Docket #0028 Date Filed: 8/3/2020

NO. 4:20-CV-01970

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

CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK,

Appellant,

V.

SPEEDCAST INTERNATIONAL LIMITED, et al.,

Appellees.

On Appeal from the United States Bankruptcy Court for the Southern District of Texas, Houston Division
Case No. 20-32243 (MI)

BRIEF OF APPELLEE THE AD HOC GROUP OF SECURED LENDERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, the ad hoc group of secured lenders (the "Ad Hoc Group of Secured Lenders") under that certain Syndicated Facility Agreement, dated as of May 15, 2018, by and among Speedcast International Limited and certain of its subsidiaries, the lenders party thereto, the other parties thereto and Credit Suisse AG, Cayman Islands Branch ("Credit Suisse"), some members of which are also lenders under that certain Senior Secured Superpriority Debtor-in Possession Credit Agreement, dated as of April 24, 2020, by and among Speedcast, Speedcast Communications, Inc., the lenders party thereto and Credit Suisse, states that it consists of the following parties:

1. Black Diamond Capital Management, L.L.C. acting on behalf of certain managed funds certifies that its parent company is Black Diamond Capital Holdings, L.L.C., a privately held company. No publicly held corporation owns 10% or more of its equity interests.

2. Centerbridge Partners, L.P., acting on behalf of certain managed funds and/or accounts, certifies that it does not have a parent company and no publicly held corporation owns 10% or more of the equity interests in Centerbridge Partners, L.P.

3. MJX Venture Management LLC, acting on behalf of certain managed funds and/or accounts certifies that 100% of its equity interests are owned by MJX Venture Holdings LP, which is not a publicly held corporation.

4. MJX Venture Management II LLC, acting on behalf of certain managed funds and/or accounts certifies that 100% of its equity interests are owned by MJX Venture Holdings II LP, which is not a publicly held corporation.

5. MJX Venture Management III LLC, acting on behalf of certain managed funds and/or accounts certifies that 100% of its equity interests are owned by MJX Venture Holdings III LP, which is not a publicly held corporation.

6. MJX Asset Management LLC, acting on behalf of certain managed funds and/or accounts certifies that it does not have a parent company and no publicly held corporation owns 10% or more of the equity interests in MJX Asset Management LLC.

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STATEMENT REGARDING ORAL ARGUMENT

The Ad Hoc Group of Secured Lenders respectfully requests oral argument. The financing agreements involved in this bankruptcy proceeding are complex, and the Ad Hoc Group of Secured Lenders believes that oral argument will aid the Court in understanding the issues presented in this appeal.

STATEMENT OF ISSUES

1. Credit Agricole Corporate and Investment Bank ("CACIB") failed to argue to the Bankruptcy Court—and therefore failed to preserve any argument on appeal—that roll-ups constitute a *per se* violation of the Bankruptcy Code.

2. The decision of the Bankruptcy Court authorizing the roll-up (the "Roll-Up") included in its *Final Order (i) Authorizing Debtors to (a) Obtain Postpetition Financing and (b) Use Cash Collateral, (ii) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (iii) Granting Adequate Protection to the Prepetition Secured Parties, (iv) Modifying the Automatic Stay, and (v) Granting Related Relief* (the "Final DIP Order"), which found that Speedcast International Limited and certain of its subsidiaries (collectively, "Speedcast" or the "Debtors")[1] had a critical need for the debtor-in-possession ("DIP") financing set forth in the Final DIP Order and were unable to find financing on more favorable terms from other sources, is consistent with orders entered by bankruptcy courts in this District and across the country and should be affirmed.

[1] References to "Speedcast" herein refer to all entities affiliated with Speedcast International Limited that filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division on April 23, 2020. ROA.9.

3. The Bankruptcy Court properly held that the Roll-Up did not violate the Syndicated Facility Agreement (the "SFA") and, by extension, was consistent with section 510(a) of the Bankruptcy Code because:

   a. the Roll-Up did not affect the distribution of proceeds by the Prepetition Agent (the "Agent") pursuant to Section 7.02 of the SFA (the "Third Amendment"); and

   b. CACIB consented to the Third Amendment to the SFA, which did not modify Section 7.02 of the SFA.

4. Even if the Roll-Up violated applicable law or loan documents, CACIB's requested relief cannot be granted as the DIP is protected under section 364(e) of the Bankruptcy Code.

5. The Bankruptcy Court properly held that CACIB was not entitled to additional adequate protection with respect to the Roll-Up because:

   a. CACIB consented to the adequate protection package set forth in the Third Amendment; and

   b. CACIB is not a lienholder under the SFA, and is not entitled to adequate protection under section 364(d)(1)(B) of the Bankruptcy Code.

STANDARD OF REVIEW

When reviewing a bankruptcy court's decision, a district court "functions as an appellate court" and "applies the standard of review generally applied in federal court appeals." *In re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992). A bankruptcy court's factual findings are reviewed for clear error and conclusions of law are reviewed *de novo*. *In re TMT Procurement Corp.*, 764 F.3d 512, 519 (5th Cir. 2014). Mixed questions of law and fact are reviewed *de novo*. *Id.*

STATEMENT OF THE CASE

Speedcast provides satellite internet services to companies in industries (e.g., passenger cruises, offshore drilling) that face deep and potentially existential challenges due to the COVID-19 pandemic, the collapse in oil prices, and the resulting economic dislocation. The upheaval in global markets has put strain on capital and made it more difficult for lenders to make investments and underwrite loans. That was particularly the case in March and April of this year, when the COVID-19 pandemic was in its early days and the capital markets were in severe turmoil.

After extensive and hard-fought negotiations, the Debtors and the DIP Lenders[2] were able to agree to a set of terms to provide DIP financing. The resulting facility (the "DIP Facility") reflects compromise and an exercise of the

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Final DIP Order.

Debtors' good faith business judgment. Importantly, however, in these extraordinary times, and in light of the uncertainty in the Debtors' position, the DIP Lenders' ability and willingness to provide capital to the Debtors was subject to the important protections and rights in the Final DIP Order.

One of the most economically significant features of the DIP Facility is the Roll-Up, which is a term of the financing whereby lenders that participate in the DIP Facility who lend $1 of new money also receive a $1 administrative expense claim that is effectively substituted for what otherwise would have been a $1 prepetition claim. Roll-ups such as this one are common features in DIP facilities where, as here, there is tremendous uncertainty regarding a debtor's financial outlook and ability to emerge from bankruptcy effectively. In this case, it is not disputed that the DIP Lenders' obligation to fund the DIP financing was entirely conditioned on the Roll-Up. [3]

At the time of the hearing on the Final DIP Order (the "Final DIP Hearing"), CACIB was the sole objector. Indeed, tireless efforts by the Debtors, the DIP

[3] Indeed, under the DIP Credit Agreement, the failure of the Final DIP Order to remain in full force and effect, including as to the Roll-Up, constitutes an event of default under the DIP Credit Agreement, which entitles the DIP Lenders to immediate repayment of the outstanding balance of the DIP Facility and the ability to terminate any outstanding commitments under the DIP Credit Agreement. *See* ROA.377-79, 3095. As a consequence, the Debtors would have extremely limited access to capital to repay the default on the DIP Facility, obtain new financing, or otherwise cover their operating expenses, all of which would imperil the Debtors' successful emergence from chapter 11.

Lenders, and the Prepetition Lenders (including members of the Ad Hoc Group of Secured Lenders) to work with other stakeholders, including the Official Committee of Unsecured Creditors (the "Committee"), achieved broad consensus support for the DIP Facility.[4] CACIB's continued efforts to undo the DIP Facility—which has already been fully funded—should be rejected.

SUMMARY OF ARGUMENT

The Bankruptcy Court's order was not in error and should be affirmed in all respects.

As an initial matter, CACIB's appeal is moot because it did not seek or obtain a stay of the Final DIP Order, ROA.2860, with the Bankruptcy Court. *See* Appellees' Mot. to Dismiss, *Credit Agricole Corp. & Inv. Bank*, No. 20-01970 (S.D. Tex. July 9, 2020), ECF No. 9. That alone mandates dismissal of this appeal.

But CACIB's appeal is wrong on the merits, too. CACIB argues, for the first time on appeal, that roll-ups are not permitted under the Bankruptcy Code. *See* CACIB Br. at 15-20. That argument fails for several reasons.

First, CACIB failed to preserve this argument for appeal. That failure requires rejection of CACIB's argument.

[4] It is not uncommon for numerous parties to file objections addressing a number of issues related to DIP financing. Here, the few objections made by parties other than CACIB were consensually resolved.

Second, the Roll-Up is permitted by the Bankruptcy Code and supported by numerous bankruptcy court precedents. Bankruptcy judges have broad discretion to approve postpetition financing arrangements under section 364 of the Bankruptcy Code. The Roll-Up is but one permissible feature that allows debtors with no viable alternatives to keep their business from liquidating and destroying value for all creditors. To hold that roll-ups violate the Bankruptcy Code would contradict the substantial body of precedent including in the Southern District of Texas, approving of this structure. It would also be highly disruptive to today's large chapter 11 cases, which frequently require the inclusion of a roll-up in their DIP facilities to obtain sufficient liquidity for debtors in severely distressed situations. This Court should embrace the litany of orders approving roll-ups as evidence that such features of DIP orders comply with the Bankruptcy Code and are often crucial terms of a DIP facility.

Third, the record before the Bankruptcy Court clearly established that the Final DIP Order, including the Roll-Up, was necessary and that the Debtors could not obtain financing on more favorable terms. CACIB does not argue otherwise. Accordingly, the Debtors exercised their reasonable business judgment by agreeing to the DIP Facility, including the Roll-Up.

CACIB's arguments that the DIP Facility violated the terms of the SFA were rejected by the Bankruptcy Court and should similarly be rejected by this Court.

ROA.3038-40. Judge Isgur found that although the SFA contains a waterfall provision that governs how the Agent shall distribute proceeds to creditors, the Third Amendment, to which CACIB consented, does not violate this provision because the waterfall only applies if the Agent receives certain funds. ROA.382. The Agent here received no funds. Thus, CACIB's arguments that the waterfall provision was not properly modified are of no moment.

Moreover, and as explained in greater detail below and as the Bankruptcy Court correctly found, CACIB *gave its consent* to the Third Amendment, which expressly permitted the Roll-Up to which CACIB subsequently objected. It cannot now rescind that consent merely because it is unhappy with the terms of the Roll-Up.

And finally, with respect to adequate protection, the Bankruptcy Court correctly found that CACIB, along with an overwhelming majority of the Lenders, consented to the adequate protection package in the DIP Facility via the Third Amendment, and was not entitled to any additional adequate protection. In any event, CACIB is not a lienholder under the SFA (but rather shares some benefit of the liens in favor of the Agent) and, accordingly, as a matter of law, CACIB is not independently entitled to adequate protection under either sections 363 or 364 of the Bankruptcy Code.

ARGUMENT

I. CACIB's Challenge to the Roll-Up as a *Per Se* Violation of the Bankruptcy Code, Raised for the First Time on Appeal, Must be Rejected.

As a threshold matter, CACIB failed to preserve any argument that roll-ups *per se* violate the Bankruptcy Code. In fact, it is surprising for CACIB to take the position that roll-ups are illegal in this appeal, particularly given that it is a willing beneficiary of a roll-up that was approved by a bankruptcy court in this District just last week. *See In re Chesapeake Energy Corporation*, No. 20-33233 (Bankr. S.D. Tex. July 31, 2020), ECF No. 597.[5]

To preserve an issue for appeal, "the argument must be raised to such a degree that the trial court may rule on it." *In re Am. Hous. Found.*, 785 F.3d 143, 159 (5th Cir. 2015) (internal citation omitted). That is, the "argument must be pressed, and not merely intimated." *In re Babcock & Wilcox Co.*, 250 F.3d 955, 961 (5th Cir. 2001). "It is well established that [reviewing courts] do not consider

[5] It is not surprising, however, that CACIB failed to argue roll-ups violate the Bankruptcy Code before the Bankruptcy Court—not only because courts regularly approve these financing transactions and because CACIB is a participant in another roll-up, but because CACIB's counsel has been involved with many roll-ups in front of the same court. *See, e.g.*, *In re California Resources Corporation*, No. 20-33568 (Bankr. S.D. Tex. July 16, 2020), ECF No. 18 (representing an ad hoc group of lenders providing DIP financing, including a roll-up, to the debtors); *In re Bristow Group Inc.*, No. 19-32713 (Bankr. S.D. Tex. July 25, 2019), ECF No. 466 (same); *In re ATP Oil & Gas Corporation*, No. 12-36187 (Bankr. S.D. Tex. August 17, 2012), ECF No. 21 (representing the DIP agent and prepetition agent in a financing that included a refinancing of prepetition debt into a DIP facility).

arguments or claims not presented to the bankruptcy court." *See In re Ginther Trs.*, 238 F.3d 686, 689 (5th Cir. 2001) (quoting *In re Gilchrist*, 891 F.2d 559, 561 (5th Cir. 1990)).

CACIB's objection to the DIP Motion fails to meet this standard. CACIB did not "intimate"—let alone "press"—any argument that roll-ups are not allowed under the Bankruptcy Code. *See generally* ROA.991-1002. It simply failed to make the argument at all. Indeed, while CACIB advanced three separate arguments in its objection urging the Bankruptcy Court to deny the DIP Motion, *see* ROA.998-1002, CACIB never argued that roll-ups contravene the Bankruptcy Code or that bankruptcy courts lack the authority to approve them.[6] Rather, counsel for CACIB's statements on the record at the Final DIP Hearing illustrate that roll-ups are in fact common practice, and that CACIB was instead focused on how *this* roll-up was not permitted by *this* SFA. *See* ROA.3028 ("In any of these negotiations, DIP lenders always ask[] for a lot. They often ask[] for a rollup. And depending on the circumstances, you know, Debtors have to push back on that and often times that's appropriate . . . . Here, we just don't see why this rollup is acceptable under the prepetition documents given how 9.08(c) and 7.02 work."). This Court, therefore, should reject CACIB's attempt to raise this issue for the first time on appeal. *See In re Am. Hous. Found.*, 785 F.3d at 159 (declining to

[6] CACIB makes those same arguments on appeal, each of which are meritless and should be rejected. *See infra* Part III.

consider argument on appeal where party failed to "mention[], much less adequately brief[]" argument "before the bankruptcy court"); *In re SkyPort Glob. Commc'ns, Inc.*, 528 B.R. 297, 320-21 (S.D. Tex. 2015) (refusing to consider argument "being made for the first time on appeal" from bankruptcy court because "arguments not raised before the lower court are waived and will not be considered on appeal"); *Range v. United States*, 245 B.R. 266, 279 (S.D. Tex. 1999) ("In general, a party appealing from a Bankruptcy Court opinion may not raise issues on review that were not raised at the trial level." (internal citations omitted)).[7]

II. The Bankruptcy Court's Authorization of the Roll-Up Was Consistent with the Bankruptcy Code, Common Practice and the Law of This Circuit.

As explained in more detail below and by Judge Isgur's statements at the Final DIP Hearing, a roll-up is a feature of DIP financing whereby prepetition secured lenders waive a prepetition secured debt claim and extend postpetition debt with a principal amount greater than the amount of funds extended. *See* ROA.3036-37. They have become an increasingly common and important tool in obtaining DIP financing, *see* 3 Collier on Bankruptcy ¶ 364.06 [2] (16th ed. 2020) ("With apparently increasing frequency, working capital lenders providing postpetition financing demand that the debtor in possession satisfy prepetition

[7] Given CACIB's failure to advance this argument to the Bankruptcy Court, this Court should decline to consider and should not remand to the Bankruptcy Court for consideration of this issue. *MaddenSewell, LLP v. Mandel*, 498 B.R. 727, 730-31 (E.D. Tex. 2013).

secured indebtedness . . . ."), and are an important tool for debtors seeking DIP financing, particularly where lenders are "understandably reluctant to do business with a debtor who is in bankruptcy," *In re Ellingsen MacLean Oil Co.*, 834 F.2d 599, 603 (6th Cir. 1987); *accord In re Pac. Lumber Co.*, 584 F.3d 229, 244 n.19 (5th Cir. 2009) (recognizing that "[l]enders will be reluctant to work with debtors who . . . decide to file bankruptcy"). And DIP financing is, of course, a key feature of the Bankruptcy Code, as it provides a mechanism for debtors to obtain liquidity "to . . . preserv[e] and maintain[] . . . the going concern values of the Debtors." *See In re Lyondell Chem. Co.*, No. 09-10023 (Bankr. S.D.N.Y. Mar. 1, 2009), ECF No. 1002 at 19 (approving DIP loan that included roll-up over objection).

Bankruptcy courts—including bankruptcy courts in the Southern District of Texas—regularly approve DIP financings that include roll-ups when no other DIP financing is available on the market. *See, e.g.*, *In re Vanguard Nat. Res., Inc.*, No. 19-31786 (Bankr. S.D. Tex. Apr. 30, 2019), ECF No. 241 at 20 (approving roll-up in circumstances where "[a]bsent granting [the DIP Loan, including the roll-up], the Debtors' estates, their businesses and properties, and their ability to successfully reorganize or otherwise preserve the enterprise value of the Debtors' estates [would] be immediately and irreparably harmed"); *In re Westmoreland Coal Co.*, No. 18-35672 (Bankr. S.D. Tex. Nov. 15, 2018), ECF No. 520 at 14 (approving roll-up where "Lenders would not be willing to provide the DIP

Facility or extend credit to the Debtors thereunder without the inclusion of the DIP Roll-Up" and where, "[a]bsent authorization . . . , the Debtors' estates and their creditors would suffer irreparable harm"); *In re Uno Rest. Holdings Corp.*, No. 10-10209 (Bankr. S.D.N.Y. Feb. 18, 2010) ECF No. 156 at 11 (approving roll-up where "the Debtors [were] unable to obtain financing from sources other than the DIP Lenders on terms more favorable than the DIP Facility"); *In re Lyondell Chem. Co.*, No. 09-10023 (Bankr. S.D.N.Y. Mar. 1, 2009), ECF No. 1002 at 20 (approving roll-up over objection and finding roll-up was "a necessary inducement to, and a portion of the compensation for," DIP loans); *see also In re Am. Comm. Lines, Inc.*, No. 20-30982 (Bankr. S.D. Tex. Feb. 10, 2020), ECF No. 202 (approving roll-up); *In re Sheridan Holding Co. II*, No. 19-35198 (Bankr. S.D. Tex. Oct. 21, 2019), ECF No. 178 (same); *In re Legacy Reserves Inc.*, No. 19-33395 (Bankr. S.D. Tex. July 23, 2019), ECF No. 255 (same); *In re Synergy Pharm. Inc.*, No. 18-14010 (Bankr. S.D.N.Y. Feb. 26, 2019), ECF No. 454 (approving roll-up over objection); *In re Mission Coal Co.*, No. 18-04177 (Bankr. N.D. Ala. Nov. 20, 2018), ECF No. 300 (approving roll-up); *In re Real Indus., Inc.*, No. 17-12464 (Bankr. D. Del. Jan. 22, 2018), ECF No. 379 (same); *In re Aleris Int'l, Inc.*, No. 09-10478 (Bankr. D. Del. Mar. 18, 2009), ECF No. 299 (approving roll-up over objection).

A finding that roll-ups violate the Bankruptcy Code would imperil the ability of debtors in the most difficult situations to obtain DIP financings—a highly undesirable effect on the bankruptcy process. It would jeopardize debtors' ability to preserve their estates' value while in bankruptcy, leading to enormous creditor losses and fewer successful emergences from bankruptcy. Indeed, the goal of the bankruptcy process is to bring together all interested parties in such a way that the debtor can resume operations as a viable going concern to maximize the value of the estate for the benefit of creditors. *See In re Cantu*, 784 F.3d 253, 262 (5th Cir. 2015) (explaining that "the purpose of chapter 11 is to allow debtors the opportunity to reorganize and thereby to provide creditors with the going-concern value," and "ordinarily creditors are better off when the debtor is reorganized into a going concern than when a liquidation occurs" (internal citations and quotations omitted)). If bankruptcy courts' authority to approve roll-ups were to be rescinded, the consequences on the bankruptcy process would be dire, to the benefit of no one.

The roll-up precedents are entirely consistent with the text of section 364. Section 364 forces debtors to start the postpetition financing process by searching for financing through unsecured credit, restricting the incentives that more economically stable debtors can offer, but proceeds to permit debtors to provide "incentives . . . to induce potential lenders to undertake the risks involved in

providing post-petition financing to a bankruptcy estate." *In re Cannonsburg Envtl. Assocs., Ltd.*, 72 F.3d 1260, 1267 (6th Cir. 1996); 11 U.S.C. § 364(a)-(d).

Understanding that "without such financing a debtor's business may close and the going concern value of creditors' collateral be irretrievably lost, thus increasing loss to *all* creditors," courts have recognized that "in appropriate situations, it would be necessary, and indeed prudent, for a postpetition debtor to enter into a 'hard' bargain with a creditor in order to acquire needed funds to complete a reorganization." *In re Ellingsen MacLean Oil Co.*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986); *see also In re Residential Capital, LLC*, 508 B.R. 851, 860-61 (Bankr. S.D.N.Y. 2014) (approving postpetition financing with "steep terms" where terms were not unreasonable given dearth of financing alternatives and where financing enabled debtor "to continue operating as a going concern . . . thereby maximizing recoveries for all secured and unsecured creditors"); *In re Farmland Indus., Inc.*, 294 B.R. 855, 885 (Bankr. W.D. Mo. 2003) (noting that "hard bargains are often the lot of Chapter 11 debtors" seeking postpetition financing). In such situations, "the terms of the bargain reached between debtor and creditor may reach beyond the usual terms of a loan agreement," and, in fact, courts approve onerous terms under section 364 because "such terms are perfectly normal considering the 'unusual' situation of a bankrupt firm." *Ellingsen MacLean Oil Co.*, 65 B.R. at 365 n.7; *see also In re W. Pac. Airlines, Inc.*, 223

B.R. 567, 572 (Bankr. D. Colo. 1997) (approving a postpetition financing under section 364 where the terms were "onerous, costly, and tough" because they "reflect[ed] this Debtor's situation and the market in which the Debtor [wa]s forced to participate as a result of its financial circumstances and the deadlines it face[d]").

Interpreting section 364 consistent with these principles, courts do not disturb postpetition financings so long as the agreement is an "exercise of [the debtors'] prudent business judgment consistent with their fiduciary duties" *In re Tridimension Energy, L.P.*, No. 10-33565, 2010 WL 5267049, at *6 (Bankr. N.D. Tex. May 27, 2010); *In re Age Refining, Inc.*, No. 10-50501, 2010 WL 4780670, at *2 (Bankr. W.D. Tex. Mar. 3, 2010) (approving DIP financing where "[t]he terms of th[e] Financing Order reflect the Debtor's exercise of prudent business judgment under exigent circumstances and are consistent with its fiduciary duties"); *In re Beechgrove Redevelopment, L.L.C.*, No. 07-12057, 2007 WL 4414777, at *1 (Bankr. E.D. La. Dec. 13, 2007) (similar). Indeed,

> cases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.

In re Ames Dep't Stores, Inc., 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (holding that a financing arrangement cannot leverage the bankruptcy process by "pervert[ing] the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the Bank and the Debtor's principals who guaranteed its debt"). Accordingly, "courts will almost always defer to the business judgment of a debtor in the selection of the lender." *In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011).

Among the basket of protections and rights that can be included in DIP financings, section 364(d) permits the Roll-Up in the Debtors' DIP Facility. *First*, as Judge Isgur explained at the Final DIP Hearing, the Roll-Up here constituted both a waiver of a prepetition claim and the issuance of postpetition debt on terms where the DIP Lenders will receive more than they put in. ROA.3036-37 (reasoning that under the Roll-Up, the DIP Lenders "agreed '[w]e're going to lend 90, we're going to get back 180 and we're going to waive a claim of 90 that is junior to the 180 that we are getting back'"). Although these terms may seem unusual, section 364's broad authorization to obtain postpetition financing gives bankruptcy judges wide-ranging discretion to approve terms "beyond the usual terms of a loan agreement," when the lender cannot obtain any other financing to keep the business afloat, *Ellingsen MacLean Oil Co.*, 65 B.R. at 365 n.7, as was

the case here, ROA.3039 (finding that, after "investigating the marketplace" the Debtors "couldn't obtain the credit" without the terms in the DIP Facility, including the Roll-Up).

Moreover, Judge Isgur found that the Roll-Up here does not directly affect the status of a prepetition claim, but rather increases the amount of postpetition principal to be repaid and, in a separate waiver, decreases the amount of prepetition claims outstanding. ROA.3037 (reasoning that the Roll-Up cannot be "collapsed" into one transaction that effectively elevates prepetition claims "because I think it's just not the economic reality of what is going on. We really have a group that's willing to put in the new 90 in order to get back 180.") Both the incurrence of postpetition debt and the waiver of prepetition claims are plainly permitted by the Bankruptcy Code. *See, e.g., In re Westmoreland Coal Co.*, No. 18-35672 (Bankr. S.D. Tex. Nov. 15, 2018), ECF No. 520 at *14 (noting the DIP Lenders' "agreement to waive certain default interest to which they [were] entitled" under prepetition obligations); 11 U.S.C. § 364(d).

Second, even if the Roll-Up can be characterized as a mechanism that "elevates the priority of lenders' prepetition claims," CACIB Br. at 15—a notion which Judge Isgur expressly disclaimed in this case, *see* ROA.3036-39—the Bankruptcy Code permits such elevation, as bankruptcy courts repeatedly undertake a similar practice in approving "first day" motions for the payment of

unsecured, prepetition claims held by employees and critical vendors.[8] Indeed, the Supreme Court of the United States recently recognized that bankruptcy courts routinely "approve[] interim distributions that violate ordinary priority rules." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017). In *Jevic*, the Court approvingly cited decisions where courts "have approved 'first-day' wage orders that allow payment of employees' prepetition wages, 'critical vendor' orders that allow payment of essential suppliers' prepetition invoices, *and 'roll-ups' that allow lenders who continue financing the debtor to be paid first on their prepetition*

[8] *See, e.g.*, *In re CEC Entm't, Inc.*, No. 20-33163 (Bankr. S.D. Tex. July 23, 2020), ECF No. 408 (authorizing payment of prepetition claims of critical vendors before approval of a bankruptcy plan); *In re 24 Hour Fitness Worldwide, Inc.*, No. 20-11558 (Bankr. D. Del. July 13, 2020), ECF No. 543 (authorizing payment of prepetition claims of critical vendors before approval of a bankruptcy plan); *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex. June 29, 2020), ECF No. 131 (authorizing payment of prepetition employee wages and salaries before approval of a bankruptcy plan); *In re Hertz Corp.*, No. 20-11218 (Bankr. D. Del. June 25, 2020), ECF No. 593 (authorizing payment of prepetition employee wages before approval of a bankruptcy plan); *Avianca Holdings S.A.*, No. 20-11133 (Bankr. S.D.N.Y. June 17, 2020), ECF No. 291 (authorizing payment of prepetition employee wages and salaries before approval of a bankruptcy plan); *In re Centric Brands Inc.*, No. 20-22637 (Bankr. S.D.N.Y. June 10, 2020), ECF No. 173 (authorizing payment of prepetition claims of critical vendors before approval of a bankruptcy plan); *In re Neiman Marcus Grp.*, No. 20-32519 (Bankr. S.D. Tex. June 2, 2020), ECF No. 732 (authorizing payment of prepetition claims of critical vendors before approval of a bankruptcy plan); *In re Carbo Ceramics Inc.*, No. 20-31973 (Bankr. S.D. Tex. Apr. 23, 2020), ECF No. 221 (authorizing payment of prepetition claims of critical vendors before approval of a bankruptcy plan); *Am. Comm. Lines Inc.*, No. 20-30982 (Bankr. S.D. Tex. Feb. 10, 2020), ECF No. 81 (authorizing payment of prepetition employee wages and salaries before approval of a bankruptcy plan).

claims." *Id.* (emphasis added). The Court reasoned that each of these authorizations have "significant Code-related objectives"—"preserv[ing] the value of the debtor as a going concern; . . . mak[ing] the disfavored creditors better off; . . . promot[ing] the possibility of a confirmable plan; . . . help[ing] to restore the *status quo ante*; and . . . protect[ing] reliance interest"—that override the ordinary priority rules, *id.* at 986, in direct contrast to CACIB's argument that roll-ups run "contrary to the spirit of the Bankruptcy Act." CACIB Br. at 15 (quoting *In re Texlon Corp.*, 596 F.2d 1092, 1098 (2d Cir. 1979)).

Both section 364(d), which authorizes DIP financing, and section 363(b), which permits the use of estate assets outside the ordinary course of business, are drafted broadly enough to ensure that priority rules can be overcome in times of necessity, and the repeated bankruptcy court orders approving these transactions are demonstrative. In the hopes of a momentous decision, CACIB argues that each of these ordinary course practices is prohibited by the Bankruptcy Code, without citing any controlling authority and, as discussed below, almost no authority at all.

Third, CACIB's heavy reliance on *Saybrook*—a nearly thirty-year-old, out-of-circuit case that addresses cross-collateralization—is telling. *See* CACIB Br. at 16-19. That case concerns whether cross-collateralization is permitted under section 364, not whether roll-ups are permitted. According to that case, cross-collateralization involves "[s]ecuring pre-petition debt with pre- and post-petition

collateral." *In re Saybrook Mfg. Co.*, 963 F.2d 1490, 1491 (11th Cir. 1992). That is not what the Roll-Up contemplates. As discussed above, the Roll-Up does not grant additional liens on prepetition claims, but instead permits the waiver of prepetition claims and the issuance of postpetition debt. This distinction alone shows that *Saybrook* is unpersuasive.

Even if *Saybrook*'s reasoning were applicable to the Roll-Up, however, the Eleventh Circuit itself recognizes that its holding is an outlier among a sea of cases whose holdings contradict it. *Id.* at 1493 (citing *In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir. 1987) (noting that "[t]hat court held that cross-collateralization was 'authorized' under section 364"); *In re Ellingsen MacLean Oil Co.*, 834 F.2d 599 (6th Cir. 1987); *In re Vanguard Diversified, Inc.*, 31 B.R. 364 (Bankr. E.D.N.Y. 1983);[9] *In re Roblin Indus., Inc.*, 52 B.R. 241 (Bankr. W.D.N.Y. 1985); *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986); *In re Tom McCormick Enters., Inc.*, 26 B.R. 437 (Bankr. M.D. Tenn. 1983)). Indeed, the number of cases cited in

[9] CACIB suggests that *Vanguard Diversified* is unpersuasive because it cites to *In re Texlon Corp.*, 596 F.2d 1092, 1098 (2d Cir. 1979), which acknowledged in dicta that cross-collateralizations may be allowed under certain circumstances. *See* CACIB Br. at 17-18. The critical fact driving the bankruptcy court's decision in *Vanguard Diversified*, however, was the debtor's presentation of compelling evidence that the postpetition financing was necessary for the debtor to continue operations, that financing on more favorable terms was unavailable, and that the postpetition financing would maximize the value of the estate for the benefit of all creditors. *Vanguard Diversified*, 31 B.R. at 366-67. As discussed in more detail below, the Bankruptcy Court clearly found that all of those factors are present in the case at hand.

Saybrook that disagree with its holding speaks volumes. And, of course, no other circuit has adopted *Saybrook*'s holding, and at least one district court presented with the issue has declined to follow it. *See Official Comm. of Unsecured Creditors v. Goold Elecs. Corp.*, No. 93-4196, 1993 WL 408366, at *3 (N.D. Ill. Sept. 22, 1993) (declining to "conclude that [cross-collateralizations are] invalid per se," and remanding to bankruptcy court to determine whether equities supported authorizing cross-collateralization).[10]

CACIB does not seriously contend that the Debtors could have obtained DIP financing that did not include the Roll-Up. Rather, CACIB's arguments that bankruptcy judges are structurally disadvantaged in their ability to assess DIP

[10] While CACIB argues that "[c]ourts around the country . . . have followed *Saybrook*'s holding," CACIB Br. at 17, that is simply not true. CACIB cites a total of three cases issued since 1992 that have done so, and the most recent is a 2011 decision from the Western District of Pennsylvania.

In re Equalnet Communications Corp., 258 B.R. 368 (Bankr. S.D. Tex. 2000)—the sole case cited by CACIB which included a roll-up—merely recounts, in conclusory fashion and without analysis, that the court previously ruled that "based on the Eleventh Circuit's ruling in the case of *Saybrook Mfg. Co. Inc.*, 963 F.2d 1490 (11th Cir. 1992), a secured creditor's prepetition loan balance could not be paid off and/or 'rolled into' a postpetition line of debtor in possession financing, with resultant enhancement of collateral position and administrative authority." *Id.* at 369. The court's prior decision to prohibit the roll-up (presumably as in violation of the Bankruptcy Code's priority scheme), however, is inconsistent with its written decision to permit prepayment of other prepetition claims. *See Equalnet*, 258 B.R. 370-71. In any event, this lone bankruptcy court decision hardly establishes the controlling law in the Fifth Circuit, especially when weighed against numerous other bankruptcy courts' approvals of roll-ups.

financing proposals and that the Debtors could have obtained more favorable financing terms from imaginary "third parties" are fantasy. *See* CACIB Br. at 20.

There can be no question that bankruptcy courts are competent to review and authorize DIP financing, Frederick Tung's commentary on the fast pace of the bankruptcy process notwithstanding. *See* 11 U.S.C. § 364 (governing court's power, after notice and hearing, to authorize issuance of postpetition credit); CACIB Br. at 19-20 (quoting Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 Yale J. Reg. 651, 655, 659, 671 (2020)).[11] In analyzing the terms of a proposed DIP financing, a court considers whether it is necessary and whether the debtor could have obtained credit on more favorable terms from another source.[12] *See In Drillmar Oil & Gas,*

[11] Contrary to CACIB's assertion that approval of DIP financings is rushed and prohibits junior claimants from seriously asserting grievances, CACIB Br. at 20, here, the Final DIP Order was approved on well over twenty-one days' notice after extensive negotiations with the Committee, who ultimately supported approval of the DIP Facility, including the Roll-Up, ROA.3033-34.

[12] Relying on an American Bankruptcy Institute recommendation, CACIB asserts that courts should only authorize a roll-up where, "among other criteria, 'it repays the prepetition facility in cash.'" CACIB Br. at 18 (quoting Comm'n to Study the Reform of Chapter 11, Am. Bankr. Inst., *2012-2014 Final Report and Recommendations*, at 73 (2014), http://commission.abi.org/full-report). The Institute's recommendations, however, are not binding. Moreover, the "other criteria" CACIB glosses over—that a roll-up "extends substantial new credit to the debtor, and provides more financing on better terms than alternative facilities offered to the debtor"—are both present here, and, as the Commission itself explains, the recommendation was crafted "to disallow roll-up provisions that

Inc., No. 09-38737, 2010 WL 5158258, at *2 (Bankr. S.D. Tex. July 12, 2010). As discussed above, bankruptcy courts in this district and elsewhere apply the business judgment standard, deferring to management's reasonable decisions to incur postpetition financing when they are consistent with fiduciary duties. *See Tridimension Energy*, 2010 WL 5267049, at *6.

Here, the Bankruptcy Court engaged in a thorough analysis of the proposed DIP financing. The Bankruptcy Court held a lengthy hearing on whether it should approve the DIP financing, ROA.2935-3050, that included testimony from the Debtors' Chief Restructuring Officer who explained that the Debtors "would require DIP financing to have adequate liquidity to make it through the restructuring process," ROA.2954. The Court also heard testimony from the Debtors' investment banker, who explained that the Debtors solicited financing from eleven different parties, none of whom was even willing to negotiate postpetition financing; rather, the DIP facility, including the Roll-Up, "was the only available financing." ROA.2960-61, 2967. CACIB did not offer any evidence to rebut this testimony. *See* ROA.3039, *see generally* ROA.2935-3050.

The Bankruptcy Court determined based on the undisputed record before it that the proposed DIP financing was necessary and that the Debtors could not

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provide little or no value to the estate." *See 2012-2014 Final Report and Recommendations*, at 73.

obtain such financing on more favorable terms. *See* ROA.2872 ("The access of the Debtor . . . to sufficient working capital and liquidity . . . [is] necessary and vital to the preservation and maintenance of going concern values of the Debtor [] and to a successful reorganization . . . ."); ROA.3039 ("The testimony that the Debtors' extremely high-qualified professionals, who are very credible witnesses, concluded after investigating the marketplace that they couldn't obtain the credit otherwise is proof" that the DIP "is unable to obtain such credit otherwise."); *see also* ROA.2876 ("The Roll-Up will benefit the Debtors and their estates because it will enable the Debtors to obtain urgently needed financing critical to administering these Chapter 11 Cases and funding their operations, which financing would not otherwise be available."). Indeed, Judge Isgur expressly found that the Debtors were unable to "arrange . . . a third-party loan for $90 million . . . , the provisions of which said, '[w]e get repaid $180 million plus a bunch of fees before anybody else gets paid anything," ROA.3036, which renders CACIB's baseless assertion that "had SpeedCast been negotiating with third parties for a $90 million loan in exchange for a $180 million repayment, it would have had a very good reason to resist the expensive terms," CACIB Br. at 20, of no moment. Based on this evidence, Judge Isgur concluded that the Debtors exercised "prudent business judgment consistent with their fiduciary duties" by executing the DIP Facility, including the Roll-Up. ROA.2876.

CACIB does not seriously challenge these findings on appeal—nor could it reasonably do so, given the overwhelming evidence presented to the Bankruptcy Court when it ruled on the DIP Motion. Because Judge Isgur's approval of the DIP financing was well-reasoned and grounded in the evidence presented, this Court should affirm the Bankruptcy Court's order authorizing the DIP Facility in its entirety.

III. The Roll-Up Does Not Violate the SFA or Section 510(a) of the Bankruptcy Code.

CACIB contends that the Roll-Up violates the SFA and section 510(a) of the Bankruptcy Code because it contravenes a waterfall provision agreed to by the Debtors' prepetition secured lenders in Section 7.02 of the SFA. *See* CACIB Br. at 21-23. Not so. The Bankruptcy Court correctly held that the Roll-Up did not implicate—let alone violate—the waterfall provision. ROA.3037. Furthermore, the Bankruptcy Court correctly found that CACIB had consented to the Roll-Up by signing the Third Amendment to the SFA. ROA.3038. In light of the Third Amendment, which was validly executed even without CACIB's consent, the Bankruptcy Court also correctly held that CACIB was not entitled to additional adequate protection related to the Roll-Up. ROA.3039-40.

A. The Roll-Up Did Not Implicate the Waterfall Provision of Section 7.02 of the SFA.

CACIB argues that the Roll-Up violates the waterfall provision set forth in Section 7.02 of the SFA because it results in the repayment of $90 million of the DIP Lenders' prepetition debt before repayment of CACIB's prepetition debt. *See* CACIB Br. at 22-23. However, the Bankruptcy Court correctly held that the Roll-Up does not violate CACIB's rights under the SFA because the Roll-Up does not implicate the SFA's waterfall provision. *See* ROA.3037 (holding that "[t]here is just no question" that the Roll-Up does not violate CACIB's rights under the SFA).

Simply put, the Roll-Up does not implicate the waterfall provision of the SFA in any manner. The waterfall provision, incorporated into Section 7.02 of the SFA, expressly provides that the "*Agents* shall apply (a) the proceeds of any collection, sale, foreclosure, or other realization upon any Collateral, including any Collateral consisting of cash, [and] (b) *any amounts received in respect of the Obligations* following the termination of the Commitments and any of the Loans becoming due and payable pursuant to Section 7.01 . . . as follows . . . ." ROA.382 (emphases added). In other words, this section sets forth the order in which the Agent must distribute proceeds or other "amounts received" upon an Event of Default to the secured parties. ROA.1848.

The Roll-Up, however, does not provide for the conveyance of any amounts to the Agent. Rather, it provides,

> Subject to and effective upon entry of the Final Order, . . . the Debtors shall be deemed to exchange and substitute (and prepay) Prepetition Loans of the DIP Lenders on a cashless[,] dollar-for-dollar basis with the DIP Roll-Up Loans . . . . The DIP Roll-Up Loans deemed substituted and exchanged (and used to prepay Prepetition Loans) . . . shall be deemed exchanged (and prepaid) therefor.[13]

ROA.2409. Because the Roll-Up is an automatic exchange and substitution of the DIP Lenders' prepetition loans, issued under an entirely separate facility from the SFA, it does not provide any amounts to the Agent, or to anyone else, that could be distributed through the waterfall.

Similarly, the Third Amendment does not implicate the waterfall provision of Section 7.02. The Third Amendment merely permits the Agent to enter into the DIP Credit Agreement and directs the Agent not to object to the proposed DIP Facility. ROA.2217 ("[T]he DIP Credit Agreement and the other 'Loan Documents' as defined in the DIP Credit Agreement, and all liens granted in connection therewith, shall be deemed permitted and not in conflict with the provisions of the Credit Agreement or any other Loan Document[,] . . . [and] the Required Lenders [] hereby (a) instruct the Agents to raise no objection to and to refrain from otherwise contesting . . . the DIP Credit Agreement . . . ."). It does not

[13] As noted above, the Bankruptcy Court expressly excluded any provisions in the DIP Order stating that the Roll-Up is a prepayment of prepetition debt. *See* ROA. 3040.

direct the Agent to distribute any proceeds or amounts under the SFA and so, cannot run afoul of the order of distribution set forth therein.

The express terms of Section 7.02, the Roll-Up, and the Third Amendment confirm that "[t]here is just no question" that the Roll-Up does not violate CACIB's rights under the SFA.

B. CACIB Consented to the Roll-Up by Executing the Third Amendment.

It was not clear error for the Bankruptcy Court to find that CACIB had "consented to the roll-up in its capacity as a secured hedging bank . . . ." CACIB Br. at 24. To the contrary, the record was more than sufficient to support the Bankruptcy Court's finding that CACIB consented to the Third Amendment, and by extension, the Roll-Up as a "single entity." ROA.3038.

First, the Bankruptcy Court correctly found that even though CACIB signed the consent as a "Lender," the definition of a "Secured Hedging Bank" *includes lenders*. ROA.3038; *see also* ROA.1734-35 (establishing that "a counterparty already party hereto as a Lender" may be a Secured Hedging Bank and that non-Lender Secured Hedging Banks "agree[] to be bound by Sections 7.02, 9.05, 9.07, 9.08(c), 9.11, 9.15, and 9.25, and Article VIII as if it were a Lender (except where expressly referenced as a 'Secured Hedging Bank')"). It therefore "does[not] mean anything" that CACIB signed the Third Amendment "'[a]s lender because a

'secured hedging bank' can also be a 'lender.'" ROA.3038. The Bankruptcy Court was correct: The two terms "are not mutually exclusive." ROA.3038.

Second, the cases that CACIB cites are all off-base because they all relate to cases in which an individual, and not an entity, signed in a single capacity. CACIB does not cite a single case wherein a court permitted a corporate entity to consent to an agreement in one capacity but to withhold its consent in another. *See* CACIB Br. at 24-25; *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) (explaining that the fact that a defendant was "sued in his official capacity does not give him standing to appeal in his individual capacity"); *Israel v. Chabra*, 537 F.3d 86, 97-98 (2d Cir. 2008) (holding that a defendant CEO's signature on an employment agreement only bound the defendant in his corporate, and not his personal, capacity); *Integrated Mktg. & Promotional Sols., Inc. v. JEC Nutrition, LLC*, No. 06-5640, 2006 WL 3627753, at *7 (S.D.N.Y. Dec. 12, 2006) (denying a defendant CEO's motion to dismiss a claim against him in his personal capacity where the defendant CEO had signed a personal guaranty of the contract at issue).

In light of the express terms of the SFA, which do not contemplate CACIB withholding consent from the Third Amendment in its capacity as a Secured Hedging Bank, the Bankruptcy Court's finding that CACIB consented to the Third Amendment as a "single entity" was not erroneous. As such, CACIB is bound by

its consent to the Third Amendment and its agreement that the DIP Credit Agreement was implemented consistently with the SFA.

It is important to note, however, that even if CACIB did not consent to the Amendment in its capacity as a Secured Hedging Bank, its consent was not necessary to effectuate the amendment and does not change the outcome here. Section 9.08(c) of the SFA provides that a Secured Hedging Bank's consent to an amendment is required only where an amendment "(i) [modifies] Sections 7.02 or 9.08(c); (ii) . . . impose[s] a cap on the Obligations in respect of Secured Hedging Agreements subject to clause *THIRD* or *FOURTH* of the enforcement waterfall set forth in Section 7.02; or (iii) [amends] the definition of "Secured Hedging Agreement" or "Secured Hedging Bank . . . ." ROA.1871. As explained in Part II.A, *supra*, the Third Amendment does not modify the waterfall provision in the SFA, and CACIB does not contend that any of these other circumstances are present. No quantum of evidence showing that CACIB did not consent to the Third Amendment in its capacity as a Secured Hedging Bank can make that fact relevant when the SFA did not require it. Once again, CACIB's argument misses the mark. *See* CACIB Br. at 24-27 (arguing that CACIB's consent as a Secured Hedging Bank was necessary to modify the waterfall and that "[t]he evidence before the Bankruptcy Court underscored what Credit Agricole's signature block reflected—that it signed [the Third Amendment] solely as a lender").

IV. Even If the Roll-Up Violates Applicable Law or the Loan Documents, CACIB's Requested Relief Cannot Be Granted.

Even if this Court concludes that roll-ups are *per se* prohibited under the Bankruptcy Code, or that the Roll-Up violates the waterfall provision in the SFA, section 364(e) of the Bankruptcy Code expressly forbids granting the relief requested by CACIB. Section 364(e) provides:

> The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e). "[T]he purpose of § 364(e) is 'to overcome a good faith lender's reluctance to extend financing in a bankruptcy context by permitting reliance on a bankruptcy judge's authorization.'" *In re TMT Procurement Corp.*, 764 F.3d at 521 (quoting *In re Adams Apple, Inc.*, 829 F.2d at 1488). Accordingly, "absent a stay pending appeal, even if [a challenger] succeeds in having the . . . Financing Order modified or reversed, any such modification or reversal would not affect [the lender's] super priority position if the loan was made in good faith with proper notice." *In re First South Sav. Ass'n*, 820 F.2d 700, 704 (5th Cir. 1987). Indeed, "the Court is without authority to either invalidate the authorization for the loan or adjust the super-priority lien," and, therefore, "[t]here is no effective

remedy available to Appellant which this Court may grant." *Bank of New Eng. v. BWL, Inc.*, 121 B.R. 413, 416-17 (D. Me. 1990).

CACIB seeks three specific remedies on appeal, two of which are relevant here.[14] First, CACIB asks this Court to "eliminate the roll-up from the final postpetition financing order." CACIB Br. at 29. Second, and in the alternative, CACIB requests an order that it receive its *pro rata* share of any payments on the Roll-Up as if the "payment [was] flown through the waterfall provision of the Syndicated Facility Agreement." CACIB Br. at 29.

Both of these remedies are prohibited by section 364(e). The first form of relief sought seeks to invalidate the Roll-Up loans, a substantial portion of the financing agreement, and the attendant liens associated with the Roll-Up. This remedy "would clearly 'affect the validity of any debt incurred' and therefore fails, mooted by § 364(e)." *In re Cooper Commons, LLC*, 430 F.3d 1215, 1219 (9th Cir. 2005). Although the second form of relief does not seek to invalidate the financing as a whole, CACIB asks this Court to alter the bargained-for-exchange on which the DIP Lenders extended credit. This, too, is prohibited by section 364(e) because "any provisions of the financing agreement that [a lender] might have bargained

[14] CACIB's final request for specific relief is to grant CACIB adequate protection for the DIP Financing. As addressed in Part V, *infra*, CACIB is not a lienholder and therefore, by definition, is not entitled to adequate protection. And, in any event, CACIB consented to the adequate protection package set forth in the Third Amendment.

for or that helped to motivate its extension of credit are protected by § 364(e)." *Id.* at 1219-20 (holding that the reviewing court could not order a *pro rata* distribution among "all the administrative claimants" when the approved financing provided for payment only to specific administrative claimants (emphasis omitted)); *see also In re W. Pac. Airlines, Inc.*, 181 F.3d 1191, 1195 (10th Cir. 1999) ("[Section] 364(e) prohibits not only outright invalidation of a lien or priority where the challenging party has failed to seek a stay, but also modification of the terms of a post-petition lender's bargained-for collateral.").

CACIB does not challenge the Bankruptcy Court's express findings that the DIP Lenders acted in good faith, and such findings are not clearly erroneous. ROA.3072 ("The DIP Financing (including the Roll-Up) . . . ha[s] been negotiated in good faith and at arm's length among [the parties, and] . . . all loans made to and guarantees issued by the Debtor DIP Loan Parties pursuant to the DIP Documents and any DIP Obligations shall be deemed to have been extended by the DIP Agent and the DIP Secured Parties and their respective affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code . . ."). Moreover, CACIB never moved for or obtained a stay of the Final DIP Order, which was the proper recourse for its objection to the financing transaction. *See In re EDC Holding Co.*, 676 F.2d 945, 947 (7th Cir. 1982) ("The proper recourse for the

objecting creditor is to get the transaction stayed pending appeal."). Accordingly, even if the Court holds the Roll-Up to be invalid, under section 364(e), "[t]here is no effective remedy available to Appellant which this Court may grant," *BWL, Inc.*, 121 B.R. at 416, because section 364(e)'s restriction on the remedies available upon reversal of a financing order remain intact even where a bankruptcy court's financing order is determined to be void, *see In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1451, n. 24 (9th Cir. 1985) (explaining that, where the court found financing order "void" with respect to a particular creditor, "[e]ven had we desired to put [the creditor] back into the position it occupied before [the bankruptcy judge] approved the [financing order], section 364(e) of the Bankruptcy Code would prevent us from doing so.").

V. The Bankruptcy Court Correctly Held that CACIB Is Not Entitled to Adequate Protection.

The Bankruptcy Court's determination that CACIB is not entitled to additional adequate protection was correct. ROA.3039-40. That is because CACIB consented to the Third Amendment, even if today it wishes it had not, and the Third Amendment approved the DIP Facility and the adequate protection package laid out in the Final DIP Order. *See* ROA.2217. Any argument otherwise is entirely without merit.

Additionally, even if CACIB did not consent to the sufficiency of the adequate protection provided by the Final DIP Order, its argument overlooks that

CACIB is not entitled on its own to adequate protection under section 364(d), as it does not have its own liens. Section 364(d)(1)(B) provides that, to "authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien," there must be "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." 11 U.S.C. § 364(d)(1)(B) (emphasis added). Schedule 1.01 of the SFA, however, provides that the Agent, *not CACIB*, holds all liens granted under the SFA. ROA.3148 (Schedule 1.01(a): "The Security to be provided to or granted in favor of the Collateral Agent and/or the Security Trustee, for the benefit of the Secured Parties, will be given or granted in accordance with the Security principles set forth in this Schedule . . . ."); ROA.3151 (Schedule 1.01(g)(vii): "All Security shall be granted in favor of the applicable Security Agent . . . ."). Because CACIB is not a lienholder, it is not entitled to the protections of Section 364(d).[15]

CONCLUSION

For the reasons set forth above, the Ad Hoc Group of Secured Term Lenders respectfully requests that this Court affirm the Bankruptcy Court's Final DIP Order.

[15] CACIB, as a Prepetition Secured Party, continues to benefit from the robust adequate protection package granted to the Agent in the Final DIP Order. *See* ROA.239-43.

Dated: August 3, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(i) because it has 8,815 words, excluding the parts of the brief exempted by Federal Rule of Bankruptcy Procedure 8015(g).

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, a true and correct copy of the foregoing document was served upon all parties via ECF transmission who are authorized to receive electronic notice in this proceeding.

/s/ Henry Flores
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