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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.,[1]	)	Case No 24 – 10453 (BFK)
Debtors.	)	(Jointly Administered)

REPLY OF AD HOC GROUP IN SUPPORT OF 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

[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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In connection with the chapter 11 cases (the "**Chapter 11 Cases**") of the above-captioned affiliated debtors-in-possession (collectively, the "**Debtors**"), the Ad Hoc Group,[2] through its undersigned counsel, hereby files this reply to the objection of the Official Committee of Unsecured Creditors (the "**Committee**") [ECF No. 375] (the "**Objection**")[3] to 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, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* (the "**DIP Motion**"), hereby joins the reply to the Objection filed by the Debtors [ECF No. 407] (the "**Debtors' Reply**"), and respectfully submits as follows:

PRELIMINARY STATEMENT

1. The DIP Financing and the other relief contemplated by the DIP Motion provide the Debtors with crucial access to $500 million of new money financing as well as consensual use of cash collateral in a manner that supports the Debtors' business and builds consensus among a broad swath of stakeholders, including secured and unsecured creditors.

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[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Declaration of Glenn Nunziata in Support of Chapter 11 Petitions* [ECF No. 27] (the "**First Day Declaration**") or the DIP Motion (as defined herein), as applicable.

[3] The Committee also filed 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, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* (the "**Supplemental Objection**") [ECF No. 390] but did not file the Supplemental Objection in accordance with the schedule ordered by the Court, *see Order Granting Joint Motion to Adjourn Final Hearing on DIP Financing Motion and Related Relief* [ECF No. 368], and also failed to serve an unredacted copy upon the Ad Hoc Group or its advisors. The Ad Hoc Group reserves its rights to respond to the Supplemental Objection, to the extent any new issues raised therein are not determined waived by the Court.

2. The DIP Financing is the culmination of a months-long and hard-fought negotiation between the Debtors and unsecured creditors. The Ad Hoc Group holds approximately $1 billion of prepetition unsecured claims (and more than $1.4 billion of total prepetition claims), and negotiated the DIP Financing in good faith as the Debtors' largest unsecured creditor constituency. As the Debtors' evidence has shown, this negotiation was extensive, managed by professional advisors and conducted with competitive tension, as the Debtors sought and progressed a variety of different strategic and financing proposals alongside the negotiations with the Ad Hoc Group.

3. Further, because unsecured creditors are likely recipients of equity in the reorganized Debtors under a plan, the Ad Hoc Group has been and remains focused on maximizing the value of the Debtors' estates and creating the strongest possible platform for the Debtors to emerge from bankruptcy as a successful going concern. The terms of the DIP Financing embody that objective. Notably, the DIP Financing provides the Debtors with access to over $500 million of liquidity on a non-priming basis that affords runway to conduct the "Raise the Bridge" contract renegotiation process (as further described in the First Day Declaration) and thereafter structure and prosecute a plan of reorganization. The Ad Hoc Group respectfully submits that approval of the DIP Financing is in the best interests of the Debtors and their estates, and is also integral to the Debtors' survival and success through the chapter 11 process.

4. Despite broad support for the DIP Financing from its own constituency and ample evidence of the good faith and competitive process with which it was negotiated, the Committee has raised numerous objections to the DIP Financing and the DIP Motion. The Committee's Objection raises a litany of arguments that (a) seek to inappropriately subvert the Debtors' proper exercise of business judgment in favor of the Committee's separate goals, (b) presume an ability to cherry-pick from a comprehensively negotiated financing package, often seeking deviation from

highly customary terms and protections, and (c) risk leaving the Debtors with no access to postpetition financing, because, if the Court were to selectively deny approval of components of an agreed, integrated financing, the Debtors may end up with no liquidity at all.

5. Notwithstanding a range of objections from the Committee that the Ad Hoc Group submits is significantly overreaching, the Ad Hoc Group has sought engagement from the Committee with respect to the DIP Financing since March, when the Committee was formed and engaged advisors. And over the last several weeks—both before and after the filing of the Objection—the Ad Hoc Group (along with the Debtors) has sought to find compromise and narrow open issues where possible. As a result, and as discussed below and expected to be reflected in the proposed final order (the "**Proposed Final Order**"), which is expected to be filed ahead of the Final Hearing, many of the Committee's issues have now been sufficiently addressed or entirely mooted. The Committee's remaining objections lack merit and should be overruled.

6. To be sure, the Ad Hoc Group strongly disagrees with the Committee's central objection that the consent rights of the DIP Creditors and the linkage between the DIP Financing and the RSA are improper or represent a departure from the terms on which debtor-in-possession financing is frequently provided in complex cases in this district and others. Here, as in many other cases, those rights serve as a critical and customary form of protection, assuring that (a) the Debtors have a viable and pre-negotiated restructuring transaction with which to emerge (and providing assurance that the DIP obligations will be repaid) and (b) the substantial amount of new money put at risk by the DIP Creditors is going to fund a restructuring process they support. Further, the RSA locks in valuable pre-negotiated creditor support that best positions the Debtors to pursue their ongoing contract negotiations, and includes customary provisions that allow the

Debtors latitude to respond and react to *any* inbound proposals from other parties, as well as a customary "fiduciary-out."

7. While the Ad Hoc Group submits that the terms of the DIP Financing were reasonable and appropriate as originally proposed to the Court, the Proposed Final Order is expected to include additional protections for the Debtors that address any lingering concerns regarding the degree of connection between the DIP Financing and the Debtors' path to restructuring by providing the Debtors with additional flexibility to pursue alternative restructuring transactions if and when the Debtors determine it is in their best interests to do so, including:

- additional discretion for the Debtors to run an "overbid" process in parallel with prosecution of the restructuring plan contemplated by the RSA, which will allow the Debtors to further market-test the RSA restructuring transaction by seeking bids for alternative transactions that pay the Debtors' funded indebtedness in cash, in full, and that may otherwise provide additional value to stakeholders; and

- clarification that a motion or agreement by the Debtors in respect of an alternative debtor-in-possession financing will not, in and of itself, trigger an event of default under the DIP Facility Agreement (and will not automatically trigger an event of default if the RSA is terminated as a result of the Debtors' pursuit of such alternative financing) so long as the refinancing is approved and consummated such that the Debtors repay all existing DIP Financing obligations in full, in cash, within 30 days.

8. The Debtors have already provided ample evidence that the entry into the RSA and the restructuring-related terms of the DIP Financing—along with the DIP Financing as a whole—represent a reasonable exercise of business judgment. Particularly with the addition of the protections described above, there is no basis for the Court to sustain the Committee's objections to these terms.

9. Similarly, the Court should not countenance the Committee's objections to the economic terms and structure of the DIP Financing, which are necessary and inextricable components of the financing package embodied by the DIP Motion, were agreed to by the Debtors in their business judgment following extensive and arms'-length negotiations, are within

reasonable ranges of terms provided in connection with similar financings and are supported by law and precedent. These include, among other things, the objections raised by the Committee to the Tranche A Participation Election (which provides for the potential equitization of a portion of the DIP Financing obligations), the Break Premium and the negotiated adequate protection payments for Prepetition Secured Parties, as well as the highly customary surcharge, equities of the case and marshaling waivers to which the Committee still objects. Simply put, these are all appropriate *and necessary* components of the financing package contained in the DIP Motion, without which the Debtors do not have any actionable access to liquidity sufficient to fund the Chapter 11 Cases.

10. The Committee's objection to the Tranche A Participation Election is particularly misplaced. The Objection incorrectly asserts that the inclusion of this feature in the DIP Financing makes the DIP Financing a *sub rosa* plan. This is unsound as a matter of law.[4] Very importantly, the Tranche A Participation Election does not "lock in" any aspect of a future plan, as the Committee posits. The Tranche A Participation Election, which was already approved with respect to the $150 million Initial Draw (as defined in the Interim DIP Order), does not fix any valuation, pricing or treatment of prepetition claims under a plan. Instead, it provides the Debtors with a

[4] *Compare PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."), *with Clyde Bergemann, Inc. v. The Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 250 F.3d 955, 960 (5th Cir. 2001) ("*Braniff* stands merely for the proposition that the provisions of § 363 permitting a trustee to use, sell, or lease the assets do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan." (emphasis added)), *and Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 354 (5th Cir. 1997) (noting that "[t]he legal standard for deciding whether a transaction under section 363(b) amounts to a *sub rosa* reorganization emerges from our caselaw," and mentioning *Braniff*); *see also In re Nordic Aviation Cap. Designated Activity Co.*, No. 21-33693 (KRH) (Bankr. E.D. Va. Feb. 3, 2022) [ECF No. 304] (approving without objection debtor-in-possession financing that would be subject to equitization); *In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sep. 10, 2020) [ECF No. 587] (approving debtor-in-possession financing that would be subject to equitization); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447] (approving debtor-in-possession financing that would be subject to equitization).

valuable opportunity to repay with equity obligations that they would otherwise be forced to raise additional financing to pay back in cash, and provides the DIP Creditors with a linked right to participate in the Debtors' reorganized equity once the full terms of a plan have been established. The inclusion and terms of an equity rights offering in a plan, as well as the plan value and any discount to such plan value with which equity might be offered, all remain subject to a full plan process that will necessarily require this Court's further approval, as well as input from the Debtors' stakeholders, including the Committee.

11. Finally, the Ad Hoc Group strongly disagrees with any assertion or implication by the Committee that the full availability of the DIP Financing does not benefit unsecured creditors, as well as with the Committee's efforts to substitute its own assessment of the Debtors' capital needs for that of the Debtors' management, board and advisors. The budget and use of proceeds were among the matters heavily negotiated among the parties in connection with structuring the DIP Financing. While the Ad Hoc Group, as the Debtors' largest creditor constituency, would, as a general matter, prefer to see a less capital-intensive chapter 11 process and a smaller financing need for the Debtors, the Ad Hoc Group also believes it is critically important that the Debtors are—and are understood by their customers, vendors and other stakeholders to be—a well-funded enterprise during their bankruptcy. Any insinuation that the financing is not necessary is baseless, and the suggestion that the proceeds of the DIP Financing disproportionately benefit the Ad Hoc Group is similarly meritless, except insomuch as the Ad Hoc Group has greater claim exposure than any other unsecured creditors, and therefore has more at stake in assuring that the Debtors and their business are well-situated to succeed.

12. The DIP Financing, the consensual use of cash collateral and the other relief contemplated by the Proposed Final Order provide significant value to the Debtors and represent

the Debtors' *only* actionable path to finance the Chapter 11 Cases. The consideration and protections afforded to the DIP Creditors and to prepetition creditors that will be included in the Proposed Final Order are reasonable and appropriate and are the result of fruitful and successful negotiations by the Debtors. The Debtors' business judgment in negotiating, structuring and proposing the DIP Financing should not be upended in favor of meritless objections from the Committee.

13. For these reasons and as further set forth below, the Ad Hoc Group respectfully submits that the Objection should be overruled and the DIP Financing approved on a final basis.

REPLY

I. The DIP Financing Is a "Package Deal" That is Fair, Reasonable and Consistent with the Bankruptcy Code and Critical to Protecting the Estates.

14. In evaluating the Objection, the Court should not seek to rewrite the comprehensive terms of the DIP Financing, but instead evaluate the terms as a whole, in connection with the circumstances of the Chapter 11 Cases.[5] As described herein, the terms of the DIP Financing are reasonable, fair and commensurate with the Debtors' financing needs. The Committee cannot ask the Court to selectively amend the DIP Financing to remove individual provisions the Committee takes issue with, while expecting to retain the many benefits conferred thereby.

[5] *See, e.g.*, *In re Exide Holdings, Inc.*, No. 20-11157 (CSS) (Bankr. D. Del. June 19, 2020), Hr'g Tr. 68:5–17 [ECF No. 354] (noting specific terms must be reviewed as part of the DIP financing's "global package"); *In re ION Media Networks, Inc.*, No. 09-13125, 2009 WL 2902568, at *4 (Bankr. S.D.N.Y. July 6, 2009) (evaluating postpetition financing comprehensively); *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 59–60 (Bankr. N.D.N.Y. 2005) (same) (citing *In re Farmland Indus., Inc.*, 294 B.R. 855, 879–80 (Bankr. W.D. Mo. 2003)); *see also In re Ellingsen MacLean Oil Co.*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986), *aff'd*, 834 F.2d 599 (6th Cir. 1987) ("[T]he bankruptcy court would rightfully be more interested by the requirements and provisions of section 364 of the Code, than it would be by a picayune examination of every legal argument that could be brought against separate provisions of the proposed agreement.").

a. The DIP Financing Reflects the Reasonable Exercise of the Debtors' Business Judgment.

15. Courts in this district and other districts routinely grant considerable deference to a debtor's business judgment in obtaining secured postpetition financing, so long as the agreement to obtain such financing does not run afoul of the provisions of, and the policies underlying, the Bankruptcy Code.[6] Here, the circumstances and the evidence before the Court clearly merit such deference.

16. The Debtors have offered ample evidence that the DIP Financing was negotiated and agreed following a thorough marketing process in which the Debtors exhaustively considered alternatives and used the possibility of alternative financing to create competitive negotiating tension. As set forth in the Tempke Declaration, the Debtors were actively engaged in competitive negotiations and marketing of a potential financing transaction from at least November 2023 until an agreement in principle was reached with the Ad Hoc Group in 2024.[7] The Debtors have also put forth substantial evidence as to the exhaustive and arms'-length nature of the negotiations with the Ad Hoc Group regarding the terms and structure of the DIP Financing (as well as the RSA) and the sophisticated advice the Debtors received in connection with those negotiations, as well as substantial evidence that the DIP Financing is well within the bounds of reasonableness.[8]

17. Importantly, the result of these negotiations for the Debtors was a success. The Debtors have obtained a comprehensive financing package that includes a $500 million new-

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6 *See In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender."); *In re Guitar Center, Inc*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) (relying on the debtors' business judgment in authorizing the debtors to obtain postpetition financing); *In re Ascena Retail Grp., Inc.,* No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) (same); *In re Chinos Holdings, Inc.,* No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) (same).

7 *See* Tempke Decl. at ¶¶ 12–19 [ECF No. 29].

8 *See id.* at ¶¶ 18–19.

money DIP Financing with no priming liens or roll-up. The Debtors have demonstrated that the DIP Financing will provide the Debtors with ongoing access to liquidity that is necessary to ensure that the Debtors have the means to administer the Chapter 11 Cases and undertake an operational and financial restructuring, with the benefit of an RSA supported by holders of more than $1.4 billion of aggregate claims. As such, the DIP Financing and the DIP Motion merit deference to the Debtors' business judgment, without any need to substitute the *ex post* assessment of the Committee or suggest (as the Committee has previewed) that a different standard of review may be appropriate.[9]

18. In attacking the Debtors' entitlement to business judgment deference, the Supplemental Objection and the Genereux Declaration contend that the absence of a valuation and a business plan should have rendered the Debtors unable to negotiate debtor-in-possession financing or a restructuring support agreement.[10] This necessarily assumes postpetition financing should only be provided when there is certainty as to the value and business prospects of a debtor, which simply cannot be true for companies in bankruptcy or in financial distress. To the contrary, chapter 11 debtors and other distressed companies should be incentivized to take measures that create stability and lock in stakeholder support. Debtor-in-possession financings and restructuring support agreements give value to debtors in bankruptcy precisely because they provide commitments of liquidity and support in situations that are inherently risky and uncertain. The

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[9] The DIP Financing does not come close to approaching the circumstances in which courts have denied business judgment deference. *Cf. In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (the business judgment would not be appropriate if terms "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of a particular party in interest rather than the estate); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (discussing *Tenney*). In a single footnote in the Supplemental Objection, the Committee merely "reserves the right to argue that the heightened standard should apply." Suppl. Obj. at 4, n.3 [ECF No. 390]. It is telling that, despite multiple rounds of briefing and extensive discovery, the Committee has not articulated a reason for, or even fully argued for, a heightened standard to apply.

[10] Suppl. Obj. at ¶ 7; Genereux Decl. at ¶ 8.

DIP Financing here is no different. It was negotiated and selected by the Debtors—and, indeed, remains the Debtors' only available means of financing—to stabilize the liquidity position of the Debtors and secure broad creditor support for their restructuring at a point of heightened vulnerability and distress.

19. Moreover, although the Ad Hoc Group submits that the terms of the DIP Financing are each valid in isolation, it is important that both the financing package and the business judgment of the Debtors in negotiating that package be assessed on a comprehensive basis. This is consistent with the manner in which the DIP Financing was pursued and negotiated by the Debtors and reflects the practical reality that the DIP Creditors have *only* committed to provide the DIP Financing with the agreed terms in place, and an effort to remove or modify individual rights and protections (particularly terms that are highly customary and/or in line with market precedents) may leave the Debtors with no available financing at all—a result that would be disastrous for the Debtors and their unsecured creditors.

b. <u>The Events of Default and Restructuring-Related Terms of the DIP Financing are Appropriate</u>.

20. The events of default in the DIP Facility Agreement are appropriate under the circumstances of the Chapter 11 Cases and consistent with terms of debtor-in-possession financings approved in complex cases in the Eastern District of Virginia and elsewhere.

21. The Committee takes particular issue with the fact that a termination of the RSA would result in an event of default under the DIP Financing. However, the terms tying the DIP Financing to the RSA are in line with precedents and reasonable in this proceeding for several reasons. *First*, as a threshold matter, the Committee's argument appears to be premised on the misapprehension that the RSA is effectively a tax on the Debtors and their estates that exists for the benefit of the supporting creditors. To the contrary, and as noted above, the RSA provides

considerable value to the Debtors and their estates, as it has allowed the Debtors to enter the chapter 11 process and undertake customer negotiations with pre-negotiated restructuring terms and commitments of support from creditors representing the vast majority of the Debtors' debt capital structure.

22. *Second*, DIP financing defaults linked to the termination of restructuring support agreements (and lender consent rights over chapter 11 processes, generally) are protections that are ubiquitous and routinely approved in complex chapter 11 cases, including in this district.[11] This is for good reason as, in cases like this one, creditors are often compelled to provide debtor-in-possession financing on a "defensive" basis, to protect against value destruction and the risk of further impairing recoveries on prepetition claims. In such cases, it is entirely appropriate for creditors to condition the extension of *additional* credit to a bankruptcy estate on some assurance as to the process such additional extension of credit is funding. There is nothing untoward or unusual about a creditor seeking such conditionality or about a debtor agreeing to it after a fulsome negotiation and evaluation of potential alternatives, as occurred here.

23. Further, while the Objection suggests that certain termination rights of creditors in the RSA are problematic because they could too readily result in the possibility of a termination

[11] *See In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) (approving a DIP financing with an event of default if "the RSA is terminated for any reason"); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) (approving a DIP financing with an event of default for "termination of the Transaction Support Agreement in accordance with its terms due to the action or omission, as applicable, of the Loan Parties," over the objection of the committee of unsecured creditors); *see also In re Airspan Networks Holdings Inc.*, No 24-10621 (TMH) (Bankr. D. Del. Apr. 19, 2024) (approving a DIP financing with an event of default upon "the termination of the RSA"); *In re Joann Inc.*, No. 24-10418 (CTG) (Bankr. D. Del. Apr. 12, 2024) (approving a DIP facility with an event of default if "the TSA shall have been terminated"); *In re Hornblower Holdings LLC*, No. 24-90061 (MI) (Bankr. S.D. Tex. Mar. 23, 2024) (approving a DIP financing with an event of default if "the Restructuring Support Agreement is terminated for any reason"); *In re Air Methods Corp.*, No. 23-90886 (MI) (Bankr. S.D. Tex. Nov. 14, 2023) (approving a DIP financing with an event of default if "the RSA Termination Event shall have occurred"); *In re Diebold Holding Co.*, No. 23-90602 (DRJ) (Bankr. S.D. Tex. July 12, 2023) (approving a DIP financing with an event of default upon "the termination of the RSA"); *In re Party City Holdco*, No. 23-90005 (DRJ) (Bankr. S.D. Tex. March 3, 2023) (approving a DIP financing with an event of default upon "the termination of the RSA").

(and therefore a default under the DIP Facility Agreement), this argument ignores the fact that (a) creditor-led termination of restructuring support agreements is in fact quite rare and (b) the specific termination provisions identified by the Committee as purportedly problematic are, themselves, commonplace in restructuring support agreements. Indeed, the support agreements in at least two notable recent cases in the Eastern District of Virginia contained similar termination events.[12]

24. The Committee's purported concern about the potential for the RSA to terminate as a result of missed case milestones is also particularly surprising given the Committee did not raise an objection to the "milestones" covenant in the DIP Facility Agreement itself, which requires compliance with the same schedule of process milestones. The case milestones in the RSA and the DIP Financing are also constructed to provide significant breathing space for the Debtors to pursue operational restructuring in bankruptcy, requiring the filing and consummation of a plan at 120 days and 205 days following the Petition Date, respectively.[13]

25. *Third*, contrary to the Committee's assertions, neither the RSA nor the DIP cross-default tied to RSA termination forecloses the possibility of the Debtors pursuing alternative

[12] By way of example, the postpetition financings in *In re Ascena Retail Group, Inc.* and *In re Chinos Holdings, Inc.* each included events of default tied to restructuring support agreements, which in turn contained creditor termination events for missing milestones, the debtors supporting or proposing alternative plans of reorganization and the debtors filing pleadings inconsistent with the RSA. *See In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va.) [ECF Nos. 14, 447]; *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va.) [ECF Nos. 6, 587].

[13] Courts in this district and others routinely approve debtor-in-possession financings with milestones reflecting more accelerated case timelines. *See In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) [ECF No. 447] (approving postpetition financing with a 70-day plan solicitation milestone and 130-day effective date milestone); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 587] (approving postpetition financing with a 14-day plan filing milestone and 130-day effective date milestone); *see also In re Wesco Aircraft Holdings, Inc.*, No. 23-90611 (DRJ) (Bankr. S.D. Tex. July 10, 2023) [ECF No. 396] (approving postpetition financing with a 90-day plan filing milestone and 195-day effective date milestone); *In re Party City Holdco*, No. 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [ECF No. 587] (approving postpetition financing with a 60-day plan filing milestone and 120-day effective date milestone).

restructuring proposals. As noted above, the RSA has always granted the Debtors an express right to receive, evaluate and respond to alternative transactions, *see* RSA § 6(d), as well as a customary "fiduciary out" termination right, to allow the Debtors to exit the agreement if the performance of their fiduciary duties demand it, *see id.* § 8(b). Further, as also noted in paragraph 7 above, the Proposed Final Order is expected to provide the Debtors with (a) additional flexibility to pursue an "overbid" process and seek higher and better offers in parallel with pursuing a plan under the RSA and (b) an express ability to refinance the DIP Financing in full, in cash, without triggering an event of default as a result of doing so (even if such refinancing terminates the RSA).[14] As a result, the Debtors have the ability to evaluate alternative proposals while party to the RSA, refinance the DIP Financing (without triggering an event of default) in the unlikely event they determine it is in their interests to do so, and actively pursue potential "topping" offers that fully repay the Debtors' funded indebtedness in parallel with pursuing the RSA plan.

26. For the same reasons, the Committee's objection to DIP consent rights over an "Acceptable Plan of Reorganization" is also misplaced. As with the RSA, the requirement that a plan be acceptable to a voting majority of DIP Creditors serves to ensure that the restructuring process that is being financed actually has the support of the providers of the DIP Financing (who are also the Debtors' largest creditor constituency and, in all likelihood, necessary supporting parties of any actionable plan). And as noted, the Debtors now retain flexibility to pursue topping bids in connection with any such plan.

[14] The Ad Hoc Group submits that, while these additional features were by no means legally necessary to build into the DIP Financing, they more than address the Committee's requests for the Debtors to be afforded greater flexibility. Genereux Decl. at ¶¶ 18–19.

c. <u>The Premiums and Fees Paid Under the DIP Financing are Fair and Reasonable</u>.

27. As the Tempke Declaration describes in detail, the economic terms of the DIP Financing, including premiums and fees, were heavily negotiated by the Debtors and reflect market terms for similar debtor-in-possession financings.[15] Indeed, these terms, taken individually and in the aggregate, fall well within the range of precedents, even setting aside the fact that, unlike many other debtor-in-possession financings, the DIP Financing is being provided on a non-priming (and largely junior lien) basis.

28. Nevertheless, the Objection asks the Court to deny approval of the Break Premium.[16] The Break Premium is an essential component of the overall economic bargain embodied in the DIP Financing and is not a term that can be individually excised with other terms (or the DIP Commitments) remaining in place. The Break Premium also serves a clear, justifiable purpose: to compensate the DIP Creditors in the event that the option to equitize a portion of their obligations through the Tranche A Participation Election never in fact materializes. Indeed, as the Objection makes clear, there is no certainty that a plan containing an equity offering (which would be necessary for the Tranche A Participation Election to occur) will be approved or consummated in the Chapter 11 Cases. *See* Committee Obj. at ¶ 22.

29. Importantly, in a circumstance where the Tranche A Participation Election occurs and DIP Creditors equitize their claims, no Break Premium is payable—the premium serves a

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15 *See* Tempke Decl. at ¶ 31 [ECF No. 29].

16 The Ad Hoc Group further notes that the Break Premium was already approved—along with the other fees and premiums under the DIP Financing—on an irrevocable basis under the Interim Order. *See* Interim Order ¶ 2(b)(ii) ("[T]he non-refundable payment to the DIP Secured Parties, as the case may be, of all fees . . . including . . . break fees and premiums . . . under the DIP Facility Agreement . . . shall be ***irrevocable, and shall be, and shall be deemed to have been, approved upon entry of this Interim Order,*** whether any such fees, premiums, expenses and other amounts arose before, on or after the Petition Date ***and whether or not the transactions contemplated hereby are consummated*** . . . .") (emphasis added).

purely compensatory function in the event that DIP Creditors are not given their bargained-for equity election right. The Break Premium should not be viewed in isolation from the other terms and value afforded to the estates by the DIP Financing and the degree of risk undertaken by the DIP Creditors, particularly given that the DIP Financing is a non-priming, junior lien instrument extended to an enterprise that, as the Committee readily notes, is in the midst of an operational restructuring and does not currently have clarity as to its business plan.[17] The DIP Creditors cannot realistically be expected to agree to reaffirm their financing commitments without this essential consideration in place.

d. <u>The Equitizing Component of the DIP Financing is Appropriate and Not a *Sub Rosa* Plan</u>.

30. The Committee asserts no valid basis for the Court to deny approval of the Tranche A Participation Election. The option afforded to DIP Creditors to equitize a portion of their obligations on the same economic terms as are used in an anticipated future equity rights offering is a critical term of the bargained-for DIP Financing, and one that benefits the Debtors' estates as a means to both (a) serve as a form of non-cash consideration for the Debtors to utilize to negotiate the DIP Financing and secure the valuable financing commitments from the DIP Creditors and (b) so long as DIP Creditors take up the equity option, reduce the overall amount of exit financing that the Debtors will be required to raise in order to repay the DIP Financing at emergence. Because its very nature is to allow the DIP Financing to be repaid with equity issued on the same terms as equity under a plan, the Tranche A Participation Election does not actually impair the position of unsecured creditors that are not DIP Creditors or any other stakeholders of

[17] The Supplemental Objection suggests that the lack of a business plan is a fundamental concern for any lender in these circumstances. Suppl. Obj. at ¶¶ 6–7. This is precisely why the Break Premium, the Tranche A Participation Election and the other economic features of the DIP Financing are necessary—to compensate the DIP Creditors for the degree of risk undertaken in underwriting a non-priming financing in these Chapter 11 Cases.

the Debtors. This election also has the potential to further align incentives between the Debtors and the DIP Creditors to support the strongest possible exit from bankruptcy for the Debtors and their business.

31. The Tranche A Participation Election does not fail as a *sub rosa* plan. Although the Fourth Circuit has not issued a decision on the matter, other courts have raised serious doubts that the *sub rosa* plan doctrine is at all applicable outside of section 363 transactions.[18] Decisions of courts within the Fourth Circuit that address the doctrine have likewise arisen in the context of section 363 transactions.[19] While sales that "dispose of all of [the debtor's] assets" have been found to come too close to serving the function of a plan,[20] the doctrine does not on its face extend to postpetition financing.

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[18] *See The Babcock & Wilcox Co.*, 250 F.3d at 960 (noting that the doctrine does not apply to DIP loans); *see also In re McClure*, No.: 1:13-bk-10386-GM, 2015 Bankr. LEXIS 1076, at *23 (C.D. Cal. Apr. 2, 2015) ("[I]t is not clear that the sub rosa plan objection applies to anything other than § 363 sales, and possibly settlement agreements. The vast majority of sub rosa plan cases involve § 363 sales."); *cf. Off. Comm. of Unsecured Creditors v. Cajun Elec. Power Coop by & Through Mabey (In re Cajun Elec. Power Coop.)*, 119 F.3d 349 (5th Cir. 1997) (applying the *sub rosa* doctrine to settlements, with the understanding that such actions find their support in section 363(b)); *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets." (emphasis added)).

[19] *See In re Cloverleaf Enters., Inc.*, 09-20056, 2010 Bankr. LEXIS 1301, at *8 (Bankr. D. Md. Apr. 2, 2010) (discussing the doctrine in the context of section 363); *In re On-Site Sourcing*, 412 B.R. 817, 825 (Bankr. E.D. Va. 2009) (mentioning the doctrine with reference to a section 363 sale); *In re Naron & Wagner, Chartered*, 88 B.R. 85, 88 (Bankr. D. Md. 1988) (discussing the doctrine in the context of section 363). *But cf. In re Abbington Partners, LLC*, 14-08681, Bankr. LEXIS 3202, at *4 (Bankr. M.D.N.C. July 28, 2014) (noting, without addressing, the argument made by the Bankruptcy Administrator that a contract amounted to a *sub rosa* plan).

[20] *Off. Comm. of Unsecured Creditors of Tower Auto. v. Debtors & Debtors in Possession (In re Tower Auto. Inc.)*, 241 F.R.D. 162, 169 (S.D.N.Y. 2006); *cf. In re Tidal Constr. Co.*, 446 B.R. 620, 623 (Bankr. S.D. Ga. 2009) ("There is an inherent friction between section 363 provisions permitting sales of assets in Chapter 11 and the more rigorous procedural safeguards under section 1125 (disclosure statements and solicitation) and 1129 (plan confirmation). The issue of when it is appropriate for a sale of all or substantially all of the assets of a debtor to occur under the expedited procedures of section 363 rather than those dealing with disclosure and plan confirmation has been litigated in numerous contexts." (citing *In re Braniff*, 700 F.2d 935; *In re Cont'l Airlines, Inc.*, 780 F.2d 1223 (5th Cir. 1986); *The Babcock & Wilcox Co.*, 250 F.3d 955 (5th Cir. 2001))); *State Dep't of Taxation & Ohio Bureau of Workers Comp. v. Swallen's, Inc. (In re Swallen's, Inc.)*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001) ("Ordering a *full distribution* in a Chapter 11 without first having a confirmed plan, therefore, violates the conceptual predicate of Chapter 11.").

32. Even if the *sub rosa* plan doctrine applies to debtor-in-possession loans, generally, the doctrine would be inapplicable to the Tranche A Participation Election in these Chapter 11 Cases, because no values, discounts, equity issuance prices or other economic terms of a plan are actually determined through the DIP Financing or the Equity Participation Election. Instead, these values remain subject to further analysis, negotiation and agreement in connection with a plan process, and also remain fully subject to further review and approval by the Court.

33. Moreover, the Tranche A Participation Election is being provided to DIP Creditors (including those DIP Creditors that participate through the syndication process run by the Debtors) solely on account of their DIP Financing obligations and not as treatment on account of any prepetition claim or interest. That parties in the Debtors' equity structure were offered the ability to participate in the Debtors' syndication is of no moment. The Debtors' syndication accounts for only a small minority of the DIP Financing (up to 20%), and the opportunity to elect to receive equity in the reorganized Debtors is not being provided to the Debtors' *prepetition* shareholders as a class, but rather is being provided on a ratable basis to DIP Creditors through a participation option linked directly to their *postpetition* financing obligations.

34. In arguing that the Tranche A Participation Election renders the DIP Financing a *sub rosa* plan, the Committee principally (and incorrectly) relies on a single decision from the *LATAM Airlines* bankruptcy that, as discussed in the Debtors' Reply, was highly fact-specific and arose in circumstances entirely distinct from those here. *See* Debtors' Reply at ¶¶ 57, 61 and 66. Since that decision, fully or partially equitizing DIP financings have become more common in complex chapter 11 cases and are approved with frequency.[21]

[21] Equitization components in debtor-in-possession financings have been approved in many recent cases. *See In re Nordic Aviation Cap. Designated Activity Co.*, No. 21-33693 (KRH) (Bankr. E.D. Va. Feb. 3, 2022) [ECF No. 304]; *In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sep. 10, 2020) [ECF No. 587]; *In re Chinos*

35. Because the Tranche A Participation Election (a) was negotiated between the Debtors and third-party DIP Creditors as an essential element of a "package deal" financing, (b) does not dictate plan terms or recoveries (and therefore does not constitute a *sub rosa* plan) and (c) has the potential to preserve liquidity for the Debtors and prejudices no one, the Court should approve the Tranche A Participation Election along with the other terms and structural features of the DIP Financing.

e. <u>The Syndication of the Company Allocated Portion of the DIP Financing Does Not Violate the Absolute Priority Rule</u>.

36. The right of the Debtors to syndicate 20% of the DIP Financing as the "Company Allocated Portion" to parties in their equity ownership structure is a component of the overall "package deal" contained in the DIP Financing alongside many other terms. At this juncture, the syndication process has been run and the Ad Hoc Group respectfully submits that this component of the financing should remain in place.

37. The Ad Hoc Group also disagrees that this syndication by the Debtors causes the DIP Financing to violate the absolute priority rule. Section 1129 of the Bankruptcy Code is a plan confirmation statute, and "is inapplicable to [a] pre-confirmation DIP financing order."[22] And as noted above, any value provided to shareholders of the Debtors that ultimately participate in the DIP Financing will be provided as consideration for credit extended in that capacity, rather than as treatment on account of prepetition interests.

Holdings, Inc., No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447]; *In re Akumin Inc.*, No. 23-90827 (CML) (Bankr. S.D. Tex. Nov. 29, 2023) [ECF No. 258], *In re Party City Holdco*, No. 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [ECF No. 587]; *In re Phoenix Servs. Topco LLC*, No. 22-10906 (MFW) (Bankr. D. Del. Nov. 2, 2022) [ECF No. 237], *In re Lumileds Holding B.V.*, No. 22-11155 (LGB) (Bankr. S.D.N.Y. Oct. 13, 2022) [ECF No. 188], *In re Carestream Health, Inc.*, No. 22-10778 (JKS) (Bankr. D. Del. Sep. 28, 2022) [ECF No. 179], *In re Grupo Aeroméxico, S.A.B. de C.V.*, No. 20-11563 (SCC) (Bankr. S.D.N.Y Oct. 13, 2020) [ECF No. 527], *In re Neiman Marcus Grp. Ltd LLC*, No. 20-32519 (DRJ) (Bankr. S.D. Tex. June 16, 2020) [ECF No. 850], *In re Am. Commercial Lines Inc.*, No. 20-30982 (MI) (Bankr. S.D. Tex. Mar. 5, 2020) [ECF No. 202]; *In re Bristow Grp. Inc.*, No. 19-32713 (DRJ) (Bankr. S.D. Tex. Aug. 21, 2019) [ECF No. 582].

[22] *The Babcock & Wilcox Co.*, 250 F.3d at 960.

f. Liens on Avoidance Proceeds are Customary and Appropriate.

38. Under section 364 of the Bankruptcy Code, liens on unencumbered assets may be granted if unsecured credit cannot be obtained. *See* 11 U.S.C. § 364(d)(1)(A). Unencumbered assets—such as proceeds of avoidance actions—should therefore be the *first* category of assets used to secure postpetition financing, not the last, because secured creditors have property rights in their collateral and unsecured creditors have no such rights in unencumbered assets. Postpetition financings are routinely secured by "all asset" blanket collateral packages because the Bankruptcy Code offers unique protections to incentivize the extension of credit to help debtors stabilize and reorganize, thereby preserving value for all stakeholders. This is of course a central policy goal of the U.S. insolvency regime.

39. Proceeds of avoidance actions are no exception to this rule. They are property of the estate and, as such, may be pledged to secure postpetition financing and diminution claims of prepetition secured creditors entitled to adequate protection. *See* 11 U.S.C. §§ 361(2); 364(c)(2), (c)(3), (d); 541(a)(3), (a)(4), 550(a). Contrary to what the Committee implies, unsecured creditors do not hold exclusive rights to the proceeds of avoidance actions—rather these proceeds are property of the Debtors' estates under section 541(a)(3).[23] Indeed, courts in this district and elsewhere have repeatedly approved similar relief.[24]

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[23] *See Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 293 (7th Cir. 2003) ("Lest this way of resolving the issue be taken to assume that § 550(a) requires that some benefit flow to unsecured creditors, we add that the statute does not say this. Section 550(a) speaks of benefit to the estate—which in bankruptcy parlance denotes the set of all potentially interested parties—rather than to any particular class of creditors.").

[24] *See, e.g.*, *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [ECF No. 309]; *In re Guitar Ct., Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315]; *In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sep. 10, 2020) [ECF No. 587]; *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447]; *In re the Gymboree Corp.*, No. 17-32986 (KLP) (Bankr. E.D. Va. July 11, 2017) [ECF No. 384]; *In re Penn Va. Corp.*, No. 16-32395 (KLP) (Bankr. E.D. Va. June 8, 2016) [ECF No. 219]; *In re Alpha Nat. Res.*, No. 15-33896 (KRH) (Bankr. E.D. Va. Sept. 17, 2015) [ECF No. 465]; *In re Invacare Corp.*, Case No. 23-90068 (CML) (Bankr. S.D. Tex. Mar. 8, 2023) [ECF No. 298]; *In re Avaya Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 7, 2023) [ECF No. 278].

40. As a threshold matter, as is expected to be reflected in the Proposed Final Order, Avoidance Proceeds will be subject to a "last look" obligation, requiring secured parties under the DIP Liens and Adequate Protection Liens to use commercially reasonable efforts to recover from other sources of collateral, before seeking to recover from such proceeds. Further, and contrary to certain authorities cited by the Committee, there is no proposal to have liens granted over avoidance actions themselves, in connection with the DIP Financing or the adequate protection provided under the DIP Order. To the contrary, while Avoidance Proceeds will be granted as collateral, the Debtors' avoidance actions will remain unencumbered. The DIP Documents are clear that, subject to applicable deadlines, all parties in interest retain the ability to bring challenges against the Prepetition Secured Parties, and that a successful challenge could impair the prepetition claims and liens or lead to other remedies.

41. Given the ubiquity with which avoidance action proceeds are sought, agreed to and approved as collateral secured by debtor-in-possession financing and adequate protection liens, the Debtors made a reasonable business decision to pledge Avoidance Proceeds (but not avoidance actions, themselves) as DIP Collateral and collateral secured by Adequate Protection Liens as a result of the intense arms'-length negotiations that resulted in the DIP Financing.

g. <u>506(c) and 552(b) Waivers Are Customary and Appropriate</u>.

42. The Committee takes issue with the highly customary waivers sought by the DIP Motion with respect to the right to seek surcharge under section 506(c) of the Bankruptcy Code and the "equities of the case" exception of section 552(b) of the Bankruptcy Code. *See* Committee Obj. at ¶¶ 52–53. But, as is often the case, the Debtors' agreement to the waivers was part and parcel of the bargain that enabled the Debtors to obtain the DIP financing and the use of cash collateral. The DIP Creditors' agreement to the other terms of the DIP Financing (and the prepetition lenders' consent to use of cash collateral) is premised on, among other factors, the

Debtors waiving any rights they may have to surcharge the DIP Collateral and seek application of the "equities of the case" exception. Removal of these waivers from the Final Order would create substantial risk for the DIP Creditors and Prepetition Secured Parties over and above that which they have already assumed and bargained for—given the sizing and absence of priming by the DIP Financing—and for which they have not otherwise been compensated under the economic terms of the DIP Financing. The risk would also be extraordinary and aberrational given the overwhelming frequency with which such waivers are granted.[25] Indeed, the Committee has not cited any unusual or unprecedented features of this DIP Financing that would justify the highly aberrational result of denying these customary waivers.

43. Notably, the rationale for the application of section 506(c) is to allow for a surcharge of secured creditors' collateral to the extent that unencumbered assets are used during the cases for the benefit of secured creditors.[26] This rationale is not applicable where, as here, the Debtors are spending the secured lenders' cash collateral to operate their businesses, and to pay the expenses of the cases, including the fees of the Committee's professionals.

44. Indeed, the Ad Hoc Group agreed in the DIP Financing to a "Carve-Out" that makes all professional fees incurred through the date of an event of default under the DIP Facility

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[25] For section 506(c) and 552(b) waivers, *see, e.g.*, *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [ECF No. 309]; *In re Guitar Center, Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315]; *In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sep. 10, 2020) [ECF No. 587]; *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447]; *In re Garrett Motion Inc.*, No. 20-12212 (MEW) (Bankr. S.D.N.Y. Oct. 23, 2020) [ECF No. 281]; *In re Centric Brands Inc.*, No. 20-22637 (SHL) (Bankr. S.D.N.Y. June 22, 2020) [ECF No. 220]; *In re Ultra Petrol. Corp.*, Case No. 20-32631 (MI) (Bankr. S.D. Tex. June 16, 2020) [ECF No. 293]; *In re Hornbeck Offshore Servs., Inc.*, Case No. 20-32679 (DRJ) (Bankr. S.D. Tex. June 15, 2020) [ECF No. 166].

[26] *See, e.g.*, *In re JKJ Chevrolet, Inc.*, 26 F.3d 481, 483 (4th Cir. 1994) ("The purpose of [section 506(c)] is to prevent a windfall to a secured creditor at the expense of the estate."); *C.S. Assocs. v. Miller*, 29 F.3d 903, 907 (3d Cir. 1994) ("Courts have narrowly construed § 506(c) to encompass only those expenses that are specifically incurred for the express purpose of ensuring that the property is preserved and disposed of in a manner that provides the secured creditor with a maximum return on the debt and also apportions those costs to the secured creditor who, realistically, is assuming the asset.") (citing *In re Parr Meadows Racing Ass'n*, 92 Bankr. 30, 35–36 (E.D.N.Y. 1988), *aff'd in part, rev'd in part on other grounds*, 880 F.2d 1540 (2d Cir. 1989)).

Agreement, and provides for millions of dollars in potential additional post-trigger expenses to be senior in all respects to the DIP Financing and all prepetition claims and liens. The Carve-Out *is* a surcharge of the collateral and a very large one at that—the 506(c) and 552(b) waivers contemplated by the DIP Motion simply ensure that secured creditors will not have a *further* surcharge forced upon them in excess of what they have negotiated and agreed to already. Estate waivers of section 506(c) and the "equities of the case" exception under section 552(b) are customary features of postpetition financings precisely because they encourage lenders to agree to similar carve-outs.[27]

45. As part of its Objection on this point, the Committee points to Judge Huennekens's remarks from the bench in the *Ascena* case for the proposition that a heightened standard of review should be applied when a committee, as opposed to the United States Trustee, makes an objection to the imposition of these highly customary waivers. *See* Committee Obj. at ¶ 50. However, Judge Huennekens's remarks viewed in context show his primary concern is to preserve the debtors as a going concern and effectuate a business deal. In those same remarks from the bench, Judge Huennekens stated:

> [T]he Court is mindful that the Bankruptcy Code is a powerful tool that allows businesses the opportunity to reorganize and right the ship and get back on its feet. And that's what the Code is meant to do, and the Code does that effectively. And the provisions of the Code shouldn't get in the way of that. And what we have got here is a going-concern plan. We have ninety-five percent of the creditors on board.

[27] *See In re Bedford Commc'ns, Inc.*, No. 10-10902 (SMB), 2010 WL 2881417, at *4 (Bankr. S.D.N.Y. Apr. 19, 2010) (approving a 506(c) waiver by the debtors and creditors' committee with respect to prepetition and postpetition collateral in consideration for a carve-out for unpaid professional fees and expenses); *see also In re Exide Holdings, Inc.*, No. 20-11157 (CSS) (Bankr. D. Del. May 21, 2020), Hr'g Tr. 125:14–18 ("[Y]ou always have 506(c) until you negotiate it away, which happens – one of the reasons you can negotiate away 506(c) is because you have the professional fee carveouts. So it's sort of both sides of the same coin."); *In re Mineral Park, Inc.*, No. 14-11996 (KJC) (Bankr. D. Del.), Hr'g Tr. 43:10–12, Sept. 23, 2014 (overruling the committee's objection and stating "given what [the secured lenders are] funding, I think [they've] paid for a 506(c) waiver and I would be willing to grant it"); *In re MPM Silicones, LLC*, No. 14-22503 (RDD) (Bankr. S.D.N.Y.), Hr'g Tr. 58:11–12; 93:12–20, May 23, 2014 (where a carve-out is provided, a 506(c) waiver is often an "acceptable trade-off").

Case No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) Hr'g Tr. at 50:10–17 [ECF No. 590]. These remarks might be more accurately characterized as a concern that the relief granted should reflect the economic realities of the case and protect the going-concern value of the Debtors, particularly amid broad support from the actual economic stakeholders. Those considerations are all attendant here where the Debtors have negotiated a valuable and necessary financing package that has the support of holders of more than $1.4 billion of the Debtors' claims (including approximately $1 billion of unsecured claims).

h. <u>The Marshaling Waiver is Customary and Appropriate</u>.

46. The Committee also objects to the marshaling waiver, though it is telling that the Committee cites no cases to support its assertion that a marshaling waiver in a final order approving debtor-in-possession financing and/or the use of cash collateral is inappropriate, when courts in this district have routinely approved such marshaling waivers. As an initial matter, the Committee lacks standing to seek marshaling, which is an equitable remedy available only to *secured* creditors, and its objection to the marshaling waiver should be overruled on that ground alone.[28] The marshaling waiver is also a bargained-for component of the DIP Financing,[29] protecting the lenders funding and consenting to such financing. These waivers are routinely granted because they provide predictability to lenders consenting to postpetition financing and thereby enable

[28] *See*, *e.g.*, *In re Am.'s Hobby Ctr., Inc.*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998) ("[A]n unsecured creditor may not utilize the doctrine of marshaling."); *Galey & Lord, Inc. v. Arley Corp. (In re Arlco, Inc.)*, 239 B.R. 261, 274 (Bankr. S.D.N.Y. 1999) (holding that unsecured creditors have no right to invoke the doctrine of marshaling) (citations omitted).

[29] *See, e.g.*, *In re MPM Silicones, LLC*, No. 14-22503 (RDD), H'rg Tr. at *92 (Bankr. S.D.N.Y. 2014) (approving no-marshaling provision in cash collateral order and stating, "I also believe that there's no basis under the facts before me to . . . compel the deletion of the no-marshaling language as it applies to the prepetition secured creditors. Generally speaking, this is the debtor's right to negotiate or secured creditors' right to insist on").

debtors to obtain financing on favorable terms.[30] Indeed, in the cases in which they are asserted, objections to marshaling waivers are regularly overruled, and, to the Ad Hoc Group's knowledge, are rarely, if ever, sustained.[31] Finally, the Committee's concerns with respect to the sequencing of potential repayment from collateral are further mitigated by the "last look" provision with respect to Avoidance Proceeds which, as noted above, is expected to be reflected in the Proposed Final Order.

II. The Committee's Remaining Concerns Have Been Addressed to the Extent Necessary.

47. Although the Objection takes issue with several additional open points with regard to the DIP Financing that were not in the arguments above, these issues and objections are expected to be addressed in the Proposed Final Order either fully or to a degree that the Ad Hoc Group submits is sufficient.[32] While certain of those changes were discussed in the foregoing paragraphs, other modifications include the following:

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[30] *See, e.g.*, *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [ECF No. 309] (granting marshaling waiver); *In re Guitar Ctr., Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315] (same); *In re Alpha Nat. Res.*, No. 15-33896 (KRH) (Bankr. E.D. Va. Sept. 17, 2015) [ECF No. 465] (same); *see also In re Kumtor Gold Co. CSJC*, No. 21-11051 (Bankr. S.D.N.Y. Oct. 26, 2021) [ECF No. 231] (granting marshaling waiver); *In re LATAM Airlines Grp. S.A.*, No. 20-11254 (Bankr. S.D.N.Y. Dec. 1, 2020) [ECF No. 1454] (same); *In re Jason Indus., Inc.*, No. 20-22766 (Bankr. S.D.N.Y. July 27, 2020) [ECF No. 131] (same); *In re LSC Commc'ns, Inc.*, No. 20-10950 (Bankr. S.D.N.Y. June 5, 2020) [ECF No. 321] (same).

[31] *See, e.g.*, *In re SquareTwo Fin. Servs. Corp.*, No. 17-10659 (JLG) (Bankr. S.D.N.Y. Apr. 27, 2017) [ECF No. 201]; Hr'g Tr. (Apr. 27, 2017) at 161:18–20 (overruling objection to marshaling waiver); *In re AOG Entm't, Inc.*, No. 16-11090 (SMB) (Bankr. S.D.N.Y. July 26, 2016) [ECF No. 296]; Hr'g Tr. (July 26, 2016) at 25:9–15, 58:1–59:2 (same); *see also In re SunEdison, Inc.*, No. 16-10992 (SMB) (Bankr. S.D.N.Y. June 9, 2016) [ECF No. 523] (granting marshaling waiver over objection); *In re Hooper Holmes, Inc.*., No. 18-23302 (RDD) (Bankr. S.D.N.Y. Sep. 27, 2018) [ECF No. 156] (same); *In re Advance Watch Ltd.*, No. 15-12690 (MG) (Bankr. S.D.N.Y. Nov. 16, 2015) [ECF No. 165] (same).

[32] The Proposed Final Order is not expected to reflect modifications to the remedies notice provision contained in paragraph 7(e) thereof, which the Committee sought in its Objection. *See* Committee Obj. Ex. A at 3. The remedies provision that was included in the Interim Order and that is expected to be included in the Proposed Final Order is consistent with the weight of precedent in this district and others. *See, e.g.*, *In re Guitar Ctr. Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315] (providing for specific rights of the Agents to permit the DIP Secured Creditors to exercise remedies broadly without requiring an emergency hearing or further order for relief from stay); *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [ECF No. 309] (providing for specific rights of the Agents to permit the DIP Secured Creditors to exercise remedies broadly without requiring an emergency hearing or further order for relief from stay); *In*

Provision	DIP Creditors' Response
Committee Investigation Period	The Proposed Final Order is expected to extend the Committee's Challenge Period from 60 days following Committee formation (as required under the Local Rules) to 90 days following Committee formation. With respect to the Committee, the Proposed Final Order is expected to provide that, if, prior to expiration of the Committee's Challenge Period, the Committee files a motion seeking standing and authority to commence litigation as a representative of the Debtors' estates and attaching to such motion a proposed complaint identifying and describing all claims and causes of action on behalf of the Debtors' estates for which the Committee is seeking standing, and such motion is granted by the Court, then the committee's Challenge Period with respect of the claims and causes of action described in the proposed complaint for which the Court granted standing shall be extended until the date that is three business days from the entry of a final order ruling on such standing motion. The Objection seeks to extend this period to 120 days after entry of the Final DIP Order, which does not comport with the Debtors' case timeline. The contemplated 90-day Challenge Period is more expansive than has been provided for in many other cases in this district.[33]
Committee Investigation Budget	The Proposed Final Order is expected to provide for a Committee investigation budget of $250,000, which is

re Ascena Retail Grp., Inc., No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) [ECF No. 587] (providing for specific rights of the Agents to exercise remedies broadly without requiring an emergency hearing or further order for relief from stay); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447] (providing for specific rights of the Agents to permit the DIP Secured Creditors to exercise remedies broadly without requiring an emergency hearing or further order for relief from stay). Importantly, the exercise of remedies prior to the expiration of the notice period only applies to declaring amounts due (i.e., DIP Creditors, as is customary, should not be estopped from asserting a default when the default has triggered the acceleration of the debt and should not be required to advance additional funds). Further, any enforcement actions against Collateral will be subject to the same fulsome procedures for notice and hearing as apply under the Interim Order. The Objection also requests modifications to the language of the Release, *see* Obj., Exhibit A. However, the release language that is expected to be included in the Proposed Final Order was already highly negotiated among the parties that is relevant to and is consistent with releases previously approved in this district. *See In re Guitar Center Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315]; *In re Intelsat S.A.,* No. 20-32299 (KLP) (Bankr. E.D. Va. June 9, 2020) [ECF No. 285]; *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447]; *In re Pier 1 Imports, Inc.,* No. 20-30805 (KRH) (Bankr. E.D. Va. Mar. 13, 2020) [ECF No. 342].

[33] *See In re Nordic Aviation Cap. Designated Activity Co.*, No. 21-33693 (KRH) (Bankr. E.D. Va. Apr. 1, 2022) [ECF No. 638] (60-day challenge period from committee formation); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447] (82-day challenge period from committee formation); *In re Patriot Coal Corp.*, No 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) [ECF No. 230] (45-day challenge period from committee formation); *In re Alpha Nat. Res.*, No. 15-33896 (KRH) (Bankr. E.D. Va. Sept. 17, 2015) [ECF No. 465] (90-day challenge period from entry of final order); *In re Chesapeake Corp.*, No. 08-36642 (DOT) (Bankr. E.D. Va. Feb 3, 2009) [ECF No. 213] (75-day challenge period from committee formation).

	consistent with precedent in this district.[34] The Committee requested $500,000, an amount that is not needed here or consistent with such precedent.
Post-Carve Out Trigger Notice Cap	The Proposed Final Order is expected to provide for a Committee cap of $1,250,000, which is a $1,000,000 increase from the Interim DIP Order and is consistent with precedent in this district.[35] The Committee requested a cap of $1,750,000, but has not provided specific justification for that amount.
Adequate Protection, Fees and Expenses	Paragraph 16 of the Proposed Final Order is expected to provide that: "With respect to payments of (a) Prepetition Secured Parties Adequate Protection Fees and Expenses made pursuant to Paragraph 13(e), (b) the 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."
Amendments to the DIP Facility	The Proposed Final Order is expected to provide for 5 days' notice for Material DIP Amendments and contemporaneous notice of non-material amendments. It is not in the interest of the unsecured creditors, the Debtors or other stakeholders to create procedural impediments to non-material amendments that provide additional relief to the Debtors.

[34] *See In re Guitar Ctr. Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315] (providing for investigation budget of $50,000); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447] (providing for investigation budget of $250,000); *In re Alpha Nat. Res.*, No. 15-33896 (KRH) (Bankr. E.D. Va. Sept. 17, 2015) [ECF No. 465] (providing for investigation budget of $250,000); *In re Patriot Coal Corp.*, No 15-32450 (KLP) (Bankr. E.D. Va. June 4, 2015) [ECF No. 230] (providing for investigation budget of $250,000); *In re Chesapeake Corp.*, No. 08-26642 (DOT) (Bankr. E.D. Va. Feb 3, 2009) [ECF No. 213] (providing for investigation budget of $25,000).

[35] *See Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [ECF No. 309] (providing for an aggregate estate professionals' cap of $500,000 for a $16 million DIP facility); *In re Guitar Ctr. Inc.*, No. 20-34656 (KRH) (Bankr. E.D. Va. Dec. 17, 2020) [ECF No. 315] (providing for an aggregate estate professionals' cap of $3 million); *In re Ascena Retail Grp., Inc.*, No. 20-33113 (KRH) (Bankr. E.D. Va. Sept. 10, 2020) [ECF No. 587] (providing for an aggregate estate professionals' cap of $5 million); *In re Chinos Holdings, Inc.*, No. 20-32181 (KLP) (Bankr. E.D. Va. June 5, 2020) [ECF No. 447] (providing for an aggregate estate professionals' cap of $6 million).

RESERVATION OF RIGHTS

48. For the avoidance of doubt, the Ad Hoc Group reserves its rights to supplement this Reply to the extent that additional issues raised in the Objection, which the Ad Hoc Group currently believes to be resolved, are for any reason not agreed and/or continue to be asserted as objections before the Court.

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CONCLUSION

WHEREFORE, for the reasons set forth herein, the Ad Hoc Group respectfully requests that the Court overrule the Objection (to the extent still outstanding), grant the DIP Motion, enter the Proposed Final Order and grant such other and further relief as is just and proper.

Dated: April 30, 2024, Virginia

/s/ Dion W. Hayes

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Certificate of Service

The undersigned hereby certifies that on April 30, 2024, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing System (CM/ECF) to all parties registered to receive such notice in the above-captioned case.

/s/ Dion W. Hayes
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