Docket #0191 Date Filed: 07/19/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

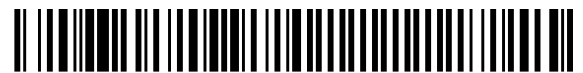
In re:	)	Chapter 11
PGX HOLDINGS, INC., *et al.*,[1]	)	Case No. 23-10718 (CTG)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 17, 70, 153**

REPLY OF DEBTORS IN SUPPORT OF MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING AND (B) UTILIZE CASH COLLATERAL, (II) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) MODIFYING THE AUTOMATIC STAY, (IV) SCHEDULING A FINAL HEARING, AND (V) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this reply (the "Reply") in support of the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Modifying the Automatic Stay, (IV) Scheduling A Final Hearing, and (V) Granting Related Relief* [Docket No. 17] (the "DIP Motion")[2] and in response to the *Preliminary Omnibus Objection and Reservation of Rights of Official Committee of Unsecured Creditors to the Debtors' DIP Financing Motion and Bidding Procedures Motion* [Docket No. 153] (the "Objection") filed by the official committee of

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PGX Holdings, Inc. (2510); Credit Repair UK, Inc. (4798); Credit.com, Inc. (1580); Creditrepair.com Holdings, Inc. (7536); Creditrepair.com, Inc. (7680); eFolks Holdings, Inc. (5213); eFolks, LLC (5256); John C. Heath, Attorney At Law PC (8362); Progrexion ASG, Inc. (5153); Progrexion Holdings, Inc. (7123); Progrexion IP, Inc. (5179); Progrexion Marketing, Inc. (5073); and Progrexion Teleservices, Inc. (5110). The location of the Debtors' service address for purposes of these chapter 11 cases is: 257 East 200 South, Suite 1200, Salt Lake City, Utah 84111.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the First Day Declaration (as defined herein), the DIP Motion, or the DIP Credit Agreement (as defined herein).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unsecured creditors (the "Committee"). In further support of the DIP Motion and this Reply, the Debtors state as follows: [3]

Preliminary Statement

1. The Debtors filed these chapter 11 cases on the heels of the entry of an adverse ruling in the CFPB Litigation which forced them to fundamentally change the way they operate their business, all while managing limited and rapidly dwindling liquidity. Against this backdrop, the Debtors entered into the DIP Facility to secure much needed new capital, the best—and ***only***—financing available to the Debtors. The Committee does not dispute that the Debtors have an existential need for postpetition financing. Nor could they. The DIP Facility is critical to sustain the Debtors' business, fund these chapter 11 cases, and provide the Debtors with their best chance to maximize value on behalf of all constituencies—including the Committee's. Without the liquidity provided by the DIP Facility, the Debtors will not have sufficient liquidity to operate their business or complete a value-maximizing marketing and sale process for the Debtors' assets. The Committee does not—and cannot—dispute this critical point. Rather, the Committee in its Objection attempts to draw attention to unfounded and baseless allegations that have absolutely no bearing on the relief currently requested from the Court.

2. Further, the Committee does not dispute that the DIP Facility resulted from a robust marketing process and hard-fought negotiations undertaken by the Debtors, with the assistance of their advisors, over the course of several weeks. As described in the Augustine Declaration, no other party offered the Debtors ***any*** alternative postpetition financing, much less such a facility on better economic terms. Against the background of arms-length, hard-fought negotiations with the

[3] A detailed description of the Debtors and their business, including the facts and circumstances giving rise to the Debtors' chapter 11 cases, is set forth in the *Declaration of Chad Wallace, Chief Executive Officer of PGX Holdings, Inc., in Support of Chapter 11 Filing and First Day Motions* (the "First Day Declaration"), filed contemporaneously herewith on June 4, 2023 (the "Petition Date") and incorporated by reference herein.

DIP Lenders over several weeks and the Debtors' undeniable need for postpetition financing to continue to support their business operations, the Debtors made the informed business decision that the DIP Facility, including its size, fees, milestones, and other terms and conditions, presented the best available alternative under the circumstances.

3. The Committee nevertheless objects to the DIP Facility, most prominently on the basis that while Lexington Law entered these cases with no secured debt on its balance sheet, the DIP Facility is guaranteed by Lexington Law and secured by Lexington Law's assets and includes a roll-up of certain prepetition obligations issued by the PGX Debtors. *See* Objection ¶¶ 5, 20.a. Contrary to the Committee's allegations, Lexington Law clearly benefits from the DIP Facility, and whether Lexington Law has any prepetition secured debt is irrelevant to the financial and operational support that the PGX Debtors and their lenders provided to the Lexington Law business prepetition, the postpetition liquidity needs of the business, and the reality of the commercial negotiations with the DIP Lenders. In fact, the Committee fails to note that while the proceeds of the DIP Facility will be used in accordance with the Budget to fund the PGX Debtors' cash needs, the DIP Facility provides direct benefits to Lexington Law by providing the necessary liquidity for the PGX Debtors to continue to support the Lexington Law business postpetition, including through continued, consensual deferral of amounts owed to the PGX Debtors under the Operating Agreements. Without such relief from the PGX Debtors and their lenders, Lexington Law would be unable to operate its business in the ordinary course

4. Additionally, as described in the First Day Declaration, the PGX Debtors' business is inextricably intertwined with that of Lexington Law. As such, the cash infusion provided by the DIP Lenders not only allows the PGX Debtors to support Lexington Law's business but also enables Lexington Law to continue generating the overwhelming majority of its revenues to the benefit of the PGX Debtors and the Lexington Law estate. Furthermore, throughout hard-fought

negotiations and given the importance of Lexington Law to the business of the PGX Debtors, the DIP Lenders made clear that they would not agree to provide the DIP Facility to the Debtors absent Lexington Law being an obligor on the DIP Obligations—whether it be new money or roll-up debt—and the Debtors granting liens on Lexington Law's assets. For these reasons, the Objection both ignores the reality of the Debtors' business as well as imperils the Debtors' ability to secure critical postpetition financing from the DIP Lenders—the ***only*** proposal the Debtors received—necessary to fund these chapter 11 cases. Simply put, faced with choosing between a comprehensive financing package that paved the way for the successful restructuring of the Debtors and liquidating, the Debtors chose the DIP Facility.

5. At the same time, the Debtors acknowledge that certain terms of the DIP Facility reflect the "give and take" of commercial negotiations and the reality of the current circumstances facing the Debtors in light of the ruling in the CFPB Litigation. But the specific provisions objected to by the Committee are both customary and appropriate for financings of this type, and well within the ambit of comparable financings.

6. While the Debtors and the Committee have actively engaged in arm's-length negotiations to resolve the issues set forth in the Objection, certain unresolved issues remain. Specifically, the Committee raises seven primary objections to the DIP Facility. The Committee argues that: (a) Lexington Law should not be an obligor nor have granted liens on its assets to secure the DIP Facility; (b) the DIP Liens and Adequate Protection Liens should not include liens on Avoidance Actions, D&O claims, commercial tort claims, and the proceeds thereof; (c) the DIP Documents should not be conditioned on a sale that's consistent with the Bidding Procedures; (d) the Challenge Period is unreasonable; (e) the commencement of a Challenge should not constitute an event of default under the DIP Documents; (f) Adequate Protection Payments should be subject to recharacterization and the calculation of Diminution in Value should exclude the payments to

Professionals and the Lenders; and (g) the Budget does not adequately fund the Committee's professionals.[4]

7. To the extent not resolved prior to the hearing, the Objection should be overruled. As set forth below, the terms of the DIP Facility and the Final Order balance the needs of the estates, the interests of its various creditor constituencies, and the demands of the DIP Lenders in order to fund the chapter 11 cases and a value-maximizing sale process and are reasonable under the circumstances. It remains undisputed that the Debtors require liquidity and that the DIP Facility is the product of an exhaustive marketing process and entered into only after vigorous, arm's-length negotiations. It also remains undisputed that no other party has offered ***any*** alternative to the DIP Facility. Accordingly, the Debtors submit that they exercised sound business judgment and that the DIP Facility provides significant benefits to their stakeholders. Therefore, the Objection should be overruled and the DIP Motion should be granted on a final basis.

Reply

I. The DIP Facility Provides Substantial Benefits, Reflects a Sound Exercise of the Debtors' Business Judgment, and Should be Approved.

8. The record is unchallenged that the Debtors (i) have a clear need for liquidity, (ii) broadly marketed the financing prepetition, and (iii) determined that the DIP Facility was the best and only available financing. "[C]ourts will almost always defer to the business judgement of a debtor in the selection of the lender." *See*, *e.g.*, *In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010). The Debtors' decision to seek approval of the DIP Facility on a final basis is a reasonable exercise of the Debtors' business judgment consistent with their fiduciary duties following a thorough process and extensive negotiations with the DIP Lenders. See DIP

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[4] The Committee also requested that the exculpation of the Prepetition Secured Parties for prepetition actions be removed from the Final Order. *See* Objection ¶ 20.f. The Debtors, the Prepetition Secured Lenders, and the DIP Lenders consented to making that change, and the Final Order was revised to exclude the exculpation of the Prepetition Secured Parties for prepetition actions. Final Order ¶ 32.

Motion ¶ 5. Courts are highly deferential to a debtor's reasonable business judgment when determining if entry into a financing agreement is permissible. *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990). "The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992). Indeed, courts "will uphold the board's decisions as long as they are attributable 'to any rational business purpose.'" *Id.* That is because "[c]ourts are loath to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence." *Id.*

A. The Prepetition Marketing Process was Fair and Reasonable.

9. As an initial matter, the prepetition marketing process to secure the DIP Financing was fair and reasonable. As set forth in the Augustine Declaration, the Debtors conducted a marketing process designed to identify parties that may be interested in providing postpetition financing. Specifically, in the weeks leading to the Petition Date, Greenhill reached out to 30 third-party financial institutions regarding such parties' interests in providing postpetition financing. *See* Augustine Decl. ¶ 9. While seven parties executed a non-disclosure agreement, none of those parties submitted an actionable proposal to the Debtors. *Id.* No party has come forward with financing in the weeks since the Petition Date and, today, the DIP Lenders are the Debtors' only source of proposed postpetition financing.

10. This outcome should not come as a surprise. Specifically, not only was the Debtors' liquidity runway limited, but all of the PGX Debtors' cash and material assets were encumbered by existing liens under the Prepetition Secured Loan Documents, and the Prepetition Secured Lenders indicated that they would not consent to a "priming" DIP financing provided by a third party.

See Augustine Decl. ¶ 8. As such, obtaining third-party postpetition financing was likely impossible given the timeline necessitated by the Debtors' dwindling liquidity and the Prepetition Secured Lenders' unwillingness to consent to a priming lien. Accordingly, any third-party proposal would likely have required the Debtors to engage in a priming fight or valuation dispute with their Prepetition Secured Lenders at the outset of these chapter 11 cases, which would have been a costly and likely unsuccessful endeavor. *Id.* Accordingly, the only available source of postpetition capital was a financing facility with the Debtors' Prepetition Secured Lenders. The Debtors' marketing process proved this out. *Id*.

11. Without the funds available from the DIP Facility and access to cash collateral, the Debtors would face immediate and irreparable harm, value-destructive interruption to their business, and the loss of support from important stakeholders on whom the Debtors' business depends. This, in turn, would hinder the Debtors' ability to maximize the value of their estates and derail the ongoing sale process. Accordingly, the Debtors submit that the terms of the DIP Facility are fair and reasonable, consistent with similar DIP financings approved in this district, represent the best (and only) available financing, and that entry into the DIP Facility is a reasonable exercise of the Debtors' business judgment.

II. The Committee's Objection Should be Overruled.

A. The Commencement of a Challenge As an Event of Default is Appropriate and Reasonable.

12. The Committee argues that the language in the DIP Documents providing that the commencement of a Challenge to the Prepetition Secured Loan Obligations constitutes an event of default undermines the purpose of the Challenge provisions and should be removed. Objection ¶ 20.e. While the Committee would prefer a Challenge not to impact the Debtors' access to liquidity, this specific provision is part of a comprehensive bargain that was carefully negotiated by the Debtors with the DIP Lenders and the Prepetition Secured Lenders, who agreed to provide DIP

Financing as part of a comprehensive restructuring solution that would include multiple sale processes, with the DIP Lenders serving as the stalking horse purchaser for the assets of the PGX Debtors using their credit bidding rights afforded to them under section 363(k) of the Bankruptcy Code. Removing events of default under the carefully-negotiated DIP Credit Agreement would strip the DIP Lenders of their negotiated rights in exchange for providing critical funding to these chapter 11 cases. Importantly, the Committee fails to cite to any authority that would support its request to strip the DIP Lenders from the benefit of their bargain. In fact, should that bargain be altered beyond the DIP Lenders' agreement, there is nothing that would preclude the DIP Lenders from refusing to fund the Debtors' cash needs in these chapter 11 cases or preclude the Prepetition Secured Lenders from withdrawing their consent to the use of cash collateral and to the priming of their prepetition debt. It would be unreasonable to expect the DIP Lenders to continue to fund these chapter 11 cases or the Prepetition Secured Lenders to continue to consent to the use of cash collateral and being primed while the Committee actively litigates against them. For these reasons, the Committee's Objection should be overruled.

B. The Budget is Reasonable and Adequate.

13. The Committee also argues that the funding of the Committee's professionals under the Budget should be increased to match that of the Debtors' professional's funding. *See* Objection ¶ 20.g. Specifically, the Committee takes issues with the fact that the funding allocated to its professionals is only "10% of the budgeted amount for the Debtors' professionals." *Id*.

14. The Committee's objections to the Budget should be overruled. As an initial matter, the Committee cannot in good faith place the funding needs of its professionals on an equal footing with the funding needs of the Debtors' where there is no contention that the scope of the Debtor professionals' duties in these cases far outweighs those of the Committee professionals. In any event, the Debtors and their advisors engaged in hard-fought, arms-length negotiations with the

DIP Lenders over the course of several weeks in order to obtain the best possible DIP Facility terms. The Budget contained within the DIP Facility represents the highest possible amounts that the Debtors could obtain, as the DIP Lenders were at that time and still remain unwilling to increase the size of the DIP Facility. Moreover, the Committee neglects to mention that the Debtors have *already* agreed to almost double the budgeted amount of fees allocated to Committee professionals from $625,000 to $1.25 million for the duration of these chapter 11 cases. Absent compelling circumstances, the Debtors should not be required to again increase the Committee's budget for no articulated reason.

15. Further, the Committee's comparison of the funding allocated to its three professionals with that allocated to the Debtors' nine professionals is inapposite and misleading. In reality, when comparing the Committee's Professional Fees for its lead restructuring counsel, local counsel, and financial advisors with the Debtors' comparable counterparts (and excluding the Debtors' other professionals for which the Committee has no appropriate respective counterparts), the Committee's Professional Fees included in the Budget, after their increase, now represent approximately 31 percent of the Debtors' Professional Fees and is wholly sufficient for the Committee to exercise its duties. The Budget was heavily negotiated and the terms of the Budget are required by the DIP Lenders in exchange for their agreement to provide the DIP Facility.

16. Further, the Budget allocated to the Committee is consistent with that approved in other comparable cases. *See In re First Guaranty Mortgage Corp.*, Case No. 22-10584 (CTG) (Bankr. D. Del. Dec. 21, 2022) (aggregate fees of professionals of the official committee of unsecured creditors amounting to approximately 17% of aggregate fees of comparable debtor professional counterparts); *In re Advantage Holdco, Inc.*, Case No. 20-11259 (JTD) (Bankr. D. Del. Mar. 2, 2022) (aggregate fees of professionals of the official committee of unsecured creditors amounting to approximately 24% of aggregate fees of comparable debtor professional

counterparts); *In re SHL Liquidation Indus. Inc.*, Case No. 20-12024 (LSS) (Bankr. D. Del. July 16, 2021) (aggregate fees of professionals of the official committee of unsecured creditors amounting to approximately 24% of aggregate fees of comparable debtor professional counterparts); *In re BBGI US, Inc.*, Case No. 20-11785 (CSS) (Bankr. D. Del. May 20, 2021) (aggregate fees of professionals of the official committee of unsecured creditors amounting to approximately 21% of aggregate fees of comparable debtor professional counterparts).[5] As such, the Budget is reasonable and adequate under the circumstances and the Committee's Objection should be overruled.

C. The Adequate Protection Package is Appropriate.

17. The Committee further argues that the payment of professional fees, along with other payments made to the Prepetition Secured Parties, should be excluded from the calculation of diminution in value under the Adequate Protection Obligations. *See* Objection ¶ 20.g. The Committee also argues that Prepetition Second Lien Lenders should not receive Adequate Protection given that Prepetition Second Lien Lenders are undersecured. *Id.* These objections are without merit.

18. ***First***, the accounting for the diminution in value resulting from the payment of professional fees and other payments made to lenders is a standard feature of comparable debtor-in-possession financing facilities approved in this district and others. *See, e.g., In re Lucky Bucks, LLC*, Case No. 23-10758 (KBO) (Bankr. D. Del. July 14, 2023) (final DIP order does not carve-out payment of professional fees or other payments made to lenders from scope of "diminution in value"); *In re Center for Autism And Related Disorders, LLC*, Case No. 23-90709 (DRJ) (Bankr. S.D. Tex. July 6, 2023) (same); *In re Plastiq Inc.*, Case No. 23-10671 (BLS) (Bankr. D. Del. June

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[5] This analysis was performed using professional fee figures listed in final fee applications of the respective professionals of the debtors and of the official committee of unsecured creditors filed in each of these cases.

22, 2023) (same); *In re SiO2 Medical Prods., Inc.*, Case No. 23-10366 (JTD) (Bankr. D. Del. Apr. 26, 2023) (same). Notably, the Committee fails to cite a single precedent in support of its position nor is the Committee able to come up with any rationale for such exclusion. This is because there is no difference between the diminution in value of the cash collateral resulting from the payment of professional fees and payments made to lenders under relevant court orders and such diminution in value resulting from any other payment. The result is the same: the use and diminution of the Prepetition Secured Lenders' cash collateral.

19. ***Second***, Prospect Capital Corporation ("Prospect Capital"), as the only Prepetition Second Lien Lender, is also a Prepetition First Lien Lender and, as such, Prospect Capital is at least entitled to receive Adequate Protection Payments in that capacity.

20. ***Third***, despite the Committee's dissatisfaction with the proposed adequate protection package, Adequate Protection Claims will only apply to the extent of diminution in value of the Prepetition Secured Lenders' collateral, which diminution will have to be proven prior to allowance of any such claims.

21. Finally, the Committee requested that Adequate Protection Payments be subject to recharacterization as principal. *See* Objection ¶ 20.g. However, the Committee fails to provide any legal basis to support of its allegation and, as such, fails to meet its burden.

D. The DIP Document Are Appropriately Conditioned on a Sale Consistent with the Bidding Procedures.

22. The Committee also objects to the provisions of the DIP Documents requiring that any sale be conducted in accordance with the Bidding Procedures and providing that an event of default occurs if a sale does not satisfy the DIP Obligations. *See* Objection ¶ 20.c. As a preliminary matter, neither the Bankruptcy Code nor any case law prohibits a secured creditor from conditioning a debtor's financing or use of cash collateral on the achievement of milestones

relating to the sale of assets or the confirmation of a chapter 11 plan. In fact, milestones are designed to minimize the stay in bankruptcy and are thus consistent with the Bankruptcy Code's goals. *See Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 137 (3d Cir. 1982) ("To realize the goals of Chapter 11, a reorganization must be accomplished quickly and efficiently."); *Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co.*, 265 U.S. 269, 272 (1924) ("The bankrupt is impelled by vital interests, not only to make the offer promptly, but to expedite confirmation."). It is common practice for milestones to be tied to cash collateral or debtor in possession financing orders. *See, e.g.*, *In re SiO2 Medical Prods., Inc.*, No. 23-10366 (JTD) (Bankr. D. Del. Apr. 26, 2023); *In re Nielsen & Bainbridge, LLC*, No. 23-90071 (DRJ) (Bankr. S.D. Tex. Mar. 6, 2023); *In re Pipeline Health System, LLC*, No. 22-90291 (MI) (Bankr. S.D. Tex. Nov. 16, 2022); *In re Town Sports Int'l, LLC*, No. 20-12168 (CSS) (Bankr. D. Del. Oct. 16, 2020); *In re Charming Charlie LLC*, No. 17-12906 (CSS) (Bankr. D. Del. Jan. 11, 2018).

23. The Debtors and the DIP Lenders have negotiated the Bidding Procedures and the milestones as part of and in connection with the DIP Financing designed to benefit the Debtors, their estates, and their creditors through a value maximizing sale process. A key aspect of the DIP Lenders agreeing to provide the DIP Financing is that the Debtors must conduct a sale in accordance with the Bidding Procedures, which contemplate the sales of the assets of both the PGX Debtors and Lexington Law, in furtherance of providing stakeholders with a value-maximizing resolution to these cases. Although the Committee would prefer to treat them separately, the sale of the PGX Debtors' assets is interdependent with the sale of Lexington Law's assets. For these reasons, ensuring that both sales proceed in parallel was a critical inducement to obtain the DIP Lenders and the Prepetition Secured Lenders' consent to the DIP Financing and use of cash collateral, as well as entry into the Restructuring Support Agreement and the Stalking Horse APA for the PGX assets.

E. The Liens and Claims on Avoidance Actions, D&O Claims, and Commercial Tort Claims and Proceeds Thereof are Appropriate.

24. The Objection asserts that the grant of liens and claims on the avoidance actions, D&O claims, and commercial torts claims and proceeds thereof (collectively, "Causes of Action") strips value from general unsecured creditors. *See* Objection ¶ 20.b. The Objection should be overruled.

25. As a threshold matter, unsecured creditors do not hold exclusive rights to the proceeds of Causes of Action. The law is clear that proceeds of avoidance actions are property of the Debtors' estates under section 541(a)(3) of the Bankruptcy Code. *See* 11 U.S.C. § 541(a)(3), As with any estate asset, the Debtors may grant DIP or adequate protection liens on those assets to the extent necessary to obtain financing or the use of cash collateral. *See* 11 U.S.C. §§ 361(2) ("[S]uch adequate protection may be provided by . . . (2) providing . . . an additional or replacement lien[.]"), 364(c)(2) ("If the trustee is unable to obtain unsecured credit . . ., 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 . . . . "); *see also In re AppliedTheory Corp.*, 2008 WL 1869770, at *1 (Bankr. S.D.N.Y. Apr. 24, 2008) ("Of course those assets started out unencumbered. But those assets can thereafter be encumbered (or made available to satisfy superpriority claims), if necessary to provide adequate protection. That's expressly authorized under section 361(2)."). Moreover, liens on the proceeds of avoidance actions are particularly appropriate in cases such as these where adequate protection liens on unencumbered assets may prove insufficient. *See In re Metaldyne Corp.*, 2009 WL 2883045, at *4 (Bankr. S.D.N.Y. Jun. 23, 2009) (approving grant of lien on proceeds of avoidance actions where, among other things, "[t]he Debtors have only limited unencumbered assets upon which replacement liens can be provided").

26. There is no requirement that proceeds of avoidance actions be reserved for unsecured creditors. To the contrary, the proceeds of avoidance actions are for the benefit of the estate. *See* 11 U.S.C. §§ 550(a) (preserving recoveries on avoidance actions "for the benefit of the estate"), 541(a)(3), 541(a)(4). Indeed, the Seventh Circuit has stated:

> Lest this way of resolving the issue be taken to assume that § 550(a) requires that some benefit flow to unsecured creditors, we add that the statute does not say this. Section 550(a) speaks of benefit to the estate—which in bankruptcy parlance denotes the set of all potentially interested parties—rather than to any particular class of creditors.

Mellon Bank, N.A. v. Dick Corp., 351 F.3d 290, 293 (7th Cir. 2003); *In re Fleming Packaging Corp.*, 2007 WL 4556985, at *6 (Bankr. C.D. Ill. 2007) ("This Court does not consider Section 550(a)'s 'for the benefit of the estate' phraseology as a statutory requirement that the unsecured creditors benefit directly from the recovery of an avoided transfer . . . ."); *see also In re Enserv Co.*, 64 B.R. 519, 521 (B.A.P. 9th Cir. 1986) ("Section 547 specifically gives the debtor in possession the right to bring an action to recover preferences. This is a decision subject to its discretion."); *Cambridge Realty West, L.L.C. v. NOP, L.L.C.*, 2010 WL 4668436, (Bankr. E.D. La. Nov. 8, 2010) ("[T]he fact that [the debtor] will then be compelled to distribute [avoidance action recoveries] according to 'contractual and statutory entitlements' does not mean that the original recovery does not benefit the estate."); *In re C.W. Min. Co.*, 477 B.R. 176, 189 (B.A.P. 10th Cir. 2012) (noting in the context of section 550(a) actions, that "[t]his Court has specifically rejected the position that 'benefit of the estate' means 'payment to general unsecured creditors' and has held that 'benefit of the estate' should be interpreted broadly.").[6]

[6] The Committee cites to *Bethlehem Steel Corp. v. Moran Towing Corp*. (*In re Bethlehem Steel Corp*.), 390 B.R. 784, 786-87 (Bankr. S.D.N.Y. 2008), for the proposition that "[i]t is well established that avoidance actions should be preserved for the benefit of unsecured creditors." Objection ¶ 20.b, n. 10. However, *Bethlehem Steel* did not hold as much; rather, that case simply explained that fraudulent transfer claims are asserted "for the benefit of the bankrupt's creditors," not the bankruptcy *unsecured* creditors. Additionally, the *Bethlehem Steel* court's assertion that "[a]voidance actions . . . never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession" should not be mistaken to imply, as the Committee suggests, that "[a]voidance actions . . . are not truly property of a debtor's estate, but instead are rights the estate holds in trust for

27. The grant of liens on the avoidance actions and proceeds thereof is part of a comprehensive financing package, inclusive of nearly $23 million of new money, that was heavily negotiated by the Debtors, the DIP Lenders, and the Prepetition Secured Lenders. The Debtors would be prejudiced and irreparably harmed without access to the DIP Facility or the consensual use of cash collateral. If the Prepetition Secured Lenders do not receive sufficient adequate protection, they are entitled to seek and obtain relief from the automatic stay (*e.g.*, to foreclose on their collateral). *See* 11 U.S.C. § 362(d)(1) ("[T]he court shall grant relief from the stay . . . (1) for cause, including the lack of adequate protection of an interest in property of such party in interest."). Were the Prepetition Secured Lenders to exercise remedies, such actions would undoubtedly destroy value in these chapter 11 cases that could otherwise be used to drive recoveries for stakeholders.

28. Additionally, liens on the proceeds of avoidance actions are routinely granted by courts in this district. *See, e.g.*, *In re SiO2 Medical Prods., Inc.*, No. 23-10366 (JTD) (Bankr. D. Del. Apr. 26, 2023); *In re Carestream Health, Inc.*, No-10778 (JKS) (Bankr. D. Del. Sept. 27, 2022); *In re Akorn, Inc.*, No. 20-11177 (KBO) (Bankr. D. Del. Jun. 15, 2020); *In re Charming Charlie LLC*, Case No. 19-11534 (Bankr. D. Del. Aug. 14, 2019); *In re Blackhawk Mining LLC*, Case No. 19-11595 (LSS) (Bankr. D. Del. Aug. 13, 2019); *In re RUI Holding Corp.*, Case No. 19-11509 (JTD) (Bankr. D. Del. Aug. 7, 2019).

the benefit of creditors" Objection ¶ 20.b, n. 10. Rather, the *Bethlehem Steel* court held that avoidance actions were not claims of the debtors to make clear that preference avoidance claims asserted by a liquidating trust established under the debtor's confirmed chapter 11 plan were not derivative of any claims that debtor possessed on the petition date, but were statutory claims that could be pursued only by trustee, debtor-in-possession, or other estate representative, such that preference claims were not subject to arbitration pursuant to the debtor's prepetition contracts with creditors that received the allegedly preferential transfers, thereby denying the movant's motion to compel arbitration. *Bethlehem Steel*, 390 at 791-92.

III. The Challenge Period is Appropriate Under the Circumstances.

29. The Committee's sixty-day challenge period under the Final Order is appropriate under the circumstances of this chapter 11 case. In the Objection, the Committee argues that this timeframe is unreasonable, although the Committee fails to indicate how long of a challenge period the Committee would deem reasonable. *See* Objection ¶ 20.d.

30. The current challenge period for the Committee is sixty days from the entry of the Interim Order. Given the Debtors' limited liquidity, the simplicity of the Debtors' existing capital structure and the Debtors' need to move quickly and efficiently through these chapter 11 cases, the current challenge period is reasonable. Specifically, the Prepetition Secured Lenders' consent to the use of cash collateral and to the priming of their prepetition debt is exclusively tied to the Debtors' proposed sale process and to the Prepetition Secured Lenders' ability to credit bid their prepetition debt with certainty at the time of the auction. As such, if the Prepetition Secured Lenders' credit bid is deemed the highest or otherwise best offer pursuant to the Bidding Procedures, the Prepetition Secured Lenders need to ascertain whether the Committee intends to bring a Challenge prior to the Auction and, if not, know that the claims underlying the Prepetition Secured Lenders' credit bid will not be subject to a Challenge following the auction. For that reason, it is critical that the Challenge Period has run in advance of the Auction. Importantly, the Final Order makes clear that if the Committee files a standing motion with the sixty-day timeline, such a filing will toll the Challenge Deadline.

31. In light of the foregoing, the Debtors submit that the Challenge Period is reasonable and appropriate as proposed, and that the Committee's Objection should be overruled.

Conclusion

32. For all of the foregoing reasons and the reasons set forth in the DIP Motion, the DIP Financing on the terms set forth in the proposed Final Order is appropriate, and the Court should overrule the Objection and enter the revised proposed Final Order.

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WHEREFORE, for the reasons discussed herein, the Debtor respectfully requests that the Court deny the Objection and approve the DIP Facility and related relief on a final basis.

Dated: July 19, 2023
Wilmington, Delaware

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