Docket #0831 Date Filed: 10/18/2020

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

In re:	§	**Chapter 11**
SPEEDCAST INTERNATIONAL LIMITED, *et al.*,	§	**Case No. 20-32243 (MI)**
Debtors.[1]	§	**Jointly Administered**

BLACK DIAMOND COMMERCIAL FINANCE, L.L.C.'S OBJECTION TO DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER (I) SCHEDULING COMBINED HEARING ON (A) ADEQUACY OF DISCLOSURE STATEMENT AND (B) CONFIRMATION OF PLAN; (II) CONDITIONALLY APPROVING DISCLOSURE STATEMENT; (III) APPROVING SOLICITATION PROCEDURES AND FORM AND MANNER OF NOTICE OF COMBINED HEARING AND OBJECTION DEADLINE; (IV) FIXING DEADLINE TO OBJECT TO DISCLOSURE STATEMENT AND PLAN; (V) APPROVING NOTICE AND OBJECTION PROCEDURES FOR THE ASSUMPTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (VI) APPROVING PLAN SPONSOR SELECTION PROCEDURES; AND (VIII) GRANTING RELATED RELIEF

Black Diamond Commercial Finance, L.L.C., in its capacity as administrative agent, collateral agent and security trustee (in such capacities, collectively, the "Syndicated Facility Agent") under the Syndicated Facility Agreement, dated as of May 15, 2018 (as amended, restated, supplemented or otherwise modified from time to time, the "Syndicated Facility Agreement"), by and among SpeedCast International Limited and certain of its subsidiaries, as borrowers, the lenders party thereto from time to time (the "Syndicated Facility Lenders"), and the Syndicated Facility Agent, by its undersigned attorneys, hereby files this objection (the

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/speedcast. The Debtors' service address for the purposes of these chapter 11 cases is 4400 S. Sam Houston Parkway East, Houston, Texas 77048.

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"Objection") to the Debtors' *Emergency Motion of Debtors for Entry of an Order (i) Scheduling Combined Hearing on (a) Adequacy of Disclosure Statement and (b) Confirmation of Plan; (ii) Conditionally Approving Disclosure Statement; (iii) Approving Solicitation Procedures and Form and Manner of Notice of Combined Hearing and Objection Deadline; (iv) Fixing Deadline to Object to Disclosure Statement and Plan; (v) Approving Notice and Objection Procedures for the Assumption of Executory Contracts and Unexpired Leases; (vi) Approving Plan Sponsor Selection Procedures; and (viii) Granting Related Relief* [Docket No. 811] (the "Motion")[2] and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Motion must be denied because the Disclosure Statement contains inadequate and incorrect information and the proposed Plan is patently unconfirmable.

2. The Disclosure Statement and Plan inaccurately provide that the Syndicated Facility Lenders' claims are unimpaired. In fact, the Syndicated Facility Claim is impaired under the Plan, which (a) terminates the Syndicated Facility Lenders' liens (including liens against *non-Debtor* SFA Loan Parties) prior to payment in full of the Syndicated Facility Claim, (b) prohibits credit bidding the Syndicated Facility Claim for the Debtors' assets despite the fact the Debtors are proposing to sell the Syndicated Lenders' collateral to the Plan Sponsor free and clear of the Syndicated Agent's lien pursuant to a Plan, and (c) effectively prohibits the Syndicated Facility Agent from using Non-Cash Consideration in any bid to become the Plan Sponsor by inserting a mechanism that requires payment in cash to any non-consenting Syndicated Facility Lender in

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in: (a) the *Joint Chapter 11 Plan of Speedcast International Limited and its Debtor Affiliates* [Docket No. 810 (Ex. A)] (the "Plan"); or (b) the *Final Order (I) Authorizing Debtors to (A) Refinance their Postpetition Financing Obligations and (B) Use Cash Collateral, (II) Amending the Interim and Final Orders, and (III) Granting Related Relief* [Docket No. 777] (the "DIP Refinancing Order").

exchange for the use of its pro rata portion of the Non-Cash Consideration. By placing a restriction on the Syndicated Facility Agent's use of Non-Cash Consideration, the Debtors are attempting to impermissibly alter inter-lender terms agreed to by the Syndicated Facility Lenders under the Syndicated Loan Facility in an improper attempt to neutralize the use of Non-Cash Consideration as currency. Each of these Plan provisions plainly alter the legal, equitable, and contractual rights of the Syndicated Facility Lenders and impair the Syndicated Facility Claim. As the Syndicated Facility Claim is plainly impaired, the Debtors can only confirm a plan if they satisfy the "cram-down" requirements of section 1129(b)(2)(A)(ii) of the Bankruptcy Code, which they cannot do.

3. The Debtors' assertion that the proposed transaction with the Plan Sponsor is a "transfer" that is not subject to section 1129(b)(2)(A)(ii) and not a "sale" is absurd. The substance of the transaction is simple. In exchange for $500 million in cash from the Plan Sponsor, the Debtors are transferring their business and the Syndicated Facility Lenders' collateral, plainly a sale.

4. Supreme Court precedent that is directly on point states that a plan providing for the sale of a secured lender's collateral free and clear of its lien must permit that secured lender to credit bid the entire amount of its claim at the sale. If a plan does not permit credit bidding in those circumstances, then it is not confirmable. Here, the Debtors are attempting to do just that: prohibit the Syndicated Facility Agent from credit bidding at a sale that will strip it of its liens against Debtor *and* non-Debtor entities.

5. As a result of the Plan's flawed structure and the Debtors' flagrant disregard for the Bankruptcy Code, the Disclosure Statement contains misleading and incorrect information and should not be approved, even on a conditional basis.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the Motion and any objections to the Motion under 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is appropriate in this district under 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

7. On April 23, 2020, the Debtors each commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

8. On April 23, 2020, the Debtors moved for authority to, among other things, enter into the Original DIP Facility and use Cash Collateral [Docket No. 27].

9. On May 20, 2020, the Court entered an order [Docket No. 239] approving the Debtors' entry into the Original DIP Facility and the use of Cash Collateral on a final basis.

10. On September 12, 2020, the Debtors filed their *Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Refinance their Postpetition Financing Obligations and (B) Use Cash Collateral, (II) Amending the Interim and Final Orders, and (III) Granting Related Relief* [Docket Nos. 686, 688], seeking Bankruptcy Court approval to refinance the Original DIP Facility and provide additional liquidity.

11. On October 5, 2020, the Bankruptcy Court entered the DIP Refinancing Order, which approved the DIP Refinancing Facility on a final basis.

12. Under the DIP Refinancing Order, the Debtors stipulated that they were justly and lawfully indebted and liable to the Prepetition Secured Parties, without defense, counterclaim or offset of any kind, in the aggregate principal amount of not less than $689.7 million and all interest,

fees, prepayment premiums, early termination fees, costs and other charges, (the "Syndicated Facility Claim"). *See* DIP Refinancing Order at ¶ J.(iii). The Debtors further stipulated that the claims under the Syndicated Facility Agreement are valid and secured by "valid, binding, enforceable, non-avoidable and properly perfected" liens on substantially all of their assets. DIP Refinancing Order ¶ J.(v).

13. The DIP Refinancing Order further provided, among other things, that

> the [Syndicated Facility Agent] shall have the right, consistent with the provisions of the Prepetition Loan Documents, to credit bid up to the full amount of the [Syndicated Facility Claim] (provided that any such credit bid of the [Syndicated Facility Claim] shall provide for the indefeasible repayment in full in cash of the DIP Obligations and the termination of the DIP Commitments), in each case as and to the extent provided for in section 363(k) of the Bankruptcy Code, without the need for further Court order authorizing the same and whether any such sale is effectuated through section 363(k) or 1129(b) of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise, in each case unless the Court for cause orders otherwise, and all parties' rights are reserved in this regard.

DIP Refinancing Order at ¶31.

14. On October 10, 2020, the Debtors filed the Motion [Docket No. 742] seeking a Combined Hearing to approve the Disclosure Statement and the Plan.

15. The Plan purports to effect a "Corporate Reorganization" whereby the Debtors will cancel their existing equity securities and issue new equity interests (the "New Speedcast Equity Interests") to a newly formed acquisition entity called New Speedcast Parent, which will become the new parent of the Speedcast Entities and will receive the Debtors' assets free and clear of, among other things, the Syndicated Facility Agent's Liens and the Syndicated Facility Claim. *See* Plan at §§5.4, 5.7, 5.13. New Speedcast Parent will then sell 100% of the New Speedcast Equity Interests to the Plan Sponsor in exchange for a purchase price of not less than $500 million, called

the "Direct Investment Amount." *See* Plan at §§5.7, 5.9. The proceeds of the Direct Investment Amount will be used to fund the Debtors' cases by, among other things, repaying the DIP Loan, paying the "Restructuring Expenses," all costs associated with the Corporate Restructuring, and funding the Plan Distributions. *See* Plan at §5.9.

16. The Plan designates the Syndicated Facility Secured Claims as "unimpaired" and "conclusively presumed to accept." *See* Plan §§3.3, 4.3(b). Notwithstanding this alleged non-impairment of their claims, the Plan terminates the Syndicated Facility Lenders' liens against both Debtor and non-Debtor SFA Loan Parties prior to the payment in full of the Syndicated Facility Claim. *See* Plan §10.6(c).

17. The Motion further seeks authority by the Debtors to "solicit proposals for the purchase of 100% of the New Speedcast Equity Interests pursuant to a chapter 11 plan (the "Plan Sponsor Transaction")." *See* Motion at Exhibit E (the "Plan Sponsor Selection Procedures"). Despite the Debtors' bald assertion that the Plan Selection Procedures are not a sale, many of the structural elements of these procedures mirror common bid procedures used in section 363 sales, including a stalking horse (the current or "Initial" Plan Sponsor), sale milestones, diligence rules, a minimum overbid, disclosures and financial requirements to be deemed a "Qualified Plan Sponsor," a 10% good faith deposit, a back-up bidder concept, and an outside date. *Id*. If the Debtors receive more than one "Qualified Plan Sponsor Proposal," the Debtors will apparently hold a blind auction to determine who will be the Plan Sponsor. *Id*.

18. Further, the Plan Sponsor Selection Procedures place unreasonable and wholly improper restrictions on the Syndicated Facility Agent's ability to bid for the New Speedcast Equity. Specifically, the Plan Sponsor Election Procedures provide that:

> As an accommodation, any Qualified Plan Sponsor entitled to direct the SFA Agent under the Syndicated Facility Agreement may offer

> as part of its Plan Sponsor Proposal, non-cash value in the form, and in an aggregate amount not to exceed the amount, of Allowed Syndicated Facility Claims (as defined in the Plan) (the amount of such Allowed Syndicated Facility Claims offered in such Plan Sponsor Proposal, the "**Non-Cash Consideration**"); *provided*, *that* (x) the cash portion of the Aggregate Consideration in any such Plan Sponsor Proposal must be no less than the Required Base Cash Amount, (y) such Plan Sponsor Proposal shall otherwise satisfy all requirements of a Qualified Plan Sponsor Proposal, and (z) concurrently with and as a condition precedent to consummation of the Transaction, in addition to any cash component of the Aggregate Consideration payable by such Qualified Plan Sponsor, such Qualified Plan Sponsor must pay (and the Plan requires that it pay) to each other SFA Lender (other than any SFA Lender that waives its right to receive such amounts in writing delivered to the Debtors) cash in an amount equal such SFA Lender's Pro Rata Share of the Non-Cash Consideration (as defined below) (the amount of any such payment obligation to SFA Lenders pursuant to this clause (z), the "**Specified Cash Amount**"). "**Pro Rata Share of the Non-Cash Consideration**" means, with respect to any SFA Lender, a percentage equal to such SFA Lender's Pro Rata (as defined in the Plan) share of the Allowed Syndicated Facility Claims (as defined in the Plan), determined without regard to any Letters of Credit (as defined in the Plan) constituting Allowed Syndicated Facility Claims (as defined in the Plan).

Plan, Exhibit E, at §V.C.5.

OBJECTION

19. Courts regularly deny approval of a disclosure statement if it sets forth the terms of a patently unconfirmable plan. *In re Am. Capital Equip., LLC*, 688 F.3d 145, 155 (3d Cir. 2012) (citations omitted); *see also In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) ("It is now well accepted that a court may disapprove of a disclosure statement…if the plan could not possibly be confirmed."); *In re Brass Corp.*, 194 B.R. 420, 422 (Bankr. E.D. Tex. 1996); ("[d]isapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible."); *In re E. Me. Elec. Coop., Inc.*, 125 B.R. 329, 333-35 (Bankr. D. Me. 1991) (denying approval of

disclosure statement because proposed plan violated the absolute-priority rule); *In re Crilly*, No. 20-11637-SAH, 2020 WL 3549848, at *3 (Bankr. W.D. Okla. June 30, 2020) (noting that previous request for approval of disclosure statement had been denied because, among other reasons, proposed plan failed to comply with the absolute-priority rule); *In re Deming Hosp., LLC*, No. 11-12-13377 TA, 2013 WL 1397458, at *9 (Bankr. D.N.M. Apr. 5, 2013) (disapproving disclosure statement because the proposed plan "violate[d] LaSalle's prohibition against 'providing junior interest holders with exclusive opportunities free from competition and without the benefit of market valuation'"); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012) (denying approval of sale procedures that sought to "circumvent" the right of secured creditors to credit bid).

20. The reason courts deny disclosure statements with patently unconfirmable plans is to avoid proceeding "with the time-consuming and expensive proposition of hearings on a disclosure statement and plan when the plan may not be confirmable because it does not comply with [confirmation requirements]." *See Am. Capital Equip., LLC*, 688 F.3d at 154 (citations omitted) ("bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable.").

21. "A plan is patently unconfirmable where (1) confirmation 'defects [cannot] be overcome by creditor voting results' and (2) those defects 'concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.'" *Id.* at 155 (quoting *In re Monroe Well Serv., Inc.*, 80 B.R. 324, 333 (Bankr. E.D. Pa. 1987)).

A. The Syndicated Facility Agent's Claim is Impaired.

22. The Plan inaccurately provides that the Syndicated Facility Secured Claims are unimpaired because the holders thereof will "receive full recovery under the Plan." Motion at ¶ 31. The Plan, however, purports to terminate the Syndicated Facility Lenders' liens on collateral pledged by both Debtor and non-Debtor SFA Loan Parties prior to the payment in full of the Syndicated Facility Claim. Plan §10.6(c). Pursuant to section 1124 of the Bankruptcy Code, a class of claims is "impaired" under a plan of reorganization unless, with respect to each claim in the class, the plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest," or cures a default and leaves such legal, equitable, and contractual rights otherwise unaltered. *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D. N.J. 2000) (citing 11 U.S.C. §1124).

23. Here, there is no question that the Syndicated Facility Secured Claim is impaired. Terminating the Syndicated Facility Lenders' liens before the Syndicated Facility Claim is paid in full plainly alters the lenders' "legal, equitable, and contractual rights," in abrogation of section 1124 of the Bankruptcy Code. 11 U.S.C. §1124(1). Moreover, the Plan purports to release the Syndicated Facility Lenders' liens on all so-called "SFA Loan Parties," a defined term that includes both Debtors and non-Debtors, in stark contravention of section 524(e) of the Bankruptcy Code and Circuit-level precedent. *See* Plan, §10.5(c) (purporting to enjoin "the enforcement of the Syndicated Facility Agreement against any SFA Loan Party," under the Syndicated Facility Agreement); Plan § 10.6(c) (providing that all Liens on the property of the SFA Loan Parties will be released on the Effective Date). Further, the Debtors' Plan Sponsor Selection Procedures, effectively impose a poison pill on the Syndicated Facility Agent's use of Non-Cash Consideration by requiring it to pay cash to each non-consenting Syndicated Facility Lender in an amount equal

to such lender's Pro Rata Share of the Non-Cash Consideration attributable to it that is part of the bid. The Debtors provide as an example that "if any Qualified Plan Sponsor includes Non-Cash Consideration of $155,000,000 in its Plan Sponsor Proposal, immediately upon consummation of the Transaction such Qualified Plan Sponsor would be required to pay $15,500,000 in cash to an SFA Lender with a Pro Rata Share of the Non-Cash Consideration equal to 10%." *Id*. at n. 6. Effectively, this eliminates the use of Non-Cash Consideration as currency in a bid to be the Plan Sponsor because it requires the Syndicated Facility Agent to cash out at par any non-consenting Syndicated Facility Lender in exchange for the use of their Non-Cash Consideration.

24. Moreover, the net-effect of this provision is to impermissibly alter inter-lender terms agreed to by the Syndicated Facility Lenders in the Syndicated Loan Facility in an attempt to eliminate the use of Non-Cash Consideration as currency in any bid to be named the Plan Sponsor. Permitting this provision to be included in the Plan Solicitation Procedures would effectively eliminate the collective-action provisions in the Syndicated Loan Facility that permit a certain percentage of lenders to direct their agent regarding the exercise of remedies. Allowing a plan to alter these inter-lender negotiated terms in order to facilitate a debtor's patently unconfirmable plan would have far-reaching, negative implications on the syndicated loan market that would go far beyond these Chapter 11 Cases.

25. As the Syndicated Facility Lenders' claims are plainly impaired, the Debtors must alter their Disclosure Statement and Plan to adequately inform parties in interest of this impairment. Due to this impairment, the Debtors can only confirm their Plan over the Syndicated Facility Lenders' rejection if the Debtors satisfy the "cram-down" requirements set forth in section 1129(b)(2)(A) of the Bankruptcy Code. As discussed further below, the Debtors cannot do so because the Plan contemplates a sale of the Prepetition Collateral to the Plan Sponsor while

denying the Syndicated Facility Lenders the right to credit bid. The Debtors' attempt to prohibit credit bidding in connection with the Plan sale violates Bankruptcy Code section 1129(b)(2)(A)(ii) and renders the Plan patently unconfirmable. *In re River Road Partners, LLC*, 651 F.3d 642, 653 (7th Cir. 2011) ("Sections 363(k) and 1129(b)(2)(A)(ii) provide a secured creditor with the right to credit bid whenever a debtor attempts to sell the asset that secures the debt free and clear of its lien.") aff'd *RadLAX*, 566 U.S. 639).

B. The "Corporate Reorganization" is a Thinly Disguised Sale.

26. The Plan asserts that the Debtors are not selling their assets, but rather are effectuating a "Corporate Restructuring." *See* Plan §5.13. In fact, the Debtors are selling their business and the Prepetition Collateral to New Speedcast Parent, a newly formed acquisition vehicle, which will then on-sell 100% of the New Speedcast Equity Interests to the Plan Sponsor in exchange for the Direct Investment Amount (*i.e.*, $500 million).

27. Debtors in this Circuit have unsuccessfully tried to assert that a "sale" is a "transfer" to skirt the requirements of section 1129(b)(2)(A)(ii) of the Bankruptcy Code. *See Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 245 (5th Cir. 2009) (rejecting debtors' argument that a similar plan transaction constituted a "transfer" and not a "sale" of assets where new entities wholly owned by the plan sponsor received title to the assets in exchange for cash and conversion of debt to equity) rev'd on other grounds *RadLAX*, 566 U.S. at 647; *see also Black's Law Dictionary* (9th ed. 2009) (definition of a "sale" as "the transfer of property or title for a price").

28. The "transfer" under the Plan of the Debtors' businesses and the Prepetition Collateral to the Plan Sponsor in exchange for cash is plainly a sale. As James Whitcomb Riley wrote, "if it looks like a duck, swims like a duck, and quacks like a duck, then it probably *is* a

duck." While the Debtors have attempted to add complexity to the sale by incorporating an equity transfer, it is merely a ploy intended to distract the Court from the substance of the transaction, which is the transfer of assets in exchange for cash, better known as a sale.

29. Moreover, the Debtors' Plan Solicitation Procedures are confusing regarding the sale process they intend to run thereby providing potential bidders with little reason to participate. The Plan Solicitation Procedures state, among other things, that:

> [o]n the Final Selection Date, the Debtors shall (i) determine, consistent with these Plan Sponsor Selection Procedures and in consultation with the Consultation Parties, which Qualified Plan Sponsor Proposal constitutes the highest or best Qualified Plan Sponsor Proposal (the "Successful Plan Sponsor Proposal"); and (ii) notify all Qualified Plan Sponsors of the identity of the Plan Sponsor that submitted the Successful Plan Sponsor Proposal (the "Plan Sponsor") and the amount of the Aggregate Consideration, Non-Cash Consideration (if any) and other material terms of the Successful Plan Sponsor Proposal.

See Exhibit E, Plan Solicitation Procedures, at Art. VII, ¶A.

30. Thus, it appears that the Debtors intend only a single round of bidding. There are numerous proposed reservations of right in the Plan Solicitation Procedures, however, that would permit the Debtors to run the process in any way they saw fit to ensure a desired outcome. The Debtors reserve the right to (a) modify or terminate the Plan Sponsor Selection Procedures, (b) waive terms and conditions set forth therein, (c) extend any of the deadlines or other dates set forth therein, (d) terminate discussions with any and all Prospective Plan Sponsors (as defined therein) at any time and without specifying the reasons therefor, and (e) determine which Plan Sponsor Proposal has made highest and best offer. *See* Plan Sponsor Procedures, p. 2, and Art. VII, ¶ A. While it is not unusual for a debtor to reserve certain rights to alter sale procedures, these Debtor reservations prove too much (*e.g.*, a blanket right to alter or terminate the Court-approved sale procedures and terminate discussions with any and all other bidders for no reason whatsoever).

Effectively, these reservations permit the Debtor to change the rules governing the process at any time and in any way they see fit thereby eviscerating this Court's proposed order approving such procedures and leaving potential bidders with no certitude about the process and little reason to participate.

C. The Debtors Plan Violates Sections 1129(b)(2)(A) and 524 of the Bankruptcy Code by Denying the Syndicated Facility Agent the Right to Credit Bid and Releasing Liens Against Non-Debtor Loan Parties.

31. The Plan purports to permit the Debtors to sell the Prepetition Collateral pledged by the SFA Loan Parties (which include both Debtors and non-Debtors) free and clear of the Syndicated Facility Lenders' liens, without affording the Syndicated Facility Agent its right to credit bid the full amount of the Syndicated Facility Claim. The Debtors' attempt to bar the Syndicated Facility Agent's credit bid rights and its supposed release of valid and perfected liens against Non-Debtor SFA Loan Parties violates sections 1129(b)(2)(A)(ii) and 524, respectively, of the Bankruptcy Code and renders the Plan patently unconfirmable.

32. In *RadLAX*, the Supreme Court held that a plan providing for the sale of collateral free and clear of a secured creditor's lien must permit the creditor to credit bid at the sale; the plan is not confirmable if it does not. *RadLAX*, 566 U.S. at 653. Justice Scalia, writing for the Court, called it "an easy case" to deny procedures that contemplated the sale of the secured creditor's collateral free and clear of its liens, yet did not permit the secured creditor to credit bid its debt. *Id*. at 649. The Court held that a "cramdown" plan premised on a sale can be deemed fair and equitable to a secured creditor only if the plan permits the creditor the opportunity to credit bid under section 1129(b)(2)(a). *Id*.

33. The Supreme Court made clear that situations such as this, where the Debtors are seeking to sell the Prepetition Collateral to a Plan Sponsor free and clear of the Syndicated Facility

Lenders' liens pursuant to the Plan, the bid procedures must be denied at the time when the Debtors seek their approval. *Id*. at 649 ("As a matter of law, no bid procedures like the ones proposed here *could* satisfy the requirements of §1129(b)(2)(A), and the distinction between approval of bid procedures and plan confirmation is therefore irrelevant.") (emphasis in original).

34. Further, the Supreme Court held that a secured creditor may credit bid up to the face amount of its secured claim, and not just the value of its collateral at the time of the sale. *Id*. at 643 n.2. In adopting the reasoning of the Third Circuit's decision in *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Systems Corp)*, 432 F.3d 448, 460 (3d Cir. 2006), the Court stated that "the ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (*up to the amount of its security interest*) without committing additional cash to protect the loan." *Id*. (emphasis added).

35. The Plan cannot compel the Syndicated Loan Agent to release its liens against non-Debtor SFA Loan Parties. 11 U.S.C. §524 ("discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."); *see also United States v. Stribling Flying Serv., Inc.*, 734 F.2d 221, 222–24 (5th Cir. 1984) (rejecting argument that personal guaranties provided by non-debtor individuals were "somehow discharged or modified" by virtue of the chapter 11 plan of the primary borrower); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997) ("[A] discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt."); *In re Cont'l Airlines*, 203 F.3d 203, 211 (3d Cir. 2000) ("Section 524(e) of the Bankruptcy Code makes clear that the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their

liabilities."). If the non-Debtor SFA Loan Parties wanted a discharge of their debts, they should have filed for bankruptcy, which they did not.

36. Moreover, non-consensual third-party releases are impermissible in this Circuit. *Ad Hoc Grp. Of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2012) (court "firmly pronounced its opposition to" non-consensual third-party releases); *Pac. Lumber Co.*, 584 F.3d at 252 ("Section 524(e) only releases the debtor, not co-liable third parties.") *see also Cole v. Nabors Corp. Servs., Inc. (In re CJ Holding Co.)*, 597 B.R. 597, (S.D. Tex. 2019) ("The Fifth Circuit has concluded that a bankruptcy court may not confirm a plan that provides 'non-consensual non-debtor releases.'" (quoting *Vitro*, 701 F.3d at 1061–62)). The Syndicated Facility Agent and the Syndicated Facility Lenders will not consensually release their claims and liens against non-Debtor SFA Loan Parties.

37. Unless the Syndicated Facility Agent is granted the right to credit bid the full amount of the Syndicated Facility Claim pursuant to section 363(k) of the Bankruptcy Code and as contemplated in the Revised DIP Order, then the Plan is unconfirmable and the Motion must be denied.

JOINDER

38. The Syndicated Facility Agent hereby joins in the objection to approval of the Motion entitled *Black Diamond Capital Management, L.L.C.'s Objection to Emergency Motion of Debtors for Entry of an Order (I) Scheduling Combined Hearing on (A) Adequacy of Disclosure Statement and (B) Confirmation of Plan; (II) Conditionally Approving Disclosure Statement; (III) Approving Solicitation Procedures and Form and Manner of Notice of Combined Hearing and Objection Deadline; (IV) Fixing Deadline to Object to Disclosure Statement and Plan; (V) Approving Notice and Objection Procedures for the Assumption of Executory Contracts and*

Unexpired Leases; (VI) Approving Plan Sponsor Selection Procedures; and (VIII) Granting Related Relief [Dkt. 827].

RESERVATION OF RIGHTS

39. The Syndicated Facility Agent expressly reserves all rights, claims, defenses, and remedies, including, without limitation, to supplement and amend this Objection, to raise further and other objections to the Motion, and to introduce evidence prior to or at any hearing regarding the Motion in the event that the Syndicated Facility Agent's objections are not resolved prior to such hearing.

WHEREFORE, for the foregoing reasons, the Syndicated Facility Agent respectfully requests that the Court sustain the Objection and grant such further relief as is just and necessary.

Dated: October 18, 2020
Houston, Texas

Respectfully submitted,

WINSTON & STRAWN LLP

/s/ Daniel J. McGuire

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CERTIFICATE PURSUANT TO
BANKRUPTCY LOCAL RULE 9013-1(g)(1)

I hereby certify that counsel to Black Diamond Commercial Finance conferred with counsel to the Debtor on October 18, 2020 prior to the filing of this Objection to attempt to resolve the relief requested in the Disclosure Statement Motion without the necessity of a hearing. The parties did not resolve the dispute.

/s/ Daniel J. McGuire

CERTIFICATE OF SERVICE

I certify that, on October 18, 2020, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Daniel J. McGuire