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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Debtors.	Lead Case No. 2:18-bk-20151-ER Chapter 11 Adv. Proc. No. 2:19-ap-01165-ER
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF VERITY HEALTH SYSTEM OF CALIFORNIA, INC., *et al.*, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION, as Trustee, Defendant.	**REPLY IN SUPPORT OF MOTION OF U.S. BANK NATIONAL ASSOCIATION, AS NOTES TRUSTEE, TO DISMISS AMENDED COMPLAINT** Date: November 21, 2019 Time: 10:00 am Judge: Hon. Ernest M. Robles Place: U.S. Bankruptcy Court Courtroom 1568 Edward R. Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

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I. INTRODUCTION

The Notes Trustee,[1] in its Motion to Dismiss, has moved to dismiss each of the four Counts set forth in the Committee's Amended Complaint on the grounds that, *inter alia*, (1) they have been waived and/or are time barred (Counts I, II, III & IV), (2) the Committee lacks standing to raise Challenges regarding post-petition assets because that goes beyond the scope of prepetition lien challenges identified in section 5(e) of the Final DIP Order (Counts I, III & IV) , (3) there is no justiciable controversy (Count II), (4) they fail to meet minimum pleading requirements, particularly the Committee's conclusory categorical assertion there were no "identifiable cash proceeds" in the Hospital Debtors' Deposit Accounts (Count II), and (5) the Committee's request for a conditional determination that the Notes Trustee is undersecured runs afoul the Court's uncontroverted finding that the Prepetition Secured Creditors were oversecured as of the Petition Date with an equity cushion of between $150 and $200 million (Count IV). *See* Tentative Ruling, p. 8.

In its Opposition, the Committee asserts that all of its new lien challenge theories and claims are "appropriate and timely" because its Original Complaint employed the term "including." *See* Opposition, p. 6. The Committee posits that the use of the word "including" in the Original Complaint somehow overrides the effect of the Challenge Deadline Deadlines in December 2018 and June 2019 under the Final DIP Order and entitles Committee to assert countless new additional lien Challenges to the Notes Trustee's Prepetition Liens long after the Challenge Deadline has lapsed, even though the new lien challenge theories and claims were not referenced or preserved under the Challenge Stipulations entered into by the Committee and Notes Trustee.

Similarly, the Committee asserts that the Court's uncontroverted factual findings in the Tentative Ruling regarding the value of the Debtors' assets and the oversecured nature of the Prepetition Secured Creditors' claims may now be challenged and circumscribed in this adversary proceeding because the Court's findings were "subject to" the Committee's ever-evolving lien challenge rights under Section 5(e). In other words, according to the Committee, the Final DIP Order is not really a *final* order at all, because its terms and the Court's factual findings with respect

[1] Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Motion to Dismiss, the Final DIP Order and the Supplemental Cash Collateral Order, as applicable.

thereto are all subject to re-litigation by the Committee on the eve of Plan conformation. However, the Final DIP Order, itself, states it is binding and enforceable, and that its findings are immediately effective and enforceable. *See* Final DIP Order, ¶¶ 28(b) & 29(b).

The Committee's ever-evolving lien challenges in this adversary proceeding cannot be divorced from the larger context of the Debtors' chapter 11 cases. As both the Court and the Committee have observed, the Debtors are suffering operating losses of approximately $450,000 per day.[2] Keeping the Hospitals operational during these chapter 11 cases, in the face of the staggering financial losses, has only been made possible because the Debtors' Prepetition Secured Creditors, including the Notes Trustee, (a) permitted their perfected prepetition liens to be primed by a $185 million DIP facility, and (b) consented to the use of hundreds of millions of dollars of their cash collateral throughout the course of the bankruptcy cases to fund operating losses, pay administrative expenses, and ultimately repay the DIP Loan itself. The Notes Trustee did so in direct reliance upon the finality of the Final DIP Order and the Court's predicate findings therein. *See* Final DIP Order, ¶ 28(a) (stating that "the Prepetition Secured Creditors … have acted in good faith in connection with … authorizing use of Cash Collateral and rely on this Final Order in good faith"). Now, at the final stages of these chapter 11 cases, the Committee is attempting to subvert the protections granted to the Notes Trustee in the Final DIP Order by raising new untimely lien challenges and collaterally attacking the Court's uncontroverted factual findings in connection therewith in an effort to forestall confirmation of the Debtors' proposed plan. The Committee's attempt to re-litigate the Final DIP Order and its factual underpinnings under the guise of a lien challenge, more than a year after the order was entered, must be rejected.

[2] *See Memorandum of Decision Granting Debtors' Emergency Motion To Enforce The Sale Order* (Docket No. 3446) p. 3; *Official Committee of Unsecured Creditors' Response in Support of Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Strategic Global Management, Inc.; (II) Finding That the Sale is Free and Clear of Conditions Materially Different Than Those Approved by the Court; and Other Relief* (Docket No. 3320), p. 3.

II. ARGUMENT

A. The Committee's New Lien Challenges Under the Amended Complaint Have Been Expressly Waived by the Committee and/or are Otherwise Time Barred

As detailed in the Notes Trustee's Motion to Dismiss, the new lien challenge claims and theories, raised for the first time in the Committee's Amended Complaint filed after the Challenge Deadline, were waived by the Committee and should be dismissed. The Final DIP Order granted the Committee limited standing to initiate a "Challenge" with respect to "the validity, enforceability and amount of the Prepetition Secured Obligation and the Prepetition Liens" on or before the "Challenge Deadline." Final DIP Order, ¶ 5(e). The initial Challenge Deadline of December 13, 2018 was subsequently extended to June 13, 2019 through a series of stipulations entered into by the Committee and Notes Trustee. As consideration for the extension of the Challenge Deadline, the Committee stipulated and agreed that the original Challenge Deadline would *not* be extended with respect to "Acknowledged Collateral," a defined term in the Challenge Stipulation that includes, *inter alia*:

- "perfected deed of trust liens and security interests in the real property";
- "perfected deed of trust liens and security interests in the *Facilities*, Appurtenances, Equipment, Leases, Rents, *Proceeds* and Inventory of St. Francis Medical Center, Saint Louise Regional Hospital and Verity Holdings LLC";
- "Accounts (as defined in the Security Agreements referred to in the Loan Agreements)";
- "All *products*, *replacements* and *Proceeds*" of the foregoing; and
- "a perfected security interest in the deposit accounts set forth on Exhibit B" thereto.

Challenge Stipulation, p. 2 (emphasis added).

The Term "Accounts" – with respect to which the Committee's lien challenge rights were expressly waived – was defined to include, *inter alia*,

- "any right to payment of a monetary obligation whether or not earned by performance, that relates to or arises out of any services provided or goods rendered by an Obligated Group Member";
- "any 'account' (as defined in the UCC), any accounts receivable, whether in the form of payments for services rendered or goods sold, rents, license fees or otherwise, any Health-Care-Insurance Receivables (as defined in the UCC)";

- "Payment Intangibles (as defined in the UCC)";
- "General Intangibles"; and
- "all *proceeds* of any of the foregoing"

Security Agreement, Schedule V.

Notwithstanding the stipulated waiver of these broad categories of liens and security interests – constituting virtually the entire lien position of the Notes Trustee, including the proceeds, products and replacements thereof – the Committee subsequently filed its Original Complaint in June of 2019 purporting to challenge the validity of Notes Trustee's liens upon and security interests in the *proceeds* of the Debtors' Accounts (which were held in the Debtors' Deposit Accounts). *See* Original Complaint, ¶ 33 (asserting that funds in certain Deposit Accounts "do not constitute identifiable cash *proceeds* of an otherwise perfected, unavoidable lien in other collateral of the Defendant") (emphasis added). As detailed in the Motion to Dismiss, any challenge to the validity of the Notes Trustee's security interest in the proceeds and products of the Accounts and other Acknowledged Collateral was expressly waived by the Committee under the Challenge Stipulation and is time barred under the Final DIP Order.

Then, nearly three months *after* the expiration of the June 13, 2019 Challenge Deadline, the Committee compounded its waiver problem by amending its Original Complaint to raise several wholly new lien challenge theories and claims for the first time, in violation of the Challenge Stipulation. These include (1) a new request in Count I for a declaration that the Notes Trustee does not have a perfected security interest in "any going concern premium that has been or will be generated" from the sale of encumbered assets (including Acknowledged Collateral), (2) a new request in Count I for a declaration that the Notes Trustee does not have a perfected security interest in MOB Assets (which is facially incorrect as to the Moss Blvd. Deed of Trust), (3) a new fraudulent conveyance claim in Count III conditionally seeking to avoid any loan agreement amendments that may have captured a valid lien on Future QAF Disbursements and; and (4) a new Count IV seeking a

declaration that the Notes Trustee would be undersecured if the Court were to agree with the Committee's positions. None of these new lien challenge theories and claims survived the Challenge Stipulation. Nor were they included in the Original Complaint (*i.e.*, filed before the lapse of the Challenge Deadline).

As indicated in the Motion to Dismiss, the Committee's new theories and claims are not proper lien Challenges for which the Committee has standing, they have not been properly pled and they have procedural defects. But, even if they were not otherwise subject to dismissal, these new lien challenge claims have been raised too late, the Challenge Deadline having expired, and are therefore waived and time barred. In fact, the new cause of action inserted as Count IV in the Amended Complaint (*i.e.*, the requested declaration that the Notes Trustee is undersecured) falls squarely within the original time limitation provision set forth in section 5(e) of the Final DIP Order:

> the "Challenge Deadline" for matters solely relating to the *value* of the Prepetition Collateral may be further extended to such time as may be agreed by stipulation among the Debtors, the Committee and the Prepetition Secured Creditors or as further ordered by the Court.

Final DIP Order, ¶ 5(e) (emphasis added).

The Challenge Stipulation plainly states that, "[i]n consideration of the extension of the Challenge Deadline for certain assets of the Debtors as provided hereinbelow, the Committee Acknowledges that the Challenge Deadline shall not be extended for the Acknowledged Collateral." Challenge Stipulation, ¶ A. In its Opposition, the Committee acknowledges that it "was obligated to pursue an action or be forever barred from doing so." Opposition, p. 12. This is precisely what happened. The Committee's intention to allow the Challenge Period to expire for Acknowledged Collateral is manifest in the Challenge Stipulation.

In its Opposition, the Committee argues that the new lien challenge claims added to its Complaint after the expiration of the June 13, 2019 Challenge Deadline are not time barred because they "relate back" to the claims delineated in the Original Complaint. This is not even responsive to

the lien challenge claims which expired in December 2018 by reason of the Court-approved Challenge Stipulation. Moreover, the Original Complaint never mentioned, let alone addressed, (1) the "MOB Assets," (2) any so-called "going concern premium," (3) fraudulent conveyance claims related to Future QAF Disbursements, or (4) the value or oversecured nature of the Notes Trustee's Prepetition Liens on Prepetition Collateral, nor were any of these new lien challenge claims referenced or preserved in the Challenge Stipulation entered into by the Committee and Notes Trustee and approved by the Court. These new claims were raised for the first time in the Committee's Amended Complaint. Under FRCP 15(c), a new claim added to a complaint "relates back" to the original claim only to the extent that "the new claim relies on the same facts and does not seek to insert new facts." *In re Magno*, 216 B.R. 34, 41 (B.A.P. 9th Cir. 1997). *See also Echlin v. PeaceHealth*, 887 F.3d 967, 978 (9th Cir. 2018) ("claims must share a common core of operative facts such that the plaintiff will rely on the same evidence to prove each claim. Thus, an amendment will not relate back when the amended complaint had to include additional facts to support the new claim"). None of the Committee's newly added lien challenge claims "relate back" to the Original Complaint because each necessarily involves new factual predicates and allegations, new legal theories, and additional forms of relief:

- The Committee's new legal claim with respect to the so-called "going concern premium" requires adjudication of a multitude of new factual matters which were not alleged in the Original Complaint, including testimonial and documentary evidence regarding (i) the existence and quantification of any such "going concern premium," (ii) the allocation of any such "going concern premium" as between or among the various Hospital Debtors, (iii) the allocation of any such "going concern premium" to the various asset classes and collateral categories identified in the Notes Trustee's Security Agreements, (iv) the quantification and attribution of the alleged "going concern premium," if any, to the Debtor's labor force, *etc.*

- The Committee's new legal claim with respect to the MOB Assets requires adjudication of new factual matters regarding, *inter alia*, (i) the valuation of the MOB Assets, (ii) the existence of any other liens or security interests on such assets, (iii) the quantification of any Diminution in Value and associated Replacement Lien held by the Notes Trustee on such assets, *etc.*

- The Committee's new fraudulent conveyance claim with respect to Future QAF Disbursements requires adjudication of new factual matters regarding, *inter alia*, (i) the solvency and capitalization of the Debtors at the time the loan and security documents were allegedly modified, (ii) whether such modifications constituted a "transfer" under the governing statutory provisions, (iii) the existence and quantification of any reasonably equivalent value associated with any such transfer, (iv) whether any such transfer is subject to a good faith or other legal or equitable defense under the governing statutes, *etc.*

- The Committee's new legal claim with respect to the supposed undersecured nature of the Notes Trustee's claims requires adjudication of new factual matters, including testimonial and documentary evidence regarding, *inter alia*, (i) the valuation of all real and personal property collateral pledged to the Notes Trustee, (ii) the existence and quantification of any alleged "going concern premium," (iii) the quantification of any Diminution in Value and associated Replacement Lien held by the Notes Trustee on any unencumbered or junior pre-petition or post-petition assets of the Debtors, (iv) the quantitative difference between the going concern value of the Debtor' assets and the hypothetical liquidation value, *etc*.

According to the Committee, the Challenge Deadline and other related limitations set forth in Section 5(e) of the Final DIP Order are rendered moot or meaningless by virtue of the fact that the Original Complaint employed the term "including." Through its use of the term "including," the Committee posits that it is entitled to assert countless new additional lien Challenges to the Notes Trustee's Prepetition Liens long after the Challenge Deadline has lapsed. This line of argument is specious; the Committee's use of the word "including" did not toll the Challenge Deadline under the Court's Final DIP Order. To argue otherwise would suggest that the Challenge Stipulation, itself, was somehow superfluous.

The Committee also asserts in its Opposition that the waiver issue is not appropriate for adjudication in connection with a motion to dismiss. *See* Opposition, pp. 14-15. The cases cited by the Committee are inapposite because the waiver issue here does not invite or require extraneous evidence; it merely requires the interpretation and application of the Final DIP Order, the Challenge Stipulation, and the Amended Complaint. Each of these documents is clear and unambiguous with respect to the applicable Challenge Deadline. Accordingly, the waiver / timeliness issue can and should be decided upon the basis of the Motion to Dismiss. A Rule 12(b)(6) motion to dismiss based upon the untimeliness of a claim may be granted when it is clear from the pleadings that the

claims being brought are untimely. *See Seven Arts Filmed Entertainment Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251 (9th Cir. 2013). No further factual development is needed here.

In short, the new lien challenge theories and claims asserted by the Committee in the Amended Complaint, brought after the Challenge Deadline expired, are waived, time barred and should be dismissed.

B. The Committee's Untimely Challenge to the Value of the Notes Trustee's Collateral Constitutes an Improper Collateral Attack on this Court's Findings in the Tentative Ruling

As detailed in the Notes Trustee's Motion to Dismiss, the Committee's new Count IV is not only untimely as a Challenge, it constitutes an improper collateral attack on the Court's prior finding that the Notes Trustee and the other Prepetition Secured Creditors are oversecured.

On October 3, 2018, this Court issued its Tentative Ruling on the Debtors' DIP Motion (Docket. No. 392). In the Tentative Ruling, the Court expressly found, as an uncontroverted factual and evidentiary matter, that the Notes Trustee and the other Prepetition Secured Creditors were oversecured with an equity cushion of between $150 and $200 million:

> Based upon its review of the declarations of James Moloney and Anita Chou, the Court finds that the Debtor has submitted competent evidence establishing the need for the proposed financing from the DIP Lender. Specifically, as of the Petition Date, the book value of the Debtors' assets was approximately $857 million. Moloney Decl. [Doc. No. 309] at ¶8. After proper marketing, the aggregate realizable value of those same assets is in the range of $725 million to $800 million. Id. As of the Petition Date, aggregate secured claims against the Debtors totaled approximately $565 million. Id. at ¶9. The realizable value of the Debtors' assets, in excess of prepetition secured liabilities, is between $150–$225 million. Id. During the first thirteen weeks of the case, the Debtors are projected to collect approximately $239 million in patient revenue, but spend approximately $405 million to maintain operations. Chou Decl. [Doc. No. 309], Ex. 1. The total cash shortfall during the first thirteen weeks is approximately $109 million. *Id*. These figures establish that the Debtors are in dire need of post-petition financing. If the Debtors continue operations, they have a realistic opportunity to sell their assets for a price that will yield between $150–$225 million in excess of existing secured debt. A sale at that price would result in a meaningful recovery for unsecured creditors. However, simply to maintain operations over the first thirteen weeks of the case, the Debtors must plug a funding shortfall in excess of $100 million. Against this backdrop, the Court finds it appropriate to approve the financing package that the Debtors have negotiated with the DIP Lender. In this respect, the Court notes that secured creditors holding a significant portion of the outstanding secured indebtedness also support the proposed financing.

Tentative Ruling, p. 8. In short, the Court made adjudicated factual findings that the going concern value of the Debtors' assets subject to the Prepetition Secured Creditor's liens in this case was $725 to $800 million, and that the total secured debt was $565 million, thereby resulting in an equity cushion of $150 to $225 million. *Id.*

Notably, the Committee actively participated in the Final Hearing on the DIP Motion, and even prosecuted a number of objections to the entry of the Final DIP Order, which objections were overruled by the Court. But the Committee never contested the Court's factual and evidentiary findings that the Notes Trustee was oversecured and, likewise, never contested that the Notes Trustee was entitled to a Prepetition Replacement Lien on all of the Debtors' assets as protection against a Diminution in Value of its equity cushion. At the final hearing, the Court considered evidence submitted by the Debtors in the form of evidentiary declarations from a number of management level individuals employed by the Debtors and their professionals. No party, including the Committee, objected to the evidence presented in support of the DIP Motion. No party, including the Committee, introduced evidence that contradicted or rebutted any of the evidence or facts presented in connection with the DIP Motion. No party, including the Committee, objected to or challenged the Court's use of going concern value (as opposed to foreclosure value or some other metric) with respect to the Prepetition Collateral and the Prepetition Secured Creditors equity cushion therein.

Following the entry of the Final DIP Order, the Committee did not appeal the Court's findings regarding the valuation of the Prepetition Secured Creditors' claims and equity cushion, nor the Court's conclusion that the Prepetition Secured Creditors were oversecured. The Committee filed an appeal solely with respect to the waivers of the "equities of the case" exception to Section 552(b) and the trustee surcharge rights under Section 506(c) of the Bankruptcy Code, but not with respect to valuation.

In its Opposition, the Committee asserts that the Court's uncontroverted factual findings in the Tentative Ruling regarding the value of the Debtors' assets and the oversecured nature of the Prepetition Secured Creditors' claims may now be challenged and circumscribed in this adversary proceeding because the Court's findings were "subject to" the Committee's ever-evolving lien

challenge rights under Section 5(e). In other words, according to the Committee, the Final DIP Order is not really a *final* order at all, because its terms and the Court's factual findings with respect thereto are all subject to re-litigation by the Committee on the eve of Plan conformation. However, the Final DIP Order, itself, states that it is binding and enforceable, and that its findings are immediately effective and enforceable. *See* Final DIP Order, ¶¶ 28(b) ("The provisions of this Final Order shall be binding upon and inure to the benefit of the DIP Agent, DIP Lender, the Debtors, the Prepetition Secured Creditors, McKesson, the Committee, all other Parties in Interest, and all creditors, and each of their respective successors and assigns") & 29(b) ("This Final Order shall constitute findings of fact and conclusions of law pursuant to the Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry of this Final Order").

The Committee's argument that the Court's findings in the Tentative Ruling are not true factual findings but, instead, mere provisional suggestions "subject to" later challenge and re-litigation by the Committee is further belied by the fact that those findings formed the basis for the Court's decision therein to *overrule* the Committee's various objections to the Final DIP Order itself.! *See* Tentative Ruling, pp. 10-12 ("The Objections Asserted by the Committee are Overruled"). Obviously, the lien challenge rights set forth in section 5(e) of the Final DIP Order relate to the specific factual stipulations made by the Debtors in that provision, and cannot be reasonably construed to override the Court's own separate and independently-derived factual findings in the Tentative Ruling, including the Court's findings resulting in the overrule the Committee's objections to the Final DIP Order. Were it otherwise, the Committee arguably would not have even needed to appeal the Final DIP Order at all, but merely repackage its failed objections to the Court's prior findings as a lien challenge.

In its Opposition, the Committee improperly conflates its right to challenge the Debtors' stipulations in section 5(e) of the Final DIP Order regarding the validity, enforceability and amount of the Prepetition Obligations and Prepetition Liens with the Court's adjudicated findings in the Tentative Ruling. The Court's asset valuation findings proceed from the Court's independent assessment of evidence at a contested hearing, not its incorporation of the Debtors' deal into findings

that can be challenged by creditors (including the Committee) who were not included in the deal. The Prepetition Secured Creditors have relied upon the Court's evidentiary findings as the adjudicated basis for the value of the Debtors' assets as of the Petition Date and the adequacy of the Replacement Liens included as adequate protection in the Final DIP Order. Read in context, section 5(e) did not grant to the Committee the right to ignore the Court's evidentiary findings (to which it did not bother to rebut at the Final Hearing) of the Court incorporated from the Tentative Ruling. Importantly, section 28(a) of the Final DIP Order states that:

> The Debtors, the DIP Agent, the DIP Lender, the Prepetition Secured Creditors and McKesson have acted in good faith in connection with negotiating the DIP Financing Agreements, extending credit under the DIP Facility, and authorizing use of Cash Collateral and rely on this Final Order in good faith. Based on the findings set forth in this Final Order and the record made during the Interim Hearing and the Final Hearing, and in accordance with section 364(e) of the Bankruptcy Code, *in the event any or all of the provisions of this Final Order are hereafter reversed, modified amended or vacated by a subsequent order of this or any other Court*, *the* DIP Agent, DIP Lender, *Prepetition Secured Creditors* and McKesson *are entitled to the protections provided in section 364(e) of the Bankruptcy Code. Any such reversal, modification, amendment or vacatur shall not* affect the validity and enforceability of any advances made pursuant to this Final Order or the DIP Financing Agreements, nor shall it *affect the validity, priority, enforceability, or perfection* of the DIP Liens, *the Prepetition Replacement Liens* or the VMF Replacement Lien. *Any* claims or DIP Protections granted to the DIP Agent and the DIP Lender hereunder, or *adequate protection granted to the Prepetition Secured Creditors* and McKesson hereunder, *arising prior to the effective date of such reversal, modification, amendment or vacatur, shall be governed in all respects by the original provisions of this Final Order, and the* DIP Agent, the DIP Lender, *Prepetition Secured Creditors* and McKesson *shall be entitled to all of the rights, remedies, privileges and benefits, including the* DIP Protections and *adequate protection granted herein, with respect to any such claims.* Since the loans made pursuant to the DIP Credit Agreement are made in reliance on this Final Order, the obligations owed to the DIP Agent, the DIP Lender, the Prepetition Secured Creditors or McKesson prior to the effective date of any reversal or modification of this Final Order cannot, as a result of any subsequent order in the Chapter 11 Cases or in any Successor Cases, be subordinated, lose their lien priority or superpriority administrative expense claim status, or be deprived of the benefit of the status of the liens and claims granted to the DIP Agent, the DIP Lender, the Prepetition Secured Creditors or McKesson under this Final Order and/or the DIP Financing Agreements.

Final DIP Order, ¶ 28(a) (emphasis added). Accordingly, if the Court permits the Committee to attack the Final DIP Order's adjudicated value findings at this stage (and it should not), the existing form of the Final DIP Order, including all such findings, should be applicable under Section 28 to any Diminution in Value that has occurred to that date.

Finally, the Committee asserts that, if it is not permitted to now challenge the Court's prior finding in the Tentative Ruling that the Notes Trustee is oversecured, "the Challenge Right would be meaningless" and so "why have a Challenge Right at all?" Opposition, p. 2. The Committee's rhetorical question misses the point: It had the opportunity to challenge the valuation evidence presented at the Final Hearing on the DIP Motion but it chose not to do so. It had the opportunity to introduce evidence or facts at the Final Hearing that contradicted or rebutted the valuation evidence presented by the Debtors but it chose not to do so. It had the opportunity at the Final Hearing to object to or challenge the Court's use of going concern value (as opposed to foreclosure value or some other metric) with respect to the Prepetition Collateral and the Prepetition Secured Creditors' equity cushion therein but it chose not to do so. It had the opportunity to appeal the Court's findings in the Tentative Ruling that the Prepetition Creditors were oversecured but did not do so. The Committee had the opportunity to otherwise raise certain of its other new lien challenge theories and claims *before* the expiration of Challenge Deadline but it chose not to do so. Instead, it waited until the end of the chapter 11 cases to raise these issues for the first time, notwithstanding the fact that the very purpose of the lien challenge provision in section 5(e) of the Final DIP Order was to timely flesh-out and adjudicate any such issues early on in the case.

C. The Court Should Dismiss Count II of the Amended Complaint as Failing to Present Justiciable Issues

As detailed in the Notes Trustee's Motion to Dismiss, Count II of the Amended Complaint fails to present a real case or controversy because the Committee fails to allege that any real money is at stake. The Court found in the Final DIP Order that the Notes Trustee and other Prepetition Secured Creditors are entitled to a Prepetition Replacement Lien in all DIP Collateral to the extent of any Diminution in Value, including any otherwise unencumbered Deposit Accounts. Moreover, the funds in the subject Deposit Accounts have already been spent by the Debtors along with hundreds of millions of dollars of the Notes Trustee's other cash collateral.

The Committee defends the need for litigation on Count II even though there are no funds to fight over on the grounds that the outcome could be helpful in fixing the amount of the Notes Trustee's prepetition claim for purposes of later Diminution in Value litigation. A fight involving

experts and tracing is not justified by this end, and this issue could be litigated more efficiently in connection with confirmation if relevant to the fully secured status of the Notes Trustee. Again, this dispute is unripe as it really relates to the Diminution in Value issues not presented in the adversary proceeding.

D. The Committee's Arguments Regarding the Merits of its so-called "Going Concern Premium" Theory are Premature and Should be Disregarded

The Notes Trustee, in its Motion to Dismiss, argued that the Committee's new claim regarding the so-called "going concern premium" should be dismissed because, *inter alia*, it goes beyond the scope of the enumerated challenges identified in section 5(e) of the Final DIP Order, and section 5(e) does not contemplate lien challenge claims or causes of action related to postpetition matters. The Notes Trustee has not sought dismissal of the Committee's "going concern premium" theory based on the legal or factual merits thereof, but rather with respect to standing and waiver. However, in order to avoid any misapprehensions about the Notes Trustee's position with respect to the Committee's "going concern premium" argument, the Notes Trustee stated in a footnote to its Motion to Dismiss that the argument is contrary to both the Final DIP Order and binding precedent in the Ninth Circuit on the proper valuation of collateral sold as part of a going concern, citing *In re Sunnyslope Housing L.P.*, 859 F.3d 637 (9th Cir. 2017). *See* Motion to Dismiss, n. 9. In its Opposition, the Committee responds the footnote with a five page exposition of its legal theory. *See* Opposition, pp. 15-20.

The Committee's arguments in favor of the "going concern premium" theory are, for purposes of this adversary proceeding, premature, irrelevant to the Motion to Dismiss, and are perhaps more appropriately addressed in the context of the confirmation of the Debtors' Plan. Nonetheless, just so the record is clear, the Notes Trustee believes that the Committee's "going concern premium" theory lacks substantive merit and reserves its right to brief and adjudicate that issue at the appropriate time. Suffice it to say that there is no "going concern premium" as a separate, distinct, and unencumbered asset class that inures solely to the benefit of unsecured creditors, and the cases cited by the Committee do not stand for that proposition. As one court in this Circuit has observed, "[t]here is no precedent that supports the conclusion that a secured creditor

with a lien on a debtor's primary assets is not entitled to the debtor's enterprise value when the debtor proposed to use that collateral in its business under a plan of reorganization." *In re Hawaiian Telcom Commc'ns, Inc*., 430 B.R. 564, 604 (Bankr. D. Haw. 2009).

III. CONCLUSION

For the foregoing reasons, the Notes Trustee respectfully reiterates its request that the Court grant its Motion to Dismiss the Amended Complaint.

Dated: October 24, 2019

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