Inc.)*, 457 B.R. 254, 270-73 (Bankr. S.D.N.Y. 2011).

committee has derivative standing to assert marshaling rights, not the question of whether the court can approve a debtor's waiver of such rights.

22. With respect to the 506(c) waiver, the Committee contends that courts have "routinely rejected similar surcharge waivers under the circumstances;" however, the Committee has failed to identify a single instance of a court denying such a waiver under equivalent, or even reasonably similar, circumstances. The Committee cites two hearing transcripts in which the court elected not to grant the 506(c) waiver, but fails to note that, in both cases, the court rejected the waiver in the context of a cash collateral motion, not a DIP financing motion.[29] Critically, the lenders seeking the surcharge waivers in those cases did not provide new money. As such, the circumstances under which those courts rejected the proposed waivers were decidedly different than the circumstances here.

23. Furthermore, neither of the two cited opinions support the Committee's position. The first opinion, *In re AFCO*, is entirely inapposite, as it does not address, or even involve, a 506(c) waiver.[30] The only other opinion cited, the Eight Circuit Bankruptcy Appellate Panel's decision in *Lockwood*, addresses the enforceability, rather than the approval, of a 506(c) waiver, and, moreover, tends to support this Court *approving* the waiver here.[31] Although the court in Lockwood struck down the 506(c) waiver at issue as unenforceable, the Committee's reliance on this case is misplaced for a number of reasons.[32] First, the Lockwood court pointedly clarified that

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[29] Transcript of Hearing, *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].

[30] *In re AFCO Enters., Inc.*, 35 B.R. 512 (Bankr. D. Utah 1983).

[31] *See Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.)*, 223 B.R. 170 (B.A.P. 8th Cir. 1998).

[32] *See id*.

it was "constrained to follow the Eighth Circuit's expansive holding on this issue" and openly disapproved of the result.[33] The *Lockwood* court noted that 506(c) waivers are "not only common in postpetition lending agreements, they are also common in cash collateral agreements" and expressed its concern that the Eighth Circuit's blanket disapproval of such waivers raised "new and significant obstacles for debtors in obtaining postpetition lending . . . [and] negotiat[ing] cash collateral agreements with their prepetition lenders."[34] Furthermore, the Eighth Circuit vacated the order that mandated the *Lockwood* result shortly thereafter, albeit on different grounds.[35]

24. Notwithstanding the Committee's hand-picked assortment of unusual, unreported, and incongruous postpetition financing rulings, the waivers contemplated in the proposed Final DIP Order—waiving the section 552(b) "equities of the case" exception; the 506(c) surcharge waiver; and the marshaling waiver—are ubiquitous in orders approving debtor-in-possession financing in the Fifth Circuit and throughout the country.[36] These provisions were critical to induce the DIP Lenders to provide the DIP Facility, and nothing about these cases dictates a need for the parties to stray from the great weight of precedent on these typically uncontroversial requests.

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[33] *Id.* at 176 n.7.

[34] *Id.*

[35] *In re Hen House Interstate, Inc.*, 177 F.3d 719, 720 (8th Cir. 1999), *aff'd sub nom. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (vacating the order on the grounds that the insurer seeking the 506(c) surcharge lacked standing).

[36] *See, e.g., In re GGI Holdings, LLC, et al.*, Case No. 20-31318-hdh-11 (Bankr. N.D. Tex.) [Dkt. No. 214] (final DIP order granting waiver of 506(c) surcharge rights, 552(b) "equities of the case" exception, and marshaling doctrine); *In re SAS Healthcare, Inc., et al.*, Case No. 19-40401-MXM-11 (Bankr. N.D. Tex.) [Dkt. No. 116] (final DIP order granting waiver of 506(c) surcharge rights, equitable marshaling doctrine, or "any similar doctrine"); *In re Forest Park Medical Ctr. at Southlake, LLC*, Case No. 16-40273-rfn-11 (Bankr. N.D. Tex.) [Dkt. No. 96] (final DIP order granting waiver of 506(c) surcharge rights, 552(b) "equities of the case" exception, and marshaling doctrine); *In re Pioneer Energy Services Corp., et al.*, Case No. 20-31425 (Bankr. S.D. Tex.) [Dkt. No. 186] (same); *In re Legacy Reserves Inc., et al.*, Case No. 19-33395 (Bankr. S.D. Tex.) [Dkt. No. 255] (same); *In re Halcón Resources Corp., et al.*, Case No. 19-34446 (Bankr. S.D. Tex.) [Dkt. No. 222] (same); *In re Vanguard Nat. Res., Inc., et al.*, Case No. 19-31786 (Bankr. S.D. Tex.) [Dkt. No. 241] (same); *In re BeavEx Holding Corp., et al.*, Case No. 19-10316 (Bankr. D. Del.) [Dkt. No. 143] (same).

IV. The Proposed Term Loan Secured Parties' Adequate Protection is Customary and Appropriate

25. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may not use, sell or lease collateral unless (A) "each entity that has an interest in such cash collateral consents" or (B) "the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section."[37] Generally, what constitutes adequate protection is decided on a case-by-case basis.[38]

26. The Term Loan Secured Parties have consented to the use of cash collateral subject to the relief requested in the Final DIP Order. The Adequate Protection Superpriority Claims, the Adequate Protection Liens, and the Adequate Protection Payments are customary and reasonable and similar to adequate protection packages approved by courts in this district and others in recent chapter 11 cases.[39] The Term Loan Secured Parties will not consent to use of cash collateral absent these customary and reasonable protections. As such, the Term Loan Secured Parties assert that the adequate protection is (a) fair and reasonable, (b) necessary to satisfy the requirements of sections 363(c)(2) and 363(e) of the Bankruptcy Code, and (c) in the best interests of the Debtors and their estates.

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[37] 11 U.S.C. § 363(c)(2).

[38] *See In re Columbia Gas Sys., Inc.*, No. 91-803, 1992 WL 79323, at *2 (Bankr. D. Del. Feb. 18, 1992); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) ("the determination of adequate protection is a fact-specific inquiry . . . left to the vagaries of each case"); *see also In re Realty Southwest Assocs.*, 140 B.R. 360, 366 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986) (the application of adequate protection "is left to the vagaries of each case, but its focus is protection of the secured creditor from diminution in the value of its collateral during the reorganization process") (citation omitted); *see also In re Cont'l Airlines Inc.*, 154 B.R. 176, 180–81 (Bankr. D. Del. 1993).

[39] *See, e.g., In re Gastar Exploration, Inc.*, No. 18-36057 (MI) (Bankr. S.D. Tex. Nov. 2, 2018) [Dkt. No. 76] (granting superpriority administrative claims, adequate protection replacement liens, adequate protection payments, and fees and expenses on an interim basis to the applicable prepetition secured creditors); *In re LINN Energy, LLC*, No. 16-60040 (DRJ) (Bankr. S.D. Tex. May 13, 2016) [Dkt. No. 89] (same); *In re Energy XXI LTD.*, No. 16-31928 (DRJ) (Bankr. S.D. Tex. Apr. 15, 2016) (same); *In re Goodrich Petrol. Corp.*, No. 16-31975 (MI) (Bankr. S.D. Tex. Apr. 18, 2016) [Dkt. No. 66] (same); *In re Midstates Petrol. Co.*, No. 16-32237 (DRJ) (Bankr. S.D. Tex. May 2, 2016), [Dkt. No. 73] (same).

CONCLUSION

WHEREFORE, the DIP Agent respectfully requests that the Court enter an order (i) approving the DIP Motion on a final basis; and (ii) granting such other and further relief as the Court deems just and proper.

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Dallas, Texas

/s/ Charles M. Persons

SIDLEY AUSTIN LLP
Charles M. Persons
State Bar No. 240604113
Juliana Hoffman
State Bar No. 24106103
2021 McKinney Avenue
Suite 2000
Dallas, TX 75201
Telephone: 214.981.3300
Facsimile: 214.981.3400
Email: cpersons@sidley.com
jhoffman@sidley.com

- *and* –

SIDLEY AUSTIN LLP
Dennis M. Twomey
(admitted *pro hac vice*)
One South Dearborn Street
Chicago, Illinois 60603
Telephone: 312.853.7000
Facsimile: 312.853.7036
Email: dtwomey@sidley.com

Julia Philips Roth
(*pro hac vice* pending)
555 West Fifth Street
Los Angeles, CA 90013
Telephone: 213.896.6000
Facsimile: 213.896.6600
Email: julia.roth@sidley.com