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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re:	)	Chapter 11
ENVIVA INC., *et al*.,	)	No. 24 – 10453 (BFK)
Debtors.[1]	)	(Jointly Administered)

[1] Due to the large number of Debtors in these jointly administered chapter 11 cases, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list may be obtained on the website of the Debtors' claims and noticing agent at www.kccllc.net/enviva. The location of the Debtors' corporate headquarters is: 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814.

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DEBTORS' REPLY TO THE OBJECTIONS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) GRANTING RELATED RELIEF

Enviva Inc. and its Debtor[2] subsidiaries (collectively, the "***Debtors***" or the "***Company***") hereby file this reply ("***Reply***") in further support of the Debtors' DIP Motion[3] and in response to the Objection[4] and the Untimely Supplemental Objection[5] filed by the Official Committee of Unsecured Creditors (the "***Committee***"). In support of this Reply, the Debtors respectfully state as follows:

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[2] Capitalized terms not otherwise defined herein shall, as applicable, share the meanings ascribed to them in the DIP Motion or the *Declaration of Glenn Nunziata in Support of Chapter 11 Petitions* [Docket No. 27] (the "***Nunziata Decl.***"), as applicable. For the avoidance of doubt, the Nunziata Decl. is incorporated herein by reference.

[3] The "***DIP Motion***" means the Debtors' *Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 24].

[4] The "***Objection***" means the *Preliminary Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 375].

[5] The "***Untimely Supplemental Objection***" means the *Supplemental Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 390]. The parties agreed to—and this Court ordered—a deadline of 10:00 a.m. (Eastern Time) on April 29, 2024, for any supplemental objection by the Committee. Docket No. 368 ¶ 3. The Committee not only failed to comply with the deadline, but also failed to request an extension or even provide an unfiled courtesy copy of any forthcoming supplemental objection to Debtors' counsel until nearly five hours after the deadline, and only then in response to an e-mail from Debtors' counsel objecting to the untimeliness. This delay was material and prejudicial because the Debtors had only 27 hours of turnaround time between the supplemental objection deadline and their own agreed—and equally Court-ordered—deadline for this Reply. *See id.* ¶ 4. Respectfully, the Court should enter an order in advance of the hearing finding all new arguments in the Untimely Supplemental Objection waived so that the parties can streamline their focus.

PRELIMINARY STATEMENT

1. The DIP Financing is a key element of a comprehensive restructuring that affords the Debtors a path to exit these chapter 11 cases with a right-sized capital structure, and this Court should approve it. In the period leading up to these chapter 11 cases, the Debtors engaged in extensive negotiations with multiple parties concerning both in-court and out-of-court restructuring solutions. In connection with that process, the Debtors and Ad Hoc Group subsequently agreed to, among other things, the DIP Financing and the consensual use of Cash Collateral, each as embodied in the Revised Final Order (as defined herein). Final approval of the DIP Financing provides the Debtors access to the liquidity necessary for them to maintain their business operations and fund critical business initiatives during these chapter 11 cases, and represents a threshold step toward a value-maximizing restructuring. More importantly at this stage, the DIP Financing emerged as ***the best*** financing available after a competitive process—and, to date, remains ***the only actionable*** financing available to the Debtors.

2. Despite the absence of any credible alternative, the Objection seeks, from the vantage of hindsight, to exercise a line-item veto over several material terms of the DIP Financing and the RSA, each of which was heavily negotiated to deliver a comprehensive agreement that will maximize value for the benefit of all the Debtors' stakeholders. In this exercise, the Objection careens from the confident assertion, on the one hand, that "[t]he RSA provides, at best, ***a bare framework*** for the Debtors' ultimate reorganization," *see* Obj. ¶ 2 (emphasis added), to an equally confident assertion, on the other, that the same RSA is "inappropriately linked" to a DIP Financing that the Committee attacks as a *sub rosa* plan. *See id*. ¶¶ 2, 39–40.

3. Neither of these inconsistent claims is true. The RSA attracted overwhelming support from across the Company's capital structure, and that support, in turn, promises to return tangible benefits to the Debtors' many stakeholders, including unsecured creditors and employees.

The RSA purposefully leaves many plan terms open for future negotiation because, as the Objection recognizes, "[t]he Debtors intend to conduct an operational restructuring of its [*sic*] contractual arrangements and develop a comprehensive business plan . . . but that work remains in progress." *See* Obj. ¶ 45. Over the course of these chapter 11 cases, the Debtors intend to pursue contract renegotiation (raise-the-bridge or "***RTB***") and related efforts to effect a value-maximizing restructuring that will benefit all of the Debtors' stakeholders, including unsecured creditors. *See* Nunziata Decl. ¶¶ 112–16. These efforts, of course, require time and liquidity—two precious commodities almost certainly unavailable to the Company in the absence of ***both*** the DIP Financing ***and*** the support embodied in the RSA.

4. These important efforts also require openness to future developments. For example, the DIP Facility Agreement contemplates that DIP Creditors may participate in a future equity rights offering, the terms of which are subject to further approval from the Court (the "***Tranche A Participation Election***"). But many terms of the Tranche A Participation Election and any potential discount to plan value remain undetermined at this stage. *See, e.g.*, Obj. ¶ 4. In criticizing that flexibility, the Objection again seeks to have things both ways—on the one hand, complaining that various aspects of the rights offering are "undetermined," *see id.* ¶¶ 4, 41, while simultaneously failing to recognize, on the other, that performing a valuation and fixing the terms of a rights offering or equitization at this early stage, before taking into account any of the expected operational and balance-sheet improvements including RTB, would only increase the risk of undervaluing the Company to the detriment of its stakeholders, including its unsecured creditors. *See id.* ¶ 34.

5. Indeed, the Debtors and the Ad Hoc Group incorporated the requisite degree of flexibility into the Tranche A Participation Election precisely to avoid the "hardwir[ing]" about which the Objection complains. *See id.* ¶ 4. Nor does participation by eligible shareholders of the

Company (or their designees) in the Company Allocated Portion of the DIP Financing violate the absolute priority rule, as posited by the Objection. *See id.* ¶¶ 46–49. Hornbook law holds that confirmation requirements such as the absolute priority rule do not apply to postpetition financings like the DIP Financing. And, in any event, the proposal advanced by the Objection that the Company Allocated Portion be struck in favor of additional commitments from the Ad Hoc Group will not impact creditor recoveries, let alone unsecured creditor recoveries; it would instead simply shift economics from one set of DIP Creditors to another. The DIP Facility Agreement, the RSA, and associated documents were all negotiated at arm's length and entered into as an exercise of the Debtors' sound business judgment. The DIP Financing is fair, and the process through which agreement was reached was also fair. The Board took appropriate safeguards, including the formation of a Transaction Committee and approval solely by disinterested directors, to guarantee as much.

6. Since filing these chapter 11 cases, together with the Ad Hoc Group, the Debtors have worked constructively to present a revised form of Final Order to be filed in advance of the hearing (the "***Revised Final Order***") that resolves ***all informal comments and other objections received in respect of the DIP Motion other than those preserved by the Objection***. Together with the Ad Hoc Group, the Debtors have likewise negotiated in good faith with the Committee to address its concerns, conceding several material points in the Revised Final Order. These changes include the addition of an "overbid" mechanic to the RSA to allow for further postpetition marketing, clarification around the process by which the Debtors could seek to refinance the DIP Loans and Notes in their entirety without automatically triggering an Event of Default under the DIP Facility Agreement, extension of the Challenge Period under the Revised Final Order, increases to the Post-Carve Out Trigger Notice Cap, and some limitations on the marshaling waiver.

A table that includes concessions not directly addressed in this Reply is attached as **Exhibit A** hereto.

7. It is time to stand behind the Debtors' efforts to prosecute these chapter 11 cases and complete the operational restructuring that will preserve and maximize value for all the Company's constituents. However imperfect the Committee may argue that the DIP Financing remains, it still represents the ***best and only actionable financing available to the Debtors***. As the Objection concedes in its very first sentence, "the Debtors have a legitimate need to access postpetition financing." Obj. ¶ 1. Absent access to the DIP Financing, the Debtors would lack the wherewithal to meet their near-term obligations, let alone pursue the value-maximizing trajectory contemplated by the RSA. Such a scenario would almost certainly prove value-destructive to all stakeholders, including unsecured creditors, and would impose a profound burden on the Company and its more than 1,200 employees.

RELEVANT BACKGROUND

8. As is further detailed in the Nunziata Decl., the Tempke Decl., and the Rajcevich Decl.,[6] the Company encountered significant challenges to liquidity during the course of late 2023 and—in an effort to address these challenges—sought bridge financing and other potential out-of-court solutions to address its funded indebtedness and provide breathing room to complete its RTB process. *See, e.g.*, Nunziata Decl. ¶¶ 112–18, 124. Through a process that involved soliciting both

[6] The "***Tempke Decl.***" is the *Declaration of Christian Tempke 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) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 29] and the "***Rajcevich Decl.***" is the *Declaration of Mark Rajcevich 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) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, and (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 30]. For the avoidance of doubt, the Tempke Decl. and the Rajcevich Decl. are each incorporated by reference herein.

in-court and out-of-court restructuring proposals, the Company was able to leverage competitive tension among potential sources of financing to secure the best proposals it could, given the circumstances. *See* Tempke Decl. ¶¶ 15–16, 18–20, 30–32. The Ad Hoc Group's proposal emerged as value-maximizing and the most viable financing package available to the Debtors.

9. Although the Company initially sought to pursue an out-of-court restructuring of the Prepetition Funded Debt, *see* Tempke Decl. ¶ 13, the confluence of several competing interests precluded a straightforward out-of-court solution. While the Advisors ultimately engaged in discussions with more than 30 parties, 20 of whom executed NDAs, *see* Tempke Decl. ¶ 13, none of the five proposals received during this initial process adequately addressed the full range of the Debtors' needs, given both the liquidity constraints under which the Company was then operating and its anticipated defaults within the capital structure. *See* Tempke Decl. ¶ 13. At various points throughout this process, the Company approached members of the Committee with opportunities to provide capital or otherwise sponsor a restructuring; however, the Debtors have received no such proposals.

10. As the Company examined possible comprehensive solutions in January 2024, including a potential refinancing of the Prepetition Senior Secured Facility in its entirety, the Ad Hoc Group expressed an interest in negotiating a holistic deleveraging transaction to be implemented as part of an in-court restructuring. Tempke Decl. ¶ 16. At the same time, the Company continued to negotiate a series of out-of-court transaction proposals from a consortium of outside strategic and debt investors (the "***Consortium***"). Tempke Decl. ¶ 19. Against this backdrop, the Company negotiated with the Ad Hoc Group on behalf of all its stakeholders to ensure that the DIP Financing would address the incentives created by this unusual dynamic. As a result, among other favorable terms, every proposal received from the Ad Hoc Group (beginning with its

first proposal in January 2024) contemplated some recovery for existing equity holders. This made sense in light of the negotiating dynamics where the Company was pursuing in-court and out-of-court paths in parallel.

11. The Company began this process with a host of baseline corporate governance procedures and protocols that the market would expect of a public company.[7] It held regular Board meetings, consulted with the Advisors and, as negotiations moved into final stages, formed a two-member committee of the Board composed of directors who had affirmatively disclaimed any interest in participating in the DIP Financing (the "***Transaction Committee***"), Messrs. Glenn Nunziata and Ralph Alexander. The Transaction Committee was tasked with, among other things, reviewing and evaluating any proposed DIP Financing and providing recommendations to the Board. These efforts complemented the ongoing work of a separate finance committee that had been formed several months earlier to make recommendations in respect of the Company's financial decision-making to the majority-independent Board.

12. Moreover, any members of the Board that did not affirmatively disclaim interest in participating in the DIP Financing recused themselves from voting on matters related thereto. All these safeguards helped to ensure that the Board engaged in appropriate conversations on the financing approach from the Company's perspective, particularly given the uncertainty in the

[7] Enviva Inc. is a public company listed on the NYSE. Enviva is in compliance with NYSE listing requirements and rules mandating that independent directors constitute a majority of the Board. *See* Enviva Inc. Proxy Statement for 2023 Annual Meeting of Stockholders held on June 15, 2023, at 23, *available at*: https://www.sec.gov/ix?doc=/Archives/edgar/data/1592057/000110465923053650/tm2311675d4_def14a.htm. Further, Enviva Inc.'s Code of Business Conduct provides that: "Any director or officer having a possible conflict of interest in any proposed transaction or arrangement is not permitted to use his or her personal influence on the matter being considered by the Board or, in the case of a director, to vote on such matter. Any director having a possible conflict of interest is not counted in determining the quorum for consideration of and vote on the particular matter, and any director or officer having a possible conflict of interest must be excused from any meeting of the Board during the discussion of and vote on the particular matter." Enviva Inc. Code of Business Conduct and Ethics, at 5 (Effective Date: Nov. 1, 2023), *available at:* https://s28.q4cdn.com/898203682/files/doc_downloads/governance/2023/11/code-of-business-conduct-and-ethics-approved-11-01-2023.pdf. .

potential syndication opportunity made available as part of an in-court process. Indeed, each of the Board, the finance committee, and the Transaction Committee was well-informed as to the material facts and circumstances concerning potential out-of-court and in-court restructuring and financing transactions throughout the process that led to the Petition Date.

13. After several months of extensive negotiations, the Debtors and the Ad Hoc Group reached agreement on the terms of a junior debtor-in-possession facility that addressed the Company's liquidity and capital structure challenges, on the one hand, and mitigated the risks posed to the Ad Hoc Group by lending into a distressed entity, on the other. Tempke Decl. ¶¶ 19–20. As is further detailed in the DIP Motion, the DIP Financing contemplates, among other things, the Tranche A Participation Election (subject to further order of the Court) and the Syndication Procedures. *See* DIP Motion ¶¶ 60–64.

14. The Company requested that the DIP Creditors provide a debtor-in-possession credit facility in an aggregate principal amount of up to $500 million. *See* DIP Motion Ex. B (DIP Facility Agreement) ¶ B. The Company and the Advisors worked extensively to ensure appropriate size and scope for the DIP Financing. *See* Rajcevich Decl. ¶¶ 13–15. This exercise required the Company to account for strategic priorities, including the cost-of-completion funding for the Epes Plant. *See* Nunziata Decl. ¶ 30. As is further detailed in the Epes 9019 Motion,[8] the Company had, on account of a dispute with the Epes Green Bonds Trustee, prepared for these chapter 11 cases as if it would not have the ability to access certain funds held by the Epes Green Bonds Trustee that could—under different circumstances—otherwise support construction of the Epes Plant. The Company had to account for the costs of operating during these chapter 11 cases, the DIP Fees

[8] The "***Epes 9019 Motion***" is the *Motion of Debtors for Entry of an Order (I) Approving the Epes Green Bonds Settlement under Federal Rule of Bankruptcy Procedure 9019 and (II) Granting Related Relief* [Docket No. 346].

and Expenses, and the Adequate Protection Obligations, terms that were heavily negotiated with the DIP Secured Parties, the Prepetition Secured Parties, and other parties, as applicable.

15. The Court entered the Interim Order on March 15, 2024, *see* Docket No. 103, three days after the Petition Date. Consistent with their charge under the Interim Order, the Debtors proceeded in accordance with the Syndication Procedures in respect of the Company Allocated Portion during the weeks that followed. Ultimately, participation in the Company Allocated Portion of the DIP Financing was oversubscribed.

16. The Debtors received informal comments and limited objections from several parties in addition to the Committee in respect of the DIP Financing and worked constructively to resolve all of these issues in advance of the hearing. The below chart highlights these efforts:

Party	Issue	Resolution
Caterpillar Financial Services Corporation ("*Caterpillar*")	Caterpillar sought language in the Final Order clarifying that the underlying property of 79 leases to which the Debtors are party would not be encumbered by DIP Liens.	The Debtors added agreed language to this effect to the Final Order.
John Hancock Life Insurance Company (U.S.A.) ("*John Hancock*")	John Hancock sought language in the Final Order clarifying that neither Enviva Wilmington Holdings, LLC nor Enviva Pellets Hamlet, LLC (together, the "***Non-Debtor Wilmington Entities***") had pledged any DIP Collateral and were not "subsidiaries" of the Company as defined in the DIP Facility Agreement.	The Debtors (i) added agreed language to the Revised Final Order clarifying that the Non-Debtor Wilmington Entities pledged any DIP Collateral, (ii) amended the definition of "subsidiary" in the DIP Facility Agreement, and (iii) acknowledged that the Debtors, the DIP Credit Parties, and John Hancock each reserve all of their respective rights regarding the Non-Debtor Wilmington Entities' status as "subsidiaries" under the DIP Facility Agreement prior to the amendment of such term.
Lenders of NMTC Loans[9] ("*NMTC Participants*")	The NMTC Participants sought, among other things, stipulations and protections, including adequate protection, that were similar to those the Interim Order contained for the Prepetition Secured Parties.	The added agreed language to the Revised Final Order that provided the requested stipulations and adequate protection.

[9] While the Debtors and the NMTC Participants have reached agreement regarding the necessary revisions to the Revised Final Order, this agreement remains subject to documenting the agreed consensus in the Revised Final Order.

17. Although the Objection now comprises the sole timely objection in respect of the DIP Motion, the Debtors, together with the Ad Hoc Group, have worked constructively with the Committee to narrow the range of issues that the Court must consider. Dialogue began on 16 different issues initially raised by the Committee. Over the course of the last several days, the Debtors and the Ad Hoc Group have agreed to several material changes to, among other documents, the RSA, the Revised Final Order, and the DIP Facility Agreement, each of which is reflected or referenced in the Revised Final Order. These revisions include the addition of an "***Overbid Process***" (as defined in Annex A to the Revised Final Order) that will allow for further postpetition marketing on terms consistent with the RSA, clarification around the process by which the Debtors could seek to refinance the DIP Loans and Notes in their entirety without automatically triggering an Event of Default under the DIP Facility Agreement, extension of the Challenge Period under the Revised Final Order, increases to the Post-Carve Out Trigger Notice Cap, and some limitations on the marshaling waiver.

ARGUMENTS AND AUTHORITIES

I. Entry Into the DIP Facility Agreement Represents a Sound Exercise of the Debtors' Business Judgment and Best Serves the Interests of the Debtors' Estates.

18. As the Objection acknowledges, the Court should apply the deferential "business judgment" standard in assessing whether the Debtors have satisfied section 364 of the Bankruptcy Code.[10] *See* Obj. ¶¶ 27–28. Business judgment is typically understood as shorthand for the

[10] The Objection cites a raft of inapposite cases where courts apply heightened scrutiny to proofs of claim filed by insiders and the underlying transactions upon which they are based. *See* ¶ 27. Review in this context often holds that an insider must demonstrate "the inherent fairness and good faith of the challenged transaction." *See, e.g.*, *In re Harford Sands Inc.*, 372 F.3d 637, 641 (4th Cir. 2004). The Objection cites just one case, *In re MSR Hotels & Resorts, Inc.*, 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2023), for the proposition that courts may apply heightened scrutiny in the context of debtor-in-possession financings.

On the rare occasions where courts have applied heightened standards of scrutiny to postpetition financing facilities, they focus on the debtors' ability to demonstrate fair price and fair process. *See, e.g.*¸ *In re Latam Airline Grp. S.A.*, 620 B.R. 722, 775 (Bankr. S.D.N.Y. 2020); *In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011). Fair price is typically understood as one point along a "range of reasonable values,"

principle that "courts should defer to—[and] should not interfere with—decisions of corporate directors upon matters entrusted to their business judgment except upon a finding of bad faith or gross abuse of their business discretion." *See, e.g.*, *In re Meridien Energy, LLC*, 2023 WL 6542665, at *10 (Bankr. E.D. Va. Oct. 6, 2023); *accord Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

19. In engaging in review for business judgment, "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives." *Aronson*, 473 A.2d at 812; *see also In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (observing that courts require only that debtors "show that a sound business purpose justifies such actions") (citations omitted). Bankruptcy courts within the Eastern District of Virginia routinely apply the business judgment rule to postpetition financings without further commentary. *See, e.g., In re Intelsat S.A.*, No. 20-32299 (Bankr. E.D. Va. Sept. 14, 2021) [Docket No. 2873] Final DIP Order ¶ H(iv) (finding that entry into the debtor-in-possession facility was a prudent decision of the debtor consistent with its business judgment); *In re Alpha Nat. Res.*, No. 15-33896 (Bankr. E.D. Va. Sept. 17, 2015) [Docket No. 465] Final DIP Order ¶ 6(d) (same). Courts in other circuits take the same approach. *See, e.g.*, *In re Republic Airways Holdings Inc.*, 2016 WL 2616717, at *11 (Bankr. S.D.N.Y. May 4, 2016) (citing *In re Ames Dep't*

see Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 466 (Del. Ch. 2011), and must factor in the "operative reality" faced by the company at the time of the transaction. *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525 (Del. 1999). As is especially relevant here, fair price can often be "established by demonstrating that no better alternatives were available." *See In re Latam*, 620 B.R. at 791 (collecting cases). Parties may demonstrate fair dealing by pointing to "evidence of careful consideration and process, including but not limited to, financial analyses, independent advice and careful deliberation." *See id*. at 773–74. In the context of so-called "section 363 sales," the Fourth Circuit has observed that "the misconduct that would destroy . . . good faith . . . involves fraud [and] collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *See Willemain v. Kivitz*, 764 F.2d 1019, 1023 (4th Cir. 1985). The Debtors submit that—to the extent the Court were so inclined as to engage in any heightened standard of review—the DIP Financing contemplates a fair price, in part because it is the only financing available, but also because the price is customary when compared to similar financings, and results from a robust and fair process. *See, e.g.*, Tempke Decl. ¶¶ 13–15, 18–20, 25–26.

Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990)); *In re Simasko Prod. Co.*, 47 B.R. 444, 448–49 (Bankr. D. Colo. 1985); *In re Diebold Holding Co., LLC*, No. 23-90602 (S.D. Tex. July 12, 2023) [Docket No. 251] Final DIP Order ¶ I(ix) (finding that entry into the debtor-in-possession facility was a prudent decision of the debtor consistent with its business judgment); *In re Gol Linhas Aereas Inteligentes S.A.*, No. 24-10118 (Bankr. S.D.N.Y. Feb. 28, 2024) [Docket No. 207] Final DIP Order ¶ H (ii) (same); *In re Genesis Care Pty Ltd.*, No. 23-90614 (Bankr. S.D. Tex. July 19, 2023) [Docket No. 323] Final DIP Order ¶ G (iv) (same); *In re Vice Group Holding Inc.*, No. 23-10738 (Bankr. S.D.N.Y. June 13, 2023) [Docket No. 138] Final DIP Order ¶ xi (same).

20. Courts retain broad discretion to approve postpetition financing "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." *See In re Ames*, 115 B.R. at 40. Terms and conditions of a proposed transaction need not achieve perfection, satisfy all parties, or even appear palatable to all parties. *See, e.g., In re J.C. Penney Co.*, No. 20-20182 (Bankr. S.D. Tex. June 5, 2020) [Docket No. 563] Hearing Transcript at 160:16-25 (observing that a contested postpetition financing "would be highly objectionable" in an ideal world because "[i]t contains an awful lot that you simply look at and you don't like," but overruling the objections thereto on the basis that the Debtors would likely be forced to liquidate "if there isn't a package going forward"). Courts will not heed jilted creditors' complaints that the debtors should "***structure differently***" those matters that "fall[] within the Debtors' business judgment." *See In re Ames*, 115 B.R. at 41 (emphasis added).

21. As is further detailed below, the robust process in which the Debtors engaged on a prepetition basis, the flexibility supplied by the RSA to consider "***Alternative Transaction***

Proposals" (as defined in Section 6(d) therein), together with the Debtors' ability to run a marketing process based on modifications to the RSA, and the broad support from across the Company's capital structure for the value-maximizing path forward for these chapter 11 cases reflected in both the RSA and the DIP Facility Agreement, in each case on a standalone basis and together, collectively, rebut the conclusory allegations that characterize the Objection's assertions to the contrary. *See* Obj. ¶¶ 29–38. Entry into the DIP Facility Agreement reflects a sound exercise of the Debtors' business judgment and the various substantive terms of the RSA and the DIP Facility Agreement, respectively, with which the Objection takes issue, are reasonable, appropriate under the circumstances, in the best interest of the estates, and should be approved.

A. The Untimely Supplemental Objection's Complaints About Discovery and Redactions Must Fail.

22. The Untimely Supplemental Objection raises various discovery issues which, in addition to being waived by the manifest untimeliness of that filing, are described in such conclusory terms that they are not properly before the Court and in any event are wholly contrary to the policies underpinning both the business judgment rule and attorney-client privilege.

23. ***First***, the Court should ignore the discovery complaints in the Untimely Supplemental Objection because the Committee failed to comply with the 10:00 a.m. (Eastern Time) deadline for that filing set forth in paragraph 3 of the Court's Order at Docket No. 368. Non-compliance with such a clear order, especially when the Committee failed to mitigate the prejudice by sharing a courtesy copy of its brief with the Debtors ahead of the deadline, should not be rewarded and instead should be deemed a waiver of the Committee's untimely arguments, as to discovery or otherwise.

24. ***Second***, the Court should ignore the Committee's discovery complaints because—despite extensive communication and negotiation with the Debtors regarding the custodians, search

protocols, and redactions over the course of the past two weeks—the Committee never filed a motion to compel raising any of its discovery issues with the Court in time for the Court to hear both sides and make a ruling. Vague, often false insinuations about redactions and the scope of the Debtors' document production in an Untimely Supplemental Objection filed two days before a hearing set to approve a $500 million debtor-in-possession financing cannot substitute for a proper discovery motion, response window, and hearing.[11] Again, the Committee's delay in raising these purported issues should be deemed a waiver.[12]

25. ***Third***, the Committee's argument fails on the merits. As the Committee would have it, these Debtors—and in fact all debtors that require postpetition financing—face a Catch-22 when it comes to privilege: either (a) waive the privilege by producing and testifying about the ***legal advice*** they received in the course of selecting and negotiating a postpetition facility, or (b) preserve the privilege, but in so doing, seal their own lips as to the non-privileged ***business reasons*** for selecting and negotiating the terms and conditions of the postpetition facility. This unworkable paradox is not the law. Indeed, it is contrary to well-settled law.

26. The Debtors are not asking the Court to approve the DIP Financing because lawyers (or anyone else) ***advised*** the Debtors that the DIP Financing is a good idea. The Debtors are asking the Court to approve the DIP Financing because the Debtors concluded ***in their own business***

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[11] For obvious reasons, there is not time to correct all of the overstatements and outright falsehoods that characterize the Untimely Supplemental Objection (*e.g.*, ¶ 9 "the Debtors have withheld almost all relevant communications;" ¶ 2 "it appears that any analysis that was done was performed by the Debtors' advisors," etc.). Suffice it to say that, over the course of the past two weeks, the Debtors have cooperated with the Committee's discovery requests and, to the extent disagreements arose, the Committee elected not to raise them with the Court in a timely manner and should not be allowed to escape the formalities of discovery motions practice by levying a host of vague complaints in an Untimely Supplemental Objection instead of a proper motion to compel.

[12] *See* Local Rule 7026-1(c) ("***Motions to Compel.*** After a discovery request is objected to or not timely complied with, and if not otherwise resolved, ***it is the responsibility of the party initiating discovery to place the matter before the*** Court by proper motion pursuant to FRBP 7037, to compel an answer, production, designation or inspection.") (emphases added).

judgment that the DIP Financing is necessary to prevent the destruction of their business and attendant loss of value to all stakeholders, and because competent, non-privileged testimony from the Debtors' investment banker will establish that the DIP Financing reflects market, reasonable terms while competent, non-privileged testimony from the Debtors' Interim Chief Executive Officer and Chief Financial Officer underscores this sound exercise of business judgment. In other words, this is not a situation involving a litigant who asserts an advice-of-counsel defense but refuses to produce the advice of counsel. Instead, this is an unremarkable situation where a litigant received legal advice but has elected to preserve its privilege as to that legal advice while producing and testifying about the business grounds for its decision.

27. Although ill-conceived, the Committee's attempt to trigger a privilege waiver merely because the Debtors admit legal advice was received on a topic is not new and has been rejected by multiple courts. *See, e.g.*, *In re Comverge* No. CIV.A. 7368-VCP, 2013 WL 1455827, at *1, 4–5 (Del. Ch. Apr. 10, 2013) (finding no waiver where directors "merely relied on the fact that they received legal advice rather than the substance of privileged communications to prove that the Board was fully informed" because the board had not attempted to rely on the substance of a privileged communication or asserted an advice-of-counsel defense); *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, No. 04-CIV-10014 PKL, 2009 WL 3111766, at *5 (S.D.N.Y. Sept. 28, 2009) (explaining that "[b]ondholders may, without waiving privilege, introduce evidence suggesting that they received advice of counsel in connection with their decisions to hold open short positions; however, should the [b]ondholders testify about the content of that advice or testify that an individual [b]ondholder's actions were reasonable because the [b]ondholder relied on counsel's advice, such testimony would waive the attorney-client and work product privileges"); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 399 P.3d 334, 345

(Nev. 2017) ("Delaware cases further support our conclusion that a party is not required to waive the attorney-client privilege as the price for receiving the protection of the business judgment rule."); *see also Navient Sols., LLC v. L. Offs. of Lohman*, No. 119-CV-461, 2020 WL 6379240, at *3 (E.D. Va. June 12, 2020) (explaining that at-issue waiver is inapplicable when a party "has not ***disclosed*** or ***described*** any attorney-client communications in an attempt to prove its claims") (emphasis in original).

28. The Committee's arguments thus fail because the Debtors have not placed the substance of any legal advice at issue by attempting to use it to prove a claim or defense or even their business judgment. For example, the Committee argues that "heavily redacted" Board materials "make it impossible to even discern what advice or analysis the Board received, let alone the Board's ultimate decision." Untimely Supplemental Objection ¶ 9. But this is irrelevant, because the Board's ultimate decision was not redacted and the Debtors are not asking the Court to approve the DIP Financing because of "advice . . . received"—and especially not legal advice received—but instead because of the Board's business judgment and the undisputed exigencies of the Debtors' financial situation and need for the DIP Financing. Again, the Committee's "heads, I win, tails, you lose" approach would create an impossible dilemma for any debtor that asserts a privilege with legal counsel—either redact the legal advice and potentially see motions to approve postpetition financing denied, or waive privilege as the price for financing. This is not, nor has it ever been, the law.

29. The Committee also cherry-picks deposition testimony to paint a picture that is at variance with reality. For example, although there were particular details of certain meetings Mr. Nunziata could not recall off the top of his head, the testimony the Untimely Supplemental Objection cites for its assertion that "Mr. Nunziata [was] unable to remember the details of ***anything***

discussed at the various Board meetings" strains credulity. Untimely Supplemental Objection ¶ 9 (emphasis added). It cannot argue "the record does not reflect meaningful board consideration or informed decision-making." *Id.* (quoting *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 834 (Del. Ch. 2011)). In one instance cited by the Untimely Supplemental Objection, Mr. Nunziata was asked whether he had "a more outsized impact at the meeting"—to which Debtors' counsel objected—and Mr. Nunziata replied, "I don't know what you mean by 'outsized.' I had all kinds of interactions with board members and others at board meetings. I don't remember how much I spoke at this meeting versus others." Nunziata Dep. Tr. (Ex. B) 88:19–89:5.

30. In another instance, Mr. Nunziata was asked if he recalled a particular analysis at one (of many) Board meetings he attended in early 2024, and he responded "I don't recall specifically the analysis that occurred on February 6th, but I recall many discussions where we evaluated financing proposals." *Id.* at 175:3–8. The other portions the Untimely Supplemental Objection cites are similarly mischaracterized. At other points in his deposition, Mr. Nunziata testified: "A lot of detail was discussed at those finance committee meetings with respect to the performance issues and other financial issues that we talked about earlier. And then those would then at the full board meeting be discussed at length and in detail or anything that required board interaction and/or approval." *Id.* at 39:9–15. The unprivileged evidence and testimony—including copious unredacted information in board minutes and materials—produced to the Committee is a far cry from *In re Del Monte* where the court stated "[t]here are no [board] minutes that suggest hard thinking" about the critical issue in the case and the chairman of a committee could not recall even generally discussing the ***concepts*** at issue." *See* 25 A.3d at 834 (emphasis in original). Each and every argument that the Untimely Supplemental Objection raises thus should be rejected.

B. The Committee's Attack on the Independence of the Transaction Committee Is Conclusory, Lacks a Request for Relief, and Downplays the Debtors' Other Procedural Safeguards.

31. The Committee's attack on the Transaction Committee should not change this Court's analysis here, nor does the Untimely Supplemental Objection ask as much of the Court. Indeed, the Untimely Supplemental Objection requests no relief in connection with its allegations. *See* Supplemental Committee Objection ¶ 14. And the Committee here does not argue this Court should apply any standard more exacting than business judgment review. *See* Obj. ¶¶ 27–28.

32. An independent director is one whose decision "is based on the corporate merits of the subject before the board rather than extraneous considerations or influence," while a director who is not independent is "dominated or otherwise controlled by an individual or entity interested in the transaction." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 174–75 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006). The Untimely Supplemental Objection does not outline facts sufficient to meet that high standard of domination by an individual or entity interested in the transaction as to either Mr. Nunziata or Mr. Alexander. Instead, it merely offers conclusory allegations without citing a single case. *See* Untimely Supplemental Objection ¶ 14. It also mischaracterizes Mr. Nunziata's testimony, taking a few of his words out of context concerning the management incentive plan. In full, Mr. Nunziata said: "It was a provision, one of many, that I focused on, but I identified as being very, very important for me to build the right team and attract talent upon emergence of the case." Nunziata Dep. Tr. (Ex. B) 267:23–268:2. Mr. Nunziata was focused on the benefits to the Company. The Committee also gestures vaguely at Mr. Alexander's "hope" that equity might recover, without proving his domination or control by an entity interested in the transaction. *See* Untimely Supplemental Objection ¶ 14.

33. In any event, the Transaction Committee was composed of directors who disclaimed a right to participate in the DIP Financing. Further, the DIP Financing was later approved by a vote

of solely disinterested shareholders. Whatever gripes the Committee levies against the Transaction Committee, they ignore the multitude of other procedural safeguards that the Debtors had enacted, both in the ordinary course as a public company, *see supra* ¶¶ 11, 13, and specifically in connection with the prepetition marketing process.

C. The Terms of the DIP Facility Agreement, Particularly Those Concerning Termination Events, Are Customary, Appropriate, and Reasonable.

34. The DIP Facility Agreement is the product of a months-long marketing and negotiation process during which the Debtors substantively engaged with the Ad Hoc Group and numerous other parties. *See supra* ¶¶ 8–17. To the extent the DIP Facility Agreement incorporates final terms of the supposedly "illusory" RSA—a criticism the Committee levies no fewer than four times, *see* Obj. ¶¶ 1, 2, 28, 29—such terms are common to nearly every modern restructuring support agreement.[13] The Committee impugns the Debtors' sound business judgment with respect to various terms, but it ignores the fact that the Debtors were negotiating ***a comprehensive agreement*** with lenders representing a majority of the Debtors' financial stakeholders against the backdrop of declining liquidity, potential impending defaults and related cross-defaults across the Company's capital structure, and uncertain operational efforts.[14]

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[13] *See, e.g.*, *In re Diamond Sports Group, LLC*, No. 23-90116 (Bankr. S.D. Tex. Jan. 17, 2024) [Docket No. 1613-1] Restructuring Support Agreement § 13.01(q) (allowing termination upon "the acceleration of the DIP Facility following an event of default thereunder"); *In re Intelsat S.A.*, No. 20-32299 (Bankr. E.D. Va. Aug. 31, 2021) [Docket No. 2774 Ex. G] Chapter 11 Plan Support Agreement § 13.01(n) (permitting termination upon the occurrence of "any Event of Default under the DIP Documents or the DIP Order"); *In re Benefytt Techs., Inc.*, No. 23-90566 (Bankr. S.D. Tex. May 23, 2023) [Docket No. 5 Ex. B] Debtor-In-Possession Credit Agreement § 8.01(e) (providing for cross-default with the Restructuring Support Agreement).

[14] The Objection's question-begging regarding the Debtors' motivations is unfounded. *See* Obj. ¶ 31. The Objection ostensibly attributes to the Second Circuit the proposition that "[s]hareholders retain substantial control over the [c]hapter 11 process, and with that control comes significant opportunity for self-enrichment at the expense of creditors." *See* Obj. ¶ 31 n.42 (quoting *In re DBSD N. Am., Inc.*, 634 F.3d 79, 100 (2d Cir. 2011)). But context makes clear that the court did not necessarily mean to endorse this position as a global matter and instead described the policy rationale for or—in the case of the quoted portion—against "gifting." Here, the Objection ignores the inconvenient (for the Committee) fact that the RSA, by its terms, currently contemplates that the prepetition claims of the 2026 Noteholders, comprising the core of the Ad Hoc Group, will be treated *pro rata* as to some claims held by general unsecured creditors outside the Ad Hoc Group. *See, e.g.*, Nunziata Decl. ¶ 135. Had the Company been acting in the best interests of the Ad Hoc Group to the detriment of its other

35. The terms are reasonable, fair, and are commonly approved by bankruptcy courts within the Eastern District of Virginia and elsewhere across the country. The carefully negotiated terms and conditions and the commercial realities facing the Debtors made entry into the DIP Facility Agreement (and to the extent interrelated, the RSA) a sound exercise of the Debtors' business judgment.

36. In cases where—as here—debtors execute restructuring support agreements with their postpetition lenders, it is unremarkable that the occurrence of a termination event in a restructuring support agreement would create a corresponding event of default under the postpetition credit agreement. *See, e.g.*, *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. May 4, 2020) [Docket No. 6 Ex. B] DIP Credit Agreement § 8.01(cc) (providing that termination of the transaction support agreement on account of the actions or omissions of the debtor would give rise to an "Event of Default" under the postpetition credit agreement); *In re Ascena Retail Grp.*, No. 20-33113 (Bankr. E.D. Va. July 31, 2020) [Docket No. 155 Ex. A] DIP Credit Agreement § VII(p) (providing, among other things, that the termination of the restructuring support agreement ***for any reason*** would likewise give rise to an "Event of Default" under the postpetition credit agreement); *In re Rite Aid Corp.*, No. 23-18993 (Bankr. D.N.J. Apr. 3, 2024) [Docket No. 2642 Ex. A] Amended DIP ABL Credit Agreement § 7.01(j) (providing that if the restructuring support agreement is terminated, it is an "Event of Default" under the credit agreement); *In re Diebold Holding Co., LLC*, Case No. 23-90602 (S.D. Tex. June 6, 2023) [Docket No. 143] Senior Secured Superpriority Debtor-in-Possession Term Loan Credit Agreement § 7.16(n) (same); *In re Air Methods Corp.*, No. 23-90886 (S.D. Tex. Oct. 25, 2023)

stakeholders, as the Objection implies may have been the case, such *pro rata* treatment would seem a curious result for nefarious collusion.

[Docket No. 89 Ex. A] Superpriority Senior Secured Debtor-in-Possession Term Loan Credit Agreement § 9.01(l)(xvii) (same); *In re Avaya Inc.*, No. 23-90088 (Bankr. S.D. Tex. Feb. 23, 2023) [Docket No. 223] Superpriority Secured Debtor-in-Possession ABL Credit Agreement § 6.18 (stating that the restructuring support agreement must be in full force for the credit agreement to be in force).

37. In an effort to drive consensus—and maintaining, in any event, that entry into the RSA was a value-maximizing choice for the Company—the Debtors have, in conjunction with the Ad Hoc Group, agreed to modify certain "Events of Default" thereunder. For instance, the filing of a motion by the Debtors to refinance the DIP Loans and Notes both in full and in cash will ***not*** trigger an Event of Default under the DIP Facility Agreement, so long as the refinancing takes effect within 30 days. *See* Revised Final Order ¶ 37(b). To the extent that filing such a motion causes any Restructuring Support Party (as defined in the RSA) to terminate the RSA, the Debtors would nonetheless retain the benefit of the 30-day period to refinance the DIP Loans and Notes before any Event of Default ripens.

38. In any event, linkage running the opposite way between events of default under postpetition credit agreements and termination rights in restructuring support agreements is likewise quite common. *See, e.g., In re Diebold Holding Co., LLC*, No. 23-90602 (Bankr. S.D. Tex. June 1, 2023) [Docket No. 18 Ex. 1] Restructuring Support Agreement § 13(o)(i) (creating a termination right under the restructuring support agreement for lenders party thereto upon the occurrence of "any event that would constitute a default under the DIP Documents or the DIP Orders . . ."); *In re Avaya Inc.*, No. 23-90088 (Bankr. S.D. Tex. Feb. 14, 2023) [Docket No. 51 Ex. B] Restructuring Support Agreement § 13.01(m) (creating a termination right under the restructuring support agreement for lenders party thereto upon the "occurrence of any

'Event of Default' under (and as defined in) the DIP Orders, the DIP Term Loan Facility Documents, or the DIP ABL Facility Documents . . ."); *In re Air Methods Corp.*, No. 23-90886 (Bankr. S.D. Tex. Oct. 24, 2023) [Docket No. 5-1] Restructuring Support Agreement § 6.02(g) (creating a termination right under the restructuring support agreement for creditors party thereto upon "the occurrence of an 'Event of Default' under the DIP Credit Agreement . . ."); *In re QualTek*, No. 23-90548 (Bankr. S.D. Tex. May 24, 2023) [Docket No. 18 Ex. B] Restructuring Support Agreement § 12.02(n) (creating a termination right under the restructuring support agreement for certain postpetition lenders party thereto upon the occurrence of "an Event of Default under and as defined in the Term Loan DIP Credit Agreement").

39. Moreover, the Objection's dubious complaint that "it is inappropriate and inconsistent with the fiduciary obligations of the Debtors to bind themselves to a yet to be determined plan of reorganization supported by the Ad Hoc Group," *see* Obj. ¶ 31 is unfounded, as it mischaracterizes both the facts of these chapter 11 cases, the weight of precedent, and well-established norms of chapter 11 practice. Like other debtors and lenders, the Debtors and Ad Hoc Group will continue to negotiate a plan of reorganization in light of the deal they struck and the broad stakeholder consensus here. Indeed, reasonable rights of consent over the terms and conditions of a chapter 11 plan (and many other key documents) are a staple feature of nearly every restructuring support agreement and/or postpetition credit agreement in complex chapter 11 cases, and have been for many years. *See, e.g.*, *In re Intelsat*, No. 20-32299 (Bankr. E.D. Va. May 15, 2020) [Docket No. 74 Ex. 1] DIP Credit Agreement § 12.21 (providing that the filing of any chapter 11 plan that was not an "Acceptable Plan" under the postpetition credit agreement would give rise to an "Event of Default" thereunder); *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. May 4, 2020) [Docket No. 6 Ex. B] Transaction Support Agreement § 7.02(l)

(creating a termination event for creditors in the event that "the Company withdraws or modifies the Plan or Disclosure Statement or files any motion or pleading with the Bankruptcy Court that is inconsistent with this Agreement . . ."); *In re Avaya Inc.*, No. 23-90088 (Bankr. S.D. Tex. Feb. 14, 2023) [Docket No. 51 Ex. B] Restructuring Support Agreement § 13.01(d) (creating a termination right under the restructuring support agreement for lenders party thereto in the event that any "Definitive Document" thereunder, such as the postpetition credit agreement and related documents, were "amended, waived, or modified in any material respect . . ."). Indeed, it is absurd to think that the Ad Hoc Group would propose debtor-in-possession financing, yet leave open to the Debtors the proposed treatment of their sizable funded unsecured claims inside the capital structure.

40. The Objection likewise protests too much in arguing that it is unusual for the exercise of a so-called "fiduciary out" provision like the one the Debtors negotiated in Section 6(d) of the RSA to result in the termination of a restructuring support agreement or event of default under a postpetition credit agreement.[15] *See, e.g.*, *In re Ascena Retail Grp.*, No. 20-33113 (Bankr. E.D. Va. July 31, 2020) [Docket No. 155 Ex. B] Restructuring Support Agreement § 11.02(b) (providing that any "Company Party" under the restructuring support agreement could terminate such agreement if, among other reasons, the relevant governing body decides, in the exercise of its fiduciary duties, to pursue an "Alternative Restructuring Proposal" thereunder); *In re Tricida, Inc.*, No. 23-10024 (Bankr. D. Del. Jan. 11, 2023) [Docket No. 2 Ex. A] Restructuring Support Agreement § 11.04(a) (automatically terminating the restructuring support agreement in the event the debtor announces publicly its intention to pursue an "Alternative Restructuring

[15] The Debtors likewise note that Article VII(i)(xiii) excludes from the definition of an "Event of Default" under the DIP Facility Agreement the filing of, public announcement relating to, support for, or written proposal or counterproposal to any party regarding an Alternative Transaction under the RSA to the extent that such action is consistent with the terms of Section 6(d) thereunder.

Proposal" thereunder or enters into agreement with respect to such); *In re Avaya Inc.*, No. 23-90088 (Bankr. S.D. Tex. Feb. 14, 2023) [Docket No. 51 Ex. B] Restructuring Support Agreement §§ 13.01(j), 13.01(p) (creating a termination right under the restructuring support agreement for lenders party thereto in the event that the relevant governing body of any debtor party exercises a "fiduciary out" provision, enters into definitive documentation relating to any "Alternative Restructuring Proposal" thereunder, or announces its intention to do so); *In re WeWork Inc.*, No. 23-19865 (Bankr. D.N.J. Nov. 7, 2023) [Docket No. 21 Ex. B] Restructuring Support Agreement §§ 11.01(r), (s) (creating termination rights for lenders party thereto in the event any company party enters into a definitive agreement to pursue an "Alternative Restructuring Proposal" thereunder or announces its intention to do so). Therefore these terms—which, again, are part of a broader deal struck between the parties—are reasonable standing alone, and cannot rise to the level of misconduct that would be required to override the Debtors' business judgment.

41. The Objection additionally errs in contending that the RSA's commonplace restriction against affirmative solicitation of "***Alternative Transactions***" (as defined in Section 6(d) thereof) exceeds the scope of analogous provisions under most contemporary restructuring support agreements.[16] *See, e.g.*, *In re Tricida, Inc.*, No. 23-10024 (Bankr. D. Del. Jan. 11, 2023) [Docket No. 2 Ex. A] Restructuring Support Agreement § 6.02(b) (prohibiting the debtor from, among other activities, seeking, soliciting, encouraging, proposing, or entering into any "Alternative Restructuring Proposal" as defined therein); *In re Diebold Holding Co. LLC*, No. 23-90602

[16] The Objection cites two plainly inapposite cases in a misguided effort to criticize the rights the Debtors carefully negotiated under Section 6(d) of the RSA to consider Alternative Transaction Proposals. *See* Obj. ¶ 31. Both cases deal with the appointment of a trustee, and neither bears even passing resemblance to the circumstances of these chapter 11 cases. In *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 526–27 (E.D.N.Y. 1989), the debtor made affirmative efforts to misrepresent and conceal important matters from the court, including the creation of a separate entity to which it transferred a key customer list. In *In re Sharon Steel Corp.*, 86 B.R. 455, 465 (Bankr. W.D. Pa. 1988), the debtor engaged in *prima facie* voidable transfers on a prepetition basis involving millions of dollars in cash, stock, and even a yacht and a plane.

(Bankr. S.D. Tex. June 1, 2023) [Docket No. 18 Ex. 1] Restructuring Support Agreement § 8.02(c) (prohibiting the parties thereto from, among other things, directly or indirectly seeking, soliciting, proposing, or supporting in the formulation or preparation of any "Alternative Restructuring Proposal" as defined therein); *In re WeWork Inc.*, No. 23-19865 (Bankr. D.N.J. Nov. 7, 2023) [Docket No. 21 Ex. B] Restructuring Support Agreement § 7.02(a) (permitting the debtor parties thereto to "consider, respond to, and facilitate any unsolicited Alternative Restructuring Proposals," notwithstanding restrictions on affirmative solicitation).

42. To the extent these routine features of the DIP Facility Agreement and RSA are remarkable ***at all***, they are testament to the lengths to which the Debtors went to ensure that substantive terms of the operative documents in these chapter 11 cases reflected customary practice, all notwithstanding at least three key considerations that posed challenges.

43. ***First***, the Debtors had significant liquidity needs, as the Committee acknowledges, *see* Obj. ¶ 1, and had to strike a deal in light of the reality of the Company's capital structure, which included funded indebtedness well in excess of $1 billion. ***Second***, despite these headwinds, the Debtors' prepetition marketing process generated competitive tension among other parties that resulted in favorable market terms for the DIP Financing. *See* Tempke Decl. ¶¶ 15, 18–20, 30–32. It culminated with just one proposal left on the table, and the Debtors still secured a fiduciary out term that is within the favorable range of precedent. ***Third***, although the RTB process commenced months before these chapter 11 cases, it remains ongoing, and the Debtors anticipate that process, when coupled with the tools available for managing contracts available to chapter 11 debtors, will provide meaningful benefits to the go-forward business. But these efforts take time, and it would not have made sense to perform a speculative valuation for purposes of negotiating more

definitive RSA terms. Accordingly, it was reasonable business judgment to leave various terms in the RSA undetermined pending further results from these efforts.

44. Although the RSA incorporated fair and reasonable terms with which the Debtors remain pleased, in the spirit of compromise the Debtors, together with the Ad Hoc Group, have taken further steps to build consensus among stakeholders. Specifically, the Debtors have agreed to add a non-standard postpetition "market check" in the form of the Overbid Process that will commence upon the filing of a chapter 11 plan of reorganization in accordance with the existing RSA. In parallel, the Overbid Process will permit the Debtors, in consultation with the Committee, to actively market offers for Alternative Transactions (a) that provide for repayment in cash in full of the DIP Loans and Notes, any fees otherwise due in connection with commitments contemplated by the RSA, and all other administrative and priority claims, as well as all claims arising from the Prepetition Funded Debt or (b) that are otherwise acceptable to Majority Consenting 2026 Noteholders under the existing RSA. The Debtors submit that these modifications underscore the seriousness with which the Company and the Restructuring Support Parties take their commitments to pursue a value-maximizing restructuring for the benefit of all stakeholders.

45. To reiterate, linkage between the DIP Facility Agreement and the RSA and the various substantive provisions with which the Objection takes issue are customary, commonplace, and appropriate. Further, these terms were heavily negotiated and part of a sound marketing process that involved oversight by the Company's disinterested members of the Company's Board.[17]

[17] Contrary to the assertion in the Untimely Supplemental Committee Objection implying that the Board did not consider the linkage between the DIP Facility Agreement and the RSA, Mr. Nunziata testified that negotiations surrounding the cross-defaults were part of the "comprehensive evaluation and proposal and a series of negotiations that lasted weeks that involved both management, advisors, and the board," and that there were numerous discussions about the termination events on the RSA. *See* Untimely Supplemental Objection. ¶ 5; Nunziata Dep. Tr. (Ex. A) 213:18–214:12; 229:24–230:5. Further, the Board properly exercised its business judgment as discussed at length in Section I of this Reply.

Moreover, in the context of these negotiations, the Debtors negotiated for favorable terms and benefits that inure to the Debtors and their estates. All this was true prior to the modifications described above; it remains true ***a fortiori*** in their aftermath. Rather than disparaging the efforts and motivations of the Debtors, the Committee should have welcomed these efforts.

D. The Tranche A Participation Election Is Reasonable and Appropriate and Should Be Approved.

46. In addition to the misguided assertion that the Tranche A Participation Election effects a *sub rosa* plan, which is discussed at greater length below, the Objection likewise opines that "the Court should not approve the Tranche A Participation Election because it represents an unquantifiable fee that the Debtors made no effort to value when the DIP Facility was negotiated." *See* Obj. ¶ 34. Setting aside the rather obvious observation that the Tranche A Participation Election cannot simultaneously so pre-determine the outcome of these chapter 11 cases that it effects a *sub rosa* plan ***and*** fail review for business judgment because—as the Objection acknowledges—no valuation has taken place and the material terms are subject to further Court approval, *see, e.g.*, Obj. ¶ 22, the Debtors have not sought to "hardwire" any plan value or discount thereto for no fewer than two very good reasons.

47. ***First***, the operational restructuring contemplated by the RSA is not yet complete, and any valuation without the benefit of RTB, among other positive developments, would likely underestimate the value of the Company to the detriment of the unsecured creditors whose interests the Committee purports to protect. ***Second***, a pre-determined valuation or discount would run counter to the guidance provided by courts that have previously approved equitization options in respect of postpetition financings that are similar to the Tranche A Participation Election; it is the fixed, pre-determined nature of such discounts that can implicate *sub rosa* concerns.

See, e.g., *In re SAS AB*, 644 B.R. 267, 270, 274 (Bankr. S.D.N.Y. 2022)[18] (approving postpetition financing that included an equitization option after examining whether this component raised *sub rosa* plan issues); *In re Avianca Holdings S.A.*, No. 20-11133 (Bankr. S.D.N.Y. Oct. 5, 2020) [Docket No. 1031] Final DIP Order ¶ F(iv) (approving postpetition financing that included an equitization component); *In re Avianca Holdings S.A.*, No. 20-11133 (Bankr. S.D.N.Y. Sept. 15, 2021) [Docket No. 2132], Third Amended Disclosure Statement ¶ I A (describing the equitization framework for the junior tranche); *In re Avianca Holdings S.A.*, No. 20-11133 (Bankr. S.D.N.Y. Oct. 26, 2020) [Docket No. 1039] Hearing Transcript at 48:6–18 (noting that equitization component without pre-determined value created flexibility for debtors); *In re Grupo Aeroméxico*, No. 20-11563 (Bankr. S.D.N.Y. Oct. 13, 2020) [Docket No. 527] Final DIP Order ¶ (1) (approving junior postpetition financing that included an equitization component); *In re Grupo Aeroméxico*, No. 20-11563 (Bankr. S.D.N.Y. Dec. 10, 2021) [Docket No. 2294] Third Amended Disclosure Statement ¶ IV C 4 (describing the equitization framework for the junior tranche).

48. Further, the Tranche A Participation Election facilitates a potentially less dilutive manner to satisfy claims arising out of the DIP Financing than a payment by an equity rights offering, which would likely require a backstop premium that would likewise be paid in equity. Taking into account all these considerations, given that the Tranche A Participation Election is part of a broader, comprehensive agreement, it represents a sound exercise of the Debtors' business judgment and benefits the Debtors' estates.

[18] The Objection points selectively to *dicta* from *SAS* to distract from the court's conclusion that, notwithstanding its stated reservations, the postpetition financing under consideration and related equitization option did not create *sub rosa* plan issues and—as is the case here—there was no better option available. *See* Obj. ¶ 40.

E. The Break Premium and Other Fees Are Consistent with Similar Fees in Comparable Postpetition Facilities and Should Be Approved.

49. The Objection likewise protests that the "***Break Premium***" (as defined in Section 2.19(g) of the DIP Facility Agreement) is too high, particularly in light of the other DIP Fees and Expenses. *See* Obj. ¶ 33. The DIP Fees and Expenses, however, are well within the ranges approved by bankruptcy courts in connection with similar postpetition financings and a reasonable exercise of the Debtors' business judgment in light of the Company's distress. *See* Tempke Decl. ¶ 26. Postpetition lending is not a non-profit enterprise.

50. While the Objection chooses to highlight that the Break Premium—by definition, a fee that is incurred only in the event that the Debtors pursue another transaction that, even accounting for this cost, would provide greater value to their stakeholders—may create a $25 million liability, this narrow framing ignores that analogous fees of a magnitude similar to the 5% Break Premium are regularly approved in comparable chapter 11 cases.[19] Moreover, the Objection's focus on the Break Premium—again, a fee that is contingent upon future events—

[19] *See e.g.*, *In re Avaya Inc.*, No. 23-90088 (Bankr. S.D. Tex. 2023) (DIP financing with a break fee of 7.0%, an upfront fee of 4.0%, and an exit fee of 10.6%); *In re Joann Inc.*, No. 24-10418 (Bankr. D. Del. 2024) (DIP financing with a backstop fee of 20% and other fees of 224.7%); *In re Diebold Holding Co., LLC*, No. 23-90602 (Bankr. S.D. Tex. 2023) (DIP financing with a backstop fee of 12.2%, upfront fee of 5.9%, and other fees of 15.3%); *In re Genesis Care Pty Ltd.*, No. 23-90614 (Bankr. S.D. Tex. 2023) (replacement DIP financing with an upfront fee of 16.5%, exit fee of 3.0%, and other fees of 20.0%); *In re Lumileds Holding B.V.*, No. 22-11155 (Bankr. S.D.N.Y. 2022) (DIP financing with a backstop fee of 12.2%, an exit fee of 12.2%, and other fees of 42.6%); *In re Curo Group. Holdings Corp.*, No. 24-90165 (Bankr. S.D. Tex. 2024) (DIP financing with a break fee of 10.0%, backstop fee of 6.7%, upfront fee of 3.0%, and an exit fee of 11.7%); *In re Hornblower Holdings LLC*, No. 24-90061 (Bankr. S.D. Tex. 2024) (junior DIP financing with a break fee of 4.0%, upfront fee of 4.0%, and an exit fee of 4.0%); *In re Audacy, Inc.*, No. 24-900004 (Bankr. S.D. Tex. 2024) (DIP financing with a break fee of 15.0%); *In re Core Scientific, Inc.*, No. 22-90341 (Bankr. S.D. Tex. 2022) (replacement DIP financing with a break fee of 5.0%, upfront fee of 3.5%, and exit fee of 5.0%); *In re SAS AB*, No. 22-10925 (Bankr. S.D.N.Y. 2022) (DIP financing with a break fee of 7.0%, unused commitment fee of 2.0%, upfront fee of 1.0%, exit fee of 4.0%, and other fees of 1.1%); *In re Grupo Aeroméxico*, No. 20-11563 (Bankr. S.D.N.Y. 2020) (Tranche B DIP financing with a break fee of 3.2%, unused commitment fee of 8.0%, upfront fee of 1.0%, exit fee of 10.0%, and other fees of 1.5%); *In re Pyxus*, No. 20-11570 (Bankr. D. Del. 2020) (DIP financing with a break fee of 12.0%, unused commitment fee of 3.0%, backstop fee of 8.2%, upfront fee of 3.3%, exit fee of 3.3%, and other fees of 95%); *In re Neiman Marcus Grp. Ltd.*, No. 20-32519 (Bankr. S.D. Tex. 2020) (DIP financing with a break fee of 3.0%, unused commitment fee of 6.4%, upfront fee of 4.0%, and exit fee of 4.6%).

further undermines the notion that the DIP Financing effects a *sub rosa* plan. Only one of these two concerns could be accurate. For the avoidance of doubt, neither is.

F. Borrowings under the DIP Financing Do Not Disproportionately Benefit the Ad Hoc Group at the Expense of General Unsecured Creditors.

51. The Objection also complains that borrowings under the DIP Facility Agreement "disproportionately benefit the Ad Hoc Group at the expense of general unsecured creditors" because (a) nearly $200 million from the DIP Financing is earmarked for cost-of-completion financing in respect of the Epes Plant, and (b) more than $100 million from DIP Financing will be used to pay fees and interest, including interest at the default rate in respect of the Prepetition Senior Secured Credit Facility. *See* ¶¶ 35–37.

52. These assertions are misguided. It is not disputed that the Epes Plant is a centerpiece of the Company's long-term strategic plan. *See* Nunziata Decl. ¶ 30. In light of the concerns described at greater length in the Epes 9019 Motion, the Company was forced to prepare for these chapter 11 cases as if it would not have the ability to access outside funds it had previously obtained to support construction of the Epes Plant. Even the Committee must acknowledge that a half-complete production facility will serve no party's interests in these chapter 11 cases, least of all unsecured creditors. Employees, vendors, and other stakeholders will suffer if the Company does not continue this project. Moreover, the prospect of a "pause" in further construction on a half-built facility could create sizable additional liabilities for the Company (including potential lien claims that would otherwise sit ahead of general unsecured creditors in order of priority), both in these chapter 11 cases and upon emergence.

53. Moreover, the postpetition interest and fees about which the Committee complains are well within the norm for postpetition financings of comparable size in chapter 11 cases of similar complexity. *See* Tempke Decl. ¶ 26. Of course, the Debtors would prefer that the cost of

capital associated with the DIP Financing were lower. For this reason, the Company negotiated in good faith and at arm's length for a period of months to ensure that the DIP Financing reflects the best available terms and conditions and not simply the only ones. *See* Tempke Decl. ¶¶ 30–31. Indeed, the Objection's complaints on these points minimize the very real benefits the DIP Financing provides as a value-maximizing transaction that affords unsecured creditors their best opportunity for recovery. Given the very real need for the Debtors to access Cash Collateral during these chapter 11 cases, *see, e.g.*, Rajcevich Decl. ¶ 14, and the absence of certainty in these negotiations, it was—in an exercise of the Debtors' sound business judgment—a necessary concession to the Prepetition Secured Parties to pay interest under the Prepetition Senior Secured Credit Facility at the default rate.

II. The DIP Facility Does Not Violate the Bankruptcy Code.

54. The Objection theorizes that the DIP Financing violates the Bankruptcy Code. This Court should reject the Committee's theories.

A. The DIP Facility Does Not Effect a *Sub Rosa* Plan Because It Does Not Fix the Terms of Recoveries for Creditors.

55. The first of these theories requires the Court to accept as a threshold assumption that—notwithstanding the conceded fact that the terms of the Tranche A Participation Election are largely undetermined and subject to further order from the Court—the Tranche A Participation Election so thoroughly dictates the outcome of these chapter 11 cases as to effect a *sub rosa* plan. *See* Obj. ¶¶ 39–45. The Untimely Supplemental Committee Objection candidly admits that the Tranche A Participation Election does no such thing, noting that the absence of set terms "cut against the very idea that the Debtors could enter into an agreement to 'lock in' certain equity rights." *See* Untimely Supplemental Objection ¶ 10. Despite this concession, the Committee seeks to excise this integral component of the DIP Financing without any apparent recognition that the

Debtors and the Ad Hoc Group reached agreement on the terms of the DIP Financing with the assumption (and indeed the requirement) that the Tranche A Participation Election would be included.[20] Moreover, the Tranche A Participation Election is beneficial to the Debtors' reorganization, their estates, and—by extension—their stakeholders, because it allows for greater flexibility upon exit from these chapter 11 cases concerning claims arising from the DIP Financing. In any event, the Committee's *sub rosa* argument plainly fails as a matter of law.

56. On these points, the Objection's professed concerns require willful suspension of disbelief. It is, of course, true that—under certain limited circumstances not applicable here—courts may deny relief that would have the effect of "short circuit[ing] the requirements of [c]hapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* . . ." *See In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983); *but see In re Babcock and Wilcox*, 250 F.3d 955, 960 (5th Cir. 2001) (holding that *Braniff* did not bar postpetition financing that "merely allow[ed] the debtors to obtain the credit necessary to their continued vitality" and did not "gut the bankruptcy estate" or "change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan"). It is likewise true that courts within the Fourth Circuit decidedly overrule *sub rosa* objections where—as here—the requested relief does not effectively take the place of a plan of reorganization by, among other things, ***dictating recoveries available to all creditors***. *See, e.g.*, *Suntrust Bank v. Den-Mark Const. Inc.*, 406 B.R. 683, 702 (E.D.N.C. 2009) (holding that postpetition financing for a debtor in possession was not a

[20] As Committee counsel once noted when the shoe was on the other foot, "[T]his is a finely tuned instrument where, you know, ***I hesitate to pull one string, you know, in the ball of yarn here***. And I know we say that often when it comes to RSAs, in this case I really mean it, Your Honor. ***This is a, you know, finely tuned instrument where all the pieces, the RSA, the DIP, the orders, the plan term sheet, they're all designed there to meet a variety of, you know, economic, legal, commercial objectives that all the parties had heading into the restructuring and leading into the RSA***." *In re Benefytt Techs., Inc.*, No. 23-90566 (Bankr S.D. Tex. May 31, 2023) [Docket No. 136] Hearing Transcript 27:5–13 (emphases added).

"disguised plan of reorganization" because it "did not affect all of the debtor's assets or all of its creditors"); *In re Augusta Aparts., LLC*, 2011 WL 6779594, at *5 (Bankr. N.D. W. Va. Apr. 25, 2011) (finding a section 363 sale did not amount to a *sub rosa* plan because it did not impair or circumvent creditor voting rights or circumvent other chapter 11 safeguards). Here, however, the Objection only argues "certain terms"—not all recoveries to creditors—are "pre[-]determine[d]" by the Tranche A Participation Election. *See* Obj. ¶ 39. This, by the Objection's own admission, is plainly not a *sub rosa* plan. Indeed, the singular focus on the equity-related "terms" in the Objection misses the point that they will be subject to approval by the Court upon further motion.

57. On occasion, courts outside the Fourth Circuit have applied the *sub rosa* doctrine to postpetition financings that—unlike the DIP Financing—***would*** effectively dictate plan recoveries. *See In re Latam Airline Grp. S.A.*, 620 B.R. at 795. *Latam* is not binding on the Court, and in any event the postpetition financing at issue there is easily distinguishable from the circumstances of these chapter 11 cases for at least three reasons: (a) unlike *Latam*, recoveries to shareholders of the Debtors are not dictated by the DIP Facility Agreement, except—as is always the case—on account of claims arising from the DIP Loans and Notes; (b) unlike *Latam*, the Tranche A Participation Election will, to the extent it occurs, take place in each DIP Creditor's discretion, rather than the Company's election; and (c) unlike *Latam*, equitization is not self-executing.

58. The Debtors have purposefully refrained from "hardwiring" the terms of recovery on account of the Tranche A Participation Election prior to plan confirmation. In *Latam*, by contrast, the postpetition facility that the court initially declined to approve pre-determined the terms of recovery by (a) establishing repayment at a 20% discount to plan value and (b) ensuring that all shareholders were entitled to acquire stock, regardless of their participation in the postpetition financing. *See* 620 B.R. at 813–14, 819. The court also noted that the set nature of the

discount to plan value was exacerbated by the rights offering outlined in the revised credit agreement, as all shareholders were entitled to acquire stock regardless of their participation in the postpetition financing. *See id*. at 819. Here, there is no set discount to plan value, ***and*** the DIP Facility Agreement does not provide shareholders that are not DIP Creditors the right to participate in a future equity rights offering. *See* Nunziata Decl. Ex. A (RSA Terms Sheet) at 143 (noting that existing equity has "[n]o right to participate in ERO"); DIP Motion ¶ 64; Tempke Decl. ¶¶ 27–29. In any event, moreover, the existence or magnitude of any discount to plan value, the proposed terms of any equity rights offering, and the related purchase price have not yet been determined, and will, in all events, be subject to approval by the *Court* upon subsequent motion. *See* DIP Motion ¶ 64; Tempke Decl. ¶¶ 27–29.

59. Again, the Objection acknowledges that the plan value, related discount, and other material terms of the Tranche A Participation Election are open and to be determined in future. *See* Obj. ¶ 42. Perhaps without apprehending the significance of this admission, the Objection also notes that the Revised Final Order "clearly dictates that any plan of reorganization proposed in the [c]hapter 11 [c]ases ***that provides for an equity investment and/or equitizes debt claims must*** include the Tranche A Participation Election." *See id.* ¶ 43 (emphasis added). This concession that the yet-to-be-determined chapter 11 plan in these cases may not include an equitization component ***at all*** belies the assertion that an uncertain option to equitize an undetermined percentage of claims at an undetermined discount to an undetermined plan value at an uncertain point in time somehow results in a *sub rosa* plan. Said differently, the Debtors cannot very well eat a cake that they've not yet baked; and the Committee wants to have its cake and eat it, too.[21]

[21] The Objection argues that certain provisions of the RSA and the DIP Facility Agreement, particularly the "Acceptable Plan" under the latter, conspire to resemble the "Company Approved Reorganization Plan" that the court found problematic in *Latam*. *See* Obj. ¶ 43. In *Latam*, however, to qualify as a Company Approved Reorganization Plan, such plan had to be proposed by the Company and approved by its board and its

60. Moreover, the Tranche A Participation Election—to the extent it does take place ***at all***—will occur in the discretion of the relevant DIP Creditors, rather than the Debtors, and only after further approval by the Court. *See* DIP Motion ¶ 63. In *Latam*, by contrast, the debtors—acting upon a vote of the very shareholders who stood to gain from the pre-determined and foreordained discount to plan value—essentially reserved discretion whether to repay the junior tranche in equity or cash. *See* 620 B.R. at 819.

61. Lastly—and unlike in *Latam*—equitization pursuant to the Tranche A Participation Election is not self-executing. In *Latam*, the debtors sought authority via the motion to approve postpetition financing to effectively distribute equity without further review from the court. *See id*. Here, by contrast, the Debtors have expressly acknowledged that any issuance of equity in the reorganized Debtors is subject to approval from the Court. *See* DIP Motion ¶ 64. It is, moreover, always possible that the DIP Financing could be refinanced entirely during the course of these chapter 11 cases. *See e.g.*, *In re SAS AB*, No. 22-10925 (Bankr. S.D.N.Y. Nov. 21, 2023) [Docket No. 1644] Final DIP Refinancing Order ¶ 1 (authorizing the Debtors to refinance their postpetition financing). Indeed, the Revised Final Order now provides that the filing of a motion to refinance the DIP Loans and Notes in their entirety will no longer trigger an automatic Event of Default. *See* Revised Final Order ¶ 37(b).

62. The Tranche A Participation Election was an integral component of the bargain struck between the Debtors and the Ad Hoc Group and allows for greater flexibility upon exit by potentially reducing the magnitude of capital solutions that otherwise could be required to repay the claims arising from the DIP Financing in cash. *See* DIP Motion ¶ 64; Tempke Decl. ¶ 29.

shareholders. *See* 620 B.R. at 760 n.63. Here, an Acceptable Plan need only meet certain unremarkable requirements described in the RSA.

As was previously explained, *supra* ¶ 47, the Tranche A Participation Election is consistent with relief granted by other courts. The *sub rosa* doctrine is not applicable to the Tranche A Participation Election or these chapter 11 cases.

B. The DIP Financing Does Not Implicate the Absolute Priority Rule.

63. The Objection likewise argues that the Company Allocated Portion of the DIP Financing provides participating eligible shareholders (or their designees) with an interest in property on account of their junior interests in the Company in violation of the absolute priority rule. *See* Obj. ¶¶ 46–49. This is incorrect for both legal and factual reasons.

1. The DIP Financing Does Not Contemplate a Distribution to Shareholders.

64. The DIP Financing does not contemplate specific distributions to any Company stakeholder on account of pre-existing claims or interests. To the extent payments are made in respect of the participation in the Company Allocated Portion, these payments have occurred and will occur in connection with repayment of the DIP Loans and Notes in accordance with the terms and conditions of the DIP Facility Agreement. The Tranche A Participation Election, to the extent approved by the Court, likewise reflects ***repayment*** to the DIP Creditors, rather than any distribution pursuant to a plan. To the extent that a DIP Creditor is a shareholder of the Company (or the designee of such), it will be treated no differently than other DIP Creditors. ***For the avoidance of doubt, shareholders that are not DIP Creditors will receive no consideration in respect of the DIP Financing.***

2. Application of the Absolute Priority Rule Is Premature.

65. Further, by its plain terms, the absolute priority rule is relevant only to confirmation of a plan of reorganization. *See* 11 U.S.C. § 1129; *see also In re Babcock & Wilcox Co.*, 250 F.3d 955, 961 (5th Cir. 2001) (noting that neither the plain language of the statute nor any persuasive

authority indicates that the absolute priority rule applies before plan confirmation). For this reason alone, discussion of the absolute priority rule is—at a minimum—premature. As is further detailed in the DIP Motion, the relief sought thereby is expressly limited by, among other acknowledgments, the need for further approval of the Tranche A Participation Election and the proposed terms of any equity rights offering, including the purchase price and any discount to plan value. *See* Obj. ¶ 63. At the appropriate time, *i.e.*, ***in connection with confirmation*** of any chapter 11 plan of reorganization, the Debtors will be prepared to demonstrate that the applicable chapter 11 plan complies with the requirements of section 1129.[22] Worth noting, moreover, is that the Committee's preferred solution in respect of the Company Allocated Portion of the DIP Financing—that is, striking it in favor of additional lending by the Ad Hoc Group—would yield no impact on creditor recoveries and simply reshuffle economics from among one set of DIP Creditors to another.

66. In straining to articulate some nexus between the absolute priority rule and the terms and conditions of the DIP Financing, the Objection improperly suggests this case resembles *Latam*. *See* Obj. ¶ 47. While the court in *Latam* did, in fact, conclude that the absolute priority rule applied to the postpetition financing because the latter specified terms that were "potentially germane to a

[22] The Untimely Supplemental Committee Objection mischaracterizes deposition testimony to imply that the Company's priorities were at variance with the absolute priority rule. Mr. Tempke testified that that the Debtors were considering all stakeholders in making their decision. Tempke Dep. Tr. (Ex. C) 192:13–19 ("[W]e locked in a recovery for the most junior stakeholders as a floor effectively ***knowing that we will have further discussions with negotiations around the classes that are going to be senior to existing equity, including the HoldCo GUCs and subsidiary GUCs."***); *see also* Tempke Dep. Tr. (Ex. C) 168:18–25 ("[A]s we were negotiating more in the context of the restructuring support agreement, you know, we were negotiating with the 26 holders, but we also attempted to negotiate participation rights and recoveries for stakeholders that would be junior to the Ad Hoc Group."); 170:22–171:9 (noting that the Company tried to negotiate recovery with a broad array of constituents). Further, Mr. Nunziata testified not that the Company Allocated Portion would "inspire employees," but that the term would have a positive effect on employees, business partners, vendors, customers, and suppliers, and that "all along, [the Debtors were] trying to figure out a way that [they] could execute a DIP proposal that allows for various stakeholders to participate." Nunziata Dep. Tr. (Ex. B) 193:16–194:3; *see also* Nunziata Dep. Tr. (Ex. B) 263:18–264:2 (noting that the Debtors were focused on their stakeholders and stating that "[t]he unsecured creditors are important stakeholders of the company."). Mr. Alexander emphasized the same, noting that in considering different financing proposals, he took note of how junior stakeholders—including specifically unsecured creditors—would fare. Alexander Dep. Tr. (Ex. D) 142:11–143:8.

plan of reorganization," *see* 620 B.R. at 798, it did so only because the financing effected a *sub rosa* plan. While it may make logical sense that confirmation requirements like section 1129 should attach to a *sub rosa* plan, the absence of *sub rosa* issues here should necessarily moot any further discussion of absolute priority. *See supra* ¶¶ 55–62. Where, as here, a postpetition financing does not establish plan terms s*ub rosa*, section 1129 does not apply and the absolute priority rule is not relevant.

III. The Remaining Arguments Raised by the Objection Are Without Merit and Should Be Overruled.

67. The Objection concludes with a grab bag of complaints about features common to postpetition financings in nearly every complex chapter 11 case. For clarity, the Committee is once again wrong on all counts. DIP Liens on Avoidance Proceeds, waivers of the Debtors' statutory rights under sections 506(c) and 552(b) of the Bankruptcy Code, and waiver of the right to assert the equitable doctrine of "marshaling" are customary and reasonable under the circumstances of these chapter 11 cases, and should be approved in connection with entry of the Final Order.

A. DIP Liens on Avoidance Proceeds Should Be Approved.

68. The Objection asserts that the Debtors have not provided an appropriate justification to support approving DIP Liens on Avoidance Proceeds. *See* Obj. ¶¶ 50–51. As the DIP Motion makes clear, though, "[t]he scope and nature of the DIP Liens and the DIP Collateral were extensively negotiated and agreed between the Debtors and the DIP Secured Parties." *See* DIP Motion ¶ 9. It is well established that the proceeds of avoidance actions comprise property of the estate under section 541 of the Bankruptcy Code and that debtors may accordingly grant liens thereon to secure obligations under postpetition financing facilities or in respect of adequate protection. *See, e.g.*, *In re Metaldyne Corp.*, No. 09-13412, 2009 WL 2883045, at *4 (Bankr. S.D.N.Y. June 23, 2009).

69. Bankruptcy courts within the Eastern District of Virginia and elsewhere across the country routinely grant similar relief in analogous chapter 11 cases. *See, e.g.*, *In re Intelsat S.A.*, No. 20-32299 (Bankr. E.D. Va. Jan. 5, 2022) [Docket No. 3986] Final DIP Order ¶ 4 (approving liens on "Avoidance Proceeds" under and as defined therein); *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. June 5, 2020) [Docket No. 447] Final DIP Order ¶ 6 (same); *In re Air Methods Corp.*, No. 23-90886 (Bankr. S.D. Tex. Nov. 14, 2023) [Docket No. 225] Final DIP Order ¶ 8(a) (same); *In re Intelsat S.A.*, No. 20-32299 (Bankr. E.D. Va. Jan. 5, 2022) [Docket No. 3986] Final DIP Order ¶ 4 (same); *In re Air Methods Corp.*, No. 23-90886 (Bankr. S.D. Tex. Nov. 14, 2023) [Docket No. 225] Final DIP Order ¶ 8(a) (same); *In re Halcón Resources Corp.*, No. 19-34446 (Bankr. S.D. Tex. Sep. 4, 2019) [Docket No. 222] Final DIP Order ¶ F (same); *In re Alpha Nat. Res.*, No. 15-33896 (Bank. E.D. Va. Sept. 17, 2015) [Docket No. 465] Final DIP Order ¶ 7 (same); *In re Wesco Aircraft Holdings, Inc.*, No. 23-90611 (Bankr. S.D. Tex. July 10, 2023) [Docket No. 396] Final DIP Order ¶ vi (same). Accordingly, the Court should approve the DIP Liens on Avoidance Proceeds.

70. Though not required to do so, the Ad Hoc Group—in an effort towards conciliation with the Committee—has now agreed to use commercially reasonable efforts to seek recovery from all other sources of DIP Collateral prior to seeking recovery from Avoidance Proceeds. *See* Revised Final Order ¶ 9.

B. Waivers of Certain Statutory Rights Under Section 506(c) and Section 552(b) of the Bankruptcy Code Should Be Approved.

71. Section 506(c) of the Bankruptcy Code ostensibly provides debtors a narrow exception to the general rule that administrative expenses must first be satisfied via unencumbered collateral. *See, e.g.*, *FSB v. Segner (In re Domistyle, Inc.)*, 811 F.3d 691, 695 (5th Cir. 2015). The Objection argues that waiver of these limited rights is premature and should be circumscribed

around certain case events. *See* Obj. ¶ 53. Among other defects, this proposal ignores the reality that "these waivers are an integral component of the [Final] Order, without which the DIP Secured Parties would not have agreed to provide the DIP Financing and the Prepetition Secured Parties would not have consented to the consensual use of Cash Collateral." *See* DIP Motion ¶ 9.

72. Bankruptcy courts within the Eastern District of Virginia and elsewhere across the country routinely grant similar relief in analogous chapter 11 cases. *See, e.g., In re Intelsat S.A.*, No. 20-32299 (E.D. Va. Jan. 5, 2022) [Docket No. 3986] Final DIP Order ¶ 8 (waiving right to surcharge collateral under section 506(c)); *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. June 5, 2020) [Docket No. 447] Final DIP Order ¶ 46 (same); *In re Paper Source Inc.*, No. 21-30660 (E.D. Va. Apr. 2, 2021) [Docket No. 309] Final DIP Order ¶ 46 (same). The Court should approve the Debtors' waiver of statutory rights under section 506(c) of the Bankruptcy Code.

73. The Objection likewise complains that the Court should not approve a similar waiver of the Debtors' ostensible statutory rights to pursue the "equities of the case" exception under section 552(b)(1) of the Bankruptcy Code to avoid certain liens. *See* Obj. ¶ 53. Again, however, bankruptcy courts within the Eastern District of Virginia and elsewhere across the country routinely grant similar relief in analogous chapter 11 cases. *See, e.g., In re Intelsat S.A.*, No. 20-32299 (E.D. Va. Jan. 5, 2022) [Docket No. 3986] Final DIP Order ¶ 10 (disclaiming the use of the "equities of the case" exception); *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. June 5, 2020) [Docket No. 447] Final DIP Order ¶ 48 (same); *In re Paper Source Inc.*, No. 21-30660 (E.D. Va. Apr. 2, 2021) [Docket No. 309] Final DIP Order ¶ 48 (same). The Court should approve the Debtors' waiver of statutory rights under section 552(b)(1) of the Bankruptcy Code.

C. Waiver of Rights Under the Equitable Doctrine of "Marshaling" Should Be Approved.

74. The Objection lastly takes issue with the Debtors' customary waiver of any rights under the equitable doctrine of marshaling. *See* Obj. ¶¶ 54–55. In the absence of such a waiver, courts may—under limited circumstances and for equitable reasons—require that a senior secured creditor satisfy its claim from property of a debtor in which a junior secured creditor lacks an interest. *See, e.g.*, *In re Tampa Chain Co.*, 53 B.R. 772, 777 (Bankr. S.D.N.Y. 1985). As with the other waivers contemplated by the Final Order, relief along these lines is customarily sought and granted by bankruptcy courts within the Eastern District of Virginia and across the country in analogous chapter 11 cases. *See, e.g.*, *In re Intelsat S.A.*, No. 20-32299 (E.D. Va. Jan. 5, 2022) [Docket No. 3986] Final DIP Order ¶ 9 (disclaiming use of the marshaling doctrine for the benefit of senior secured lenders); *In re Chinos Holdings Inc.*, No. 20-32181 (Bankr. E.D. Va. June 5, 2020) [Docket No. 447] Final DIP Order ¶ 47 (same); *In re Paper Source Inc.*, No. 21-30660 (E.D. Va. Apr. 2, 2021) [Docket No. 309] Final DIP Order ¶ 47 (same). The Court should approve the Debtors' waiver of rights under the equitable doctrine of marshaling.[23]

D. All of the Objection's Remaining Issues with Other Provisions of the Final Order are Similarly Without Merit.

75. The Objection appends a list of further objections regarding the proposed Final Order as Exhibit A thereto. None of these objections warrants meaningful attention, but—to the extent helpful—the Debtors have attached as **Exhibit A** hereto a chart detailing these objections, as well as the Debtors' responses (together with those of the Ad Hoc Group, to the extent applicable). For the avoidance of doubt, however, the Court should nonetheless overrule any

[23] As discussed, *supra* ¶ 70, the Ad Hoc Group has also agreed to use commercially reasonable efforts to seek recovery from all other sources of DIP Collateral prior to seeking recovery from Avoidance Proceeds. *See* Revised Final Order ¶ 9.

feature of the Objection or the Untimely Supplemental Objection that is not mooted by revisions reflected in the Revised Final Order.

CONCLUSION

76. For the foregoing reasons, the Court should overrule the Objection and the Untimely Supplemental Objection, grant the relief requested in the DIP Motion on a final basis, and enter the Revised Final Order substantially in the form that is subsequently filed on the docket.

Richmond, Virginia
Dated: April 30, 2024

/s/ *Jeremy S. Williams*

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EXHIBIT A

Responses to the Committee's Proposed Modifications to Final Order

Issue	Provision in Proposed Final Order[24]	Objection[25]	Company Response[26]
Committee Challenge Period	The Proposed Final Order (¶ 18) provides that the Committee must obtain standing and commence any appropriate causes of action within 60 days from the date of its formation, *i.e.*, May 24, 2024.	The Objection contends that the current Challenge Period is too short and should expire no earlier than 120 days from entry of the Final Order. The Objection also argues that the right to object to the allowance of any claim (or portion thereof) in respect of postpetition interest on account of the Prepetition Senior Secured Debt should not be subject to the Challenge Period.	The Revised Final Order (¶ 18) extends the Challenge Period from 60 days from the date of its formation (as is required by Local Rules) to 90 days following the date of its formation, *i.e.*, June 23, 2024.
Committee Investigation Budget	The Proposed Final Order (¶ 20) limits the funds available to the Committee to investigate claims and liens to $50,000.	The Objection claims that such a budget is unreasonable in light of the circumstances and should be increased to at least $500,000.	The Revised Final Order (¶ 20) increases the budget to investigate claims and liens to $250,000.
Post-Carve Out Trigger Notice Cap	The Proposed Final Order (¶ 4(a)(i)) limits the Post-Carve Out Trigger Notice Cap for Committee Professionals to $250,000.	The Objection claims that the Post-Carve Out Trigger Notice Cap should be increased to $1,750,000.	The Revised Final Order (¶ 4(a)(i)) increases the Post-Carve Out Trigger Notice Cap to $1,250,000.
Adequate Protection, Fees, and Expenses	The Proposed Final Order (¶ 13) does not provide that payments made for Prepetition Secured Parties Adequate Protection Fees and Expenses are subject to disgorgement and/or recharacterization.	The Objection argues that the professional fees and expenses of, and any other adequate protection payments to, the Prepetition Agent, Minority Lender Group, and the Ad Hoc Group should be subject to review and recharacterization and/or disgorgement in the event of a	The Revised Final Order (¶ 16) now provides that: "With respect to payments of (a) Prepetition Secured Parties Adequate Protection Fees and Expenses made pursuant to paragraph 13(e), (b) the

[24] The "***Proposed Final Order***" was filed at Docket No. 225 on April 4, 2024.

[25] This column is intended to provide a summary of material concerns raised by the Objection that were not addressed in the body of the Motion. It does not purport to raise every issue that is discussed in the Objection.

[26] This column is intended to provide a summary of responses from the Company, including any revisions reflected in the Revised Final Order. It is for illustrative purposes only, is qualified in its entirety by the Revised Final Order, and in the event of any disagreement between this **Exhibit A** and the Revised Final Order or the DIP Documents (as amended), the DIP Documents shall govern.

Issue	Provision in Proposed Final Order[24]	Objection[25]	Company Response[26]
	The Proposed Final Order (¶16) provides that any and all fees, costs, and expenses paid prior to the Petition Date to or for the benefit of the DIP Secured Parties, the Prepetition Agent, the Minority Lender Group or the Ad Hoc Group, in connection with or with respect to the DIP Financing or these chapter 11 cases, shall not be subject to recharacterization, avoidance, subordination, disgorgement or any similar form of recovery by the Debtors or any other person.	successful Challenge, or in the event the Court determines that the Prepetition Secured Parties are not entitled to such payments pursuant to section 506(b) of the Bankruptcy Code.	NMTC Adequate Protection Fees and Expenses made pursuant to paragraph 13(f), and (c) the Minority Lender Group Fee and Expense Reimbursement made pursuant to paragraph 13(j), and except to the extent payment of any such fees or expenses has been separately approved in connection with any plan or other order of the Court, the rights of the Committee to seek recharacterization of such payments as payments of principal under the applicable Prepetition Debt Documents are preserved in the event of a determination in a final, non-appealable order of the Court that the applicable parties are undersecured, and all parties' rights are reserved with respect thereto."
Exercise of Remedies	The Proposed Final Order (¶7(e)) provides that the automatic stay otherwise applicable to the Prepetition Secured Parties shall automatically be terminated upon expiration of the Remedies Notice Period without further notice or order. Upon expiration of the Remedies Notice Period, and absent order of the Court to the contrary, the DIP Agent, DIP Secured Parties, and Prepetition Secured Parties shall be permitted to exercise remedies.	The Objection seeks amendment of the Proposed Final Order to provide for termination only upon an emergency hearing.	No change in Revised Final Order.
Amendments to the DIP Facility	The Proposed Final Order (¶36) provides that the DIP Documents may be amended and restated, supplemented, or otherwise modified in accordance with the DIP Documents without further application to or order of the Court; *provided*, that any amendment to the	The Objection seeks a 10-day notice period and the opportunity to object to any amendment, restatement, waiver, supplement, or other modification to the	The Revised Final Order (¶ 40) now provides for a five-day notice for Material DIP Amendments and contemporaneous notice of amendments that are not Material DIP Amendments.

Issue	Provision in Proposed Final Order[24]	Objection[25]	Company Response[26]
	DIP Facility Agreement that (a) shortens the maturity of the DIP Loans and Notes, (b) increases the aggregate commitments, or (c) increases the rate of interest payable (each, a "***Material DIP Amendment***") shall be provided to the U.S. Trustee or Committee, which shall have three business days of such notice to object in writing.	DIP Facility Agreement or any of the DIP Documents.	
Releases	The Proposed Final Order (¶19) provides for releases by the Debtors of the Prepetition Secured Parties, the DIP Secured Parties (solely in their capacities as such and not in any other capacity) and their respective Representatives (the "***Released Parties***") from all claims arising out of or related to the DIP Documents, the negotiation thereof and the obligations thereunder.	The Objection asserts that the scope of the releases should be narrowed.	No change in Revised Final Order.

EXHIBIT B

Nunziata Deposition Transcript (Relevant Excerpts)

In the Matter Of:

In Re - Enviva Inc.

GLENN NUNZIATA

April 25, 2024

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

In re:	)	
	)	Chapter 11
ENVIVA INC., et al.,	)	
	)	Case No. 24-10453
Debtors	)	

C O N F I D E N T I A L

- - -

Thursday, April 25, 2024

- - -

Deposition of GLENN NUNZIATA was taken before Elizabeth M. Kondor, Certified Court Reporter and Notary Public, on the above date, commencing at 9:20 a.m.

Job No. 939056

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(Appearances continued on Page 3)

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the Debtors and Debtors in Possession.

ALSO PRESENT:
JASON PARAL,
Inhouse counsel/Enviva

WILLIAM GREVE,
Ducera Partners, Advisor

Appearances continued on Page 5:

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Phone Appearances continued on Page 5

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I N D E X

E X H I B I T S

E X H I B I T S (Continued)

E X H I B I T S (Continued)

E X H I B I T S (Continued)

E X H I B I T S (Continued)

the finance committee interacted with the full board.

A. Well, oftentimes, nonfinance committee members attended the finance committee meetings, just to stay current on issues. So there was sort of an open invite to the full board if they felt compelled to join that meeting.

A lot of detail was discussed at those finance committee meetings with respect to the performance issues and other financial issues that we talked about earlier. And then those would then at the full board meeting be discussed at length and in detail for anything that required board interaction and/or approval.

Q. Did the finance committee provide recommendations to the full board?

A. In some cases, I believe they did.

Q. When they provided a recommendation, I assume there was some vote that proceeded the recommendation?

A. I guess technically, yes. I mean, it was more of a, Is everybody aligned, let's discuss, does anybody have any objections to this recommendation prior to bringing it to the board.

interest payment?

A. Can you clarify the question?

Q. Sure.

Did the company possess the ability to pay the required interest payment?

A. I'm still not clear.

Q. I'll try again. I'm not trying to be cute.

A. Okay.

Q. Like, did the company have enough liquidity to pay the interest payment that was due on January 15th?

A. I recall that our cash balance exceeded the amount of money that would have been required to pay the interest payment.

Q. What was your role at this meeting?

A. I was interim CEO, CFO and director of Enviva.

Q. Right, but you're the only -- it lists you as having reviewed it in the first sentence.

Did you have a more outsized impact at the meeting?

MR. JOHNSTON: I object to that as vague.

A. I don't know what you mean by "outsized." I had all kinds of interactions with board members and others at board meetings. I don't remember how much I spoke at this meeting versus others.

Q. If you turn to the -- it says 2026 Notes. This is Roman Numeral II, "2026 NOTES INTEREST PAYMENT AND COMMUNICATION PLAN."

Do you see that?

A. I do.

Q. It says, "Management and the advisory team reviewed risks and opportunities associated with paying the Interest Payment when due or taking advantage of a 30-day grace period provided therefor (the 'Grace Period Proposal'), including impacts on liquidity and on interactions with trade partners, potential financing partners, employees, and other stakeholders. Extensive discussion ensued among the Board, management, and advisors present regarding the benefits and drawbacks of nonpayment of the Interest Payment."

Do you see that?

A. I do.

Q. And following that discussion, the

just so the record is clear, works for Lazard?

A. Correct.

Q. Do you recall this analysis of the financing proposals that Mr. Tempke provided?

A. I don't recall specifically the analysis that occurred on February 6th, but I recall many discussions where we evaluated the financing proposals.

Q. At this February 6th meeting, would the board have discussed the counterproposal that the company put forward on February 6, 2024, that we were looking at earlier?

A. I can't answer that affirmatively given that there's -- the minutes lack that detail, but I don't know. I can't recall.

Q. So you don't know if the board approved the language that the Tranche A would mandatorily converge?

A. By looking at these two documents, I can't make that link. But I do recall the board being actively engaged with our proposals and counterproposals with the Ad Hoc Group.

Q. And this says that Mr. Tempke presented a comparative analysis of the financing proposals to the board; is that right?

were interested in optimizing the value of the company for all its stakeholders. And we felt -- and there's a few provisions that accomplish this, but we felt like the introduction of nonAd Hoc Group members into the capital structure was advantageous and allowed for a broader distribution of the value.

Q. In the company response February 6, 2024, do you see that same column, the bullet all the way at the bottom says, "Existing equity holders will have the ability to participate in the company allocated portion of the DIP commitments. "

Do you see that?

A. I do.

Q. Why did the company add that existing equity holders would have the ability to participate in the company allocated portion of the DIP commitments?

A. An element of the transaction that I favor is existing shareholders being able to invest in our restructuring. I think that sends an excellent message to our employees. It sends an excellent message to our business partners, vendors, customers, suppliers. And so all along,

we were trying to figure out a way that we can execute a DIP proposal that allows for various stakeholders to participate. And, again, having some old money with new money is a good message for us.

Q. So was it important to the company to ensure that existing equity was able to have the ability to participate in the company after the bankruptcy?

A. It was.

Q. Do those existing equity holders, do they include Riverstone?

A. Riverstone was an equity holder, so, yes, they would be included.

Q. Did you have any conversations with Riverstone regarding their desire or their investors's desire to have existing equity holders participate in the company-allocated portion of the DIP?

A. I did not have a conversation with Riverstone about that.

Q. What about Riverstone's investors?

A. I did not have a conversation with their investors about that allocation and syndication. That was led by Lazard.

the board about whether existing equity holders should have the right to participate?

A. We met with the board many, many times around this proposal, the financing proposal from the Ad Hoc Group and definitely covered the topic of the DIP allocation.

Q. Can you tell me what the board said about the DIP allocation?

A. I do recall sharing with the board, I don't remember the specific dates or context of my statement, but my general message was, I think such a provision is a positive move in this negotiation for the reasons I stated earlier.

Q. Can you -- if you turn to Exhibit 17, which is the Finance Committee Materials that we discussed that were presented at the February 6th board meeting.

Can you direct me to where there was a discussion of providing existing equity holders with the ability to participate in the company allocated portion of the DIP commitments?

A. Given that the company responses are redacted, I wouldn't be able to point to that.

Q. Can we turn to 5776?

A. What exhibit?

A. I don't recall the specifics and the points raised in our evaluation. I do know that it was important for us to maintain as much flexibility regarding financing as possible.

Q. And any default under -- and you obviously didn't want that -- any default under the RSA would trigger a default under the DIP, correct?

A. The company response that we submitted on the 11th was requesting or proposing that we would not link those two.

Q. Right.

And the reason for that is because you don't want to have the RSA and DIP linked with regards to default, correct?

A. I don't recall the exact reason for it.

Q. Do you think that it is a good policy to have the RSA and DIP connected with regards to default?

A. I think when trying to obtain financing in a distressed situation, that there is a series of negotiations regarding a comprehensive proposal with respect to both support and financing, and so I can't speak to

you about what my preference is.

What my preference was, was to obtain financing to keep this company up straight so I could look my employees in the face and tell them we found a way to get through the restructure.

So none of these terms were negotiated individually. This was a very comprehensive evaluation and proposal and a series of negotiations that lasted weeks that involved both management, advisors, and our board.

Q. So you did or did not consider it important to have a default -- that a default under the RSA would not trigger a default under the DIP?

A. It was obviously the objective of the company to limit the amount of risk associated with any default.

Q. And the AHG response was the linkage between them to be addressed through definitive documentation.

Do you see that?

A. I do.

Q. Okay.

If you would please turn to page 20.

A. Okay.

Q. So B lays out that the following RSA party termination events; is that accurate?

I don't want to read it.

A. Well, there's also (a), but, yes, (b).

Q. So (b) outlines what are the RSA terminating events and then there's little Roman numerals, correct?

A. Correct.

Q. And so (v) is if the debtor filed any definitive document, motion, or pleading with the bankruptcy court that is materially inconsistent with this agreement.

Do you see that?

A. I do.

Q. And so if the debtor does that, that would terminate the DIP?

A. If not withdrawn within five business days, correct.

Q. Was there any discussion at the company about agreeing to that term?

A. There were numerous discussions about the terminating events on the RSA. And

obviously we were negotiating for the best provisions possible for Enviva. But this was a very active negotiation and it went to the very last moments, but we push for as much room as we can get in these terminating events.

Q. What room did Enviva get in these terminating events?

A. I can't recall at the beginning -- where they started and where they ended.

Q. Does that provision seem to give the Ad Hoc Group power over the course of the bankruptcy?

MR. JOHNSTON: Objection. Vague and ambiguous.

BY MR. GILLER:

Q. You can answer.

A. Can you clarify?

Q. I can repeat.

Does this provision (b)(v) that states that if the debtor files definitive document, motion or pleading that is materially inconsistent with this Agreement, that it would lead to a default under the RSA, do you believe that that would give too much power to the Ad Hoc Group?

MR. JOHNSTON: Same objection.

A. Sometimes we had advisors. Sometimes other board members were present.

Q. And just to reiterate, you're unaware of whether there were any minutes for those meetings?

A. I am unaware.

Q. And the transaction committee didn't have any independent advisors, any advisors other than --

A. Other than our three we've talked about, no.

Q. Yes.

When you say three, we've talked about?

A. A&M, V&E and Lazard.

Q. Turning back to the board of director minutes.

A. February 15th?

Q. Yes.

There's the FORBEARANCE AGREEMENTS, this is number III.

A. Yes.

Q. And it says, paraphrasing, Mr. Meyer reviewed the key terms, is discussing the forbearance proposal.

And then the last sentence says, "Messrs.

Meyer and Tempke responded to directors' questions regarding the Forbearance Proposal and a fulsome discussion ensued."

Do you recall that?

A. I see it written. I don't recall the specific meeting and contents, but I see it written.

Q. Do you recall any discussion of the forbearance proposal?

A. We certainly discussed the forbearance at a board meeting. I just don't recall the specific discussion.

Q. Was there anyone who opposed -- let's take a step back.

The forbearance proposal was to ensure that -- was with the Ad Hoc Group because the grace period had ended; is that accurate?

A. The intent of the forbearance was to prevent us from triggering a default due to lack of payment of interest once the 30-day grace period had expired.

Q. And that was with the Ad Hoc Group?

A. It says here that the agreements in relation to certain of the company's debt instruments including the '26 notes, the

Q. Whose idea was it to have a transaction committee?

A. I don't recall who raised it, but it was discussed at least one board meeting prior to the formation of the committee.

Q. Was it suggested by a board member or by an advisor?

A. I don't recall.

Q. How does the transaction committee differ from the finance committee?

A. The biggest thing, the biggest difference is interested versus disinterested parties.

Q. I think you touched on this before, but just to clarify, why were you and Alexander the only two disinterested parties who joined the transaction committee?

A. As I indicated earlier, we were the only two people who were willing to completely commit to not participating in the DIP.

Q. The only two people on the board?

A. On the board, yeah.

Q. Did you have any concern that the board, who was voting on the DIP negotiations, had a potential to participate on the DIP?

A. We evaluated many things, including our leverage position in this negotiation. So I can't recall specifically talking about that item, but we talked about the negotiation at length.

Q. Did you think you had leverage in the negotiation with the Ad Hoc Group concerning the DIP?

A. That negotiation was weeks long, so, you know, we did the best we can in negotiating this deal.

I kept my employees, my stakeholders, my business partners, you know, and company value at top of mind when evaluating on this and leaned on my advisors as much as I could to negotiate what they felt was a fair market deal.

Q. You said that you were focused on your employees, your stakeholders, your business partners, and you kept them top of mind when evaluating the DIP proposals; is that accurate?

A. That's what I just said.

Q. Did you consider the unsecured creditors when you were contemplating or negotiating the DIP process?

A. The unsecured creditors are important stakeholders of the company.

Q. But you indicated before you never reached out to the unsecureds to see if they wanted to participate in the DIP during the final few weeks of the negotiations with the Ad Hoc Group?

A. I did not. We had charged our advisors in marketing this financing.

Q. We had discussed before that one of the terms was removing the specific amount of the discount to equity. And specifically, it's on page 5777. And this was in the company response. The company put in an equivalent to the ERO discount as opposed to the previous four that had a 25 percent discount.

Do you see that?

A. I do.

Q. Is your understanding that without a specific term, the discount that is provided to those who -- provided could be large? I mean, it's an unknowable number at this point in time, correct?

A. It appears that the discount percentage was removed, so it was unknowable.

Q. And in addition to a management team, you yourself were personally retained as part of the management -- as part of the assumption employment agreement?

A. I have an employment agreement, and I am currently CEO -- interim CEO and CFO of the enterprise, correct.

Q. Just to confirm, so you thought it was important for your management team and yourself to stay the same in Enviva?

A. I was focused on my team. The board felt I was the right answer for CEO.

Q. And you informed -- you informed your advisors of your views about your employment and that of your team?

A. It was one of the many, many provisions that we discussed with our advisors.

Q. And are you aware of the management incentive plan?

A. I am.

Q. Was that something that you focused on with the advisors?

A. It was a provision, one of many, that I was focused on, but I identified as being very, very important for me to build the right

team and attract talent upon emergence of the case.

Q. In addition to benefiting your team, the management incentive plan also benefits you personally, correct?

A. It could.

MR. GILLER: Can we take five minutes just to make sure I have nothing else.

(Recess.)

MR. GILLER: No further questions at this time.

MR. JOHNSTON: Anybody on the phone?

Hearing none, I've got a few follow-up questions, Mr. Nunziata.

EXAMINATION BY MR. JOHNSTON:

Q. Do you have Exhibit 23 there in your stack? It should be really towards the bottom.

Exhibit 23 is an e-mail February 14, 2024, from Jason Paral.

Do you see that?

A. I do.

Q. And on the second page, it references a verbal agreement with the Ad Hoc Group.

Do you recall those questions?

EXHIBIT C

Tempke Deposition Transcript (Relevant Excerpts)

In the Matter Of:

In Re - Enviva Inc.

CHRISTIAN TEMPKE

April 25, 2024

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

In re:	Chapter 11
ENVIVA INC., et al.,	Case No.
Debtors.	24-10453(BFK)

VIDEOTAPED STENOGRAPHIC DEPOSITION OF:
CHRISTIAN TEMPKE
Thursday, April 25, 2024

New York, New York

9:14 a.m. - 5:05 p.m.

Reported stenographically by:
Richard Germosen, FAPR, CA CSR No. 14391
RDR, CRR, CCR, CRCR, CSR-CA, NYACR, NYRCR
NCRA/NJ/NY/CA Certified Realtime Reporter
NCRA Realtime Systems Administrator
Job No. 2024-939055

VIDEOTAPED STENOGRAPHIC DEPOSITION of CHRISTIAN TEMPKE, taken in the above-entitled matter before RICHARD GERMOSEN, Fellow of the Academy of Professional Reporters, Certified Court Reporter, (License No. 30XI00184700), Certified Realtime Court Reporter-NJ, (License No. 30XR00016800), California Certified Shorthand Reporter, (License No. 14391), NCRA/NY/CA Certified Realtime Reporter, NCRA Registered Diplomate Reporter, New York Association Certified Reporter, NCRA Realtime Systems Administrator, taken at the offices of AKIN GUMP STRAUSS HAUER & FELD LLP, Bank of America Tower, One Bryant Park, New York, New York 10036, on Thursday, April 25, 2024, commencing at 9:14 a.m.

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I N D E X

E X H I B I T S

E X H I B I T S (CONT'D.)

EXHIBIT NO.	DESCRIPTION	PAGE
Exhibit 6	document ENV-UCC-DIP_0000722A through 0000723A	203
Exhibit 7	document ENV-UCC-DIP 0000594A through 0000598A	211
Exhibit 8	document ENV-UCC-DIP_0001148 through 0001178	213
Exhibit 9	document ENV-UCC-DIP_0001148_A through 0001178_A	214

**original exhibits returned with original transcript by LEXITAS LEGAL to AKIN GUMP STRAUSS HAUER & FELD LLP
(exhibit index concluded)

PRODUCTION OF DOCUMENTS AND/OR INFORMATION

Page	Line
36	10
40	14
92	11

existing equity.

On the other hand, a comprehensive restructuring, like the one that is being proposed as, you know, under the restructuring support agreement and the in-court financing, carries a lot of debt equitization, deleveraging, and dilution to existing shareholders, and so as we were thinking about, you know, moving from or expanding the scope from, you know, like out of court to in court as part of this proposal, we negotiated for existing shareholders' company side allocation to provide new -- to provide the ability to invest new capital in the company, you know, in the form of the DIP financing. That's one aspect.

The second aspect is really related to, as we were negotiating more in the context of the restructuring support agreement, you know, we were negotiating with the 26 holders, but we also attempted to negotiate participation rights and recoveries for stakeholders that would be junior to the Ad Hoc Group.

I'll say this another way. Withdraw the question.

Does equity have any right to expect to recover before unsecured creditors in a chapter 11 case?

ATTORNEY KOULOTOUROS: Objection to the extent you're calling for some kind of legal conclusion.

Q. I'm asking for your understanding of the restructuring.

A. Yeah, it sounds like a -- like I don't want to give you kind of like the legal answer. I think -- you know, I think the -- my general understanding I think would be the same, absent agreements amongst the stakeholders around, you know, their recoveries.

Q. What specifically did you do to advocate for junior stakeholders other than equity?

A. We tried to in broad strokes classify the different stakeholders into categories, and to the best of our ability negotiate, you know, what type of recovery

those creditors could receive.

Q. When you talk about "those creditors," specifically what creditors are you referring to?

A. Subsidiary general unsecured creditors, the Epes and bondholders, the HoldCo creditors, to the extent there are HoldCo creditors and equity.

(Stenographer clarification.)

THE WITNESS: Epes, E-P-E-S.

Q. You mentioned subsidiary general unsecured creditors. Is it fine if we just say GUCs instead general unsecured creditors?

A. We can call them GUCs.

Q. Okay. Thank you.

You can turn back to your -- what I'll call the side-by-side document.

A. Yeah. Where do you want to go?

Q. The Bates ending in 63.

ATTORNEY MORAN: You said ending at 63?

ATTORNEY GESSNER: Yes.

A. Okay. I'm there.

ATTORNEY GESSNER: It's towards the front, Matt.

framework being confirmed by the bankruptcy court and the judge.

Q. But it's been agreed between the debtors and the Ad Hoc Group; correct?

A. Subject to confirmation of a plan.

Q. Yeah.

Did the company push the Ad Hoc Group to get a concrete number of reorganized equity for subsidiary GUCs?

ATTORNEY KOULOTOUROS: Objection. Form.

A. So number one, we locked in a recovery for the most junior stakeholders as a floor effectively knowing that we will have further discussions with negotiations around the classes that are going to be senior to the existing equity, including HoldCo GUCs and subsidiary GUCs.

Frankly, I think given that we don't even know the amount of GUCs that we're going to have or HoldCo claims that we have at the time when we negotiated this, including the valuation point, I think it is a lot harder to come up with like specific

EXHIBIT D

Alexander Deposition Transcript (Relevant Excerpts)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re:	)	
	)	Chapter 11
ENVIVA INC., et al.,	)	Case No. 24-10453
	)	
Debtors	)	

ORAL VIDEOTAPED DEPOSITION

RALPH ALEXANDER

APRIL 26, 2024

ORAL VIDEOTAPED DEPOSITION OF RALPH ALEXANDER, produced as a witness at the instance of the Official Committee of Unsecured Creditors and duly sworn, was taken in the above-styled and numbered cause on the 26th day of April, 2024, from 9:40 a.m. to 4:26 p.m., before Melinda Barre, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Akin Gump Strauss Hauer & Feld, LLP, 1111 Louisiana, Suite 4400, Houston, Harris County, Texas, pursuant to the Rules of Procedure and the provisions stated on the record or attached hereto.

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William Greeve, Ducera Partners
Jason Koh
Nicholas Herron
Sam Schiff
Nicholas D'Angelo

INDEX

EXHIBITS

EXHIBIT	DESCRIPTION	PAGE
Exhibit 1	Declaration of Christian Tempke in Support of the Motion of Debtors for Entry of Interim and Final Orders	69
Exhibit 2	January 3rd, 2024 Enviva Inc. Finance Committee Meeting Minutes	75
Exhibit 3	Slide Deck Entitled "Finance Committee Materials," January 3rd, 2024, Project Orange	80
Exhibit 4	Slide Deck Entitled "Finance Committee Materials, February 6, 2024, Project Orange"	140
Exhibit 5	Slide Deck Entitled "Finance Committee Update, November 2023"	181
Exhibit 6	2-15-24 Minutes of Board of Directors Meeting of Enviva Inc.	182

Q. Just for a clear record, that's because large portions of the sheet are blacked out, correct?
A. Correct.
Q. The parts that are blacked out have titles next to them stating Certainty of Commitment, Framework of RSA/Level of Plan Support, Potential to Minimize Litigation Risk, Recovery to Junior Stakeholders, Potential to Shorten Time in Bankruptcy, Considerations, correct?
A. Correct.
Q. And that would have all been information that you would have considered in helping form the decision you were making as a member of the finance committee related to the financing proposals, correct?
A. Correct.
Q. Okay. Do you recall what advice you got regarding recovery to junior stakeholders?
MR. LEU: I'm going to instruct the witness not to answer to the extent -- sorry.
I'm going to instruct the witness not to answer to the extent the question calls for advice from Vinson & Elkins. You can answer otherwise.
A. Do I remember. I don't remember the specifics. I do remember the -- some of the proposals were more favorable to the junior stakeholders than others. Some

looked solid on junior stakeholders; and some, again, were more comprehensive, which included -- including that.

BY MR. LUFT:

Q. And who were the junior stakeholders that you understood to be being referenced in this information?

A. Pretty much the unsecured creditors and the unsecured credit group.

Q. What about the equity?

A. I guess the equity, too, but less -- I don't recollect that conversation.

Q. Which proposal did you understand to be most favorable to the unsecured creditors?

A. Well, my recollection is none of these proposals other than the first one was actionable. At least that's my recollection. So it became a moot point, I think.

But it was also, as I recollect -- again, it was the most comprehensive. We were trying to get -- when this started, the last thing we wanted to talk about was a DIP or restructuring. It was -- the instruction of the finance committee with this leadership was, Find a way through.

We were aggressive about it. We couldn't even use the words. It was like, Don't want to hear