Docket #0383 Date Filed: 7/9/2023

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

In re **WESCO AIRCRAFT HOLDINGS, INC.**, *et al.*,[1] Debtors.	Case No. 23-90611 (DRJ) Chapter 11 (Jointly Administered)

DEBTORS' OMNIBUS STATEMENT AND REPLY REGARDING OBJECTIONS TO DEBTORS' EMERGENCY 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

(RELATED TO ECF NOS. 84, 286, 289, 299, 337, 368)

[1] The Debtors operate under the trade name Incora and have previously used the trade names Wesco, Pattonair, Haas, and Adams Aviation. A complete list of the Debtors in these chapter 11 cases, with each one's federal tax identification number and the address of its principal office, is available on the website of the Debtors' noticing agent at http://www.kccllc.net/incora/. The service address for each of the Debtors in these cases is 2601 Meacham Blvd., Ste. 400, Fort Worth, TX 76137.

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The above-captioned debtors and debtors in possession (the "***Debtors***" and, together with their non-Debtor subsidiaries, "***Incora***") file this reply (this "***Reply***") in support of the *Debtors' Emergency 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* [ECF No. 84] (the "***DIP Motion***")[2] and in response to the objections filed by the ad hoc group of holders of 8.50% notes due 2024 and 9.00% notes due 2026 (the "***2024/2026 Noteholder Group***") [ECF No. 337] (the "***2024/2026 Noteholder Objection***") and by Langur Maize, L.L.C. ("***Langur Maize***") [ECF No. 289] (the "***Langur Maize Objection***").[3]

PRELIMINARY STATEMENT

1. The Debtors have obtained commitments for $300 million in DIP term loans, whose economic terms are accepted by every major stakeholder in these chapter 11 cases. No stakeholder disagrees that the proposed DIP facility is essential to maintaining the Debtors' business operations during these chapter 11 cases. Without it, the Debtors could not use the chapter 11 process to pay critical vendors, re-negotiate burdensome contracts, resolve pending litigation, and de-lever their capital structure. The need here is existential.

2. The Debtors have successfully negotiated the terms of the proposed Final DIP Order (as filed at ECF No. 382, the "***Proposed Final Order***") with many parties and are prepared to seek approval of the DIP Financing on an almost completely consensual basis. The Proposed Final Order incorporates agreements, summarized below, with the Committee, the First Lien Noteholder

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

[3] Additionally, the Debtors have fully and consensually resolved the objections filed by certain local tax authorities at ECF No. 286; the Prepetition ABL Agent at ECF No. 299; and BOKF, NA in its capacity as indenture trustee ("***BOKF***") at ECF No. 368. The Debtors have further addressed and resolved several informal comments received from other parties, including those of the official committee of unsecured creditors (the "***Committee***"). *Cf.* Stmt. & Res. of Rights. of Off. Comm. of Unsec. Creds. ¶ 2, ECF No. 367. The Debtors have also incorporated new language to address the sole issue raised by the Langur Maize Objection. As discussed below, Langur Maize raised a new and meritless issue on July 9.

Group, the Prepetition ABL Agent, BOKF, the 2024/2026 Noteholder Group, and various vendors, customers, insurance companies and local taxing authorities.

3. Three issues raised by the 2024/2026 Noteholder Group remain unresolved. *First*, the 2024/2026 Noteholder Group argues that the fees and expenses of the First Lien Noteholder Group should not be considered DIP Fees and Expenses. *See* 2024/2026 Noteholder Obj. ¶ 17-18. The First Lien Noteholder Group consists of the same two investors that have offered to provide the DIP Financing that is available to the Debtors. In that context, the DIP Purchasers have required fee coverage for all of their professional fees in connection with the chapter 11 cases, for so long as their DIP Financing remains outstanding. The Debtors believe this to be a reasonable and customary request that the Court should approve.

4. *Second*, the 2024/2026 Noteholder Group requests a broad provision to the effect that nothing in the Final Order will "prejudice, limit or otherwise impair" a request to rescind adequate protection following entry of a hypothetical "order providing that the Prepetition 1L Notes or the Prepetition 1.25L Notes are not secured obligations." 2024/2026 Noteholder Obj. ¶ 24. The Debtors believe that the Court addressed this matter at the last hearing, and that the rest of the Proposed Final Order is sufficiently clear regarding adequate protection.

5. *Third*, the 2024/2026 Noteholder Group seeks an unprecedented extension of time to file a Challenge if they are denied standing due to non-compliance with a "no action" provision in their indentures. This request must be rejected. The 2024/2026 Noteholder Group is a well-advised group of sophisticated investors who can make their own determinations whether to comply with the no-action process before filing a standing motion. Nothing in the Bankruptcy Code, case law, or equity requires the Court to give them a free option if they fail to satisfy their contractual obligations.

6. For its part, the Langur Maize Objection complains that the Debtors should not pay fees and expenses in relation to Langur Maize's pending state court action. The Debtors have attempted to address this concern by including new language to clarify what had always been

intended: nothing in the Final Order grants or approve any indemnification in favor of the Prepetition 1.25L Notes Secured Parties.

7. This additional text should have resolved the Langur Maize Objection completely. However, on the morning of Sunday, July 9, Langur Maize raised a new and unrelated objection to the granting of liens on Avoidance Proceeds. The Court should not countenance this late-breaking objection, which is, in any case, devoid of merit. The DIP Motion has always proposed to grant liens on Avoidance Proceeds. The Debtors and the First Lien Noteholder Group were also clear about this at the June 1 hearing. Other parties in interest understood that the DIP Motion proposed to grant liens on Avoidance Proceeds and negotiated "last look" or "soft marshaling" language, which is consistent with extensive precedent in this District. *See* Proposed Final Order ¶ 9.

8. For these reasons, and those stated below, the Debtors submit that the Court should overrule all outstanding objections and approve the DIP Motion.

CONSENSUAL MODIFICATIONS

9. As noted above, the Debtors, the First Lien Noteholder Group, and their advisors have worked tirelessly over the past weeks to resolve numerous objections and comments from various parties across the capital structure. The most noteworthy modifications are set forth below and are in each case qualified by reference to the text of the Proposed Final Order, which (to the extent entered by the Court) will control.

Citation and Topic	Description of Modification
¶¶ 2(b)(i), 34 Major amendments to DIP Facility	Debtors may not "increase facility-based fees or create additional facility-based fees" over the objection of the U.S. Trustee or the Committee without further court approval.
¶ 4(a) Carve-Out amount	"Post-Trigger Fee Cap" component of the Carve-Out increased from $5,000,000 to $6,000,000.

Citation and Topic	Description of Modification
¶ 4(b) Entitlement to deliver Trigger Notice for Carve-Out.	Clarification that prepetition secured parties may not deliver a Trigger Notice until the DIP Obligations have been indefeasibly paid in full and the DIP Commitments terminated.
¶ 4(c)(2) Limits on Carve-Out disbursements	Clarification that disbursements from the Pre-Trigger Reserve shall be made in accordance with paragraph 20 of the Final Order (which concerns the Committee's investigation budget and limitations on the use of the DIP Notes, the Collateral and the Carve-Out).
¶ 9 Marshaling and proceeds of certain causes of action	In the event of an enforcement of remedies in accordance with the Final Order, the DIP Secured Parties and the Prepetition Secured Parties will use commercially reasonable efforts to first satisfy their claims and liens from applicable Collateral other than Avoidance Proceeds or proceeds of claims or causes of action against the Debtors current or former directors and officers.
¶ 13 Grounds for adequate protection	Clarification that adequate protection is granted for diminution in value only to the extent the Bankruptcy Code provides for adequate protection on account of sale, lease or use of Prepetition Collateral, priming of the Prepetition Liens, payments, or the imposition of the automatic stay.
¶ 13(g) Adequate protection for Prepetition 1L Notes Secured Parties	Clarification that 1L Notes Adequate Protection Fees and Expenses will be paid without duplication of the DIP Fees and Expenses.
¶ 13(h) Adequate protection for Prepetition ABL Secured Parties	Clarification that ABL Adequate Protection Fees and Expenses include expenses that relate to indemnification claims under the applicable provision of the Prepetition ABL Credit Agreement.
¶ 13(i) Cash payments to Prepetition ABL Secured Parties	Reservation of rights for Prepetition ABL Secured Parties to seek allowance of post-petition interest at the contractual default rate.
¶ 20 Committee investigation budget	Budget increased from $100,000 to $150,000.

Citation and Topic	Description of Modification
¶ 21 Indemnification	Clarification that the Final Order grants indemnification only with respect to the DIP Secured Parties and the DIP Documents. This clarification is without prejudice to the expense reimbursement rights provided under the Orders and any indemnification rights that may exist from other sources, including Prepetition ABL Credit Documents and Prepetition 1L Notes Documents.
¶ 25 Limitation of liability	Clarification in heading that this is a customary limitation on lender and agent liability, rather than an exculpation provision that might implicate Fifth Circuit case law on exculpations.
¶ 28 Credit bidding	Clarification that credit bids of Prepetition Secured Debt are subject to Challenges to Prepetition Liens brought under paragraph 19.
¶ 30(d) ABL borrowing base	Debtors will maintain "Global Specified Availability" (i.e., the contractually calculated difference between collateral value and ABL exposures) of at least $15,000,000 *plus* an amount that represents certain disagreements regarding the manner of calculating the borrowing base. The additional amount will decrease over time as those disagreements are resolved. For purposes of the Global Specified Availability covenant, cash will be measured each week as the minimum balance over a rolling period of approximately one week, rather than as the point-in-time balance on a given calculation date. The Debtors will work in good faith to establish an account at Bank of America (the Prepetition ABL Agent) which, once established, will hold any cash that is counted toward the calculation of Global Specified Availability.
¶ 30(e) ABL "FILO amortization"	Loans in the "FILO" tranche of the Prepetition ABL Facility will be exchanged into loans in the standard tranche, which will accrue interest at a lower rate.
¶ 30(f) Potential exit financing	The Prepetition ABL Agent will work in good faith with other parties to secure a commitment for exit financing in connection with a confirmable plan of reorganization.
¶ 39 Partial resolutions of 2024/2026 Noteholder Objection	(a) Reservation of rights with respect to any potential adequate protection of 2024 Unsecured Notes and 2026 Unsecured Notes following disposition of bondholder litigation. Resolves ¶¶ 22-24 of the 2024/2026 Noteholder Objection. (b) Clarification regarding effect of Final Order on certain other proceedings. Along with the inclusion of the word "Allowed" in the DIP Note Purchase Agreement's definition of Acceptable Plan

Citation and Topic	Description of Modification
	of Reorganization, this clarification resolves ¶¶ 19-21 of the 2024/2026 Noteholder Objection. (c) Clarification that Debtors' stipulations do not bind parties other than the Debtors, except as set forth in paragraph 19. Resolves ¶¶ 11-12 of the 2024/2026 Noteholder Objection. (d) Clarification that good-faith findings do not apply to the March 2022 transactions. Along with modifications to paragraph 21, this clarification resolves ¶¶ 13-15 of the 2024/2026 Noteholder Objection. (e) Stipulation that the filing at ECF No. 50 in the *Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd.* adversary proceeding constitutes a "Challenge." Rights of all parties to oppose that Challenge, including on standing grounds, are preserved. Partly resolves ¶¶ 25-26 of the 2024/2026 Noteholder Objection.
¶ 40 Partial resolution of Langur Maize Objection	Clarifications regarding relationship between Final Order and indemnification rights of Prepetition 1.25L Notes Secured Parties.
¶ 41 Additional resolutions of Committee comments	(a) Committee will receive all reporting provided to the DIP Agent under the DIP Documents or to the Prepetition ABL Agent. (b) Clarification that a breach or default under the Prepetition Debt Documents does not, by itself, give rise to an Event of Default under Section 7.01(b) of the DIP Note Purchase Agreement. (c) Requirement for filing of notice, under certain circumstances, regarding an asserted 507(b) Claim.
¶ 42 Consignor property	Reservation of rights regarding consigned goods in the possession of Debtors.
¶ 43 Customer property	Reservation of rights regarding customer-owned goods in the possession of Debtors.
¶ 44 Insurance	Clarification that Final Order (except paragraph 27) does not modify the terms and conditions of certain insurance policies.
¶ 45 Tax liens	Clarification that pre- and post-petition statutory liens of certain tax authorities are not primed.

ARGUMENT

I. THE REMAINING COMPONENTS OF THE 2024/2026 NOTEHOLDER OBJECTION SHOULD BE OVERRULED.

10. Following the inclusion of negotiated language in the Proposed Final Order, the Debtors believe that only two components of the 2024/2026 Noteholder Objection remain outstanding.

11. *First*, the 2024/2026 Noteholder Group opposes payment of the First Lien Noteholder Group's fees and expenses as "DIP Fees and Expenses" under the DIP Financing. *See* 2024/2026 Noteholder Obj. ¶¶ 17-18; *cf.* Proposed Final Order ¶ 2(b)(ii). This challenge should be overruled because payment of a DIP lender's fees and expenses during a chapter 11 case is a reasonable and customary cost of doing business in chapter 11.

12. Here, the First Lien Noteholder Group consists of the two investors that have offered the DIP Financing—the only actionable financing that was available to the Debtors as of the Petition Date or that is available to the Debtors today. *See* Decl. of Peter Laurinaitis ¶ 21. The proposed fee coverage is an integral component of the package deal that the First Lien Noteholder Group has offered. In other words, the DIP Financing would not be available to the Debtors without payment of the First Lien Noteholder Group's fees and expenses, or at least not on as favorable economic terms. Importantly, no other Prepetition 1L Secured Party's fees or expenses are treated as DIP Obligations, and the First Lien Noteholder Group's fees and expenses are treated as DIP Obligations only for so long as their own DIP Notes are outstanding; the fees and expenses of the Prepetition 1L Notes Trustee (as well as the fees and expenses of the First Lien Noteholder Group, once the DIP Notes are paid in full) are covered only as a form of adequate protection. *See* Proposed Final Order ¶ 13(g).

13. Unsurprisingly, the 2024/2026 Noteholder Group has cited no instance in which a bankruptcy court has compelled investors to extend DIP financing without full payment or reimbursement of their own fees and expenses during the term of the DIP financing. To the contrary, bankruptcy courts in the District routinely approve DIP financings that require debtors to

cover the DIP lenders' fees and expenses as prescribed by the DIP financing documents. *See, e.g.*, Final Order ¶ 2(b)(ii), *In re Monitronics Int'l, Inc.*, Case No. 23-90332 (CML) (Bankr. S.D. Tex. June 8, 2023) [ECF No. 140]; Final Order ¶ 2(c), *In re Core Sci., Inc.*, Case No. 22-90341 (DRJ) (Bankr. S.D. Tex. Mar. 1, 2023) [ECF No. 608]; Final Order ¶ 41, *In re Sungard AS New Holdings, LLC*, Case No. 22-90018 (DRJ) (Bankr. S.D. Tex. Mar. 1, 2023) [ECF No. 220]; Corr. & Am. Final Order ¶ 2, *In re Cineworld Grp. plc*, Case No. 22-90168 (MI) (Bankr. S.D. Tex. Nov. 3, 2022) [ECF No. 722]; Final Order ¶ 15(b)(iii), *In re Basic Energy Servs., Inc.*, Case No. 21-90002 (DRJ) (Bankr. S.D. Tex. Sept. 14, 2021) [ECF No. 344]. The Debtors submit that the Court should follow suit and should not allow the 2024/2026 Noteholder Group to cherry-pick a particular provision to alter.

14. *Second*, the 2024/2026 Noteholder Group seeks to reserve rights to rescind the adequate protection granted by the Final Order in the hypothetical situation that the Court grants secured status to the unsecured Prepetition 2024 Notes or the Prepetition 2026 Notes. *See* 2024/2026 Noteholder Obj. ¶ 24.[4] The Debtors believe it is inappropriate to include language regarding rescission of adequate protection provisions that speak for themselves. When this issue was raised at the June 1 hearing, the Court agreed, saying: "And right now, the order is silent as to what happens if you win, right? . . . That's all you're going to get." Tr. of June 1 Hr'g 126:1-2, :4.

[4] The Debtors have accepted much of the language requested by the 2024/2026 Noteholder Group in this paragraph of their Objection. *Compare* 2024/2026 Noteholder Obj. ¶ 24, lines 1-17 of block quote, *with* Proposed Final Order ¶ 39(a). The disputed language is:

> Further, for the avoidance of doubt, if this Court (or an appellate court therefrom with competent jurisdiction) enters an order providing that the Prepetition 1L Notes or the Prepetition 1.25L Notes are not secured obligations of the Debtors, then nothing in this Final Order shall prejudice, limit or otherwise impair any rights of the holders of the Prepetition 2024 Notes and/or the Prepetition 2026 Notes from requesting that the Court rescind (and the Court to rescind) the adequate protection afforded the holders of the Prepetition 1L Notes or Prepetition 1.25L Notes under this Final Order; provided that the rights of all parties in interest, including the Debtors, the DIP Secured Parties and the Prepetition Secured Parties, to object to such relief are hereby preserved . . . .

2024/2026 Noteholder Obj. ¶ 24, lines 17-26 of block quote.

15. *Third*, the 2024/2026 Noteholder Group demands an unprecedented toggle to its deadline to lodge a Challenge. *See* 2024/2026 Noteholder Obj. ¶ 26. The 2024/2026 Noteholder Objection proposes that if the 2024/2026 Noteholder Group is denied standing to pursue its pending Challenge based on failure to comply with the "no-action" clause of the indenture that governs its constituents' debt, then it will be afforded a second bite at the apple: *another* 75 days to comply with the no-action clause and re-file a Challenge. The 2024/2026 Noteholder Group cites no precedent for the gratuitous accommodation and provides no reason to believe that anything in the Bankruptcy Code requires its proposed language. The 2024/2026 Noteholder Group does not even refer to this aspect of its proposed language in its argument. *See* 2024/2026 Noteholder Obj. ¶¶ 25-26. The 2024/2026 Noteholder Group just wants a free option to file its Challenge without first complying with the indenture's no-action provision.

16. In any event, this request is inappropriate. The 2024/2026 Noteholder Group is a well-advised group of sophisticated investors. Those investors can make their own determination whether to comply with the no-action process in the first instance. Every other stakeholder has found the Debtors' proposed framework to be workable and consistent with precedent in this District, in that it provides that the Challenge period is extended automatically while a meritorious standing motion is pending. *See* Proposed Final Order ¶ 19 ("[I]f, prior to the applicable date . . . [a] party in interest files a motion seeking standing . . . and such motion is granted by the Court, then the Challenge Period for such party in interest . . . shall be extended . . . ."). The language in the Proposed Final Order is commonplace in this District and should again be accepted by the Court. *See, e.g.*, Final Order ¶ 33, *In re Loyalty Ventures Inc.*, Case No. 23-90111 (CML) [ECF No. 170] (60-day challenge period, subject to extension during consideration of standing motion); Final Order ¶ 17, *In re Nielsen & Bainbridge, LLC*, Case No. 23-90071 (DRJ) [ECF No. 249] (same); Final Order ¶ 25, *In re Talen Energy Supply, LLC*, Case No. 22-90054 (MI) [ECF No. 588] (90-day challenge period, subject to extension during consideration of standing motion); Final Order ¶ 44, *In re Agilon Energy Holdings II LLC*, Case No. 21-32156 (MI) [ECF No. 240] (same as *Loyalty* and *Nielsen*).

II. THE LANGUR MAIZE OBJECTION SHOULD BE OVERRULED.

A. The Indemnification Provisions Are Appropriate and Have Been Appropriately Clarified to Address the Langur Maize Objection.

17. The Langur Maize Objection points out that "several paragraphs in the Interim DIP Order reference indemnification obligations." Langur Maize Obj. ¶ 3. Indeed they do. One passage allows the DIP Credit Parties to "incur and guarantee all Obligations," which happens to include some indemnification obligations. *See id.* (quoting Interim DIP Order, Preamble(iv)). Another passage directs the DIP Credit Parties to "pay all fees, expenses and indemnities in connection with or that may be reasonably required, necessary, or desirable for [their] performance . . . under or related to the DIP Financing," which again includes performance of some indemnification obligations. *See id.* (quoting Interim DIP Order ¶ 2(b)). Another passage requires the DIP Credit Parties to pay, as adequate protection, "fees and expenses of . . . the Prepetition 1L Notes Trustee." *See* Interim DIP Order ¶ 13(g).[5]

18. In quoting these passages, Langur Maize has selected some of the most ordinary provisions in the Proposed DIP Order to pick on. As set forth above, it is routine for Debtors to pay the fees and expenses of investors that provide a DIP facility. Just as routine is the payment of fees and expenses for a secured indenture trustee. Nowhere does Langur Maize cite a case in which a court refused to award fees and expenses as adequate protection to a senior secured indenture trustee or administrative agent.

19. Yet, to resolve its concerns about the ostensible breadth of these provisions, Langur Maize requests "confirmation" that the Final Order will not approve any indemnity claim that does not "arise directly out of the payments under and terms of the DIP Notes themselves." Langur

[5] The Langur Maize Objection misquotes this last provision in a crucial way. The Objection asserts that the Debtors are required to pay fees and expenses of "the Prepetition Notes Trustee [i.e., WSFS]." Langur Maize Obj. ¶ 4. In fact, the provision requires payment of the fees and expenses of the Prepetition ***1L*** Notes Trustee. This makes all the difference. Under Langur Maize's misquotation, the Debtors would be required to pay the fees and expenses of WSFS in its capacity as Prepetition ***1.25L*** Notes Trustee as well, which might potentially include its expenses in defending against Langur Maize's state court litigation. But, by limiting the 1L adequate protection to the Prepetition ***1L*** Notes Trustee, the Debtors have appropriately limited WSFS's fee coverage to expenses incurred in its capacity managing the Prepetition 1L Secured Notes (as well as its role in the DIP Facility).

Maize Obj. ¶ 7. This "confirmation" would negate the fees and expenses granted as adequate protection granted to the Prepetition 1L Secured Parties, much of which may not "arise directly out of . . . the DIP Notes themselves." Likewise, the fees and expenses of the First Lien Noteholder Group are a bargained-for component of the DIP Financing, which must be covered regardless of whether a particular billable hour "arise[s] directly out of . . . the DIP Notes themselves."

20. Despite this, the Debtors have included a new paragraph in the Proposed Final Order that seeks to clarify the effect (or lack thereof) of the Final Order on indemnification of Prepetition 1.25L Secured Parties.

21. To the extent Langur Maize seeks anything further, its Objection is not consistent with customary DIP financing practice and is not narrowly tailored to any legitimate concern about payments to the Prepetition 1.25L Secured Parties who are the defendants in Langur Maize's lawsuit. The Langur Maize Objection should be overruled.

B. The Court Should Grant Liens on Proceeds of Avoidance Actions, with Customary "Last-Look" Language

22. Separate from anything in the Langur Maize Objection, Langur Maize's counsel informed the Debtors and the First Lien Noteholder Group ***late Sunday morning*** that it wishes to object to the imposition of liens on Avoidance Proceeds.

23. Langur Maize should not be heard to object on this point. The Debtors have consistently made it clear that liens on Avoidance Proceeds would be sought at the final hearing on the DIP Motion. In the DIP Motion itself, the Debtors sought orders "granting to the DIP Agent . . . liens . . . on all DIP Collateral, including . . . ***subject only to and effective upon entry of the Final Order, any Avoidance Proceeds*** . . . ." DIP Motion ¶ 7(f). At the June 1 hearing, Mr. Schaible (counsel to the First Lien Noteholder Group) said: "No liens on avoidance actions as of now or at all. ***And the liens on the proceeds would be subject to the final order.***" Tr. of June 1 Hr'g, 35:11-12. Likewise, after proposed counsel to the Debtors give a similar explanation, *see id.* at 130:19-131:2, the Court appeared to share that understanding of the relief sought: "I've got it, and I'll tell

you now, I'm going to want a last-look provision in the final order if I do that, but you already know that, but I'll say that for everybody else to the extent that there is a concern." *Id.* at 131:3-6.

24. Consistent with those colloquies and the DIP Motion, the Interim DIP Order reserved the matter of liens on Avoidance Proceeds for resolution at the hearing on the Proposed Final Order. *See* Interim Order at Preamble(vi), ¶¶ 5, 6(a), 13(b), (d), (f); DIP Note Purchase Agr. § 5.21(a), Ex. 1 to Interim Order. And of course, no reservation-of-rights language in the Interim ***Order*** modified in any way the relief requested by the DIP ***Motion***, which is the pleading before the Court at the July 10 hearing.

25. Other parties in interest also shared this understanding of the relief requested, and have used the past several weeks productively to negotiate for customized "last look" or "soft marshaling" language that appears in the Proposed Final Order. *See* Proposed Final Order ¶ 9 ("[I]n the event of an enforcement of remedies in accordance with the terms of this Final Order, the DIP Secured Parties and the Prepetition Secured Parties shall use commercially reasonable efforts to first satisfy the claims and liens of such parties from applicable Collateral other than Avoidance Proceeds or proceeds of claims or causes of action against the Debtors' current or former directors and officers before seeking to recover from Avoidance Proceeds or proceeds of claims or causes of action against the Debtors' current or former directors and officers."); *cf.* Stmt. & Res. of Rights of Off. Comm. of Unsec. Creds. ¶ 2(x) (describing negotiated terms).

26. To the extent that the Court considers Langur Maize's late-breaking objection to liens on Avoidance Proceeds, the objection should be overruled on the merits. Judges of this Court have ruled that such liens are appropriate in several cases, including in *In re Cobalt Int'l Energy, Inc.*:

> There is nothing impermissible about granting a lien on the proceeds of avoidance actions. I agree with the arguments that have been made that the avoidance actions are property of the [e]state, they are not property of the unsecured creditors . . . . I was worried about them granting a lien as I first heard on the avoidance actions themselves because I thought that might have gone a step further than would have been prudent given what we explained before. But as long as it's only on the proceeds, there's no economic difference

> that I can think of . . . . [T]here's no real upside to the unsecured creditors . . . if I do or don't grant this because the 507(b) rights prime all of their rights anyway.

Tr. of Jan. 25, 2018 Hr'g at 177-178, Case No. 17-36709 (Bankr. S.D. Tex.) (comment of Isgur, J.); *see also In re Venator Materials PLC*, Case No. 23-90301 (DRJ) [ECF No. 213] (Bankr. S.D. Tex. June 12, 2023) ¶ 7; *In re Monitronics Int'l, Inc.*, Case No. 23-90332 (CML) [ECF No. 140] (Bankr. S.D. Tex. June 8, 2023) ¶ 7; *In re Avaya Inc.*, Case No. 23-90088 (DRJ) [ECF No. 278] (Bankr. S.D. Tex. Mar. 7, 2023) ¶ 13; *In re Party City Holdco Inc.*, Case No. 23-90005 (DRJ) [ECF No. 587] (Bankr. S.D. Tex. Mar. 3, 2023) ¶ 7; *In re Altera Infrastructure L.P.*, Case No. 22-90130 (MI) [ECF No. 416] (Bankr. S.D. Tex. Oct. 7, 2022) ¶ 6; *In re Talen Energy Supply, LLC*, Case No. 22-90054 (MI) [ECF No. 588] (Bankr. S.D. Tex. June 17, 2022) ¶ 8.

27. Indeed, the proposed language goes somewhat beyond the usual "soft marshaling" language of the foregoing cases, in that it applies not just to the proceeds of Avoidance Actions, but to the proceeds of ***any*** "claim[] or cause[] of action against the Debtors' current or former directors and officers." Proposed Final Order ¶ 9. This concession was given by the DIP Purchasers to other parties in interest who raised timely concerns regarding Avoidance Proceeds; Langur Maize should not be allowed to ask for more on the morning before the scheduled hearing.

CONCLUSION

28. The proposed DIP Financing is fair and necessary. It does not prejudice the rights of any creditors in these chapter 11 cases, and will allow the Debtors to pay critical vendors, fund their chapter 11 cases, and maximize the value of their estates. For these reasons, and those set forth in the First Lien Noteholder Group's reply memorandum, the Debtors respectfully request that the Court grant the DIP Motion.

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Dated: July 9, 2023
Houston, TX

Respectfully submitted,

/s/ Charles A. Beckham, Jr.

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CERTIFICATE OF SERVICE

I certify that, on July 9, 2023, a true and correct copy of the foregoing document was served through the Electronic Case Filing system of the United States Bankruptcy Court for the Southern District of Texas and will be served as set forth in the Affidavit of Service to be filed by the Debtors' noticing agent.

/s/ Charles A. Beckham, Jr.
Charles A. Beckham, Jr.