

“DIP Motion”),² seeking approval of that certain superpriority secured debtor-in-possession term loan (the “DIP Facility”). In support of the Objection, GMF respectfully states as follows:

PRELIMINARY STATEMENT

1. By the DIP Motion, the Debtors seek approval of the DIP Facility. The DIP Facility, if approved, will be secured by liens that will prime GMF’s first and second liens on certain of the Debtors’ assets. While the Debtors may need financing to fund their chapter 11 cases, the Debtors cannot obtain such financing at the expense of their existing secured lenders like GMF.

2. The Debtors correctly acknowledge in the DIP Motion that their prepetition secured lenders are entitled to adequate protection. Yet, despite acknowledging that fact, the Debtors look to sidestep this basic requirement on the spurious grounds that their secured lenders are significantly oversecured. In support, the Debtors rely solely upon a bare-bones declaration that provides no substantive analysis of the value of GMF’s and the other lenders’ collateral.

3. Priming a secured creditor’s liens, and thereby degrading the creditor’s property rights, is extraordinary and commands an equally extraordinary evidentiary showing. The Debtors have failed to make that showing, which forecloses the relief they seek. GMF therefore requests that approval of the DIP Motion on a final basis be denied unless and until the Debtors provide the protection to which GMF is entitled under the Bankruptcy Code.

BACKGROUND

4. The Debtors commenced these chapter 11 cases on March 20, 2024 (the “Petition Date”). In support of the filings, the Debtors submitted the *Declaration of David R. Campbell in Support of Debtors’ Chapter 11 Petitions and First Day Pleadings* [Docket No. 44] (the “First-

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

Day Declaration”). The First-Day Declaration provides background information regarding, among other things, the Debtors’ businesses and capital structure. As discussed in the First-Day Declaration, the Debtors have multiple secured lenders (collectively, the “Prepetition Secured Parties”) that have each financed different portions of the Debtors’ geographic footprint and, as a result, have unique collateral packages.³ GMF is one such Prepetition Secured Party.

5. GMF is lender under that certain *Amended and Restated Loan Agreement*, dated August 5, 2020 (with any amendments or modifications thereto, the “GMF Loan Agreement”), which amended and restated that certain *Loan Agreement*, dated March 23, 2020.⁴ Certain Debtors are borrowers under the GMF Loan Agreement (the “Debtor Borrowers”), and certain other Debtors are guarantors (the “Debtor Guarantors”).⁵ As of the date of this Objection, GMF is owed not less than \$30 million (the “GMF Obligations”). As is relevant to this Objection, the GMF Obligations are secured by perfected liens on real and personal property of the Debtor Borrowers (the “GMF Collateral”).⁶

6. On the Petition Date, the Debtors filed the DIP Motion seeking approval of the DIP Facility. The DIP Facility provides priming liens in favor of the DIP Lender (the “DIP Liens”), which will be senior to all prepetition liens.⁷ On March 26, 2024, the Court entered an order granting the DIP Motion on an interim basis (the “Interim DIP Order”).⁸ Pursuant to the

³ First-Day Declaration ¶ 22.

⁴ *Id.*

⁵ A list of the Debtor Borrowers and Debtor Guarantors is provided on Exhibit D to the First-Day Declaration.

⁶ First-Day Declaration ¶ 22.

⁷ DIP Motion ¶ 23 (“The Proposed Interim Order provides for . . . valid, binding, continuing, enforceable, non-avoidable automatically and fully perfected priming first priority senior liens and security interests in all DIP Collateral, regardless of where located, which senior priming liens and security interests in favor of the DIP Lender shall be senior to all Prepetition Liens . . .”).

⁸ Docket No. 97.

Interim DIP Order, the DIP Liens attach to the “DIP Collateral” consisting of “all of the Debtors’ assets”⁹ (which includes the GMF Collateral). Because the DIP Liens are priming the Prepetition Secured Parties’ existing liens, the Prepetition Secured Parties’ property interests must be adequately protected.

7. As adequate protection, the Debtors propose granting the Prepetition Secured Parties: (1) replacement liens, (2) superpriority claims, and (3) reporting information.¹⁰ With respect to the replacement liens, those liens are subordinate to (1) the DIP Liens, (2) the liens securing certain other obligations, and (3) the Carve Out.¹¹ Moreover, the other Prepetition Secured Parties are collectively receiving replacement liens on all of the Debtors’ prepetition assets,¹² including the GMF Collateral, which has the effect of further subordinating GMF’s priority with respect to its own collateral. The superpriority claims are likewise junior to the DIP Lender’s superpriority claim and are shared with all other Prepetition Secured Parties.¹³ And finally, the reporting obligations in no way protect the value of the Prepetition Secured Parties’ interests. Simply put, the proposed adequate protection offers GMF no real protection at all.

8. In apparent recognition of this deficiency, the Debtors try to bolster the claim that the Prepetition Secured Parties are adequately protected by contending that “each Prepetition Secured Lender enjoys a substantial equity cushion.”¹⁴ To support this remarkable assertion, the

⁹ Interim DIP Order ¶ 10(a).

¹⁰ Interim DIP Order ¶ Q. In addition, certain “Consenting Secured Lenders” (as defined in the Interim Order) will receive reimbursement of their professional fees. *Id.* The Debtors did not seek GMF’s consent to the DIP Facility.

¹¹ *Id.* ¶ 13(a) (providing that the replacement liens are “subordinate only to (i) the DIP Liens, (ii) the Permitted Prior Liens, (iii) the eCapital Obligations until such time as the eCapital Obligations are paid in full in cash, and (iv) the Carve Out”).

¹² Motion ¶ 29 (“all the Prepetition Secured Lenders will receive adequate protection of replacement liens on the prepetition collateral”).

¹³ Interim DIP Order ¶ 13(b).

¹⁴ DIP Motion ¶ 29.

Debtors submit the declaration of David R. Campbell (the “Valuation Declaration”).¹⁵ The Valuation Declaration, however, is devoid of any substantive analysis regarding the value of each Prepetition Secured Party’s collateral.

9. The DIP Motion is already subject to objections from several Prepetition Secured Parties, namely Lument Real Estate Capital, LLC; X-Caliber Funding LLC; and Grandbridge Real Estate Capital LLC and Berkadia Commercial Mortgage LLC (collectively, the “Secured Party Objections”).¹⁶ In general terms, the Secured Party Objections explain, accurately, why the proposed adequate protection is illusory, thus precluding the Debtors from priming the Prepetition Secured Parties’ liens. GMF agrees and files the Objection to reiterate that the DIP Facility does not comply with the Bankruptcy Code’s requirements in that crucial respect.

OBJECTION

10. “As a general principle, the Bankruptcy Code recognizes the primacy of prepetition contractual liens and seeks to preserve the financial interests created thereby.” *In re Mosello*, 195 B.R. 277, 287 (Bankr. S.D.N.Y. 1996). Accordingly, courts rightfully regard priming as “a last resort.” *In re Stoney Creek Techs., LLC*, 364 B.R. 882, 890 (Bankr. E.D. Pa. 2007) (quoting *In the Matter of Qualitech Steel Corp.*, 276 F.3d 245, 248 (7th Cir. 2001)); see also *In re YL W. 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) (“granting post-petition financing on a priming basis is extraordinary and is allowed only as a last resort”). “Given the consequences to the existing creditor of a priming lien, the court must be ‘particularly cautious’ when evaluating whether the subordinated creditor is adequately protected.” *Stoney Creek Techs.*, 364 B.R. at 890 (quoting *In re First South Savings Ass’n*, 820 F.2d 700, 710 (5th

¹⁵ Docket No. 40.

¹⁶ Docket Nos. 57, 61, and 73, respectively.

Cir. 1987) (because “super priority financing displaces liens on which creditors have relied in extending credit, a court that is asked to authorize such financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected”).

11. The fundamental policy of respecting creditors’ lien rights is embodied in Bankruptcy Code section 364(d), which allows non-consensual priming of a creditors’ lien “*only if*” the creditor is adequately protected. *See* 11 U.S.C. 364(d)(1)(B) (emphasis added); *see also Resolution Trust Corp. v. Swedeland Dev. Group (In re Swedeland Dev. Group)*, 16 F.3d 552, 564 (3d Cir. 1994) (“Section 364(d)(1) of the Code provides that the bankruptcy court may authorize post-petition financing supported by a superpriority lien only if ‘there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted’” (quoting 11 U.S.C. 364(d)(1)(B)). The debtor bears the burden of satisfying the elements of section 364(d)(1). *See* 11 U.S.C. § 364(d)(2) (“In any hearing under this subsection, the [debtor] has the burden of proof on the issue of adequate protection”); *see also Swedeland*, 16 F.3d at 564 (“A debtor has the burden to establish that the holder of the lien to be subordinated has adequate protection.”).

12. “The Code does not expressly define adequate protection, but section 361 states that it may be provided by (1) periodic cash payments; (2) additional or replacement liens; or (3) other relief resulting in the ‘indubitable equivalent’ of the secured creditor’s interest in such property.” *Swedeland*, 16 F.3d at 564 (citing 11 U.S.C. § 361). Regardless of the proposed form, adequate protection “should as nearly as possible under the circumstances of the case provide the creditor with the value of his bargained for rights.” *Id.* (quoting *In re Martin*, 761 F.2d 472, 476 (8th Cir. 1985)). Said differently, adequate protection “should provide the pre-

petition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing.” *Id.*

13. Because priming is “extraordinary relief” it requires “a strong showing that the loan to be subordinated is adequately protected.” *In re LTAP US, LLLP*, No. 10-14125 KG, 2011 WL 671761, at *3 (Bankr. D. Del. Feb. 18, 2011). Priming can be approved “only upon a tangible demonstration of adequate protection.” *Id.* (citing *Swedeland*, 16 F.3d at 567). This showing “should be premised on facts, or on projections grounded on a firm evidentiary basis.” *In re Windsor Hotel, L.L.C.*, 295 B.R. 307, 314 (Bankr. C.D. Ill. 2003) (citing *Mosello*, 195 B.R. at 293) (rejecting the overly optimistic assumptions of the debtor’s expert witness and denying approval of the proposed priming loan). Conversely, “speculative projections” will not suffice. *Stoney Creek Techs.*, 364 B.R. at 893; *In re St. Petersburg Hotel Assocs., Ltd.*, 44 B.R. 944, 946 (Bankr. M.D. Fla. 1984) (refusing to approve DIP financing where the assumptions that formed the basis for adequate protection were “highly speculative and unrealistic”).

14. Despite this demanding standard, the Debtors have provided the absolute bare minimum support for their conclusions regarding the value of the GMF Collateral and the Debtors’ other assets. The only support—the 6-page Valuation Declaration, which consists primarily of biographical and background information—boils down to just a few paragraphs discussing, in the broadest possible terms, how the Debtors reached the dubious conclusion that the Prepetition Secured Parties all enjoy a “significant equity cushion.” Further, it is entirely unclear from the Valuation Declaration to what extent (if at all) the Debtors considered any of the particularities affecting the value of the GMF Collateral specifically. This superficial gloss is a far cry from the “strong showing” or “tangible demonstration” that the law demands. *LTAP*

US, 2011 WL 671761, at *3. In fact, this “evidence” is best described as the sort of “speculative projections” that courts routinely reject.

15. At bottom, the Debtors hope to force GMF and the other Prepetition Secured Parties to assume the risk of the Debtors’ projections being wrong—without even providing those parties or the Court with meaningful information regarding those projections. What is more, even if those projections are correct, the Debtors’ proposed adequate protection in the form of replacement liens shared collectively with the other Prepetition Secured Parties fails to provide GMF with the indubitable equivalent of its interest in the GMF Collateral.¹⁷

16. “Congress did not contemplate that a creditor could find its priority position eroded and, as compensation for the erosion, be offered an opportunity to recoup dependent upon the success of a business with inherently risky prospects.” *Swedeland*, 16 F.3d at 567. The law is clear that priming is extraordinary and requires a correspondingly extraordinary evidentiary showing. The Debtors have not come anywhere close to making that showing and, for that reason, approval of the DIP Motion on a final basis should be denied unless and until the Debtors provide protection to GMF’s secured position that is, in fact, adequate.

RESERVATION OF RIGHTS

17. GMF reserves all its rights, including, without limitation, (1) to assert other and further objections to the DIP Motion; (2) to supplement the legal or factual arguments set forth in the Objection; (3) to submit testimony or evidence at the hearing to consider the relief requested by the DIP Motion; and (4) to seek additional or alternative adequate protection. GMF further reserves its rights with respect to the GMF Collateral, including to seek relief from the automatic

¹⁷ GMF has engaged in preliminary discussions with the Debtors regarding an expected proposal regarding the allocation of the Prepetition Collateral (as defined in the Interim DIP Order), as contemplated in paragraph 33 of the Interim DIP Order. As of the date of this Objection, no such proposal has been forthcoming.

stay to exercise its rights with respect its collateral in accordance with the GMF Loan Agreement. Finally, GMF reserves its rights with respect to the allocation of the Prepetition Collateral, including to object to any siloing mechanism or other proposal regarding the allocation of the Prepetition Collateral, as contemplated in paragraph 33 of the Interim DIP Order.

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CONCLUSION

WHEREFORE, GMF respectfully requests that the Court sustain the Objection, deny approval of the DIP Motion on a final basis absent appropriate adequate protection, and grant such other and further relief as the Court deems appropriate.

Dated: April 16, 2024
Wilmington, Delaware

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