Docket #0079 Date Filed: 06/15/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
PLASTIQ, INC., *et al.*[1]	:	Case No. 23-10671-BLS
Debtors.	:	(Jointly Administered)
		Related to D.I. Nos. 11, 23, and 38

OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO APPROVAL OF BIDDING PROCEDURES AND ENTRY OF FINAL ORDER APPROVING POSTPETITION FINANCING

The Official Committee of Unsecured Creditors (the "Committee"), through its undersigned proposed counsel, hereby files this limited objection to the request of the above-captioned debtors (the "Debtors") for entry of the Bidding Procedures Order[2] and Final DIP Order.[3] In support of its objection, the Committee respectfully states as follows:[4]

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Plastiq Inc. (6125), PLV Inc. d/b/a/ PLV TX Branch Inc. (5084), and Nearside Business Corp. (N/A). The corporate headquarters and the mailing address for the Debtors is 1475 Folsom Street, Suite 400, San Francisco, California 94103.

[2] As defined in the *Debtors' Motion for Entry of (A) an Order (I) Approving Bidding Procedures in Connection with the Sale of the Debtors' Assets and Related Bid Protections, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing, (IV) Authorizing Procedures Governing Assumption and Assignment of Certain Contracts and Unexpired Leases, and (V) Granting Related Relief; and (B) an Order (I) Approving the Purchase Agreements, and (II) Authorizing a Sale Free and Clear of all Liens, Claims, Encumbrances, and Other Interests* [D.I. 23] (the "Bidding Procedures Motion").

[3] As referenced and defined as the "Final Order" in the *Debtors' Emergency Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection to Certain Prepetition Lenders; (III) Authorizing Use of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [D.I. 11] (the "DIP Motion").

[4] Capitalized terms not otherwise defined herein have the meanings set forth in the Bidding Procedures Motion and DIP Motion, as applicable.

PRELIMINARY STATEMENT

1. In ruling on the Bidding Procedures Motion and the DIP Motion, the Court faces two primary issues:

- Bidding procedures should promote competitive bidding to maximize value. The proposed Bidding Procedures here fail to provide bidders enough time to come to the table, adopt an unnecessarily confusing stalking horse purchase price, and endorse a stalking horse bid that violates the Bankruptcy Code and otherwise will likely chill bidding. Will such Bidding Procedure really maximize value?

- Post-petition financing from existing secured lenders should be closely scrutinized so cases do not solely benefit secured lenders at the expense of unsecured creditors. The proposed DIP Facility charges above-market rates and fees, provides no wind-down funding, provides inadequate funding for the Committee's professionals, and strips the estates of significant potential unencumbered value. Is this financing in the best interest of the Debtors' estates?

2. The Debtors' pleadings paint a decidedly incomplete picture. On one hand, the Debtors describe a business that: (i) received third-party valuations in 2021 and 2022 of $550 million and $480 million; (ii) processed, through their main business segment, approximately $3.6 billion worth of transactions in 2022; and (iii) is encumbered by only $43.3 million of prepetition secured debt. But, on the other, the Debtors seek approval of a sale process that is predicated on a stalking horse bid (the "Stalking Horse Bid") that offers only $27.5 million in cash and is funded by a $7.1 million DIP Facility from Blue Torch with above-market interest rates, substantial up-front and back-end fees, and no assured means to wind-down the estates, insofar as it lacks, most notably, funding for a chapter 11 liquidating plan that would preserve litigation claims and other unencumbered assets for the benefit of general unsecured creditors. The Debtors fail to provide any satisfactory explanation for this disconnect between apparently valuable assets and the meager proceeds promised by the current sale process, making oversight by the Committee and the Court especially important.

3. The terms of the proposed Stalking Horse Bid may cast some light on the truth. Blue Torch, the existing secured lender, appears unconcerned about the modest cash component of the purchase price, potentially because it will receive significant preferred equity in the buyer on account of its alleged secured claims. In addition to the fact that such a debt-for-equity swap should be effectuated through a *plan*, and not a sale under section 363, this circumstance underscores that there may be considerably more value to be realized. Rather than maximizing that value now, which would benefit all stakeholders, Blue Torch appears poised to retain all the upside for itself, by re-investing in a now debt-free business, with the only losers being the Debtors' unsecured creditors. This is not an outcome that the Committee can accept or that the Court should condone.

4. The Bidding Procedures require substantial revision if they are to pass muster. The sale process timeline should be extended to afford third parties adequate time to perform due diligence and submit bids, and any approved stalking horse bid should provide a purchase price formulation that is clear-cut and cast in terms against which competing bidders may effectively bid. And the Stalking Horse Bid should not provide for any value to flow to Colonnade, a party with a threatened litigation claim that, even if valid, would only amount to a prepetition unsecured claim that is not entitled to any special treatment and should only permit Colonnade to stand in line with the Debtors' other unsecured creditors for its *pro rata* share of the recovery afforded to all such creditors under the Debtors' chapter 11 plan.

5. The Court should also deny final approval of the proposed DIP Facility unless the Debtors and Blue Torch agree to material changes. Interest rates and fees should be decreased to market levels, especially considering the modest size and short duration of the facility, as well as the fact that the sale process funded by the DIP Facility may inure entirely to the benefit of Blue

Torch and the other secured lenders. Additional enhancements and protections, such as waivers of the estates' rights under sections 506(c) and 552(b) and replacement liens on unencumbered property, including estate causes of action, should not be considered absent a fully funded carve-out and wind-down budget that will ensure funding to carry these cases through confirmation of a liquidating chapter 11 plan and establishment of a litigation trust for the benefit of general unsecured creditors. The Debtors and Blue Torch cannot be permitted to use the chapter 11 process for what amounts to a "hit and run"—a quick sale of its collateral followed by dismissal or conversion of the cases; if that is all Blue Torch was prepared to fund, it should have proceeded by means of a Uniform Commercial Code Article 9 foreclosure process, not a chapter 11 bankruptcy case where the interests of all relevant stakeholders must be recognized and afforded their statutory entitlements.

6. The Committee—which was just appointed on June 7, 2023, and for which professionals were only fully engaged late on the evening of June 9, 2023—agrees that a chapter 11 process can be utilized to maximize value of the Debtors' estates to promote the interests of *all* stakeholders. But the financing and sale procedures proposed by the Debtors and Blue Torch fall well short of the mark. The Committee remains hopeful that the issues raised herein can be addressed consensually. But in the absence of significant improvements, the Committee objects to entry of both the Bidding Procedures Order and Final DIP Order in their current form.

FACTUAL BACKGROUND

7. The Debtors filed these cases, the Bidding Procedures Motion, and the DIP Motion on May 24, 2023.

8. The Court entered the Interim Order with respect to the DIP Motion on May 25, 2023 [D.I. 38]. The hearings as to both motions have been rescheduled to June 21, 2023 (the

"Final Hearing"), when the rest of the Debtors' first-day relief will be considered for final approval.

9. The U.S. Trustee appointed the Committee on June 7, 2023. On June 8, 2023, the Committee selected DLA Piper LLP (US) as its proposed counsel. On June 9, 2023, the Committee selected Dundon Advisors LLC as its proposed financial advisors.

10. The Committee, through its advisors, worked quickly to evaluate the key pleadings filed to date, with primary initial focus on the proposed DIP financing and Bidding Procedures. Indeed, over the weekend after their selection, the Committee's proposed professionals shared with the Debtors and counsel for Blue Torch a comprehensive issues list as to both the DIP Motion and the Bidding Procedures Motion and have since worked in good faith to find a middle ground upon which a consensual resolution could be based. Those efforts remain ongoing, and the Committee remains optimistic that many of the issues raised herein can be resolved, or at least narrowed, in advance of the Final Hearing.

Bidding Procedures, as Filed and in Current Form, Are Not Designed to Maximize Value

11. Through the proposed Bidding Procedures, the Debtors seek approval of a sale timetable that is unnecessarily compressed and unlikely to yield favorable results. While the Debtors may have undertaken a prepetition sale process,[5] the proposed timeline appears to provide insufficient time for interested bidders to formulate and submit bids.

12. The following table briefly describes the key objectionable provisions of the proposed Bidding Procedures:

[5] The Committee is continuing to investigate the prepetition sale process and its discussions with the Debtors' professionals remain ongoing. The Committee reserves all rights as to any conclusions about the scope and sufficiency of that process.

Bidding Procedures	**Committee Objection**
July 14, 2023, Bid Deadline Proposed Order, ¶ 21	The accelerated bid deadline does not provide enough time for third-party bidders to perform diligence and submit bids. The Debtors' pre-petition marketing process must be critically scrutinized given the price level of the Stalking Horse Bid compared to 2022 and 2021 business valuations. The proposed timetable is ***not*** designed to maximize value, but to rush headlong through a perfunctory process, apparently for the sole benefit of Blue Torch, Priority and Colonnade.
Stalking Horse Purchase Price Stalking Horse Agreement, § 2.5	The definition of "Consideration" is unnecessarily confusing and may chill bidding. The Stalking Horse Bid includes $27.5 million in cash, plus the issuance to Blue Torch of preferred equity in the Stalking Horse SPV (apparently valued as the sum of the prepetition secured debt of $43.5 million plus the postpetition secured debt of $7.38 million, minus the amount of cash actually received by Blue Torch). The bid also provides $2 million of cash to unsecured creditor Colonnade, plus 5% of common equity in the Stalking Horse SPV. It is unclear what value is ascribed to the Colonnade equity payment, although the cryptic Colonnade terms annexed to the Stalking Horse APA reference total claims of $69.7 million asserted by Colonnade, suggesting the Debtors could ascribe a value as high as $67.7 million to the stock contribution. This would certainly chill bidding and, as discussed below, impermissibly siphons value from the Debtors' estates to Colonnade.
Payments to Colonnade Stalking Horse Agreement, §2.5, Exhibit B	Paying cash and equity to Colonnade under the Stalking Horse Bid is an impermissible end-run around section 1129(b)(1)'s "unfair discrimination" prohibition by treating similarly situated creditors differently and has all the earmarks of a *sub rosa* plan in that cash and equity are being distributed to secured and unsecured creditors, with releases being granted, but without any of the protections of a plan confirmation process.
Purchase of Avoidance Actions Stalking Horse Agreement, §2.1	The Stalking Horse Bid includes the sale of "all causes of action, lawsuits, claims, rights of recovery and other similar rights of any Seller, including avoidance claims or causes of action under Chapter 5 of the Bankruptcy Code relating to the Business and the Purchased Assets." This definition is astoundingly overbroad and could be construed to include all the estates' causes of action and rights and claims against any party. Such causes of action are unencumbered assets, and as such must be preserved for the benefit of unsecured creditors, especially all causes of action against insiders, the existing lenders, and parties involved in the failed de-SPAC transaction.

Breakup Fee and Expense Reimbursement Proposed Order, ¶ 22	The proposed Bid Protections inexplicably include both a 3% Breakup Fee and an expense reimbursement capped at 2% of the Purchase Price, which could authorize an additional $1.05 million in expenses. Any expense reimbursement should be capped at not more than $250,000, not a percentage of the purchase price. Absent such a limitation, a competing bidder would need to bid $2.625 million in Bid Protections plus the $200,000 bid increment, which will certainly chill bidding.

13. Each of these issues should be satisfactorily addressed before the Court approves the proposed Bidding Procedures, in their current or any other form.

DIP Facility Cannot Be Approved on Terms Currently Proposed; Final DIP Order Cannot Be Entered Until Issues Are Addressed

14. To obtain postpetition financing, section 364(d) of the Bankruptcy Code requires a debtor to prove: (i) it is unable to obtain unsecured credit; (ii) the proposed credit is necessary to preserve the assets of the estate; and (iii) the terms of the financing are fair, reasonable and adequate.[6] The Court should only approve postpetition financing to the extent it is "in the best interests of the general creditor body."[7]

15. Where obtaining authority for financing and use of cash collateral requires the furnishing of adequate protection to prepetition lenders under sections 361, 363, and 364 of the Bankruptcy Code, such relief must be narrowly tailored. The goal of providing adequate protection to prepetition parties is to preserve the *status quo*, not to better those parties' positions.[8] Thus, a

[6] 11 U.S.C. § 364(d); *see also In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990).

[7] *In re Roblin Indus.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985).

[8] *See, e.g.*, *In re 354 E. 66th St. Realty Corp*., 177 B.R. 776, 782 (Bankr. E.D.N.Y. 1995); *In re Roe Excavating, Inc.*, 52 B.R. 439, 440 (Bankr. S.D. Ohio 1984).

lender's entitlement to adequate protection arises only when there is evidence establishing likely loss to its collateral position.[9]

16. Due to a debtor's diminished capacity to negotiate financing on favorable terms, post-petition lenders "often extract favorable terms that harm the estate and creditors," especially "when the lender has a prepetition lien on cash collateral."[10] Such undue leverage should not be condoned. Thus, for example, courts counsel against affording secured lenders unilateral control over the course of chapter 11 cases because to do so would improperly usurp the mandated roles of the Court, the debtors, and committees in the chapter 11 process.[11]

17. The proposed DIP Facility and Bidding Procedures appear designed to facilitate the liquidation of the Debtors' assets on Blue Torch's preferred timetable, solely for the secured lenders' benefit, and without any consideration for the Debtors' general unsecured creditors. This is inappropriate. These cases should simply not be conducted for the sole benefit of secured lenders.[12]

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9 *See, e.g., Swedeland Dev. Grp.*, 16 F.3d 552, 565 (3d Cir. 1994); *In re Stoney Creek Techs., LLC*, 364 B.R. 882, 890 (Bankr. E.D. Pa. 2007); *accord In re Saypol*, 31 B.R. 796, 800 (Bankr. S.D.N.Y. 1983) ("In the context of the automatic stay, Congress believed the existence *vel non* of such a decline [in the value of the secured creditor's interest] to be almost decisive in determining the need for adequate protection.")

10 *Resolution Tr. Co. v. Official Unsecured Creditors Comm. (In re Defender Drug Stores Inc.)*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (citing *In re Ames Dep't. Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990)); *In re Tenney Vill. Co.*, 104 B.R. 562, 567-70 (Bankr. D.N.H. 1989).

11 *See, e.g., In re Tenney Vill. Co., Inc*., 104 B.R. at 568 (postpetition financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of the secured creditor; to do so would permit secured creditors to "run roughshod over numerous sections of the Bankruptcy Code"); *In re Berry Good, LLC*, 400 B.R. 741, 747 (Bankr. D. Ariz. 2008) ("[B]ankruptcy courts do not allow terms in financing arrangements which convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the post-petition lender.").

12 *See In re Encore Healthcare Assocs.*, 312 B.R. 52, 54-55 (Bankr. E.D. Pa. 2004) (finding no business justification for a sale under section 363 if the sale's sole purpose . . . [i]s to liquidate assets for the benefit of the secured creditor").

18. Making things even worse, the proposed Final Order with respect to DIP Facility would provide the Debtors' prepetition secured lenders (*i.e.*, Blue Torch and any other lenders under the prepetition credit facility) with every conceivable protection, including liens on and claims against, unencumbered assets that rightly should be available for unsecured creditors, who instead would bear the full risk of administrative insolvency.

19. The following table highlights the key objectionable provisions of the proposed DIP Facility and Final Order:

DIP Provision	**Committee Objection**
Interest Rate and Fees DIP Loan Agreement, §§ 4(a), 8(a), and 8(c)	The proposed DIP Facility proposes terms that are demonstrably above market, with an interest rate of SOFR plus 12.0%, plus a 5% up-front fee and another 4% exit fee. This equates to a 25.5% annualized cost of capital, which is excessive given the low risk and the value that is proposed to flow to the lenders through the sale process—a process that, as currently envisioned, will not benefit anyone else.
Maturity Date DIP Loan Agreement, § 17	The proposed DIP Facility matures upon sale closing, but it fails to provide for the funding of an adequate wind-down budget to ensure funding to confirm a liquidating plan.
506(c) Waiver Interim Order, ¶ 5.11	These chapter 11 cases appear to have been filed for the sole purpose of selling the secured lenders' collateral. If Blue Torch expects to use the bankruptcy process for this purpose, it must "pay the freight," including providing for a wind-down budget with funding sufficient to confirm a liquidating plan that establishes a litigation trust for the benefit of unsecured creditors. Without provision for such a trust, the estates should retain the right to surcharge collateral.
552(b) and Equities of the Case Waiver, Liens on Avoidance Actions and other Unencumbered Assets Interim Order, ¶¶ 2.1(a), 2.4(a), 5.12, 5.13	For the same reasons articulated above, all these exceptional protections are inappropriate if the cases are run only for secured lenders' benefit. The cases must be adequately funded, including an acceptable carve-out, administrative expenses (including section 503(b)(9) claims) must be assured of payment, and a wind-down budget funded. The lenders should also first marshal the value of encumbered collateral before seeking to recover from any unencumbered assets. The lenders should not receive any

	liens on any estate claims or causes of action, or the proceeds thereof, or on any D&O or similar insurance policies or proceeds.
Adequate Protection Payments Interim Order, ¶ 2.4(a)(ii)	The Debtors propose to pay all accrued and unpaid prepetition or postpetition interest, fees, and costs to the prepetition lenders. Such payments are inappropriate unless and until the Debtors establish that the prepetition lenders are oversecured. Such relief is particularly troubling given that $3.5 million of the prepetition secured debt appears to be patently avoidable, as the result of prepetition up-tiering of the lenders' put warrants into secured debt.
Budget/Carve-Out	The proposed budget and carve-out suffer from multiple deficiencies, including: • No liquidity cushion for any unanticipated expenses up to or beyond the proposed July 31, 2023 closing date; • $500,000 KERP bonus for employees, most/all of whom will be retained by the buyer while unsecured creditors may receive nothing; • Impermissible disparity between funding for Debtors' professionals ($4.8 million) and Committee professionals ($500,000); • Post-termination carve-out of $250,000, which given the professional fee budget numbers is plainly insufficient; • Committee lien investigation budget ($25,000) is insufficient; and • Professional fee escrow must protect both Debtors' and Committee's professionals.

20. **No liens on causes of action.** The Court should not grant Blue Torch any liens on any estate causes of action, including avoidance actions, or the proceeds of such actions. The purpose of avoidance actions is "to make available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate . . . .[A]ny recovery is for the benefit of **all unsecured**

creditors. . . ."[13] Chapter 5 causes of action belong to creditors, not the Debtors.[14] Similarly, the Court should not grant any liens on or claims against assets that were unencumbered prepetition, such as commercial tort claims, which may ultimately be the only source of recovery for unsecured creditors.[15]

21. It would be unduly punitive to unsecured creditors to expand Blue Torch's prepetition collateral package by granting liens on previously unencumbered assets.[16] Especially with respect to avoidance actions, such relief is fundamentally at odds with the unique purposes served by avoidance actions. Avoidance actions are distinctly creatures of bankruptcy law designed to benefit, and ensure equality of distribution among, general unsecured creditors.[17] The Debtors provide no justification for the extraordinary grant of liens on avoidance actions, or for the potential payment of superpriority claims with the proceeds of such actions. The Court should not grant Blue Torch a lien on avoidance actions or the proceeds thereof, all of which should be reserved for the benefit of the Debtors' unsecured creditors.

22. **No waivers of section 506(c), section 552(b) equities, and marshaling.** A waiver of the estates' section 506(c) surcharge rights, the equities under section 552(b), and

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[13] *Buncher Co. v. Off. Comm. Of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000) (citing *In re Cybergenics Corp.*, 226 F.3d 237, 241-42 (3d Cir. 2000)) (emphasis added).

[14] *See Cybergenics*, 226 F.3d at 243-47.

[15] Based on a preliminary review of the UCC financing statements, the Debtors' secured lenders do not appear to have a perfected security interest in any commercial tort claims. *See* 6 Del. Code § 9-108(e)(1).

[16] *See, e.g., In re Four Seasons Marine & Cycle, Inc.*, 263 B.R. 764, 771 (Bankr. E.D. Tex. 2001) (describing fundamental unfairness imposed on unsecured creditors by granting replacement lien on unencumbered assets of estate); *In re Integrated Testing Prods. Corp.*, 69 B.R. 901, 905 (D.N.J. 1987) (prepetition secured creditor not entitled to proceeds of sale collateral recovered as preference because allowing the secured creditor "to claim these preferences would frustrate the policy of equal treatment of creditors under the Code.").

[17] *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000), *rev'd en banc*, 330 F.3d 548 (3d Cir. 2003) (identifying underlying intent of avoidance powers to recover valuable assets for estate's benefit); *In re Tribune Co.*, 464 B.R. 126, 171 (Bankr. D. Del. 2011) (noting "that case law permits all unsecured creditors to benefit from avoidance action recoveries").

marshaling and other similar doctrines are not warranted here. A blanket waiver of the surcharge rights under section 506(c) is inappropriate if there is a risk of administrative insolvency,[18] which is the case here where there is no assurance of funding for a wind-down budget or any funding after closing of the sale to confirm a liquidating plan. There has similarly been no showing at this stage of the case to justify any waiver of the "equities of the case" exception under section 552(b) or the equitable doctrines of marshalling and similar doctrines.[19]

23. **Adequate protection liens and claims.** Any adequate protection liens and claims granted should be limited solely to the extent of a diminution in value, if any, in the lenders' prepetition collateral and subject to the Committee's objection and challenge rights. If anything, the sale process preserves, rather than diminishes, the lenders' prepetition collateral. So far, Blue Torch has only agreed to fund a sale for the benefit of the lenders.

24. Additional adequate protection is inappropriate given the existence of obvious bases to challenge at least certain aspects of the lenders' prepetition secured claims, including approximately $3.5 million of claims resulting from up-tiering equity put warrants into secured claims without reasonably equivalent value. The Committee is continuing to investigate the Debtors' prepetition transfers and transactions and reserves all rights.

25. **Superpriority administrative expense claims.** Similarly, any superpriority claim should be eliminated where the Debtors are spending cash to maintain the lenders' collateral. At a minimum, no adequate protection liens or superpriority claims should be granted without (i) proof that the lenders' collateral was actually impaired; and (ii) provision for payment of the reasonable administrative expense of the bankruptcy cases.

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[18] *See In re Visual Indus., Inc.*, 57 F.3d 321, 325 (3d Cir. 1995).

[19] *See In re Metaldyne, Inc.*, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009).

26. **Committee budget.** The proposed budget includes just $500,000 for all Committee professionals. This is inadequate, especially when compared to the more than $4.8 million budgeted for the Debtors' professionals, plus another $500,000 budgeted for Blue Torch's professionals. The Committee has a substantial amount of work to do in a very short period given the Debtors' intent to forge ahead with an unnecessarily expedited sale process and given Blue Torch's unwillingness to fund an adequate wind-down budget.

27. A committee's professionals should never be precluded from fulfilling their statutory and fiduciary duties due to financial constraints.[20] Courts typically deem a committee professionals' fee budget adequate when it is approximately 30-40% of the budget for the debtors' professionals.[21] Despite this well-accepted standard, the proposed budget for the Committee's professionals of only $500,000 is just 10.25% of the $4,875,000 budgeted for the Debtors' professionals.

28. Under the circumstances of these cases, the Committee submits that a budget of at least $1.1 million is appropriate for Committee professionals, and respectfully suggests that the Debtors' professionals' budget should be reduced (or, at a minimum, restated such that the any success fee payable to the Debtors' financial advisor is deemed payable out of sale proceeds) to a more reasonable $3.2 million. This would result in a 34.3% ratio (easily in line with the accepted

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[20] *See In re Channel Master Holdings, Inc.*, 309 B.R. 855 (Bankr. D. Del. 2004) (re-allocating fees to committee professionals from other miscellaneous category in debtor-in-possession financing budget when committee carve-out was insufficient).

[21] *See, e.g.*, *In re Cal Div Int'l., Inc.*, Case No. 15-10548 (CSS), 2015 WL 9487852 (Bankr. D. Del., Dec. 28, 2015); *In re Eastern Outfitters, LLC*, Case No. 17-10243 (LSS) (Bankr. D. Del. Mar. 31, 2017) [Docket No. 260] (approving final DIP financing order where the budget reflected committee professional fees of approximately 35% of the Debtors' professional fee budget); *In re Pacific Sunwear of California, Inc.*, Case No. 16-10882 (LSS) (Bankr. D. Del. Apr. 7, 2016) (committee fee budget approved at 35% of budget for debtors' professionals).

standard), and it would reduce the overall professional fee budget from $5.375 million to $4.2 million, which by itself would provide a much-needed funding source for a wind-down budget.[22]

29. **Carve-Outs.** The cap on fees for investigating prepetition liens should be increased from $25,000 to $75,000. Similarly, the Carve-Out should be modified to include at least $25,000 for any chapter 7 trustee appointed upon a conversion of the cases.

30. **Wind-Down budget.** The Budget currently includes absolutely nothing beyond the sale closing, leaving nothing to prepare and confirm a liquidating plan. The Court should condition any approval of financing on the inclusion of a reasonable post-sale budget sufficient to confirm a liquidating plan and create a litigation trust for the benefit of unsecured creditors.

31. Each of these issues must be satisfactorily addressed before the Court approves the proposed DIP Financing on a final basis. Absent adequate modifications, the Court should deny approval of the DIP financing as currently proposed or, at minimum, adjourn the hearing to provide the parties additional time to discuss a path forward.

RESERVATION OF RIGHTS

32. Given the limited time since the Committee's formation, this objection is necessarily preliminary in nature and may not encompass every objection the Committee may have to the proposed DIP Facility and Bidding Procedures. The Committee reserves the right to raise additional objections prior to or at the hearing.

[22] Any argument that any of the hourly fees payable to Portage Point should be deemed "operating expenses" and not part of the Debtors' "professional expenses," should be rejected by the Court. All such fees relate to Portage Point's twin mandates in these cases—the preservation of asset value in order to maximize sale proceeds and the optimization of the sale process for the same purpose. No other category of activity exists for a CRO, and none should be recognized in this case, especially if proposed, as it apparently may be, solely to limit the Committee's professional fee entitlement.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) deny final approval of the proposed DIP Facility and deny approval of the Bidding Procedures as currently proposed, unless and until each is amended as proposed herein; and (ii) grant such other and further relief as the Court deems warranted.

Dated: June 15, 2023
Wilmington, Delaware

DLA PIPER LLP (US)

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CERTIFICATE OF SERVICE

I, Aaron S. Applebaum, hereby certify that on this 15th day of June, 2023, I caused a true and correct copy of the foregoing *Omnibus Objection of the Official Committee of Unsecured Creditors to Approval of Bidding Procedures and Entry of Final Order Approving Postpetition Financing* to be served via the Court's CM/ECF system to all parties registered to receive such notices and via email on the parties listed below.

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