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 DEBTORS

MCKOOL SMITH PC

John J. Sparacino, Attorney-in-Charge
SBN 18873700 | SDID 12551
Veronica F. Manning
SBN 24098033 | SDID 2781496
Thomas J. Eisweirth (*Pro Hac Vice*)
600 Travis Street, Suite 7000
Houston, TX 77002
Tel.: (713) 485-7300
Fax: (713) 485-7344
jsparacino@mckoolsmith.com
vmanning@mckoolsmith.com
teisweirth@mckoolsmith.com

Gayle R. Klein
SBN 00797348 | SDID 22651
One Manhattan West
395 9th Avenue
50th Floor
New York, NY 10001
Tel.: (212) 402-9400
Fax.: (212) 402-9444
gklein@mckoolsmith.com

Conflicts Counsel to Appellee Debtors

2032243200925000000000033

Table of Contents

STATEMENT REGARDING ORAL ARGUMENT i
STATEMENT OF ISSUES 1
STANDARD OF REVIEW 3
STATEMENT OF THE CASE.....3
SUMMARY OF ARGUMENT 13
I. Section 364(e) Prohibits the Modification or Reversal of the Roll-Up on Appeal.....15
II. Sitting as an Appellate Court, this Court Should Not Consider Credit Agricole's Broad Roll-Up Attack Not Raised Below 18
A. The General Waiver Rule as to Arguments Not Raised Below Preclude Credit Agricole's Assertion of the *Per Se* Issue. 19
B. Credit Agricole Has Not Attempted to Show, Nor Can it Show, Extraordinary Circumstances That Might Warrant Application of the Discretionary Exception to the General Waiver Rule.....20
C. By Not Raising the Waiver Exception in its Opening Brief, Credit Agricole Has Abandoned the Issue and May Not Now Urge it.....25
III. Even if This Court Considers the *Per Se* Issue, Credit Agricole's Position is Legally Incorrect.....26
IV. The Roll-Up Does Not Violate Section 510(a) or the SFA.....34
A. There Has Been No Modification of the Waterfall Provision 34
B. Credit Agricole's Consent "as a Secured Hedging Bank" Was Not Required to Enter into the Third Amendment.....37
C. The Bankruptcy Court Finding That Credit Agricole Consented to the Third Amendment and the Roll-Up Is Not Clearly Erroneous 38
V. The Bankruptcy Court Did Not Err with Regard to Adequate Protection 41
A. The Bankruptcy Court Properly Found Sufficient Adequate Protection, Not, As Credit Agricole Contends, No Entitlement to Adequate Protection 41

B. Credit Agricole's Consent Issue is Irrelevant and/or Incorrect 45

C. In Any Event, Credit Agricole Retains the Ability to Seek Further Adequate Protection Relief in the Bankruptcy Court 47

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

Cases

In re Adams Apple, Inc.,
829 F.2d 1484 (9th Cir. 1987) 28

AG Acceptance Corp. v. Veigel,
564 F.3d 695 (5th Cir. 2009) 20, 21, 22

Anderson v. Valdez,
916 F.3d 404 (5th Cir. 2019) 17

Barnhart Ranch Co. v. Comm'r of Internal Revenue,
714 F. App'x 376 (5th Cir. 2017) 21

In re Beker Indus. Corp.,
58 B.R. 725 (Bankr. S.D.N.Y. 1986).....28

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986).....39

In re Briggs Transp. Co.,
780 F.2d 1339 (8th Cir. 1985) 44

Cazorla v. Koch Foods of Mississippi, L.L.C.,
838 F.3d 540 (5th Cir. 2016) 21

Conley, 707 F.2d 175 22

U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC,
138 S. Ct. 960 (2018).....3

Czyzewski v. Jevic Holding Corp.,
137 S. Ct. 973 (2017).....30, 33

Doe v. Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Trustees,
855 F.3d 681 (5th Cir. 2017) 26

In re Ellingsen MacLean Oil Co., Inc.,
834 F.2d 599 (6th Cir. 1987) 28

In re Energy Partners, Ltd.,
409 B.R. 211 (Bankr. S.D. Tex. 2009) 44

In re Equalnet Commc'ns Corp.,
258 B.R. 368 (Bankr. S.D.Tex. 2000) 32, 33

French v. Allstate Indem. Co.,
637 F.3d 571 (5th Cir. 2011) 21

Ginther v. Ginther Trs. (In re Ginther Trs.),
238 F.3d 686 (5th Cir. 2001) 17, 18, 19, 40

Israel v. Chabra,
537 F.3d 86 (2d Cir. 2008) 39

In re Legacy Reserves Inc.,
No. 19-33396 (MI) (Bankr. S.D. Tex. June 20, 2019), Dkt. No. 255 .....24, 32

In re McDermott International, Inc.,
No. 20-30336 (DRJ) (Bankr. S.D. Tex. January 23, 2020).....31

Nasti v. CIBA Specialty Chemicals Corp.,
492 F.3d 589 (5th Cir. 2007) 19, 20

In re O & S Trucking, Inc.,
No. 12-61003, 2012 WL 2803738 (Bankr. W.D. Mo. June 29, 2012) 29

O'Dwyer v. O'Dwyer (In re O'Dwyer),
611 F. App'x 195 (5th Cir. 2015).....18

Piney Woods Country Life School v. Shell Oil Co.,
905 F.2d 840 (5th Cir. 1990) 26

Rossco Holdings, Inc. v McConnell,
613 F. App'x 302 (5th Cir. 2015).....19

In re Sanchez Energy Corporation,
No. 19-34508 (MI) (Bankr. S.D. Tex. August 15, 2019), Dkt. No. 865.....24, 32

Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.),
963 F.2d 1490 (11th Cir. 1992) 27, 31, 32, 33

In re Sheridan Holding Company II, LLC,
No. 19-35198 (MI) (Bankr. S.D. Tex. October 21, 2019), Dkt. No. 178.....32

Sherwin Pipeline, Inc. v. Sherwin Alumina Co., LLC (In re Sherwin Alumina Co., LLC),
952 F.3d 229 (5th Cir. 2020) 3

In re Snowshoe Co., Inc.,
789 F.2d 1085 (4th Cir. 1986) 44

Tanguy v. West (In re Davis),
746 F. App'x 392 (5th Cir. 2018).....18

TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.),
764 F.3d 512 (5th Cir. 2014) 15, 16, 17, 18

In re Trinity Coal Corporation,
No. 13-50364 (E.D.Ky. Apr. 8, 2013), Dkt. No. 267 28

United Nat'l. Ins. Co. v. Mundell Terminal Services, Inc.,
740 F.3d 1022 (5th Cir. 2014) 19

United Paperworkers Int'l Union AFL-CIO, CLC v. Champion Int'l Corp.,
908 F.2d 1252 (5th Cir. 1990) 26

In re Vanguard Natural Resources, Inc.,
No. 19-31786 (DRJ) (Bankr. S.D. Tex. April 3, 2019), Dkt. No. 241.....32

Matter of Verity Health Sys. of California, Inc.,
No. 19-55997, 2020 WL 3057465 (9th Cir. June 9, 2020) 29

Villas at Parkside Partners v. City of Farmers Branch, Tex.,
726 F.3d 524 (5th Cir. 2013) 20

Waldron v. Adams & Reese, L.L.P. (*In re Am. Int'l Refinery, Inc.*),
676 F.3d 455 (5th Cir. 2012) 3

XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.,
513 F.3d 146 (5th Cir. 2008) 20

Statutes

11 U.S.C. § 363(m) 9, 17, 18

11 U.S.C. § 364 .....*passim*

11 U.S.C. § 510(a) .....*passim*

STATEMENT REGARDING ORAL ARGUMENT

While the Appellee Debtors understand that the Court has set this matter for oral argument, the Debtors respectfully submit that oral argument is not required for this appeal. The Debtors are prepared to present oral argument in accordance with the Court's prior ruling and setting.

STATEMENT OF ISSUES

Pursuant to Federal Rules of Bankruptcy Procedure 8014(b)(2), the Appellees (collectively, the "**Debtors**" or "**Speedcast**")[1] respectfully submit this counter-statement of the issues presented to assist in this Court's review of the Bankruptcy Court's decision below.

1. Whether this Court is precluded from reversing or modifying a postpetition financing order, in light of section 364(e) of the Bankruptcy Code and Fifth Circuit precedent, where the Bankruptcy Court made the requisite findings of good faith (without challenge) and Appellant Credit Agricole failed to obtain a stay pending appeal.

2. Whether Credit Agricole waived its merits argument that the Bankruptcy Code does not permit a "roll-up" in postpetition financing transactions where Credit Agricole failed to raise the issue in the Bankruptcy Court.

3. Whether the Bankruptcy Court's approval of the Roll-Up[2] violated section 510(a) of the Bankruptcy Code where the purported subordination agreement is not implicated by the Roll-Up.

4. Whether the Bankruptcy Court committed clear error in finding that Credit Agricole consented to, or lacked objection rights to, the postpetition

[1] A complete list of the Debtors may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/speedcast.

[2] Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the DIP Finance Order.

financing under the DIP Finance Motion.

5. Whether the Bankruptcy Court committed clear error in finding that the adequate protection provided to Credit Agricole in the DIP Finance Order satisfied the Bankruptcy Code.

STANDARD OF REVIEW

The standard of review for factual determinations by a bankruptcy court is clear error. *Waldron v. Adams & Reese, L.L.P.* (*In re Am. Int'l Refinery, Inc.*), 676 F.3d 455, 461 (5th Cir. 2012). Accordingly, "[a bankruptcy court's] findings of fact may be reversed only if the reviewing court has the definite and firm conviction that a mistake has been made." *Id.* Issues of law are reviewed *de novo*. *Sherwin Pipeline, Inc. v. Sherwin Alumina Co., LLC (In re Sherwin Alumina Co., LLC)*, 952 F.3d 229, 233 (5th Cir. 2020). Where an issue presents mixed questions of law and fact, the standard for review depends on whether resolving the question involves primarily factual issues (deferential "clear error" standard) or legal issues (*de novo* standard). *See U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966-68 (2018).

STATEMENT OF THE CASE

Speedcast is the world's largest global satellite provider specializing in satellite connectivity for business and enterprise satellite networks. *See* Healy Decl.[3] ¶ 6; Bankr. R. on Appeal ("**AR**") 97. A collapse in oil prices and the halting of cruise-industry operations significantly impaired Speedcast's biggest customers. *See* Healy Decl. ¶¶ 31-32; AR 107-08. As a result, on April 23, 2020 (the "**Petition Date**"), each of the Debtors filed a petition for relief under chapter 11 of title 11 of

[3] *Decl. of Michael Healy in Supp. of Debtors' Chapter 11 Pet. and First Day Relief*, Bankr. Dkt. No. 16 ("**Healy Declaration**").

the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "**Bankruptcy Code**")[4] in the United States Bankruptcy Court for the Southern District of Texas (the "**Bankruptcy Court**"). Bankr. Dkt. No. 1; AR 72.

As conceded by the Appellant, Credit Agricole Corporate and Investment Bank ("**Credit Agricole**"), the Debtors needed financing to remain a going concern. CA Br.[5] at 4; *see also* Healy Decl. ¶¶ 38-48, 48; AR 111-14. Certain of the Debtors' prepetition lenders offered up to an additional $180 million in financing. Healy Decl. ¶¶ 36, 48; AR 110. This borrowing amount was comprised of: (i) new money loan advances in an aggregate principal amount of up to $90,000,000 (the "**New Money Loans**"), and (ii) loans issued in substitution and exchange of loans under the prepetition financing arrangement on a cashless basis—without involvement of the Prepetition Agent or any other person—in an aggregate principal amount equal to $90,000,000 (the "**Roll-Up**", and together with the New Money Loans, the "**DIP Loans**," and the facilities providing for such DIP Loans, the "**DIP Facility**").[6] *Id.*; *see also* Waldman Decl.[7] ¶ 12; AR 424-25.

---

[4] All statutory references herein are to the Bankruptcy Code unless otherwise indicated.

[5] *Br. of Appellant Credit Agricole Corporate and Investment Bank*, D. Dkt. 4 ("**Brief**" or "**CA Brief**").

[6] The DIP Loans were to be provided by to the Debtors by the DIP Lenders pursuant to a "**DIP Credit Agreement**" between the Debtors and the DIP Secured Parties (defined to include the DIP Agent and the DIP Lenders).

[7] *Decl. of Adam Waldman in Supp. of Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the*

As a member of the prepetition lender syndicate, Credit Agricole was offered the opportunity to participate as a lender in the DIP Facility, but declined and instead sold out of its position as a revolving lender. *See* May 20, 2020 Hr. Tr. ("**Final Hearing Transcript**") 16:8-14; AR 2946. Importantly, the Debtors were unable to secure any other source of potential financing, which they proved through uncontested evidence in the Bankruptcy Court proceedings below. Waldman Decl. ¶ 24; AR 428-29. Accordingly, without the DIP Facility, the Debtors would not have survived. Healy Decl. ¶¶ 38-48; Waldman Decl. ¶ 25; AR 111-14, 429.

Prior to the bankruptcy, on May 15, 2018, Speedcast entered into a syndicated loan agreement (the "**SFA**") with several large international lending institutions, including Credit Agricole. Healy Decl. 28; AR 106. The agent and collateral agent for the syndicated lender group is Credit Suisse AG, Cayman Islands Branch (in its various roles, the "**Prepetition Agent**"). *Id.* Speedcast and Credit Agricole also entered into an ISDA Master Agreement and subsequent interest rate swap confirmations to execute interest rate "swap" or hedging transactions. CA Obj.[8] ¶ 4; AR 993. Given the swap or hedging relationship, Credit

---

Automatic Stay, (V) Scheduling a Final Hearing and (VI) Granting Related Relief, Bankr. Dkt. No. 34 ("**Waldman Declaration**").

[8] *Obj. of Credit Agricole Corporate and Investment Bank to Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing and (VI) Granting Related Relief*, Bankr. Dkt. No. 167 ("**CA Objection**" or "**Objection**").

Agricole is both a "Lender" and "Secured Hedging Bank" under the terms of the SFA. CA Obj. ¶ 5; AR 993. Each role carries different rights and obligations under the various prepetition loan agreements, but the ***same*** Credit Agricole entity performs both roles.

To effectuate the DIP Facility, on the Petition Date, a group of prepetition lenders,[9] ***including Credit Agricole***, entered into the Third Amendment to the SFA (the "**Third Amendment"**). *See* Bankr. Dkt. No. 208-14 at 1, 57; AR 2216, 2272. The Third Amendment accomplished two important and relevant functions—(i) the amendment of the SFA to allow for the implementation of the DIP Loans, and (ii) the instruction or direction by the signatory Required Lenders (including Credit Agricole) to the Prepetition Agent to: (a) not oppose the DIP Finance Order or DIP Facility, and (b) execute and deliver the "DIP Intercreditor Agreement" (as defined in the Third Amendment § 4). Third Amend. § 2; AR 2217.

The Third Amendment amended the SFA solely "to permit (i) entry by [the Debtors] into the DIP Credit Agreement . . . , (ii) the establishment of the DIP Facilit[y], (iii) the incurrence of the DIP Loans, and (iv) the granting of liens securing the 'Obligations' as defined in the DIP Credit Agreement." *Id.* The Third Amendment further states that "the DIP Credit Agreement . . . shall be deemed

[9] The lenders that consented and agreed to the Third Amendment were sufficient in number to constitute the "Required Lenders" (as defined in the SFA) to implement the Third Amendment.

permitted and not in conflict with the provisions of the [SFA]." *Id.*

The Third Amendment also set forth two specific instructions/directions by Credit Agricole (and the other signatory Lenders) to the Prepetition Agent. First, Credit Agricole instructed the Prepetition Agent "to raise no objection to and to refrain from otherwise contesting . . . the DIP Order . . . ."[10] Third Amend. § 2; AR 2217. Second, Credit Agricole "authorize[d] and direct[ed] the [Prepetition] Agent . . . to execute and deliver the DIP Intercreditor Agreement . . . ." *See* Third Amend. § 4; AR 2218-19.

The DIP Intercreditor Agreement designates the prepetition loans, liens, agent, and lenders as "Junior," and the DIP Loans, liens, agent, and lenders as "Senior." Third Amend. Ex. II § 2.01; AR 2459. That agreement further sets forth customary terms so as to implement the seniority of the DIP Facility vis-à-vis the SFA and the prepetition loans and liens. *See* Third Amend. Ex. II; AR 2452. The agreement does not impact the payment rights and priorities set forth internally in the prepetition loan agreements.

Given that the postpetition financing was necessary to Speedcast's survival, on the Petition Date, the Debtors filed an emergency motion to approve debtor-in-

[10] This instruction also evidences a concession by CACIB that only the Prepetition Agent has the authority or right to assert a prepetition lender or SFA-based objection to the DIP Finance Motion. *See* Third Amend. § 2; SFA § 8.01; AR 1849-55, 2217.

possession financing.[11] *See* DIP Finance Mot.; AR 152.

The DIP Finance Motion was one of the Debtors' "first-day motions." *See* Healy Decl. ¶¶ 3, 36. Such motions are routinely filed in large commercial chapter 11 cases to provide a relatively seamless transition into chapter 11. Under the DIP Finance Motion, the Debtors generally sought Bankruptcy Court approval of the DIP Facility and of the agreed terms of the DIP Loans. *See* DIP Finance Mot. ¶¶ 6; AR 155-59. As is fairly common, the postpetition lenders (the "**DIP Lenders**") consist of several institutions that were among the Debtors' prepetition lender syndicate but not Credit Agricole given its refusal to participate.

Due to specific requisites of the Bankruptcy Code and Bankruptcy Rules, the approval of postpetiton financing motions typically occurs in two-steps. First, shortly after the petition is filed, the court will conduct an interim or emergency hearing to consider approval of an immediate needs portion of the full borrowing amount. Second, several weeks into the chapter 11 case, the court will conduct a final hearing to consider approval of the entirety of the borrowing.

The Bankruptcy Court held an interim hearing on the DIP Finance Motion on April 23, 2020. *See* Apr. 23, 2020 Hr. Tr. at 1 ("**First Day Hearing**

[11] *Emergency Motion of Debtors For Entry of Interim and Final Orders (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, (V) Scheduling a Final Hearing and (VI) Granting Related Relief*, Bankr. Dkt. No. 27 (the "**DIP Finance Motion**").

Transcript"); AR 875. Credit Agricole appeared at the interim hearing and made a limited objection to entry of an interim approval order, including to the Roll-Up. *See generally id.* The Bankruptcy Court overruled Credit Agricole's objections and entered (i) an initial interim order on April 23, 2020 [Bankr. Dkt. No. 49; AR 434], and (ii) a corrected interim order on April 24, 2020 [Interim Order[12] at 1; AR 655].

The Interim Order, *inter alia*, (i) approved the interim relief sought by the DIP Finance Motion, including the Roll-Up [Interim Order p. 2, ¶ 4; AR 656, 677-80], (ii) set forth findings that the Debtors and all relevant parties had acted in good faith and were thus entitled to the protections of section 364(e) and 363(m) [Interim Order ¶¶ G(vii); AR 668-69], and (iii) set a final hearing for the DIP Finance Motion [Interim Order ¶ 38; AR 718].

On May 11, 2020, Credit Agricole filed an objection to the financing. CA Obj. at 1; AR 991. In its Objection, Credit Agricole requested denial of the DIP Finance Motion, stating as its sole and specific objection grounds that the Roll-Up: (i) violated the SFA, (ii) violated section 510(a) as contrary to the terms of an alleged subordination agreement, and (iii) failed to provide Credit Agricole adequate protection as required by section 364(d)(1)(B). *See generally* CA Obj. ¶¶ 16-26; AR 997-1002. Credit Agricole did not raise, assert or argue that the Roll-Up

[12] *Corrected Interim 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, (V) Scheduling a Final Hearing and (VI) Granting Related Relief*, Bankr. Dkt. No. 77 (the "**Interim Order**").

should be rejected as generally violative of, or impermissible under, the Bankruptcy Code. Credit Agricole also did not raise this argument when it appeared at the interim hearing.

On May 19, 2020, responses in support of final approval of the DIP Finance Motion were filed by the Debtors [Bankr. Dkt. No. 223; AR 2669], the DIP Agent [Bankr. Dkt. No. 233; AR 2697], and an *ad hoc* group of DIP Lenders [Bankr. Dkt. No. 229; AR 2685].

On May 20, 2020, the Bankruptcy Court conducted a hearing to consider final approval of the DIP Finance Motion. Final Hr. Tr. at 1; AR 2931. The only contested issue and focus of the hearing was Credit Agricole's Objection. *See generally id.* At no time during the three-hour hearing did Credit Agricole argue, or even suggest, that the Roll-Up was impermissible under the Bankruptcy Code. Credit Agricole, however, did raise in specific detail at the final hearing and in its objection that (1) the Roll-Up should not be approved absent its consent, and (2) its prior consent was only provided in a limited capacity and not in its capacity as a "Secured Hedging Bank." Final Hr. Tr. 46:19-47:11, 49:23-50:14; 50:20-54:13; AR 2976-77, 2979-84. The Bankruptcy Court rejected this attempt to parse its capacities. *See* Final Hr. Tr. 58:20-23; AR 2988. Specifically, the Bankruptcy Court found that "[w]hen [Credit Agricole] signed the [T]hird [A]mendment, it consented." Final Hr. Tr. 108:6-7; AR 3038. The fact that Credit Agricole signed

as "as Lender" does not impact the analysis because the defined terms Lender and Secured Hedging Bank "are not mutually exclusive" under the plain terms of the SFA. Final Hr. Tr. 108:7-13; AR 3038.

At the conclusion of the evidence and arguments of counsel, the Bankruptcy Court announced its final approval of the DIP Finance Motion. Final Hr. Tr. 105:7-110:23; AR 3035-3040. Subsequently on May 20, 2020, the Bankruptcy Court entered its approval order that is the subject of this appeal. DIP Finance Order[13] at 1; AR 2860.

On June 3, 2020, Credit Agricole filed its Notice of Appeal of the DIP Finance Order, resulting in this appeal (the "**Appeal**"). Bankr. Dkt. No. 276; AR 3051. On July 2, 2020, Credit Agricole filed its Brief. CA Br. at 1. In its Brief, Credit Agricole lists three issues for appeal, only the latter two of which were raised at the Bankruptcy Court:

1. The Bankruptcy Court erred in authorizing a nonconsensual roll-up because the Bankruptcy Code does not permit such agreements.
2. The Bankruptcy Court violated the Bankruptcy Code and a purported subordination agreement by approving Speedcast's roll-up agreement.
3. The Bankruptcy Court erred in finding that CACIB was not entitled to adequate protection based on consent, because the evidence conclusively showed that Credit Agricole had not consented to the roll-up agreement in the relevant capacity.

[13] *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*, Bankr. Dkt. No. 239 (the "**DIP Finance Order**").

See CA Br. at 3.

Presumably, Credit Agricole did not raise the first issue below because it is a common practice of the Bankruptcy Courts in this District, and other Districts across the nation, to approve roll-up financings and, therefore, any broad, general opposition to the permissibility of roll-ups under the Bankruptcy Code would have been overruled, just like all of its other objections. Credit Agricole never sought a stay of the DIP Finance Order, and thus, the postpetition financing has been effectuated.

Given those facts, the Debtors filed a motion to dismiss the Appeal (the "**Motion to Dismiss**"). D. Dkt. No. 9. In their Motion to Dismiss, the Debtors request that this Court dismiss this Appeal as moot under section 364(e) and Fifth Circuit precedent, both of which require dismissal of an appeal of a postpetition financing order where the Bankruptcy Court makes a finding that the postpetition lenders acted in good faith (which was never contested), and the appealing party fails to obtain a stay pending appeal. *See generally id.* ¶¶ 18-29. The Debtors alternatively request that this Court dismiss the portion of the Appeal seeking consideration of Credit Agricole's entirely new argument that the Bankruptcy Code broadly does not permit or authorize roll-ups. *See id.* ¶¶ 30-31.

The Debtors similarly request the Court deny Credit Agricole's requested relief in this appeal. Not only has it waived the issue of whether roll-ups are

permitted under the Bankruptcy Code, its position is incorrect. Roll-ups are permissible, are regularly implemented in this and other Districts, and no circuit has an absolute bar on them. Moreover, Credit Agricole consented to the DIP Facility and, regardless, the DIP Facility (which affords Credit Agricole adequate protection) was the only financing available to keep the Debtors a going concern and provide any opportunity of a successful reorganization under chapter 11.

As of the date of the filing of this Appellees' Brief, the Lenders have fully funded the DIP Facility and the Debtors have fully drawn all amounts thereunder. Accordingly, the Roll-Up has been completed.

SUMMARY OF ARGUMENT

This is an appeal of the Bankruptcy Court's order approving postpetition financing under section 364 of the Bankruptcy Code. Credit Agricole's opposition to the order, both in the Bankruptcy Court and now in this Court on appeal, has always focused upon the inclusion of a "roll-up" feature in the postpetition financing. Simply, Credit Agricole seeks to undo or share in the roll-up protection that was negotiated by the DIP Lenders and approved by the Bankruptcy Court. As a threshold matter, section 364(e) of the Bankruptcy Code and Fifth Circuit precedent plainly bar the relief sought by Credit Agricole and thus mandate the dismissal of this appeal in its entirety. This Court should not reach the merits of the Credit Agricole appeal issues.

Even on the merits, Credit Agricole's three identified issues are misplaced. The Court should decline to consider Credit Agricole's first issue—whether roll-up features are *per se* impermissible—as it waived the issue by never raising it in the Bankruptcy Court and further abandoned the issue by not raising it in its opening Brief in this appeal. Even if considered, Credit Agricole's view that roll-up financings are *per se* impermissible is wrong as it (1) relies upon an older, non-controlling case that has proven to be an outlier with the passage of time; and (2) ignores the reality that the Bankruptcy Court, and courts around the country, routinely consider and approve roll-up financings.

Credit Agricole's second issue asserts that the Roll-Up has effectively made an impact upon, or change to, the "Waterfall" (as defined herein) that is violative of section 510(a) of the Bankruptcy Code and/or the prepetition loan documents. The reality is, however, that there has been no change whatsoever to the Waterfall, and that funds delivered to the Prepetition Agent to repay the prepetition obligations will flow through the Waterfall as stated in the agreement. The Waterfall will be complied with, not violated. In any event, the Bankruptcy Court correctly found that Credit Agricole explicitly consented to the "effective impact" that it complains of today. This finding of consent was not clearly erroneous and must stand to bar Credit Agricole's continued fight.

As its third issue, Credit Agricole wrongly contends that the Bankruptcy

Court determined that Credit Agricole was not entitled to "adequate protection" in connection with the financing. The Bankruptcy Court determined no such thing. Rather, the Bankruptcy Court properly found that sufficient adequate protection was provided to Credit Agricole. And indeed, the DIP Finance Order sets forth a plethora of adequate protection grants made to Credit Agricole. It cannot be credibly argued that the Bankruptcy Court committed clear error or abused its discretion in finding Credit Agricole to be adequately protected.

To the extent that this Court reaches the merits of Credit Agricole's appeal, which it should not under the clear mandate of section 364(e) and controlling precedent, all issues should be rejected and the Bankruptcy Court's approval and entry of the DIP Finance Order should be affirmed.

ARGUMENT

I. Section 364(e) Prohibits the Modification or Reversal of the Roll-Up on Appeal

Under section 364(e), postpetition financing orders are *per se* unreviewable on appeal absent a stay pending the appeal or allegations of lender bad faith.[14] *TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 519 (5th Cir. 2014) (quoting *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 240 n.15

[14] Further discussion of section 364(e) and its application to this Appeal is presented in Debtors' Motion to Dismiss. D. Dkt. No. 9.

(5th Cir. 2009) ("A failure to obtain a stay of an authorization under [section 364] moots an appeal of that authorization where the purchaser or lender acted in good faith."). Because Credit Agricole failed to obtain a stay pending appeal and the Bankruptcy Court found, without challenge, that the DIP Financing (including the Roll-Up) was negotiated in good faith, the entirety of Credit Agricole's appeal must be dismissed as moot.

Nonetheless, Credit Agricole ignores the unambiguous statutory mandate and asserts that it "neither needed nor had a basis to pursue the extraordinary relief of a stay [pending appeal] before the Bankruptcy Court." CA Reply[15] at 2. Relying exclusively on a nearly 30-year-old outlier opinion from the Eleventh Circuit, Credit Agricole contends that section 364(e) is inapplicable here because roll-ups are *per se* impermissible under the Bankruptcy Code, and that issue is "fused together" with the mootness issue and the two "cannot be separated or decided apart." *Id.* at 4 (citing *Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.)*, 963 F.2d 1490 (11th Cir. 1992)). Credit Agricole therefore asserts that this Court "cannot determine if this appeal is moot under section 364(e) until [it] decides" the merits of their appeal—*i.e.*, whether roll-ups are permissible under section 364. CA Reply at 4 (citing *Saybrook*, 963 F.2d at 1493).

Credit Agricole's suggested approach and result directly conflict with the

[15] *Appellant Credit Agricole Corporate and Investment Bank's Reply in Support of its Motion to Expedite Appeal*, D. Dkt. No. 14 ("**CA Reply**").

Fifth Circuit's express holding in *TMT Procurement* that the issue of statutory mootness must be decided first absent a stay pending appeal. 764 F.3d at 520. *TMT Procurement* involved an appeal of a postpetition financing order that granted the postpetition lender a first-priority lien in shares of common stock in the appellant, Vantage. *Id.* at 518. Vantage argued that the stock shares were not property of the bankruptcy estate, and thus (i) the bankruptcy and district courts lacked statutory authority and subject matter jurisdiction to enter an order imposing a lien upon the shares; and (ii) sections 364(e) and 363(m) could not protect the unauthorized actions in the lower court orders. *Id.* at 519-20. The Fifth Circuit held that "[c]onsistent with our precedent, we do not reach the issue of whether the Vantage Shares are 'property of the estate' before deciding the statutory mootness issue because of Vantage's failure to obtain a stay pending appeal." *Id.* at 520. Because there was no stay obtained, the Fifth Circuit also refused to consider the subject matter jurisdiction issue "before deciding the statutory mootness issue." *Id.* Indeed, the Fifth Circuit ***did*** consider the statutory mootness issue first, determined that the bankruptcy court's finding of good faith was clearly erroneous, and thus proceeded to consider the merits of the appeal as the lack of good faith prevented the application of section 364(e) or 363(m).[16]

[16] *TMT Procurement*'s *per se* approach to section 364(e) mootness is consistent with decades of Fifth Circuit case law decided under the analogous section 363(m). *See*, *e.g.*, *Anderson v. Valdez*, 916 F.3d 404, 410 (5th Cir. 2019) (refusing to address unsecured creditor's challenge

Credit Agricole now makes the identical argument that was rejected in *TMT Procurement*. This Court should follow the Fifth Circuit mandate and address statutory mootness first. Credit Agricole did not obtain a stay and the Bankruptcy Court found, without any contest, good faith.[17] Therefore section 364(e) applies to moot Credit Agricole's appeal. As plainly alluded to in *TMT Procurement*, whether the Bankruptcy Court violated the statute in approving the Roll-Up is immaterial, the mootness issue must be decided first.

For these reasons, the Debtors respectfully request that the Court grant its Motion to Dismiss Credit Agricole's Appeal as moot.

II. Sitting as an Appellate Court, this Court Should Not Consider Credit Agricole's Broad Roll-Up Attack Not Raised Below

The primary issue argued in Credit Agricole's Brief is that prepetition debt roll-ups in postpetition financings are *per se* not permitted by the Bankruptcy Code, and that the Bankruptcy Court lacked authority under section 364 to approve the Roll-Up (hereinafter referred to as the "***Per Se* Issue**"). However, Credit

---

to the distribution of proceeds of a 363 sale where the creditor failed to obtain a stay pending appeal); *Ginther v. Ginther Trs. (In re Ginther Trs.)*, 238 F.3d 686, 689 (5th Cir. 2001) (holding that a challenge to a bankruptcy court's jurisdiction is "irrelevant" to a statutory mootness inquiry because the "failure to obtain a stay is fatal to a challenge of a bankruptcy court's authorization of the sale of property"); *O'Dwyer v. O'Dwyer (In re O'Dwyer)*, 611 F. App'x 195 (5th Cir. 2015) ("We . . . conclude that Code § 363(m) renders this appeal moot. As a result, we may not reach the merits of Debtor's challenges to the sale").

[17] Credit Agricole's failure to challenge good faith in the Bankruptcy Court results in the abandonment of this argument. *See Ginther*, 238 F.3d at 689 ("As Redstone's status as a good faith purchaser was not challenged in the bankruptcy court, however, we need not address this issue."); *Tanguy v. West (In re Davis)*, 746 F. App'x 392 (5th Cir. 2018) ("[W]e do not consider arguments related to the good faith of a purchaser that were not raised before the bankruptcy court.").

Agricole never raised the *Per Se* Issue at the Bankruptcy Court despite having the opportunity to do so (i) at the interim hearing; (ii) in its written objection to the DIP Finance Motion; and (iii) at the hearing for final approval of the DIP Finance Motion. Thus, Credit Agricole has waived its right to argue the *Per Se* Issue on appeal before this Court.

A. The General Waiver Rule as to Arguments Not Raised Below Preclude Credit Agricole's Assertion of the *Per Se* Issue

Fifth Circuit law is unwavering that appellate courts "do not consider arguments or claims not presented to the bankruptcy court." *Ginther*, 238 F.3d at 689 (citation omitted). Accordingly, arguments and issues not raised at the Bankruptcy Court are determined to be waived for appeal purposes. *See Id.*.; *see also United Nat'l. Ins. Co. v. Mundell Terminal Services, Inc.*, 740 F.3d 1022, 1029 (5th Cir. 2014) ("[A]s a 'general principle of appellate review,' failure to raise an argument before the [lower court] waives that argument" (quoting *Conley v. Bd. Of Trs. of Granada Cnty. Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983)); *Rossco Holdings, Inc. v McConnell*, 613 F. App'x 302, 307 (5th Cir. 2015) ("Failure to raise an argument before the [lower court] waives that argument." (quoting *Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 747 (5th Cir. 2011)). While "no bright-line rule exists for determining whether a matter was raised below," *Nasti v. CIBA Specialty Chemicals Corp.*, 492 F.3d 589, 595 (5th Cir. 2007) (quoting *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 142 n.4 (5th Cir. 1996)), preservation requires that

the litigant "press and not merely intimate the argument . . . to such a degree that the [lower] court has an opportunity to rule on it." *Nasti*, 492 F.3d at 595 (quoting *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994)); *accord XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008).

The general waiver rule must apply here to prevent Credit Agricole's assertion of the *Per Se* Issue for the first time on appeal.

B. Credit Agricole Has Not Attempted to Show, Nor Can it Show, Extraordinary Circumstances That Might Warrant Application of the Discretionary Exception to the General Waiver Rule

While the waiver issue is wholly-ignored in Credit Agricole's Brief, Credit Agricole has pushed back against waiver in the CA Reply. There, implicitly conceding that it never raised the *Per Se* Issue, Credit Agricole asks this Court to remedy its failure to raise the issue below by applying the discretionary exception to the general waiver rule. *See* CA Reply, Dkt. No. 14 at 4-5.[18] Credit Agricole's half-hearted and dilatory effort to shield itself from waiver fails for several reasons.

As an initial matter, conspicuously absent from Credit Agricole's discussion of the discretionary waiver exception is the full text of the exception. Credit Agricole omits that the Fifth Circuit has repeatedly held that the exception is only available when the proponent of the new argument can "demonstrate

[18] Notably, the statement Credit Agricole quotes from *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 582 n.26 (5th Cir. 2013), appears in the case's ***dissenting opinion***.

'extraordinary circumstances.'" *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) (citing *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996)); *see also Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540, 549 n.23 (5th Cir. 2016) (declining to address new argument on appeal where "Plaintiffs d[id] not argue that extraordinary circumstances [we]re present"); *French v. Allstate Indem. Co.*, 637 F.3d 571, 583 (5th Cir. 2011) ("The Plaintiffs make no argument or showing of extraordinary circumstances in this case, and we therefore adhere to our general [waiver] rule."); *Barnhart Ranch Co. v. Comm'r of Internal Revenue*, 714 F. App'x 376, 380 (5th Cir. 2017) (declining to address entirely new legal theory based on a "controlling line of cases" not raised in tax court where the parties asserting the argument "fail[ed] to cite any extraordinary circumstances permitting . . . consider[ation of] their waived legal theory."). To be clear, "the burden to establish extraordinary circumstances is on the party seeking review," that is, Credit Agricole. *Veigel*, 564 F.3d at 700.

"Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from [the appellate court's] failure to consider it." *Veigel*, 564 F.3d at 700 (quoting *N. Alamo*, 90 F.3d at 916). Thus, Credit Agricole must prove to this Court that the *Per Se* Issue is ***both*** a pure question of law ***and*** that a miscarriage of justice will result if this Court does not consider it. Credit Agricole has made no effort to carry its burden

and, therefore, the Court should reject Credit Agricole's attempt to raise the *Per Se* Issue.

Even assuming Credit Agricole had made a miscarriage of justice argument (it did not), such an argument would fail. To qualify, the asserted error must be "so obvious" that the reviewing court's refusal to consider the issue "would result in a miscarriage of justice." *Conley*, 707 F.2d at 178. The Fifth Circuit has acknowledged that when determining whether a miscarriage of justice would result, "we have often considered whether the alleged error is obvious or merely debatable." *Veigel*, 564 F.3d at 701 (citing *Conley*, 707 F. 2d at 178).

The *Veigel* decision highlights the extremely high burden placed on a party to demonstrate that a miscarriage of justice will result from failing to consider a newly raised argument. In *Veigel*, the Fifth Circuit did find that a miscarriage of justice would result, but it did so only because the lower court's decision was "patently erroneous in light of controlling precedent." *Veigel*, 564 F.3d at 701. *Veigel* involved the review of a trial court judgment that included an award of attorney's fees. For the first time on appeal, the appellant asserted that clear Fifth Circuit precedent precluded an award of attorney's fees on the subject claim as a matter of law. *Id.* at 701. The Fifth Circuit determined that its failure to address the appellant's newly-asserted argument "would result in significant actual harm," and thus invoked the "discretionary exception" to the general waiver rule to consider,

and reverse, the "patently erroneous" award of attorney's fees. *Id*.

In sum, to prevail on the miscarriage of justice prong, Credit Agricole must show that the impermissibility of roll-ups is not debatable as a matter of law. It cannot do so. The *Per Se* Issue is anything but a well-settled legal principle that the Bankruptcy Court erroneously applied. Indeed, Credit Agricole devotes several pages of its Brief to conceding this very issue in arguing that there is no guiding precedent in the Fifth Circuit as to the permissibility of a postpetition roll-up. *See* CA Br. at 15-20. The alleged impermissibility of roll-up features in postpetition financings is simply not a supported, much less well-settled, legal principle under Fifth Circuit precedent. Courts within this Circuit routinely approve financings that include roll-up provisions. *See* DIP Finance Mot. at ¶¶ 37-42 (citing to multiple cases in in which roll-up financings were approved in the Southern District of Texas and elsewhere); AR 186-89. Further, there is no clear precedent that precludes the availability of roll-ups, and Credit Agricole has cited to none. As such, Credit Agricole cannot show, even if it had attempted, that a miscarriage of justice will result if this Court properly refuses to consider Credit Agricole's *Per Se* Issue that was not raised in the Bankruptcy Court.

In its Reply, Credit Agricole gives brief lip-service to the second extraordinary circumstances prong, that the matter at issue is a pure question of law. Credit Agricole states, without any analysis, that the permissibility of roll-ups

under the Bankruptcy Code is a pure question of law. This Court need not even reach this issue given the non-existence of the miscarriage of justice prong. But even so, Credit Agricole is wrong on this point and concedes as much in its filings.

First, courts around the country routinely authorize and approve roll-up financings ***based upon the requisite factual showing***. *See, e.g.*, *In re Sanchez Energy Corporation*, No. 19-34508 (MI) (Bankr. S.D. Tex. August 15, 2019), Dkt. No. 865 at ¶ 5(d) ("[T]he DIP Agent and the DIP Lenders would not be willing to provide the New Money Facility or extend credit to the Debtors thereunder without the inclusion of the Roll-Up Loans within the DIP Facility."); *In re Legacy Reserves Inc.*, No. 19-33396 (MI) (Bankr. S.D. Tex. June 20, 2019), Dkt. No. 255 ¶ J(ii) ("The Debtors are unable to obtain secured credit under section 364(d)(1) of the Bankruptcy Code without . . . (b) allowing the DIP Secured Parties to provide the loans, letters of credit, and other financial accommodations under the DIP Facility (including the completion of the [roll-up])"); *see also* DIP Financing Order at ¶ K(vii); AR 3072. The Bankruptcy Court stated as much during its oral ruling at the final hearing when it said "I think my call is based on the evidentiary Record that is before me, it is based on the proofs that I got and it is based on my reading of the documents." Final Hr. Tr. 110:13-15; AR 3040. Thus, it is well-recognized that certain facts may warrant the approval of a roll-up. The plain import of that is that roll-ups are not, as a matter of law, impermissible under the Bankruptcy Code.

Second, in its Brief, Credit Agricole essentially concedes that roll-ups are permissible upon certain factual showings. Credit Agricole describes the "disadvantage" that bankruptcy judges face when considering postpetition financings terms on an emergency basis, and concludes by stating that "[j]udges must assess 'whether the extraordinary terms are necessary to induce lending' on the fly without 'the benefit of ***counterfactuals***.'" CA Br. at 20 (emphasis added). In other words, there are facts that may support a roll-up and there are "counterfactuals" that may cut against approval of a roll-up. By definition, this means that the permissibility of roll-ups is not a pure question of law.

Thus, even if the Court must assess the "pure question of law" prong in considering extraordinary circumstances, that prong is not satisfied.

C. By Not Raising the Waiver Exception in its Opening Brief, Credit Agricole Has Abandoned the Issue and May Not Now Urge it

In its Brief, Credit Agricole wholly ignores the waiver issue and its obligation to show "extraordinary circumstances" that might warrant the application of the discretionary exception to the general waiver rule. Credit Agricole has only ever addressed the waiver issue in its Reply (filed after its Brief), and even then only touched upon one prong (the pure question of law prong) of the required two-pronged extraordinary circumstances showing that is its burden. By not even raising these issues in its opening Brief, Credit Agricole has waived and abandoned its opportunity to assert or show "extraordinary circumstances," and

this Court should decline to consider whether the discretionary exception should apply to the *Per Se* Issue. *See Doe v. Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Trustees*, 855 F.3d 681, 688 (5th Cir. 2017) ("Doe failed to analyze the theory in a meaningful way in his opening brief. The argument is thus forfeited."); *United Paperworkers Int'l Union AFL-CIO, CLC v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir. 1990) (referring to "the general proposition that any issues not raised or argued in the appellant's brief are considered waived and will not be entertained on appeal") (citing *In re Tex. Mortgage Servs. Corp.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985)); *Piney Woods Country Life School v. Shell Oil Co.*, 905 F.2d 840, 854 (5th Cir. 1990) (holding that an appellant abandons any issues not raised in its initial brief).

For all of the above reasons, this Court should refuse to consider Credit Agricole's newly-raised argument that the Bankruptcy Code does not permit the Roll-Up.

III. Even if This Court Considers the *Per Se* Issue, Credit Agricole's Position is Legally Incorrect

In addition to being waived, Credit Agricole's argument that roll-ups of prepetition debt are not permitted under the Bankruptcy Code is simply wrong. The "authority" that Credit Agricole provides in support of its argument is outdated law that is not specifically on point, whose reasoning recent Supreme Court authority rejects. As Credit Agricole concedes, the overwhelming trend in recent years—

particularly including in this District—is court approval of roll-ups as a means of obtaining postpetition financing. *See* CA Br. at 19. So although certain ***commentators*** may question the principle, *see id.*, ***bankruptcy courts*** frequently approve roll-ups, even in the face of objections.

Credit Agricole asserts that *Saybrook*, an Eleventh Circuit opinion from last century disfavoring cross-collateralization, should be applied to foreclose ***all*** roll-ups under the Bankruptcy Code. *See* CA Br. at 16-20. *Saybrook*, however, is not binding authority, does not apply to roll-ups, has never been applied in the Fifth Circuit or any other Circuit as a prohibition to roll-ups, and, in any event, was wrongly decided.

In *Saybrook*, the Eleventh Circuit determined that cross-collateralization is inconsistent with bankruptcy law because (1) it is not specifically authorized as a method of postpetition financing under Section 364, and (2) it is directly contrary to the fundamental priority scheme of the Bankruptcy Code. 963 F.2d at 1494-95. Neither ground holds up or has any remaining relevance in light of the nearly 30 years of jurisprudence and the practical realities observed in bankruptcy cases around the country.

First, as previously noted, courts routinely approve roll-up financings. Beyond a handful of outliers, Credit Agricole is unable to cite to any critical mass of courts that flatly forbid roll-up financings. Indeed, Credit Agricole itself—

represented by its counsel of record here—has participated in roll-up postpetition financings. *See, e.g., In re Trinity Coal Corporation*, No. 13-50364 (E.D.Ky. Apr. 8, 2013), Dkt. No. 267 ¶ 10 ("As set forth in the Interim Order, the DIP Agent and DIP Lenders are hereby authorized to roll up, amend and/or extend the Letters of Credit issued by Credit Agricole pre-petition and enter into the LC Roll-Up Facility as part of the DIP Facility."). Additionally, and more importantly, courts simply do not bind themselves to the strict language of what is "specifically authorized" by section 364. The Bankruptcy Code provides bankruptcy courts a broad and flexible grant of authority to authorize a chapter 11 debtor to obtain postpetition credit and incur secured debt as part of their reorganization efforts. *See In re Adams Apple, Inc.*, 829 F.2d 1484, 1491 (9th Cir. 1987) ("Not only does section 364 permit a judge to authorize secured loans in appropriate circumstances, but section 105(a) provides for a broad exercise of authority by a bankruptcy judge to further the provisions of the Bankruptcy Code."). Section 364 is rather short and fairly straightforward, and courts routinely grant rights and protections that stray outside of the explicit statutory words. *See*, *e.g.*, *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, 602 (6th Cir. 1987) ("Even if the order were interpreted to exceed the scope of section 364(c), however, we are aware of no case authority holding that section 364(e) protection is unavailable to orders purportedly granted under section 364(c) but determined to have exceeded

section 364(c)'s scope."); *In re Beker Indus. Corp.*, 58 B.R. 725, 741 (Bankr. S.D.N.Y. 1986) (approving postpetition financing including cross-collateralization although "[s]uch forward cross-collateralization is not expressly permitted by the Code."); *Matter of Verity Health Sys. of California, Inc.*, No. 19-55997, 2020 WL 3057465, at *1 n.1 (9th Cir. June 9, 2020) ("The adequate protection package, although not expressly included in § 364, is protected by § 364(e) because the package is part of Ally Financial, Inc.'s (the DIP Lender) agreement to finance."); *In re O & S Trucking, Inc.*, No. 12-61003, 2012 WL 2803738, at *2 (Bankr. W.D. Mo. June 29, 2012) ("Nothing in the Bankruptcy Code expressly authorizes the payment of so-called critical vendors, *per se*. Nevertheless, courts have said it is permissible under . . . § 364 . . . of the Bankruptcy Code."). To suggest or believe, as *Saybrook's* holding appears to do, that authorizations or grants may not extend beyond the explicit words in the statute is simplistic, naïve, and ignores modern financial reality. It is hard to fathom any postpetition financing facility today that limits itself to the explicit protections stated in section 364 and awards no rights or protections beyond the statutory words.[19]

Second, the customary priority rules are routinely shaped and contoured (or ignored) in today's corporate restructuring practice. Simply, ordinary priority rules

[19] While multiple examples of such rights and protections exist, a very common development is the grant and approval of binding "milestones" in financing orders, whereby a court will approve and enforce certain case-specific milestones or goals agreed to by the debtor in connection with the postpetition financing.

are not absolute. As the Supreme Court recently recognized, bankruptcy courts may approve interim distributions that violate ordinary priority rules when they serve significant Code-related objectives. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983-85 (2017).

In *Czyzewski*, the Supreme Court held that a bankruptcy court cannot approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent. 137 S. Ct. at 984. In so holding, the Court distinguished structured dismissals from other types of orders that a bankruptcy judge may appropriately issue that violate ordinary priority rules. Specifically, the Supreme Court recognized that bankruptcy courts "have approved . . . 'roll-ups' that allow lenders who continue financing the debtor to be paid first on their prepetition claims." *Id.* (citations omitted). Such roll-ups enable a successful reorganization and make even the disfavored creditors better off. Indeed, a fundamental purpose of the Bankruptcy Code is to permit insolvent businesses to reorganize and restructure their debts in order to revive the debtors' business and maximize the value of the bankruptcy estate. Therefore, it stands to reason that a roll-up is appropriate, even if it violates ordinary priority, when there is a significant offsetting bankruptcy-related justification, such as preservation of the debtor as a going concern, promoting the possibility of a confirmable plan, and/or helping restore the *status quo ante*. *See Id.* at 985-86.

In approving the DIP Finance Order, the Bankruptcy Court reasoned that, absent the Roll-Up, the Debtors would not have been able to obtain financing. Specifically, Judge Isgur found:

> 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's not to say it's unchallengeable proof, but it is unchallenged proof. And that professional expert opinion that came into the Record makes the showing under 364(d).

(Final Hr. Tr. at 109:18-24; AR 3039). And Credit Agricole freely admits that "[t]he Debtors needed financing to remain a going concern." CA Br. at 4. With no other financing options available, without the Roll-Up, it is unlikely the Debtors would have continued as a going concern and the possibility of a confirmable plan would have been far less. Thus, the Roll-Up was correctly approved, regardless of whether it violated ordinary priority rules.

Even if *Saybrook* were correctly decided, it retains minimal influential relevance in today's practice. Indeed, in the 28 years following *Saybrook*, bankruptcy courts all across the country—including those in this District—regularly approve roll-ups, even over objections.[20] *See e.g.*, *In re McDermott International, Inc.*, No. 20-30336 (DRJ) (Bankr. S.D. Tex. January 23, 2020)

[20] Ironically, Credit Agricole's counsel recently published an article acknowledging how common roll-ups have become, stating that "[h]alf of the 2018 DIP financing facilities [in oil and gas bankruptcies] included a 'roll-up' (refinancing) of some or all of the debtor's prepetition secured obligations." Kelli Stephenson Norfleet, *Reviewing 2018 Oil and Gas DIP Financing Trends*, Haynes and Boone LLP, https://www.haynesboone.com/publications/reviewing-2018-oil-and-gas-dip-financing-trends.

(authorizing approximately $2.81 billion in DIP financing that included repayment of approximately $1 billion of prepetition debt); *In re Sheridan Holding Company II, LLC*, No. 19-35198 (MI) (Bankr. S.D. Tex. October 21, 2019), Dkt. No. 178 (authorizing approximately $100 million in DIP financing that included repayment of approximately $50 million of prepetition debt); *In re Sanchez Energy Corporation*, No. 19-34508 (MI) (Bankr. S.D. Tex. August 15, 2019), Dkt. No. 865 (authorizing approximately $350 million in DIP financing that included repayment of approximately $175 million of prepetition debt); *In re Legacy Reserves Inc.*, No. 19-33396 (MI) (Bankr. S.D. Tex. June 20, 2019), Dkt. No. 255 (authorizing approximately $350 million in DIP financing that included repayment of approximately $87.5 million of prepetition debt, pursuant to the interim DIP order); *In re Vanguard Natural Resources, Inc.*, No. 19-31786 (DRJ) (Bankr. S.D. Tex. April 3, 2019), Dkt. No. 241 (authorizing approximately $130 million in DIP financing that included repayment of approximately $65 million in prepetition debt).

The only case that Credit Agricole cites to suggest that *Saybrook* is good law in this District is *In re Equalnet Commc'ns Corp.*, 258 B.R. 368, 369 (Bankr. S.D.Tex. 2000). *Equalnet*, however, does not stand for the proposition that roll ups are ***never*** permissible, but, rather, its reasoning supports approving the Roll-Up here. In *Equalnet*, Judge Greendyke noted in dicta that he had previously

concluded that, based on *Saybrook*, a secured creditor's prepetition loan balance could not be paid off and/or "rolled into" postpetition financing where such roll-up resulted in the enhancement of collateral position and administrative priority. *Equalnet*, 258 B.R. at 369. Subsequently in the same case, certain creditors argued that *Saybrook* precluded the court from authorizing the debtor pay certain prepetition amounts. *Id.* The court disagreed and declined to extend *Saybrook*'s reasoning to the motions at issue because "the relief requested is necessary to preserve the Debtors' ongoing operations" and was "in the best interests of the Debtors' estates, their creditors, equity holders and all parties in interest." *Id.* Thus, the reason Judge Greendyke declined to extend *Saybrook* to the payment of prepetition of claims was exactly the same reason the Supreme Court noted roll-ups are allowed in *Czyewski*. Applying the reasoning of *Equalnet* here, because the Roll-Up was "a necessary inducement for . . . any Prepetition Credit Facility Debt" [DIP Finance Order at § 4; AR 2883], its approval by the Bankruptcy Court was appropriate.

Finally, Credit Agricole disingenuously argues that the Bankruptcy Court was at a disadvantage and given little time to consider the issues or consequences of the Roll-Up. CA Br. at 20. Credit Agricole was heard at both the interim and final hearings. Credit Agricole's objections to the DIP Finance Order were extensively briefed before the final hearing. The final hearing ran three hours long,

with a sole focus on the Roll-Up issues. To say that the Bankruptcy Court incorrectly viewed the Roll-Up as no different than a situation with a postpetition loan from an entirely new lender is to cast aspersions on a court that very clearly and carefully considered the issue.[21] *See* Final Hr. Tr. 110:13-15; AR 3040 (statement by the Bankruptcy Court that its decision was "based on the evidentiary [r]ecord," "proofs," and the Bankruptcy Court's "reading of the documents"). To the extent Credit Agricole is arguing that the Bankruptcy Court did not carefully enough consider the permissibility of roll-ups under the Bankruptcy Code, Credit Agricole has no one to blame but itself, as it did not raise the issue below.[22]

IV. The Roll-Up Does Not Violate Section 510(a) or the SFA

A. There Has Been No Modification of the Waterfall Provision

Credit Agricole further contends that the Bankruptcy Court erred in approving the Roll-Up because it violates the waterfall provision contained in Section 7.02 of the SFA (the "**Waterfall**"). *See* CA Br. at 21-23. The Waterfall sets forth how the Prepetition Agent is to distribute the cash proceeds (meaning the

[21] Such an argument also flies in the face of Judge Isgar's extensive experience on the bench in one of the busiest Districts for large chapter 11 filings in the entire country. Indeed, Haynes and Boone's article discussing roll-ups in oil and gas bankruptcies cites to eight such cases filed in the Southern District of Texas Bankruptcy Court in 2018 alone. *See* Kelli Stephenson Norfleet, *Reviewing 2018 Oil and Gas DIP Financing Trends*, Haynes and Boone LLP, https://www.haynesboone.com/publications/ reviewing-2018-oil-and-gas-dip-financing-trends.

[22] Presumably, Judge Isgur would have found that roll-ups are permissible under the Code, as he discussed in Interim hearing when he would ordinarily approve such relief. *See* Final Hr. Tr. 36:13-21; AR 910 ("As you know, I do roll up some finalized if I get a committee organized. I don't mean a routine basis, but I've done it pretty often.")

payment order) of collateral that the Prepetition Agent receives or obtains following an event of default under the SFA. Credit Agricole asserts that the Roll-Up "effectively" violates the Waterfall and thus violates section 510(a) and the SFA. *Id.* at 22. Credit Agricole is wrong.

The Bankruptcy Court's approval of the Roll-Up did not violate section 510(a). Assuming without conceding that the Waterfall is a subordination agreement subject to section 510(a), the Roll-Up does not change or violate the Waterfall. The postpetition loan (*i.e.*, the DIP Facility) and the prepetition loan (*i.e.*, the Prepetition Credit Facility) are two separate and distinct loan transactions. Each is governed by its own loan agreements, each has its own agent with rights and obligations set out in the loan agreements, and each has its own lenders. The contractual terms of the DIP Facility do not dictate or change the contractual terms of the Prepetition Credit Facility, and *vice versa*. As such, the contractual terms of the DIP Facility do not dictate or change (even "effectively") the application of the Waterfall. They cannot.

The DIP Finance Order and the DIP Intercreditor Agreement (which was agreed to by Credit Agricole) provide that the postpetition loans are senior to the prepetition loans. The DIP Credit Agreement contains its own waterfall relative to repaying the DIP Loans. Then, as and when the Prepetition Agent receives funds to distribute in satisfaction of prepetition loans, the distribution of the funds will be

governed by the Waterfall. Nothing about the DIP Facility or the DIP Finance Order changes this result. Neither the Roll-Up nor any other provision of the DIP Credit Agreement dictates the priority or order of the distribution of funds actually received by the Prepetition Agent. Thus, the Waterfall is not implicated. The "four corners" of the alleged subordination agreement—the SFA—are untouched and not violated by the DIP Facility.

Perhaps recognizing that section 510(a) is not implicated, much less violated, Credit Agricole resorts to arguing that the Roll-Up is "unfair" to Credit Agricole. Indeed, far from consistently arguing the *Per Se* Issue, Credit Agricole asserts that the Roll-Up should flow through the Waterfall. *See* CA Br. at 23. This would allow Credit Agricole to participate in the negotiated benefit of the Roll-Up without participating in the burden and risk of providing new money postpetition financing to assist in Speedcast's reorganization. Credit Agricole fails to point to any specific contractual provisions, cite to any legal authority, or offer any other explanation for its request, and instead makes a plea to this Court to unwind a heavily-negotiated, and Bankruptcy-Court-approved $180 million financing transaction because Credit Agricole believes it is "unfair."

Each of the prepetition lenders, including Credit Agricole, is a highly-sophisticated international financial institution. Nothing in the prepetition loan documents prevents or prohibits a post-bankruptcy roll-up loan. Had Credit

Agricole wanted to avoid the possibility of a roll-up loan, it should have negotiated a clear prohibition or declined to participate in the loan syndication from its inception. It did not do so. There is no legal or equitable principle that allows it to escape the ramification of its participation in the prepetition syndicate. "Unfairness" certainly provides no such grounds.

B. Credit Agricole's Consent "as a Secured Hedging Bank" Was Not Required to Enter into the Third Amendment

Credit Agricole seeks to parse its consent to the Third Amendment, saying that it consented as a "lender" but not as "secured hedging bank." This alleged distinction is not relevant. For this Court to even reach this issue, it must find that such a distinction is legally and factually correct ***and*** that the Roll-Up modifies the Waterfall. Even then, the Third Amendment was done at the consent and direction of the Required Lenders (including Credit Agricole)—the only parties necessary under the plain terms of the SFA. *See* SFA § 9.08(b) ("[N]either this Agreement nor any other Loan Document nor any provision hereof or thereof may be waived, amended or modified except pursuant to an agreement or agreements in writing entered into by the Borrowers and the Required Lenders"). In other words, except as to two specific matters discussed below, only syndicate lenders have consent rights to SFA amendments, not secured hedging banks.

Nevertheless, Credit Agricole asserts that the Roll-Up was improperly authorized because the Third Amendment lacked Credit Agricole's consent as a

Secured Hedging Bank. CA Br. at 24. Credit Agricole relies upon Section 9.08(c) of the SFA, which provides exceedingly narrow consent or objection rights to a Secured Hedging Bank. Such consent is required only when an amendment modifies Sections 7.02 or 9.08(c) of the SFA. *See id.*; SFA § 9.08(c). Simply, a Secured Hedging Bank only has consent rights as to a Waterfall change or a change that attempts to modify this consent right. In all other instances, "no Secured Hedging Bank shall have any right to notice of any action or, . . . to consent to, direct or object to any action hereunder . . . other than in its capacity as a Lender." SFA § 9.08(c). As amply shown above, the Waterfall has not been modified. Thus, whether Credit Agricole has a dual consent capacity is irrelevant. It did consent as a lender and its consent as a Secured Hedging Bank was simply not needed as Section 9.08(c) of the SFA was not implicated.

C. The Bankruptcy Court Finding That Credit Agricole Consented to the Third Amendment and the Roll-Up Is Not Clearly Erroneous

The Bankruptcy Court rejected Credit Agricole's "dual capacity" distinction and correctly found that Credit Agricole consented to the Third Amendment. Credit Agricole seeks to avoid the consequences of its signature by arguing that it signed solely in its capacity as a "Lender," and specifically not in its capacity as a "Secured Hedging Bank." CA Br. at 24. Credit Agricole argues that the capacity is made evident by the signature block that reads "as Lender" beneath the company's

name. *Id*. The Bankruptcy Court instead found that Credit Agricole "signed [the Third Amendment] as an entity," and as an entity, cannot "limit [its] consent to being in one [capacity] or the other." Final Hr. Tr. 58:20-23; AR 2988. Moreover, as the Bankruptcy Court explained, under the terms of the SFA the terms "Lender" and "Secured Hedging Bank" are not mutually exclusive:

> [T]he definition of a "secured hedging bank" actually notes in it within that definition that secured hedging banks can include lenders. So the fact that Credit Agricole signs an agreement and they sign an agreement and say, "As Lender," doesn't mean anything because a "secured hedging bank" can also be a "lender." Those are not mutually exclusive terms.

Final Hr. Tr. 108:7-13; AR 3038.

In its Brief, Credit Agricole cites two cases ostensibly to support its position that "[a] signature in one capacity is not a signature in all capacities." CA Br. at 25 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986) and *Israel v. Chabra*, 537 F.3d 86, 97 (2d Cir. 2008)). While both cases do facially support Credit Agricole's broad proposition, they each deal with a very different and inapplicable concept. Namely, each case evaluated the question of whether an individual corporate representative acting on behalf of a company is simultaneously acting in his or her ***individual capacity***. *See Bender*, 475 U.S. at 543 n.6 ("The fact that Mr. Youngman was sued in his official capacity does not give him standing to appeal in his individual capacity."); *Chabra*, 537 F.3d at 97 ("[T]he question is whether Chabra's signing of the Second Amendment on behalf

of AMC allows enforcement of its terms against him in his individual capacity, or if he otherwise intended to be personally bound by the Second Amendment.").

That an individual may execute an agreement in an agent or representative, rather than personal, capacity is not at all controversial and is vastly different than the situation here. Credit Agricole signed the Third Amendment as a single legal entity, not in any type of agent or representative capacity. In its singular legal capacity, Credit Agricole agreed to the terms of the Third Amendment, including the Roll-Up. Credit Agricole cites no authority that recognizes the ability of a single legal entity to, in essence, cleave itself into unique or separate capacities in the execution of a contract—to essentially "self-designate" a limited contractual and/or legal capacity.

Finally, to the extent Credit Agricole points to "evidence" regarding its corporate representative's state of mind when he signed the Third Amendment [CA Br. at 25-26], the Bankruptcy Court ruled such evidence was an inadmissible attempt to question or deviate from the terms of an unambiguous contract. Final Hr. Tr. 58:25-591-2 (sustaining the Debtors' objection to Credit Agricole's witness testimony regarding intent when signing the Third Amendment). Credit Agricole has not appealed that ruling and nor has it challenged the validity of the Third Amendment. Therefore, it cannot now offer extrinsic evidence to explain what Credit Agricole "intended" when it signed. *Ginther*, 238 F.3d at 689.

In any event, the Bankruptcy Court's finding of consent was not clearly erroneous. Contrary to Credit Agricole's assertion that the "only evidence" proffered on the consent issue was its own self-serving (and inadmissible) testimony [CA Br. at 21], the Bankruptcy Court expressly reviewed the entire record, evaluated all submitted proofs, and read the relevant factual declarations and finance documents. Final Hr. Tr. 110:13-15; AR 3040. Only after consideration of all of this evidence did the Bankruptcy Court reach its decision regarding Credit Agricole's consent. Accordingly, the Bankruptcy Court's factual finding of consent must be affirmed.

V. The Bankruptcy Court Did Not Err with Regard to Adequate Protection

A. The Bankruptcy Court Properly Found Sufficient Adequate Protection, Not, As Credit Agricole Contends, No Entitlement to Adequate Protection

Under the Bankruptcy Code, an existing lienholder is entitled to receive "adequate protection" of its lien interest in connection with postpetition financing (section 364(d)(1)(B)) and a debtor's use of cash collateral (section 363(e)). Credit Agricole complains that the Bankruptcy Court committed error in finding that Credit Agricole was not entitled to adequate protection. Credit Agricole's position is wrong as the Bankruptcy Court made no such finding. Instead, the Bankruptcy Court found and determined that the plethora of protections granted to Credit

Agricole (and the other Prepetition Secured Parties)[23] constituted sufficient adequate protection as required by the Bankruptcy Code. *See* DIP Finance Order ¶¶ K(vi), (ix).

In making its argument, Credit Agricole employs a contrived and incomplete reading of the Bankruptcy Court's oral statements at the conclusion of the final hearing. In addressing the adequate protection issue at hearing, the Bankruptcy Court held that "whether [Credit Agricole] like[s] that consent today or not, the consent that they authorized ***is not a basis on which they are entitled to anymore adequate protection than is already authorized under the proposed DIP Order***." Final Hr. Tr. 110:4-8 (emphasis added). Plainly, the Court did not hold that Credit Agricole was entitled to ***no*** adequate protection; rather, the Bankruptcy Court held that Credit Agricole was entitled to ***no additional*** adequate protection.

In pressing its position, Credit Agricole also conveniently ignores the entirety of the DIP Finance Order, which explicitly states that "[t]he Prepetition Secured Parties are entitled . . . to adequate protection of their interests" [DIP Finance Order ¶ 15], and then proceeds to set out in extensive detail over six pages the various types of adequate protection granted to Credit Agricole (and the other Prepetition Secured Parties). The adequate protection granted to Credit Agricole

[23] While it requires a rather circuitous reading of the DIP Finance Order and certain prepetition loan agreements, Credit Agricole's alleged prepetition hedge claim is an "Obligation" under the prepetition agreements, and thus Credit Agricole is the holder of Prepetition Credit Facility Debt as that term is used and defined in the DIP Finance Order. As such, Credit Agricole, as a Secured Hedging Bank, is a Prepetition Secured Party.

includes (i) adequate protection liens, (ii) superpriority administrative expense claims, (iii) the recovery of certain prepetition fees and expenses, (iv) postpetition adequate protection payments, (v) the performance of certain case milestones by the Debtors, (vi) the performance of certain budget and financial covenants, (vii) reporting and information rights, and (viii) the maintenance of collateral. *See id.*

The Bankruptcy Court's extensive findings regarding the sufficiency of adequate protection set forth in the DIP Finance Order further undermine Credit Agricole's assertion. Specifically, the Bankruptcy Court found that "[t]he Prepetition Secured Parties are entitled to the Adequate Protection provided in the Interim Order and this Final Order as and to the extent set forth herein and therein . . . the terms of the proposed adequate protection arrangements . . . are fair and reasonable . . . and constitute reasonably equivalent value and fair consideration for the use of the Prepetition Collateral, including the Cash Collateral . . . ." *See id.* ¶ K (ix). Thus, in the DIP Finance Order, the Bankruptcy Court (i) recognizes the entitlement to adequate protection, (ii) sets out the multiple forms of adequate protection that are provided, and (iii) finds that the grant of adequate protection is reasonable and fair. Further, in orally ruling at the final hearing, the Bankruptcy Court stated that Credit Agricole was not "entitled to anymore adequate protection than is already authorized under the [DIP Finance Order]." Final Hr. Tr. 110:4-8; AR 3040.

Credit Agricole's contention that the Bankruptcy Court found no entitlement to adequate protection is simply incorrect. For appellate purposes, it is a vastly different matter to say that the Bankruptcy Court held there was no entitlement to adequate protection versus merely contesting the sufficiency of adequate protection. The sufficiency of adequate protection is a finding of fact that may only be overturned if clearly erroneous. *See*, *e.g.*, *In re Energy Partners, Ltd.*, 409 B.R. 211, 236 (Bankr. S.D. Tex. 2009) ("Since 'value' is the linchpin of adequate protection, and since value is a function of many factual variables, it logically follows that adequate protection is a question of fact." (quoting *In re O'Connor*, 808 F.2d 1393, 1397 (10th Cir. 1987)); *see also In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir. 1986) ("[W]e conclude that a judicial determination of such adequate protection is a question of fact rooted in measurements of value and the credibility of witnesses."); *In re Briggs Transp. Co.*, 780 F.2d 1339, 1348 (8th Cir. 1985) ("[A]dequate protection is a flexible concept which requires a court to make decisions on a case-by-case basis, after full consideration of the particular characteristics of each proceeding."). Credit Agricole does not argue that the Bankruptcy Court's finding as to the sufficiency of adequate protection is clearly erroneous. Indeed, no valid argument exists. Similarly, Credit Agricole's assertion that the Debtors somehow failed to carry their burden of showing adequate protection in favor of Credit Agricole is belied by the clear findings by the

Bankruptcy Court set forth in the DIP Finance Order. The Court should reject Credit Agricole's adequate protection contentions and affirm the Bankruptcy Court's findings given the absence of clear error, or even the allegation of such by Credit Agricole.

B. Credit Agricole's Consent Issue is Irrelevant and/or Incorrect

Credit Agricole further argues its adequate protection issue with the irrelevant position that the Bankruptcy Court erroneously based its ruling upon "consent" by Credit Agricole. This too is a flawed argument. First, the Bankruptcy Court plainly found the existence of sufficient adequate protection, and thus any consent issue is simply irrelevant. Yes, the Bankruptcy Court ***also*** found consent by Credit Agricole, but each (sufficiency and consent) is an independent basis of approval. Whether or not Credit Agricole consented does not change the finding of sufficient adequate protection. The Bankruptcy Court's finding as to adequate protection simply does not depend upon a finding of consent by Credit Agricole to the adequate protection.

Second, if consent somehow were relevant to a decision, the Bankruptcy Court was not clearly erroneous in finding Credit Agricole's consent. As discussed *supra*, Credit Agricole is not able to cleave itself into distinct and separate entities for consent purposes. Even if it were correct, Credit Agricole did consent in the only capacity that it had any consent right, as a lender. Specifically, Section 9.08(c)

of the SFA states in pertinent part that "no Secured Hedging Bank shall have any right . . . to consent to, direct or object to any action hereunder . . . other than in its capacity as a lender." *See* SFA § 9.08(c); AR 1871. Credit Agricole, as a lender, did consent to the sufficiency of adequate protection when it consented to the Third Amendment. By signing the Third Amendment, Credit Agricole directed the Prepetition Agent "to raise no objection to and to refrain from otherwise contesting . . . the DIP [Finance] Order." *See* Third Amend. § 2; AR 2217. Simply, there was ample ground for the Bankruptcy Court to find Credit Agricole's consent to the adequate protection provided by the Debtors.

Third, and alternatively, the only party that is legally required to receive adequate protection in connection with the DIP Finance Order, the Prepetition Agent, not only consented to the sufficiency of adequate protection, but did so at Credit Agricole's direction. Section 364(d)(1)(B) requires that "the holder of the lien" receive adequate protection in connection with the grant of a priming lien financing. Credit Agricole is not the holder of any liens under the SFA. Rather, as is common in syndicated credit transactions, the Prepetition Agent is the holder of all liens under the SFA. *See* SFA Sched. 1.01(a); *see also id.* § 1(g)(vii) ("All Security shall be granted in favor of the applicable Security Agent"); AR 3151. While the Secured Hedging Banks may be beneficiaries of the prepetition liens, they are not the holders of any prepetition liens and are therefore not covered by

section 364's requirement to provide adequate protection.

C. In Any Event, Credit Agricole Retains the Ability to Seek Further Adequate Protection Relief in the Bankruptcy Court

Finally, Credit Agricole has an alternative available remedy in the event that it truly disputes the sufficiency of adequate protection. The DIP Finance Order specifically provides that the DIP Finance Order does not "prejudice, limit or otherwise impair the rights of any of the Prepetition Secured Parties to seek new, different or additional adequate protection . . . ." *See* DIP Finance Order ¶ K(ix); AR 2726. Of course, the Debtors also retain the right to oppose any such request.

This Court need not reverse or modify the DIP Finance Order based upon Credit Agricole's adequate protection argument given that Credit Agricole has this alternative path to remedy its adequate protection complaints.

CONCLUSION

For the reasons stated above, the Appellees respectfully request that the Court affirm the decision of the Bankruptcy Court.

Dated: August 3, 2020

Respectfully submitted,

MCKOOL SMITH PC

/s/ John J. Sparacino
John J. Sparacino, attorney-in-charge
SBN 18873700 | SDID 12551
Veronica F. Manning
SBN 24098033 | SDID 2781496
Thomas J. Eisweirth (*Pro Hac Vice*)
600 Travis Street, Suite 7000
Houston, TX 77002

Tel.: (713) 485-7300
Fax: (713) 485-7344
jsparacino@mckoolsmith.com
vmanning@mckoolsmith.com
teisweirth@mckoolsmith.com

Gayle R. Klein
SBN 00797348 | SDID 22651
One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001
Tel.: (212) 402-9400
gklein@mckoolsmith.com

Conflicts Counsel to Appellee Debtors

RULE 8015(h) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Bankruptcy Procedure 8013(f)(3)(A) because it has 11,742 words, excluding the parts of the document exempted by Federal Rule of Bankruptcy Procedure 8015(g).

/s/ John J. Sparacino
John J. Sparacino

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Appellee Debtors was served by electronic delivery on all counsel of record and persons and entities receiving ECF notice in this case on August 3, 2020.

/s/ John J. Sparacino
John J. Sparacino