



AMERICAN
BANKRUPTCY
INSTITUTE

2020 Virtual Winter Leadership Conference

"Too Many Hats": The Peculiar Problems and Challenges that Arise When an Equity Sponsor/ Secured Lender Is a DIP Lender/ Stalking-Horse Buyer in a Chapter 11 Case

Jordan A. Kroop, Moderator

Perkins Coie LLP | Phoenix

Hon. Robert D. Drain

U.S. Bankruptcy Court (S.D.N.Y.) | White Plains

Christine A. Okike

Skadden, Arps, Slate, Meagher & Flom LLP | New York

Paul H. Zumbro

Cravath, Swaine & Moore LLP | New York

SUMMARY OF “TOO MANY HATS” PANEL MATERIALS

December 3, 2020



CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re Coram Healthcare Corp.</i>, 271 B.R. 228 (Bankr. D. Del. 2001) Judge Mary F. Walrath	Coram Healthcare (debtor) – leading provider of alternative site infusion therapy services Cerebus Partners, L.P. – noteholder and one of Coram’s largest creditors David. D. Crowley – Coram CEO and restructuring consultant hired by Cerebus	Confirmation objection by equity committee. Crowley had been receiving ~\$1M/year under an employment agreement with Cerebus.	Court denied confirmation on the basis that Crowley’s continuous conflict of interest tainted debtors’ reorganization efforts. Crowley’s conflict (i) precluded proposal of a plan in “good faith” under 1129(a)(3) and (ii) violated his fiduciary duties to the debtors and estate. Appointment of special committee and disclosure of conflict was not a sufficient cure. Chapter 11 Trustee appointed to resolve case.

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re HDR Holdings, Inc., Case 19-11369-MFW (Bankr. D. Del. 2019)</i> Memorandum Opinion re: 363 Sale [Dkt. 396] Judge Maryellen Noreika	HDR Holding, Inc. and Schramm—hydraulic drill and equipment manufacturer for the oil and gas, mining and water markets GenNx360 – controlling shareholder Schramm II Inc. – DIP Lender and stalking horse bidder; wholly owned by GenNx360 UCC & DNOW, L.P. (UCC chair)	Appeal by UCC and DNOW of 363 sale of substantially all of the Debtors' assets (including certain Avoidance Actions against GenNx30).	Court found that the 363 sale was valid (no bad faith and assets were purchased for value) despite the close relationship between the Debtors and the purchaser. <u>No Bad Faith</u>: There was proper disclosure of relationships of the parties and that the sale included the Avoidance Actions. Sale process involved sufficient solicitation of other buyers. <u>Purchase for Value</u>: Separate valuation of the Avoidance Actions was not required under law. Sufficient consideration for the assets was otherwise provided.

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re Innkeepers USA Trust, et al., 422 B.R. 227 (Bankr. S.D.N.Y. 2010)</i> Judge Shelly C. Chapman	Innkeepers USA Trust (debtor) – REIT Lehman Ali Inc. – mortgagee holding ~\$238M in floating mortgage loan debt Apollo Investment Corporation – Debtors' parent company	Debtors moved for authorization to assume prepetition PSA with Lehman. Secured creditors, <i>inter alios</i>, objected on the grounds that the PSA provided Lehman with an outsize recovery at other creditors' expense. Lehman was to receive 100% of the issued and outstanding new shares of common stock to be issued by reorganized debtors. The new shares were to include all equity in all 92 of the Debtors (Lehman was secured by collateral of only 20 of the Debtors).	Court denies motion to assume PSA on the basis that the PSA was not a disinterested business transaction and its assumption was not in the best interests of the debtors' estates. PSA and PSA process were dominated by Lehman at the expense and exclusion of remaining creditors (including ~\$1.2M of other secured debtholders). PSA was not entered into with due care or in good faith (<i>i.e.</i>, lack of transparency, no marketing process, PSA substantially limited ability to engage in restructuring discussions with creditors other than Lehman, other creditors actively shut out of the process, Appollo's involvement obfuscated, toothless fiduciary out).

AMERICAN BANKRUPTCY INSTITUTE

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re New Cotai Holdings, LLC</i>, 19-22911-rdd (Bankr. S.D.N.Y. 2019) Special Counsel Retention Order [Dkt. 215] Judge Robert D. Drain	New Cotai Holdings (debtors) – casino investment vehicle DLA Piper – special counsel Ad Hoc Group of Noteholders Independent Fiduciaries (including a fiduciary selected by the Ad Hoc Group of Noteholders) – appointment required by the court	Debtors sought appointment of DLA Piper as special counsel to Independent Fiduciaries to investigate potential claims of Debtors’ estates related to an IPO. Ad Hoc Group of Noteholders and UST objected not based on qualifications or disinterestedness of DLA Piper, but on standing and process grounds with respect to proper investigation and potential resolution of the IPO claims.	Court approved retention of DLA Piper as special counsel to the Independent Fiduciaries. Debtors entered into “Independent Fiduciary Agreement” at the court’s instruction, which included an information sharing protocol under which DLA Piper and the Independent Fiduciaries agreed to share information with advisors to the Debtors and the Ad Hoc Group of Noteholders. <i>Independent Fiduciaries to Debtors v. more typical UCC investigation?</i>

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re Sears Holding Corporation</i>, 18-23538-rdd (Bankr. S.D.N.Y. 2018) 363 Order [Dkt. 2507] Judge Robert D. Drain	Sears Holding Corporation et al. (debtors) – retailer ESL Investments, Inc. – controlling shareholder Transform HoldCo LLC- entity created and wholly owned by ESL to purchase Sears’ assets	UCC objected to 363 sale of substantially all of Sears’ assets because, <i>inter alia</i>, purchase by Transform HoldCo (insider purchaser) impermissibly tainted sale process	Court approved 363 sale, finding an independent sale process had occurred. ESL had been replaced as a controlling party pre-petition in order to neutralize its involvement in any sale process. Debtors’ committees that actually controlled the sale process were truly independent, focused on obtaining the best outcome for the Debtors’ and engaged in robust negotiations with ESL. Sale was entitled to “good faith” protections of § 363(m) because, despite a few isolated instances of questionable conduct, ESL generally acted to preserve the independence of the sale process.

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

<i>In re LATAM Airlines Group S.A. et al., 20-11254-jlg (Bankr. S.D.N.Y. 2020)</i> Memorandum Decision re DIP Motion [Dkt. 1056] Judge James Garrity Jr.	LATAM Airlines Group S.A. et al. (debtors) – airline Qatar Airways Investments (U.K.) Ltd and Costa Verde Aeronautica S.A. – Tranche C Lenders and two of the Debtors’ largest shareholders (32% ownership, including affiliates) Ad Hoc Group of Bondholders Knighthood (holds over \$100mm in unsecured bonds issued or guaranteed by LATAM entities)	Objection to DIP by UCC, Ad Hoc Group of Bondholders and Knighthood on the basis that the Tranche C loan was an overpriced insider loan benefiting the Debtors’ majority shareholders at the expense of unsecured creditors. Tranche C loan: \$900mm first loss, undercollateralized junior loan (out of \$2.45bn total proposed DIP). Debtors able to compel Tranche C Lenders to subscribe to restricted equity in the reorganized debtors at a 20% discount to plan value (the “Equity Subscription”).	Court did not approve DIP, finding that the Equity Subscription gave rise to a sub rosa plan. Specifically, approving the Equity Subscription would have locked in plan terms that were not market-tested in advance of plan approval processes (thereby “short circuiting” Bankruptcy Code requirements and court oversight). Tranche C loan was an insider transaction (<i>i.e.</i>, control by Tranche C Lenders) subject to review under entire fairness standard. Process and terms of Tranche C loan were fair (<i>i.e.</i>, wide marketing of the DIP post-petition, good faith engagement with multiple parties on alternative loan proposals, significant modifications to final proposal, no better equivalent or alternative terms available). No bar to a finding of “good faith” under § 364(e). Transaction was (i) not facially improper, (ii) supported by reasonable legal bases and (iii) not a result of abuse or misuse of shareholder status. Tranche C loan was permissible under the “new value” exception to the absolute priority rule (<i>i.e.</i>, <i>North LaSalle</i> and related market test requirements), citing arms-length negotiation, extensive post-petition market testing and lack of viable alternatives.

Page 7 of 10

CRAVATH, SWAINE & MOORE LLP

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re OneWeb Global Limited, et al., 20-22437-rdd (Bankr. S.D.N.Y. 2020)</i> UCC Motion re: UCC derivative standing [Dkt. 402] Hearing Transcript, July 28, 2020 Judge Robert D. Drain Mediation by Judge. Shelley C. Chapman	OneWeb Global Limited, et al. (debtors) – satellite communications UCC SoftBank, Airbus, Qualcomm, Banco Azteca, Government of Rwanda, and GLAS (as administrative and collateral agent) – Investor Defendants and OneWeb controlling shareholders (SoftBank in particular had many roles – largest equityholder, largest debtholder and initial DIP lender.)	UCC sought (i) derivative standing to pursue and potentially settle claims for recharacterization and equitable subordination against Investor Defendants and (ii) disallowance of claims against Investor Defendants on the ground they were equity interests. Investor Defendants had purchased ~\$1.6bn in promissory notes from OneWeb. UCC challenged these purchases as capital contributions made to salvage the Investor Defendants’ preexisting equity investments in OneWeb.	Following mediation, UCC settled with, <i>inter alios</i>, Investor Defendants for \$10mm (distributed to certain general unsecured creditors). In exchange, UCC agreed not to prosecute any litigation and to support confirmation of debtors’ plan.

Page 8 of 10

CRAVATH, SWAINE & MOORE LLP

AMERICAN BANKRUPTCY INSTITUTE

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>The Search for an Unbiased Fiduciary in Corporate Reorganization</i> , 86 Notre Dame L. Rev. 469 (March 2011)	N/A	Article analyzes the intensified contest for control in corporate reorganizations and whether, as a result, existing bankruptcy laws and processes adequately protect the interests of all of a debtor's stakeholders.	Efforts by a stakeholder to influence control often lead to conflicts of interests and multiple, competing demands on bankruptcy fiduciaries, <i>i.e.</i>, debtors-in-possession and statutory committees. In theory, these fiduciaries should shun their personal interests and any undue influence by particular stakeholders. In practice, however, debtors and committees frequently are unable or unwilling to do so, and bankruptcy courts often do not learn of conflicts, if at all, until it is too late. Article suggests mitigating impact of conflicts on the bankruptcy process by employing a mandatory third-party neutral (a "case facilitator"). Objectives would be to facilitate information sharing among the court, debtor and stakeholders (<i>e.g.</i>, periodic status reports), and negotiations regarding resolution of a debtor's bankruptcy. While case examiner would be serving in a role akin to a mediator, they would <i>not</i> make independent assessments or recommendations to the court.

CASE / DOCUMENT	PARTIES	ISSUE	RESOLUTION
<i>In re UCI International, LLC, et al.</i>, 16-11354-mfw (Bankr. D. Del. 2016) Hearing Transcript, July 12, 2016 Judge Mary F. Walrath	UCI International, LLC, et al. (debtors) – automotive and industrial filtration products Rank Group Finance (UCI affiliate) and Credit Suisse – prepetition ABL Lenders Ad Hoc Group of Bondholders	Ad Hoc Group of Bondholders objected to proposed DIP, a roll-up of insider debt led by Rank (effectively an equity sponsor) and Credit Suisse (allegedly beholden to Rank by virtue of certain business arrangements).	Court declined to approve DIP due to flawed pre-bankruptcy DIP process, which was driven by Rank's relationship with UCI (Rank had terminated certain shared services agreements with the Debtors on the eve of the bankruptcy filing). Alternative options (<i>e.g.</i>, cash collateral, proposal by the Ad Hoc Group of Bondholders) remained available. Walrath harshly disapproved of after the fact "cleansing": "<i>You can't screw up the debtor completely, and then appoint an independent director and make everything all right, by letting the independent director have free reign in doing what it can to clean up the mess.</i>"

AMERICAN BANKRUPTCY INSTITUTE

Case 16-11353-MFW Doc 130-1 Filed 07/23/16 Page 12 of 14

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
UCI INTERNATIONAL, LLC., et al, Case No. 16-11354 (MFW)
Courtroom No. 4
824 Market Street
Wilmington, Delaware 19801
Debtors. July 12, 2016
10:30 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Edmon Morton, Esquire
YOUNG CONAWAY STARGATT & TAYLOR LLP
1000 North King Street
Wilmington, Delaware 19801

James Ducayet, Esquire
Jessica Boelter, Esquire
SIDLEY AUSTIN
One South Dearborn
Chicago, Illinois 60603

For U.S. Trustee: Richard Schepacarter, Esquire
OFFICE OF THE UNITED STATES TRUSTEE
844 N. King Street
Wilmington, Delaware 19801

Audio Operator: Brandon McCarthy

Transcription Service: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
Telephone: (302) 654-8080
E-Mail: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording:
transcript produced by transcription service.

1 APPEARANCES: (Continued)

2 For Ad Hoc: Matthew Feldman, Esquire
3 Willkie Farr & Gallagher
4 787 Seventh Avenue
New York, New York 10019

5 For Credit Suisse: Omid Nasab, Esquire
6 Paul Zumbro, Esquire
7 CRAVATH, SWAINE & MOORE LLP
825 8th Avenue
New York, New York 10019

8 For Official Committee
9 Of Unsecured Creditors: Lorenzo Marinuzzi, Esquire
10 Jessie Liu, Esquire
11 MORRISON FOERSTER
250 West 55th Street
New York, New York 10019

12 For Rank: Elliot Moskowitz, Esquire
13 Timothy Graulich, Esquire
14 DAVIS POLK
450 Lexington Avenue
New York, New York 10017

1 it reflects the debtors' judgment. Thank you.

2 THE COURT: Thank you.

3 All right. Let's take a ten-minute break, and
4 I'll come back and give you my ruling.

5 (Recess taken at 4:35 p.m.)

6 (Proceedings resume at 4:53 p.m.)

7 (Call to order of the Court)

8 THE COURT OFFICER: You may be seated.

9 THE COURT: All right. Let me issue my ruling.

10 I think I must start with what the appropriate
11 standard is, and I think it's the entire fairness standard,
12 not the debtors' business judgment, for a number of reasons,
13 not simply the fact that one of the lenders in the DIP is an
14 insider, but give the history of transactions that have
15 occurred in this case, not simply in the bankruptcy case, but
16 pre-bankruptcy.

17 And I think it's important that I consider all of
18 the history because I agree with the committee's argument, to
19 use my own words: You can't screw up the debtor completely,
20 and then appoint an independent director and make everything
21 all right, by letting the independent director have free
22 reign in doing what it can to clean up the mess.

23 And I think, in this case, I cannot conclude that
24 the DIP is entirely fair. Yes, after the bankruptcy, the
25 process was fair, and I accept that Mr. Carr and Mr. Whittman

1 were both independent, and both made their decisions
2 independent of any untoward influence by Rank, or anybody
3 associated with Rank.

4 But again, I can't start from June 2nd. I have to
5 consider where the debtor was on June 2nd, as a result of
6 what occurred pre-bankruptcy. And specifically, the
7 termination of the various agreements -- or attempted
8 termination of the very shared services agreement and the
9 warehouse lease. And there are some arguments that the
10 debtor has, arguments to assert that those notices were
11 defective, et cetera.

12 But I think, even in the absence of that, the fact
13 that those terminations were sent were clearly not in the
14 best interests of the debtor, even if they had been fully
15 effective, and there was no way to undo them. I think,
16 having sent those notices makes this entire process unfair,
17 and I just can't get beyond that.

18 This is not the case where I think I can approve a
19 roll-up of an insider debt, and that's where -- that's really
20 where I am. I might have been forced to approve that, if
21 there weren't other options. There are other options here:
22 Use of cash collateral, another DIP proposal, revisions to
23 this DIP.

24 The debtor is not in a position where it needs a
25 DIP today. The debtor has successfully operated for the last

1 five weeks, has exceeded its projections, not simply because
2 of timing of receipts and payments. The debtor has made
3 agreements with vendors, has been able to retain, in large
4 part, its factory. I think that the debtor has the time to
5 continue to work on what is an acceptable alternative to this
6 DIP, or to revise this DIP, so it would otherwise be
7 acceptable to the parties. And I urge the parties to
8 continue to talk about that.

9 There is nothing wrong with the milestones.
10 There's nothing wrong, in principle, with the roll-up. There
11 is nothing wrong with solving the debtors' operational
12 problems. It's just that, in the context of this case, I
13 can't say that the result has been achieved through a fair
14 process.

15 So I'm going to suggest that we continue this
16 hearing to an acceptable date, rather than enter an order.
17 And I'll hear from the parties what they think that
18 acceptable date could be.

19 MS. BOELTER: Your Honor, for the record, this is
20 Jessica Boelter, Sidley Austin, for the debtors.

21 The current interim cash collateral order has a
22 sunset date of July 15th, and then it officially terminates
23 five days thereafter, so July 20th. What I guess I would
24 propose, Your Honor, that we take a few days to caucus with
25 the parties-in-interest; I think everyone needs to speak with

1 their clients, and come back before you, telephonic or
2 otherwise, maybe in a couple of days, you know, Thursday or
3 Friday of this week.

4 THE COURT: All right. Oh, it's Friday. I do
5 have -- I'm here all week, and I'm here next week.

6 MS. BOELTER: Okay.

7 THE COURT: But I do have a long-planned vacation
8 starting July 22nd, so ...

9 MS. BOELTER: So maybe we should get in on
10 Thursday, rather than Friday, of this week.

11 THE COURT: That would be fine.

12 MS. BOELTER: Okay.

13 THE COURT: I'm available -- Thursday, I have no
14 hearings; Friday, I do have hearings in the morning. But I
15 will make myself available.

16 MS. BOELTER: Why don't we propose a -- maybe a
17 telephonic hearing during the morning, Thursday morning?

18 THE COURT: The 14th?

19 MS. BOELTER: Yes.

20 THE COURT: Okay. 10:30 work for the parties?

21 MR. MARINUZZI: That's fine, Your Honor. Thank
22 you.

23 THE COURT: Okay. I'll set -- I'll continue this
24 for a telephonic status update on Thursday at 10:30 then.

25 MS. BOELTER: Thank you, Your Honor.

1 THE COURT: Does anybody else -- Mr. Morton.

2 MR. MORTON: And Your Honor, just to note, we'll
3 just simply file a notice on the docket to that effect, just
4 one page of it, that indicates it's been continued as to the
5 DIP.

6 THE COURT: That's fine.

7 MR. MORTON: All right. We'll stand adjourned
8 then.

9 COUNSEL: Thank you, Your Honor. Thank you, Your
10 Honor.

11 (Proceedings adjourned to 7/14/16 at 10:30 a.m.)

12 (Concluded at 5 p.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 14:12:12 Desc: Main Document Pg 1 of 34

Filed Under Temporary Seal — Subject to the Protective Order by and
 OneWeb Global Limited, et al., SoftBank Group Corp., Airbus Group Proj B.V., Banco
 Azteca, S.A. Institucion de Banca Multiple, Qualcomm and the Official
 Committee of Unsecured Creditors of OneWeb Global Limited, et al.

Luc A. Despins, Esq.
 Pedro A. Jimenez, Esq.
 Nicholas A. Bassett, Esq.
PAUL HASTINGS LLP
 200 Park Avenue
 New York, New York 10166
 Telephone: (212) 318-6000
 Facsimile: (212) 319-4090
 lucdespins@paulhastings.com
 pedrojimenez@paulhastings.com
 nicholasbassett@paulhastings.com

Seth Van Aalten, Esq.
 Justin R. Alberto, Esq. (admitted pro hac vice)
 Sarah A. Carnes, Esq.
 Nolan E. Shanahan, Esq.
COLE SCHOLZ P.C.
 1325 Ave. of the Americas, 19th Floor
 New York, New York 10019
 Telephone: (646) 563-8935
 Facsimile: (646) 563-7935
 E-mail: svanaalten@coleschotz.com
 jalberto@coleschotz.com
 scarnes@coleschotz.com
 nshanahan@coleschotz.com

*Counsel to the Official Committee of
 Unsecured Creditors (as to all Defendants
 other than Airbus & Qualcomm)*

*Counsel to the Official Committee of
 Unsecured Creditors (as to all Defendants)*

**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

-----X
 :
 In re: : Chapter 11
 :
 OneWeb Global Limited, et al. : Case No. 20-22437 (RDD)
 :
 Debtors.¹ : (Jointly Administered)
 :
 -----X

**OFFICIAL COMMITTEE OF UNSECURED CREDITORS' (I) MOTION FOR ORDER
 GRANTING COMMITTEE DERIVATIVE STANDING TO PURSUE AND, IF
 APPROPRIATE, SETTLE CLAIMS FOR RECHARACTERIZATION AND
 EQUITABLE SUBORDINATION AGAINST CERTAIN PURPORTED SECURED
 CREDITORS, AND (II) OBJECTION TO SUCH CREDITORS' CLAIMS**

¹ The debtors in these cases (the "Debtors"), along with the last four digits of each Debtor's federal tax identification number, if any, are: OneWeb Global Limited (N/A); OneWeb Holdings LLC (5429); OneWeb Communications Limited (9487); WorldVu Satellites Limited (7802); WorldVu Development LLC (9067); WorldVu JV Holdings LLC (N/A); 1021823 B.C. LTD (8609); Network Access Associates Limited (8566); OneWeb Limited (8662); WorldVu South Africa (Pty) Ltd. (1867); OneWeb Chile SpA (2336); WorldVu Australia Pty Ltd. (5436); WorldVu Unipessoal Lda. (2455); OneWeb Norway AS (0209); OneWeb ApS (9191); OneWeb Network Access Holdings Limited (8580); OneWeb G.K. (1396); OneWeb Ltd (8661); and WorldVu Mexico S. DE R. L. DE C.V. (1234). The Debtors' headquarters is located at 195 Wood Lane, West Works Building, 3rd Floor, London, W12 7FQ, UK.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
RELEVANT BACKGROUND	5
I. Overview of OneWeb: An Ambitious Project With No Operations or Revenue	5
II. Initial Equity Investments by Investor Defendants.....	5
III. OneWeb’s Failed Efforts to Raise Debt Financing from Third Parties	7
IV. The 2018 “Note Purchase Agreement”	7
V. The 2019 “A&R Note Purchase Agreement”	10
VI. OneWeb’s Inability to Secure Additional Financing and Eventual Bankruptcy	14
VII. The Committee’s Investigation of Potential Claims	15
RELIEF REQUESTED.....	16
ARGUMENT ON MOTION FOR STANDING TO PURSUE	
RECHARACTERIZATION AND EQUITABLE SUBORDINATION CLAIMS	16
I. The Committee’s Claims Are Colorable.....	18
A. Bankruptcy Courts Have Authority to Determine the Proper Characterization of an Investment Under the Bankruptcy Code Applying Federal Law	18
B. The Recharacterization Analysis Under the Bankruptcy Code Looks to the Economic Reality of the Transaction.....	20
C. The Committee Has Pled Colorable Claims that the Purported Notes Are, In Economic Reality, Equity Interests, and Should Be Treated as Such	22
D. Application of the AutoStyle Factors Supports Recharacterization of the Purported Notes	25
1. Six Factors Strongly Support Recharacterization	25
(i) OneWeb Was Severely Undercapitalized At All Relevant Times.....	25
(ii) OneWeb Had No Ability to Obtain Financing From Third- Party Lenders	27
(iii) Repayment of the Purported Notes was Entirely Dependent Upon the Success of OneWeb’s Business or Its Ability to Raise Additional Financing.....	29
(iv) OneWeb Used the Proceeds of the Purported Notes to Make Capital Investments, Not to Fund Operations.....	31
(v) A Substantial Identity of Interest Exists Between the Investor Defendants and OneWeb’s Equity Holders	33

TABLE OF CONTENTS
(CONT.)

	Page
(vi) No Sinking Fund Existed for Repayments.....	35
2. Four Factors Are At Worst Neutral in the Analysis	36
(i) The Purported Notes Contained No Schedule of Payments, and, Although They Established Fixed Maturity Dates, Such Dates Were Illusory	36
(ii) While the Purported Notes Contained a Fixed Rate of Interest, There Was No Requirement That Interest Be Paid Prior to Maturity	38
(iii) Although the Purported Notes Were Purportedly Secured, the Collateral Was Worth Far Less Than the Amounts Advanced	39
(iv) The Investor Defendants Agreed to Subordinate Their Claims to Those of Legitimate Outside Lenders	40
3. Only One Factor—the Labels Given to the Transactions—Weighs Slightly Against Recharacterization	41
E. The Committee Has a Colorable Claim for Equitable Subordination of the Purported Note Claims Under Section 510(c) of the Bankruptcy Code.....	42
II. The Debtors’ Refusal to Pursue the Claims is Unjustifiable	46
ARGUMENT ON CLAIM OBJECTION	48

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AI Int'l Holdings (BVI) Ltd. v. MUFG Union Bank (In re Weinstein Co. Holdings, LLC),</i> 595 B.R. 455 (Bankr. D. Del. 2018)	48
<i>In re Adelphia Commc'ns Corp.,</i> 365 B.R. 24 (Bankr. S.D.N.Y. 2007)	22, 29
<i>Adelphia Commc'ns. Corp. v. Bank of Am. (In re Adelphia Commc'ns. Corp.),</i> 330 B.R. 364 (Bankr. S.D.N.Y. 2005)	17, 18, 28, 47
<i>In re Adler, Coleman Clearing Corp.,</i> 277 B.R. 520 (Bankr. S.D.N.Y. 2002)	42
<i>In re: Aéropostale, Inc.,</i> 555 B.R. 369 (Bankr. S.D.N.Y. 2016)	19, 27
<i>Ashcroft v. Iqbal,</i> 556 U.S. 662 (2009)	22
<i>Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.),</i> 269 F.3d 726 (6th Cir. 2001)	passim
<i>Bell Atl. Corp. v. Twombly,</i> 550 U.S. 554 (2007)	22
<i>Benjamin v. Diamond (In re Mobile Steel Co.),</i> 563 F.2d 692 (5th Cir. 1977)	43
<i>In re Borders Grp., Inc.,</i> 453 B.R. 459 (Bankr. S.D.N.Y. 2011)	43
<i>In re Chas. P. Young Co.,</i> 145 B.R. 131 (Bankr. S.D.N.Y. 1992)	43
<i>Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.),</i> 432 F.3d 448 (3d Cir. 2006) (Ambro, C.J.)	passim
<i>In re Cold Harbor Assocs., L.P.,</i> 204 B.R. 904 (Bankr. E.D. Va. 1997)	passim
<i>In re Enron Corp.,</i> 379 B.R. 425 (S.D.N.Y. 2007)	42

TABLE OF AUTHORITIES
(CONT.)

	Page(s)
Cases	
<i>Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (In re Dornier Aviation (N. Am.), Inc.),</i> 453 F.3d 225 (4th Cir. 2006)	18, 19, 32
<i>In re Fid. Bond & Mortg. Co.,</i> 340 B.R. 266 (Bankr. E.D. Pa. 2006)	41
<i>Frank Lyon Co. v. United States,</i> 435 U.S. 561 (1978).....	21
<i>In re Great Atl. & Pac. Tea Co., Inc.,</i> No. 10-24549-RDD (Bankr. S.D.N.Y. Sept. 26, 2011) (Drain, J.).....	21
<i>Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.),</i> 650 F.3d 539 (5th Cir. 2011)	19
<i>In re Hedged-Invs. Assocs., Inc.,</i> 380 F.3d at 1298–99	22
<i>Interstate Cigar Co. v. Bambu Sales, Inc. (Interstate Cigar Co.),</i> 182 B.R. 675 (Bankr. E.D.N.Y. 1995).....	43, 44
<i>Le Café Crème, Ltd. v. Le Roux (In re Le Café Crème, Ltd.),</i> 244 B.R. 221 (Bankr. S.D.N.Y. 2000)	42, 43, 44, 45
<i>LightSquared LP v. SP Spec. Opportunities LLC (In re LightSquared),</i> 511 B.R. 253 (Bankr. S.D.N.Y. 2014).....	42
<i>Official Comm. of Unsecured Creditors of America’s Hobby Ctr. v. Hudson United Bank (In re America’s Hobby Ctr.),</i> 223 B.R. 275 (Bankr. S.D.N.Y. 1998).....	17, 46
<i>Official Comm. of Unsecured Creditors of the Debtors v. Austin Fin. Serv. (In re KDI Holdings, Inc.),</i> 277 B.R. 493 (Bankr. S.D.N.Y. 1999).....	16
<i>Official Comm. Of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co. (In re Sunbeam Corp.),</i> 284 B.R. 355 (Bankr. S.D.N.Y. 2002).....	42, 43
<i>Official Comm of Unsecured Creditors v. Bay Harbour Master Ltd. (In re BH S & B Holdings LLC),</i> 420 B.R. 112 (Bankr. S.D.N.Y. 2009).....	passim

TABLE OF AUTHORITIES
(CONT.)

	Page(s)
Cases	
<i>Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.),</i> 326 B.R. 532 (W.D. Pa. 2005).....	46
<i>Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re</i> <i>Fitness Holdings Int'l, Inc.),</i> 714 F.3d 1141 (9th Cir. 2013)	19
<i>Official Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (In re Sabine</i> <i>Oil & Gas Corp.),</i> 562 B.R. 211 (S.D.N.Y. 2016).....	19
<i>Official Creditors' Comm. for OMect, Inc. v. Electrochem Funding, LLC (In re</i> <i>QMect, Inc.),</i> 349 B.R. 620 (Bankr. N.D. Cal. 2006)	48
<i>Redmond v. Cimarron Energy Co. (In re Alternate Fuels, Inc.),</i> 507 B.R. 324 (10th Cir. BAP 2014), reversed on other grounds, 789 F.3d 1139 (10th Cir. 2015).....	19
<i>RWNIH-DL 122nd St. 1 LLC v. Futterman (In re Futterman),</i> No. 17-12899 (MEW), 2019 WL 2553614 (Bankr. S.D.N.Y. June 20, 2019).....	48
<i>Sender v. Bronze Group (In re Hedged-Invs. Assoc., Inc.),</i> 380 F.3d 1292 (10th Cir. 2004)	19
<i>Summit Coffee Co. v. Herby's Foods, Inc. (In re Herby's Food's, Inc.),</i> 2 F.3d 128 (5th Cir. 1993)	43, 44, 45, 46
<i>Unsecured Creditors Comm. Of Debtor STN Enters. v. Noyes (In re STN Enters.),</i> 779 F.2d 901 (2d Cir. 1985).....	16, 17
<i>Weisfelner v. Blavatnick (In re Lyondell Chem.),</i> 544 B.R. 75 (Bankr. S.D.N.Y. 2016).....	passim
<i>Whiteley v. Slobodian (In re Mechanicsburg Fitness, Inc.),</i> 592 B.R. 798 (Bankr. M.D. Pa. 2018)	48
<i>In re Yoga Smoga, Inc.,</i> No. 16-13159-mew, 2016 WL 8943849 (Bankr. S.D.N.Y. Dec. 21, 2016)	19, 20

TABLE OF AUTHORITIES
(CONT.)

	Page(s)
Cases	
Statutes	
11 U.S.C.	
§ 101(31).....	43
§ 101(31)(B)(iii).....	1
§ 105(a).....	1, 18
§ 363.....	1
§ 501(c).....	46
§ 502.....	4, 48, 49
§ 502(a).....	48
§ 502(b).....	<i>passim</i>
§ 502(b)(1).....	48
§ 510(c).....	1, 19, 42
Other Authorities	
Bankruptcy Rule 2004	16
Fed. R. Bankr. P. 7008.....	22
Fed. R. Civ. P.	
8(a)(2)	22
12(b)(6)	16, 22
Lawrence Ponoroff, <i>Whither Recharacterization</i> , Rutgers Univ. L. R., 68:1217 (2016).....	19

To the Honorable United States Bankruptcy Judge Robert D. Drain:

Pursuant to sections 105(a), 502(b), and 510(c) of title 11 of the United States Code (the “Bankruptcy Code”) and the *Final Order (i) Authorizing Debtors to Use Cash Collateral Pursuant to 11 U.S.C. § 363, (ii) Granting Certain Protections to Prepetition Noteholders, and (iii) Granting Related Relief* [Docket No. 118] (the “Cash Collateral Order”), the Official Committee of Unsecured Creditors (the “Committee”) seeks an order (i) granting it derivative standing to pursue and, if appropriate, settle claims against SoftBank Group Corp. (“SoftBank”), Airbus Group Proj B.V. (“Airbus”), Qualcomm Technologies, Inc. (“Qualcomm”), Banco Azteca, S.A., Institucion de Banca Multiple (“Banco Azteca”), the Government of the Republic of Rwanda (the “Government of Rwanda” and together with SoftBank, Airbus, Qualcomm, and Banco Azteca, the “Investor Defendants”), and Global Loan Agency Services Ltd. and GLAS Trust Corporation Ltd., as administrative agent and collateral agent, respectively (together with the Investor Defendants, the “Defendants”) for recharacterization or equitable subordination of their claims against the Debtors, or (ii) disallowing such claims under section 502(b) of the Bankruptcy Code on the ground that they are, in reality, equity interests. In support of this motion and objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. During the two years prior to the commencement of these cases, the Investor Defendants, controlling shareholders of OneWeb,² purchased nearly \$1.6 billion in purported promissory notes (the “Purported Notes”) from OneWeb to help finance its ambitious plan to revolutionize the world’s internet connectivity by launching a massive fleet of low-Earth orbit (“LEO”) satellites capable of high-speed data transmission to customers on the ground. These

² All references herein to “OneWeb” or the “Company” refer to the Debtors.

investments, despite their “debt” labels, were in economic substance capital contributions that the Investor Defendants made to salvage—and, through stock warrants accompanying the Purported Notes, enhance—their hundreds of millions of dollars of preexisting equity investments in the Company. [REDACTED]

[REDACTED]

[REDACTED]

2. It is well-settled that bankruptcy courts have the ability to “recharacterize” a purported creditor’s claim as equity where the underlying “debt” was actually equity from its inception based on the transaction’s economic reality. Here, the facts and circumstances surrounding the Purported Notes present a textbook case for such recharacterization because it is clear that the investments were at all times effective capital contributions and not loans to the Company. As such, the Purported Notes should be treated as equity in these cases.

3. Critical to understanding the economic substance of the Purported Notes is the nature of OneWeb’s business. From its inception, OneWeb was at all times a high-risk venture dependent upon [REDACTED] capital infusions to bring its business plan to reality.

[REDACTED] By the time of its bankruptcy filing, it had launched only 74 of the approximately 650 satellites in its proposed constellation and never commenced operations or generated a penny of revenue (because it had nothing to sell). Importantly, the Company could not begin operations with a partial buildout of its satellite system but rather needed to finance and construct virtually the entire system for it to function as a global communications network. [REDACTED]

[REDACTED]³ Thus, this is not a situation where real lenders came to the rescue of a once-successful, already existing business that fell on hard times; rather, this is a case of strategic investors who made speculative bets on a high-risk project to support their parochial business interests and to reap the financial rewards of the project's potential success.

4. The Investor Defendants first became involved in OneWeb in 2015 and 2017 when they made approximately \$1.5 billion in equity investments in the Company hoping to generate outsized returns. These investments gave the Investor Defendants more than 70% of the Company's equity (with SoftBank itself owning approximately 50%) and effective control over its decision-making. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Upon information and belief, the reason the Investor Defendants (who as insiders sat on both sides of the transaction) styled the investments as "notes" was to obtain priority over other equity holders and creditors (via purported security interests) in the event of a bankruptcy filing, which the Investor Defendants saw coming from at least the middle of 2018.

5. Consistent with the investors' expectations, the terms of the Purported Notes [REDACTED]

and that the Investor Defendants would receive equity in the Company (in the form of

³ See Ex. 1 to Ex. A, Project OneWeb M&A Committee Memorandum dated February 19, 2019, at AIRBUS_0000014. All subsequent references herein to numerical exhibits (e.g. Ex. 2) are references to the attachments to Exhibit A hereto.

convertible “notes” and/or stock warrants) as part of their investments. Unsurprisingly, the Investor Defendants acquired Purported Notes in approximate proportion to their preexisting equity ownership, with SoftBank, the Company’s largest shareholder, maintaining approximately 50% ownership throughout. Although the Purported Notes were ostensibly secured by liens on the Debtors’ assets, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. For bankruptcy purposes, the Purported Notes must be treated in accordance with their economic reality as equity to ensure that the Defendants do not receive a recovery in these cases ahead of—or even *pari passu* with—general unsecured creditors. Accordingly, by this Motion, the Committee seeks derivative standing to file the adversary complaint attached hereto as Exhibit A (the “Complaint”) seeking either (i) recharacterization of the Defendants’ claims as equity, or (ii) equitable subordination of the Defendants’ claims to those of general unsecured creditors due to the Investor Defendants’ inequitable conduct in using their positions as insiders to acquire the Purported Notes to advance their parochial interests and obtain priority over other creditors. In addition, the Committee hereby objects to the Defendants’ claims under section 502(b) of the Bankruptcy Code. Because the Committee has direct standing to pursue a claim objection under section 502, the Court can grant the Committee’s request for recharacterization by sustaining its instant claim objection without first granting the Committee derivative standing to commence an adversary proceeding.

RELEVANT BACKGROUND

I. Overview of OneWeb: An Ambitious Project With No Operations or Revenue

7. Founded in 2012, OneWeb spent eight years attempting to develop an LEO satellite constellation system and associated ground infrastructure in the hope of one day delivering high-speed internet and other communication services for use by consumers, businesses, governmental entities, and institutions, including schools, hospitals, and other end-users, whether on the ground, in the air, or at sea.

8. [REDACTED] ⁴
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ⁵ [REDACTED]
[REDACTED]

II. Initial Equity Investments by Investor Defendants

9. Because it never generated revenue, OneWeb was always dependent upon massive capital infusions for its survival. [REDACTED]
[REDACTED] ⁶

10. In 2015, OneWeb raised approximately \$500 million in equity financing from non-bank entities with business interests in related industries, including \$125 million each from Defendants Airbus and Qualcomm and \$25 million from an affiliate of Defendant Banco

⁴ Compl. at ¶ 18.

⁵ *Id.* at ¶ 19.

⁶ See Ex. 2, Senior Secured Credit Facility Proposal, at SBG0008511.

Azteca.⁷ In 2016 and 2017, OneWeb raised another \$1 billion in equity from SoftBank and an additional more than \$200 million from existing equity investors, including \$100 million from Qualcomm, \$75 million from Grupo Salinas (the parent of Banco Azteca), and \$42 million from Airbus.⁸ OneWeb also raised \$40 million from the Government of Rwanda.⁹

11. At the time of these investments (and their subsequent “loans”), the Investor Defendants were engaged in business with OneWeb or held significant interests in businesses in related industries that would benefit from a global satellite communications network. Specifically, SoftBank held interests in telecommunications companies Sprint and T-Mobile; Banco Azteca affiliates held major interest in a cellular carrier; Airbus manufactured OneWeb’s satellites; Qualcomm designed and provided the wireless communications interface for OneWeb’s satellites; and the Government of Rwanda hoped to benefit from satellites providing internet service to rural schools in Rwanda.¹⁰

12. Each Defendant thus had vested interests in OneWeb’s success—based on its parochial business goals and not the interests of a typical shareholder or lender—and made substantial capital contributions (and, later, “loans”) in furtherance of those interests. In exchange, certain of the Investor Defendants, specifically, SoftBank, Airbus, and Qualcomm, received seats on OneWeb’s board of directors.¹¹ As of 2017, the Investor Defendants held over 70% of all equity in, and thus had effective control over, OneWeb.^{12,13}

⁷ Compl. at ¶ 22.

⁸ *Id.* at ¶ 23.

⁹ *Id.*

¹⁰ *Id.* at ¶ 24.

¹¹ *Id.* at ¶ 25.

¹² *Id.*

¹³ Indeed, Softbank alone had approximately 50% ownership of the Company’s stock and a designee sitting on the board of directors.

III. OneWeb's Failed Efforts to Raise Debt Financing from Third Parties

13. In addition to the equity capital it received from the Investor Defendants and other equity holders, OneWeb attempted for years to obtain debt financing from third parties.

[REDACTED]

[REDACTED] OneWeb hoped that loans from these parties would complement the equity funding it had raised.¹⁴

14. This financing, however, never materialized. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵

15. [REDACTED]

[REDACTED]

[REDACTED]¹⁶

IV. The 2018 "Note Purchase Agreement"

16. [REDACTED]

[REDACTED]

[REDACTED]¹⁷

17. [REDACTED]

[REDACTED]

¹⁴ Compl. at ¶ 28.

¹⁵ *Id.* at ¶ 29.

¹⁶ *Id.* at ¶ 30.

¹⁷ *Id.* at ¶ 31.

[REDACTED]

[REDACTED] 18 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 19 [REDACTED]

[REDACTED] 20

18. Notwithstanding its awareness of these issues, just days after the July 8th meeting, SoftBank agreed to advance up to \$500 million in new funding, but this time (and for the first time) pursuant to a Note Purchase Agreement dated July 12, 2018 (the “Original NPA”). Despite the agreement’s label, the Original NPA’s terms, and the circumstances surrounding it show that Purported Notes acquired thereunder would serve as capital contributions, not loans.²¹

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

²¹ Compl. at ¶ 37.

20. Following the execution of the Original NPA, SoftBank acquired Purported Notes under on six separate occasions in an aggregate amount of \$408 million: \$100 million on February 2, 2018; \$39 million on August 13, 2018; \$29 million on September 21, 2018; \$70 million on October 17, 2018; \$50 million on December 12, 2018; and \$120 million on January 11, 2019.

26

22 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 _____

[REDACTED] ²⁷ [REDACTED]

[REDACTED] ²⁸

V. The 2019 “A&R Note Purchase Agreement”

23. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ²⁹

24. This time around, at SoftBank’s urging, all the Investor Defendants agreed to participate in an Amended and Restated Note Purchase Agreement dated March 18, 2019 (the “A&R NPA” and, together with the Original NPA, the “NPAs”). [REDACTED]

[REDACTED]

[REDACTED] ³⁰ [REDACTED]

[REDACTED]

[REDACTED]

25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁷ See Ex. 19, SoftBank Presentation dated May 31, 2018, at SBG0015953.

²⁸ See Ex. 8, OneWeb March 2018 Board Presentation, at ONEWEB0006755.

²⁹ Compl. at ¶ 50.

³⁰ See, e.g., Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019 at AIRBUS_0000012

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³¹

26.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

^{32, 33}

27. The A&R NPA, like the Original NPA, purported to provide for security interests in OneWeb's assets. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³¹

³² Compl. at ¶ 55.

³³ Banco Azteca was a initially a party to the A&R NPA and the Warrant Purchase Agreement; however, the Committee understands that, upon receiving warrants, Banco Azteca assigned its rights and obligations under the warrants to Eagle Investment SCS, an entity affiliated with Ricardo Salinas, the individual who controls Banco Azteca and its affiliates, including a Mexican cellular carrier.

[REDACTED] ³⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ³⁶ [REDACTED]

[REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ³⁷ [REDACTED]

[REDACTED]

29. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ³⁸ [REDACTED]

[REDACTED] ³⁹

³⁴ See Ex. 22, Email from Yoshi Segawa (Softbank) Email to Alex Clavel (Softbank) dated Aug. 6, 2018, at ONEWEB0009021.

³⁵ See First Day Decl. ¶ 9 (Docket No. 3) (calling the spectrum assets OneWeb’s “most significant” assets).

³⁶ Compl. at ¶ 57.

³⁷ Each Defendant signed a letter agreement for this purpose. See, e.g., Ex. 23, Softbank Letter Agreement dated July 12, 2019.

³⁸ See Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019 at AIRBUS_0000012.

³⁹ Id. at AIRBUS_0000011 (emphasis added).

30. Pursuant the A&R NPA, Investor Defendants acquired Purported Notes, and provided funding to the Debtors, in a total aggregate amount of \$1.559 billion through October 2019, as follows (all amounts in millions of dollars):

Defendant	
SoftBank	
Banco Azteca	
Airbus	
Qualcomm	
Govt. of Rwanda	
Total	\$1,559

31.

[REDACTED]

[REDACTED]

[REDACTED] 42 [REDACTED]

[REDACTED]

[REDACTED] 43 [REDACTED]

[REDACTED]

[REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ See Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019, at AIRBUS_0000011.

32. Notwithstanding this knowledge, the Investor Defendants decided to purchase Purported Notes, on information and belief, to salvage (and enhance) their preexisting equity investments in OneWeb and to further other parochial interests,⁴⁴ all while obtaining ostensible priority over other shareholders and third-party creditors in the event of a bankruptcy.⁴⁵

VI. OneWeb's Inability to Secure Additional Financing and Eventual Bankruptcy

33. Even with the additional capital contributions by the Investor Defendants under the A&R NPA, OneWeb was still unable to bring its ambitious business plan to fruition. By early 2020, the Company was again in need of funding to stave off chapter 11.⁴⁶

34. In early March 2020, OneWeb believed it had secured additional long-term funding from existing shareholders. On March 12, 2020, however, these investors said they could not commit to such funding. On March 16, 2020, OneWeb entered into a term sheet for purported bridge financing from SoftBank to be consummated by March 26, 2020. On March 21, 2020, SoftBank notified the Company that such financing was unavailable.⁴⁷

35. On March 27, 2020 (the "Petition Date"), the Debtors filed chapter 11 petitions in this Court, commencing the above-captioned cases. By the time of the bankruptcy filing, OneWeb had never made payments to the Investor Defendants under the Purported Notes. The Debtors reported in their first-day filings that the aggregate amount owing under the Purported Notes, including purported accrued interest, is approximately \$1.733 billion.⁴⁸

⁴⁴

⁴⁵ Compl. at ¶ 66.

⁴⁶ *Id.* at ¶ 70.

⁴⁷ *Id.* at ¶ 71.

⁴⁸ *Id.* at ¶ 72.

36. Once in chapter 11, the Debtors commenced a process for selling their assets.⁴⁹ The Debtors recently announced that the Successful Bid (as defined in the Bidding Procedures Order) will generate, upon approval of a chapter 11 plan implementing such bid, approximately \$190 million in consideration to the Defendants—\$100 million in the form of equity in the reorganized Debtors and \$90 million in the form of repayment of the roll-up DIP loans.⁵⁰ Accordingly, if the Defendants have valid claims secured by unavoidable, perfected security interests, general unsecured creditors are unlikely to see any recovery from the Debtors' assets.⁵¹

VII. The Committee's Investigation of Potential Claims

37. On April 16, 2020, the Committee was appointed by the United States Trustee to represent the interests of the Debtors' general unsecured creditors.⁵²

38. On April 30, 2020, the Court entered the Cash Collateral Order. The Debtors stipulated therein that the Defendants hold valid claims against the Debtors and perfected liens on their assets. Paragraph 11 of the order, however, authorized the Committee to investigate, without limitation, the "amount, character, validity, priority, and extent of" such claims and liens for a period of 75 days (*i.e.*, until July 14, 2020).⁵³

39. For the past approximately two months, the Committee has conducted an extensive investigation into potential claims that would benefit the estates, including claims against the Defendants. This investigation has included the receipt of thousands of documents

⁴⁹ See Order (A) Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing and Approving Form and Manner of Notice Thereof, (C) Approving Assumption and Assignment Procedures and Form and Manner of Notice Thereof; and (D) Granting Related Relief (the "Bidding Procedures Order") [Docket No. 104].

⁵⁰ See Notice of (A) Successful Bidder, (B) Adequate Protection of Future Performance, and (C) Proposed Assumed Contracts [Docket No. 367], Ex. A (Plan Support Agreement), Ex. A (Term Sheet) at 2-3.

⁵¹ Compl. at ¶ 73.

⁵² *Id.* at ¶ 74.

⁵³ *Id.* at ¶ 75.

from certain of the Defendants and the Debtors and informal interviews. Based on this investigation, the Committee has concluded that the claims described herein hold substantial value for unsecured creditors and are in the estates' best interests to pursue.⁵⁴

RELIEF REQUESTED

40. The Committee requests an order (i) granting it derivative standing to pursue and, if appropriate, settle claims against the Defendants for recharacterization or equitable subordination of their claims against the Debtors, or (ii) disallowing Defendants' claims under section 502(b) of the Bankruptcy Code on the ground that they are in reality equity interests.

**ARGUMENT ON MOTION FOR STANDING TO PURSUE RECHARACTERIZATION
AND EQUITABLE SUBORDINATION CLAIMS**

41. In *In re STN Enterprises*, the Second Circuit held that a creditors' committee may obtain standing to pursue claims on behalf of the bankruptcy estate where the committee has shown (i) the existence of "colorable" claims, and (ii) that the trustee or debtor in possession has unjustifiably failed to bring suit or abused its discretion in not suing. *Unsecured Creditors Comm. Of Debtor STN Enters. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904-05 (2d Cir. 1985) (citing sections 1103(c)(5) and 1109(b) as forming the basis for such authority).

42. Claims are colorable so long as the committee's allegations, taken as true, present plausible claims for relief sufficient to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Hr'g Tr. at 47:21-23, *In re Christian Bros.' Inst.*, No. 11-22820-RDD (Bankr. S.D.N.Y. Aug. 6, 2012) (Drain, J.) [Docket No. 407]; *see also Official Comm. of Unsecured Creditors of the Debtors v. Austin Fin. Serv. (In re KDI Holdings, Inc.)*, 277 B.R.

⁵⁴ The Court has ordered Bankruptcy Rule 2004 discovery from Banco Azteca [Docket No. 355], directing it and its affiliates to produce documents to the Committee by July 14, 2020. The Committee received an initial production from Banco Azteca on July 12, 2020 but has not had time to review its contents. The Committee reserves its right to supplement this motion and its complaint with these or any other materials it receives in discovery.

493, 508 (Bankr. S.D.N.Y. 1999) (calling the inquiry “‘much the same as that undertaken when a defendant moves to dismiss a complaint for failure to state a claim’”) (*quoting Official Comm. of Unsecured Creditors of America's Hobby Ctr. v. Hudson United Bank (In re America's Hobby Ctr.)*, 223 B.R. 275, 281 (Bankr. S.D.N.Y. 1998)). “Caselaw construing requirements for ‘colorable’ claims has made it clear that the required showing is a *relatively easy one to make*.” *Adelphia Commc’ns. Corp. v. Bank of Am. (In re Adelphia Commc’ns. Corp.)*, 330 B.R. 364, 376-77 (Bankr. S.D.N.Y. 2005) (emphasis added) (granting committee’s motion for standing to pursue fraudulent conveyance and other claims); *see also* Hr’g Tr. at 47:21-23, *In re Christian Bros.’ Inst.* (granting motion for standing even though it was “clear . . . that th[e] [proposed litigation] would not be an easy case for the committee to win,” as Court did not “see it as being a case that would die in a motion to dismiss”).

43. Assuming the proposed claims are colorable, the Court must next determine whether pursuing the claims would likely benefit the debtor’s estate. *In re Am.’s Hobby Ctr.*, 223 B.R. at 282. This inquiry requires the court to “weigh[] . . . the probability of success and financial recovery, whether it is preferable to appoint a trustee to bring suit instead of the creditors’ committee, and ‘the terms relative to attorneys’ fees on which suit might be brought.” *Id.* at 282 (quoting *STN*, 779 F.2d at 905). The committee need not, however, show a likelihood of success on the merits to prevail on this factor, *Adelphia*, 330 B.R. at 386, nor should the court conduct a “mini trial” on the committee’s claims. *See STN*, 779 F.2d at 905.

44. Overall, the bar a committee must meet to obtain derivative standing is not high. As Judge Gerber observed in *Adelphia*:

[T]hose proposing to pursue litigation on behalf of an estate must give the Court comfort that their litigation will be *a sensible expenditure of estate resources*. That means, as a practical matter, providing the Court with a predicate for concluding that the claims will, if proven, provide a basis for recovery, and that

the proposed litigation will not be a hopeless fling. It also means, as a practical matter, that the prospective rewards can reasonably be expected to be commensurate with the litigation's foreseeable cost. ***But no more than that is required***

Adelphia, 330 B.R. at 386 (further explaining that the purpose of inquiry is not to protect rights of prospective defendants but rather “to protect the estate, to ensure that the litigation reasonably can be expected to be a sensible expenditure of estate resources, and will not impair reorganization.”).⁵⁵ As explained below, the Committee has more than made this showing.

I. The Committee’s Claims Are Colorable

45. The Committee has colorable claims to recharacterize the Purported Notes because the Committee’s allegations, if proven, show that the Purported Notes are, in economic substance, equity interests that should be treated as such in these chapter 11 cases.

A. Bankruptcy Courts Have Authority to Determine the Proper Characterization of an Investment Under the Bankruptcy Code Applying Federal Law

46. “[T]here can be little doubt that bankruptcy courts have the power to recharacterize debt as equity when such is warranted by the facts.” *Weisfelner v. Blavatnick (In re Lyondell Chem.)*, 544 B.R. 75, 93 (Bankr. S.D.N.Y. 2016). This power derives from, among other things, the broad authority of bankruptcy courts under section 105(a) of the Bankruptcy Code to take actions as necessary to achieve equitable results. *See Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (In re Dornier Aviation (N. Am.), Inc.)*, 453 F.3d 225, 231 (4th Cir. 2006) (“In our view, recharacterization is well within the broad powers afforded a bankruptcy court in § 105(a) and facilitates the application of the priority scheme laid out in §

⁵⁵ Although *Adelphia* involved a situation where the debtor had agreed to pursue the claims with the committee, the court still had to consider whether the claims were in the best interests of the estate, including with some consideration of the claims’ merits. *Id.* at 386. The court then went on to apply the same “colorability” standard and made clear in doing so that its comments applied to both “*Housecraft* **and** *STN* [*i.e.*, where the debtor does not consent] motions.” *Id.*

726.”). These equitable powers help ensure that “substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done.” *Lyondell*, 544 BR at 92 (quoting *Pepper v. Litton*, 308 U.S. 295, 305 (1939)). Bankruptcy courts also have the ability to disallow a claim that is in fact an equity interest under section 502(b) of the Bankruptcy Code,⁵⁶ which allows courts to disallow claims by parties who are not legitimate creditors. *See* 11 U.S.C. § 502(b).⁵⁷

47. Regardless of which section of the Bankruptcy Code governs the recharacterization analysis, federal law applies. Although the Second Circuit has not had occasion to address the issue, this is the conclusion that the majority of the other courts of appeals⁵⁸ and numerous bankruptcy courts in this district have reached.⁵⁹ While two circuit courts⁶⁰ have applied state law, instead of federal law, to the analysis of a related issue, no court in this district has held that state law governs the issue of the true characterization of an instrument labeled as debt. Nor should this Court.

⁵⁶ The Committee, as a party in interest, has standing to assert a claim objection under section 502(b) directly. Thus, the Court need not grant the Committee derivative standing to seek recharacterization of the Defendants’ claims but can instead grant the Committee’s claim objection, as set forth herein.

⁵⁷ Bankruptcy courts may also have the ability to recharacterize claims as equity as a form of “no fault” equitable subordination under section 510(c) of the Bankruptcy Code. *See* Lawrence Ponoroff, *Whither Recharacterization*, 68 Rutgers U.L.R 1217 (2016). Thus, section 510(c) provides another statutory mechanism for the Court to grant this motion.

⁵⁸ *See Fairchild Dornier GMBH v. Official Comm. of Unsecured Creditors (In re Official Comm. of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.)*, 453 F.3d 225, 234 (4th Cir. 2006); *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 456 (3d Cir. 2006) (Ambro, C.J.); *Sender v. Bronze Group (In re Hedged-Invs. Assoc., Inc.)*, 380 F.3d 1292, 1298 (10th Cir. 2004); *Redmond v. Cimarron Energy Co. (In re Alternate Fuels, Inc.)*, 507 B.R. 324 (10th Cir. BAP 2014), *reversed on other grounds*, 789 F.3d 1139 (10th Cir. 2015); *Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726, 748 (6th Cir. 2001).

⁵⁹ *See, e.g., Official Comm. of Unsecured Creditors v. Bay Harbour Master Ltd. (In re BH S & B Holdings LLC)*, 420 B.R. 112, 158 (Bankr. S.D.N.Y. 2009); *In re Yoga Smoga, Inc.*, No. 16-13159-mew, 2016 WL 8943849 (Bankr. S.D.N.Y. Dec. 21, 2016); *In re: Aéropostale, Inc.*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016); *In re Lyondell Chem.*, 544 B.R. 75 (Bankr. S.D.N.Y. 2016); *Official Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas Corp.)*, 562 B.R. 211, 216 (S.D.N.Y. 2016).

⁶⁰ *See Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.)*, 650 F.3d 539 (5th Cir. 2011); *Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 714 F.3d 1141 (9th Cir. 2013).

B. The Recharacterization Analysis Under the Bankruptcy Code Looks to the Economic Reality of the Transaction

48. In analyzing whether to recharacterize⁶¹ an investment as equity when it has been dressed up as a loan, the court must look at the economic substance of a transaction, instead of the labels given to it, to identify its true nature.⁶² *See Yoga Smoga*, 2016 WL 8943849, at *6 (“Properly viewed, what it really is, is an effort to look behind labels and to see, based on what parties actually intended to do, and how they actually structured their deal, whether something was debt or equity at the time.”). Recharacterization is the last step in the process and will follow if, after analysis, the court determines that the true nature of the transaction is different than the documents and labels the parties employed. The first step is for the court to assess the true substance of the transaction rather than the forms the parties used. In assessing the economic realities of an investment, the question is whether the investor was acting in the capacity of a lender (*i.e.*, investing capital with the objective of earning a rate of return (from interest and fees) greater than its cost of capital) or whether the totality of the circumstances indicate that the investor had a different expectation. As stated by the Third Circuit, the court must ultimately reach a “commonsense conclusion” as to whether “the party infusing funds does so as a banker (the party expects to be repaid with interest no matter the borrower’s fortunes; therefore, the funds are debt) or as an investor (the funds infused are repaid based on the borrower’s fortunes; hence, they are equity).” *SubMicron*, 432 F.3d at 456.

⁶¹ The term “recharacterization” is a bit “misleading” in that the analysis really focuses on the “proper characterization in the first instance of an investment;” if the investment is equity, then there is technically nothing to “re characterize.” *SubMicron*, 432 F.3d at 454 n. 7, 455-56 (the “overarching inquiry” is “whether the parties called an instrument one thing when in fact they intended it as something else”).

⁶² Understood correctly, so-called recharacterization works only one way. If the parties called an investment equity, it is equity. If the parties called an investment debt, it may or may not be debt.

49. This “substance over form” inquiry is not unique to debt recharacterization. The Supreme Court has applied the same analysis in tax cases. *See Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) (“In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed. The Court has never regarded the simple expedient of drawing up papers as controlling for tax purposes when the objective economic realities are to the contrary.”) (internal quotations omitted). The Second Circuit has applied similar principles to determine whether or not a purported lease is a “true lease” under the Bankruptcy Code. These cases recognize that “the use of terms such as ‘lease’ or ‘landlord’ and ‘tenant’ does not automatically transform an agreement into a bona fide lease for the purposes of [the Bankruptcy] Code; rather, a court must look to the economic substance of the transaction and not its form.” *Rensselaer Polytechnic Inst.*, 936 F.2d at 748 (internal quotations omitted) (finding that lease was not “true lease” despite its label); *see also, e.g., In re United Airlines, Inc.*, 368 F.3d 720, 724 (7th Cir. 2004) (Easterbrook, C.J.) (recognizing, in evaluating whether credit card processing agreement was a “financial accommodation,” that court must “determine the nature of the entire transaction rather than hunt for features that look like loans or guarantees”); Hr’g Tr. at 67:10-20, *In re Great Atl. & Pac. Tea Co., Inc.*, No. 10-24549-RDD (Bankr. S.D.N.Y. Sept. 26, 2011) [Docket No. 2658] (Drain, J.) (focusing on “substance as opposed to the phraseology that the parties have used” in determining that an agreement was not, in “economic substance,” a true lease).

50. Courts in this district and elsewhere have applied a set of factors to help determine whether a purported loan was in substance equity. These factors are not controlling and are meant only to guide the court in its broader analysis. Not all factors are—or should be—weighed equally, and “[n]one of the[] factors is dispositive and their significance may vary

depending upon circumstances.” *In re Hedged-Invs. Assocs., Inc.*, 380 F.3d at 1298–99;
SubMicron, 432 F.3d at 456 (“No mechanistic scorecard suffices.”).

51. The factors most often applied, and those that have been applied by the
bankruptcy courts in this district—often called the “*AutoStyle* factors”—are as follows:

(1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.

In re Adelphia Commc'ns Corp., 365 B.R. 24, 74 (Bankr. S.D.N.Y. 2007) (citing *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749–50 (6th Cir.2001)).

C. The Committee Has Pled Colorable Claims that the Purported Notes Are, In Economic Reality, Equity Interests, and Should Be Treated as Such

52. As discussed above, to have colorable claims, a committee's complaint need only be sufficient to survive a motion to dismiss under Rule 12(b)(6). This requires no more than “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); Fed. R. Bankr. P. 7008 (applying Rule 7008 to adversary proceedings). A “short and plain” statement is sufficiently detailed if it provides a defendant with “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (internal quotations omitted). The asserted claim need only be “plausible on its face”—that is, it must support a “reasonable inference that the defendant is liable . . .” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

53. Here, the Committee's allegations, taken as true, are more than sufficient to support a “reasonable inference” the Purported Notes were, in reality, equity interests. This is so

because the Investor Defendants, unlike true lenders, relied exclusively on the fortunes of OneWeb's "business" for repayment and extended funding to the Company on terms on which no legitimate, third-party lender would lend.⁶³ [REDACTED]

[REDACTED]

[REDACTED]⁶⁴

The Investor Defendants agreed to acquire the Purported Notes to protect and expand (through the receipt of warrants entitling them to additional shares of stock) their existing equity investments in the Company and to gain seniority over the Committee's constituents.⁶⁵ These strategies were consistent with the broader financial objectives of the Investor Defendants, each of which had other equity holdings in related-industry companies and, with the exception of Banco Azteca, was not in the business of making loans.⁶⁶

54. The express equity components built into the NPAs further illuminate the true nature of the investments. [REDACTED]

[REDACTED]⁶⁷ [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

⁶³ Compl. at ¶ 32.

⁶⁴ *Id.*

⁶⁵ Upon information and belief, Airbus also sought to ensure that OneWeb would have sufficient funds to continue paying Airbus on its existing satellite manufacturing contract with OneWeb.

⁶⁶ Banco Azteca is an affiliate of the broader Grupo Elektra and Grupo Salinas family, which held the equity investments in OneWeb and which have ownership interests in a cellular telephone business. Banco Azteca would not have purchased Purported Notes if not for these corporate relationships.

⁶⁷ [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]⁶⁸

55. The Debtors also apparently viewed the Purported Notes as akin to equity. For example, in a March 2018 board presentation, the Company [REDACTED]

[REDACTED]⁶⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁰ [REDACTED]

[REDACTED]

[REDACTED]⁷¹ [REDACTED]

[REDACTED]⁷²

56. Based on these allegations, the “commonsense” conclusion, *see SubMicron*, 432 F.3d at 456, is that the Investor Defendants provided funding to OneWeb as “investors,” not “bankers.” *Id.* Thus, the Committee has asserted a colorable claim that the investments were equity, not debt, and therefore recharacterization is appropriate.

⁶⁸ Compl. at ¶ 55.

⁶⁹ Ex. 8, Mar. 2018 Board Presentation, at ONEWEB0006755; *see also* Ex. 17, Email from Milbank (Debtors’ counsel) to Allen & Overy (DFI counsel) dated Apr. 26, 2018 [REDACTED]

⁷⁰ [REDACTED] *See* Ex. 31 at ONEWEB0006605.

⁷¹ *See* Ex. 21, Jan. 17, 2019 Board Presentation, at ONEWEB0006936 (emphasis added); *see also* Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019, at AIRBUS_0000011 [REDACTED]

⁷² *See* Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019 at AIRBUS_0000011 [REDACTED]

D. Application of the *AutoStyle* Factors Supports Recharacterization of the Purported Notes

57. Although the Committee does not believe it is strictly necessary for the Court to further evaluate each of the *AutoStyle* factors, a review of these factors further supports the Committee’s position. The substantial majority of the eleven factors either directly support recharacterization or are at worst neutral in the analysis when properly viewed within the circumstances of this case. Only one factor weighs slightly against recharacterization.

1. Six Factors Strongly Support Recharacterization

58. Six of the *AutoStyle* factors—(i) the adequacy or inadequacy of capitalization; (ii) the identity of interest between the creditor and the stockholder; (iii) the source of repayments; (iv) the corporation’s ability to obtain financing from outside lending institutions; (v) the extent to which the advances were used to acquire capital assets; and (vi) the presence or absence of a sinking fund to provide repayments—weigh heavily in favor of recharacterizing the Purported Notes as equity interests.

(i) OneWeb Was Severely Undercapitalized At All Relevant Times

59. “Thin or inadequate capitalization is strong evidence that [] advances are capital contributions rather than loans.” *AutoStyle*, 269 F.3d at 751. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷³ [REDACTED]

[REDACTED]⁷⁴

⁷³ Compl. at ¶ 28.

⁷⁴ See, e.g., Compl. at ¶ 31.

60. [REDACTED]

[REDACTED]⁷⁵ [REDACTED]

[REDACTED]⁷⁶ [REDACTED]

61. [REDACTED]

[REDACTED]⁷⁷ [REDACTED]

[REDACTED]⁷⁸ [REDACTED]

62. Some courts have been reluctant to “put too much emphasis on th[e]
[undercapitalization] factor,” *BH S & B Holdings*, 420 B.R. at 159, because they do not want to

⁷⁵ Compl. at ¶ 31.

⁷⁶ [REDACTED]

⁷⁷ [REDACTED]

⁷⁸ [REDACTED]

“penalize [lenders] for lending to a distressed company.” *Aeropostale*, 555 B.R. at 422. This concern is not implicated here, because OneWeb was not a once-healthy business that fell on hard times and needed emergency financing to stay afloat; rather, it was never really a business at all. OneWeb hoped to one day finish building out its satellite constellation and begin operations, but it never even approached that point. The Investor Defendants’ capital infusions in 2018 and 2019 were not meant to “fund [OneWeb’s] turnaround,” *id.*, but rather to fund the massive additional capital expenditures necessary for the Company to move toward operational status. Recharacterizing the Purported Notes under these circumstances would not discourage lending to distressed companies in the future.

63. In summary, OneWeb was severely undercapitalized at all relevant times. Accordingly, the factor weighs strongly in favor of recharacterization.

(ii) OneWeb Had No Ability to Obtain Financing From Third-Party Lenders

64. “The fact that no reasonable creditor would have acted in the same manner [as the purported creditor] is strong evidence that the advances were capital contributions rather than loans.” *BH S & B Holdings*, 420 B.R. at 158 (citing *AutoStyle*, 269 F.3d at 752). This factor looks at the debtor’s “ability to obtain financing from outside lending institutions.” *See In re AutoStyle Plastics, Inc.*, 269 F.3d at 750.

65. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁹ Compl. at ¶ 29.

[REDACTED]

[REDACTED]

[REDACTED]⁸⁰ [REDACTED]

[REDACTED]

[REDACTED]

66. Although some courts have applied this factor differently when analyzing new purported loans made to a debtor for the purpose of protecting preexisting loans to the debtor, *see SubMicron*, 432 F.3d at 457, the Investor Defendants here had not made other loans to OneWeb. When SoftBank first acquired Purported Notes in 2018, its relationship with OneWeb was solely as an equity holder. The same is true for the other Investor Defendants who first bought Purported Notes in 2019; prior to that point, they were shareholders. The fact that the Investor Defendants may have acquired Purported Notes to protect existing *equity* investments only supports the conclusion that such “notes” were, in reality, further equity.

67. The Committee is aware of Judge Gerber’s observation in *Lyondell* that an existing shareholder, like an existing lender, might make legitimate loans to a financially distressed company to protect its equity investment when no outside lender would do so. 544 B.R. at 99. This reasoning, however, is inconsistent with the purpose of this factor. As stated by the Sixth Circuit, this factor specifically asks whether financing is available to the company from “*outside* lending institutions.” (emphasis added). *AutoStyle*, 269 F.3d at 752. In other words, this factor assumes that the party whose claims are being challenged is an insider holding a preexisting interest in the debtor. Indeed, as Judge Gerber himself recognized in *Adelphia*, it is the “*paradigmatic situation for recharacterization*” where the same individuals or entities (or

⁸⁰ Compl. at ¶ 29.

affiliates of such) control both the transferor and the transferee, and inferences can be drawn that funds were put into an enterprise with little or no expectation that they would be paid back along with other creditor claims.” *Adelphia*, 365 B.R. at 74 (emphasis added). This is exactly what the Committee has alleged here: at the time of the transactions in question, the Investor Defendants were controlling equity holders of the Debtor, sat on both sides of the NPAs, had no legitimate expectation of repayment as creditors, and were the only parties willing to fund the Company. Recharacterization is appropriate under these circumstances.

68. For all of these reasons, OneWeb’s repeated inability to obtain financing from third-party lending institutions weighs strongly in favor of recharacterization.

(iii) Repayment of the Purported Notes was Entirely Dependent Upon the Success of OneWeb’s Business or Its Ability to Raise Additional Financing

69. This factor supports recharacterization “[i]f the expectation of repayment depends solely on the success of the borrower’s business,” thus creating “the appearance of a capital contribution.” *AutoStyle*, 269 F.3d at 751; see *BH S & B Holdings*, 420 B.R. at 159 (finding this factor weighed in favor of recharacterization because the committee “adequately pled that the source of repayments was expected to be [the borrower’s] earnings”).

70. [REDACTED]

[REDACTED] The Investor Defendants knew that OneWeb could pay principal and interest on the Purported Notes only if its business succeeded or if it could obtain replacement financing from other sources.⁸¹ See *Lyondell*, 544 B.R. at 96-97 (finding that this factor supported recharacterization where trustee had alleged, among other things, details of debtor’s liquidity issues and lenders’ knowledge of such issues). Moreover, as discussed below,

⁸¹ Compl. at ¶ 58.

although the Purported Notes were ostensibly secured, the value of the collateral was far less than the amount advanced. Thus, the Investor Defendants could not have reasonably relied on the collateral as a source of repayment.

71. That the Investor Defendants viewed the Purported Notes as equity investments is further evidenced by the fact that they required the stock warrants as an inducement to “lend.” The Investor Defendants knew it would not have been economically feasible to simply loan funds to the Company in exchange for promised repayment of principal plus capitalized interest. To justify the transaction economically—and to ensure it fit within their broader investment strategies—the Investor Defendants required the warrants, which allowed them to further participate in OneWeb’s “upside” should it succeed, and the ability to obtain priority over existing creditors and shareholders who did not acquire Purported Notes.⁸²

72. The parties’ communications remove any doubt as to their lack of expectation of repayment. In a January 2019 board presentation (which would have been presented to the Investor Defendants’ board designees), the Company noted that [REDACTED]

[REDACTED]⁸³

[REDACTED]

[REDACTED]

[REDACTED]⁸⁴ [REDACTED]

⁸² Compl. at ¶ 55.

⁸³ See Ex. 21, Jan. 17, 2019 OneWeb Board Presentation, at ONEWEB0006936 (emphasis added). [REDACTED]

⁸⁴ See Ex. 18, June 2018 Presentation re Project Owl, at SBG0009586.

[REDACTED]⁸⁵ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁸⁶

73. In summary, the allegations of the Complaint are more than sufficient to show that the Investor Defendants relied upon the success of the business for repayment. This factor thus weighs strongly in favor of recharacterizing the Purported Notes as equity contributions.

(iv) OneWeb Used the Proceeds of the Purported Notes to Make Capital Investments, Not to Fund Operations

74. “Use of advances to meet the daily operating needs of the corporation, rather than to purchase capital assets, is indicative of bona fide indebtedness.” *AutoStyle*, 269 F.3d at 752. “Conversely, the use of advances to acquire capital assets may indicate that the advances had the nature of a capital contribution.” *In re Cold Harbor Assocs., L.P.*, 204 B.R. 904, 918 (Bankr. E.D. Va. 1997) (holding that use of advances to eliminate lien on company real estate “further convinces this Court that the advances were in fact equity contributions”).

75. The Complaint alleges that OneWeb used all or the vast majority of the \$1.559 billion the Investor Defendants advanced under the NPAs to make capital investments.⁸⁷ Only a

⁸⁵ [REDACTED]

⁸⁶ See Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019 at AIRBUS 0000011. [REDACTED]

⁸⁷ Compl. at ¶ 61.

small portion was used to pay general operating expenses. Indeed, OneWeb *never even had operations*; thus, any “operational” expenditures that OneWeb incurred were merely incidental to the development of its capital assets. [REDACTED]

[REDACTED]

[REDACTED]⁸⁸ [REDACTED]

[REDACTED]⁸⁹

76. [REDACTED]

[REDACTED]

[REDACTED] The Fourth Circuit considered and rejected a similar contention in *Dornier Aviation*, finding that a transfer of inventory (instead of cash) could be viewed as a “loan” because the debtor otherwise would have needed to pay for the inventory under a sales arrangement. *See* 453 F.3d at 234 (noting that a ruling to the contrary would elevate form over substance and “simply invite equity investors to structure their capital contributions” as non-cash transfers). The same logic applies here: [REDACTED]

[REDACTED]

Allowing Qualcomm’s investment to be treated as a loan in this situation would be a classic elevation of form over substance.

77. In summary, all of the Investor Defendants, including Qualcomm, made investments that the Company used to acquire capital assets. This weighs in favor of a finding that the Purported Notes were in reality equity interests.

⁸⁸ *See* OneWeb Strategic Plan Financial Model Phase 1 + Phase 2, February 2020, Ex. 27.

⁸⁹ *See* OneWeb Update Presentation in September 2018, Ex. 28 at SBG0017987.

(v) A Substantial Identity of Interest Exists Between the Investor Defendants and OneWeb's Equity Holders

78. “If stockholders make advances in proportion to their respective stock ownership, an equity contribution is indicated,” while “a sharply disproportionate ratio between a stockholder’s percentage interest in stock and debt is indicative of bona fide debt.” *AutoStyle*, 269 F.3d at 751. In this case, each of the Investor Defendants was an existing equity holder in OneWeb and extended financing to OneWeb via the Purported Notes in approximate proportion to its equity holdings.

79. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁰ The fact that the Investor Defendants other than SoftBank ultimately decided not to exercise this purchase right in 2018 does not change what the Original NPA demonstrates about the nature of the investment.

80. In 2019, the other Investor Defendants decided to invest alongside SoftBank under the A&R NPA. [REDACTED]

[REDACTED]

[REDACTED]⁹¹ The end result was that each of the Investor Defendants made “loans” to OneWeb in the approximate proportion of their equity ownership. [REDACTED]

[REDACTED]

⁹⁰ [REDACTED]

⁹¹ [REDACTED]

[REDACTED]⁹²); [REDACTED]
[REDACTED]

81. The table below⁹³ shows how these investments compared to each Defendant's (i) pre-existing proportional equity interests among all investors in OneWeb, and (ii) proportional equity interests among the other Investor Defendants when warrants are included:

Investor	Pre-NPA Equity Ownership %	Equity Ownership % Calculated Based Upon the Investor Defendants Only (including warrants)	Purported Loan %
SoftBank	[REDACTED]		
Banco Azteca ⁹⁴			
Airbus			
Qualcomm			
Government of Rwanda			

82. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁹² The \$429 million was comprised of \$408 million in purported principal and \$21 million in purported accrued interest.

⁹³ Compl. at ¶ 62.

⁹⁴ Banco Azteca's equity was held by certain affiliated entities.

[REDACTED]

[REDACTED]⁹⁵ [REDACTED]⁹⁶

83. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁷ Such a provision would be highly unusual, if not unheard of, in traditional commercial markets where participants highly value the ability to sell their loans to other parties.

84. While some courts have described this factor as looking for an “exact” correlation between equity holdings and debt, the absence of such an exact correlation does not support a finding that the transaction is debt. If that were the test, it would be quite easy for investors to stagger their investments in small amounts so as to negate this factor. Here, although certain of the Investor Defendants’ debt and equity positions are not exactly proportionate, they are certainly not “sharply disproportionate.”⁹⁸ As such, this factor weighs in the direction of equity.

(vi) No Sinking Fund Existed for Repayments

85. “The failure to establish a sinking fund for repayment is evidence that the advances were capital contributions rather than loans.” *AutoStyle*, 269 F.3d at 753. For example, in *Cold Harbor*, the bankruptcy court found that the debtor’s failure to have “ever even considered establishing a sinking fund to provide for the repayment of the advances” supported

⁹⁵ Compl. at ¶ 63.

⁹⁶ The likely explanation as to why Qualcomm’s correlation is not as high as the others is that Qualcomm invested by rolling over the entirety of an existing contract receivable. Unlike the others, Qualcomm did not choose to invest a set amount of cash equal to its existing ownership percentage.

⁹⁷ Ex 13, A&R NPA, at § 5.2.

⁹⁸ “[A] sharply disproportionate ratio between a stockholder’s percentage interest in stock and debt is indicative of bona fide debt.” *AutoStyle*, 269 F.3d at 751.

the conclusion that the transaction did not “bear the earmarks of a loan,” because the parties paid “little regard for the method of repayment.” 204 B.R. at 918. The same is true here: not only did OneWeb not establish a sinking fund for repayment, but it had no means to do so because it lacked the requisite liquidity.

86. In *AutoStyle*, the court recognized that this factor may be somewhat mitigated by the presence of a security interest, 269 F.3d at 753. Here, however, the collateral securing the Purported Notes was worth substantially less than the amounts owed on the Purported Notes. *See infra* at ¶¶ 96-98. Under these circumstances, a sinking fund could have protected the Investor Defendants against this shortfall, but none existed. This factor thus supports recharacterization.⁹⁹

2. Four Factors Are At Worst Neutral in the Analysis

87. While the above six factors clearly support recharacterization, the following four factors—(i) the presence or absence of a fixed maturity date and schedule of payments; (ii) the presence or absence of a fixed rate of interest and interest payments; (iii) the security, if any, for the advances; and (iv) the extent to which the advances were subordinated to the claims of outside creditors—are at worst neutral in the analysis.

(i) The Purported Notes Contained No Schedule of Payments, and, Although They Established Fixed Maturity Dates, Such Dates Were Illusory

88. “The absence of a fixed maturity date and a fixed obligation to repay is an indication that the advances were capital contributions and not loans . . . [and] the absence of a set schedule of repayment of principal weighs in favor of equity, but is not dispositive.”

⁹⁹ The Committee is aware that some courts, including Judge Gerber in *Lyondell*, have been skeptical of whether this factor has relevance in modern corporate financings. *See Lyondell*, 544 B.R. at 101. The Committee believes this factor remains relevant here at least insofar as a sinking fund could have supported OneWeb’s repayment of the Purported Notes, had one existed.

Lyondell, 544 B.R. at 95 (quoting *AutoStyle*, 269 F.3d at 750). [REDACTED]

[REDACTED]

[REDACTED]

89. [REDACTED]

¹⁰⁰ [REDACTED]

[REDACTED]¹⁰¹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

90. [REDACTED]

[REDACTED]

[REDACTED]¹⁰² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Without both, there was no realistic chance that the

Company would be capable of repaying the “debt” on the stated maturity date.

91. Accordingly, despite the fact that the Purported Notes contained nominal maturity dates, this factor either weighs in favor of recharacterization or is at worst neutral in the analysis.

¹⁰⁰ Compl. at ¶ 38.

¹⁰¹ *Id.* at ¶ 39.

¹⁰² *Id.* at ¶ 54.

- (ii) While the Purported Notes Contained a Fixed Rate of Interest,
There Was No Requirement That Interest Be Paid Prior to Maturity

92. “The absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans.” *AutoStyle*, 269 F.3d at 750. Conversely, the presence of a fixed rate of interest does not necessarily indicate that an investment was debt if no provisions were made for the payment of interest. *See Cold Harbor*, 204 B.R. at 918 (“Although there is a defined rate of interest on the face of the notes, no provisions have been made for the payment of interest payments prior to a demand for repayment in full by a shareholder.”).

93. [REDACTED]

[REDACTED]

[REDACTED] ¹⁰³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ¹⁰⁴

94. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰³ [REDACTED] *See Ex. 12, A&R NPA, at B § 4(b).*

¹⁰⁴ Compl. at ¶ 40.

95. In sum, although the NPAs contained ostensible fixed interest rates, they did not impose a schedule of cash payments, nor were any such payments ever made. For these reasons, this factor on balance supports recharacterization. At a minimum, it is neutral.

96. “The absence of a security for an advance is a strong indication that the advances were capital contributions rather than loans.” *AutoStyle*, 269 F.3d at 752. While other courts have recognized that the presence of a security interest is indicative of debt, this factor intuitively should not weigh against recharacterization because it presumes the answer to the inquiry; to wit, that the investment is debt. Additionally, the presence of security should not be a factor in favor of debt if the enterprise has no revenues and the value of the ostensible collateral is a mere fraction of the amount of the purported debt obligation.

97. Here, although the Investor Defendants obtained purported security interests in substantially all of OneWeb’s assets in exchange for their investments, the Complaint alleges that these assets were worth far less than the face amount of the Purported Notes.¹⁰⁶ In total, the Investor Defendants “lent” approximately \$1.56 billion to OneWeb through the end of 2019. [REDACTED]

¹⁰⁷ Ex. 29, Mar. 4, 2020 Presentation re: Perspectives on Value of OneWeb's Global Ku- and Ka-Band Authorization, at OCOW-00004920. [REDACTED]

98. In summary, the Purported Notes may have been “undersecured” by more than one billion dollars, and the results of the recent sale process more than confirm that point. In this scenario, the security interests would not, in the mind of a reasonable lender, have provided a meaningful source of repayment. For this reason, to make sure form does not prevail over substance, the presence of purported security interests under the Purported Notes should not weigh against recharacterization. It should be neutral in the analysis.

(iv) The Investor Defendants Agreed to Subordinate Their Claims to Those of Legitimate Outside Lenders

99. “Subordination of advances to claims of all other creditors indicates that the advances were capital contributions and not loans.” *AutoStyle*, 269 F.3d at 752. While this factor technically refers to subordination to “all” creditor claims, partial subordination and/or lack of seniority to other creditor claims remains a relevant consideration. *See Lyondell*, 544 B.R. at 100 (holding that where advances ranked *pari passu* with claims of other unsecured creditors, “this factor [was] neutral”); *see also AutoStyle*, 269 F.3d at 752 (noting that defendants’ agreement to subordinate their claims to those of certain (but not all) other creditors was a “slight indication of equity”).

100. The obligations under the Purported Notes, at their inception, were not subordinated to the claims of OneWeb’s other creditors. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 108 [REDACTED]

[REDACTED]

108 [REDACTED]

[REDACTED]

[REDACTED]

101. Under these circumstances, where the Investor Defendants agreed to subordination to certain claims and equal treatment with others, this factor is at worst neutral in the analysis.

3. Only One Factor—the Labels Given to the Transactions—Weighs Slightly Against Recharacterization

102. “The issuance of a stock certificate indicates an equity contribution; the issuance of a bond, debenture, or note is indicative of a bona fide indebtedness.” *BH S & B Holdings*, 420 B.R. at 158 (quoting *Stinnett's Pontiac Serv., Inc. v. Commissioner*, 730 F.2d 634, 638 (11th Cir. 1984)). Here, the parties documented the Purported Notes as “notes.” The NPAs also included equity documentation, however, including provisions allowing for conversion to equity (in the case of the Original NPA) and the issuance of warrants (in the case of the A&R NPA).

103. Regardless of the labels used, this factor alone “cannot be regarded as conclusive, or even particularly strong evidence [of a bona fide loan], as placing significant weight on the label given to the transaction by the parties would have the effect of rendering moot much of the inquiry into the nature of the transaction.” *Cold Harbor*, 204 B.R. at 916. The very purpose of the recharacterization analysis is to ensure that form does not prevail over substance; thus, one cannot escape recharacterization merely by calling a transaction a “note.” See *In re Fid. Bond & Mortg. Co.*, 340 B.R. 266, 303 (Bankr. E.D. Pa. 2006) (recharacterizing “promissory notes” as equity after concluding they were intended “to be an equity investment” and not debt).

104. Here, because the other factors described above reveal that the true economic nature of the Purported Notes were equity investments, the Court should disregard the labels given to the transactions. Moreover, certain of those labels are in fact in the nature of equity

investments—*e.g.*, the warrants. Accordingly, to the extent this factor weighs in favor of debt, it only does so slightly.

105. For all of the foregoing reasons, the Committee has adequately pled colorable claims for recharacterization of the Defendants’ claims under the Purported Notes, and thus the Committee should be granted standing to pursue those claims.

E. The Committee Has a Colorable Claim for Equitable Subordination of the Purported Note Claims Under Section 510(c) of the Bankruptcy Code

106. Even if the Court were to determine that the Committee is not entitled to derivative standing to seek recharacterization of the Defendants’ claims as equity (and that it needs derivative standing to do so), the Court should alternatively grant the Committee derivative standing to seek equitable subordination of the Defendants’ claims to those of general unsecured creditors pursuant to section 510(c) of the Bankruptcy Code.

107. The three-part test for equitable subordination under section 510(c) requires a showing that: (1) the claimant engaged in some form of inequitable conduct; (2) such misconduct gives rise to an unfair advantage for claimant or brings harm to the creditors of the debtor; and (3) equitable subordination is not inconsistent with the Bankruptcy Code. *Le Café Crème, Ltd. v. Le Roux (In re Le Café Crème, Ltd.)*, 244 B.R. 221, 234-35 (Bankr. S.D.N.Y. 2000) (citing *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 700 (5th Cir. 1977)); *see also LightSquared LP v. SP Spec. Opportunities LLC (In re LightSquared)*, 511 B.R. 253, 347 (Bankr. S.D.N.Y. 2014); *Official Comm. Of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co. (In re Sunbeam Corp.)*, 284 B.R. 355, 363 (Bankr. S.D.N.Y. 2002). Inequitable conduct “is not limited to fraud, but includes even lawful conduct that shocks one’s good conscience,” *In re Adler, Coleman Clearing Corp.*, 277 B.R. 520, 563 (Bankr. S.D.N.Y. 2002), and may include undercapitalization. *In re Enron Corp.*, 379 B.R. 425, 433 (S.D.N.Y. 2007);

Sunbeam Corp., 284 B.R. at 365; *see also Interstate Cigar Co. v. Bambu Sales, Inc. (Interstate Cigar Co.)*, 182 B.R. 675, 680 (Bankr. E.D.N.Y. 1995); *Summit Coffee Co. v. Herby's Foods, Inc. (In re Herby's Food's, Inc.)*, 2 F.3d 128, 131 (5th Cir. 1993). In applying this analysis, claims of insiders are subject to heightened scrutiny. *Mobile Steel*, 563 F.2d at 702; *see also Interstate Cigar Co.*, 182 B.R. at 679.¹⁰⁹

108. The Committee has adequately pled that the Investor Defendants are insiders and that they engaged in inequitable conduct for their benefit that harmed the Company's other creditors while OneWeb was undercapitalized. Accordingly, the Committee has a colorable claim for equitable subordination.

109. Under section 101(31) of the Bankruptcy Code, "insiders" include directors of the debtor and persons in control of the debtor. 11 U.S.C. § 101(31). In addition, because the list of "insiders" in section 101(31) is non-limiting, "[i]nsider status can also be determined on a case-by-case basis based on the totality of the circumstances, including the degree of an individual's involvement in a debtor's affairs." *In re Borders Grp., Inc.*, 453 B.R. 459, 469 (Bankr. S.D.N.Y. 2011). "[A]n insider is one with a close enough relationship with the debtor such that his conduct requires rigorous scrutiny by the courts." *In re Chas. P. Young Co.*, 145 B.R. 131, 136 (Bankr. S.D.N.Y. 1992). Here, all but one of the Investor Defendants (the Government of Rwanda) appointed a director to OneWeb's board and used such position to obtain access to inside information and influence the Company's decision-making. In addition, the Investor Defendants, collectively, held more than 70% control of OneWeb's equity. Although some

¹⁰⁹ After the plaintiff has presented initial factual evidence to satisfy this three-part test, the claimant bears the ultimate burden of demonstrating that it acted fairly and in good faith. *See Le Cafe Creme*, 244 B.R. at 235 ("The initial burden of going forward with factual evidence to overcome the validity of the claimant's proof of claim rests on the trustee or a fiduciary. Once the initial burden is met, it then shifts to the claimant 'to demonstrate its good faith and the fairness of its conduct.'") (quoting *Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.)*, 712 F.2d 206, 212 (5th Cir.1983)).

Investor Defendants were less active than others in managing the Company's affairs, as noted previously, they effectively relied on SoftBank as their *de facto* agent in such matters. Based on the totality of these circumstances, the Investor Defendants were all insiders of OneWeb for purposes of the Bankruptcy Code, and therefore their actions are subject to heightened scrutiny.

110. The Committee has also established that OneWeb was undercapitalized. In the equitable subordination context, undercapitalization is defined an inadequacy of capital contributed to a debtor corporation. *Herby's Foods*, 2 F.3d at 131-32. Undercapitalization can be established where: (1) if in the opinion of a skilled financial analyst, it would definitely be insufficient to support a business of the size and nature of the bankrupt in light of the circumstances existing at the time the bankrupt was capitalized;¹¹⁰ *or* (2) if at the time when advances were made, the bankrupt could not have borrowed a similar amount of money from an informed outside source. *Id*; *see also Le Café Crème, Ltd.*, 244 B.R. at 235; *Interstate Cigar Co.*, 182 B.R. at 679. By either test, OneWeb was undercapitalized at all times since its inception—and specifically at the time of the Purported Notes. [REDACTED]

[REDACTED]

[REDACTED]¹¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹⁰ The Committee is prepared in litigation to present expert testimony on this and other issues if necessary.

¹¹¹ Compl. at ¶ 28.

[REDACTED]

[REDACTED]

111. While “undercapitalization alone generally does not justify equitable subordination, evidence of additional inequitable conduct may do so.” *Herby’s Foods*, 2 F.3d at 132. Here, the Investor Defendants engaged in unfair, self-serving transactions with OneWeb that were not at arm’s length and were designed to manipulate the Company’s cash position. While knowing of OneWeb’s financial condition, the Investor Defendants supplied cash in the form of the Purported Notes to an insolvent company that had no revenue and no ability to repay any debts. The only purpose of these purported “loans” was to support the Investor Defendants’ parochial interests at the expense of the Company’s other creditors and for them to obtain priority in the event of a bankruptcy filing. Without these funds, OneWeb would not have been able to continue operations, and the Committee’s constituents would not have continued to increase their credit exposure to OneWeb and thereby would not have been harmed.

112. In *Le Café Crème*, the court held that equitable subordination was justified where the debtor was undercapitalized and “[t]he evidence presented abundantly showed that [the creditors], as insiders and having knowledge of the Debtor’s financial affairs, repaid themselves on account of their Loans and *entered into the Purchase Agreement to convert their equity into debt while the Debtor had insufficient funds to pay its suppliers* and routinely paid suppliers with checks which were returned for insufficient funds.” 244 B.R. at 236 (emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]

██████████ In effect, the Investor Defendants inequitably used their insider position to shift the risk of OneWeb's failure from themselves to the Company's other, legitimate creditors.

113. Under these circumstances, equitable subordination of the Investor Defendants' claims to the claims of the Committee's constituents under section 501(c) of the Bankruptcy Code would offset the harm that the Investor Defendants caused to the Committee's constituents through their inequitable conduct. *See Herby's Foods*, 2 F.3d at 134 ("a claim should be subordinated only to the extent necessary to correct the harm or unfair advantage caused by the inequitable conduct"). Equitable subordination is thus consistent with the Bankruptcy Code's equitable goals and has been more than adequately pled on the face of the Complaint.

II. The Debtors' Refusal to Pursue the Claims is Unjustifiable

114. As discussed above, once a committee has shown the existence of colorable claims, it should be granted standing to pursue those claims if the debtor has refused to do so and such refusal is unjustifiable. There is no question that the Debtors in this case have refused to pursue the Committee's proposed claims against the Defendants, as they agreed not to do so in the Cash Collateral Order. Specifically, the Debtors stipulated and agreed that the Defendants hold valid claims, that such claims are not subject to recharacterization, subordination, or any other challenge, and that the Defendants' liens are valid and perfected. *See Cash Collateral Order* ¶ D(vi). Thus, no formal "demand" on the Debtors to bring suit is necessary. *See Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 545 (W.D. Pa. 2005) (finding demand unnecessary where debtors had waived right to challenge proposed defendants' claims in final and interim DIP orders).

115. Whether the Debtors' refusal to pursue the claims is unjustified requires the Court to assess whether the claims would likely benefit the debtor's estate, including by "weighing . . . the probability of success and financial recovery." *Am. 's Hobby Ctr.*, 223 B.R. at 282. To be

clear, however, the Committee need not demonstrate a likelihood of success to obtain standing. *Adelphia*, 330 B.R. at 386.

116. The Committee's pursuit of its proposed claims would benefit the Debtors' unsecured creditors greatly. As it stands, by virtue of the Defendants' purported secured claims against the Debtors in an aggregate face amount of more than \$1.7 billion, and based on the Debtors' stipulation that their security interests are valid and perfected, the Defendants stand to receive all of the value in these chapter 11 cases. Meanwhile, the Debtors' legitimate unsecured creditors, including vendors and trade creditors, will receive nothing unless they are parties to executory contracts and such contracts are assumed. If, however, the Purported Notes are recharacterized as equity or equitably subordinated to the claims of other creditors, the Committee's constituents will share in the net proceeds of the sale of the Company's assets, which based on the PSA include at least \$90 million in cash and \$100 million in equity in reorganized OneWeb. The costs of pursuing the litigation, including through trial and any appeals, would be minimal by comparison.

117. To the extent required, the Committee has also made a more than sufficient showing of a probability of success on the merits of the litigation. The Complaint and this motion are filled with detailed allegations, including citations to numerous documents the Committee has obtained in discovery, not mere conclusory allegations. The Committee has demonstrated that ample support exists for its claims such that the pursuit of litigation, at the very least, will not be a "hopeless fling." *Adelphia*, 330 B.R. at 386.

118. Because its claims are colorable, and because their pursuit would benefit unsecured creditors, the Committee is entitled to pursue the claims on behalf of the Debtors. The Court should thus grant the motion and authorize the Committee to file the Complaint.

ARGUMENT ON CLAIM OBJECTION

119. Although the Committee should be granted derivative standing to commence the proposed Adversary Proceeding for the reasons discussed above, the Committee already has direct standing under section 502 of the Bankruptcy Code to object to the Defendants' claims.

120. Section 502(a) provides that "[a] claim or interest . . . is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). The Committee is a "party in interest" and thus has a statutory right to bring a claim objection under section 502. *See RWNH-DL 122nd St. I LLC v. Futterman (In re Futterman)*, No. 17-12899 (MEW), 2019 WL 2553614, at *3 (Bankr. S.D.N.Y. June 20, 2019) (non-settling creditor had standing to assert claim objection "because section 502 of the Bankruptcy Code provides that any 'party in interest' in a bankruptcy case has the right to object to a proof of claim").¹¹²

121. Under section 502(b) of the Bankruptcy Code, a claim is subject to disallowance if it is unenforceable against the debtor and property of the debtor, under any agreement or applicable law." 11 U.S.C. § 502(b)(1). Here, the Defendants' purported claims are unenforceable against the Debtors because they are, in reality, equity interests and not debt, for all of the reasons discussed above.

122. Accordingly, even if the Court does not grant the Committee derivative standing to pursue its claims against the Defendants in an adversary proceeding, it may still treat this

¹¹² See also *Whiteley v. Slobodian (In re Mechanicsburg Fitness, Inc.)*, 592 B.R. 798, 807 (Bankr. M.D. Pa. 2018) ("The language of section 502(a) is clear and unambiguous. It plainly authorizes a party in interest to object to any claim or interest [and] [n]owhere is this right made subject to any other provision of the Code or to the Trustee's refusal to pursue possible objections to certain claims."); *AI Int'l Holdings (BVI) Ltd. v. MUFG Union Bank (In re Weinstein Co. Holdings, LLC)*, 595 B.R. 455, 463-64 (Bankr. D. Del. 2018) (rejecting argument that section 502 does not grant creditors standing to object to claims of other creditors and is, instead, cause of action belonging to the trustee that other creditors may only bring derivatively); *Official Creditors' Comm. for OMect, Inc. v. Electrochem Funding, LLC (In re QMect, Inc.)*, 349 B.R. 620, 625 (Bankr. N.D. Cal. 2006) (a "creditor or creditors' committee has standing independent of the trustee or debtor-in-possession to object to another creditor's claim").

motion as a claim objection and disallow the Defendants' claims pursuant to section 502 of the Bankruptcy Code.

[Remainder of page intentionally left blank]

WHEREFORE, the Committee respectfully requests that this Court enter an order substantially in the form attached hereto as **Exhibit B** granting the relief requested herein, and granting the Committee such other relief as this Court deems just and proper.

Dated: July 13, 2020

/s/ Luc A. Despins
PAUL HASTINGS LLP
Luc. A. Despins, Esq.
Pedro A. Jimenez, Esq.
Nicholas A. Bassett, Esq.
200 Park Avenue
New York, New York 10166
Telephone: (212) 318-6000
lucdespins@paulhastings.com
pedrojimenez@paulhastings.com
nicholasbassett@paulhastings.com

*Counsel to the Official Committee of Unsecured
Creditors (as to all Defendants other than Airbus and
Qualcomm)*

/s/ Seth Van Aalten
COLE SCHOLZ P.C.
Seth Van Aalten, Esq.
Justin R. Alberto, Esq. (admitted pro hac vice)
Sarah A. Carnes, Esq.
Nolan E. Shanahan, Esq.
1325 Ave. of the Americas, 19th Floor
New York, New York 10019
Telephone: (646) 563-8935
Facsimile: (646) 563-7935
E-mail: svanaalten@coleschotz.com
jalberto@coleschotz.com
scarnes@coleschotz.com
nshanahan@coleschotz.com

*Counsel to the Official Committee of Unsecured
Creditors (as to all Defendants)*

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 58 of 154

EXHIBIT A

Compliant

Luc A. Despains, Esq.
Pedro A. Jimenez, Esq.
Nicholas A. Bassett, Esq.
PAUL HASTINGS LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 318-6000
Facsimile: (212) 319-4090
lucdespains@paulhastings.com
pedrojimenez@paulhastings.com
nicholasbassett@paulhastings.com

*Counsel to the Official Committee of
Unsecured Creditors (as to all Defendants
other than Airbus & Qualcomm)*

Seth Van Aalten, Esq.
Justin R. Alberto, Esq. (admitted pro hac vice)
Sarah A. Carnes, Esq.
COLE SCHOLZ P.C.
1325 Ave. of the Americas, 19th Floor
New York, New York 10019
Telephone: (646) 563-8935
Facsimile: (646) 563-7935
E-mail: svanaalten@coleschotz.com
jalberto@coleschotz.com
scarnes@coleschotz.com

*Counsel to the Official Committee of
Unsecured Creditors (as to all Defendants)*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

OneWeb Global Limited, et al.
Debtors.¹

The Official Committee of Unsecured Creditors of OneWeb
Global Limited *et al.*,

Plaintiff,

v.

Airbus Group, Inc., SoftBank Group Corp., Banco Azteca,
Institucion de Banca Multiple, Qualcomm Technologies, Inc.,
The Govt. of the Republic of Rwanda, Global Loan Agency Ltd.,
as Administrative Agent, and GLAS Trust Corp. Ltd., as
Collateral Agent,

Defendants.

x
: Chapter 11
:
: Case No. 20-22437 (RDD)
:
: (Jointly Administered)
:
: **Adv. Proc. No. ____**
:
: **Adversary Complaint of the**
: **Official Committee of**
: **Unsecured Creditors for:**
:
: **(1) Recharacterization**
: **(2) Equitable**
: **Subordination**
: **(3) Disallowance of Claims**
:
:
x

¹ The debtors in these cases (the "Debtors"), along with the last four digits of each Debtor's federal tax identification number, if any, are: OneWeb Global Limited (N/A); OneWeb Holdings LLC (5429); OneWeb Communications Limited (9487); WorldVu Satellites Limited (7802); WorldVu Development LLC (9067); WorldVu JV Holdings LLC (N/A); 1021823 B.C. LTD (8609); Network Access Associates Limited (8566); OneWeb Limited (8662); WorldVu South Africa (Pty) Ltd. (1867); OneWeb Chile SpA (2336); WorldVu Australia Pty Ltd. (5436); WorldVu Unipessoal Lda. (2455); OneWeb Norway AS (0209); OneWeb ApS (9191); OneWeb Network Access Holdings

Plaintiff, the Official Committee of Unsecured Creditors of OneWeb Global Limited, *et al.*, (the “Committee”) in the chapter 11 cases of the above-captioned Debtors, by and through its undersigned counsel, hereby files this complaint (the “Complaint”), on behalf of the Debtors’ estates and their creditors, against Defendants SoftBank Group Corp. (“SoftBank”), Airbus Group Proj B.V. (“Airbus”), Qualcomm Technologies, Inc. (“Qualcomm”), Banco Azteca, S.A., Institucion de Banca Multiple (“Banco Azteca”), the Government of the Republic of Rwanda (the “Government of Rwanda” and together with SoftBank, Airbus, Qualcomm, and Banco Azteca, the “Investor Defendants”), and Global Loan Agency Services Limited and GLAS Trust Corporation Limited, as administrative agent and collateral agent, respectively, under the A&R NPA (defined below) (together with the Investor Defendants, the “Defendants”).² The Committee reserves the right to amend this Complaint to supplement the parties and claims for the relief included herein. In support of the requested relief, the Committee alleges as follows:

NATURE OF PROCEEDING

1. The Committee brings this action for the benefit of the Debtors’ unsecured creditors to obtain a judgment that all “claims” arising from the nearly \$1.6 billion in purported promissory notes (the “Purported Notes”) issued by OneWeb³ to the Investor Defendants prepetition are appropriately characterized as equity and not debt in these chapter 11 cases consistent with their economic reality. The Purported Notes bear all the hallmarks of an equity investment in that they were acquired by the Investor Defendants [REDACTED]

[REDACTED]. The Investor Defendants acquired the Purported Notes, not for the purpose of being repaid on their investment as lenders,

Limited (8580); OneWeb G.K. (1396); OneWeb Ltd (8661); and WorldVu Mexico S. DE R. L. DE C.V. (1234). The Debtors’ headquarters is located at 195 Wood Lane, West Works Building, 3rd Floor, London, W12 7FQ, UK.

² As defined below. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Cash Collateral Order (defined herein).

³ All references herein to “OneWeb” or the “Company” refer to the Debtors.

but rather to further their strategic business interests in the same and related industries, to enhance their existing equity ownership in the Company in the hope of participating in its economic upside should the Company be successful, and to obtain priority over the Company's other creditors in the event of a bankruptcy filing.

2. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In this way, this is not a situation where lenders came to the rescue of a once-successful business that fell on hard times and needed rehabilitation; rather, this is a case of strategic equity investors who made a series of equity bets on a risky company based on the allure of outsized returns and attempted to elevate those equity interests [REDACTED]. The Bankruptcy Code requires under these circumstances that the Purported Notes be characterized as equity interests and not debt—in fact, this case is a textbook example of when a purported creditor's claims should be “recharacterized” as equity for bankruptcy purposes.

3. In the alternative, the Committee requests equitable subordination of the Investor Defendants' claims to the claims of the Debtors' unsecured creditors under section 510(c) of the Bankruptcy Code. The Investor Defendants were insiders who controlled the Company through ownership of more than 70% of its equity, and for some Investor Defendants, seats on its board. The Investor Defendants used this position of control and their access to inside information to saddle the Company with nearly \$1.6 billion in purported secured debt obligations to the detriment of the Company's other, legitimate creditors. Equitable subordination of the Defendants' claims is necessary under these circumstances to ensure that the Company's general

⁴ See Project OneWeb M&A Committee Memorandum dated February 19, 2019 (AIRBUS_0000001-0000017), at AIRBUS_0000014, attached hereto as **Exhibit 1**.

unsecured creditors—who stand to receive nothing if the Defendants’ claims are not recharacterized or subordinated—are not harmed by the Investor Defendants’ inequitable conduct.

PARTIES

4. The Committee, as Plaintiff in this adversary proceeding, on behalf of the Debtors’ estates and their unsecured creditors, was appointed on May 29, 2020, pursuant to Sections 328(a), 330(a), and 1103 of the Bankruptcy Code. The Committee was authorized to file this complaint on behalf of the Debtors’ estate by Court order dated ____, 2020.

5. Airbus Group Proj B.V. is a company incorporated under the laws of The Netherlands with its principal place of business in Amsterdam, The Netherlands. It is an affiliate of Airbus SE, which is a European multinational aerospace corporation based in Toulouse, France.

6. SoftBank Group Corp. is a Japanese multinational conglomerate holding company organized under the laws of Japan with its principal place of business in Tokyo, Japan.

7. Banco Azteca, S.A., Institucion de Banca Multiple is a bank organized under the laws of Mexico with its principal place of business in Mexico City, Mexico. It is a subsidiary of Grupo Elektra, SAB de CV, which is a corporation organized under the laws of Mexico with its principal place of business in Mexico City, Mexico.

8. Qualcomm Technologies, Inc. is a Delaware based corporation with its principal place of business in San Diego, CA.

9. The Government of the Republic of Rwanda is a foreign state.

10. Global Loan Agency Services Limited is a limited liability company registered in England and Wales. It serves as administrative agent under the Purported Notes and has agreed to file and seek payment on claims in these cases on behalf of the Investor Defendants.

11. GLAS Trust Corporation Limited is a limited liability company registered in England and Wales. It serves as collateral agent under the Purported Notes and has also agreed to file and seek payment on claims in these cases on behalf of the Investor Defendants

JURISDICTION AND VENUE

12. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Alternatively, this Court has noncore concurrent jurisdiction over this proceeding under 28 U.S.C. § 1334(b), as the causes of action are directly related to the Debtors' bankruptcy cases and will have a significant impact on the Debtors' estates.

13. This Court has personal jurisdiction over the Defendants pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). The foreign entities named as defendants herein have sufficient minimum contacts with the United States at large and/or have already submitted to the jurisdiction of the Court.

14. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

15. The statutory bases for the relief requested herein are sections 105(a), 502(b), and 510(c) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 7001 of the Bankruptcy Rules.

16. Pursuant to Paragraph 11 of this Court's April 30, 2020 *Final Order (I) Authorizing Debtors to Use Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Certain Protections to Prepetition Noteholders Pursuant to 11 U.S.C. §§ 361, 362, 363 and 507, and (III) Granting Related Relief* [Docket No. 118] (the "Cash Collateral Order"), the Court granted the Committee the right to "investigate the accuracy of the Stipulations (but solely with respect to the Debtors and their estates) against the [Investor Defendants], including, without limitation, the amount, character, validity, priority, and extent of the Prepetition Obligations[.]"

BACKGROUND

I. Overview of OneWeb: An Ambitious Project With No Operations or Revenue

17. Critical to understanding the economic substance of the Purported Notes is the nature of OneWeb's business. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

18. [REDACTED]

[REDACTED]

19. By the time of its bankruptcy filing, OneWeb had launched only 74 of the approximately 650 satellites in its proposed constellation and never commenced operations or generated a penny of revenue (because it had nothing to sell). Importantly, OneWeb could not begin operations with a partial buildout of its satellite system, but instead needed to finance and construct substantially the entire system in order for it to function as a global communications network as intended.

20. [REDACTED]

[REDACTED]⁵

II. Initial Investments by Investor Defendants

21. Because it never generated revenue, OneWeb was always dependent upon massive capital infusions for its survival. [REDACTED]

[REDACTED]⁶ Although the Company fell far short of meeting this target, most of the capital it did raise came from the Investor Defendants.

22. In 2015, OneWeb raised approximately \$500 million in equity financing from various non-bank entities in related industries, including \$125 million each from Defendants Airbus and Qualcomm and \$25 million from an affiliate of Defendant Banco Azteca.⁷

⁵ See Ex. 1, Project OneWeb M&A Committee Memorandum, at 0000014.

⁶ See OneWeb 2017 Senior Secured Credit Facility Proposal dated January 2017 (SBG0008533-8683), at SBG0008551 [REDACTED] attached hereto as **Exhibit 2**.

⁷ Declaration of Thomas Wayne in Support of Chapter 11 Petitions and First Day Pleadings ¶ 27 [Docket No. 3] (the "Wayne Declaration").

23. In 2016 and 2017, OneWeb raised another \$1 billion in equity from SoftBank and an additional more than \$200 million from existing equity investors, including \$100 million from Qualcomm, \$75 million from Grupo Salinas (the ultimate parent of Banco Azteca), and \$42 million from Airbus.⁸ OneWeb also raised \$40 million from the Government of Rwanda. By the end of 2017, SoftBank was the majority equity holder in OneWeb, and the other Investor Defendants also held significant equity investments in the Company.

24. At the time they made their investments, the Investor Defendants were engaged in business with OneWeb or held significant interests in the same or related industries, which interests naturally stood to benefit from OneWeb's proposed global satellite network. SoftBank held interests in telecommunications companies Sprint and T-Mobile; Banco Azteca affiliates held major interest in a cellular carrier; Airbus manufactured OneWeb satellites; Qualcomm designed and provided the satellites' wireless communications interface; and the Government of Rwanda hoped to benefit from satellites providing internet service to rural schools in Rwanda. Each Investor Defendant thus had vested parochial interests in OneWeb's success and made substantial capital contributions (and, later, "loans") in furtherance of those interests.

25. In exchange for their equity investments, certain of the Investor Defendants—specifically, SoftBank, Airbus, and Qualcomm—received seats on OneWeb's board of directors. In the aggregate, the Investor Defendants owned more than 70% of the Company's equity (with SoftBank itself holding approximately 50%) and together had effective control over its decision-making.⁹

⁸ *Id.*

⁹ Indeed, Softbank alone had approximately 50% ownership of the Company's stock and a designee sitting on the board of directors.

26. The Investor Defendants knew from the beginning that this initial equity funding would not be nearly enough to bring OneWeb's business plan to fruition, but they hoped it would at least serve as a bridge to additional financing from outside lenders.

III. OneWeb's Failed Efforts to Raise Debt Financing from Third Parties

27. OneWeb made extensive attempts over a number of years to obtain debt financing from outside lenders and other third parties. Despite these efforts, no outside debt financing ever came to fruition, as no disinterested lender was willing to lend to a "project" with no operations or revenues anywhere on the horizon.

28. [REDACTED]
[REDACTED]
[REDACTED]¹⁰ [REDACTED]
[REDACTED]
[REDACTED]^{11,12}

29. This financing never materialized. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹³ [REDACTED]
[REDACTED]¹⁴

¹⁰ See Ex. 2, OneWeb 2017 Senior Secured Credit Facility Proposal, at SBG0008551.

¹¹ *Id.*

¹² By the Petition Date, this target was reduced to 648 satellites.

¹³ See June 29, 2017 WorldVu Satellites Limited Board of Directors Meeting Minutes (ONEWEB00006127-6134), at ONEWEB00006130 [REDACTED]

[REDACTED] attached hereto as Exhibit 3.

¹⁴ See February 23, 2017 WorldVu Satellites Limited Board of Directors Meeting (ONEWEB00006076-6081), at ONEWEB00006080-6081 [REDACTED] attached hereto as

30. [REDACTED]

[REDACTED] 15 [REDACTED]

IV. The 2018 “Note Purchase Agreement”

31. [REDACTED]

32. [REDACTED]

[REDACTED] ¹⁶ Therefore, the Company turned to its largest equity holder—SoftBank—as a source of additional capital.

33. SoftBank, which by this time held approximately 50% of the Company’s stock, was acutely aware of the Company’s liquidity issues based on its insider status and through its constant communications with Company management.

34. [REDACTED]

[REDACTED] 17

Exhibit 4: June 21, 2018 OneWeb Board of Directors Presentation (ONEWEB00006809-6875), at ONEWEB0006852 [REDACTED] attached hereto as **Exhibit 5:** Emails between David Tolley (OneWeb), Eric Beranger (OneWeb), and Laurent Jaffart (Airbus) dated July 4, 2018 (ONEWEB00008932-8934), at ONEWEB0008932 [REDACTED] attached hereto as **Exhibit 6.**

¹⁵ See Emails between David Tolley (OneWeb) and Ozzie Ramos (Barclays) dated October 12, 2018 (ONEWEB00011341) at ONEWEB00011341, attached hereto as **Exhibit 7.**

¹⁶ See March 8, 2018 OneWeb Board of Directors Presentation (ONEWEB00006754-6808), at ONEWEB0006761 [REDACTED] attached hereto as **Exhibit 8;** Ex. 5, June 21, 2018 OneWeb Board of Directors Presentation, at ONEWEB0006842 [REDACTED]

¹⁷ See Emails between David Tolley (OneWeb), Ren Tanaka (SoftBank), and Alex Clavel (SoftBank) dated May 15, 2018 (SBG009617), at SBG009617 ([REDACTED]), attached hereto as **Exhibit 9.**

35. [REDACTED]

[REDACTED]

36. [REDACTED]

[REDACTED]¹⁹

37. [REDACTED]

[REDACTED]²⁰ Despite the agreement's label, the Original NPA's terms and the circumstances surrounding it show that the Purported Notes issued thereunder would effectively serve as capital contributions, not loans.

38. [REDACTED]

[REDACTED]²¹

¹⁸ See June 13, 2008 Memorandum to Board (SBG0008764-8864), at SBG008766, attached hereto as Exhibit 10.

¹⁹ See July 9, 2018 OneWeb Board Minutes (ONEWEB0004975-4980), at ONEWEB0004980 [REDACTED]

[REDACTED] attached hereto as Exhibit 11.

²⁰ See Original NPA (ONEWEB0000061-214), attached hereto as Exhibit 12.

²¹ [REDACTED] See Amended & Restated Note Purchase Agreement dated March 18, 2019 (ONEWEB0000835-1018), attached hereto as Exhibit 13.

[REDACTED]

[REDACTED]²²

39. [REDACTED]

[REDACTED]²³

[REDACTED]

[REDACTED]²⁴

40. [REDACTED]

[REDACTED]

[REDACTED]²⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁶

41. The Purported Notes were ostensibly secured by a lien on OneWeb's assets. As alleged in more detail below, however, this lien provided little "security" to SoftBank because the

²² Ex. 12, Original NPA.

²³ *Id.*

²⁴ [REDACTED]

[REDACTED] See Email from Yoshi Segawa (SoftBank) to Ren Tenaka (SoftBank) dated July 3, 2018 (SBG0012717-12722), at SBG0012718, attached hereto as **Exhibit 14**.

²⁵ [REDACTED]

²⁶ [REDACTED]

assets serving as collateral for the obligations under the Purported Notes were worth far less than the aggregate face amount of the Purported Notes.²⁷

42. Following the execution of the Original NPA, SoftBank purchased Purported Notes thereunder on six separate occasions in an aggregate amount of \$408 million: \$100 million on July 12, 2018; \$39 million on August 13, 2018; \$29 million on September 21, 2018; \$70 million on October 17, 2018; \$50 million on December 12, 2018; and \$120 million on January 11, 2019.

43. [REDACTED]
[REDACTED]
[REDACTED]²⁸

44. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²⁹
[REDACTED]³⁰

45. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁷ In any event, there is no need to speculate on this point at this time, as the result of the just-completed sale process proves the point beyond peradventure.

²⁸ [REDACTED].

²⁹ [REDACTED]
[REDACTED]

³⁰ [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]³¹ [REDACTED]

[REDACTED]

46. Internal documents from OneWeb and SoftBank remove any doubt as to the true economic character of the Purported Notes. [REDACTED]

[REDACTED]

[REDACTED]³² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³³

47. [REDACTED]

[REDACTED]

[REDACTED]³⁴ [REDACTED]

[REDACTED]

[REDACTED]³⁵ [REDACTED]

[REDACTED]³⁶

³¹ [REDACTED]

³² See Ex. 8, March 8, 2018 OneWeb Board of Directors Presentation, at ONEWEB0006755; *see also* May 2018 Memorandum to OneWeb Board (ONEWEB0006605-6621), at ONEWEB0006605 [REDACTED] attached hereto as Exhibit 31.

³³ See Email correspondence between V. May (Milbank) and M. Jacovides (Allen & Overy) dated April 26, 2018 (ONEWEB0009560-9563), at ONEWEB0009560, attached hereto as Exhibit 17.

³⁴ See June 2018 Presentation re Project Owl (SBG0009585-9591), at SBG0009586, attached hereto as Exhibit 18.

³⁵ In the same presentation, Softbank estimated the chances of the outside financing coming through at approximately 20%. Yet Softbank still went through with the transaction.

³⁶ See SoftBank Presentation dated May 31, 2018 (SBG0015841-15953), at SBG0015953, attached hereto as Exhibit 19. [REDACTED]

48. Upon information and belief, the only reason Softbank was willing to make the Original NPA investment was to protect its original equity investment in OneWeb and to support its other interests in the same and related industries. As noted previously, Softbank (like the other Investor Defendants) was deeply involved in related industry businesses and, upon information and belief, made its investments in part to support and expand such ongoing businesses.

49. Upon information and belief, Softbank labeled its investments as “notes,” instead of capital contributions, in an effort to obtain priority over the Company’s other equity holders and creditors in the event of an eventual bankruptcy filing.

V. The “2019 Restated and Amended Note Purchase Agreement”

50. [REDACTED]

[REDACTED]

51. While only SoftBank invested under the Original NPA, this time all Investor Defendants agreed to invest. On March 18, 2019, OneWeb entered into the Amended and Restated Note Purchase Agreement (the “A&R NPA”) among OneWeb and the Investor Defendants, Defendant Global Loan Agency Services Limited, as administrative agent, and GLAS Trust Corporation Limited, as collateral agent. The A&R NPA amended and restated the Original NPA without terminating any rights or obligations thereunder.³⁷

52. SoftBank effectively led and controlled the Investor Defendants’ discussions with the Company regarding the A&R NPA, presented the ultimate investment opportunity to the rest

³⁷ See Whayne Decl. ¶ 30.

of the group, and acted as the *de facto* agent for the other Investor Defendants.³⁸ For this reason, all knowledge that SoftBank obtained and considered in connection with the A&R NPA can be imputed to the other Investor Defendants.

53. Given that the Investor Defendants controlled OneWeb through their equity interests and board seats, they sat on both sides of the A&R NPA transaction and, upon information and belief, largely dictated its terms. SoftBank, in particular, exerted the most control over the process both for itself and on behalf of the other Investor Defendants. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54. [REDACTED]

[REDACTED]

[REDACTED]⁴⁰ [REDACTED]

[REDACTED]

[REDACTED]

³⁸ See, e.g., Ex. 1, Project OneWeb M&A Committee Memorandum dated Feb. 19, 2019 at AIRBUS_0000012

³⁹ See Ex. 13, A&R NPA, § 5.7, at ONEWEB0000860.

⁴⁰ [REDACTED]

of the group, and acted as the *de facto* agent for the other Investor Defendants.³⁸ For this reason, all knowledge that SoftBank obtained and considered in connection with the A&R NPA can be imputed to the other Investor Defendants.

53. Given that the Investor Defendants controlled OneWeb through their equity interests and board seats, they sat on both sides of the A&R NPA transaction and, upon information and belief, largely dictated its terms. SoftBank, in particular, exerted the most control over the process both for itself and on behalf of the other Investor Defendants. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

54. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁸ [REDACTED]
("The security documents have been negotiated by Softbank as lead lender to be the security package for all Purchasers.")

³⁹ See Ex. 13, A&R NPA, § 5.7, at ONEWEB0000860.

⁴⁰ [REDACTED]

55. Another new and critical component of the A&R NPA that SoftBank negotiated was a Warrant Purchase Agreement, pursuant to which each Investor Defendant was entitled to receive “penny warrants” redeemable for one share of stock in the company per \$300,000 of funding.⁴¹ The fact that the warrants were “penny warrants” meant that they had a nominal exercise price, and therefore the Investor Defendants could effectively buy shares of stock by purchasing Purported Notes, with no further investment required.

56. [REDACTED]

⁴² [REDACTED]

⁴³ [REDACTED]

57. The A&R NPA, like the Original NPA, provided for security interests in OneWeb’s assets. The value of these assets, however, absent an eventual full deployment of the satellite constellation, was not sufficient to cover the Investor Defendants’ total exposure (as noted below, nearly \$1.6 billion) in the event of default. [REDACTED]

⁴⁴ [REDACTED]

⁴¹ See OneWeb Global Limited Warrant Purchase Agreement dated Mar. 18, 2020 (ONEWEB0001045-1102), at ONEWEB0001046, attached hereto as Exhibit 20.

⁴² [REDACTED]

⁴³ See Jan. 17, 2019 OneWeb Board Presentation (ONEWEB0006918-6964), at ONEWEB0006936 (emphasis added), attached hereto as Exhibit 21. [REDACTED]

⁴⁴ See Email from Yoshi Segawa (Softbank) to Alex Clavel (Softbank) Dated Aug. 6, 2018 (ONEWEB0009021-9023), at ONEWEB0009021, attached hereto as Exhibit 22.

[REDACTED]⁴⁵ [REDACTED]

[REDACTED]

[REDACTED]

58. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁶ [REDACTED]

[REDACTED]

59. As part of the A&R NPA, SoftBank’s \$408 million in Purported Notes issued under the Original NPA, together with approximately \$21 million in accrued interest, were converted into a new senior secured promissory note under the A&R NPA. SoftBank also received warrants at the initial closing to purchase voting and/or non-voting shares of OneWeb Global Limited in the amount of \$408 million divided by \$300/share.⁴⁷

60. On the whole, the terms and conditions of the Purported Notes were highly unusual for a “debt” transaction, and the Investor Defendants recognized this. [REDACTED]

[REDACTED]

[REDACTED]

⁴⁵ See Whayne Decl. ¶ 9 (calling the spectrum assets OneWeb’s “most significant” assets).

⁴⁶ [REDACTED]

⁴⁷ See Whayne Decl. ¶ 31.

48 [REDACTED]

49 [REDACTED]

61. Pursuant the A&R NPA, Investor Defendants collectively purchased Purported Notes, and provided funding to the Debtors, in a total aggregate amount of \$1.559 billion through October 2019, as follows (all amounts in millions of dollars):

Defendant	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
SoftBank	[REDACTED]				
Banco Azteca ⁵⁰					
Airbus					
Qualcomm					
Govt. of Rwanda					
Total					\$1,559

62. [REDACTED]

52 [REDACTED]

[REDACTED]

[REDACTED] The table below shows how the investments under the A&R NPA compared to each Investor Defendant's (i) pre-existing proportional equity interests among all investors in OneWeb, and (ii) proportional equity interests among the other Investor Defendants when warrants are included.

48 [REDACTED]

49 [REDACTED]

⁵⁰ Banco Azteca's equity was held by certain affiliated entities.

⁵¹ Qualcomm's investment under the A&R NPA consisted of a "roll over" of the preexisting services contract receivable that OneWeb owed to Qualcomm.

52 [REDACTED]

Investor	Pre-NPA Equity Ownership %	Equity Ownership % Calculated Based Upon the Investor Defendants Only (including warrants)	Purported Loan %
SoftBank			
Banco Azteca			
Airbus			
Qualcomm			
Government of Rwanda			

63. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵³

64. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁴

Such a provision would be highly unusual, if not unheard of, in traditional commercial markets where participants highly value the ability to sell their loans to other parties.

65. At the time of their investments, the Investor Defendants were aware of OneWeb's undercapitalization and liquidity issues, [REDACTED]

⁵³ [REDACTED]

⁵⁴ Ex. 13, A&R NPA.

[REDACTED]

[REDACTED]⁵⁵ [REDACTED]

[REDACTED]⁵⁶ [REDACTED]

[REDACTED]

66. The Investor Defendants nevertheless decided to purchase Purported Notes, on information and belief, for the purposes of salvaging (and even enhancing, through the warrants) their preexisting equity investments in OneWeb and supporting other parochial business interests,⁵⁷ while also obtaining ostensible priority over other shareholders and third-party creditors in the event of a bankruptcy. The Investor Defendants were not acting as true lenders.

67. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁸ [REDACTED]

[REDACTED]

⁵⁵ [REDACTED]
[REDACTED]
[REDACTED] See emails between Quinn Li (Qualcomm), David Wise (Qualcomm) and others dated June 20-21, 2018 (QCOW-00003564-3567), at QCOW-00003564, attached hereto as **Exhibit 24**. The [REDACTED] see also email from David Wise to others dated Aug. 28, 2018 (QCOW-00003544-3545), at QCOW-00003544 [REDACTED] attached hereto as **Exhibit 25**.

⁵⁶ See Ex. 1, Project OneWeb M&A Committee Memorandum, at AIRBUS_0000011.

⁵⁷ [REDACTED]
[REDACTED] See Ex. 1, Project OneWeb M&A Committee Memorandum dated February 19, 2019, at AIRBUS_0000011 [REDACTED]
[REDACTED]

⁵⁸ [REDACTED]

68. Notably, all but one of the Investor Defendants were entities that did not engage in lending as part of their ordinary business. The only Investor Defendant that did engage in lending was Banco Azteca, but it became involved in the project due to the existing equity interests of its affiliates and would not have acquired Purported Notes absent those interests.

69. OneWeb used all or the vast majority of the \$1.559 billion the Investor Defendants advanced under the NPAs to make capital investments. Very little of the funds were used to pay general operating expenses. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹

[REDACTED]

[REDACTED]⁶⁰

VI. OneWeb's Inability to Secure Additional Financing and Eventual Bankruptcy

70. Even with the additional capital contributions by the Investor Defendants under the A&R NPA, OneWeb was still unable to bring its ambitious business plan to fruition. By early 2020, the Company was again in need of funding to stave off chapter 11.

71. In early March 2020, OneWeb believed it had secured additional long-term funding from existing shareholders. On March 12, 2020, however, these investors said they could not commit to such funding. On March 16, 2020, OneWeb entered into a term sheet for purported bridge financing from SoftBank to be consummated by March 26, 2020. On March 21, 2020, SoftBank notified the company that such financing was unavailable.

⁵⁹ See OneWeb Strategic Plan Financial Model Phase 1 + Phase 2, February 2020, attached hereto as **Exhibit 27**.

⁶⁰ See OneWeb Update Presentation in September 2018 (SBG0017954-17995), at SBG0017987, attached hereto as **Exhibit 28**.

72. On March 27, 2020 (the “Petition Date”), the Debtors filed chapter 11 petitions in this Court, commencing the above-captioned cases. As of the Petition Date, OneWeb had never made any payments to the Investor Defendants under the Purported Notes. The Debtors reported in their first-day filings that the aggregate amount owing under the Purported Notes, including purported accrued interest, is approximately \$1.733 billion.

73. Once in chapter 11, the Debtors commenced a process for selling their assets.⁶¹ After running this process, the Debtors announced that the Successful Bid (as defined in the Bidding Procedures Order) would generate, upon approval of a chapter 11 plan implementing such bid, approximately \$190 million in consideration to the holders of the Purported Notes—\$100 million in the form of equity in the reorganized Debtors and \$90 million in the form of repayment of the roll-up DIP loans.⁶² Accordingly, if the Defendants have valid claims secured by unavoidable, perfected security interests, general unsecured creditors are unlikely to see any recovery from the Debtors’ assets.⁶³

VII. The Committee’s Investigation of Potential Claims

74. On April 16, 2020, the Committee was appointed by the United States Trustee to represent the interests of the Debtors’ general unsecured creditors.

75. On April 30, 2020, the Court entered the Cash Collateral Order. The Debtors stipulated therein that the Investor Defendants hold valid claims against the Debtors and perfected liens on their assets. Paragraph 11 of the order, however, authorizes the Committee to investigate,

⁶¹ See Order (A) Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing and Approving Form and Manner of Notice Thereof, (C) Approving Assumption and Assignment Procedures and Form and Manner of Notice Thereof; and (D) Granting Related Relief (the “Bidding Procedures Order”) [Docket No. 104].

⁶² See Notice of (A) Successful Bidder, (B) Adequate Protection of Future Performance, and (C) Proposed Assumed Contracts [Docket No. 367], Ex. A (Plan Support Agreement), Ex. A (Term Sheet) at 2-3.

⁶³ *Id.* at ¶ 75.

without limitation, the “amount, character, validity, priority, and extent of” such claims and liens for a period of 75 days (*i.e.*, until July 13, 2020).

**FIRST CAUSE OF ACTION – RECHARACTERIZATION OF DEBT ISSUED UNDER
THE PURPORTED NOTES AS EQUITY PURSUANT TO 11 U.S.C. §§ 105(a) AND
510(c) OF THE BANKRUPTCY CODE AGAINST ALL DEFENDANTS**

76. The Committee repeats and re-alleges the allegations contained in paragraphs 1-75 as if fully set forth herein.

77. The Purported Notes are in economic substance equity investments.

78. Considering the totality of the circumstances, the Defendants’ claims under the Purported Notes against the Debtors should be characterized as equity.

79. [REDACTED]

80. In acquiring the Purported Notes, the Investor Defendants, unlike true lenders, relied exclusively on the fortunes of OneWeb’s “business” for repayment and extended funding to the Company on terms on which no legitimate, third-party lender would have agreed to lend.

81. [REDACTED]

82. Upon information and belief, the only reasons the Investor Defendants agreed to purchase the Purported Notes were to protect and expand (through the receipt of warrants entitling them to additional shares of stock) their existing equity investments in the Company, to support their own parochial business interests, and to gain seniority over the Committee’s constituents.

83. The Investor Defendants acquired Purported Notes in general proportion to their relative equity holdings in OneWeb. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁶⁴

84. The proceeds of the Purported Notes were used almost exclusively for the purpose of funding Project Costs (as defined in the A&R NPA), not general operating expenses. In fact, OneWeb never even had operations, thus any “operational” expenditures that OneWeb incurred were merely incidental to the development of its capital assets.

85. Both NPAs contained express equity components. [REDACTED]

[REDACTED]

[REDACTED] The A&R NPA contained an even clearer equity component in that each of the Investor Defendants was entitled to receive warrants exercisable for one common share per \$300,000 in Purported Notes. Because the warrants were “penny warrants” (*i.e.*, had a nominal exercise price), the Investor Defendants effectively purchased shares of stock by purchasing Purported Notes.

86. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁴ [REDACTED]

87. [REDACTED]

88. The negotiations of the NPAs were not arms-length. Every Investor Defendant was an insider with access to non-public knowledge as an existing equity holder prior to purchasing a debt instrument under the Purported Notes. The Investor Defendants, collectively, held more than 70% of the Company's equity and all but one had a seat on the board. SoftBank alone held approximately 50% of the Company's equity. The Investor Defendants thus sat on both sides of the NPAs as they were negotiated and entered into.

89. Although the Purported Notes were ostensibly secured, the value of the collateral was far less than the amount advanced. Thus, the Investor Defendants could not have reasonably relied on such collateral as a source of repayment. [REDACTED]

[REDACTED]

[REDACTED]

⁶⁵ [REDACTED]

[REDACTED]

90. There was no sinking fund to provide repayments under the Purported Notes.

91. The Investor Defendants agreed that, if OneWeb were ultimately successful in obtaining debt financing from the DFIs and ECAs, the Investor Defendants would subordinate their claims under the Purported Notes to claims arising under such debt financing. Each Investor Defendant signed a letter agreement for this purpose.⁶⁶ This agreed subordination of the Purported

⁶⁵ March 4, 2020 Presentation re: Perspectives on Value of OneWeb's Global Ku- and Ka-Band Authorization (QCOW-00004907-5004), at QCOW-00004920, attached hereto as **Exhibit 29**. [REDACTED]

[REDACTED] Email from Ren Tanaka (SoftBank) to David Tolley (OneWeb) dated July 6, 2018 (SBG0018756-18758), at SBG0018745, attached hereto as **Exhibit 30**.

⁶⁶ See e.g., Ex. 23, Softbank Letter Agreement.

[REDACTED]

[REDACTED]

92. For the reasons set forth above, the Investor Defendants' claims with respect to the Purported Notes should be characterized as equity.

**SECOND CAUSE OF ACTION (IN THE ALTERNATIVE) – EQUITABLE
SUBORDINATION OF THE DEFENDANTS' CLAIMS UNDER THE PURPORTED
NOTES TO THE CLAIMS OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §
510(c) OF THE BANKRUPTCY CODE AGAINST ALL DEFENDANTS**

93. The Committee repeats and re-alleges the allegations contained in paragraphs 1-92 as if fully set forth herein.

94. [REDACTED]

[REDACTED]

95. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

96. The Investor Defendants were insiders of the Debtors under section 101(31) of the Bankruptcy Code. All but one of the Investor Defendants (the Government of Rwanda) appointed a director to OneWeb's board and used such position to obtain access to inside information and influence the Company's decision-making. In addition, the Investor Defendants, collectively, held more than 70% control of OneWeb's equity. Although some Investor Defendants were less active than others in managing the Company's affairs, they effectively relied on SoftBank as their *de facto* agent in such matters and acted together as a group.

97. The Investor Defendants engaged in inequitable, unfair, self-serving transactions with the Debtor that were not at arms' length and were designed to manipulate the Company's

cash position. While knowing of OneWeb's financial condition, the Investor Defendants supplied cash in the form of the Purported Notes [REDACTED]

[REDACTED] Upon information and belief, the only purpose of these purported "loans" was to support the Investor Defendants' parochial interests at the expense of the Company's other creditors and for them to obtain priority in the event of a bankruptcy filing.

98. [REDACTED]
[REDACTED]
[REDACTED]

99. The Investor Defendants inequitably used their insider position to shift the risk of OneWeb's failure from themselves to the Company's other, legitimate creditors.

100. For these reasons, if the Defendants' claims with respect to the Purported Notes are not recharacterized, they should be equitably subordinated to the claims of the Debtors' unsecured creditors under section 510(c) of the Bankruptcy Code.

THIRD CAUSE OF ACTION – OBJECTION TO DEFENDANTS' CLAIMS UNDER SECTION 502(b) OF THE BANKRUPTCY CODE AGAINST ALL DEFENDANTS

101. The Committee repeats and re-alleges the allegations contained in paragraphs 1-100 as if fully set forth herein.

102. Under section 502(b) of the Bankruptcy Code, a party in interest, such as an official committee, may object to a claim, and the court must disallow a claim, if it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law."

103. If the Court does not recharacterize or equitably subordinate the Defendants' claims under sections 105(a) or 510(c) of the Bankruptcy Code, it should disallow them under section 502(b) because they are in reality equity interests for the reasons indicated above.

PRAYER FOR RELIEF

WHEREFORE, the Committee respectfully request that the Court enter an order (i) recharacterizing the Investor Defendants' claims under the Purported Notes as equity interests and disallowing such claims; and (ii) in the alternative, equitably subordinating the Investor Defendants' claims to those of the Debtors' unsecured creditors.

Dated: July 13, 2020
New York, New York

/s/ Luc A. Despins
PAUL HASTINGS LLP
Luc. A. Despins, Esq.
Pedro A. Jimenez, Esq.
Nicholas A. Bassett, Esq.
200 Park Avenue
New York, New York 10166
Telephone: (212) 318-6000
lucdespins@paulhastings.com
pedrojimenez@paulhastings.com
nicholasbassett@paulhastings.com

*Counsel to the Official Committee of Unsecured
Creditors (as to all Defendants other than Airbus and
Qualcomm)*

/s/ Seth Van Aalten
COLE SCHOLZ P.C.
Seth Van Aalten, Esq.
Justin R. Alberto, Esq. (admitted pro hac vice)
Sarah A. Carnes, Esq.
Nolan E. Shanahan, Esq.
1325 Ave. of the Americas, 19th Floor
New York, New York 10019
Telephone: (646) 563-8935
Facsimile: (646) 563-7935
E-mail: svanaalten@coleschotz.com
jalberto@coleschotz.com
scarnes@coleschotz.com
nshanahan@coleschotz.com

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 88 of 154

*Counsel to the Official Committee of Unsecured
Creditors (as to all Defendants)*

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 89 of 154

EXHIBIT 1

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 91 of 154

EXHIBIT 2

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 93 of 154

EXHIBIT 3

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 95 of 154

EXHIBIT 4

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 97 of 154

EXHIBIT 5

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 99 of 154

EXHIBIT 6

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 101 of 154

EXHIBIT 7

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 103 of 154

EXHIBIT 8

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 105 of 154

EXHIBIT 9

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 107 of 154

EXHIBIT 10

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 109 of 154

EXHIBIT 11

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 111 of 154

EXHIBIT 12

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 113 of 154

EXHIBIT 13

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 115 of 154

EXHIBIT 14

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 117 of 154

EXHIBIT 15

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 119 of 154

EXHIBIT 16

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 121 of 154

EXHIBIT 17

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 123 of 154

EXHIBIT 18

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 125 of 154

EXHIBIT 19

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 127 of 154

EXHIBIT 20

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 129 of 154

EXHIBIT 21

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 131 of 154

EXHIBIT 22

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 133 of 154

EXHIBIT 23

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 135 of 154

EXHIBIT 24

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 137 of 154

EXHIBIT 25

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 139 of 154

EXHIBIT 26

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 141 of 154

EXHIBIT 27

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 143 of 154

EXHIBIT 28

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 145 of 154

EXHIBIT 29

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 147 of 154

EXHIBIT 30

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 149 of 154

EXHIBIT 31

FILED UNDER SEAL

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

20-22437-rdd Doc 402 Filed 07/13/20 Entered 07/13/20 21:45:12 Main Document
Pg 151 of 154

EXHIBIT B

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
In re: : Chapter 11
:
OneWeb Global Limited, et al. : Case No. 20-22437 (RDD)
:
Debtors.¹ : (Jointly Administered)
:
-----X

**ORDER GRANTING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS'
(I) MOTION FOR ORDER GRANTING COMMITTEE DERIVATIVE STANDING
TO PURSUE AND, IF APPROPRIATE, SETTLE CLAIMS FOR
RECHARACTERIZATION AND EQUITABLE SUBORDINATION AGAINST
CERTAIN PURPORTED SECURED CREDITORS
AND (II) OBJECTION TO SUCH CREDITORS' CLAIMS**

Upon the motion (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") to the above-captioned debtors and debtors in possession (collectively, the "Debtors" or "OneWeb") of these chapter 11 cases, the Committee seeks entry of an order (this "Order"), pursuant to sections 105(a), 502(b), and 510(c) of title 11 of the United States Code (the "Bankruptcy Code") and the *Final Order (i) Authorizing Debtors to Use Cash Collateral pursuant to 11 U.S.C. § 363, (ii) Granting Certain Protections to Prepetition Noteholders, and (iii) Granting Related Relief* [ECF 118] (the "Cash Collateral Order"), (i) granting the Committee derivative standing to pursue and, if appropriate, settle claims against SoftBank Group Corp. ("SoftBank"), Airbus Group Proj B.V. ("Airbus"), Qualcomm Technologies, Inc. ("Qualcomm"), Banco Azteca, S.A., Institucion de Banca Multiple ("Banco Azteca"), the

¹ The debtors in these cases (the "Debtors"), along with the last four digits of each Debtor's federal tax identification number, if any, are: OneWeb Global Limited (N/A); OneWeb Holdings LLC (5429); OneWeb Communications Limited (9487); WorldVu Satellites Limited (7802); WorldVu Development LLC (9067); WorldVu JV Holdings LLC (N/A); 1021823 B.C. LTD (8609); Network Access Associates Limited (8566); OneWeb Limited (8662); WorldVu South Africa (Pty) Ltd. (1867); OneWeb Chile SpA (2336); WorldVu Australia Pty Ltd. (5436); WorldVu Unipessoal Lda. (2455); OneWeb Norway AS (0209); OneWeb ApS (9191); OneWeb Network Access Holdings Limited (8580); OneWeb G.K. (1396); OneWeb Ltd (8661); WorldVu Mexico S. DE R. L. DE C.V. (1234). The Debtors' headquarters is located at 195 Wood Lane, West Works Building, 3rd Floor, London, W12 7FQ, UK.

Government of the Republic of Rwanda (the “Government of Rwanda” and together with SoftBank, Airbus, Qualcomm, and Banco Azteca, the “Investor Defendants”), and Global Loan Agency Services Ltd. and GLAS Trust Corporation Ltd., as administrative agent and collateral agent, respectively, under the A&R NPA (defined in the Motion) (together with the Investor Defendants, the “Defendants”) for recharacterization or equitable subordination of their claims against the Debtors, or (ii) disallowing such claims under section 502(b) of the Bankruptcy Code on the ground that they are, in reality, equity interests, as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Cash Collateral Order; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interest of the Debtors’ estates, their creditors, and other parties in interest; and this Court having found that the Committee provided appropriate notice of the Motion and the opportunity for a hearing under the circumstances; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation, **IT IS HEREBY ORDERED**

THAT:

1. The Motion is granted as set forth herein.
2. [The Committee is granted derivative standing to pursue and, subject to authorization by the Court, settle claims against the Defendants for recharacterization and/or equitable subordination of their claims against the Debtors.]

OR

3. [Pursuant to section 502(b) of the Bankruptcy Code, the claims of the Defendants are disallowed on the ground that they are, in reality, equity interests, and all liens issued to the Defendants in connection with such claims are preserved for the benefit of the estate under section 551 of the Bankruptcy Code.]

4. The Committee is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

5. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Date: July ___, 2020
White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

In Re:

ONEWEB GLOBAL LIMITED, et al.

Main Case No. 20-22437-rdd

July 28, 2020

eScribers, LLC

(973) 406-2250

operations@escribers.net

www.escribers.net

To purchase copies of this transcript, please contact us by phone or email



Min-U-Script® with Word Index

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - -x

In the Matter of:

ONEWEB GLOBAL LIMITED, et al.,	Main Case No.
Debtors.	20-22437-rdd

- - - - -x

United States Bankruptcy Court
300 Quarropas Street
White Plains, New York

July 28, 2020
1:04 PM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1

2 Notice of Agenda for Matters Scheduled for July 28, 2020, at

3 1:00 PM

4

5 Motion to Extend Time / Notice of Debtors' Motion to Extend the

6 Debtors' Exclusive Periods to File a Chapter 11 Plan and

7 Solicit Acceptances Thereof Pursuant to Section 1121 of the

8 Bankruptcy Code (ECF #395)

9

10 Official Committee of Unsecured Creditors' Limited Objection to

11 Debtors' Motion to Extend Debtors' Exclusive Periods to file a

12 Chapter 11 Plan and Solicit Acceptances Thereof Pursuant to

13 Section 1121 of the Bankruptcy Code (related document(s)395)

14 filed by Luc A. Despins on behalf of Official Committee of

15 Unsecured Creditors (ECF 419)

16

17 Debtors' Reply to the Committee's Objection to the Motion To

18 Extend Their Exclusive Periods to File a Chapter 11 Plan and

19 Solicit Acceptances Thereof (related document(s)395, 419) filed

20 by Lauren C. Doyle on behalf of OneWeb Global Limited (ECF

21 #440)

22

23 Motion for Order Granting Committee Derivative Standing to

24 Pursue and, if Appropriate, Settle Claims for

25 Recharacterization and Equitable Subordination Against Certain

1
2 Purported Secured Creditors, and (II) Objection to Such
3 Creditors' Claims (related document(s)402)

4
5 Softbank Group Corp.'s Objection to the Official Committee of
6 Unsecured Creditors' (I) Motion for Order Granting Committee
7 Derivative Standing to Pursue, and if Appropriate, Settle
8 Claims for Recharacterization and Equitable Subordination
9 Against Certain Purported Secured Creditors, and (II) Objection
10 to Such Creditors' Claims (related document(s)402) filed by
11 Gary S. Lee on behalf of SoftBank Group Corporation (ECF #427)

12
13 Joinder and Supplemental Memorandum of Law in Opposition to the
14 Official Committee Of Unsecured Creditors' (I) Motion For Order
15 Granting Committee Derivative Standing to Pursue and, if
16 Appropriate, Settle Claims for Recharacterization and Equitable
17 Subordination Against Certain Purported Secured Creditors and
18 (Ii) Objection to Such Creditors' Claims (related
19 document(s)402) filed by Timothy Q. Karcher on behalf of Grupo
20 Elektra S.A.B. de C.V. (ECF #428)

21
22 Joinder of Airbus Group Proj B.V. to the Softbank Group Corp.'s
23 Objection to the Official Committee of Unsecured Creditors' (I)
24 Motion for Order Granting Committee Derivative Standing to
25 Pursue and, if Appropriate, Settle Claims for

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Recharacterization and Equitable Subordination Against Certain
Purported Secured Creditors, and (II) Objection to Such
Creditors' Claims (related document(s)402, 427) filed by
Michael C. Hefter on behalf of Airbus Group Proj B.V. (ECF
#429)

Debtors' Objection to the Official Committee of Unsecured
Creditors' (I) Motion for Order Granting Committee Derivative
Standing to Pursue, and if Appropriate, Settle Claims for
Recharacterization and Equitable Subordination Against Certain
Purported Secured Creditors, and (II) Objection to Such
Creditors' Claims (related document(s)402) filed by Lauren C.
Doyle on behalf of OneWeb Global Limited (ECF 430)

Joinder of Qualcomm Technologies, Inc. and Qualcomm Global
Trading PTE. Ltd to the Debtors' and Softbank Group Corp.'s
Objections to the Official Committee of Unsecured Creditors'
Motion for Derivative Standing to Pursue Recharacterization and
Subordination of Certain Secured Creditors' Claims and
Objections Thereto (related document(s)402, 430, 427) filed by
Rachel Ehrlich Albanese on behalf of Qualcomm Technologies,
Inc. and Qualcomm Global Trading Pte. Ltd. (ECF #440)

Official Committee of Unsecured Creditors' Motion for an Order

1

2 Authorizing the Committee to Exceed the Page Limit for the
3 Committee's Reply in Support of Motion for Order Granting
4 Committee Derivative Standing to Pursue and, if Appropriate,
5 Settle Claims for Recharacterization and Equitable
6 Subordination against Certain Purported Secured Creditors filed
7 by Luc A. Despins on behalf of Official Committee of Unsecured
8 Creditors (ECF #422)

9

10 Official Committee of Unsecured Creditors' Reply in Support of
11 Motion for Order Granting Committee Derivative Standing to
12 Pursue and, if Appropriate, Settle Claims for
13 Recharacterization and Equitable Subordination against Certain
14 Purported Secured Creditors (related document(s) 402) filed by
15 Luc A. Despins on behalf of Official Committee of Unsecured
16 Creditors (ECF #445)

17

18

19

20 Transcribed by: Linda Ferrara
21 eScribers, LLC
22 352 Seventh Avenue, Suite #604
23 New York, NY 10001
24 (973) 406-2250
25 operations@escribers.net

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S (TELEPHONICALLY):

MILBANK LLP

Attorneys for Debtors
55 Hudson Yards
New York, NY 10001

BY: TYSON LOMAZOW, ESQ.
BRIAN KINNEY, ESQ.
LAUREN C. DOYLE, ESQ.

MILBANK LLP

Attorneys for Debtors
1850 K Street, NW
Suite 1100
Washington, DC 20006

BY: ANDREW M. LEBLANC, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PAUL HASTINGS LLP

Attorneys for Official Creditors' Committee

200 Park Avenue

New York, NY 10166

BY: LUC A. DESPINS, ESQ.

PAUL HASTINGS LLP

Attorneys for Official Creditors' Committee

2050 M Street NW

Washington, DC 20036

BY: NICHOLAS A. BASSETT, ESQ.

MORRISON & FOERSTER LLP

Attorneys for SoftBank Group Corporation

250 West 55th Street

New York, NY 10019

BY: DAVID J. FIOCCOLA, ESQ.

GARY S. LEE, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROSKAUER ROSE LLP
Attorneys for Grupo Elektra
11 Times Square
New York, NY 10036

BY: TIMOTHY Q. KARCHER, ESQ.
CARLOS E. MARTINEZ, ESQ.
SETH FIUR, ESQ.

COLE SCHOTZ P.C.
Attorneys for the Official Committee of Unsecured
Creditors
1325 Avenue of the Americas
19th Floor
New York, NY 10019

BY: NOLAN E. SHANAHAN, ESQ.
SETH VAN AALTEN, ESQ.

1

2 HOGAN LOVELLS US LLP

3 Attorneys for Airbus DS Satnet LLC and Airbus Group

4 Proj B.V.

5 390 Madison Avenue

6 New York, NY 10017

7

8 BY: CHRISTOPHER (CHRIS) R. BRYANT, ESQ.

9 MICHAEL HEFTER, ESQ.

10

11

12 CRAVATH, SWAINE & MOORE LLP

13 Attorneys for Gharti Global Ltd.

14 825 Eighth Avenue

15 New York, NY 10019

16

17 BY: PAUL H. ZUMBRO, ESQ.

18

19

20 HUGHES HUBBARD & REED LLP

21 Attorneys for Airbus OneWeb Satellites LLC

22 One Battery Park Plaza

23 New York, NY 10004

24

25 BY: JEFFREY S. MARGOLIN, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WEIL, GOTSHAL & MANGES LLP
Attorneys for HMG
767 Fifth Avenue
New York, NY 10153

BY: GABRIEL A. MORGAN, ESQ.
GARRETT FAIL, ESQ.
ANTHONY L. GREENE, ESQ.

DLA PIPER LLP (US)
Attorneys for Qualcomm
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, CA 90067

BY: ERIC GOLDBERG, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TOGUT, SEGAL & SEGAL LLP
Attorneys for Kongsberg Satellite Services AS (KSAT)
One Penn Plaza
Suite 3335
New York, NY 10119

BY: NEIL BERGER, ESQ.
ALBERT TOGUT, ESQ.

UNITED STATES DEPARTMENT OF JUSTICE
Office of the United States Trustee
201 Varick Street
Suite 1006
New York, NY 10014

BY: RICHARD C. MORRISSEY, ESQ.

ONEWEB GLOBAL LIMITED, ET AL.

12

1 P R O C E E D I N G S

2 THE COURT: Good afternoon. This is Judge Drain.

3 We're here on In re OneWeb Global Limited, et al.

4 This is a completely telephonic hearing. I'll ask you to
5 identify yourself and your client the first time you speak. I
6 may do so again, if you speak again, and I think that the court
7 reporter may not be able to put together your voice with your
8 name.

9 There's one authorized recording of this hearing.
10 It's taken by CourtSolutions. CourtSolutions provides a copy
11 to our clerk's office on a daily basis. If you want to order a
12 transcript, you should contact the clerk's office to arrange
13 for the preparation of one.

14 So with that introduction, I have the proposed agenda
15 submitted by the debtors, and I'm happy to go down that agenda.
16 There are really two matters on it.

17 MR. LOMAZOW: Thank you, Your Honor, and good
18 afternoon. For the record, this is Tyson Lomazow of Milbank
19 LLP, counsel to the debtors. Yes, we're happy to proceed
20 through the agenda in accordance with the order as it was
21 filed.

22 The first item on the agenda is the debtors'
23 exclusivity motion, and I believe the second item is the
24 committee's motion for standing. I also just wanted to take a
25 moment to introduce my partners, Andrew Leblanc and Lauren

1 Doyle, who are joining me on the phone this afternoon.

2 THE COURT: Okay.

3 MR. LOMAZOW: So with that, Your Honor, I would
4 propose to proceed with presenting the debtors' motion on the
5 agenda today which is the exclusivity motion, if that pleases
6 the Court.

7 THE COURT: That's fine, thanks.

8 MR. DESPINS: Your Honor, this is Luc Despins with
9 Paul Hastings. Just to save time with the Court, on this first
10 matter, you know, the committee had filed a limited objection.
11 We've made several points in there. We wanted the Court to be
12 aware of those points. The debtors responded saying they're
13 going to cut down their request to ninety days. That's fine
14 with us. We just didn't want you a month from now to say,
15 where have you been if we ever seek to terminate exclusivity.
16 We've made our point. I don't think we need to spend the
17 Court's time further on this matter. But of course, if you
18 want to hear more, I'm happy to do so, but I wanted to say that
19 right off the bat to save the Court some time perhaps.

20 THE COURT: Okay. No, I appreciate that, and you're
21 correct, the debtors did respond to the objection by doing two
22 things. One was pretty obvious, which is noting that an
23 extension of exclusivity never precludes a party later from
24 seeking to shorten exclusivity for cause under Section 1121,
25 and then secondly, they reduced the time of the extension

1 requested by 30 days from 120 days to 90 days.

2 The committee objection, I believe, was the only
3 objection to the motion, given what I've just heard, and based
4 on my review of the motion, and my understanding of the status
5 of these cases, with the approval of the framework for the
6 purchase and the filing of the disclosure statement and plan,
7 and the timing for the expiration at this point of
8 solicitation, I will grant the motion. The debtors have
9 established sufficient cause for the revised requested
10 extension of ninety days. So the debtors can email that order
11 to chambers.

12 MR. LOMAZOW: Thank you, Your Honor. We will go ahead
13 and do so.

14 THE COURT: Okay.

15 MR. LOMAZOW: At this point, we'll turn the podium
16 over to the creditors' committee for their motion for standing.

17 THE COURT: Okay, very well.

18 MR. DESPINS: Good afternoon, Your Honor. Luc Despins
19 with Paul Hastings again, for the committee, and I'm here on
20 the phone with my colleague from Cole Schotz, Seth Van Aalten,
21 who is a conflicts counsel for the committee.

22 We're obviously here on the motion for standing to
23 file a complaint seeking a recharacterization and equitable
24 subordination, and also in our objection under 502(b) to the
25 claims of the secured lenders, although we've conceded that the

1 502(b) motion technically cannot be heard now because thirty
2 days has not passed. Nevertheless, I didn't want to forget
3 that part.

4 I don't intend to take a lot of your time, Your Honor,
5 because I think I know you enough to know that by now you
6 probably have a very good sense of what you want to do with
7 this but I'd like to provide the Court with some details that I
8 think are important, and we think we've provided the Court with
9 a lot more details than the typical standing motion, in terms
10 of factual support, but we just want to cover some basic
11 points.

12 First, on the merits, when I was preparing for the
13 hearing, Your Honor, I was struck by the fact that there's tons
14 of cases on recharacterization but courts -- basically, it's
15 very clear that courts look at this and make a kind of a
16 holistic decision at the outset of where they're going to end
17 up, and then go through the factors, and of course that's
18 perfectly appropriate, but in that context, if a court decides
19 that it's not going to recharacterize, then it will say well,
20 there are documents here. There's a note, there's a promissory
21 note, there's collateral, et cetera, et cetera, and on the
22 other hand, if the Court wants to recharacterize it, the Court
23 will say that these factors are not strong, and the other
24 factors are more important.

25 So the question is obviously, you need to look at the

1 overall relationship and in order for this process to be
2 meaningful, substance must prevail over form, and more
3 importantly, in the Second Circuit, we don't have a circuit
4 court decision on recharacterization but we do have a long
5 history in this circuit of dealing with form versus substance
6 in the lease or true lease context with the PCH and the
7 Rensselear cases that Your Honor's well familiar with.

8 And with these decisions, what they tell us is that
9 before we give an entity special treatment, for example, in
10 those cases, landlord treatment, or in our case, creditor
11 treatment, you need to look at what is really going on, and the
12 labels really just don't matter. And I'm sure Your Honor will
13 recall, there was a time where courts were a bit confused by
14 this in the lease context, when in fact lawyers would put in
15 the lease various representations that both parties agreed that
16 if there's a Chapter 11 case, this lease will be treated as a
17 true lease. And some courts at the beginning said well, you
18 see, that's the intent of the parties, and eventually courts
19 realized no, that's not going to govern the situation here.

20 So where does that leave the Court? I guess, if I
21 were a judge, and I'm certainly not qualified enough to be, I
22 would say that the Court needs to look at factors that cannot,
23 and pardon the colloquial expression, but that cannot be
24 "gamed", and what I mean by that is that if the factors can be
25 gamed by the parties, or controlled by the parties, it's form

1 over substance. So anyone can draft a loan agreement. Anyone
2 can put a maturity date. Anyone can do that.

3 Those factors can all be controlled by the parties,
4 but what cannot be gained, if you will, is undercapitalization,
5 insider control status, ability or not to get other financing,
6 source of repayment, or ability to get repaid, use of proceeds
7 to make capital investments, and the issue of identify of
8 interest, although that also -- if the Court were to adopt a
9 very strict approach, that also could be gained because you
10 could say well, I own 46.9 percent; I'll buy forty-nine percent
11 of the notes, and here we go, you know, so -- and the courts
12 have said in Autostyle that if -- what the Court is looking for
13 is a sharp disproportionality, not exact matching of the equity
14 interest.

15 But how the parties view the transaction internally,
16 meaning when they're not communicating to the outside, and
17 maybe also what the debtor -- how the debtor did describe it to
18 the world, although that to a certain extent could be gained by
19 the debtor, that can also be relevant.

20 So viewed in this light, if you focused on the items
21 that cannot be easily controlled, the conclusion here, the
22 committee believes, it jumps at us. Why? Because what --
23 first, undercapitalization. This is not a case about
24 undercapitalization. It's a case of pure and simple insolvency
25 before these documents are executed. The documents are

1 compelling on that.

2 If you look at the -- I hope Your Honor has had a
3 chance to look at the email that Mr. Bassett sent this morning
4 with three documents, but in there, there was a presentation to
5 the Board of Directors of OneWeb, August 9, 2018, again because
6 we're in an open courtroom, and people have not agreed that
7 this can be disclosed publicly, I just want to point Your
8 Honor, your attention to certain specific pages of that
9 presentation. So I don't know if -- first of all, did Your
10 Honor get a chance to receive that email and to look at it?

11 THE COURT: I did. I don't know if there's any
12 objection to my considering it. It repeats certain points that
13 were also made in the motion itself, but I'm aware of it.

14 MR. DESPINS: Okay. But it's really on page 2, which
15 is SBG0015823 where there's a clear statement of gross
16 insolvency there; a statement that bankruptcy is being
17 considered. Those factors, we believe speak for themselves,
18 and there are other pages -- page 4, which is SBG015825, where
19 they clearly say that the company will need to do what's on
20 page 5. Again, I'm speaking in code here because Your Honor
21 has it, so I'm not going to belabor the point.

22 So clearly here, this is just not a question of well,
23 the debtor was on hard times. The debtor was not on hard
24 times. They were tapped out completely, and they had millions
25 of dollars of backed-up receivables to their vendors at that

1 time, and so that's really important.

2 And just to make sure you have the complete picture,
3 Your Honor, that memo that you saw, the reason you're seeing
4 it, is because at that meeting where the board is discussing
5 these issues, counsel for the lenders is in attendance; counsel
6 for the lenders in this case is in attendance, and so are many
7 other people that are not the directors of the company but
8 they're representatives of other investors in the company.

9 So if that's not sufficient to give you the full
10 picture of what's going on, when the 2019 transaction was
11 approved, Your Honor, by the board -- so the board is
12 considering that transaction, who is in attendance at that
13 meeting? Not only the board representatives, which is of
14 course very appropriate, but a bunch of other people that are
15 representatives of the lenders, including somebody from Rwanda,
16 which is -- you know, they're not a director. They have no
17 business being there, but of course all in the family, the
18 lenders are all present while the board is approving their
19 loan.

20 And by the way, I don't think the parties are fighting
21 us on undercapitalization, but I didn't want to -- I could've
22 just be silent on it but I wanted to make sure Your Honor
23 focused on the fact that this was much more than
24 undercapitalization.

25 Then what I want to say about undercapitalization, or

1 in this case insolvency, is that the Court cannot afford a lot
2 of weight to the mechanical test such as was there a loan, was
3 there a maturity date, was there an interest rate. When the
4 lenders and the debtors did this in the face of insolvency,
5 when they knew -- and this is our -- what we're saying, they
6 knew that one, they would be at the back of the bus if they
7 were filing at that point, meaning they would be solely equity,
8 and two, even with the money, and I'm using the term "fuel"
9 here, that they were putting in the plane, the plane still
10 could not take off. It would need more fuel for the plane to
11 take off eventually.

12 So they knew all of this, and of course, they
13 structured this to make sure they primed everybody else. So if
14 you look at the second document that was attached to the email
15 by Mr. Bassett, you'll see that it's SoftBank's internal
16 committee approval for the loans, and again, it's a loan
17 document, so I'm not going to take you through every page of
18 it, but I think it's very important and again, because it's not
19 public, I will just point you to -- there's no page numbers,
20 there are Bates numbers, so this one is SBG0025843.

21 And in there, there's a -- I don't know if you have it
22 handy, but there's a box there, and then there's a bullet after
23 that, that starts with, "There is still risk", and I'm not
24 going to further than that but basically I want to make sure
25 Your Honor reads that, and basically that is acknowledgement

1 that even if they put more fuel, the plane will not be able to
2 take off because there's not enough funding, and therefore,
3 there's no money to repay them. And let's remember, this is a
4 company that has never had any revenues and was not forecasted
5 to have any revenues at any time until the latest was 2021.

6 Then, if you look at same document, SBG0025849,
7 there's a -- in that page, there's a risk and mitigation
8 heading, and there's a sentence that basically repeats the same
9 sentence, "There is still a risk", et cetera, et cetera, and
10 then the second bullet, at the bottom of that page that is
11 entitled, "In the event of". Basically, that sentence says
12 hey, we're doing this because we're going to be in front of the
13 bus now if we do this transaction in a subsequent bankruptcy.

14 So clearly, they knew about this; this was designed to
15 do this; and the Mexican investor is no better in the sense
16 that you saw in the reply. We quoted from their language.
17 They make no bones about the fact that they look at this
18 transaction as a loan in form only, and basically, Your Honor,
19 the way we look at this is that the lenders in the company set
20 up this game of musical chairs, inviting our constituents,
21 meaning the trade, the suppliers, to come and play, but they
22 made sure that when the music stopped, they all had a
23 guaranteed seat, and -- but not the trade.

24 You'll recall at the beginning, Your Honor, I
25 mentioned one factor, which is what did OneWeb tell the world,

1 meaning our constituents, when it entered into this
2 transaction? And this is important, and we forwarded this to
3 Your Honor today, which is the press release that they issued
4 on March 18th, 2019. That is public, so I am not going to
5 refrain from quoting it.

6 And basically there -- and it's very important to
7 understand that before this, the company had equity rounds of
8 financing that they had announced, that they had made public
9 announcement about. So now the issue of press release on March
10 18th, telling the world that it has secured its largest
11 fundraising round to-date. This brings the total funds raised
12 to 3.4 billion. Now of course, the message conveyed here is
13 that this is still equity because they're talking about a round
14 of financing. They're raising new capital, and they're -- when
15 you look at the dollar amounts, the 3.4 billion, you add that
16 to the dollars raised through equity, and that's the total
17 amount.

18 And so that's important, one, because the lenders are
19 quoted extensively in that memo -- in that, sorry, press
20 release, so it's not like the company went off on its own and
21 did some crazy thing. The Mexican investor is listed, so is
22 SoftBank, and they're quoted as saying this is great news and
23 they talk about this capital raise.

24 And so we believe, Your Honor, that shows -- and by
25 the way, apologies for not showing that until now. I guess

1 better late than never, but this shows two potential scenarios,
2 Your Honor. First, either the company and the lenders did not
3 believe that this was debt because they made a great effort to
4 convey the fact that this was equity, and not debt, or they
5 knew, they thought it was debt, but they did not want to
6 disclose that to the world, and wanted people to extend credit
7 on that basis while they were getting in front of the bus.

8 So Your Honor, this goes not only to
9 recharacterization; it goes to equitable subordination, as
10 well, and Your Honor, we believe that is also important.

11 Moving onto the issue of insider control and
12 substantial identity of interest, Your Honor. First they
13 concede that SoftBank was an insider because they're arguing
14 that not all of them were insiders, so the point is SoftBank
15 was an insider. That's in the debtors' objection, but then
16 they say the others are not insiders, and therefore, this
17 fails, and the point they're making is that they're citing case
18 law that says that if Chase Manhattan Bank has an appointee to
19 the Board, that doesn't make Chase an insider because it has a
20 director on the board, and that's true, but that's not the
21 point we're making here. Here, we're making the point that
22 together, they were all acting in concert under the leadership
23 of SoftBank, which was the insider. SoftBank had all the
24 information, and they controlled the company with their seventy
25 percent -- either on the board or through their equity interest

1 of a total of about seventy percent or so.

2 So then the identity of interest. I want to mention
3 that because they make a big point about that. What Autostyle
4 said is that there cannot be a sharp discrepancy, and we
5 believe we satisfied that.

6 Is it percent -- for each lender, percentage by
7 percentage identical? No, it's not. But again, it would be so
8 easy for people in that situation to game the system by just
9 changing the percentages that the standard, which is there's
10 not a sharp discrepancy between the investment and the equity
11 ownership, is what should govern, and here we meet that.

12 Next, Your Honor, is the ability to get other
13 financing. They're not even challenging that. They're not
14 fighting us on that.

15 The next point is the source of repayment. This is
16 very important here because this distinguishes a number of
17 cases that have expressed concerns about discouraging rescue
18 financing, and I know that that would sound accord with you
19 because of the fact that I've been in front of you before, and
20 this -- the case here is very different. This is not a
21 retailer that was hit by hard times and they have to close some
22 stores, and all that. They never had any revenues. It was
23 part of the plan. Not that they didn't want to have revenues,
24 but it was not an accident. They had no revenues. They knew
25 that, and that's why this is such an important fact is that

1 there's no -- even their loan would not get the company to a
2 revenue-generating place, and that is key here.

3 So in that sense, the ability to get repaid was nil
4 from the firm's revenue, and Mr. Van Aalten will cover that
5 when he talks about the manufacturers, because they were
6 brutally honest about that issue in their own internal
7 correspondence.

8 Then this ability to get financing, or not -- the
9 ability not to get other financing, and the ability to -- the
10 source of repayment, ties into what courts refer to as the
11 issue of whether the lenders viewed themselves as lenders or
12 not. We plead with sufficient facts that they each had a
13 reason to be there which have nothing to do with being lenders.
14 Most of them were not lenders actually. These entities were
15 not lenders. They had another parochial reason, either because
16 they had an internet company, they were in the manufacturing
17 business, et cetera, et cetera. So this is why these loans are
18 loans in name only.

19 And there's no issue here in terms of the overwhelming
20 percentage of the advances being used for capital expenditures,
21 so that's not even an issue. And then I'd like to talk -- and
22 there are other factors that are covered in our papers. We're
23 not going to review that, but I'd like to talk for two minutes
24 about the documents because they make a big deal about these
25 documents, and obviously, the -- you know, one would think that

1 we should stay away from that argument because that's bad for
2 us, but I think it's important for the Court to look at some
3 aspect of these documents.

4 The first point I want to make is that now SoftBank
5 has acknowledged -- this is in their reply on paragraph 31 of
6 their objection, they've acknowledged that the first loan,
7 quote/unquote "loan", that they made was automatically
8 convertible to equity upon new financing being obtained.

9 So there's no greater level of subordination than
10 agreeing to become equity. So this factor is clearly met, and
11 we should have emphasized this more, but I want to make sure
12 that, Your Honor, that was not lost on Your Honor.

13 The second point is the control by SoftBank, still in
14 the loan documents, and this is Exhibit B to SoftBank's
15 objection. There's a document SBG43 -- well, it's a range of
16 4326 all the way to 4352. But on page 4339, you'll see, Your
17 Honor, that SoftBank has complete control over the -- what
18 happens with the loan because of the way they define "required
19 lenders". You might say well, they're consenting adults. They
20 can do whatever they want. You know, they -- but that's not
21 the point, is that a lender would never -- a normal lender,
22 would never let another lender -- even, by the way, if they're
23 not in the majority, as long as they're present, if it's them
24 and somebody else -- would never let somebody else control
25 repayment of principal, interest, maturity; never, never do

1 that.

2 And also that shows that, of course, SoftBank was
3 leading -- they were basically agents for these people, but --
4 so that's a very important point, that a lender would never do
5 that.

6 Next, the covenants, Your Honor, and this is on -- it
7 goes to the totality of circumstances because I know the
8 argument will be made that hey, you know, they're consenting
9 adults; they can agree to whatever they want but if -- just to
10 humor me for a second, Your Honor, on 4346, paragraph 7(g),
11 capital expenditures, basically, it's a negative covenant, and
12 basically, if you look there, it's -- and by the way, it's the
13 same in the public version of the document -- they say that
14 they shall not be able -- this is "The borrower shall not be
15 able to make any capital expenditures other than those
16 authorized by OneWeb's board."

17 I mean that is so bizarre for a loan. It's like
18 General Motors basically getting a loan from JPMorgan Chase,
19 and JPMorgan saying, you can make whatever loan that you
20 determine -- or sorry, you can use the proceeds in whatever way
21 that you determine is appropriate.

22 More than that, there are no financial covenants in
23 any of these documents. So again, as consenting adults are
24 able to agree to whatever they want, but the point is you add
25 all these factors, plus the rest of the factors together, and

1 it paints a picture that these lenders really knew what they
2 were doing here, which is what -- certainly, they wanted to get
3 ahead of the others if there was a bankruptcy, but they knew
4 that this was not a true loan.

5 Then I'll switch to the merits -- sorry, the benefit
6 to the estate, Your Honor, because the debtor has made a big
7 point about don't allow this; this will lead to disaster. So I
8 think it's important to look at the state of play today, Your
9 Honor. The debtors' schedules, this is docket number 211, 206,
10 209, show a total of 2.2 billion of unsecured claims with at
11 least 331 million of that being third-party claims. So this is
12 prima facie valid for now. This may change, but right now,
13 that's the status.

14 The bar date is August 11th, but already more than 120
15 proofs of claims, alleging over 20 million in claims have been
16 filed, and we all know how this process works if the bar date,
17 they will all be filed in a week, or in the days before the bar
18 date. So that's the state of play today.

19 So the argument that this is -- that what we're doing
20 is being done on behalf of very few people today, there's no --
21 that's not a cognizable argument. When we get to that point,
22 we can have another discussion because -- but right now,
23 there's been no commitment by anyone to assume any specific
24 contract except for perhaps one contract, and we have the state
25 of play is exactly as I described it.

1 Second, the PSA provides for zero distributions to
2 unsecured creditors. It is all going to the secureds, and the
3 assumption of an executory contract may be good for some
4 unsecured creditors, but that's not the same as getting a plan
5 distribution to unsecured creditors that have no executory
6 contracts, and on top of that, they are getting -- giving
7 releases to each other. So the lenders on the board are giving
8 a release -- are supporting the release that goes to the
9 insiders for the use of the plane, the bonuses, et cetera,
10 that's all being released, and of course, they're also getting
11 a release from claims against themselves.

12 So what they have to do then is they have to argue
13 that the deal will -- the deal, meaning the sale, will fail if
14 the committee is authorized to proceed, and they argue that
15 this will destroy -- that authorizing us to proceed will
16 destroy the deal with the bidder, but they ignore the built-in
17 safety valve for the ninety million dollars that we negotiated.
18 You'll recall that, Your Honor, as part of the PSA.

19 The hundred million dollars in equity, we'll deal with
20 that later, if and when it becomes relevant. By the way, if
21 you follow the debtors' approach, we may never get to the
22 hundred million dollars because we already have ninety -- the
23 hundred million dollars of equity because we already have the
24 ninety million dollars that's available if we prevail. So if
25 the claims are small, we won't get to the hundred million

1 dollars.

2 What the debtors are hoping here is that you'll make
3 some statement regarding the hundred million dollars in equity
4 and the point, Your Honor, we would urge you not to do that
5 because that issue is not before the Court today. You
6 authorizing us to proceed means nothing with respect to the
7 hundred million dollars. That's a separate issue.

8 Next, they argue that the fees will cost the admin
9 claim cap to be exceeded, and therefore, the plan will fail.
10 First, as we pointed out, the debtors have been very, very
11 generous with their funds when it suits them. I've mentioned
12 the airplane use, the consulting fee, millions of dollars of
13 payment on the eve of filing. So it's kind of interesting that
14 now we're -- really can't afford to do anything else because of
15 these payments.

16 But it can't be, Judge, that they could block a
17 meritorious claim by placing a cap on admin claims. If they
18 could do that -- by the way, this is the lenders doing that --
19 that would be an incredible trick. Basically, the committee
20 could never be able to prosecute claims.

21 And the argument that standing cannot be granted
22 unless we are bringing new money to the estate is ridiculous.
23 If that were the case, no committee challenge of secured
24 lenders claim could ever be prosecuted because that's not
25 bringing new money to the estate, and there is benefit in

1 eliminating secured debt that should not exist.

2 Under certain circumstances -- I mean this may never
3 come to pass, but the thirty-percent shareholders who did not
4 participate in the loans could get a recovery once unsecured
5 claims have been paid in full if we are successful because it
6 trickles down to the absolute priority rule.

7 On the issue of fees, they'll say well, it's only the
8 committee's fees but it's going to generate huge fees, and
9 they're the debtors, they are so quick, Judge, to volunteer to
10 pay the lenders fees. When -- you know, if you look at the
11 cash -- the final order on the cash collateral, it basically
12 says that yeah, they're entitled to get their fees paid, but
13 that's one of the concessions that was made in order -- because
14 they're alleging a security interest in their assets. If it
15 turns out that they're equity, they have no such entitlement.
16 So we shouldn't jump to the conclusion that they will have all
17 their fees paid.

18 And on that point, Your Honor, the issue of fees, I
19 would say this, if your decision today is going to turn on the
20 issue of your concern with respect to the estate being -- and
21 it's totally insolvent. I don't think it will be insolvent,
22 but somehow damage being caused to the estate by the size of
23 fees. I will tell you that we will need to pin down the
24 precise terms of this but -- because I need to talk to the
25 committee, but -- and we would come back to the Court because

1 Your Honor has to approve it, but we are prepared to do this on
2 a contingency-fee basis, and I want to be very clear about
3 that.

4 I think that it would be a terrible precedent.
5 Meaning, if there are meritorious claims, the issue cannot be
6 forced to go with contingency fee because the debtor is not
7 forced to do that, and neither is the lender. I think it would
8 be a terrible precedent but I do not want Your Honor to believe
9 that we're not willing to put our money where our mouth is, and
10 we don't think it's required, and we hope you don't require it,
11 but if that's going to make the difference between you granting
12 it or not, we believe that we can come back to Your Honor
13 promptly with a proposal that would make this a contingency fee
14 arrangement.

15 And that's all I have, but I know Mr. Van Aalten has
16 maybe a -- just a very few short minutes to deal with the
17 claims of the manufacturers.

18 THE COURT: Okay.

19 MR. VAN AALTEN: Thank you. Can you hear me, Your
20 Honor?

21 THE COURT: Yes, fine. Thanks.

22 MR. VAN AALTEN: Terrific. Good afternoon, Your
23 Honor. For the record, Seth Van Aalten from Cole Schotz,
24 conflicts counsel to the committee with respect to both
25 Qualcomm and Airbus.

1 Your Honor, I will of course adopt and incorporate the
2 presentation made by Mr. Despins today, as it relates to the
3 general legal and factual predicates to our standing motion.
4 Given that we don't have sealed courtroom today, Your Honor,
5 and it's certainly awkward, but I will be my most careful self
6 in walking Your Honor through some of the exhibits to the
7 motion in the course of my presentation today.

8 Your Honor, what our preliminary discovery has
9 revealed, and as we've laid out in the standing motion and
10 complaint, is that equally if not more colorable claims can be
11 asserted against Qualcomm and Airbus, both of whom invested
12 heavily in the 2015, '16, and '17 equity financings, both of
13 whom received board seats on account thereof, and both of whom
14 participated in the March 2019 amended and restated notes
15 purchase agreement.

16 And so with my co-counsel, Your Honor, having provided
17 the general background, I would focus the Court on three narrow
18 topics, applicable to both Qualcomm and Airbus. First, that
19 they both clearly understood the company's dire financial
20 condition well before, and at the time of the notes purchase in
21 March of 2019, Your Honor.

22 Second, that both recognized and accepted the reality
23 that OneWeb's ultimate repayment of these notes would be
24 contingent upon the future success of a very distressed, pre-
25 revenue business, or upon the injection of additional project

1 financing that would not likely be available to OneWeb in the
2 absence of its future operational success.

3 And third, Your Honor, that both were focused on their
4 own commercial interests, not as traditional lenders fixated on
5 amortization, but as equity investors, and contract
6 counterparties playing for upside were this company to succeed.

7 Airbus, Your Honor, manufactured OneWeb's satellites,
8 and Qualcomm designed and provided wireless communications
9 interface for the satellites.

10 And what we've seen, I think clearly from our
11 preliminary discovery, Your Honor, is that prior to their
12 investment in the purported notes, both Qualcomm and Airbus
13 recognized and understood OneWeb's liquidity shortfalls. They
14 recognized and understood OneWeb's inability to timely pay its
15 debts, and as my co-counsel noted, the significant likelihood
16 that a future bankruptcy filing was in the cards here, and I'd
17 like to point Your Honor to some exhibits to this point.

18 As to Airbus, Your Honor, if we look at Exhibit 5 to
19 the standing motion, and I'm really going to be as generic as
20 possible in my exhibit references today, but we have here a
21 board presentation, and Your Honor can see the date on the
22 second page, and if we turn to Bates OneWeb 6842, Your Honor
23 can see in the first bullet on that page, some pertinent
24 information concerning OneWeb's cash position, and the nature
25 of the payments being made by the company at this time.

1 And if Your Honor looks at the fourth bullet on that
2 page, we see some information concerning OneWeb's current and
3 future liquidity posture.

4 And so it's clear to us, Your Honor, again, based on
5 only preliminary discovery, that both Qualcomm and Airbus in
6 their capacities, not only as board members, but as service
7 providers to OneWeb -- we'll talk about that later on --
8 understood precisely what they were investing into in March of
9 2019, that OneWeb was a venture company bathed in risk, and one
10 facing tremendous liquidity constraints.

11 And that, Your Honor, segues into the second topic,
12 which is the manner in which OneWeb's financial condition
13 colored the March 2019 investments made by Qualcomm and Airbus.
14 And what we've seen, Your Honor, is that both Qualcomm and
15 Airbus understood that these notes would not be repaid unless
16 OneWeb either succeeded operationally to a far more significant
17 degree than where it stood in March of 2019, or if it obtained
18 additional project financing, which was of course tied to its
19 operational success.

20 And with respect to Airbus, Your Honor, I would direct
21 Your Honor to Exhibit 1 to the standing motion, and I'm looking
22 at Bates Airbus 11, and Your Honor can see the nature and the
23 date of this document at the top of the page. Again, I'm going
24 to be very careful, but I would focus Your Honor on the third
25 subject heading of this page, and the second bullet, and I'll

1 give Your Honor a minute to read that.

2 THE COURT: Okay.

3 MR. VAN AALTEN: Next, I would ask Your Honor to take
4 a look at the first subject heading on the page, and
5 specifically the second bullet.

6 THE COURT: Okay.

7 MR. VAN AALTEN: And finally, Your Honor, I would
8 direct you to the very next bullet down in that section, and I
9 would ask you to read that.

10 THE COURT: All right.

11 MR. VAN AALTEN: Thank you. Turning to Qualcomm, Your
12 Honor, its March 2019 investment was a little different than
13 that of Airbus, whereas Airbus purchased the purported notes
14 with cash, Your Honor, Qualcomm did not. What Qualcomm did
15 instead, Your Honor, was it rolled over the entirety of its
16 contract receivable into the note.

17 So just to give some perspective to that, Your Honor,
18 we have Qualcomm, a service provider, with a very large
19 unsecured receivable as of March 2019, effectively no different
20 than the many service providers who now comprise OneWeb's
21 general unsecured claims class, and Qualcomm's receivable is
22 elevated, purportedly secured status, through the notes, and
23 why is that, Your Honor? It's because of Qualcomm's equity
24 investment in OneWeb. It's by virtue of its ownership stake in
25 the company. It's by virtue of its seat in the board room.

1 That, Your Honor, was Qualcomm's investment in these purported
2 notes.

3 But none of that, Your Honor, changed Qualcomm's
4 repayment expectations, and this was a fact, Your Honor, going
5 back at least a year prior to March of 2019, and I would direct
6 Your Honor to Exhibit 24 for that point -- and it's Exhibit 24
7 to the standing motion, of course, and I'm at Bates QCOW3564,
8 and here, Your Honor, I would like you to read the three
9 emails, starting at the very bottom of the page.

10 THE COURT: Okay.

11 MR. VAN AALTEN: Thank you. So Your Honor, what we
12 have here, no different than what we saw with respect to
13 Airbus, is recognition that what would ultimately form
14 Qualcomm's investment in the purported notes, it's a rolled
15 account receivable was not likely to be repaid absent OneWeb's
16 future operational success for additional project financing.

17 And so that, Your Honor, brings us to the third topic,
18 which is why would Qualcomm or Airbus invest in the purported
19 notes with knowledge of the liquidity constraints facing OneWeb
20 with the understanding that repayment of the notes would be so
21 highly contingent. What was their motivation, Your Honor?

22 And the distinction that's important to make here is
23 that unlike SoftBank, unlike Banco Azteca, Your Honor, Qualcomm
24 and Airbus had additional parochial contract interest at stake
25 in OneWeb that could only be reaped in the event OneWeb

1 succeeded.

2 So with respect to Qualcomm, Your Honor, I would ask
3 that we turn to Exhibit 25 to the standing motion, and we're
4 looking at Bates QCOW3544, and if Your Honor looks at the
5 second email down the page, we see Qualcomm's stated approach
6 to OneWeb in the last two bullet points.

7 And so what this tells us, Your Honor, is exactly
8 where Qualcomm's focus was, and that was on the future work
9 stream that would only exist if OneWeb was to succeed. I would
10 say, Your Honor, that the evidence received to date in this
11 regard is even stronger with respect to Airbus, and I would
12 direct Your Honor back to Exhibit 1 to the standing motion at
13 Bates Airbus 11, back to the same page where we were before.
14 And what I would like Your Honor to focus on here is Airbus's
15 investment thesis, and I would start by directing Your Honor to
16 the third subject heading on the page, and the third bullet
17 point therein.

18 I would like Your Honor to read that and specifically
19 focus on the penultimate sentence in that bullet.

20 And so that, Your Honor, that tells us a little about
21 Airbus's investment thesis going all the way back to 2015
22 through the March 2019 purported notes purchase, and so if we
23 move up the page, Your Honor, to the second subject heading --

24 THE COURT: Can I interrupt you though?

25 MR. VAN AALTEN: -- I'd like --

1 THE COURT: Why is this suggested it should be equity
2 or equitable subordination?

3 MR. VAN AALTEN: I'm sorry, Your Honor?

4 THE COURT: Why should either of these two exhibits
5 suggest recharacterization or equitable subordination?

6 MR. VAN AALTEN: Your Honor, we have here an internal
7 memorandum that is demonstrating a -- again, I want to be
8 careful -- an investment thesis that is akin to equity,
9 recognizing -- and again, I would encourage Your Honor to
10 review the memo in its entirety -- recognizing that repayment
11 of this purported debt that right here at this time, Airbus is
12 deciding to put into this company. It's a month before the
13 March 2019 notes purchased, has a very low likelihood of
14 repayment, and that -- what the investment thesis concerns,
15 Your Honor, is that there are some costs here. Airbus put in
16 equity many years before, and there are also opportunity costs
17 with respect to Airbus in connection with obtaining current,
18 and then future contracts that would be signed with a joint
19 venture, owned fifty-fifty by Airbus and OneWeb.

20 So there's the parochial interest, there's the
21 doubling down of the equity, and I think if Your Honor read
22 this in its entirety, and I understand this is awkward doing it
23 this way without a sealed courtroom, but I think Your Honor
24 would see evidence in support of both recharacterization and
25 equitable subordination.

1 THE COURT: Well, I'm not sure I was being clear.
2 What I was focusing on was not the notion of somehow preserving
3 some costs in equity, but rather a desire to have a future
4 relationship on a contract basis. I'm not sure that's
5 inconsistent with a loan, and looking at the Qualcomm exhibit,
6 there's clearly a desire on Qualcomm's part to be paid its
7 receivable, and its concern that as the facts stand without
8 some change, that receivable may not get paid, but I'm not sure
9 that argues for recharacterization to equity or equitable
10 subordination.

11 MR. VAN AALTEN: Understood, Your Honor. The purpose
12 here is really, I think, primarily to focus Your Honor on the
13 fact that both Airbus and Qualcomm are making further
14 investments at a time when this company is either insolvent or
15 in extreme financial distress without any expectation for
16 repayment. So a commercial lender in that situation, obviously
17 is not going to extend financing.

18 What we have here are different interests, motivations
19 that we would not attribute to a traditional lender, and we
20 just wanted to make sure Your Honor understood the investment
21 thesis here. That this was not about amortization. This was
22 about future investment return on potentially some costs, as
23 well as future lucrative contracts in the event that this
24 company were to turn around.

25 THE COURT: What's the amount of --

1 MR. VAN AALTEN: And so --

2 THE COURT: -- the Qualcomm debt that was rolled over?

3 MR. VAN AALTEN: I believe it was ninety-eight million
4 dollars, Your Honor.

5 THE COURT: Okay.

6 MR. VAN AALTEN: Your Honor, I would ask you to turn
7 to Bates Airbus 12, it's the very next page, and to the subject
8 heading beginning with the word "Condition", and I would like
9 Your Honor to read the first sentence of that paragraph.

10 THE COURT: I'm sorry, this is in Exhibit 1 still?

11 MR. VAN AALTEN: Yes, it's the next page. Bates
12 Airbus 12, and we're looking at the paragraph beginning -- it's
13 the subject heading beginning with the word "Conditions", and I
14 would like you to read the first sentence of that section.

15 THE COURT: All right.

16 MR. VAN AALTEN: Thank you. Your Honor, with respect
17 to the committee's standing motion, we're here today under
18 standard of colorability, recognizing that what we've put
19 before Your Honor is based on preliminary discovery efforts
20 that we've conducted under an expedited investigation time line
21 pursuant to the DIP order, and as it concerns the core element
22 of recharacterization, which is, I think, Your Honor, as the
23 Third Circuit stated in Micron, a common sense conclusion as to
24 whether the party infusing the funds does so as a banker, or as
25 an investor with expectations of repayment tied to the

1 borrower's fortune.

2 And if we look at the Autostyle factors -- and Mr.
3 Despins went through this at length, I won't repeat him --we
4 see from the preliminary evidence concerning both Qualcomm and
5 Airbus, that both before and at the time of the March 2019 note
6 and purchase agreement, both recognize that OneWeb was severely
7 undercapitalized, that OneWeb was not at that time able to
8 obtain third-party financing outside of its equity, that the
9 repayment of the purported notes was entirely dependent on the
10 company's operational viability, or ability to raise additional
11 project financing, that the March 2019 investments were used to
12 make capital investments, and that we have a substantial
13 identity of interest between OneWeb's existing equity owners.

14 And finally, Your Honor, what we've seen with respect
15 to both Qualcomm and Airbus, as opposed to the other investors,
16 is that we do have clear evidence that they were focused on
17 their own parochial interests as contract counterparties, not
18 focused on what traditional lenders would be looking at.
19 That's what the evidence to date has demonstrated, Your Honor.
20 These are, in our view, colorable claims.

21 Unless Your Honor has any questions for me, I would
22 cede the podium back to my co-counsel, to the extent that he
23 has any further remarks.

24 THE COURT: Okay.

25 MR. DESPINS: No further remarks here. I mean, well

1 obviously a reply but I think we'll turn it over to the
2 debtors, or to SoftBank at this point, Your Honor.

3 THE COURT: Well, let me ask you, and maybe this is a
4 question for the debtors' counsel, but what is the current
5 deadline regarding notice of assumption and assignment of
6 contracts, or alternatively, rejection of contracts?

7 MR. DESPINS: And I know -- this is Luc Despins with
8 Paul Hastings. I know it's like four or five days before the
9 confirmation hearing, but I don't know what that date is yet,
10 so maybe Mr. Lomazow has a more precise date in mind.

11 MR. LEBLANC: Your Honor, this is Andrew Leblanc from
12 Milbank on behalf of the debtors.

13 Your Honor, I'll get an answer -- I'll get the
14 specific date, but Mr. Despins is right. I believe that the
15 deadline to assume or reject contracts is in connection with
16 the plan supplement filings, which is just a handful of days
17 before the confirmation hearing, but I will get Your Honor the
18 date as we go through the argument and I understand the
19 question.

20 THE COURT: Okay. All right. Mr. Despins, have you
21 now gotten the discovery from Banco Azteca?

22 MR. DESPINS: We got a very limited production. They
23 called it a final production, and we got it on Tuesday of last
24 week, or Wednesday, but we don't believe that that production
25 is complete by any stretch of the imagination, and that's one

1 of the arguments we're making, Your Honor, which is they should
2 not be allowed to come in here and argue when they blatantly
3 violated Your Honor's order, and then produced a handful of
4 documents, compared to the other parties. So we know that what
5 they call the final production is not final, but we don't know
6 how yet.

7 THE COURT: Where are you on -- did you seek document
8 production from Grupo Salinas?

9 MR. DESPINS: Well, I could have my partner, Nick
10 Bassett, address that, but we sought -- your order, I believe,
11 directed the entity that's the lender and its affiliates to
12 produce, so we did get documents. That's why, in our reply, we
13 pointed out that this is all one group, they're all operating
14 together, and this -- but Mr. Bassett may have more details on
15 that.

16 THE COURT: Well --

17 MR. BASSETT: Okay, Your Honor --

18 THE COURT: Has there been discovery as to what, if
19 any, outstanding receivables were paid for with the loan
20 proceeds?

21 MR. DESPINS: No, not --

22 THE COURT: For example, was there was a major pay
23 down of the trade vendors?

24 MR. DESPINS: No, we don't have the details of the use
25 of proceeds. Obviously, I would say a huge chunk of that went

1 to Airbus because they're manufacturing satellites, but we
2 don't have an allocation of the use of proceeds at this time.

3 THE COURT: All right. Okay. I am happy to hear from
4 the debtors, and the other objectors.

5 MR. LEBLANC: Thank you, Your Honor. Again, this is
6 Andrew Leblanc from Milbank on behalf of the debtors.

7 And Your Honor just to give you a sense, we obviously
8 filed our objection, and I'm confident Your Honor has reviewed
9 it. We -- what I expect to address, Your Honor, is
10 substantially just deal with the cost benefit analysis, and the
11 unjustifiable refusal, or the alleged unjustifiable refusal,
12 and I'll leave it primarily to the objectors to deal with the
13 merits of the claim, or the colorability arguments.

14 I will -- just to react, Your Honor, to the arguments
15 that were made, and we raised these issues in our objection as
16 well, but as I listen to Mr. Despins argue, it just -- it seems
17 to really come down -- and again, I won't go deep into the
18 merits here -- but it really seems to come down to an argument
19 that parties are not permitted to lend incremental dollars to
20 startup companies, unless they've lent enough to get them to
21 the conclusion of whatever capital is needed.

22 And so I don't think that's consistent with the law.
23 There's no suggestion here by them that anyone was attempting
24 to elevate their own equity position that they previously
25 invested. Rather, it was simply a decision that for any

1 incremental dollars beyond those which had been invested, the
2 need was to do so on a debt basis, and I think as Your Honor
3 alluded to, we believe that the vast majority of the dollars
4 that were put in, in fact, were used to invest in the company
5 to pay suppliers, vendors, management, employees, to do all the
6 things that one had to do. There's no suggestion that the
7 equity holders received a dividend, got a distribution, or
8 somehow were benefitted by the amounts that were lent in the
9 subsequent lending.

10 And so I just -- we really question the theory here,
11 Your Honor, and think that the broad brush that the committee
12 is attempting to swipe here with respect to colorability simply
13 goes too far.

14 Now, I don't -- I'll leave it to others to really
15 address the merits though, Your Honor, because what we want to
16 focus on really is the cost benefit analysis.

17 Your Honor, but to -- let me answer the question. I
18 did get an answer to the question. The plan supplement date
19 that is required in or is proposed in our plan and disclosure
20 statement in the schedule that we're proposing, would be
21 September 18th, if Your Honor approves the disclosure statement
22 motion dates. That's in advance of a confirmation hearing on
23 October 2nd.

24 THE COURT: So it's about two weeks.

25 MR. LEBLANC: About two weeks, Your Honor, yes.

1 THE COURT: Okay.

2 MR. LEBLANC: So Your Honor, let me address -- I want
3 to address the unjustifiable refusal in the way that many
4 courts do, and do so in the context of a cost benefit analysis,
5 and I would refer the Court to Judge Chapman's admonition in
6 the Sabine case, citing to Adelpia and applied theory where
7 she wrote that, "The role of the Court as gatekeeper is to
8 protect the estate and ensure that the proposed litigation
9 reasonably can be expected to be a sensible expenditure of the
10 state resources that will not impair reorganization. Courts
11 have denied standing where the proposed litigation would delay
12 resolution of the reorganization proceeding by impeding
13 approval of the pending plan of reorganization."

14 Now here, Your Honor, I'm going to break up the costs
15 and the benefits and start with the costs. The costs here are
16 in one category certain and in another category extraordinarily
17 damaging and very high probability. And what I mean by that is
18 there's obviously the actual expense to the estate, and I'll
19 talk about that in a minute. But first, the debtors are
20 exceedingly concerned that the efforts by the committee here
21 would, in fact, put at jeopardy the entire sale process that
22 has been negotiated. The relief that's sought here is
23 inconsistent with the sale order.

24 Now, Mr. Despina says he hopes that you don't say
25 anything about that. The simple reality is, Your Honor, if he

1 proceeds with his litigation and prevails, and the Court
2 then -- or the Court can't approve the distribution of the
3 equity component to the people that the bidder has designated
4 would receive it, then we have a busted plan and a busted sale.

5 And so I don't think Your Honor can ignore that. If
6 Your Honor were to grant standing to them, it would have to be
7 limited in a way that is consistent with the sale that's --
8 because it's the bidder who has dictated who would receive that
9 equity. And we can't just ignore the terms of the bid and hope
10 that in the future the bidder will waive them in favor of the
11 committee, if they're successful in their litigation, or will
12 otherwise ignore our noncompliance with them.

13 And the reason we can't do that Your Honor is because
14 the bid that is on the table is by far the best option
15 available for all unsecured creditors and for all other
16 stakeholders of this estate. It's the only going-concern
17 transaction that we have been able to identify, and itself
18 includes 1.1 billion dollars of consideration, including
19 amounts to pay the outstanding DIP loans, amounts to pay the
20 secured creditors, and most significantly, a very significant
21 amount to pay pre-petition unsecured claims of contracts that
22 would be assumed by the buyer.

23 And significantly, it contemplates a going concern for
24 this company, which means that we expect the vast majority of
25 pre-petition contracts will be assumed, and either be

1 renegotiated or cure payments would be made. And there's 850
2 million dollars that's set aside for that.

3 And so we don't know how many of those contracts will
4 be assumed, Your Honor. But we do assume, because the bidders
5 are expected to continue this as a going concern and continue
6 the project that has been underway for the last several years,
7 that this transaction is going to be hugely valuable, not just
8 to the secured creditors, to the employees of the company, but
9 also to unsecured creditors, the constituency that Mr. Despins
10 and his colleagues represent.

11 And we think that doing anything to put at risk that
12 sale would be an enormous mistake and a reckless act that would
13 be inconsistent with how we view our fiduciary duties, Your
14 Honor, and we think the Court should not countenance.

15 But let me -- let me just take a second to expand upon
16 how we think this transaction, if -- I'm sorry, this
17 litigation, if allowed to proceed, would jeopardize the sale.

18 So first -- I mentioned this, Your Honor, and I won't
19 spend much more time on it, but the buyer has dictated in their
20 sale -- in the purchase and sale agreement, how the equity is
21 going to be provided and who they will permit to hold the
22 hundred million dollars of existing equity. And as long as
23 that issue is on the table, if there is an order from this
24 Court that is inconsistent with that direction, and we can't
25 comply with that provision of the sale agreement, then we can't

1 close without some further waiver from the bidder, and it gives
2 them the ability to simply walk away. That's a risk that we're
3 unable to take or unwilling to take.

4 Your Honor, the bid -- and Mr. Despins referred to
5 this -- the bid also has a limitation on the amount of
6 administrative expenses that can be incurred. This was not the
7 debtors imposing this; this is -- and it's completely
8 understandable from our perspective -- this is a bidder saying
9 if I'm going to buy this company as a whole and as a going
10 concern, I want to limit how much administrative expenses are
11 incurred.

12 And the cap that's contained in the plan is
13 approximately -- contained in the plan support agreement is an
14 aggregate cap of 25.9 million. In the plan it's -- I'm sorry,
15 it's 25 million in the PSA, which is at docket 400; in the plan
16 it's 25.9 million, which is just subject -- that's been subject
17 to further discussion and recharacterizing things. But there
18 is a cap of how much can be incurred in administrative
19 expenses.

20 The committee makes no effort to hide the fact that
21 this litigation, if it were permitted to proceed, would be very
22 expensive.

23 Now, we heard today from Mr. Despins that he would be
24 prepared on his behalf to consider a contingency fee for their
25 portion of the fees that would have to be incurred. And that

1 is helpful. Your Honor, the committee didn't offer any
2 estimate of what the budget would be for something like this.
3 But we used, as an example, another case where the same counsel
4 prosecuted claims that were similar, but for a very
5 significantly smaller amount, where it was more than five
6 million dollars just for the committee's fees.

7 And that doesn't -- even if the committee were to take
8 this on a contingency, that doesn't quantify the fees that
9 would be incurred by the estate. And let me explain why that
10 is, Your Honor, because I think there's been some statements
11 about this that aren't quite right.

12 First, Your Honor, we obviously will have fees, as the
13 debtors. We have -- I will give all the credit in the world to
14 the committee -- we have worked collaboratively with them
15 throughout this case to minimize the expense of their
16 investigation, including responding to document requests
17 informally, not requiring motion practice with respect to that,
18 even providing interviews of our employees, to help them
19 understand the situation, so that we don't have -- we didn't
20 have to have extensive and expensive depositions with multiple
21 parties at them.

22 We have tried very hard, and to their credit, the
23 committee has cooperated with this -- with us in this, to make
24 this investigation as efficient as possible, from our
25 perspective.

1 I know they had litigation and discovery practice with
2 respect to other parties. But the net result of that, Your
3 Honor, is that while we provided them with the most relevant
4 transaction documents and we've searched for some limited sets
5 of emails, we haven't done the level of discovery production
6 and the level of deposition activity that will have to happen
7 if this case is prosecuted.

8 We've produced less than 2,000 documents. They've
9 deposed no witnesses. And even if we had produced more than
10 that or had done depositions privately with the committee, the
11 other parties, the defendants -- if these claims are filed --
12 are going to be entitled to do that.

13 And the simple reality is, Your Honor, that the
14 company and the estate is the primary evidentiary body in this.
15 These are the company's transactions, the company's documents,
16 and the company's witnesses. We expect there'll be multiple
17 depositions of innumerable parties, both former and current
18 employees, and an enormous production activity.

19 In short, Your Honor, my expectation would be that we
20 would run a run rate comparable to what the committee would do,
21 because it's far easier to propound discovery requests than it
22 is to respond to them, and it's far less costly to take a
23 deposition than it is to defend one, because of the time that
24 you have to spend both in prep and then taking the deposition.

25 So that is a cost that can't be understated, what we

1 are going to have to incur.

2 Your Honor, in addition to that, Mr. Despins suggested
3 that we don't have to pay the fees of the lenders because it's
4 just cash -- because it's just an adequate protection payment
5 that's contained in the cash collateral order. That isn't true
6 to begin with, but it's only -- but even if it were true with
7 respect to the cash collateral order, it's only partially true.

8 We have an obligation under an order to pay those fees
9 under the cash collateral order. He is suggesting that if he
10 prevails, he may be successful in convincing Your Honor that
11 those fees have to be recharacterized and repaid. That may be
12 true under the cash collateral order. I'm not certain that it
13 is. But it certainly is not true under the DIP order.

14 We can't lose sight of the fact, Your Honor, that the
15 targets of their investigation are not just pre-petition
16 secured lenders. They are also the DIP lenders who funded this
17 case entirely, that allowed us to get through a sale process
18 and allowed us to get to where we are.

19 And given that fact, Your Honor, we have an obligation
20 to pay them in their capacity as DIP lenders. And while Mr.
21 Despins may have arguments that if he prevails in the
22 litigation he could even claw some of that back, because it
23 wasn't related to their capacity as a DIP lender, that is a
24 fight that we are unwilling to risk our sale on, because at
25 least, at a minimum, while this litigation goes on, we have to

1 pay those expenses, we have to pay our own expenses.

2 And if the net effect of that is -- even if the
3 committee takes it on a contingency, is that we exceed the
4 administrative expense cap, then we have either an
5 administratively insolvent estate or we have to go to the
6 buyers, hat-in-hand, with no leverage, and beg them to change
7 that provision of their purchase offer. And we just -- we
8 don't have the ability --

9 THE COURT: Why would litigation of the
10 recharacterization claims ever pertain to these companies as
11 DIP lenders?

12 MR. LOMAZOW: Your Honor, I don't think it would. But
13 we do have an obligation to pay them in their capacity as DIP
14 lenders.

15 THE COURT: Right, but --

16 MR. LOMAZOW: And we have an obligation --

17 THE COURT: -- but if it doesn't pertain, then you
18 wouldn't pay them.

19 MR. LOMAZOW: Well, I agree, Your Honor. But we
20 also -- we have the obligation today to pay them as pre-
21 petition secured lenders under the cash collateral orders. And
22 that's an adequate protection that's been provided to them.

23 And that's why I said while it may be true if Mr.
24 Despins succeeds that we can get that money back from them, if
25 he doesn't succeed we are putting at greater risk the inability

1 to comply with the terms of the sale.

2 THE COURT: Well, it's fungible, right? There's 90
3 million coming in, they're paying 25.9 on top of that?

4 MR. LOMAZOW: Correct, Your Honor. The 25.9 is the --
5 is the cap in their proposal for what can be used for
6 administrative expenses, yes.

7 THE COURT: Well, why do they care, as far as whether
8 any portion of the ninety million can be used on top of that?

9 MR. LOMAZOW: And Your Honor, they may not. That's
10 possible. But obviously that's a change to their -- to their
11 sale -- to the purchase and sale order.

12 THE COURT: They've already spent the money.

13 MR. LOMAZOW: They have. Obviously, Your Honor, as it
14 was originally proposed by them, that ninety million was
15 supposed to go to pay the DIP lenders on their -- on the roll-
16 up portion.

17 THE COURT: Right.

18 MR. LOMAZOW: The changes that were made --

19 THE COURT: Which is --

20 MR. LOMAZOW: -- in connection with the --

21 THE COURT: -- which is the very thing that's at
22 issue.

23 MR. LOMAZOW: No, understood -- I understand, Your
24 Honor. And I was just going to say that that was changed. But
25 Your Honor, it's still -- it still is concerning to us that we

1 could find ourselves in a position where this -- the cost of
2 this causes us to not be able to comply with the sale, and
3 particularly, if the committee is not successful. That's the
4 circumstance we're most concerned, because then there's no
5 argument to get those funds back.

6 We may be able to use other monies to maintain
7 administrative solvency, but that's what our concern is, Your
8 Honor, that we -- we don't want to take the risk of losing this
9 sale by pursuing this litigation. And it's those two issues
10 that we think put at risk the sale, both the administrative
11 expense cap and the equity component of the sale.

12 Now, Your Honor, I do think -- just the other
13 component of the cost -- so that's the cost associated with
14 putting at risk the sale and the benefits of the sale that are
15 embedded into the sale and the plan that we've now proposed.
16 There is also just the question of the cost-benefit analysis
17 relative to the costs of the litigation.

18 And I need to respond to Mr. Despins' comments both
19 made in their pleading and in their -- and today on the record,
20 the suggestion that we were bad stewards of our financial
21 condition prior to this, because certain management members
22 were paid a retention bonus prior to filing.

23 Your Honor, it's been made clear, and I don't think
24 there's any dispute to this, that management was the key to
25 getting a sale done here. This sale doesn't happen without the

1 members of management that we have here with the company. It
2 also doesn't happen if they leave because we couldn't
3 compensate them appropriately.

4 Mr. Despins didn't object to the KEIP, which provided
5 an incentive to those management -- to those members of
6 management to facilitate and to work to get a sale of the type
7 that we got here. He was aware at the time, and we disclosed
8 to the Court -- we had a discussion of this at the hearing on
9 it -- the pre-petition retention payments that were made.

10 That investment that we made to keep the management
11 team at the company is what is returning to us a sale that is
12 over a billion dollars of value to all the creditors,
13 including, to a substantial extent, the unsecured creditors
14 here. That is a good return on the investment that we're
15 talking about, which was approximately ten million dollars,
16 when you add up the pre-petition retention payments and the
17 incentive payments that haven't been finally calculated, but
18 would be, upon closing. That is an exceedingly good return on
19 our investment.

20 We don't think that the return on the investment here
21 would be anything approaching that. We think -- it's hard.
22 Again, we don't have a budget from the committee as to what
23 this would cost. Even if they do it on a contingency fee it's
24 likely to exceed ten million dollars in litigation expenses
25 that we have to fund, that we may be able to recoup some

1 portion of from the lenders if he's successful.

2 But if he's not, that is not -- the benefits of that
3 litigation pale in comparison to the cost of that litigation,
4 when you analyze it that way.

5 And I think the suggestion that we were cavalier with
6 our funds by giving management an incentive -- a retention
7 payment so they would stay and asking the Court to approve
8 incentive payments so that they would get the sale done, that
9 they did, it's just -- it shows you how out-of-touch, I think,
10 the creditors' committee is here, because the only reason that
11 sale exists is because management did what they did to get it
12 across the finish line.

13 And it shows us being good stewards. And it's exactly
14 why, Your Honor, we're objecting to this motion, because we do
15 not think this is a good use of the company's money, of the
16 estates' money, to prosecute these claims, given where we sit
17 today, with the risk that it brings.

18 Now, Your Honor, we talk in our pleadings about the
19 benefits. The simple answer is, nobody knows today what the
20 quantum of unsecured claims will be at the end of the day. So
21 we can't tell you whether it's going to be 10 million dollars,
22 20 million dollars, or 200 million dollars. We certainly
23 think, given the nature of the bid here, that most of the
24 contracts will be assumed and the unfunded -- or the remaining
25 unsecured claims will be minimal.

1 I can't quantify what "minimal" means, but
2 importantly, Your Honor, there's no -- there's no funded
3 unsecured indebtedness here other than the deficiency claims of
4 the secured creditors. So there's no unsecured bonds or
5 unsecured debt instrument here. It is just commercial
6 creditors and a few litigation claimants that would stand to
7 benefit from this.

8 And we suggested in our pleadings, Your Honor, that
9 maybe this is a decision that could be deferred until we can
10 see what the quantum of unsecured claims are. But the
11 unsecured committee has not, to this point, made any effort to
12 show that there's a -- that the benefit of this litigation,
13 other than its headline number, would ever exceed the costs
14 that would be incurred by parties, even if they now will take
15 it on a contingency.

16 And so we think, Your Honor, it fails on the cost-
17 benefit analysis, even if the Court were to conclude that these
18 claims were colorable.

19 With that, Your Honor, unless you have any questions
20 for me, I do think that it's important for -- the targets of
21 the investigation are going to talk, I'm sure, extensively on
22 the merits of the claims and the colorability.

23 But I do think, Your Honor, when we look at the cases
24 like Adelphia, Sabine, and really apply (audio interference)
25 Circuit, where they caution that requiring bankruptcy court

1 approval conditioned on the litigation's effect on the estate,
2 helps prevent committees and individual creditors from pursuing
3 adversary proceedings that may provide them with private
4 benefits but result in a net loss to the estate -- and that's
5 from *In re Applied Theory*, 493 F.3d 82, 86 (2d Cir. 2007) --
6 Your Honor, that is exactly our concern here, that a litigation
7 here, if successful, may benefit a few creditors, but it puts
8 at risk an enormous value for the estate and even without that
9 risk, it really calls into question whether there's a benefit
10 to that litigation -- whether the benefit to that litigation
11 exceeds its own costs.

12 So with that, Your Honor, we would urge the Court to
13 deny the motion. And I'll cede the virtual podium to the -- I
14 think to SoftBank's counsel at Morrison & Foerster.

15 THE COURT: Okay. Before you do that, I take it from
16 your remarks that the debtors themselves did not do any in-
17 depth investigation of these potential claims?

18 MR. LOMAZOW: That's correct, Your Honor. We didn't
19 have a separate special committee, didn't issue a report,
20 anything like that. That's why our focus is primarily on the
21 legal issues that we just raised and the cost-benefit analysis.

22 THE COURT: Okay. And remind me, on the pre-petition
23 payments, were those agreed or supported by the lenders as part
24 of the PSA?

25 MR. LOMAZOW: The pre-petition payments -- Your Honor,

1 I don't think they were specifically called out. I believe
2 that there's just an exchange of releases, as you would expect
3 with respect to a plan. But I don't -- I don't believe -- and
4 I'll confirm and speak up before my colleagues conclude -- but
5 I don't believe there's any specific reference to the pre-
6 petition payments in the PSA.

7 THE COURT: Well, when they were made --

8 MR. LOMAZOW: Oh, I'm sorry.

9 THE COURT: -- what was the -- what was the state of
10 play as regards the debtors' agreement to provide a release to
11 the secured lenders?

12 MR. LOMAZOW: Your Honor, there wasn't. It was -- the
13 DIP agreement -- I think from a timing perspective, the DIP was
14 actually approved by the board after the retention payments
15 were approved and paid, but they happened close enough in -- I
16 don't -- I'm doing that a little bit from memory, Your Honor.

17 I think that they were close enough in time, but the
18 releases or the agreement that the debtors would not challenge
19 these transaction -- challenge the validity of the loans came,
20 really, in connection with the DIP facility and the agreement
21 by the lenders, at least some portion of them, to provide the
22 DIP financing to the company. And that happened pre-petition,
23 as did the pre-petition retention payments.

24 THE COURT: Okay. So again, I've read the pleadings
25 on this, but I'm happy to hear from the respective defendants.

1 MR. GOLDBERG: Good afternoon, Your Honor. This is
2 Eric Goldberg of DLA Piper representing the Qualcomm
3 defendants.

4 I'll be brief and then defer to SoftBank counsel to
5 make the main presentation. I first wanted to start off with a
6 sort of paraphrased quote from Sigmund Freud which I think is
7 relevant here. And that would be to the effect of sometimes a
8 loan is just a loan. And what we have here is, for the
9 lenders, what turned out to be a bad loan, but bad loans still
10 are loans.

11 The first point I wanted to raise had to do with
12 evidence. In their presentations, Mr. Despins and Mr. Van
13 Aalten both spent a considerable amount of time talking about
14 what lenders would do, what lenders wouldn't do. They make the
15 same points in their papers.

16 But the fact is that there is simply no evidence that
17 supports the contentions they have made as to what a normal
18 lender would or should or could do in dealing with the startup
19 of a company. There's no evidence. There's no statements or
20 declaration from any experts in the lending field about any of
21 this. It's simply supposition -- aspirational supposition, if
22 you will, for what the committee would want to be the case.

23 But I respectfully submit that that is not the case.
24 A substantial part of my practice is dealing with lending to
25 venture companies and startup companies. And loans like this

1 are made all the time. Some of them get paid, and some of them
2 don't. The ones that don't aren't necessarily equity. They
3 turn out to be bad loans, but that's part of the lending
4 business.

5 I understand when I say that Mr. Despins and Mr. Van
6 Aalten are probably shaking their heads and saying I'm doing
7 exactly what I had accused them of doing, which is arguing
8 beyond the evidence. But the difference here is that this is
9 the committee's motion. Under the Sabine Oil case, it's
10 clearly the committee's burden to establish each element of
11 their argument, to wit, that these claims are colorable.

12 And with regard to the arguments they had made that
13 the loans made here are not real loans, and no lender would
14 make those loans; there's simply no evidence in the record to
15 support that argument. (Audio interference) point has to do
16 with details. And this pertains only to Qualcomm.

17 First, the committee glosses over the fact that the
18 equity in the debtor and the loans made to the debtor for
19 Qualcomm were made by different entities. Qualcomm
20 Technologies is the vendor and contract party whose receivable
21 was converted into the secured notes at issue here. A separate
22 Qualcomm entity, Qualcomm Global Trading, is the one that made
23 the investment, made additional investments, and monitored the
24 investment throughout.

25 They're separate entities, and while they -- in their

1 brief and in their argument, the committee has attempted to
2 blur the distinction and they pointed to you various snippets
3 of this email or that email, the fact is that if you look at
4 what they have pointed out, you'll see that the Qualcomm
5 Technologies people are focused on their interests and getting
6 repaid, their interest as a vendor and as a lender. And the
7 Qualcomm Global Trading people, whose business is investing in
8 startup companies, were focused on their equity investment.

9 There's also substantiate time gap between when the
10 initial equity investment was made and when the loan was
11 converted -- or when the receivable was converted. And there's
12 also a vast difference, as the debtors' point -- or has been
13 pointed out, I think, in the debtors' and SoftBank brief about
14 what the committee argues is a substantial identity of
15 interest. Well, certainly, it is the case, and the numbers
16 show that with respect to Qualcomm, there was no such identity.

17 The percentage of equity that Qualcomm Global Trading
18 held is vastly different from the percentage of the secured
19 loan that Qualcomm Technologies ended up owning by virtue of
20 the conversion of its receivable.

21 And the last point, Your Honor, that I'll make with
22 respect to Qualcomm is on the issue of control. In their
23 brief, the committee has argued that the potential defendants
24 here used the leverage -- used their power as equity holders
25 and members of the board to effectively force this transaction

1 to be dressed up as a secured loan when, the committee argues,
2 in actuality, this is really equity.

3 In that sense, the committee is arguing that the
4 potential defendants here used their position of power and
5 influence on the board to force the debtor to color these
6 transactions as secured loans when, in fact, they were merely
7 equity.

8 But I think, Your Honor, that that argument proves too
9 much, at least with respect to Qualcomm. Because if Qualcomm
10 had sufficient power over this debtor, by virtue of its very
11 small ownership position, I can guarantee you they wouldn't
12 have used it to convert it into a secured loan. They would
13 have used that power to get themselves paid. They weren't able
14 to do that, so I think, certainly, at least with respect to
15 Qualcomm, the committee's argument about abuse of power or that
16 the equity holders used their influence on the board to direct
17 this transaction to take the shape of a secured loan simply
18 doesn't hold water. That's all I have, Your Honor. Thank you.

19 THE COURT: Well, I gather Qualcomm was owed ninety-
20 eight million dollars?

21 MR. GOLDBERG: Yes, Your Honor.

22 THE COURT: The debtor didn't have that money; did it?

23 MR. GOLDBERG: Well, it didn't have that money, or it
24 was unwilling to use that money to pay the receivable. But
25 certainly, it had substantial proceeds after the notes. It

1 could have simply used part of the note proceeds to pay
2 Qualcomm, and it didn't do that.

3 THE COURT: So Qualcomm didn't get any payments
4 thereafter?

5 MR. GOLDBERG: Not on the amount --

6 THE COURT: (Indiscernible) work?

7 MR. GOLDBERG: -- that was converted -- not on the
8 amount that was converted. There was additional ongoing work
9 that has gone on since then.

10 THE COURT: And it got paid for that?

11 MR. GOLDBERG: Some but not all, there's still some.
12 You may recall, Your Honor, there was an agreement to prove, a
13 few weeks ago, with regard to the potential assumption and
14 rejection of the contract that is still in place between
15 Qualcomm Technologies and the debtors.

16 THE COURT: Okay. This is a question I have for all
17 of you. There appear to me to be very few cases dealing with
18 recharacterization of debt for startup companies, venture
19 capital-type lenders. I've located two or three. You haven't
20 given me any. Are you aware of any?

21 MS. FIOCCALO: Good afternoon, Your Honor. This is
22 David Fiocco at Morison Foerster.

23 THE COURT: I guess I'm not going to get an answer to
24 that question from Qualcomm's counsel.

25 MR. GOLDBERG: Oh, I'm sorry, Your Honor. I thought

1 you were directing that to all counsel. For Qualcomm, no, I
2 haven't --

3 THE COURT: Well, Qualcomm, but then to other counsel,
4 too. But just on Qualcomm, since he was representing that he
5 knew about the nature of venture capital lending.

6 MR. GOLDBERG: No, Your Honor. I have not located any
7 such cases dealing specifically with startups.

8 THE COURT: Okay. Okay, I don't have any other
9 questions of Qualcomm.

10 Well, I don't know who's going to go next.

11 MR. VAN AALTEN: Well, I thought that would be counsel
12 for SoftBank. No?

13 THE COURT: Yeah. No, well, I thought that --

14 MS. FIOCCALO: Hi, this is David Fioccalo of Morrison
15 Foerster.

16 Can you hear me?

17 THE COURT: Yes.

18 MS. FIOCCALO: Okay. I think I was double muted. I
19 apologize.

20 THE COURT: Okay.

21 MS. FIOCCALO: Your Honor, David Fioccalo of Morrison
22 and Foerster. I have the honor and privilege of representing
23 SoftBank here.

24 And I'm going to address the colorability of the
25 committees' claims I think in that process. I can also address

1 the question Your Honor had about the startup issue.

2 Let me begin by saying, Your Honor, that, as you know,
3 characterization is an unusual and extreme remedy. And as
4 committee counsel noted that when courts are considering a
5 recharacterization claim, the Court has to apply common sense
6 conclusions, not a mechanical scorecard. And that that
7 requires the claims to be assessed on a case-by-case basis,
8 with a contextual analysis of each individual situation.
9 There's no bright-line test. There's no one-size-fits-all
10 rule.

11 And when you look at the context here for these loans,
12 and the economic realities of the transactions, it's plainly
13 evident that these were bridge loans to a startup company that
14 was still in its development and construction phase. And it
15 was in financial distress. And it was in financial distress
16 for the period of the two -- the two loans at issue.

17 And so are the claims colorable? We don't think so,
18 Your Honor. We don't even think it's close. The committee
19 counsel gives short shrift or ignores the case law that
20 undermines its position. They ignore the actual terms of the
21 debt instruments themselves. And most importantly, as Your
22 Honor pointed out, the context in which the loans were made.

23 So what is the context here? There are two
24 transactions at issue, the original note purchase agreement,
25 which I'll refer to as the original NPA, and the amended and

1 restated note purchase agreement, which I'll refer to as the
2 A&RNPA.

3 These notes contain fixed maturity dates, fixed rate
4 of interest, and a traditional security package over all of the
5 debtors' assets. These were bridge financing where certain
6 equity holders provided additional capital as debt in order to
7 allow the debtor to maintain its business operations and
8 effectuate a business plan that was developed long before the
9 debtors incurred this debt at all.

10 The project was the design, construction, delivery,
11 launch, operation, and maintenance of 900 lower orbit
12 satellites. A key aspect of maintaining the value of the
13 debtors' business along this journey was to ensure that their
14 licensed spectrum kept its priority. This required the
15 spectrum to be used at certain frequencies for ninety days at
16 certain orbits. This required the launch and placing into
17 operation of satellites in some elements of the debtors'
18 network.

19 The deadline to use that spectrum under the licenses
20 was late 2019. And maintaining the spectrum priority gave the
21 debtor a first mover advantage over its competitors. It could
22 also risk losing a spectrum license if they didn't use it.

23 To fund the development of the satellite constellation
24 within the 2019 deadline, the debtors entered into the original
25 NPA. This was in July of 2018. It was a one-year development

1 bridge loan of 408 million dollars.

2 The goals of this financing were to build the network
3 needed to maintain the priority spectrum. It was also supposed
4 to give the debtors sufficient time to close on long-term
5 financing. Mr. Despins used the flight needing fuel to carry
6 it through its full journey. Sometimes, in midflight, you need
7 to refuel. That's what a bridge financing does.

8 Ultimately, the negotiations between a group of
9 lenders for that long-term financing didn't materialize. But
10 the original NPA had standard features of loans, conditions
11 precedent to the initial and subsequent draws, reps and
12 warranties, affirmative and negative covenants in event of
13 default, and the ability to exercise remedies on default. It
14 had a fixed maturity date of 364 days and a fixed interest rate
15 of thirteen percent that reflected the risk of the development
16 of this project.

17 Now, because that long-term financing didn't
18 materialize, the debtors began negotiating terms for additional
19 debt to be used to build out the network. That was the amended
20 and restated NPA in March of 2019. And the expectation was
21 with that new round of debt financing the debtors could either
22 attract additional financing to get it to commercial viability
23 or a buyer.

24 And if you look at the terms of the A&RNPA, it has
25 traditional debt terms like the original NPA. It had a fixed

1 maturity date of five years. It had a fixed interest rate of
2 twelve-and-a-half percent. And the notes were secured by all
3 of the debtors' assets.

4 So with this background, we have to look at the
5 economic reality of the transactions. Are the economic reality
6 of these transactions different than the documents and the
7 labels the parties used? Looking at the totality of the
8 circumstances, the context in which the loans were made, are
9 the transactions more akin to equity or debt?

10 We submit this isn't a close case. Applying common
11 sense and the intent of the parties, when you look at the
12 eleven AutoStyle factors, five of them weigh heavily against
13 recharacterization. The rest, neutral and don't weigh in favor
14 of recharacterization at all. So let me quickly try to get
15 through those factors, Your Honor.

16 The first one is the labels given to the notes. They
17 show an intent here to treat the notes as loans. The committee
18 concedes that this factor weighs against recharacterization.
19 They are instruments of indebtedness. The labels themselves,
20 note purchase agreement, are evidence that these were debts.
21 The plain terms of the instruments show that these were formal
22 loan documents. And how the parties labeled the debt
23 instruments is often the best evidence of what the parties
24 actually intended. This is why courts are bound to consider
25 this factor. That's from Cold Harbor Associates, 204 B.R. 904

1 at 916. These are valid and enforceable instruments that are
2 evidence of indebtedness.

3 Now, this committee argues that the labels given these
4 agreements are undermined by two features. One is the
5 convertibility of the debt to equity under the original NPA,
6 and the other is a warrant purchase agreement that was signed
7 the same day as the A&RNPA. And I want to address both of them
8 in turn, briefly, Your Honor.

9 The conversion feature under the original NPA, there
10 was no conversion to equity under that law. So it's really a
11 moot issue. It was a loan. It never became equity. That
12 feature, the convertibility feature, just shows an intent that
13 SoftBank wanted to do debt financing, not contribute more
14 equity. Allowing equity conversion in no way minimizes the
15 significance or weight to be given to the debts themselves.
16 It's a typical feature in a bridge loan.

17 Convertibility, in other words, under the original
18 NPA, shows an intent to not contribute additional equity in all
19 circumstances, but only if certain financing milestones were
20 achieved. And the convertibility feature was mandatory. It
21 was not optional. And again, it only triggered if there was
22 additional financing, so it wasn't what we'd call, in quotes,
23 an "equity kicker". At any rate, the notes under the original
24 NPA were never converted into equity, and were, instead,
25 refinanced into the A&RNPA.

1 Now, they also talked about the warrant purchase
2 agreements. These warrants were separate transactions from the
3 loans under the A&RNPA. In the original -- the A&RNPA didn't
4 contain any convertibility feature. Instead, it provided
5 payment on a fixed maturity date.

6 The fact that the warrant purchase agreement was a
7 separate transaction also is evidence of intent to distinguish
8 between debt financing and equity investments. And even though
9 it might be considered an equity kicker, courts have held that
10 such features don't weigh in favor of recharacterization
11 because lenders sometimes need the extra consideration to make
12 the loan in the first place. And they are not a substitute for
13 repayment. That's the case here. This is supported by Emerald
14 Casino and In re Kaylish (ph.), which is cited on page 15 of
15 SoftBank's brief.

16 The bottom line on this factor, Your Honor, is that
17 the original NPA and the A&RNPA were specifically designed to
18 ensure repayment in a variety of circumstances based on the
19 expectation that the loans would ultimately be repaid or
20 converted upon additional project financing or a sale. This
21 factor clearly weighs against recharacterization.

22 The second factor, the notes expressly contained fixed
23 maturity dates and schedules of payments. These are the true
24 hallmarks of a debt and weigh against recharacterization.
25 There's no dispute about the fixed maturity dates. It's 364

1 days for the original NPA and five years for the A&RNPA. The
2 (indiscernible) of a maturity date is enough to satisfy this
3 factor.

4 Now, the committee claims that the maturity dates are
5 illusory because the notes under the original NPA were rolled
6 up into future financing and because the debtors were still in
7 startup mode with no revenue and no customers. But this
8 argument doesn't support the inference that the notes were
9 intended to be equity, and they ignore the economic reality of
10 the transaction.

11 First, just because a loan is not repaid at maturity
12 doesn't prove that the lender intended to provide equity at the
13 time of making the loan. This is In re Franklin Equipment,
14 418 B.R. 176 at 195.

15 THE COURT: I read your brief. I'm sorry, sir. Can
16 you --

17 MS. FIOCCALO: Yes.

18 THE COURT: -- discuss something other than your
19 brief?

20 MS. FIOCCALO: Sure, Your Honor. Then I'll just --
21 I'll keep it short and just address, I think, two points that
22 came up today.

23 THE COURT: All right.

24 MS. FIOCCALO: One is this -- and I apologize. I
25 mean, I have to do this, Your Honor, referring to --

1 THE COURT: I know. I probably cut you --

2 MS. FIOCCALO: -- a sealed document.

3 THE COURT: And I apologize. I probably cut you with
4 three-fourths of your outline. But --

5 MS. FIOCCALO: That's okay, Your Honor. As long as --
6 as long as it's coming from you and not from me. So.

7 THE COURT: Okay.

8 MS. FIOCCALO: So I want to -- I want to just address,
9 I think, two issues quickly. One is this idea that SoftBank
10 was in control and could change the terms of the loans. And I
11 would say in response to that the cleanest way to do it, Your
12 Honor, is if you look at Grupo Elektra's brief at paragraph 14.
13 And they redacted it in the public version.

14 But I think if you look at paragraph 14, it outlines
15 that what committee counsel has said is not true. SoftBank did
16 not have the control that they're claiming that we have.

17 THE COURT: As far as that one other lender? I want
18 to make sure --

19 MS. FIOCCALO: There is -- so this is one example,
20 Your Honor, of that. There is another example that I'm happy
21 to submit something under seal to provide the Court with that
22 other example. But it's essentially very similar. So I mean,
23 it goes contrary to the fact that the committee is urging that
24 SoftBank had control and can change the terms of the debt.
25 And that's actually just not the case.

1 And the other point I would raise, Your Honor, is just
2 on one of the documents that Mr. Bassett submitted this morning
3 on the committee email, Exhibit 3. They talk a lot about
4 SoftBank not wanting to get -- not expecting to get repaid for
5 the loans. And if you look at Exhibit 3, which were the
6 investment committee approval requests -- I would point the
7 Court to pages 8 and 9. So it's Bates number SBG25849, 25850.

8 And you'll see the last bullet on page 8 is what the
9 committee had highlighted that starts "In the event of". And
10 then the highlighting stops at "financing". And I would ask
11 that the Court read the rest of that bullet that begins with
12 "In addition" and ends with "repaid".

13 And then just one last point, Your Honor, and you
14 touched on this. Just to emphasize that this was a development
15 and construction project, where revenue's not made until the
16 company transitions into commercial operation. These were
17 bridge loans that enabled the debtor to attract the next round
18 of financing to get towards commercial viability.

19 The fact that the company was distressed and existing
20 equity investors made the bridge loans to the company to get it
21 to that next round, there's nothing remarkable about that
22 situation. They happen every day, and if you look at the
23 labels of the documents, the interest rates, the fixed maturity
24 dates, the fact that all of the -- all of the loans were
25 secured; to recharacterize the loans on these facts is

1 inconsistent with the case law and will have a chilling effect
2 on all pre-revenue startup-debt financing.

3 And absent these types of loans for startups, some of
4 them may never achieve operational status. And for all of
5 these reasons, Your Honor, and the reasons stated in our brief,
6 we submit that the committee has not established a colorable
7 claim, and their motion should be denied.

8 THE COURT: All right. I think I interrupted you when
9 I was asking would I -- went back and asked Qualcomm's counsel
10 about this.

11 Your brief cites one case on the development company
12 startup loans, I think, which is the 10th Circuit opinion in In
13 re Alternate Fuels, Inc. Are you aware of any other cases
14 that deal with that topic?

15 MS. FIOCCALO: Your Honor, not quite using the same
16 language, but I think that the case -- there are cases in our
17 brief that do discuss sort of the same context in which
18 startups find themselves, which are pre-revenue or in a
19 distressed financial condition. And while I think that there
20 aren't a ton of cases exactly using the same concept of
21 startup, the principles apply the same to this case.

22 THE COURT: Well, there's arguably a --

23 MS. FIOCCALO: The principles in those cases --

24 THE COURT: -- distinction between companies that go
25 into distress and companies that start out, in essence, in

1 distress. And I think the committee's contending that this
2 fact pattern is the latter, not the former.

3 MS. FIOCCALO: Right, Your Honor, but if you're -- but
4 then, under that logic you can't really issue a loan to a
5 pre-revenue company, right? Or raise funding in rounds of
6 financing, by the committee's logic. I mean, there's a lot
7 of -- some public companies that started out as startups, still
8 aren't making money. And you cannot -- you cannot have a
9 policy where if they're pre-revenue and they require vast
10 amounts of financing to get off the ground, that all of the
11 financing along the way has to -- has to be debt. I mean,
12 there are --

13 THE COURT: But isn't that -- isn't that basically a
14 bright-line test that you're asking me to adopt?

15 MS. FIOCCALO: Well, no, I think -- I think if you
16 look at all of the factors, as Mr. Despins said, holistically,
17 here they weigh against finding that the loans should be
18 recharacterized. I think you have to look at all of those
19 factors collectively. We wouldn't urge a bright-line test, but
20 when you look at each of them and you apply them here in this
21 particular context -- and I think you need to draw on a lot of
22 the principles of the cases we've already cited, that's the
23 conclusion one reaches.

24 THE COURT: Okay.

25 MS. FIOCCALO: But Your Honor, what they're asking

1 for, I think, is a bright-line test. That if there is no
2 revenue for the company and no customers yet because they're in
3 a development and construction phase and require multiple
4 rounds of financing, that they cannot -- it cannot be a loan.
5 that it has to be equity. And that's what we're urging
6 against.

7 THE COURT: Okay.

8 MR. DESPINS: Your Honor, reply?

9 THE COURT: Well, there were a couple of --

10 MR. DESPINS: Sorry.

11 THE COURT: There was one other joinder, I think. Let
12 me make sure. Yeah, there was one other joinder. I don't know
13 if anyone else has anything more to say in opposition to the
14 motion that --

15 MR. KARCHER: Good afternoon, Your Honor. This is
16 Timothy Karcher from Proskauer Rose.

17 Can I be heard?

18 THE COURT: Sure.

19 MR. KARCHER: Thank you, Your Honor. I'm Timothy
20 Karcher of Proskauer Rose on behalf of Grupo Elektra and Banco
21 Azteca.

22 And I rise, Your Honor, virtually, to make a few brief
23 points. I won't go over again what MoFo and the debtors said,
24 but I do want to point out, Your Honor, that in our separate
25 opposition and joinder we made a few clarifying points, which I

1 think may have been lost today. And we also attached a
2 document which Morrison & Foerster referred to. And I hope the
3 Court will have an opportunity to review that document.
4 It's --

5 THE COURT: No, I've read it. I've reviewed it.

6 MR. KARCHER: Yeah, further supports -- okay. So if
7 you read our pleadings, you know Banco Azteca is a subsidiary
8 of Grupo Elektra, and Grupo Elektra is publicly traded on the
9 Mexican stock exchange. And unlike other defendants in this
10 action, Banco Azteca stands alone in two very important
11 respects that cannot be gamed, as Mr. Despina suggested.

12 First, Banco Azteca is a commercial bank. It is
13 regularly engaged in the lending of money, and that is a fact.
14 Second, Banco Azteca, the lender here, holds no equity in
15 OneWeb. That's in our pleadings.

16 The fact that we are a regulated bank is, I think,
17 extremely important to the argument that we make today. We're
18 regulated under Mexican law. And as we pointed out in our
19 papers, in order to make an equity investment of the kind
20 suggested by the committee, Banco Azteca would have to have
21 complied with certain specialized regulatory requirements.

22 We've cited the law -- the regulatory law in our
23 objection, but the committee ignored that. And they haven't
24 spoken to it today, either.

25 I also want to talk about the magnitude of the loan

1 that Banco Azteca made and the notion of disproportionality.
2 If you look, Your Honor, at the board presentation submitted by
3 the UCC, it's at their Exhibit 26. And it's Bates OneWeb7086.

4 This, Your Honor -- and I'll just talk about it
5 generally -- is a board presentation made on January 2019.
6 That's just before Banco Azteca made its first loan in March of
7 2019. And on the page that I'm referring to, Your Honor, it
8 talks about OneWeb ownership in the left-hand column. And you
9 get to that 4.4 percent that you've seen for Azteca affiliates.

10 But if you follow it over to the right-hand column,
11 you'll see that the amount of the expected loan or investment
12 was seventy million dollars, based on its ownership interest.
13 That's not what happened, Your Honor. In fact, Banco Azteca
14 made a 300-million-dollar loan in three separate installments
15 in 2019 after this board presentation. The idea that it is
16 somehow proportionate to the equity holdings that are purported
17 to be held by -- and to be clear, these are Banco Azteca
18 affiliates, not Banco Azteca itself, I think undercuts the
19 argument. This is sharply disproportionate, 300 million versus
20 70 million.

21 The next thing that I want to talk about is that
22 document that was cited in our response, the only document we
23 produced or put in our -- put in our reply papers. And this
24 goes to the point Mr. Despins was making that a lender would
25 never let someone else control -- never, never -- they would

1 never do that. Well, we didn't do that, and it's clear from
2 the document we provided that that was not going to happen, and
3 that we were a lender acting as a lender with the expectation
4 that the interest payments would not be changed, that the
5 maturity date would not be changed, that the principal would be
6 repaid. We made doubly, triply sure of that.

7 I will point out, and I think it's been said a number
8 of times today, but this was indeed a loan with a maturity of
9 2023. That's three years from today, Your Honor. So the idea
10 that there was no revenue, and that the company failed -- the
11 company wasn't expected to make the repayments until three
12 years from today.

13 Now, the last thing I want to -- I want to say and
14 highlight, Your Honor, is like other -- like other courts and
15 like other people who've spoken today, we've struggled with
16 this notion of the submicron common sense approach, and the
17 AutoStyle factors. And I want to highlight the idea that I
18 think Your Honor was touching on. In the context of a startup
19 and who would make a loan, and whether or not a loan made to a
20 startup or a company that's in distress is something that
21 should be recharacterized as equity.

22 I'm not eloquent enough, Your Honor, to put into words
23 a proper framework for it as well as I think Judge Wiles did in
24 his decision in the matter of Yoga Smoga, which was cited by
25 the committee in its motion, and the committee again in its

1 response. That case is 2016 Westlaw 8943849. And I'm going
2 to -- I'm going to tell you what Judge Wiles said on page 13.

3 And he's going through the recharacterization factors,
4 and he says here on page 13, and I'll quote. He says, "Second,
5 courts often consider the financial straits of a borrower and
6 ask whether a reasonable third party would have made a loan
7 under the same circumstances. Some courts have concluded that
8 if a third party would not have made a loan, then an advance
9 should be treated as equity."

10 And the judge goes on to say, "Of all the factors that
11 courts have considered in this context, this one, this is the
12 one that has always made the least sense to me. The gist of
13 the reasoning is this: if a loan would have been risky because
14 there was too much of a chance that the loan would not be
15 repaid in full, then the lender must have really intended to
16 make an equity contribution, which would be even further down
17 in the capital structure, and which would have an even lower
18 chance of ever being recovered. That reasoning is backwards.

19 "If a company is in dire straits, the common sense
20 says that a person who provides additional money is more likely
21 to want it to be considered debt, not equity, because, even if
22 the debt may not be repaid in full, at least it will stand
23 higher in the capital structure. This is true regardless of
24 whether the lender is an insider or an existing equity holder."

25 That's the quote from Judge Wiles, and I think it's

1 perfectly apt here. Banco Azteca is a commercial bank. It
2 made a loan. It documented that loan as it would a commercial
3 loan with an expectation that it would be repaid. It did that
4 knowing it was making a loan -- or in the situation where the
5 loan was being made to a company that wouldn't show revenue
6 until 2023, or 2021 was when it was going to show revenue. And
7 2023 was when the loan was going to be repaid.

8 I think that's the reasoning and the logic that this
9 Court should apply in denying the recharacterization motion or
10 the efforts of the committee to recharacterize this loan.

11 I think, Your Honor, that those are really the points
12 that I wanted to make. I will address the discovery issue, if
13 Your Honor will allow me please.

14 THE COURT: Okay.

15 MR. KARCHER: We did receive their discovery requests.
16 And we had a number of discussions with them about the length
17 and the breadth of the discovery. And what we concluded was
18 that a lot of what they were seeking from us they were probably
19 also going to be able to get from SoftBank or from the debtors.
20 And that it would be duplicative for us to undertake a lengthy
21 discovery request and produce documents that they were going to
22 get elsewhere.

23 We also agreed, Your Honor, to the custodians who were
24 likely to have the documents that they were looking for. And
25 our discovery response and our replies were consistent with the

1 custodians and the time periods that we had discussed. We have
2 produced a hundred pages or thirty documents that are not
3 privileged. We have a large stack of documents that are
4 privileged, and we will provide them with a log for that. But
5 we think that what we provided with them was in line with what
6 we had agreed to, and that we think that they got the
7 documents, certainly, in time to put them into the -- into
8 their pleadings.

9 In fact, they cite in their response some emails that
10 we had -- that they had received from us. One of the emails
11 that they cite, they used to say well, obviously, Banco Azteca
12 was thinking of this as equity because they talk about it as
13 being a bankable or a nonbankable asset. Remember, Your Honor,
14 that the timeframe for that document is post-bankruptcy or at
15 the time of the bankruptcy filing, not at the time that we were
16 making the loan.

17 Our client made the loan and always wanted to be a
18 loan because that's what the bank has recorded it as on their
19 books and records. That's what we've treated it as all along.
20 And that's what the discovery to the production to the
21 committee fully demonstrates.

22 THE COURT: Did your production include communications
23 from affiliates?

24 MR. KARCHER: Well, so the custodians that we had
25 would, I believe, have the communications from affiliates in

1 the time period that we agreed to.

2 THE COURT: Okay. All right. Okay, anyone else in
3 objection to the motion? Okay, Mr. Despins, just briefly, if
4 you want to say something.

5 MR. DESPINS: Yeah, I'll try to cover a lot of stuff.
6 I'll start from what was just covered, so that it's fresh in
7 your memory. First of all, the document we quoted from is not
8 post-bankruptcy. It was February, and it clearly shows that
9 the important thing for them was that the form was always
10 something that showed a loan. And that that was their goal,
11 and that's why we cited it.

12 And I'm not going to address the discovery thing,
13 other than to say we had no ability to test whether the
14 discovery was complete because of when it was produced. And it
15 was clearly in violation of the court order.

16 In terms of the Yoga case, it's true that Judge Wiles
17 said that. But the point is that that seems to basically go to
18 the issue that the subjective belief of a party is what
19 controls here. And there's nothing further from what the
20 analysis should be. It can't be that.

21 Then the point about the maturity being in 2023,
22 that's true, but the point is that the fuel they're providing
23 for the plane could not get them to that point and could not
24 get them to a point where any revenues would occur. That's the
25 key. We're not asking for a bright-line test that you cannot

1 finance a startup. There's just so many differentiating
2 factors here that make it not applicable.

3 Now, the issue of control by SoftBank, they say oh,
4 look, we had this side letter with the Mexican lender. And by
5 the way, it's not an accident that it was Banco Azteca that was
6 put in there. It was all controlled by the same people at
7 Salinas and decided to put that entity. But it has nothing to
8 do with it being a bank or anything like that.

9 Now, the issue of SoftBank being in control and no,
10 that's not the case because there was a side letter. So now
11 they're telling you there's two side letters. That leaves
12 three lenders that don't have the side letters. And by the
13 way, Your Honor, I know you'll look at this. The side letter
14 doesn't do any good for them. And it's true, it says you can't
15 exchange principal and all that, but it does not govern
16 remedies.

17 Remedies are governed by SoftBank. So SoftBank, they
18 can be in default, the money is due, they control the exercise
19 of remedies. And these guys did not cover that, and that shows
20 the point is that SoftBank is in complete control of that. And
21 you would never have a lender put another lender in complete
22 control of remedies when you're in full default.

23 The issue of -- now, let me now go to Mr. LeBlanc's
24 point. Your Honor, we tried to be nice about this. But there
25 are huge corporate-governance issues here. This is rife with

1 conflict. Mr. LeBlanc said he wasn't clear whether the four
2 million and change was approved at the same time as the DIP.
3 I'm sure they were discussing the DIP at that time, let's not
4 kid ourselves, because that's two days before the filing.

5 And two, at that time, or soon thereafter, they're
6 discussing the KEIP, and SoftBank negotiated the KEIP, and of
7 course, now we know that they're getting -- that the debtors
8 are giving them a release as part of the plan support
9 agreement. It's basically a group scratching each other's
10 backs, and that should be very troubling with the Court. It's
11 all linked. It's all related.

12 The whole argument about highly damaging, the parade
13 of horrors, is not accurate. The ninety million is fully
14 protected, meaning that the bidder cannot do anything about
15 that. That money is gone, as you said.

16 As to the hundred million dollars, again, we would
17 cross that bridge if and when we get to it. The fact that you
18 authorized us to recharacterize or to attempt to recharacterize
19 1.7 billion dollars of debt does not address remedies.
20 Remedies can be addressed later.

21 Now, I want to address where I think you're heading,
22 Your Honor, which is the issue of the assumption of contracts,
23 right? If everyone's contracts were assumed, this issue might,
24 in theory, go away. First of all, I don't believe that for a
25 second that it will happen, but not only that, but it's going

1 to be too late. They're doing this five days before
2 confirmation. And it is true that in a normal cooperative
3 environment you would try to say hey, let's wait for the bar
4 date. Let's analyze the claims. You would do that jointly,
5 and there would be a joint effort. But that's not what's
6 happening here. I guarantee you, they will try to jam the
7 committee so that the committee, for example, will cease to
8 exist on the petition date, so therefore cannot be a plaintiff
9 anymore. Not petition date. On the confirmation date or the
10 effective date. So it cannot be a plaintiff anymore.

11 There'll be no funding. There'll be tons of
12 roadblocks that they will put in, which forces us to push the
13 issue today. But I can see that you're reluctant, and I can --
14 I, sort of, see that, and it makes sense if, in fact, there was
15 a way to protect the committee, protect the creditors, so they
16 can see what's behind the curtain, whether it's real or not.

17 At the end of the day, I believe there'll be at least
18 twenty -- thirty million dollars of claims that are not being
19 assumed by the buyer. So the question is, Mr. Leblanc is
20 basically saying well, just too bad for these people. We'll
21 just let them go. The committee cannot do that. That would be
22 inappropriate. And on the facts here, where you have this
23 hopelessly conflicted group of people, it cannot be the result.
24 And we hope Your Honor is sensitive to that.

25 And I just want to end by saying that we're not trying

1 to establish a bright-line test that says that startup
2 financing isn't possible, but the facts here are just so
3 compelling that we believe that there will be no impact,
4 practically, on startup financing.

5 Thank you, Your Honor.

6 THE COURT: Okay. All right. I have before me the
7 official unsecured creditors' committee's motion to be accorded
8 standing to pursue, on a derivative basis, and, if appropriate,
9 settle claims against the defendants in a proposed complaint
10 that's attached to the motion for recharacterization of the
11 defendants secured claims in these bankruptcy cases to equity
12 under federal law and/or alternatively, to equitably
13 subordinate the claims to the claims of the general unsecured
14 creditors under Section 510(c) of the Bankruptcy Code.

15 I should note that the motion also includes a request,
16 then on the basis of the complaint, although it needn't be on a
17 complaint necessarily, for an order disallowing the defendants'
18 claims under Section 502(b) of the Bankruptcy Code, again, on
19 the grounds that they are equity interests.

20 This is a topic, this latter point, that has not been
21 addressed, as far as I can tell, above the bankruptcy court
22 level, and I don't think, in the Southern District of New York.
23 To the extent it has been addressed at all, most of the time
24 it's addressed in the context of the proper standard for a
25 recharacterization motion, i.e. whether the motion or the

1 adversary proceeding should be considered under Section 105 of
2 the Bankruptcy Code, or alternatively, under Section 502(b) of
3 the Bankruptcy Code, the distinction being the case, in most
4 courts' analysis, if disallowance is being pursued under
5 Section 502(b), the analysis might well be under applicable
6 nonbankruptcy law, i.e. state law in most instances.

7 Most courts have concluded that the proper analysis is
8 under 105(a) generally and is not focused on the fact that
9 there are two options under the Bankruptcy Code. They have
10 just said that if someone is seeking recharacterization, and
11 they say they want to do it under Section 105, they can. See
12 *In re Alternate Fuels, Inc.*, 789 F.3d 1139, 1147-1149 (10th
13 Cir. 2015).

14 On the other hand, the authorities that I've located
15 that deal with the standing issue under Section 502(b) have
16 made it clear, and I agree with them, that there's no
17 limitation on a parties-in-interest's standing, except a
18 constitutional limitation, i.e. that they are the party
19 aggrieved to pursue recharacterization under Section 502(b) of
20 the Bankruptcy Code as part of a claim objection. See *In re*
21 *Tara Retail Group, LLC*, 595 B.R. 215, 222-223 (Bankr. N.D.W.
22 Va. 2018). *United States v. State Street Bank & Trust Co.*, 520
23 B.R. 29, 72 (Bankr. D. Del. 2014). And *In re Brooke Capital*
24 *Corp*, 2011 Bankr. LEXIS 210, at *23 (Bankr. D. Kan. Jan. 20,
25 2011).

1 A court does have other means to control its calendar
2 and to try to ensure that litigation is not pursued by parties
3 that are acting as a fiduciary and/or being paid by the estate
4 separate and apart from standing, and conceivably that applies
5 here with regard to the 502(b) portion of the relief sought by
6 the committee, but it's not a standing issue or an issue that
7 pertains to standing.

8 No objecting party has objected to that portion of the
9 committee's request. I think the reason is obvious. There's
10 no basis to object on a standing ground.

11 So at some level, the arguments over standing are,
12 although, perhaps, important for the course of this case, kind
13 of, in a very strict sense, not dispositive here. I'll keep
14 that in mind with regard to my ruling on standing.

15 But turning to the motion's request to obtain
16 standing, under the case law in the Second Circuit there are
17 two basic scenarios in which a creditors' committee or another
18 party-in-interest can obtain standing to pursue claims on
19 behalf of the bankruptcy estate. One is where the debtor
20 consents to a third party bringing suit, which, of course, is
21 not applicable here, and the other is when the debtor-in-
22 possession unjustifiably refuses to bring an action against
23 some third party. See, for example, *In re STN Enterprises*, 779
24 F.2d 901, (2d Cir. 1985) and the trio of cases following it,
25 including *In re Adelphia Communications Corp.*, 544 F.3d 420,

1 424 (2d Cir. 2008).

2 Fiduciary considerations are of the utmost importance
3 in considering expanding standing to someone beyond the initial
4 and primary fiduciary for debtors' estate, namely the debtor-
5 in-possession. The Second Circuit has recognized, though, that
6 there are times when a debtor-in-possession may not always
7 fulfill its responsibilities and may unjustifiably fail to
8 bring valid claims or abuse its discretion by not suing. *Id.*
9 544 F.3d 424.

10 The court went on to say, however, it is the court's
11 role and not that of a derivative plaintiff both to oversee the
12 litigation and to check any potential for abuse by the parties,
13 i.e. the court has to make ultimately a decision whether, in
14 exercising its fiduciary duties, the debtor is acting properly
15 in not bringing litigation. And the flip side, the third party
16 would not be a good steward of the estate's resources in
17 bringing litigation, or to the contrary, the debtor is
18 unjustifiably, in light of its fiduciary duties, refusing to
19 bring the litigation, and the requesting plaintiff is, in fact,
20 or would, in fact, act as a proper fiduciary.

21 The standard to evaluate a standing motion in the
22 Second Circuit is well established. Again, it goes back to the
23 seminal case *In re STN Enterprises*. Here, "if the committee
24 presents a colorable claim or claims for relief that on
25 appropriate proof would support a recovery, the court's

1 threshold inquiry will not be at an end. In order to decide
2 whether the debtor unjustifiably failed to bring suit so as to
3 give the creditors' committee standing to bring an action, the
4 court must also examine, on affidavit and other submission, by
5 evidentiary hearing or otherwise, whether an action asserting
6 such claim is likely to benefit the reorganization estate."

7 779 F.2d 905.

8 But the Court engages in an analysis in which it looks
9 at whether there is a colorable claim that the committee wants
10 to bring, that its pursuit of that claim is likely to benefit
11 the estate and to the extent the inquiry isn't subsumed in that
12 second factor, whether the trustee or debtor-in-possession has
13 unjustifiably failed to pursue it.

14 The quantum of proof is flexible for such an analysis.
15 Clearly the Second Circuit in STN acknowledged that the court
16 may properly engage in some review of disputed facts to
17 determine if there is proper factual support for the allegation
18 and to determine if the proposed litigation would be a sensible
19 application of estate resources. See *In re Sabine Oil & Gas*
20 *Corp.*, 562 B.R. 211, 222 (S.D.N.Y. 2016), and *In re Adelphia*
21 *Communications Corp.*, 330 B.R. 364, 369 (Bankr. S.D.N.Y. 2005).

22 This does not require a minitrial, but as noted by the
23 Circuit, the bankruptcy court should assure itself that there
24 is a sufficient likelihood of success to justify the
25 anticipated delay and expense to the bankruptcy estate that the

1 initiation and continuation of litigation would likely produce.
2 In re STN, 779 F.2d 905, 906.

3 The first part of the analysis, that the claims be
4 colorable, has been noted as a relatively easy one to make, In
5 re Adelphia Communications Corp., 330 B.R. 376, and is often
6 equated with the standard of considering a motion to dismiss.
7 It's not necessarily limited to that consideration, however,
8 particularly where the standing motion is raised early in a
9 bankruptcy case, and there has not been the type of bankruptcy
10 discovery under Rule 2004 that would normally inform a
11 complaint in a Chapter 11 case of this nature.

12 We are relatively early in this Chapter 11 case. The
13 committee, I guess it's had about a month to conduct discovery
14 under Bankruptcy rule 2004, given the deadline it faced under
15 the debtor-in-possession order from April. It has not taken
16 depositions. It has obtained a fair amount of document
17 discovery, but that discovery has pertained to at least two
18 relatively complex, factually that is, determinations with
19 respect to credit facilities that are the subject of the
20 proposed complaint.

21 The objectors contend that under the applicable case
22 law, which, at the Circuit level, is really outside of the
23 Second Circuit and based on two leading cases. In re Submicron
24 Systems Corp., 432 F.3d 448 (3d Cir. 2006) and In re Autostyle
25 Plastics, Inc., 269 F.3d 726 (6th Cir. 2000), that on a motion

1 to dismiss or colorable claims analysis, that there is no
2 colorable claim here for recharacterization or equitable
3 subordination.

4 Courts in the Second Circuit at the district court and
5 bankruptcy court level, and frankly, also in the Third Circuit,
6 even after Submicron, often include an analysis of the so-
7 called Autostyle factors for determining whether a debt claim
8 should be recharacterized as equity.

9 The objectors here argue that the secured loans should
10 clearly not be recharacterized on their merits, where the
11 committee, applying the same basic analysis, contends that, at
12 a minimum, they state colorable claims for purposes of the STN
13 analysis.

14 Similarly, the parties disagree over whether the
15 complaint separately sets forth a claim for equitable
16 subordination under Section 510(c) of the Bankruptcy Code.
17 Both of those causes of action seek essentially the same
18 ultimate result, which is recharacterization of the loan
19 transaction in a way that puts them behind general unsecured
20 claims, but the tests are different, as noted by the Fourth
21 Circuit In re Dornier Aviation (North America), Inc., 453 F.3d
22 225, 232 (4th Cir. 2006).

23 Equitable subordination differs markedly and serves
24 different purposes from recharacterization. While a bankruptcy
25 court's recharacterization decision rests on the substance of

1 the transaction giving rise to claimant's demand, its equitable
2 subordination decision rests on the assessment of the
3 creditor's behavior. When a claim is equitably subordinated,
4 the courts seek to remedy some inequity or unfairness
5 perpetrated against the bankrupt entity's other creditors by
6 postponing the subordinated creditor's right to repayment until
7 others' claims have been satisfied.

8 Here, the complaint attached to the motion would fail
9 to survive a motion to dismiss the equitable subordination
10 claim if the defendants were not shown to be insiders of the
11 debtor. That is because in the Second Circuit it is difficult
12 to show equitable subordination of a noninsider without
13 showing, unless the creditor has dominated or control of the
14 debtor to gain an unfair advantage, some agreed to an existing
15 legally recognized duty arising under contract tort or other
16 area of law, and in a commercial case, demonstration of a
17 substantial breach of contract and advantage taking by the
18 creditor.

19 In the absence of such a breach, the proponent must
20 demonstrate fraud, misrepresentation, estoppel, or similar
21 conduct that justifies the intervention of equity. Again, what
22 is a lack of a showing of domination or control or inside
23 status. See *In re 80 Nassau Associates*, 169 B.R. 832, 836-838.

24 The committee alleges that each of the defendants is
25 an insider, based on, with regard to most of the defendants,

1 their role both as a shareholder and their having appointed a
2 representative on the debtors' board, but the committee
3 recognizes that, in all likelihood, that would be insufficient
4 to support an insider allegation without more, since neither of
5 those facts creates a per se insider relationship under Section
6 10131 of the Bankruptcy Code. And the courts have therefore,
7 in the absence of a specific per se insider status under that
8 section, focused on the degree of control or ability to control
9 the debtors' affairs to determine whether one is an insider.
10 It is indisputable that SoftBank is an insider, given that it
11 controls the majority of the debtors' shares. None of the
12 other defendants, however, has that power, so the complaint
13 depends in its allegation of insider status on the assertion
14 that each of the other defendants, in essence, ceded its rights
15 or abilities to operate independently as a normal creditor to
16 SoftBank and worked with SoftBank to obtain an unfair advantage
17 in respect of the loans that were -- the debt that was
18 ostensibly occurred under the second loan facility, the first
19 one being a solely SoftBank loan facility.

20 I'm not prepared on today's record to conclude that
21 that argument would not survive a motion to dismiss or does not
22 state a colorable claim. Again, this is early in the case, and
23 the committee has not had the opportunity to take sufficient
24 discovery to support what nevertheless might be a plausible
25 argument that these particular lenders operated through

1 SoftBank, hand in glove with SoftBank to obtain an unfair
2 advantage by turning what would otherwise be equity, or in one
3 case unsecured debt -- that case being Qualcomm -- into debt
4 with a lien on all the debtors' -- or substantially, all of the
5 debtors' assets.

6 I am most skeptical about that allegation with regard
7 to two of the defendants. I've already mentioned one,
8 Qualcomm, which already had debt in the form of a receivable,
9 and the other being Banco Azteca, which itself was not a
10 shareholder, did not have a board representative, and
11 therefore, the committee would have to rely upon a control
12 relationship over Banco Azteca through its ultimate
13 shareholder, Grupo Salinas, which also controls Grupo Elecktra
14 which is Banco's -- the intermediate shareholder between it and
15 Salinas.

16 But I'm not prepared to conclude that the equitable
17 subordination claim, in fact, should die at this moment. I say
18 that in part because of the limited discovery that the
19 committee has obtained both with respect to the apparent
20 deference that Qualcomm had to SoftBank over the terms of the
21 loan and other disclosures by Qualcomm regarding how it viewed
22 the debt, the limited discovery that the debtors -- I'm
23 sorry -- that the committee has obtained regarding the
24 relationship between Banco Azteca and its controlling
25 shareholder, and how the Banco Azteca choice to participate in

1 the loan was described, and finally, the press release
2 regarding the nature of the loan which did not describe it as a
3 loan.

4 And as far as recharacterization is concerned, as I
5 noted, the ultimate analysis here is whether, in light of the
6 actual substance of a transaction, it can be said that the
7 parties intended it to be equity and not what it states it
8 is -- a debt -- or it is stated to be, a debt.

9 Applying the so-called "AutoStyle factors", albeit
10 recognizing every opinion that those factors are only that,
11 they are contact-specific without any bright-line tests and
12 frankly, often, I think, cited to make it harder to be reversed
13 but, a little less cynically, to give guidance to courts as to
14 the proper shape of the analysis to allow courts determine
15 whether the debt, as so denominated, really should be viewed as
16 debt or, to the contrary, equity.

17 It is, in fact, an odd analysis ultimately that
18 goes -- although not necessarily specifically denominated as
19 such -- to more than just what the parties wanted, but again,
20 to the substance of the transaction and in essence, ultimately
21 to some sense that the risks and rewards of debt are just not
22 true to the particular transaction, whereas the risks and
23 reward of equity are.

24 Without couching the analysis in that way, one runs up
25 against the illogic that has been recognized by at least two

1 courts; one was referenced in oral argument today by colleague
2 Judge Wiles' decision in *In re Yoga Smoga, Inc.*, 2016 WL
3 8943849 (Bankr. S.D.N.Y., Dec. 21, 2016), as well as by the
4 district court in *In re Daewoo Motor America, Inc.*, 471 B.R.
5 721 (C.D. Cal., 2012).

6 A major portion of the analysis is based on the notion
7 that this can't be viewed as debt because no rational lender
8 would've made a loan under the circumstances present, namely,
9 usually significant financial distress or undercapitalization,
10 which aren't necessarily the same thing.

11 But of course, as noted by the Daewoo court, if a
12 corporation is insolvent, no rational investor would choose to
13 buy equity, put it even more out of the money and most likely
14 completely worthless. At the very least, one would think that
15 insolvency should be viewed as evidence supporting an
16 investor's assertion, if it was legitimately concerned about
17 repayment of its advance and intended the advance would be
18 treated as debt.

19 Nevertheless, I believe that there are good and
20 legitimate reasons not to focus on the financial condition of a
21 company when the so-called "debt" that is sought to be
22 recharacterized if incurred. That is particularly the case
23 when it was undercapitalized from the start which, of course,
24 is what the complaint here alleges.

25 The 10th Circuit in *In re Alternate Fuels, Inc.*, 789

1 F.3d, notes that a rule that precludes a shareholder from
2 making a loan to help preserve -- in that case, hid equity in a
3 company -- simply because at the time of the loan, the company
4 was in distress financially -- would go too far and prevent
5 rescue loans. There are plenty of cases where creditors are
6 found not to make a loan recharacterized where they were making
7 a rescue loan for a similar reason.

8 On the other hand, that case relied upon earlier
9 precedent from the 10th Circuit with which it agreed but which
10 also noted that where courts have recharacterized an advance to
11 a failing corporation by a dominant shareholder, on that basis
12 alone, the facts show that the corporation was grossly
13 undercapitalized from the start requiring almost immediate
14 shareholder "loans" to operate. In re Midtown Produce
15 Terminal, Inc., 599 F.2d 389 392 (10th Cir. 1979).

16 This simply highlights the fact-based nature of the
17 recharacterization inquiry, whether it's under the common sense
18 "I know it when I see it" approach of SubMicron, which focuses
19 largely on the nature of equity versus the nature of debt, the
20 risks and rewards of each, or the multifactor tests by which
21 courts of the Third Circuit also employ under SubMicron. That
22 multifactor test rarely, if ever, results in dismissal of the
23 case at the pleading stage with the exception of the In re
24 Lyondell default case, addressed by all of the parties, 544
25 B.R. 75 (Bankr. S.D.N.Y., 2016). To the contrary, many of the

1 other cases, with the exception of Tese-Milner cited by the
2 parties, reached their conclusion after a trial; see, for
3 example, In re Aeropostale, 555 B.R. 369 (Bankr. S.D.N.Y.,
4 2016).

5 I'll note that the Lyondell case involved a revolving
6 loan, which to me would present major problems for
7 recharacterizations just in the nature of revolving credit
8 facilities. There were similar serious problems with the Tese-
9 Milner complaint. The case I'm referring to there is In re
10 Ticketplanet.com, Tese-Milner v. TPAC, LLC, 313 B.R. 46 (Bankr.
11 S.D.N.Y., 2004).

12 Here, the complaint is dependent on a handful of key
13 allegations which certainly are plausible based on the
14 complaint's terms and the limited facts before me. The
15 original loan from SoftBank and the second March 2019 loan
16 facility from SoftBank and the other defendants with SoftBank
17 rolling over the original loan into it, were not incurred with
18 a reasonable prospect of repayment barring extraordinary
19 circumstances. They were incurred in a context where not only
20 had third-party financing of the debt level not been available,
21 but also equity financing was not available.

22 This was still a startup company -- or set of
23 companies; substantially all of the known proceeds were to go
24 to make investments in capital investments in construction.
25 The original loan was convertible to equity if there were

1 specific financing; it never did materialize, but if it did
2 materialize, it would occur.

3 In the terms of the loan, in both instances, were
4 highly deferential to the debtors' board, which SoftBank
5 controlled, and gives SoftBank control over revenues and with
6 regard to all but one, and perhaps, two lenders, amendments of
7 key covenants such as maturity, weight, amount, et cetera, that
8 would not be in a traditional loan.

9 There also are, with the limited discovery that has
10 taken place, multiple references to the parties themselves, the
11 defendants, that is, referring to the financings in terms that
12 would indicate they were thinking of taking an equity risk as
13 opposed to a debt risk with, however, the protection, if all
14 else fails, of being ahead of other creditors.

15 Whether that adds up to a complaint that would
16 ultimately survive the motion to dismiss and, more importantly,
17 a successful litigation, I'm not deciding. But it does appear
18 to me that the claims are colorable, again, with two
19 limitations that I have significant concerns about. They
20 involve the same two defendants.

21 It's clear to me that the debt that Qualcomm seeks to
22 enforce today was rolled over from legitimate debt, i.e.
23 contract receivables similar to the vendor debt represented by
24 the creditors' committee. It's hard for me to see how that
25 rollover portion would somehow transform the receivable into

1 equity.

2 Secondly, Banco Azteca, unlike the other party's
3 defendant, is a bank subject to regulation by the Mexican
4 banking authorities and, as I noted before, not a shareholder,
5 although, it is controlled by a shareholder.

6 Once one is talking about a regulated true bank, they
7 would be precluded from making an equity investment. I believe
8 it would be incumbent upon a plaintiff seeking to
9 recharacterize its purported loan to show that he was playing
10 fast and loose with bank regulations when it incurred the debt.

11 Again, discovery here has been limited. And the key
12 facts, similar to the key fact with respect to the equitable
13 subordination analysis, is whether Banco Azteca's shareholder
14 so dominated it. I bet one could conclude that it was, in
15 fact, playing fast and loose with Mexican bank regulations.

16 The infirmity with respect to both of those defendants
17 is important because the amounts owed to them are so large that
18 if, in fact, the complaint failed as to either of them, there
19 would be little chance for a recovery to the benefit of
20 unsecured creditors.

21 Banco Azteca is owed over 300 million dollars, and as
22 I'll get to in a moment, it does not appear there's anything
23 close to that that could pay it and leave money over for the
24 unsecured creditors. It's conceivable that the Qualcomm loan
25 would be recharacterized as an unsecured loan, i.e.,

1 receivable, as opposed to a secured loan. But of course, at
2 that point, Qualcomm would share it pari passu with the
3 unsecured creditors. But again, the amount of that debt at
4 this point is, I believe, in excess of a hundred million
5 dollars, the face amount being ninety-eight million before any
6 interest.

7 The parties have spent a great deal of time going
8 through the other AutoStyle factors, and I believe I should
9 address them briefly. But ultimately, I've given my conclusion
10 that, when looked at on a practical and case-by-case basis, I
11 would not be prepared on today's record to conclude that the
12 claims are not at least colorable; going through them is only
13 of limited utility.

14 The first is the adequacy or inadequacy of
15 capitalization. Again, based on the facts, that courts have
16 been all over the lot as to how important that factor is. I
17 think it's, at most, important where the capitalization was
18 inadequate from the start, and I believe that that has been
19 adequately alleged in the complaint.

20 The second factor is the identity of interest between
21 the creditor and the stockholder. Here, there is a substantial
22 identity of interest with the exception, again, of the two
23 defendants that I have previously singled out: Banco Azteca
24 and Qualcomm.

25 Three is the source of repayments which ties into the

1 adequacy of capitalization here. Other than a backup lien, in
2 the event that the company did not receive next stage
3 financing, whether equity or debt, from third parties, that
4 backup lien has, as proven, limited value, far less than the
5 billion-six of financing at stake.

6 Four is the corporations agree to obtain financing
7 from outside lending institutions. It's clear that that was
8 not available. But again, the facts are important here as to
9 whether this was a rescue loan, which courts recognize the
10 validity of where, in particular, company has fallen on hard
11 times, or alternatively, a situation that's always contemplated
12 because of undercapitalization, the need for additional
13 financing.

14 I would sound that score that the debtors' objection
15 cites an article discussing financing of startup companies,
16 particularly here in the tech world, the venture of tech world,
17 Darian M. Ibrahim, "Debt as Venture Capital", 2010 U. Ill. L.
18 Rev. 1169, 2010.

19 The author of that article, which obviously now is
20 dated -- it goes back to 2010 -- states that contrary to
21 popular myth, there is material lending to start-up companies.
22 At that time, it was one to five billion estimated or about ten
23 percent of financing for start-up venture capital-type vehicles
24 by a limited group of players. But clearly, it exists. And
25 the committee is not saying anything to the contrary.

1 However, based on the author's interviews of venture
2 capital investors and venture lender parties, the article does
3 say the following, "Venture debt" -- as far as this article is
4 concerned -- "does not mean debt from angel investors or VCs
5 that is commonly converted to equity." That's at page 1171.

6 At page 1173, the author says, "The venture lenders
7 viewed convertible" debtors -- convertible "debt really being
8 equity and, therefore, a security for investors". On the same
9 page, the article states, "Venture debt is debt financing going
10 to subsequent rounds of equity, i.e., a bridge." That's also
11 at page 1173.

12 The objectors have argued that their loan or loans
13 were bridges to subsequent equity investments or debt
14 investments. Committee contends to the contrary that they were
15 a bridge to nowhere, and importantly, the defendants knew that
16 it was a bridge to nowhere. If it is, in fact, the case that
17 it was the latter, then I believe there's a colorable claim.
18 On this record, one cannot decide which party is right.

19 The other factors are, in fact, in favor of the
20 objectors, i.e., the instruments of deed were named loan
21 agreements or security agreements. They did have a fixed
22 maturity date and a schedule of payments, although those were
23 PIK until the blessed event occurred, and they were a loan to
24 be repaid. There was a fixed rate of interest, although,
25 again, a PIK, And there was collateral.

1 On the other hand, all of those terms were terms
2 within the complete control of the lenders and the board, which
3 substantially overlapped. While it, of course, is supremely
4 easy to recharacterize something claimed to be debt when
5 there's no debt instrument or any evidence that it was treated
6 as debt, the recharacterization doctrine is not limited to such
7 fact patterns, so I do not believe those factors, although they
8 are in favor of the objectors, to be dispositive here of this
9 record.

10 That still leaves, however, the second prong of the
11 analysis under SGN (ph.) and its progeny, namely, is the
12 committee's pursuit of these claims in the best interest of the
13 estate and money well spent. As with the first prong of the
14 analysis, the committee has the burden to show that, in fact,
15 the pursuit of the claims is beneficial. It's argued here that
16 there's an easy answer to that: namely, that these claims do
17 not augment the estate. They're not like fraudulent transfer
18 claims or preference claims.

19 On the other hand, that argument just highlights that
20 I made at the beginning of this opinion, which is that while
21 managing litigation is something that a court always should do,
22 applying the standing doctrine of SGN to recharacterization
23 claims and/or equitable subordination claims is somewhat
24 problematic. Their purpose is not to augment the estate but to
25 comply with the bankruptcy -- or to ensure that the estate and

1 the debtor complies with the Bankruptcy Code.

2 Of course, if because of these claims, the court is
3 unable to confirm a plan which provides for specific payment on
4 account of ostensible debt claims that should either be
5 recharacterized or equity-subordinated and/or provides estate
6 releases on such claims, then one could argue that obviously
7 pursuing such claims does, in fact -- or is, in fact,
8 consistent with the Bankruptcy Code and proper. Otherwise, one
9 would be confirming a plan that shouldn't be confirmed.

10 So I don't accept the no augmentation argument. It
11 says both too much and too little in this context.

12 It is however, of great concern to me that the pursuit
13 of these claims would either, A, jeopardize what is clearly a
14 beneficial exit strategy through the third-party BidCo
15 transaction or, B, would result in the incurrence of hard
16 litigation costs with a projected benefit over and above those
17 costs that, at least today, appears to me to be speculative.
18 The debtors are primarily focused on that point, that second
19 aspect of the analysis. They make two points with regard to
20 jeopardizing the proposed transaction with BidCo. The first
21 is, I believe, a legitimate one, which is that BidCo has in its
22 agreement agreed to allocate one hundred million dollars of
23 equity in the reorganized entity that it is sponsoring but to
24 go to the current creditors, the secured creditors, who again
25 are also, with the exception of Banco Azteca, equity holders.

1 There is a risk that if that equity goes to other
2 parties because of a recharacterization win by the committee,
3 BidCo could walk from its transaction or at least renegotiate
4 it. I don't believe that that risk should be allowed to even
5 exist. There should not be that cloud over a proposed
6 transaction.

7 On the other hand, it is a definitional cloud. If
8 potentially a third party other than the specific entities
9 designated by BidCo would have the same characteristics for
10 approval purposes, it shouldn't be an issue. But ultimately, I
11 believe the committee should not be permitted to pursue a
12 transaction -- I'm sorry -- pursue litigation that would, by
13 its plain terms, cause a breach of the purchase agreement if
14 the committee succeeded and the order would have to be drafted
15 to preclude that relief and the pursuit of that relief from
16 taking place, which in all likelihood would mean that the
17 remedies that the committee would see would be limited to the
18 other aspect of the consideration provided by BidCo, which is
19 ninety million dollars, which is clearly carved out in the sale
20 order and not required to be allocated to the defendant.

21 The debtor also argues that the costs of the
22 litigation could well jeopardize the cap on administrative
23 expenses that the BidCo transaction provides for the payment of
24 \$25.9 million. I'm far less sympathetic with that argument.

25 First, there is also ninety million dollars of cash

1 coming in under the BidCo offer. And second, there's certainly
2 a way to deal with administrative insolvency in this context.
3 It does not appear to me to be right to foreclose a legitimate
4 argument that might create a confirmation obstacle simply
5 because administrative expenses might not be paid. That too is
6 a confirmation obstacle. Parties know how to deal with it if
7 they want confirmation of a plan and their administrative
8 expense creditors or creditors who would otherwise be
9 benefiting under such a plan and could, therefore, fund the
10 administrative expenses.

11 I am, however, very sympathetic to the debtor's
12 argument that we simply do not know today who the creditors are
13 that would benefit from a litigation success by the committee.
14 We can project the costs of such litigation if it's full bore
15 litigation. And I believe the costs both directly incurred by
16 the committee as well as by the debtors would be somewhere
17 between five and ten million dollars which is a substantial
18 amount of cash.

19 The committee has stated that it's willing to proceed
20 on a contingency fee basis which would, in all likelihood, cut
21 that sum in half, if not more, but it wouldn't eliminate the
22 added protection costs and the cost by the debtors of complying
23 with discovery. The added protection costs would only be
24 eliminated if the committee prevailed, and as noted in the
25 Sabine case that I cited, one can't assume -- or should not

1 assume -- that that would happen in evaluating the cost portion
2 of the projected ledgers sheet.

3 On the other hand, it's quite possible that the
4 unsecured claims that are not dealt with by contract assumption
5 and critical vendor payments would be in a range that would
6 argue that one would not spend five to ten million dollars for
7 to benefit. Mr. Despins himself speculated that they might be
8 in the twenty to thirty million dollar range. Considering the
9 risks of litigation and the cost, it would seem to me that most
10 of the activity with regard to the litigation that the
11 committee wants to pursue should best be dealt with after we
12 have a much better handle on the unpaid creditors -- or the
13 creditors that would be unpaid if the committee did not succeed
14 in its motion.

15 Now, that time appears to be one that would be no
16 earlier than the confirmation hearing, and arguably, that is
17 too short a time for the committee to act. But I would like to
18 consider that in more detail.

19 First, the committee was dealing with a deadline under
20 the cash collateral order in paragraph 11 which set an
21 investigation termination date which the committee met by
22 bringing this motion. However, that paragraph states,
23 "Provided that if prior to the investigation termination date,
24 a party files a motion seeking standing to pursue such claims
25 or cause of action which motion attaches a complaint that

1 specifies all of the alleged claims and causes of action being
2 pursued, then the investigation termination date shall be
3 extended solely as to such party and solely as to such claims
4 or causes of action so specified until the date that is one
5 business day after the entry of an order resolving such timely
6 filed motion.

7 So I could well adjourn this motion to a date after
8 the key fact, which is who the intended beneficiaries of the
9 committee's relief are, and then measure their claims as
10 against the costs and the risks of the committee's proposed
11 litigation.

12 Mr. Despins says, well, that would leave the committee
13 at a disadvantage because the debtor would be moving ahead with
14 its plan, which provides for a relief and payment of ninety
15 million dollars to the secured creditors. But of course, the
16 committee has an objection to that plan as it currently stands,
17 and I would have to evaluate it in light of the facts as they
18 exist today and as they will be developed as part of
19 discrepancy going toward confirmation.

20 It is certainly not a foregone conclusion that I would
21 confirm a plan of that nature, and if the debtor truly wants to
22 preserve the BidCo deal, it should consider setting aside the
23 ninety million dollars to be fought over until the facts are
24 clearer as to whether there's an appropriate settlement or not,
25 certainly with regard to the release.

1 I'm not prepared today, of course, to decide the
2 standing motion, therefore, and -- and this is where the "of
3 course" comes in -- the standing motion's request that the
4 committee have control of settlement for these causes of action
5 in light of the foregoing. But that doesn't mean that I would
6 also simply defer to the debtor's decision to settle them.

7 It is also clear to me, and I'm sure clear to the
8 parties who have briefed these issues that as with most
9 bankruptcy cases, this is not an all-or-nothing analysis,
10 particularly given the assertion that the actual unpaid group
11 of unsecured creditors is relatively small, and given the
12 nature of the litigation here, one would think that people
13 would sit down and negotiate a settlement before incurring the
14 extra cost of litigation on all sides. And I strongly urge
15 them to do that.

16 So I will adjourn the hearing on this motion to the
17 next omnibus day. I strongly suggest, as I said, that the
18 parties sit down and try to negotiate a settlement. As far as
19 any extra discovery is concerned, I strongly suggest that the
20 parties limit it to discovery with respect to Qualcomm and
21 Banco Azteca/Grupo Salinas, Grupo Elektra if they're going to
22 have it at all and that any other discovery be in the context
23 of plan confirmation and the committee's likely objection to it
24 in light of what we just went through.

25 So that's my ruling. I don't know if the parties have

1 any questions about it.

2 MR. DESPINS: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. DESPINS: Luke Despins with Paul Hastings. I'm
5 not sure where we ended up on the 502(b) objection.

6 THE COURT: Well, it's alive -- it's an objection. We
7 didn't have a hearing on it today. You can pursue it, but I
8 think it needs to -- it should properly be pursued -- if you're
9 going to pursue it at all, if you can't settle the matter.

10 MR. DESPINS: Of course. Yeah. Yeah.

11 THE COURT: And therefore, I suggest it be reserved
12 for a date after confirmation, which would of course, would
13 require an amendment to the plan. But I would need a strong
14 analysis as to why a debtor release is warranted here as part
15 of the disclosure statement and plan confirmation, and given
16 that the debtors have not done that analysis on a factual
17 basis, I think they could see where I'm going about setting
18 aside the ninety million and not specifically allocating it at
19 this point.

20 MR. DESPINS: And Your Honor, the other point was just
21 a comment. My understanding is that if a claim is avoided or
22 disallowed, the lien that goes with that under 506(d) is also
23 disallowed and then that lien is preserved for the benefit of
24 the estate under 551. So I just -- that's to address the point
25 about the unsecured being behind these two creditors. We would

1 never be behind. We might be pari passu, but we would pick up
2 the claims of the others.

3 THE COURT: Well, that's one of the reasons we're
4 adjourning this. No one's really argued that point, and it
5 could be argued, if need be, in the future. It isn't -- I
6 mean, I will point out to you that 551 covers the preservation
7 of an avoided transfer under section 522, 544, 545, 547, 548 --

8 MR. DESPINS: Or any lien --

9 THE COURT: -- 549, or 724 or any lien void under
10 Section 506(d), so I'm not sure if that's right necessarily,
11 but in any event, that's something people can raise if they
12 can't settle this at the adjourned hearing.

13 MR. DESPINS: And does Your Honor believe that
14 mediation might be beneficial or no?

15 THE COURT: I think you all are up to it yourselves.

16 MR. DESPINS: Okay.

17 THE COURT: You know, I could call upon one of my
18 colleagues, but look, you all are experienced lawyers. You
19 certainly know the risks and rewards here, and I think you
20 have -- all of you have a pretty good idea what the amount
21 of -- out of the money unsecured creditors ultimately will be
22 and the costs of ongoing litigation, and there's clearly a
23 settlement to be had in there.

24 MR. DESPINS: Understood. Thank you.

25 MR. LEBLANC: And Your Honor, this is Andrew Leblanc

1 of Millbank. We hear you loud and clear, and we look forward
2 to working with the parties to see if we can come to a
3 resolution.

4 THE COURT: Okay. Very well. So I did take you up,
5 Mr. Leblanc, on commenting that the sanctity of the covenant in
6 the BidCo agreement regarding who gets the equity is important.
7 But it's just the agreement. People are not supposed to draft
8 more than that, and there are ways to settle the whole thing --
9 again, I believe. So I'm not looking for any sort of order at
10 this point, but I just want to be clear what I meant when I
11 said that that agreement on that provision should not be
12 jeopardized. But at the same time, it should be limited to
13 jeopardizing it through that provision, not some other -- not
14 the plan, which is a different consideration.

15 MR. LEBLANC: Understood, Your Honor. Yes.

16 THE COURT: Okay. All right. So I want to thank the
17 parties. They did an extensive job briefing this, and I wish
18 you luck.

19 (Whereupon these proceedings were concluded at 4:30 PM)
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

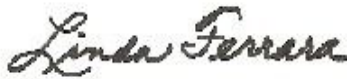
I N D E X

RULINGS:	PAGE	LINE
Motion to extend time granted	14	8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.



Linda Ferrara (CET-656)
AAERT Certified Electronic Transcriber
eScribers
352 Seventh Ave., Suite #604
New York, NY 10001

Date: July 29, 2020

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

	achieve (1) 77:4	114:7;115:16	114:10	45:11;106:19;
\$	achieved (1) 72:20	adjourned (1) 117:12	agenda (5) 12:14,15,20,22; 13:5	114:1
\$25.9 (1) 111:24	acknowledged (3) 26:5,6;94:15	adjourning (1) 117:4	agents (1) 27:3	alleges (2) 97:24;101:24
*	acknowledgement (1) 20:25	admin (2) 30:8,17	aggregate (1) 50:14	alleging (2) 28:15;31:14
*23 (1) 91:24	across (1) 58:12	administrative (12) 50:6,10,18;54:4; 55:6;56:7,10; 111:22;112:2,5,7,10	aggrieved (1) 91:19	allocate (1) 110:22
A	act (3) 49:12;93:20; 113:17	administratively (1) 54:5	ago (1) 66:13	allocated (1) 111:20
A&RNPA (8) 69:2;70:24;72:7, 25;73:3,3,17;74:1	acting (4) 23:22;82:3;92:3; 93:14	admonition (1) 47:5	agree (5) 27:9,24;54:19; 91:16;107:6	allocating (1) 116:18
AALTEN (23) 8:20;14:20;25:4; 32:15,19,22,23;36:3, 7,11;37:11;38:25; 39:3,6;40:11;41:1,3, 6,11,16;62:13;63:6; 67:11	action (9) 80:10;92:22;94:3, 5;96:17;113:25; 114:1,4;115:4	adopt (3) 17:8;33:1;78:14	agreed (9) 16:15;18:6;60:23; 84:23;85:6;86:1; 97:14;102:9;110:22	allocation (1) 45:2
abilities (1) 98:15	activity (3) 52:6,18;113:10	adults (3) 26:19;27:9,23	agreeing (1) 26:10	all-or-nothing (1) 115:9
ability (13) 17:5,6;24:12;25:3, 8,9,9;42:10;50:2; 54:8;70:13;86:13; 98:8	actual (4) 47:18;68:20; 100:6;115:10	advance (5) 46:22;83:8; 101:17,17;102:10	agreement (22) 17:1;33:15;42:6; 49:20,25;50:13; 61:10,13,18,20; 66:12;68:24;69:1; 71:20;72:6;73:6; 88:9;110:22;111:13; 118:6,7,11	allow (4) 28:7,69;7,84:13; 100:14
able (13) 12:7;21:1;27:14, 15,24;30:20;42:7; 48:17;56:2,6;57:25; 65:13;84:19	actuality (1) 65:2	advances (1) 25:20	agreements (4) 72:4;73:2;108:21, 21	allowed (5) 44:2;49:17;53:17, 18;111:4
above (2) 90:21;110:16	actually (4) 25:14;61:14; 71:24;75:25	advantage (5) 69:21;97:14,17; 98:16;99:2	ahead (4) 14:12;28:3; 104:14;114:13	Allowing (1) 72:14
absence (3) 34:2;97:19;98:7	add (3) 22:15;27:24;57:16	adversary (2) 60:3;91:1	Airbus (31) 9:3,3,21;32:25; 33:11,18;34:7,12,18; 35:5,13,15,20,22; 36:13,13;37:13,18, 24;38:11,13;39:11, 15,17,19;40:13;41:7, 12;42:5,15;45:1	alluded (1) 46:3
absent (2) 37:15;77:3	added (2) 112:22,23	Aeropostale (1) 103:3	Airbus's (2) 38:14,21	almost (1) 102:13
absolute (1) 31:6	addition (2) 53:2;76:12	affairs (1) 98:9	airplane (1) 30:12	alone (2) 80:10;102:12
abuse (3) 65:15;93:8,12	additional (15) 33:25;35:18; 37:16,24;42:10; 63:23;66:8;69:6; 70:18,22;72:18,22; 73:20;83:20;107:12	affidavit (1) 94:4	akin (2) 39:8;71:9	along (3) 69:13;78:11;85:19
accept (1) 110:10	address (16) 44:10;45:9;46:15; 47:2,3;67:24,25; 72:7;74:21;75:8; 84:12;86:12;88:19, 21;106:9;116:24	affiliates (5) 44:11;81:9,18; 85:23,25	al (1) 12:3	Alternate (3) 77:13;91:12; 101:25
accepted (1) 33:22	addressed (5) 88:20;90:21,23, 24;102:24	affirmative (1) 70:12	albeit (1) 100:9	alternatively (4) 43:6;90:12;91:2; 107:11
accident (2) 24:24;87:5	adds (1) 104:15	afford (2) 20:1;30:14	ALBERT (1) 11:9	although (10) 14:25;17:8,18; 90:16;92:12;100:18; 105:5;108:22,24; 109:7
accord (1) 24:18	Adelphia (5) 47:6;59:24;92:25; 94:20;95:5	afternoon (8) 12:2,18;13:1; 14:18;32:22;62:1; 66:21;79:15	alive (1) 116:6	always (6) 83:12;85:17;86:9; 93:6;107:11;109:21
accordance (1) 12:20	adequacy (2) 106:14;107:1	again (35) 12:6,6;14:19;18:5, 20;20:16,18;24:7; 27:23;35:4,23;39:7, 9;45:5,17;57:22; 61:24;72:21;79:23; 82:25;88:16;90:18; 93:22;97:21;98:22; 100:19;104:18; 105:11;106:3,15,22; 107:8;108:25; 110:24;118:9	allegations (1) 103:13	amended (3) 33:14;68:25;70:19
accorded (1) 90:7	adequate (2) 53:4;54:22	against (13) 29:11;33:11; 71:12,18;73:21,24; 78:17;79:6;90:9; 92:22;97:5;100:25;	allegation (4) 94:17;98:4,13; 99:6	amendment (1) 116:13
account (3) 33:13;37:15;110:4	adequately (1) 106:19		alleged (3)	amendments (1) 104:6
accurate (1) 88:13	adjourn (2)			America (2) 96:21;101:4
accused (1) 63:7				Americas (1) 8:15

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

5;112;18;117:20 amounts (6) 22:15;46:8;48:19; 19:78:10;105:17 analysis (30) 45:10;46:16;47:4; 56:16;59:17;60:21; 68:8;86:20;91:4,5,7; 94:8,14;95:3;96:1,6, 11,13;100:5,14,17, 24;101:6;105:13; 109:11,14;110:19; 115:9;116:14,16 analyze (2) 58:4;89:4 and/or (4) 90:12;92:3; 109:23;110:5 Andrew (4) 12:25;43:11;45:6; 117:25 angel (1) 108:4 Angeles (1) 10:16 announced (1) 22:8 announcement (1) 22:9 ANTHONY (1) 10:9 anticipated (1) 94:25 anymore (2) 89:9,10 apart (1) 92:4 apologies (1) 22:25 apologize (3) 67:19;74:24;75:3 apparent (1) 99:19 appear (4) 66:17;104:17; 105:22;112:3 appears (2) 110:17;113:15 applicable (5) 33:18;87:2;91:5; 92:21;95:21 application (1) 94:19 applied (2) 47:6;60:5 applies (1) 92:4 apply (5) 59:24;68:5;77:21; 78:20;84:9 Applying (4) 71:10;96:11; 100:9;109:22	appointed (1) 98:1 appointee (1) 23:18 appreciate (1) 13:20 approach (5) 17:9;29:21;38:5; 82:16;102:18 approaching (1) 57:21 appropriate (6) 15:18;19:14; 27:21;90:8;93:25; 114:24 appropriately (1) 57:3 approval (6) 14:5;20:16;47:13; 60:1;76:6;111:10 approve (3) 32:1;48:2;58:7 approved (4) 19:11;61:14,15; 88:2 approves (1) 46:21 approving (1) 19:18 approximately (2) 50:13;57:15 April (1) 95:15 apt (1) 84:1 area (1) 97:16 arguably (2) 77:22;113:16 argue (8) 29:12,14;30:8; 44:2;45:16;96:9; 110:6;113:6 argued (5) 64:23;108:12; 109:15;117:4,5 argues (5) 40:9;64:14;65:1; 72:3;111:21 arguing (3) 23:13;63:7;65:3 argument (25) 26:1;27:8;28:19; 21;30:21;43:18; 45:18;56:5;63:11, 15;64:1;65:8,15; 74:8;80:17;81:19; 88:12;98:21,25; 101:1;109:19; 110:10;111:24; 112:4,12 arguments (6) 44:1;45:13,14;	53:21;63:12;92:11 arising (1) 97:15 around (1) 40:24 arrange (1) 12:12 arrangement (1) 32:14 article (5) 107:15,19;108:2,3, 9 aside (3) 49:2;114:22; 116:18 aspect (4) 26:3;69:12; 110:19;111:18 aspirational (1) 62:21 asserted (1) 33:11 asserting (1) 94:5 assertion (3) 98:13;101:16; 115:10 assessed (1) 68:7 assessment (1) 97:2 asset (1) 85:13 assets (4) 31:14;69:5;71:3; 99:5 assignment (1) 43:5 associated (1) 56:13 Associates (2) 71:25;97:23 assume (5) 28:23;43:15;49:4; 112:25;113:1 assumed (6) 48:22,25;49:4; 58:24;88:23;89:19 assumption (5) 29:3;43:5;66:13; 88:22;113:4 assure (1) 94:23 attached (4) 20:14;80:1;90:10; 97:8 attaches (1) 113:25 attempt (1) 88:18 attempted (1) 64:1 attempting (2)	45:23;46:12 attendance (3) 19:5,6,12 attention (1) 18:8 Attorneys (11) 7:3,11,19;8:3,13; 9:3,13,21;10:3,13; 11:3 attract (2) 70:22;76:17 attribute (1) 40:19 audio (2) 59:24;63:15 augment (2) 109:17,24 augmentation (1) 110:10 August (2) 18:5;28:14 author (2) 107:19;108:6 authorities (2) 91:14;105:4 authorized (4) 12:9;27:16;29:14; 88:18 authorizing (2) 29:15;30:6 author's (1) 108:1 automatically (1) 26:7 Autostyle (9) 17:12;24:3;42:2; 71:12;82:17;95:24; 96:7;100:9;106:8 available (6) 29:24;34:1;48:15; 103:20,21;107:8 Avenue (6) 7:4;8:15;9:5,14; 10:4,14 Aviation (1) 96:21 avoided (2) 116:21;117:7 aware (5) 13:12;18:13;57:7; 66:20;77:13 away (3) 26:1;50:2;88:24 awkward (2) 33:5;39:22 Azteca (25) 37:23;43:21; 79:21;80:7,10,12,14, 20;81:1,6,9,13,17, 18;84:1;85:11;87:5; 99:9,12,24,25;105:2, 21;106:23;110:25 Azteca/Grupo (1)	115:21 Azteca's (1) 105:13 B back (14) 20:6;31:25;32:12; 37:5;38:12,13,21; 42:22;53:22;54:24; 56:5;77:9;93:22; 107:20 backed-up (1) 18:25 background (2) 33:17;71:4 backs (1) 88:10 backup (2) 107:1,4 backwards (1) 83:18 bad (6) 26:1;56:20;62:9,9; 63:3;89:20 Banco (26) 37:23;43:21; 79:20;80:7,10,12,14, 20;81:1,6,13,17,18; 84:1;85:11;87:5; 99:9,12,24,25;105:2, 13,21;106:23; 110:25;115:21 Banco's (1) 99:14 Bank (11) 23:18;80:12,16; 84:1;85:18;87:8; 91:22;105:3,6,10,15 bankable (1) 85:13 banker (1) 41:24 banking (1) 105:4 Bankr (9) 91:21,23,24,24; 94:21;101:3;102:25; 103:3,10 bankrupt (1) 97:5 bankruptcy (28) 18:16;21:13;28:3; 34:16;59:25;85:15; 90:11,14,18,21;91:2, 3,9,20;92:19;94:23, 25;95:9,9,14;96:5, 16,24;98:6;109:25; 110:1,8;115:9 bar (4) 28:14,16,17;89:3 barring (1) 103:18

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

based (11) 14:3;35:4;41:19; 73:18;81:12;95:23; 97:25;101:6;103:13; 106:15;108:1 basic (3) 15:10;92:17;96:11 basically (17) 15:14;20:24;25; 21:8,11,18;22:6; 27:3,11,12,18;30:19; 31:11;78:13;86:17; 88:9;89:20 basis (13) 12:11;23:7;32:2; 40:4;46:2;68:7;90:8; 16:92:10;102:11; 106:10;112:20; 116:17 BASSETT (7) 7:15;18:3;20:15; 44:10,14,17;76:2 bat (1) 13:19 Bates (10) 20:20;34:22; 35:22;37:7;38:4,13; 41:7,11;76:7;81:3 bathed (1) 35:9 Battery (1) 9:22 became (1) 72:11 become (1) 26:10 becomes (1) 29:20 beg (1) 54:6 began (1) 70:18 begin (2) 53:6;68:2 beginning (6) 16:17;21:24;41:8; 12,13;109:20 begins (1) 76:11 behalf (6) 28:20;43:12;45:6; 50:24;79:20;92:19 behavior (1) 97:3 behind (4) 89:16;96:19; 116:25;117:1 belabor (1) 18:21 belief (1) 86:18 believes (1) 17:22	beneficial (3) 109:15;110:14; 117:14 beneficiaries (1) 114:8 benefit (18) 28:5;30:25;45:10; 46:16;47:4;59:7,12, 17;60:7,9,10;94:6; 10;105:19;110:16; 112:13;113:7; 116:23 benefiting (1) 112:9 benefits (5) 47:15;56:14;58:2, 19;60:4 benefitted (1) 46:8 BERGER (1) 11:8 best (4) 48:14;71:23; 109:12;113:11 bet (1) 105:14 better (3) 21:15;23:1;113:12 beyond (3) 46:1;63:8;93:3 bid (5) 48:9,14;50:4,5; 58:23 BidCo (10) 110:14,20,21; 111:3,9,18,23;112:1; 114:22;118:6 bidder (7) 29:16;48:3,8,10; 50:1,8;88:14 bidders (1) 49:4 big (3) 24:3;25:24;28:6 billion (7) 22:12,15;28:10; 48:18;57:12;88:19; 107:22 billion-six (1) 107:5 bit (2) 16:13;61:16 bizarre (1) 27:17 blatantly (1) 44:2 blessed (1) 108:23 block (1) 30:16 blur (1) 64:2 Board (26)	18:5;19:4,11,11, 13,18;23:19,20,25; 27:16;29:7;33:13; 34:21;35:6;36:25; 61:14;64:25;65:5, 16;81:2,5,15;98:2; 99:10;104:4;109:2 body (1) 52:14 bonds (1) 59:4 bones (1) 21:17 bonus (1) 56:22 bonuses (1) 29:9 books (1) 85:19 bore (1) 112:14 borrower (2) 27:14;83:5 borrower's (1) 42:1 both (32) 16:15;32:24; 33:11,12,13,18,19, 22;34:3,12;35:5,14; 39:24;40:13;42:4,5, 6,15;52:17,24;56:10, 18;62:13;72:7; 93:11;96:17;98:1; 99:19;104:3;105:16; 110:11;112:15 bottom (3) 21:10;37:9;73:16 bound (1) 71:24 box (1) 20:22 BR (12) 71:25;74:14; 91:21,23;94:20,21; 95:5;97:23;101:4; 102:25;103:3,10 breach (3) 97:17,19;111:13 breadth (1) 84:17 break (1) 47:14 bridge (11) 68:13;69:5;70:1,7; 72:16;76:17,20; 88:17;108:10,15,16 bridges (1) 108:13 brief (12) 62:4;64:1,13,23; 73:15;74:15,19; 75:12;77:5,11,17; 79:22	briefed (1) 115:8 briefing (1) 118:17 briefly (3) 72:8;86:3;106:9 bright-line (7) 68:9;78:14,19; 79:1;86:25;90:1; 100:11 bring (6) 92:22;93:8,19; 94:2,3,10 bringing (6) 30:22,25;92:20; 93:15,17;113:22 brings (3) 22:11;37:17;58:17 broad (1) 46:11 Brooke (1) 91:23 brush (1) 46:11 brutally (1) 25:6 BRYANT (1) 9:8 budget (2) 51:2;57:22 build (2) 70:2,19 built-in (1) 29:16 bullet (12) 20:22;21:10; 34:23;35:1,25;36:5, 8;38:6,16,19;76:8,11 bunch (1) 19:14 burden (2) 63:10;109:14 bus (3) 20:6;21:13;23:7 business (9) 19:17;25:17; 33:25;63:4;64:7; 69:7,8,13;114:5 busted (2) 48:4,4 buy (3) 17:10;50:9;101:13 buyer (4) 48:22;49:19; 70:23;89:19 buyers (1) 54:6 BV (1) 9:4 C CA (1)	10:16 Cal (1) 101:5 calculated (1) 57:17 calendar (1) 92:1 call (3) 44:5;72:22;117:17 called (3) 43:23;61:1;96:7 calls (1) 60:9 came (2) 61:19;74:22 can (47) 14:10;16:24;17:1, 2,2,3,19;18:7;26:20; 27:9,19,20;28:22; 32:12,19;33:10; 34:21,23;35:22; 38:24;47:9;48:5; 50:6,18;54:24;55:5, 8;59:9;65:11;67:16, 25;74:15;75:24; 79:17;87:18;88:20; 89:13,13,16;90:21; 91:11;92:18;100:6; 112:14;116:7; 117:11;118:2 cap (9) 30:9,17;50:12,14, 18;54:4;55:5;56:11; 111:22 capacities (1) 35:6 capacity (3) 53:20,23;54:13 capital (16) 17:7;22:14,23; 25:20;27:11,15; 42:12;45:21;67:5; 69:6;83:17,23; 91:23;103:24; 107:17;108:2 capitalization (3) 106:15,17;107:1 capital-type (2) 66:19;107:23 cards (1) 34:16 care (1) 55:7 careful (3) 33:5;35:24;39:8 CARLOS (1) 8:8 carry (1) 70:5 carved (1) 111:19 case (50) 16:10,16;17:23,

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

24;19;6;20;1;23;17; 24:20;30;23;47;6; 51:3;15;52;7;53;17; 62:22;23;63;9; 64:15;68;19;71:10; 73:13;75;25;77:1,11, 16,21;83:1;86:16; 87:10;91:3;92:12, 16;93:23;95:9,11,12, 21;97:16;98:22; 99:3,3;101:22;102:2, 8,23,24;103:5,9; 108:16;112:25 case-by-case (2) 68:7;106:10 cases (19) 14:5;15:14;16:7, 10;24:17;59:23; 66:17;67:7;77:13,16, 20,23;78:22;90:11; 92:24;95:23;102:5; 103:1;115:9 cash (13) 31:11,11;34:24; 36:14;53:4,5,7,9,12; 54:21;111:25; 112:18;113:20 Casino (1) 73:14 category (2) 47:16,16 cause (4) 13:24;14:9; 111:13;113:25 caused (1) 31:22 causes (5) 56:2;96:17;114:1, 4;115:4 caution (1) 59:25 cavalier (1) 58:5 CD (1) 101:5 cease (1) 89:7 cede (2) 42:22;60:13 ceded (1) 98:14 certain (12) 17:18;18:8,12; 31:2;47:16;53:12; 56:21;69:5,15,16; 72:19;80:21 certainly (14) 16:21;28:2;33:5; 53:13;58:22;64:15; 65:14,25;85:7; 103:13;112:1; 114:20,25;117:19 cetera (8)	15:21,21;21:9,9; 25:17,17;29:9;104:7 chairs (1) 21:20 challenge (3) 30:23;61:18,19 challenging (1) 24:13 chambers (1) 14:11 chance (5) 18:3,10;83:14,18; 105:19 change (7) 28:12;40:8;54:6; 55:10;75:10,24;88:2 changed (4) 37:3;55:24;82:4,5 changes (1) 55:18 changing (1) 24:9 Chapman's (1) 47:5 Chapter (3) 16:16;95:11,12 characteristics (1) 111:9 characterization (1) 68:3 Chase (3) 23:18,19;27:18 check (1) 93:12 chilling (1) 77:1 choice (1) 99:25 choose (1) 101:12 CHRIS (1) 9:8 CHRISTOPHER (1) 9:8 chunk (1) 44:25 Cir (8) 60:5;91:13;92:24; 93:1;95:24,25; 96:22;102:15 circuit (20) 16:3,3,5;41:23; 59:25;77:12;92:16; 93:5,22;94:15,23; 95:22,23;96:4,5,21; 97:11;101:25;102:9, 21 circumstance (1) 56:4 circumstances (8) 27:7;31:2;71:8; 72:19;73:18;83:7; 101:8;103:19	cite (2) 85:9,11 cited (9) 73:14;78:22; 80:22;81:22;82:24; 86:11;100:12;103:1; 112:25 cites (2) 77:11;107:15 citing (2) 23:17;47:6 claim (20) 30:9,17,24;45:13; 68:5;77:7;91:20; 93:24;94:6,9,10; 96:2,7,15;97:3,10; 98:22;99:17;108:17; 116:21 claimants (1) 59:6 claimant's (1) 97:1 claimed (1) 109:4 claiming (1) 75:16 claims (67) 14:25;28:10,11,15, 15;29:11,25;30:17, 20;31:5;32:5,17; 33:10;36:21;42:20; 48:21;51:4;52:11; 54:10;58:16,20,25; 59:3,10,18,22;60:17; 63:11;67:25;68:7, 17;74:4;89:4,18; 90:9,11,13,13,18; 92:18;93:8,24;95:3; 96:1,12,20;97:7; 104:18;106:12; 109:12,15,16,18,18, 23,23;110:2,4,6,7, 13;113:4,24;114:1,3, 9;117:2 clarifying (1) 79:25 class (1) 36:21 claw (1) 53:22 cleanest (1) 75:11 clear (17) 15:15;18:15;32:2; 35:4;40:1;42:16; 56:23;81:17;82:1; 88:1;91:16;104:21; 107:7;115:7,7;118:1, 10 clearer (1) 114:24 clearly (17) 18:19,22;21:14;	26:10;33:19;34:10; 40:6;63:10;73:21; 86:8,15;94:15; 96:10;107:24; 110:13;111:19; 117:22 clerk's (2) 12:11,12 client (2) 12:5;85:17 close (8) 24:21;50:1;61:15, 17;68:18;70:4; 71:10;105:23 closing (1) 57:18 cloud (2) 111:5,7 Co (1) 91:22 co-counsel (3) 33:16;34:15;42:22 code (11) 18:20;90:14,18; 91:2,3,9,20;96:16; 98:6;110:1,8 cognizable (1) 28:21 Cold (1) 71:25 COLE (3) 8:12;14:20;32:23 collaboratively (1) 51:14 collateral (9) 15:21;31:11;53:5, 7,9,12;54:21;108:25; 113:20 colleague (2) 14:20;101:1 colleagues (3) 49:10;61:4;117:18 collectively (1) 78:19 colloquial (1) 16:23 color (1) 65:5 colorability (5) 41:18;45:13; 46:12;59:22;67:24 colorable (16) 33:10;42:20; 59:18;63:11;68:17; 77:6;93:24;94:9; 95:4;96:1,2,12; 98:22;104:18; 106:12;108:17 colored (1) 35:13 column (2) 81:8,10 coming (3)	55:3;75:6;112:1 comment (1) 116:21 commenting (1) 118:5 comments (1) 56:18 commercial (10) 34:4;40:16;59:5; 70:22;76:16,18; 80:12;84:1,2;97:16 commitment (1) 28:23 Committee (92) 7:3,11;8:13;13:10; 14:2,16,19,21;17:22; 20:16;29:14;30:19, 23;31:25;32:24; 46:11;47:20;48:11; 50:20;51:1,7,14,23; 52:10,20;54:3;56:3; 57:22;58:10;59:11; 60:19;62:22;63:17; 64:1,14,23;65:1,3; 68:4,18;71:17;72:3; 74:4;75:15,23;76:3, 6,9;77:6;80:20,23; 82:25,25;84:10; 85:21;89:7,7,15,21; 92:6,17;93:23;94:3, 9;95:13;96:11; 97:24;98:2,23;99:11, 19,23;104:24; 107:25;108:14; 109:14;111:2,11,14, 17;112:13,16,19,24; 113:11,13,17,19,21; 114:12,16;115:4 committees (1) 60:2 committees' (1) 67:25 committee's (15) 12:24;31:8;41:17; 51:6;63:9,10;65:15; 78:1,6;90:7;92:9; 109:12;114:9,10; 115:23 common (6) 41:23;68:5;71:10; 82:16;83:19;102:17 commonly (1) 108:5 communicating (1) 17:16 communications (6) 34:8;85:22,25; 92:25;94:21;95:5 companies (12) 45:20;54:10; 62:25,25;64:8; 66:18;77:24,25; 78:7;103:23;107:15,

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

21	conceded (1) 14:25	confirming (1) 110:9	48:23	conversion (4) 64:20;72:9,10,14
company (45) 18:19;19:7,8;21:4; 19:22;7:20;23:2,24; 25:1,16;34:6,25; 35:9;36:25;39:12; 40:14,24;46:4; 48:24;49:8;50:9; 52:14;57:1,11; 61:22;62:19;68:13; 76:16,19,20;77:11; 78:5;79:2;82:10,11, 20;83:19;84:5; 101:21;102:3,3; 103:22;107:2,10	concedes (1) 71:18	conflict (1) 88:1	contend (1) 95:21	convert (1) 65:12
	conceivable (1) 105:24	conflicted (1) 89:23	contending (1) 78:1	converted (8) 63:21;64:11,11; 66:7,8;72:24;73:20; 108:5
	conceivably (1) 92:4	conflicts (2) 14:21;32:24	contends (2) 96:11;108:14	convertibility (5) 72:5,12,17,20;73:4
	concept (1) 77:20	confused (1) 16:13	contentions (1) 62:17	convertible (4) 26:8;103:25; 108:7,7
	concern (8) 31:20;40:7;48:23; 49:5;50:10;56:7; 60:6;110:12	connection (4) 39:17;43:15; 55:20;61:20	context (17) 15:18;16:6,14; 47:4;68:11,22,23; 71:8;77:17;78:21; 82:18;83:11;90:24; 103:19;110:11; 112:2;115:22	convey (1) 23:4
company's (6) 33:19;42:10; 52:15,15,16;58:15	concerned (6) 47:20;56:4;100:4; 101:16;108:4; 115:19	consents (1) 92:20	contextual (1) 68:8	conveyed (1) 22:12
comparable (1) 52:20	concerning (4) 34:24;35:2;42:4; 55:25	consider (5) 50:24;71:24;83:5; 113:18;114:22	contingency (8) 32:6,13;50:24; 51:8;54:3;57:23; 59:15;112:20	convincing (1) 53:10
compared (1) 44:4	concerns (4) 24:17;39:14; 41:21;104:19	considerable (1) 62:13	contingency-fee (1) 32:2	cooperated (1) 51:23
comparison (1) 58:3	concert (1) 23:22	consideration (5) 48:18;73:11;95:7; 111:18;118:14	contingent (2) 33:24;37:21	cooperative (1) 89:2
compelling (2) 18:1;90:3	concessions (1) 31:13	considerations (1) 93:2	continuation (1) 95:1	copy (1) 12:10
compensate (1) 57:3	conclude (6) 59:17;61:4;98:20; 99:16;105:14; 106:11	considered (5) 18:17;73:9;83:11, 21;91:1	continue (2) 49:5,5	core (1) 41:21
competitors (1) 69:21	concluded (4) 83:7;84:17;91:7; 118:19	considering (6) 18:12;19:12;68:4; 93:3;95:6;113:8	contract (14) 28:24,24;29:3; 34:5;36:16;37:24; 40:4;42:17;63:20; 66:14;97:15,17; 104:23;113:4	Corp (6) 91:24;92:25; 94:20,21;95:5,24
complaint (17) 14:23;33:10;90:9, 16,17;95:11,20; 96:15;97:8;98:12; 101:24;103:9,12; 104:15;105:18; 106:19;113:25	conclusion (8) 17:21;31:16; 41:23;45:21;78:23; 103:2;106:9;114:20	consistent (4) 45:22;48:7;84:25; 110:8	contracts (12) 29:6;39:18;40:23; 43:6,6,15;48:21,25; 49:3;58:24;88:22,23	corporate-governance (1) 87:25
complaint's (1) 103:14	conclusions (1) 68:6	constellation (1) 69:23	contrary (7) 75:23;93:17; 100:16;102:25; 107:20,25;108:14	Corporation (4) 7:19;101:12; 102:11,12
complete (7) 19:2;26:17;43:25; 86:14;87:20,21; 109:2	condition (6) 33:20;35:12;41:8; 56:21;77:19;101:20	constituency (1) 49:9	contribute (2) 72:13,18	corporations (1) 107:6
completely (4) 12:4;18:24;50:7; 101:14	conditioned (1) 60:1	constituents (2) 21:20,22:1	contribution (1) 83:16	correspondence (1) 25:7
complex (1) 95:18	Conditions (2) 41:13;70:10	constitutional (1) 91:18	control (24) 17:5;23:11;26:13, 17,24;64:22;75:10, 16,24;81:25;87:3,9, 18,20,22;92:1;97:13, 22;98:8,8;99:11; 104:5;109:2;115:4	cost (14) 30:8;45:10;46:16; 47:4;52:25;56:1,13, 13;57:23;58:3; 112:22;113:1,9; 115:14
complied (1) 80:21	conduct (2) 95:13;97:21	constraints (2) 35:10;37:19	control (24) 17:5;23:11;26:13, 17,24;64:22;75:10, 16,24;81:25;87:3,9, 18,20,22;92:1;97:13, 22;98:8,8;99:11; 104:5;109:2;115:4	cost- (1) 59:16
complies (1) 110:1	conducted (1) 41:20	construction (5) 68:14;69:10; 76:15;79:3;103:24	control (24) 17:5;23:11;26:13, 17,24;64:22;75:10, 16,24;81:25;87:3,9, 18,20,22;92:1;97:13, 22;98:8,8;99:11; 104:5;109:2;115:4	cost-benefit (2) 56:16;60:21
comply (4) 49:25;55:1;56:2; 109:25	confident (1) 45:8	consulting (1) 30:12	controlled (7) 16:25;17:3,21; 23:24;87:6;104:5; 105:5	costly (1) 52:22
complying (1) 112:22	confirm (3) 61:4;110:3;114:21	contact (1) 12:12	controlling (1) 99:24	costs (19) 39:15,16;40:3,22; 47:14,15,15;56:17; 59:13;60:11;110:16, 17;111:21;112:14, 15,22,23;114:10; 117:22
comprising (1) 48:3;56:11,13	confirmation (13) 43:9,17;46:22; 89:2,9;112:4,6,7; 113:16;114:19; 115:23;116:12,15	contact-specific (1) 100:11	controls (3) 86:19;98:11;99:13	couching (1) 100:24
comprise (1) 36:20	confirmed (1) 110:9	contained (4) 50:12,13;53:5; 73:22		counsel (17) 12:19;14:21;19:5, 5;32:24;43:4;51:3;
concede (1) 23:13		contemplated (1) 107:11		
		contemplates (1)		

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

60:14;62:4;66:24; 67:1,3,11;68:4,19; 75:15;77:9 countenance (1) 49:14 counterparties (2) 34:6;42:17 couple (1) 79:9 course (25) 13:17;15:17; 19:14,17;20:12; 22:12;27:2;29:10; 33:1,7;35:18;37:7; 88:7;92:12,20; 101:11,23;106:1; 109:3;110:2;114:15; 115:1,3;116:10,12 COURT (141) 12:2,6;13:2,6,7,9, 11,19,20;14:14,17; 15:7,8,18,22,22; 16:4,20,22;17:8,12; 18:11;20:1;26:2; 30:5;31:25;32:18, 21;33:17;36:2,6,10; 37:10;38:24;39:1,4; 40:1,25;41:2,5,10, 15;42:24;43:3,20; 44:7,16,18,22;45:3; 46:24;47:1,5,7;48:1, 2;49:14,24;54:9,15, 17;55:2,7,12,17,19, 21;57:8;58:7;59:17, 25;60:12,15,22;61:7, 9,24;65:19,22;66:3, 6,10,16,23;67:3,8,13, 17,20;68:5;74:15,18, 23;75:1,3,7,17,21; 76:7,11;77:8,22,24; 78:13,24;79:7,9,11, 18;80:3,5;84:9,14; 85:22;86:2,15; 88:10;90:6,21;92:1; 93:10,13;94:4,8,15, 23;96:4,5;101:4,11; 109:21;110:2;116:3, 6,11;117:3,9,15,17; 118:4,16 courtroom (3) 18:6;33:4;39:23 courts (27) 15:14,15;16:13,17, 18;17:11;25:10; 47:4,10;68:4;71:24; 73:9;82:14;83:5,7, 11;91:7;96:4;97:4; 98:6;100:13,14; 101:1;102:10,21; 106:15;107:9 courts' (1) 91:4 Court's (4)	13:17;93:10,25; 96:25 CourtSolutions (2) 12:10,10 covenant (2) 27:11;118:5 covenants (4) 27:6,22;70:12; 104:7 cover (4) 15:10;25:4;86:5; 87:19 covered (2) 25:22;86:6 covers (1) 117:6 CRAVATH (1) 9:12 crazy (1) 22:21 create (1) 112:4 creates (1) 98:5 credit (5) 23:6;51:13,22; 95:19;103:7 creditor (5) 16:10;97:13,18; 98:15;106:21 Creditors (33) 8:14;29:2,4,5; 48:15,20;49:8,9; 57:12,13;59:4,6; 60:2,7;89:15;90:14; 97:5;102:5;104:14; 105:20,24;106:3; 110:24,24;112:8,8, 12;113:12,13; 114:15;115:11; 116:25;117:21 Creditors' (8) 7:3,11;14:16; 58:10;90:7;92:17; 94:3;104:24 creditor's (2) 97:3,6 critical (1) 113:5 cross (1) 88:17 cure (1) 49:1 current (5) 35:2;39:17;43:4; 52:17;110:24 currently (1) 114:16 curtain (1) 89:16 custodians (3) 84:23;85:1,24 customers (2)	74:7;79:2 cut (4) 13:13;75:1,3; 112:20 cynically (1) 100:13 D Daewoo (2) 101:4,11 daily (1) 12:11 damage (1) 31:22 damaging (2) 47:17;88:12 Darian (1) 107:17 date (31) 17:2;20:3;28:14, 16,18;34:21;35:23; 38:10;42:19;43:9,10, 14,18;46:18;70:14; 71:1;73:5;74:2;82:5; 89:4,8,9,9,10; 108:22;113:21,23; 114:2,4,7;116:12 dated (1) 107:20 dates (6) 46:22;69:3;73:23, 25;74:4;76:24 DAVID (4) 7:23;66:22;67:14, 21 day (6) 58:20;72:7;76:22; 89:17;114:5;115:17 days (14) 13:13;14:1,1,1,10; 15:2;28:17;43:8,16; 69:15;70:14;74:1; 88:4;89:1 DC (1) 7:13 deadline (6) 43:5,15;69:19,24; 95:14;113:19 deal (14) 25:24;29:13,13,16, 19;32:16;45:10,12; 77:14;91:15;106:7; 112:2,6;114:22 dealing (6) 16:5;62:18,24; 66:17;67:7;113:19 dealt (2) 113:4,11 debt (60) 23:3,4,5;31:1; 39:11;41:2;46:2; 59:5;66:18;68:21;	69:6,9;70:19,21,25; 71:9,22;72:5,13; 73:8,24;75:24; 78:11;83:21,22; 88:19;96:7;98:17; 99:3,3,8,22;100:8,8, 15,16,21;101:7,18, 21;102:19;103:20; 104:13,21,22,23; 105:10;106:3;107:3, 17;108:3,4,7,9,9,13; 109:4,5,6;110:4 debtor (26) 17:17,17,19;18:23, 23;28:6;32:6;63:18, 18;65:5,10,22;69:7, 21;76:17;92:19; 93:14,17;94:2;97:11, 14;110:1;111:21; 114:13,21;116:14 debtor- (1) 93:4 debtor-in- (1) 92:21 debtor-in-possession (3) 93:6;94:12;95:15 debtors (35) 12:15,19;13:12, 21;14:8,10;20:4; 30:2,10;31:9;43:2, 12;45:4,6;47:19; 50:7;51:13;60:16; 61:18;66:15;69:9, 24;70:4,18,21;74:6; 79:23;84:19;88:7; 99:22;108:7;110:18; 112:16,22;116:16 debtors' (21) 12:22;13:4;23:15; 28:9;29:21;43:4; 61:10;64:12,13;69:5, 13,17;71:3;93:4; 98:2,9,11;99:4,5; 104:4;107:14 debtor's (2) 112:11;115:6 debts (3) 34:15;71:20;72:15 Dec (1) 101:3 decide (3) 94:1;108:18;115:1 decided (1) 87:7 decides (1) 15:18 deciding (2) 39:12;104:17 decision (11) 15:16;16:4;31:19; 45:25;59:9;82:24; 93:13;96:25;97:2; 101:2;115:6	decisions (1) 16:8 declaration (1) 62:20 deed (1) 108:20 deep (1) 45:17 default (5) 70:13,13;87:18, 22;102:24 defend (1) 52:23 defendant (2) 105:3;111:20 defendants (20) 52:11;61:25;62:3; 64:23;65:4;80:9; 90:9,11;97:10,24,25; 98:12,14;99:7; 103:16;104:11,20; 105:16;106:23; 108:15 defendants' (1) 90:17 defer (2) 62:4;115:6 deference (1) 99:20 deferential (1) 104:4 deferred (1) 59:9 deficiency (1) 59:3 define (1) 26:18 definitional (1) 111:7 degree (2) 35:17;98:8 Del (1) 91:23 delay (2) 47:11;94:25 delivery (1) 69:10 demand (1) 97:1 demonstrate (1) 97:20 demonstrated (1) 42:19 demonstrates (1) 85:21 demonstrating (1) 39:7 demonstration (1) 97:16 denied (2) 47:11;77:7 denominated (2) 100:15,18

deny (1) 60:13	69:8;114:18	116:15	dividend (1) 46:7	draft (2) 17:1;118:7
denying (1) 84:9	development (7) 68:14;69:23,25; 70:15;76:14;77:11; 79:3	disclosures (1) 99:21	DLA (2) 10:12;62:2	drafted (1) 111:14
DEPARTMENT (1) 11:12	dictated (2) 48:8;49:19	discouraging (1) 24:17	docket (2) 28:9;50:15	Drain (1) 12:2
dependent (2) 42:9;103:12	die (1) 99:17	discovery (30) 33:8;34:11;35:5; 41:19;43:21;44:18; 52:1,5,21;84:12,15, 17,21,25;85:20; 86:12,14;95:10,13, 17,17;98:24;99:18, 22;104:9;105:11; 112:23;115:19,20,22	doctrine (2) 109:6,22	draw (1) 78:21
depends (1) 98:13	difference (3) 32:11;63:8;64:12	discrepancy (3) 24:4,10;114:19	document (17) 20:14,17;21:6; 26:15;27:13;35:23; 44:7;51:16;75:2; 80:2,3;81:22,22; 82:2;85:14;86:7; 95:16	draws (1) 70:11
deposed (1) 52:9	different (11) 24:20;36:12,19; 37:12;40:18;63:19; 64:18;71:6;96:20, 24;118:14	discretion (1) 93:8	documented (1) 84:2	dressed (1) 65:1
deposition (3) 52:6,23,24	differentiating (1) 87:1	discuss (2) 74:18;77:17	documents (23) 15:20;17:25,25; 18:4;25:24,25;26:3, 14;27:23;44:4,12; 52:4,8,15;71:6,22; 76:2,23;84:21,24; 85:2,3,7	DS (1) 9:3
depositions (4) 51:20;52:10,17; 95:16	differs (1) 96:23	discussed (1) 85:1	dollar (2) 22:15;113:8	due (1) 87:18
depth (1) 60:17	difficult (1) 97:11	discussing (4) 19:4;88:3,6; 107:15	dollars (40) 18:25;22:16; 29:17,19,22,23,24; 30:1,3,7,12;41:4; 45:19;46:1,3;48:18; 49:2,22;51:6;57:12, 15,24;58:21,22,22; 65:20;70:1;81:12; 88:16,19;89:18; 105:21;106:5; 110:22;111:19,25; 112:17;113:6; 114:15,23	duplicative (1) 84:20
derivative (2) 90:8;93:11	DIP (15) 41:21;48:19; 53:13,16,20,23; 54:11,13;55:15; 61:13,13,20,22;88:2, 3	discussion (3) 28:22;50:17;57:8	dominant (1) 102:11	duties (3) 49:13;93:14,18
describe (2) 17:17;100:2	dire (2) 33:19;83:19	discussions (1) 84:16	dominated (2) 97:13;105:14	duty (1) 97:15
described (2) 28:25;100:1	direct (5) 35:20;36:8;37:5; 38:12;65:16	dismiss (5) 95:6;96:1;97:9; 98:21;104:16	domination (1) 97:22	
design (1) 69:10	directed (1) 44:11	dismissal (1) 102:22	done (6) 28:20;52:5,10; 56:25;58:8;116:16	earlier (2) 102:8;113:16
designated (2) 48:3;111:9	directing (2) 38:15;67:1	dispositive (2) 92:13;109:8	Dornier (1) 96:21	early (3) 95:8,12;98:22
designed (3) 21:14;34:8;73:17	direction (1) 49:24	disproportionality (2) 17:13;81:1	double (1) 67:18	easier (1) 52:21
desire (2) 40:3,6	directly (1) 112:15	disproportionate (1) 81:19	doubling (1) 39:21	easily (1) 17:21
DESPINS (47) 7:7;13:8,8;14:18, 18;18:14;33:2;42:3, 25;43:7,7,14,20,22; 44:9,21,24;45:16; 47:24;49:9;50:4,23; 53:2,21;54:24;57:4; 62:12;63:5;70:5; 78:16;79:8,10; 80:11;81:24;86:3,5; 113:7;114:12;116:2, 4,4,10,20;117:8,13, 16,24	director (2) 19:16;23:20	dispute (2) 56:24;73:25	doubly (1) 82:6	easy (4) 24:8;95:4;109:4, 16
Despins' (1) 56:18	Directors (2) 18:5;19:7	disputed (1) 94:16	down (13) 12:15;13:13;31:6, 23;36:8;38:5;39:21; 44:23;45:17,18; 83:16;115:13,18	economic (4) 68:12;71:5,5;74:9
destroy (2) 29:15,16	disadvantage (1) 114:13	distinction (4) 37:22;64:2;77:24; 91:3	Doyle (1) 13:1	effect (4) 54:2;60:1;62:7; 77:1
detail (1) 113:18	disagree (1) 96:14	distinguish (1) 73:7		effective (1) 89:10
details (5) 15:7,9;44:14,24; 63:16	disallowance (1) 91:4	distinguishes (1) 24:16		effectively (2) 36:19;64:25
determinations (1) 95:18	disallowed (2) 116:22,23	distress (8) 40:15;68:15,15; 77:25;78:1;82:20; 101:9;102:4		effectuate (1) 69:8
determine (6) 27:20,21;94:17, 18;98:9;100:14	disallowing (1) 90:17	distressed (3) 33:24;76:19;77:19		efficient (1) 51:24
determining (1) 96:7	disaster (1) 28:7	distribution (3) 29:5;46:7;48:2		effort (4) 23:3;50:20;59:11; 89:5
developed (2)	disclose (1) 23:6	distributions (1) 29:1		efforts (3) 41:19;47:20;84:10
	disclosed (2) 18:7;57:7	District (3) 90:22;96:4;101:4		eight (1) 65:20
	disclosure (4) 14:6;46:19,21;			Eighth (1) 9:14
				either (13) 23:2,25;25:15; 35:16;39:4;40:14; 48:25;54:4;70:21; 80:24;105:18;110:4,

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

13	104:22	16,21;40:3,9;42:8,	30:13	17:25
Elecktra (1)	enforceable (1)	13;45:24;46:7;48:3,	even (25)	executory (2)
99:13	72:1	9;49:20,22;56:11;	20:8;21:1;24:13;	29:3,5
Elektra (5)	engage (1)	63:2,18;64:8,10,17,	25:1,21;26:22;	exercise (2)
8:3;79:20;80:8,8;	94:16	24;65:2,7,16;69:6;	38:11;51:7,18;52:9;	70:13;87:18
115:21	engaged (1)	71:9;72:5,10,11,14,	53:6,22;54:2;57:23;	exercising (1)
Elektra's (1)	80:13	14,18,23,24;73:8,9;	59:14,17;60:8;	93:14
75:12	engages (1)	74:9,12;76:20;79:5;	68:18;73:8;83:16,17,	Exhibit (13)
element (2)	94:8	80:14,19;81:16;	21;96:6;101:13;	26:14;34:18,20;
41:21;63:10	enormous (3)	82:21;83:9,16,21,24;	111:4	35:21;37:6,6;38:3,
elements (1)	49:12;52:18;60:8	85:12;90:11,19;	event (8)	12;40:5;41:10;76:3,
69:17	enough (8)	96:8;97:21;99:2;	21:11;37:25;	5;81:3
elevate (1)	15:5;16:21;21:2;	100:7,16,23;101:13;	40:23;70:12;76:9;	exhibits (3)
45:24	45:20;61:15,17;	102:2,19;103:21,25;	107:2;108:23;	33:6;34:17;39:4
elevated (1)	74:2;82:22	104:12;105:1,7;	117:11	exist (5)
36:22	ensure (5)	107:3;108:5,8,10,13;	eventually (2)	31:1;38:9;89:8;
eleven (1)	47:8;69:13;73:18;	110:23,25;111:1;	16:18;20:11	111:5;114:18
71:12	92:2;109:25	118:6	everybody (1)	existing (5)
eliminate (1)	entered (2)	equity-subordinated (1)	20:13	42:13;49:22;
112:21	22:1;69:24	110:5	everyone's (1)	76:19;83:24;97:14
eliminated (1)	Enterprises (2)	ERIC (2)	88:23	exists (2)
112:24	92:23;93:23	10:18;62:2	evidence (16)	58:11;107:24
eliminating (1)	entire (1)	ESQ (20)	38:10;39:24;42:4,	exit (1)
31:1	47:21	7:7,15,23,24;8:7,8,	16,19;62:12,16,19;	110:14
eloquent (1)	entirely (2)	9,19,20;9:8,9,17,25;	63:8,14;71:20,23;	expand (1)
82:22	42:9;53:17	10:7,8,9,18;11:8,9,	72:2;73:7;101:15;	49:15
else (8)	entirety (3)	18	109:5	expanding (1)
20:13;26:24,24;	36:15;39:10,22	essence (3)	evident (1)	93:3
30:14;79:13;81:25;	entities (4)	77:25;98:14;	68:13	expect (4)
86:2;104:14	25:14;63:19,25;	100:20	evidentiary (2)	45:9;48:24;52:16;
elsewhere (1)	111:8	essentially (2)	52:14;94:5	61:2
84:22	entitled (3)	75:22;96:17	exact (1)	expectation (6)
email (8)	21:11;31:12;52:12	establish (2)	17:13	40:15;52:19;
14:10;18:3,10;	entitlement (1)	63:10;90:1	exactly (6)	70:20;73:19;82:3;
20:14;38:5;64:3,3;	31:15	established (3)	28:25;38:7;58:13;	84:3
76:3	entity (5)	14:9;77:6;93:22	60:6;63:7;77:20	expectations (2)
emails (4)	16:9;44:11;63:22;	estate (27)	examine (1)	37:4;41:25
37:9;52:5;85:9,10	87:7;110:23	28:6;30:22,25;	94:4	expected (4)
embedded (1)	entity's (1)	31:20,22;47:8,18;	example (9)	47:9;49:5;81:11;
56:15	97:5	48:16;51:9;52:14;	16:9;44:22;51:3;	82:11
Emerald (1)	entry (1)	54:5;60:1,4,8;92:3,	75:19,20,22;89:7;	expecting (1)
73:13	114:5	19;93:4;94:6,11,19,	92:23;103:3	76:4
emphasize (1)	environment (1)	25;109:13,17,24,25;	exceed (3)	expedited (1)
76:14	89:3	110:5;116:24	54:3;57:24;59:13	41:20
emphasized (1)	equally (1)	estates' (1)	exceeded (1)	expenditure (1)
26:11	33:10	58:16	30:9	47:9
employ (1)	equated (1)	estate's (1)	exceedingly (2)	expenditures (3)
102:21	95:6	93:16	47:20;57:18	25:20;27:11,15
employees (4)	Equipment (1)	estimate (1)	exceeds (1)	expense (6)
46:5;49:8;51:18;	74:13	51:2	60:11	47:18;51:15;54:4;
52:18	equitable (15)	estimated (1)	except (2)	56:11;94:25;112:8
enabled (1)	14:23;23:9;39:2,5,	107:22	28:24;91:17	expenses (10)
76:17	25;40:9;96:2,15,23;	estoppel (1)	exception (4)	50:6,10,19;54:1,1;
encourage (1)	97:1,9,12;99:16;	97:20	102:23;103:1;	55:6;57:24;111:23;
39:9	105:12;109:23	et (9)	106:22;110:25	112:5,10
end (5)	equitably (2)	12:3;15:21,21;	excess (1)	expensive (2)
15:16;58:20;	90:12;97:3	21:9,9;25:17,17;	106:4	50:22;51:20
89:17,25;94:1	equity (91)	29:9;104:7	exchange (3)	experienced (1)
ended (2)	17:13;20:7;22:7,	evaluate (2)	61:2;80:9;87:15	117:18
64:19;116:5	13,16;23:4,25;24:10;	93:21;114:17	exclusivity (5)	experts (1)
ends (1)	26:8,10;29:19,23;	evaluating (1)	12:23;13:5,15,23,	62:20
76:12	30:3;31:15;33:12;	113:1	24	expiration (1)
enforce (1)	34:5;36:23;39:1,8,	eve (1)	executed (1)	14:7

explain (1) 51:9	65:6;73:6;75:23; 76:19,24;78:2;80:13, 16;81:13;85:9; 88:17;89:14;91:8; 93:19,20;99:17; 100:17;105:12,15, 18;108:16,19;109:7, 14;110:7,7;114:8	48:10;71:13; 73:10;108:19;109:8	102:4	flip (1) 93:15
expressed (1) 24:17		feature (6) 72:9,12,12,16,20; 73:4	financing (48) 17:5;22:8,14; 24:13,18;25:8,9; 26:8;34:1;35:18; 37:16;40:17;42:8, 11;61:22;69:5;70:2, 5,7,9,17,21,22;72:13, 19,22;73:8,20;74:6; 76:10,18;77:2;78:6, 10,11;79:4;90:2,4; 103:20,21;104:1; 107:3,5,6,13,15,23; 108:9	Floor (1) 8:16
expression (1) 16:23		features (3) 70:10;72:4;73:10		focus (9) 33:17;35:24;38:8, 14,19;40:12;46:16; 60:20;101:20
expressly (1) 73:22		February (1) 86:8		focused (10) 17:20;19:23;34:3; 42:16,18;64:5,8; 91:8;98:8;110:18
extend (3) 23:6;40:17;119:3	fact-based (1) 102:16	federal (1) 90:12	financings (2) 33:12;104:11	focuses (1) 102:18
extended (1) 114:3	factor (11) 21:25;26:10; 71:18,25;73:16,21, 22;74:3;94:12; 106:16,20	fee (6) 30:12;32:6,13; 50:24;57:23;112:20	find (2) 56:1;77:18	focusing (1) 40:2
extension (3) 13:23,25;14:10	factors (25) 15:17,23,24;16:22, 24;17:3;18:17; 25:22;27:25,25; 42:2;71:12,15;78:16, 19;82:17;83:3,10; 87:2;96:7;100:9,10; 106:8;108:19;109:7	fees (16) 30:8;31:7,8,8,10, 12,17,18,23;50:25; 51:6,8,12;53:3,8,11	finding (1) 78:17	FOERSTER (6) 7:18;60:14;66:22; 67:15,22;80:2
extensive (2) 51:20;118:17		few (8) 28:20;32:16;59:6; 60:7;66:13,17;79:22, 25	fine (3) 13:7,13;32:21	follow (2) 29:21;81:10
extensively (2) 22:19;59:21		fiduciary (7) 49:13;92:3;93:2,4, 14,18,20	finish (1) 58:12	following (2) 92:24;108:3
extent (5) 17:18;42:22; 57:13;90:23;94:11	facts (14) 25:12;40:7;76:25; 89:22;90:2;94:16; 98:5;102:12;103:14; 105:12;106:15; 107:8;114:17,23	field (1) 62:20	FIOCCALO (19) 66:21,22;67:14,14, 18,21,21;74:17,20, 24;75:2,5,8,19; 77:15,23;78:3,15,25	force (2) 64:25;65:5
extra (3) 73:11;115:14,19	factual (4) 15:10;33:3;94:17; 116:16	fifty-fifty (1) 39:19	FIOCCOLA (1) 7:23	forced (2) 32:6,7
extraordinarily (1) 47:16	factually (1) 95:18	fight (1) 53:24	firm's (1) 25:4	forces (1) 89:12
extraordinary (1) 103:18	FAIL (5) 10:8;29:13;30:9; 93:7;97:8	fighting (2) 19:20;24:14	first (37) 12:5,22;13:9; 15:12;17:23;18:9; 23:2,12;26:4,6; 30:10;33:18;34:23; 36:4;41:9,14;47:19; 49:18;51:12;62:5, 11;63:17;69:21; 71:16;73:12;74:11; 80:12;81:6;86:7; 88:24;95:3;98:18; 106:14;109:13; 110:20;111:25; 113:19	forecasted (1) 21:4
extreme (2) 40:15;68:3	failed (4) 82:10;94:2,13; 105:18	file (1) 14:23		foreclose (1) 112:3
extremely (1) 80:17	failing (1) 102:11	filed (7) 12:21;13:10; 28:16,17;45:8; 52:11;114:6		foregoing (1) 115:5
F	fails (3) 23:17;59:16; 104:14	files (1) 113:24		foregone (1) 114:20
F2d (4) 92:24;94:7;95:2; 102:15	fair (1) 95:16	filing (7) 14:6;20:7;30:13; 34:16;56:22;85:15; 88:4		forget (1) 15:2
F3d (8) 60:5;91:12;92:25; 93:9;95:24,25; 96:21;102:1	fallen (1) 107:10	filings (1) 43:16		form (7) 16:2,5,25;21:18; 37:13;86:9;99:8
face (2) 20:4;106:5	familiar (1) 16:7	final (4) 31:11;43:23;44:5, 5	FIUR (1) 8:9	formal (1) 71:21
faced (1) 95:14	family (1) 19:17	finally (4) 36:7;42:14;57:17; 100:1	five (9) 43:8;51:5;71:1,12; 74:1;89:1;107:22; 112:17;113:6	former (2) 52:17;78:2
facie (1) 28:12	far (14) 35:16;46:13; 48:14;52:21,22; 55:7;75:17;90:21; 100:4;102:4;107:4; 108:3;111:24; 115:18	finance (1) 87:1	fixated (1) 34:4	forth (1) 96:15
facilitate (1) 57:6	fast (2) 105:10,15	financial (11) 27:22;33:19; 35:12;40:15;56:20; 68:15,15;77:19; 83:5;101:9,20	fixed (12) 69:3,3;70:14,14, 25;71:1;73:5,22,25; 76:23;108:21,24	fortune (1) 42:1
facilities (2) 95:19;103:8	favor (5)	financially (1)	flexible (1) 94:14	forty-nine (1) 17:10
facility (4) 61:20;98:18,19; 103:16			flight (1) 70:5	forward (1) 118:1
facing (2) 35:10;37:19				forwarded (1) 22:2
fact (44) 15:13;16:14; 19:23;21:17;23:4; 24:19,25;37:4; 40:13;46:4;47:21; 50:20;53:14,19; 62:16;63:17;64:3;				fought (1) 114:23
				found (1) 102:6
				four (3) 43:8;88:1;107:6
				fourth (2)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

35:1;96:20 framework (2) 14:5;82:23 Franklin (1) 74:13 frankly (2) 96:5;100:12 fraud (1) 97:20 fraudulent (1) 109:17 frequencies (1) 69:15 fresh (1) 86:6 Freud (1) 62:6 front (3) 21:12;23:7;24:19 fuel (5) 20:8;10;21:1;70:5; 86:22 Fuels (3) 77:13;91:12; 101:25 fulfill (1) 93:7 full (7) 19:9;31:5;70:6; 83:15;22;87:22; 112:14 fully (2) 85:21;88:13 fund (3) 57:25;69:23;112:9 funded (2) 53:16;59:2 funding (3) 21:2;78:5;89:11 fundraising (1) 22:11 funds (5) 22:11;30:11; 41:24;56:5;58:6 fungible (1) 55:2 further (10) 13:17;20:24; 40:13;42:23;25;50:1; 17:80:6;83:16;86:19 future (13) 33:24;34:2,16; 35:3;37:16;38:8; 39:18;40:3,22,23; 48:10;74:6;117:5	17:4,9,18 game (2) 21:20;24:8 gamed (3) 16:24,25;80:11 gap (1) 64:9 GARRETT (1) 10:8 GARY (1) 7:24 Gas (1) 94:19 gatekeeper (1) 47:7 gather (1) 65:19 gave (1) 69:20 General (6) 27:18;33:3,17; 36:21;90:13;96:19 generally (2) 81:5;91:8 generate (1) 31:8 generic (1) 34:19 generous (1) 30:11 gets (1) 118:6 Gharti (1) 9:13 gist (1) 83:12 given (15) 14:3;33:4;53:19; 58:16,23;66:20; 71:16;72:3,15; 95:14;98:10;106:9; 115:10,11;116:15 gives (3) 50:1;68:19;104:5 giving (5) 29:6,7;58:6;88:8; 97:1 Global (5) 9:13;12:3;63:22; 64:7,17 glosses (1) 63:17 glove (1) 99:1 goal (1) 86:10 goals (1) 70:2 goes (14) 23:8,9;27:7;29:8; 46:13;53:25;75:23; 81:24;83:10;93:22; 100:18;107:20;	111:1;116:22 going-concern (1) 48:16 GOLDBERG (10) 10:18;62:1,2; 65:21,23;66:5,7,11, 25;67:6 Good (17) 12:2,17;14:18; 15:6;29:3;32:22; 57:14,18;58:13,15; 62:1;66:21;79:15; 87:14;93:16;101:19; 117:20 GOTSHAL (1) 10:2 govern (3) 16:19;24:11;87:15 governed (1) 87:17 grant (2) 14:8;48:6 granted (2) 30:21;119:3 granting (1) 32:11 great (4) 22:22;23:3;106:7; 110:12 greater (2) 26:9;54:25 GREENE (1) 10:9 gross (1) 18:15 grossly (1) 102:12 ground (2) 78:10;92:10 grounds (1) 90:19 Group (9) 7:19;9:3;44:13; 70:8;88:9;89:23; 91:21;107:24; 115:10 Grupo (9) 8:3;44:8;75:12; 79:20;80:8,8;99:13, 13;115:21 guarantee (2) 65:11;89:6 guaranteed (1) 21:23 guess (4) 16:20;22:25; 66:23;95:13 guidance (1) 100:13 guys (1) 87:19	H half (1) 112:21 hallmarks (1) 73:24 hand (8) 15:22;91:14;99:1; 102:8;109:1,19; 111:7;113:3 handful (3) 43:16;44:3;103:12 handle (1) 113:12 handy (1) 20:22 happen (7) 52:6;56:25;57:2; 76:22;82:2;88:25; 113:1 happened (3) 61:15;22;81:13 happening (1) 89:6 happens (1) 26:18 happy (6) 12:15,19;13:18; 45:3;61:25;75:20 Harbor (1) 71:25 hard (8) 18:23,23;24:21; 51:22;57:21;104:24; 107:10;110:15 harder (1) 100:12 HASTINGS (6) 7:2,10;13:9;14:19; 43:8;116:4 hat-in-hand (1) 54:6 heading (8) 21:8;35:25;36:4; 38:16,23;41:8,13; 88:21 headline (1) 59:13 heads (1) 63:6 hear (6) 13:18;32:19;45:3; 61:25;67:16;118:1 heard (4) 14:3;15:1;50:23; 79:17 hearing (12) 12:4,9;15:13;43:9, 17;46:22;57:8;94:5; 113:16;115:16; 116:7;117:12 heavily (2)	33:12;71:12 HEFTER (1) 9:9 held (3) 64:18;73:9;81:17 help (2) 51:18;102:2 helpful (1) 51:1 helps (1) 60:2 hey (3) 21:12;27:8;89:3 Hi (1) 67:14 hid (1) 102:2 hide (1) 50:20 high (1) 47:17 higher (1) 83:23 highlight (2) 82:14,17 highlighted (1) 76:9 highlighting (1) 76:10 highlights (2) 102:16;109:19 highly (3) 37:21;88:12;104:4 himself (1) 113:7 history (1) 16:5 hit (1) 24:21 HMG (1) 10:3 HOGAN (1) 9:2 hold (2) 49:21;65:18 holder (1) 83:24 holders (5) 46:7;64:24;65:16; 69:6;110:25 holdings (1) 81:16 holds (1) 80:14 holistic (1) 15:16 holistically (1) 78:16 honest (1) 25:6 Honor (222) 12:17;13:3,8; 14:12,18;15:4,13;
G				
GABRIEL (1) 10:7 gain (1) 97:14 gained (3)				

Min-U-Script®

eScribers, LLC | (973) 406-2250
operations@escribers.net | www.escribers.net

(10) framework - Honor

16:12;18:2,8,10,20; 19:3,11,22;20:25; 21:18,24;22:3,24; 23:2,8,10,12;24:12; 26:12,12,17;27:6,10; 28:6,9;29:18;30:4; 31:18;32:1,8,12,20; 23:33:1,4,6,8,16,21; 34:3,7,11,17,18,21, 22;35:1,4,11,14,20, 21,22,24;36:1,3,7,12, 14,15,17,23;37:1,3,4, 6,8,11,17,21,23;38:2, 4,7,10,12,14,15,18, 20,23;39:3,6,9,15,21, 23;40:11,12,20;41:4, 6,9,16,19,22;42:14, 19,21;43:2,11,13,17; 44:1,17;45:5,7,8,9, 14;46:2,11,15,17,21, 25;47:2,14,25;48:5, 6,13;49:4,14,18; 50:4;51:1,10,12; 52:3,13,19;53:2,10, 14,19;54:12,19;55:4, 9,13,24,25;56:8,12, 23;58:14,18;59:2,8, 16,19,23;60:6,12,18, 25;61:12,16;62:1; 64:21;65:8,18,21; 66:12,21,25;67:6,21, 22;68:1,2,18,22; 71:15;72:8,73:16; 74:20,25;75:5,12,20; 76:1,13;77:5,15; 78:3,25;79:8,15,19, 22,24;81:2,4,7,13; 82:9,14,18,22;84:11, 13,23;85:13;87:13, 24;88:22;89:24; 90:5;116:2,20; 117:13,25;118:15	humor (1) 27:10 hundred (11) 29:19,22,23,25; 30:3,7;49:22;85:2; 88:16;106:4;110:22 I Ibrahim (1) 107:17 Id (1) 93:8 idea (5) 75:9;81:15;82:9, 17;117:20 identical (1) 24:7 identify (3) 12:5;17:7;48:17 identity (7) 23:12;24:2;42:13; 64:14,16;106:20,22 ie (8) 90:25;91:6,18; 93:13;104:22; 105:25;108:10,20 ignore (6) 29:16;48:5,9,12; 68:20;74:9 ignored (1) 80:23 ignores (1) 68:19 Ill (1) 107:17 illogic (1) 100:25 illusory (1) 74:5 imagination (1) 43:25 immediate (1) 102:13 impact (1) 90:3 impair (1) 47:10 impeding (1) 47:12 importance (1) 93:2 important (24) 15:8,24;19:1; 20:18;22:2,6,18; 23:10;24:16,25; 26:2,27:4;28:8; 37:22;59:20;80:10, 17;86:9;92:12; 105:17;106:16,17; 107:8;118:6 importantly (5) 16:3;59:2;68:21;	104:16;108:15 imposing (1) 50:7 in- (1) 60:16 inability (2) 34:14;54:25 inadequacy (1) 106:14 inadequate (1) 106:18 inappropriate (1) 89:22 Inc (8) 77:13;91:12; 95:25;96:21;101:2,4, 25;102:15 incentive (4) 57:5,17;58:6,8 include (2) 85:22;96:6 includes (2) 48:18;90:15 including (5) 19:15;48:18; 51:16;57:13;92:25 inconsistent (5) 40:5;47:23;49:13, 24;77:1 incorporate (1) 33:1 incredible (1) 30:19 incremental (2) 45:19;46:1 incumbent (1) 105:8 incur (1) 53:1 incurred (12) 50:6,11,18,25; 51:9;59:14;69:9; 101:22;103:17,19; 105:10;112:15 incurrence (1) 110:15 incurring (1) 115:13 indebtedness (3) 59:3;71:19;72:2 indeed (1) 82:8 independently (1) 98:15 indicate (1) 104:12 Indiscernible (2) 66:6;74:2 indisputable (1) 98:10 individual (2) 60:2;68:8 inequity (1)	97:4 inference (1) 74:8 infirmity (1) 105:16 influence (2) 65:5,16 inform (1) 95:10 informally (1) 51:17 information (3) 23:24;34:24;35:2 infusing (1) 41:24 initial (3) 64:10;70:11;93:3 initiation (1) 95:1 injection (1) 33:25 innumerable (1) 52:17 in-possession (1) 93:5 inquiry (3) 94:1,11;102:17 inside (1) 97:22 insider (14) 17:5;23:11,13,15, 19,23;83:24;97:25; 98:4,5,7,9,10,13 insiders (4) 23:14,16;29:9; 97:10 insolvency (6) 17:24;18:16;20:1, 4;101:15;112:2 insolvent (5) 31:21,21;40:14; 54:5;101:12 installments (1) 81:14 instances (2) 91:6;104:3 instead (3) 36:15;72:24;73:4 institutions (1) 107:7 instrument (2) 59:5;109:5 instruments (6) 68:21;71:19,21, 23;72:1;108:20 insufficient (1) 98:3 intend (1) 15:4 intended (7) 71:24;74:9,12; 83:15;100:7;101:17; 114:8	intent (6) 16:18;71:11,17; 72:12,18;73:7 interest (24) 17:8,14;20:3; 23:12,25;24:2; 26:25;31:14;37:24; 39:20;42:13;64:6, 15;69:4;70:14;71:1; 76:23;81:12;82:4; 106:6,20,22;108:24; 109:12 interesting (1) 30:13 interests (5) 34:4;40:18;42:17; 64:5;90:19 interface (1) 34:9 interference (2) 59:24;63:15 intermediate (1) 99:14 internal (3) 20:15;25:6;39:6 internally (1) 17:15 internet (1) 25:16 interrupt (1) 38:24 interrupted (1) 77:8 intervention (1) 97:21 interviews (2) 51:18;108:1 into (25) 22:1,25;10:35;8, 11;36:16;39:12; 45:17;56:15;60:9; 63:21;65:12;69:16, 24;72:24,25;74:6; 76:16;77:25;82:22; 85:7,7;99:3;103:17; 104:25;106:25 introduce (1) 12:25 introduction (1) 12:14 invest (2) 37:18;46:4 invested (3) 33:11;45:25;46:1 investigation (9) 41:20;51:16,24; 53:15;59:21;60:17; 113:21,23;114:2 investing (2) 35:8;64:7 investment (24) 24:10;34:12; 36:12,24;37:1,14;

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

38:15,21;39:8,14; 40:20,22;57:10,14, 19,20;63:23,24;64:8, 10;76:6;80:19; 81:11;105:7 investments (11) 17:7;35:13;40:14; 42:11,12;63:23; 73:8;103:24,24; 108:13,14 investor (4) 21:15;22:21; 41:25;101:12 investors (7) 19:8;34:5;42:15; 76:20;108:2,4,8 investor's (1) 101:16 inviting (1) 21:20 involve (1) 104:20 involved (1) 103:5 issue (35) 17:7;22:9;23:11; 25:6,11,19,21;30:5, 7;31:7,18,20;32:5; 49:23;55:22;60:19; 63:21;64:22;68:1,16, 24;72:11;78:4; 84:12;86:18;87:3,9, 23;88:22,23;89:13; 91:15;92:6,6;111:10 issued (1) 22:3 issues (7) 19:5;45:15;56:9; 60:21;75:9;87:25; 115:8 item (2) 12:22,23 items (1) 17:20	47:21 job (1) 118:17 joinder (3) 79:11,12,25 joining (1) 13:1 joint (2) 39:18;89:5 jointly (1) 89:4 journey (2) 69:13;70:6 JPMorgan (2) 27:18,19 Judge (11) 12:2;16:21;30:16; 31:9;47:5;82:23; 83:2,10,25;86:16; 101:2 July (1) 69:25 jump (1) 31:16 jumps (1) 17:22 JUSTICE (1) 11:12 justifies (1) 97:21 justify (1) 94:24	knowing (1) 84:4 knowledge (1) 37:19 known (1) 103:23 knows (1) 58:19 Kongsberg (1) 11:3 KSAT (1) 11:3	27:3;95:23 lease (6) 16:6,6,14,15,16,17 least (15) 28:11;37:5;53:25; 61:21;65:9,14;83:12, 22;89:17;95:17; 100:25;101:14; 106:12;110:17; 111:3 leave (6) 16:20;45:12; 46:14;57:2;105:23; 114:12 leaves (2) 87:11;109:10 Leblanc (13) 12:25;43:11,11; 45:5,6;46:25;47:2; 88:1;89:19;117:25, 25;118:5,15 LeBlanc's (1) 87:23 ledgers (1) 113:2 LEE (1) 7:24 left-hand (1) 81:8 legal (2) 33:3;60:21 legally (1) 97:15 legitimate (4) 101:20;104:22; 110:21;112:3 legitimately (1) 101:16 lend (1) 45:19 lender (26) 24:6;26:21,21,22; 27:4;32:7;40:16,19; 44:11;53:23;62:18; 63:13;64:6;74:12; 75:17;80:14;81:24; 82:3,3;83:15,24; 87:4,21,21;101:7; 108:2 lenders (45) 14:25;19:5,6,15, 18;20:4;21:19; 22:18;23:2;25:11,11, 13,14,15;26:19;28:1; 29:7;30:18,24; 31:10;34:4;42:18; 53:3,16,16,20;54:11, 14,21;55:15;58:1; 60:23;61:11,21;62:9, 14,14;66:19;70:9; 73:11;87:12;98:25; 104:6;108:6;109:2 lending (8)	46:9;62:20,24; 63:3;67:5;80:13; 107:7,21 length (2) 42:3;84:16 lengthy (1) 84:20 lent (2) 45:20;46:8 less (5) 52:8,22;100:13; 107:4;111:24 letter (3) 87:4,10,13 letters (2) 87:11,12 level (8) 26:9;52:5,6;90:22; 92:11;95:22;96:5; 103:20 leverage (2) 54:6;64:24 LEXIS (1) 91:24 license (1) 69:22 licensed (1) 69:14 licenses (1) 69:19 lien (7) 99:4;107:1,4; 116:22,23;117:8,9 light (6) 17:20;93:18; 100:5;114:17;115:5, 24 likelihood (6) 34:15;39:13; 94:24;98:3;111:16; 112:20 likely (10) 34:1;37:15;57:24; 83:20;84:24;94:6, 10;95:1;101:13; 115:23 limit (2) 50:10;115:20 limitation (3) 50:5;91:17,18 limitations (1) 104:19 Limited (17) 12:3;13:10;43:22; 48:7;52:4;95:7; 99:18,22;103:14; 104:9;105:11; 106:13;107:4,24; 109:6;111:17; 118:12 line (5) 41:20;58:12; 73:16;85:5;119:2
J	K	L		
jam (1) 89:6 Jan (1) 91:24 January (1) 81:5 JEFFREY (1) 9:25 jeopardize (3) 49:17;110:13; 111:22 jeopardized (1) 118:12 jeopardizing (2) 110:20;118:13 jeopardy (1)	Kan (1) 91:24 KARCHER (8) 8:7;79:15,16,19, 20;80:6;84:15;85:24 Kaylish (1) 73:14 keep (3) 57:10;74:21;92:13 KEIP (3) 57:4;88:6,6 kept (1) 69:14 key (9) 25:2;56:24;69:12; 86:25;103:12;104:7; 105:11,12;114:8 kicker (2) 72:23;73:9 kid (1) 88:4 kind (4) 15:15;30:13; 80:19;92:12 knew (10) 20:5,6,12;21:14; 23:5;24:24;28:1,3; 67:5;108:15	labeled (1) 71:22 labels (6) 16:12;71:7,16,19; 72:3;76:23 lack (1) 97:22 laid (1) 33:9 landlord (1) 16:10 language (2) 21:16;77:16 large (3) 36:18;85:3;105:17 largely (1) 102:19 largest (1) 22:10 last (7) 38:6;43:23;49:6; 64:21;76:8,13;82:13 late (3) 23:1;69:20;89:1 later (4) 13:23;29:20;35:7; 88:20 latest (1) 21:5 latter (3) 78:2;90:20;108:17 launch (2) 69:11,16 Lauren (1) 12:25 law (14) 23:18;45:22; 68:19;72:10;77:1; 80:18,22,22;90:12; 91:6,6;92:16;95:22; 97:16 lawyers (2) 16:14;117:18 lead (1) 28:7 leadership (1) 23:22 leading (2)		

Min-U-Script®

eScribers, LLC | (973) 406-2250
operations@escribers.net | www.escribers.net

(12) investments - line

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

linked (1) 88:11	76:5,17,20,24,25; 77:3,12;78:17;96:9; 98:17;102:5,14; 108:12	lower (2) 69:11;83:17	47:3;49:3;87:1; 102:25	mediation (1) 117:14
liquidity (4) 34:13;35:3,10; 37:19	located (3) 66:19;67:6;91:14	Ltd (1) 9:13	March (17) 22:4,9;33:14,21; 35:8,13,17;36:12,19; 37:5;38:22;39:13; 42:5,11;70:20;81:6; 103:15	meet (1) 24:11
listed (1) 22:21	log (1) 85:4	LUC (4) 7:7;13:8;14:18; 43:7	MARGOLIN (1) 9:25	meeting (2) 19:4,13
listen (1) 45:16	logic (3) 78:4,6;84:8	luck (1) 118:18	markedly (1) 96:23	members (5) 35:6;56:21;57:1,5; 64:25
litigation (41) 47:8,11;48:1,11; 49:17;50:21;52:1; 53:22,25;54:9;56:9; 17;57:24;58:3,3; 59:6,12;60:6,10,10; 92:2;93:12,15,17,19; 94:18;95:1;104:17; 109:21;110:16; 111:12,22;112:13, 14,15;113:9,10; 114:11;115:12,14; 117:22	LOMAZOW (19) 12:17,18;13:3; 14:12,15;43:10; 54:12,16,19;55:4,9, 13,18,20,23;60:18, 25;61:8,12	lucrative (1) 40:23	MARTINEZ (1) 8:8	memo (3) 19:3;22:19;39:10
litigation's (1) 60:1	long (6) 16:4;26:23;49:22; 69:8;75:5,6	Luke (1) 116:4	matching (1) 17:13	memorandum (1) 39:7
little (6) 36:12;38:20; 61:16;100:13; 105:19;110:11	long-term (3) 70:4,9,17	Lyondell (2) 102:24;103:5	material (1) 107:21	memory (2) 61:16;86:7
LLC (4) 9:3,21;91:21; 103:10	look (37) 15:15,25;16:11, 22;18:2,3,10;20:14; 21:6,17,19;22:15; 26:2;27:12;28:8; 31:10;34:18;36:4; 42:2;59:23;64:3; 68:11;70:24;71:4, 11;75:12,14;76:5,22; 78:16,18,20;81:2; 87:4,13;117:18; 118:1	M	materialize (4) 70:9,18;104:1,2	mention (1) 24:2
LLP (11) 7:2,10,18;8:2;9:2, 12,20;10:2,12;11:2; 12:19	looked (1) 106:10	Madison (1) 9:5	matter (5) 13:10,17;16:12; 82:24;116:9	mentioned (4) 21:25;30:11; 49:18;99:7
loan (82) 17:1,19;19:20,2; 16:21;18:25;1;26:6, 7,14,18;27:17,18,19; 28:4;40:5;44:19; 62:8,8,9;64:10,19; 65:1,12,17;70:1; 71:22;72:11,16; 73:12;74:11,13; 78:4;79:4;80:25; 81:6,11,14;82:8,19, 19;83:6,8,13,14; 84:2,2,3,4,5,7,10; 85:16,17,18;86:10; 96:18;98:18,19; 99:21;100:1,2,3; 101:8;102:2,3,6,7; 103:6,15,15,17,25; 104:3,8;105:9,24,25; 106:1;107:9;108:12, 20,23	looking (9) 17:12;35:21;38:4; 40:5;41:12;42:18; 71:7;84:24;118:9	maintaining (2) 69:12,20	matters (1) 12:16	merely (1) 65:6
loans (38) 20:16;25:17,18; 31:4;48:19;61:19; 62:9,10,25;63:3,13, 13,14,18;65:6;68:11, 13,16,22;70:10;71:8, 17;73:3,19;75:10;	looks (3) 35:1;38:4;94:8	maintenance (1) 69:11	maturity (18) 17:2;20:3;26:25; 69:3;70:14;71:1; 73:5,23,25;74:2,4, 11;76:23;82:5,8; 86:21;104:7;108:22	meritorious (2) 30:17;32:5
	loose (2) 105:10,15	major (3) 44:22;101:6;103:6	may (24) 12:6,7;28:12;29:3, 21;31:2;40:8;44:14; 53:10,11,21;54:23; 55:9;56:6;57:25; 60:3,7;66:12;77:4; 80:1;83:22;93:6,7; 94:16	merits (7) 15:12;28:5;45:13, 18;46:15;59:22; 96:10
	Los (1) 10:16	majority (4) 26:23;46:3;48:24; 98:11	maybe (5) 17:17;32:16;43:3, 10;59:9	message (1) 22:12
	lose (1) 53:14	management (9) 46:5;56:21,24; 57:1,5,6,10;58:6,11	mean (13) 16:24;27:17;31:2; 42:25;47:17;74:25; 75:22;78:6,11; 108:4;111:16;115:5; 117:6	met (2) 26:10;113:21
	losing (2) 56:8;69:22	managing (1) 109:21	meaning (7) 17:16;20:7;21:21; 22:1;29:13;32:5; 88:14	Mexican (7) 21:15;22:21;80:9, 18;87:4;105:3,15
	loss (1) 60:4	mandatory (1) 72:20	meaningful (1) 16:2	MICHAEL (1) 9:9
	lost (2) 26:12;80:1	MANGES (1) 10:2	means (4) 30:6;48:24;59:1; 92:1	Micron (1) 41:23
	lot (9) 15:4,9;20:1;76:3; 78:6,21;84:18;86:5; 106:16	Manhattan (1) 23:18	meant (1) 118:10	midflight (1) 70:6
	loud (1) 118:1	manner (1) 35:12	measure (1) 114:9	Midtown (1) 102:14
	LOVELLS (1) 9:2	manufactured (1) 34:7	mechanical (2) 20:2;68:6	might (10) 26:19;73:9;88:23; 91:5;98:24;112:4,5; 113:7;117:1,14
	low (1) 39:13	manufacturers (2) 25:5;32:17		Milbank (3) 12:18;43:12;45:6
		manufacturing (2) 25:16;45:1		milestones (1) 72:19
		many (7) 19:6;36:20;39:16;		Millbank (1) 118:1
				million (47) 28:11,15;29:17,19, 22,23,24,25;30:3,7; 41:3;49:2,22;50:14, 15,16;51:6;55:3,8, 14;57:15,24;58:21, 22,22;65:20;70:1; 81:12,19,20;88:2,13, 16;89:18;105:21; 106:4,5;110:22;

Min-U-Script®

eScribers, LLC | (973) 406-2250
operations@escribers.net | www.escribers.net

(13) linked - million

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

111:19,24,25; 112:17;113:6,8; 114:15,23;116:18 millions (2) 18:24;30:12 Milner (1) 103:9 mind (2) 43:10;92:14 minimal (2) 58:25;59:1 minimize (1) 51:15 minimizes (1) 72:14 minimum (2) 53:25;96:12 minitrial (1) 94:22 minute (2) 36:1;47:19 minutes (2) 25:23;32:16 misrepresentation (1) 97:20 mistake (1) 49:12 mitigation (1) 21:7 mode (1) 74:7 MoFo (1) 79:23 moment (3) 12:25;99:17; 105:22 money (21) 20:8;21:3;30:22, 25:32;9:54;24; 55:12;58:15,16; 65:22,23,24;78:8; 80:13;83:20;87:18; 88:15;101:13; 105:23;109:13; 117:21 monies (1) 56:6 monitored (1) 63:23 month (3) 13:14;39:12;95:13 MOORE (1) 9:12 moot (1) 72:11 more (28) 13:18;15:9,24; 16:2;19:23;20:10; 21:1;26:11;27:22; 28:14;33:10;35:16; 43:10;44:14;49:19; 51:5;52:9;71:9; 72:13;79:13;83:20;	98:4;100:19;101:13; 104:16;112:21; 113:18;118:8 MORGAN (1) 10:7 Morison (1) 66:22 morning (2) 18:3;76:2 MORRISON (5) 7:18;60:14;67:14, 21;80:2 MORRISSEY (1) 11:18 Most (17) 25:14;33:5;48:20; 52:3;56:4;58:23; 68:21;90:23;91:3,6, 7;97:25;99:6; 101:13;106:17; 113:9;115:8 motion (53) 12:23,24;13:4,5; 14:3,4,8,16,22;15:1, 9;18:13;33:3,7,9; 34:19;35:21;37:7; 38:3,12;41:17; 46:22;51:17;58:14; 60:13;63:9;77:7; 79:14;82:25;84:9; 86:3;90:7,10,15,25, 25;93:21;95:6,8,25; 97:8,9;98:21; 104:16;113:14,22, 24,25;114:6,7;115:2, 16;119:3 motion's (2) 92:15;115:3 motivation (1) 37:21 motivations (1) 40:18 Motor (1) 101:4 Motors (1) 27:18 mouth (1) 32:9 move (1) 38:23 mover (1) 69:21 Moving (2) 23:11;114:13 much (8) 19:23;49:19; 50:10,18;65:9; 83:14;110:11; 113:12 multifactor (2) 102:20,22 multiple (4) 51:20;52:16;79:3;	104:10 music (1) 21:22 musical (1) 21:20 must (4) 16:2;83:15;94:4; 97:19 muted (1) 67:18 myth (1) 107:21 N name (2) 12:8;25:18 named (1) 108:20 namely (4) 93:4;101:8; 109:11,16 narrow (1) 33:17 Nassau (1) 97:23 nature (12) 34:24;35:22; 58:23;67:5;95:11; 100:2;102:16,19,19; 103:7;114:21; 115:12 NDW (1) 91:21 necessarily (6) 63:2;90:17;95:7; 100:18;101:10; 117:10 need (15) 13:16;15:25; 16:11;18:19;20:10; 31:23,24;46:2; 56:18;70:6;73:11; 78:21;107:12; 116:13;117:5 needed (2) 45:21;70:3 needing (1) 70:5 needn't (1) 90:16 needs (2) 16:22;116:8 negative (2) 27:11;70:12 negotiate (2) 115:13,18 negotiated (3) 29:17;47:22;88:6 negotiating (1) 70:18 negotiations (1) 70:8	NEIL (1) 11:8 neither (2) 32:7;98:4 net (3) 52:2;54:2;60:4 network (3) 69:18;70:2,19 neutral (1) 71:13 Nevertheless (3) 15:2;98:24;101:19 New (16) 7:5,21;8:5,17;9:6, 15,23;10:5;11:6,16; 22:14;26:8;30:22, 25;70:21;90:22 news (1) 22:22 Next (14) 24:12,15;27:6; 30:8;36:3,8;41:7,11; 67:10;76:17,21; 81:21;107:2;115:17 nice (1) 87:24 NICHOLAS (1) 7:15 Nick (1) 44:9 nil (1) 25:3 ninety (14) 13:13;14:10; 29:17,22,24;55:8,14; 69:15;88:13;111:19, 25;114:14,23;116:18 ninety- (1) 65:19 ninety-eight (2) 41:3;106:5 nobody (1) 58:19 NOLAN (1) 8:19 nonbankable (1) 85:13 nonbankruptcy (1) 91:6 noncompliance (1) 48:12 none (2) 37:3;98:11 noninsider (1) 97:12 normal (4) 26:21;62:17;89:2; 98:15 normally (1) 95:10 North (2) 10:15;96:21 note (10)	15:20,21;36:16; 42:5;66:1;68:24; 69:1;71:20;90:15; 103:5 noted (10) 34:15;68:4;94:22; 95:4;96:20;100:5; 101:11;102:10; 105:4;112:24 notes (26) 17:11;33:14,20, 23;34:12;35:15; 36:13,22;37:2,14,19, 20;38:22;39:13; 42:9;63:21;65:25; 69:3;71:2,16,17; 72:23;73:22;74:5,8; 102:1 notice (1) 43:5 noting (1) 13:22 notion (4) 40:2;81:1;82:16; 101:6 nowhere (2) 108:15,16 NPA (12) 68:25;69:25; 70:10,20,25;72:5,9, 18,24;73:17;74:1,5 number (6) 24:16;28:9;59:13; 76:7;82:7;84:16 numbers (3) 20:19,20;64:15 NW (1) 7:12 NY (10) 7:5,21;8:5,17;9:6, 15,23;10:5;11:6,16 O object (2) 57:4;92:10 objected (1) 92:8 objecting (2) 58:14;92:8 objection (19) 13:10,21;14:2,3, 24;18:12;23:15; 26:6,15;45:8,15; 80:23;86:3;91:20; 107:14;114:16; 115:23;116:5,6 objectors (7) 45:4,12;95:21; 96:9;108:12,20; 109:8 obligation (5) 53:8,19;54:13,16,

Min-U-Script®

eScribers, LLC | (973) 406-2250
operations@escribers.net | www.escribers.net

(14) millions - obligation

20 obstacle (2) 112:4,6 obtain (6) 42:8;92:15,18; 98:16;99:1;107:6 obtained (5) 26:8;35:17;95:16; 99:19,23 obtaining (1) 39:17 obvious (2) 13:22;92:9 obviously (14) 14:22;15:25; 25:25;40:16;43:1; 44:25;45:7;47:18; 51:12;55:10,13; 85:11;107:19;110:6 occur (2) 86:24;104:2 occurred (2) 98:18;108:23 October (1) 46:23 odd (1) 100:17 off (7) 13:19;20:10,11; 21:2;22:20;62:5; 78:10 offer (3) 51:1;54:7;112:1 Office (3) 11:13;12:11,12 Official (4) 7:3,11;8:13;90:7 often (5) 71:23;83:5;95:5; 96:6;100:12 Oil (2) 63:9;94:19 omnibus (1) 115:17 once (2) 31:4;105:6 One (59) 9:22;11:4;12:9,13; 13:22;20:6,20; 21:25;22:18;25:25; 28:24;31:13;35:9; 43:25;44:13;46:6; 47:16;52:23;63:22; 71:16;72:4;74:24; 75:9,17,19;76:2,13; 77:11;78:23;79:11; 12:83;11:12;85:10; 92:19;95:4;98:9,19; 99:2,7;100:24;101:1, 14;104:6;105:6,14; 107:22;108:18; 110:6,8,21,22; 112:25;113:6,15;	114:4;115:12;117:3, 17 ones (1) 63:2 one's (1) 117:4 one-size-fits-all (1) 68:9 OneWeb (20) 9:21;12:3;18:5; 21:25;34:1,22;35:7, 9,16;36:24;37:19,25, 25:38;6,9;39:19; 42:6,7;80:15;81:8 OneWeb7086 (1) 81:3 OneWeb's (11) 27:16;33:23;34:7, 13,14,24;35:2,12; 36:20;37:15;42:13 one-year (1) 69:25 ongoing (2) 66:8;117:22 only (23) 14:2;19:13;21:18; 23:8;25:18;31:7; 35:5,6;37:25;38:9; 48:16;53:6,7;58:10; 63:16;72:19,21; 81:22;88:25;100:10; 103:19;106:12; 112:23 onto (1) 23:11 open (1) 18:6 operate (2) 98:15;102:14 operated (1) 98:25 operating (1) 44:13 operation (3) 69:11,17;76:16 operational (5) 34:2;35:19;37:16; 42:10;77:4 operationally (1) 35:16 operations (1) 69:7 opinion (3) 77:12;100:10; 109:20 opportunity (3) 39:16;80:3;98:23 opposed (3) 42:15;104:13; 106:1 opposition (2) 79:13,25 option (1)	48:14 optional (1) 72:21 options (1) 91:9 oral (1) 101:1 orbit (1) 69:11 orbits (1) 69:16 order (29) 12:11,20;14:10; 16:1;31:11,13; 41:21;44:3,10; 47:23;49:23;53:5,7, 8,9,12,13;55:11; 69:6;80:19;86:15; 90:17;94:1;95:15; 111:14,20;113:20; 114:5;118:9 orders (1) 54:21 original (16) 68:24,25;69:24; 70:10,25;72:5,9,17, 23;73:3,17;74:1,5; 103:15,17,25 originally (1) 55:14 ostensible (1) 110:4 ostensibly (1) 98:18 others (4) 23:16;28:3;46:14; 117:2 others' (1) 97:7 other's (1) 88:9 otherwise (5) 48:12;94:5;99:2; 110:8;112:8 ourselves (2) 56:1;88:4 out (22) 18:24;30:10; 31:15;33:9;44:13; 61:1;62:9;63:3;64:4, 13;68:22;70:19; 77:25;78:7;79:24; 80:18;82:7;101:13; 106:23;111:19; 117:6,21 outline (1) 75:4 outlines (1) 75:14 out-of-touch (1) 58:9 outset (1) 15:16	outside (4) 17:16;42:8;95:22; 107:7 outstanding (2) 44:19;48:19 over (28) 14:16;16:2;17:1; 26:17;28:15;36:15; 41:2;43:1;57:12; 63:17;65:10;69:4, 21;79:23;81:10; 92:11;96:14;99:12, 20;103:17;104:5,22; 105:21,23;106:16; 110:16;111:5; 114:23 overall (1) 16:1 overlapped (1) 109:3 oversee (1) 93:11 overwhelming (1) 25:19 owed (3) 65:19;105:17,21 own (8) 17:10;22:20;25:6; 34:4;42:17;45:24; 54:1;60:11 owned (1) 39:19 owners (1) 42:13 ownership (5) 24:11;36:24; 65:11;81:8,12 owning (1) 64:19	papers (4) 25:22;62:15; 80:19;81:23 parade (1) 88:12 paragraph (8) 26:5;27:10;41:9, 12;75:12,14;113:20, 22 paraphrased (1) 62:6 pardon (1) 16:23 pari (2) 106:2;117:1 Park (2) 7:4;9:22 parochial (4) 25:15;37:24; 39:20;42:17 part (14) 15:3;24:23;29:18; 40:6;60:23;62:24; 63:3;66:1;88:8; 91:20;95:3;99:18; 114:18;116:14 partially (1) 53:7 participate (2) 31:4;99:25 participated (1) 33:14 particular (4) 78:21;98:25; 100:22;107:10 particularly (5) 56:3;95:8;101:22; 107:16;115:10 parties (37) 16:15,18,25,25; 17:3,15;19:20;44:4; 45:19;51:21;52:2,11, 17;59:14;71:7,11,22, 23;92:2;93:12; 96:14;100:7,19; 102:24;103:2; 104:10;106:7;107:3; 108:2;111:2;112:6; 115:8,18,20,25; 118:2,17 parties-in-interest's (1) 91:17 partner (1) 44:9 partners (1) 12:25 party (15) 13:23;41:24; 63:20;83:6,8;86:18; 91:18;92:8,20,23; 93:15;108:18;111:8; 113:24;114:3 party-in-interest (1)
P				
package (1) 69:4 page (31) 18:14,18,20;20:17, 19;21:7,10;26:16; 34:22,23;35:2,23,25; 36:4;37:9;38:5,13, 16,23;41:7,11;73:14; 76:8;81:7;83:2,4; 108:5,6,9,11;119:2 pages (4) 18:8,18;76:7;85:2 paid (13) 31:5,12,17;40:6,8; 44:19;56:22;61:15; 63:1;65:13;66:10; 92:3;112:5 paints (1) 28:1 pale (1) 58:3				

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

92:18 party's (1) 105:2 pass (1) 31:3 passed (1) 15:2 passu (2) 106:2;117:1 pattern (1) 78:2 patterns (1) 109:7 PAUL (7) 7:2,10;9:17;13:9; 14:19;43:8;116:4 pay (19) 31:10;34:14; 44:22;46:5;48:19,19, 21;53:3,8,20;54:1,1, 13,18,20;55:15; 65:24;66:1;105:23 paying (1) 55:3 payment (7) 30:13;53:4;58:7; 73:5;110:3;111:23; 114:14 payments (17) 30:15;34:25;49:1; 57:9,16,17;58:8; 60:23,25;61:6,14,23; 66:3;73:23;82:4; 108:22;113:5 PC (1) 8:12 PCH (1) 16:6 pending (1) 47:13 Penn (1) 11:4 penultimate (1) 38:19 people (17) 18:6;19:7,14;23:6; 24:8;27:3;28:20; 48:3;64:5,7;82:15; 87:6;89:20,23; 115:12;117:11; 118:7 per (2) 98:5,7 percent (9) 17:10,10;23:25; 24:1,6;70:15;71:2; 81:9;107:23 percentage (5) 24:6,7;25:20; 64:17,18 percentages (1) 24:9 perfectly (2)	15:18;84:1 perhaps (4) 13:19;28:24; 92:12;104:6 period (2) 68:16;86:1 periods (1) 85:1 permit (1) 49:21 permitted (3) 45:19;50:21; 111:11 perpetrated (1) 97:5 person (1) 83:20 perspective (4) 36:17;50:8;51:25; 61:13 pertain (2) 54:10,17 pertained (1) 95:17 pertains (2) 63:16;92:7 pertinent (1) 34:23 petition (4) 54:21;61:6;89:8,9 ph (2) 73:14;109:11 phase (2) 68:14;79:3 phone (2) 13:1;14:20 pick (1) 117:1 picture (3) 19:2,10;28:1 PIK (2) 108:23,25 pin (1) 31:23 PIPER (2) 10:12;62:2 place (5) 25:2;66:14;73:12; 104:10;111:16 placing (2) 30:17;69:16 plain (2) 71:21;111:13 plainly (1) 68:12 plaintiff (5) 89:8,10;93:11,19; 105:8 plan (28) 14:6;24:23;29:4; 30:9;43:16;46:18; 19:47;13:48;4; 50:12,13,14,15;	56:15;61:3;69:8; 88:8;110:3,9;112:7, 9;114:14,16,21; 115:23;116:13,15; 118:14 plane (6) 20:9,9,10;21:1; 29:9;86:23 Plastics (1) 95:25 plausible (2) 98:24;103:13 play (5) 21:21;28:8,18,25; 61:10 players (1) 107:24 playing (3) 34:6;105:9,15 Plaza (2) 9:22;11:4 plead (1) 25:12 pleading (2) 56:19;102:23 pleadings (6) 58:18;59:8;61:24; 80:7,15;85:8 please (1) 84:13 pleases (1) 13:5 plenty (1) 102:5 plus (1) 27:25 PM (1) 118:19 podium (3) 14:15;42:22;60:13 point (55) 13:16;14:7,15; 18:7,21;20:7,19; 23:14,17,21,21;24:3, 15;26:4,13,21;27:4, 24;28:7,21;30:4; 31:18;34:17,17; 37:6;38:17;43:2; 59:11;62:11;63:15; 64:12,21;76:1,6,13; 79:24;81:24;82:7; 86:17,21,22,23,24; 87:20,24;90:20; 106:2,4;110:18; 116:19,20,24;117:4, 6;118:10 pointed (7) 30:10;44:13;64:2, 4,13;68:22;80:18 points (11) 13:11,12;15:11; 18:12;38:6;62:15; 74:21;79:23,25;	84:11;110:19 policy (1) 78:9 popular (1) 107:21 portion (10) 50:25;55:8,16; 58:1;61:21;92:5,8; 101:6;104:25;113:1 position (6) 34:24;45:24;56:1; 65:4,11;68:20 possession (1) 92:22 possible (5) 34:20;51:24; 55:10;90:2;113:3 post-bankruptcy (2) 85:14;86:8 postponing (1) 97:6 posture (1) 35:3 potential (6) 23:1;60:17;64:23; 65:4;66:13;93:12 potentially (2) 40:22;111:8 power (6) 64:24;65:4,10,13, 15;98:12 practical (1) 106:10 practically (1) 90:4 practice (3) 51:17;52:1;62:24 pre- (3) 33:24;54:20;61:5 precedent (4) 32:4,8;70:11; 102:9 precise (2) 31:24;43:10 precisely (1) 35:8 preclude (1) 111:15 precluded (1) 105:7 precludes (2) 13:23;102:1 predicates (1) 33:3 preference (1) 109:18 preliminary (5) 33:8;34:11;35:5; 41:19;42:4 prep (1) 52:24 preparation (1) 12:13	prepared (6) 32:1;50:24;98:20; 99:16;106:11;115:1 preparing (1) 15:12 pre-petition (9) 48:21,25;53:15; 57:9,16;60:22,25; 61:22,23 pre-revenue (4) 77:2,18;78:5,9 present (4) 19:18;26:23; 101:8;103:6 presentation (9) 18:4,9;33:2,7; 34:21;62:5;81:2,5,15 presentations (1) 62:12 presenting (1) 13:4 presents (1) 93:24 preservation (1) 117:6 preserve (2) 102:2;114:22 preserved (1) 116:23 preserving (1) 40:2 press (4) 22:3,9,19;100:1 pretty (2) 13:22;117:20 prevail (2) 16:2;29:24 prevailed (1) 112:24 prevails (3) 48:1;53:10,21 prevent (2) 60:2;102:4 previously (2) 45:24;106:23 prima (1) 28:12 primarily (4) 40:12;45:12; 60:20;110:18 primary (2) 52:14;93:4 primed (1) 20:13 principal (3) 26:25;82:5;87:15 principles (3) 77:21,23;78:22 prior (5) 34:11;37:5;56:21, 22;113:23 priority (4) 31:6;69:14,20;

70:3 private (1) 60:3 privately (1) 52:10 privilege (1) 67:22 privileged (2) 85:3,4 probability (1) 47:17 probably (5) 15:6;63:6;75:1,3; 84:18 problematic (1) 109:24 problems (2) 103:6,8 proceed (8) 12:19;13:4;29:14, 15:30;6:49;17; 50:21;112:19 proceeding (2) 47:12;91:1 proceedings (2) 60:3;118:19 proceeds (9) 17:6;27:20;44:20, 25;45:2;48:1;65:25; 66:1;103:23 process (5) 16:1;28:16;47:21; 53:17;67:25 produce (4) 44:12;84:21;95:1; 102:14 produced (6) 44:3;52:8,9;81:23; 85:2;86:14 production (9) 43:22,23,24;44:5, 8;52:5,18;85:20,22 progeny (1) 109:11 Proj (1) 9:4 project (10) 33:25;35:18; 37:16;42:11;49:6; 69:10;70:16;73:20; 76:15;112:14 projected (2) 110:16;113:2 promissory (1) 15:20 promptly (1) 32:13 prong (2) 109:10,13 proof (2) 93:25;94:14 proofs (1) 28:15	proper (7) 82:23;90:24;91:7; 93:20;94:17;100:14; 110:8 properly (3) 93:14;94:16;116:8 proponent (1) 97:19 proportionate (1) 81:16 proposal (2) 32:13;55:5 propose (1) 13:4 proposed (12) 12:14;46:19;47:8, 11;55:14;56:15; 90:9;94:18;95:20; 110:20;111:5; 114:10 proposing (1) 46:20 propound (1) 52:21 prosecute (2) 30:20;58:16 prosecuted (3) 30:24;51:4;52:7 PROSKAUER (3) 8:2;79:16,20 prospect (1) 103:18 protect (3) 47:8;89:15,15 protected (1) 88:14 protection (5) 53:4;54:22; 104:13;112:22,23 prove (2) 66:12;74:12 proven (1) 107:4 proves (1) 65:8 provide (7) 15:7;60:3;61:10, 21;74:12;75:21;85:4 provided (13) 15:8;33:16;34:8; 49:21;52:3;54:22; 57:4;69:6;73:4;82:2; 85:5;111:18;113:23 provider (1) 36:18 providers (2) 35:7;36:20 provides (7) 12:10;29:1;83:20; 110:3,5;111:23; 114:14 providing (2) 51:18;86:22	provision (4) 49:25;54:7; 118:11,13 PSA (5) 29:1,18;50:15; 60:24;61:6 public (6) 20:19;22:4,8; 27:13;75:13;78:7 publicly (2) 18:7;80:8 purchase (15) 14:6;33:15,20; 38:22;42:6;49:20; 54:7;55:11;68:24; 69:1;71:20;72:6; 73:1,6;111:13 purchased (2) 36:13;39:13 pure (1) 17:24 purported (10) 34:12;36:13;37:1, 14,18;38:22;39:11; 42:9;81:16;105:9 purportedly (1) 36:22 purpose (2) 40:11;109:24 purposes (3) 96:12,24;111:10 pursuant (1) 41:21 pursue (10) 90:8;91:19;92:18; 94:13;111:11,12; 113:11,24;116:7,9 pursued (4) 91:4;92:2;114:2; 116:8 pursuing (3) 56:9;60:2;110:7 pursuit (5) 94:10;109:12,15; 110:12;111:15 push (1) 89:12 put (21) 12:7;16:14;17:2; 21:1;32:9;39:12,15; 41:18;46:4;47:21; 49:11;56:10;81:23, 23;82:22;85:7;87:6, 7,21;89:12;101:13 puts (2) 60:7;96:19 putting (3) 20:9;54:25;56:14	QCOW3564 (1) 37:7 Qualcomm (53) 10:13;32:25; 33:11,18;34:8,12; 35:5,13,14;36:11,14, 14,18;37:18,23;38:2; 40:5,13;41:2;42:4, 15;62:2;63:16,19,19, 22,22;64:4,7,16,17, 19,22;65:9,9,15,19; 66:2,3,15;67:1,3,4,9; 99:3,8,20,21;104:21; 105:24;106:2,24; 115:20 Qualcomm's (10) 36:21,23;37:1,3, 14;38:5,8;40:6; 66:24;77:9 qualified (1) 16:21 quantify (2) 51:8;59:1 quantum (3) 58:20;59:10;94:14 quick (1) 31:9 quickly (2) 71:14;75:9 quite (3) 51:11;77:15;113:3 quote (3) 62:6;83:4,25 quote/unquote (1) 26:7 quoted (4) 21:16;22:19,22; 86:7 quotes (1) 72:22 quoting (1) 22:5	76:23 rather (2) 40:3;45:25 rational (2) 101:7,12 re (26) 12:3;60:5;73:14; 74:13;77:13;91:12, 20,23;92:23,25; 93:23;94:19,20;95:2, 5,23,24;96:21;97:23; 101:2,4,25;102:14, 23;103:3,9 reached (1) 103:2 reaches (1) 78:23 react (1) 45:14 read (12) 36:1,9;37:8;38:18; 39:21;41:9,14; 61:24;74:15;76:11; 80:5,7 reads (1) 20:25 real (2) 63:13;89:16 realities (1) 68:12 reality (6) 33:22;47:25; 52:13;71:5,5;74:9 realized (1) 16:19 really (26) 12:16;16:11,12; 18:14;19:1;28:1; 30:14;34:19;40:12; 45:17,18;46:10,14, 16;59:24;60:9; 61:20;65:2;72:10; 78:4;83:15;84:11; 95:22;100:15;108:7; 117:4 reaped (1) 37:25 reason (7) 19:3;25:13,15; 48:13;58:10;92:9; 102:7 reasonable (2) 83:6;103:18 reasonably (1) 47:9 reasoning (3) 83:13,18;84:8 reasons (4) 77:5,5;101:20; 117:3 recall (4) 16:13;21:24; 29:18;66:12
			R	
			raise (6) 22:23;42:10; 62:11;76:1;78:5; 117:11 raised (5) 22:11,16;45:15; 60:21;95:8 raising (1) 22:14 range (3) 26:15;113:5,8 rarely (1) 102:22 rate (7) 20:3;52:20;69:3; 70:14;71:1;72:23; 108:24 rates (1)	
		Q		
		QCOW3544 (1) 38:4		

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

receivable (13) 36:16,19,21; 37:15;40:7,8;63:20; 64:11,20;65:24; 99:8;104:25;106:1	57:25 recovered (1) 83:18 recovery (3) 31:4;93:25;105:19 redacted (1) 75:13 reduced (1) 13:25 REED (1) 9:20 refer (4) 25:10;47:5;68:25; 69:1 reference (1) 61:5 referenced (1) 101:1 references (2) 34:20;104:10 referred (2) 50:4;80:2 referring (4) 74:25;81:7;103:9; 104:11 refinanced (1) 72:25 reflected (1) 70:15 refrain (1) 22:5 refuel (1) 70:7 refusal (3) 45:11,11;47:3 refuses (1) 92:22 refusing (1) 93:18 regard (11) 38:11;63:12; 66:13;92:5,14; 97:25;99:6;104:6; 110:19;113:10; 114:25 regarding (6) 30:3;43:5;99:21, 23;100:2;118:6 regardless (1) 83:23 regards (1) 61:10 regularly (1) 80:13 regulated (3) 80:16,18;105:6 regulation (1) 105:3 regulations (2) 105:10,15 regulatory (2) 80:21,22 reject (1)	43:15 rejection (2) 43:6;66:14 related (2) 53:23;88:11 relates (1) 33:2 relationship (5) 16:1;40:4;98:5; 99:12,24 relative (1) 56:17 relatively (4) 95:4,12,18;115:11 release (11) 22:3,9,20;29:8,8, 11;61:10;88:8; 100:1;114:25; 116:14 released (1) 29:10 releases (4) 29:7;61:2,18; 110:6 relevant (4) 17:19;29:20;52:3; 62:7 relied (1) 102:8 relief (7) 47:22;92:5;93:24; 111:15,15;114:9,14 reluctant (1) 89:13 rely (1) 99:11 remaining (1) 58:24 remarkable (1) 76:21 remarks (3) 42:23,25;60:16 remedies (8) 70:13;87:16,17,19, 22;88:19,20;111:17 remedy (2) 68:3;97:4 remember (2) 21:3;85:13 remind (1) 60:22 renegotiate (1) 111:3 renegotiated (1) 49:1 Rensselaar (1) 16:7 reorganization (4) 47:10,12,13;94:6 reorganized (1) 110:23 repaid (16) 17:6;25:3;35:15;	37:15;53:11;64:6; 73:19;74:11;76:4, 12;82:6;83:15,22; 84:3,7;108:24 repay (1) 21:3 repayment (17) 17:6;24:15;25:10; 26:25;33:23;37:4, 20;39:10,14;40:16; 41:25;42:9;73:13, 18;97:6;101:17; 103:18 repayments (2) 82:11;106:25 repeat (1) 42:3 repeats (2) 18:12;21:8 replies (1) 84:25 reply (6) 21:16;26:5;43:1; 44:12;79:8;81:23 report (1) 60:19 reporter (1) 12:7 represent (1) 49:10 representations (1) 16:15 representative (2) 98:2;99:10 representatives (3) 19:8,13,15 represented (1) 104:23 representing (3) 62:2;67:4,22 reps (1) 70:11 request (6) 13:13;84:21; 90:15;92:9,15;115:3 requested (2) 14:1,9 requesting (1) 93:19 requests (4) 51:16;52:21;76:6; 84:15 require (5) 32:10;78:9;79:3; 94:22;116:13 required (6) 26:18;32:10; 46:19;69:14,16; 111:20 requirements (1) 80:21 requires (1) 68:7	requiring (3) 51:17;59:25; 102:13 rescue (4) 24:17;102:5,7; 107:9 reserved (1) 116:11 resolution (2) 47:12;118:3 resolving (1) 114:5 resources (3) 47:10;93:16;94:19 respect (25) 30:6;31:20;32:24; 35:20;37:12;38:2, 11;39:17;41:16; 42:14;46:12;51:17; 52:2;53:7;61:3; 64:16,22;65:9,14; 95:19;98:17;99:19; 105:12,16;115:20 respectfully (1) 62:23 respective (1) 61:25 respects (1) 80:11 respond (3) 13:21;52:22;56:18 responded (1) 13:12 responding (1) 51:16 response (5) 75:11;81:22;83:1; 84:25;85:9 responsibilities (1) 93:7 rest (3) 27:25;71:13;76:11 restated (3) 33:14;69:1;70:20 rests (2) 96:25;97:2 result (5) 52:2;60:4;89:23; 96:18;110:15 results (1) 102:22 Retail (1) 91:21 retailer (1) 24:21 retention (6) 56:22;57:9,16; 58:6;61:14,23 return (4) 40:22;57:14,18,20 returning (1) 57:11 Rev (1)

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

107:18 revealed (1) 33:9 revenue (7) 25:4;33:25;74:7; 79:2;82:10;84:5,6 revenue-generating (1) 25:2 revenues (7) 21:4,5;24:22,23, 24;86:24;104:5 revenue's (1) 76:15 reversed (1) 100:12 review (5) 14:4;25:23;39:10; 80:3;94:16 reviewed (2) 45:8;80:5 revised (1) 14:9 revolving (2) 103:5,7 reward (1) 100:23 rewards (3) 100:21;102:20; 117:19 RICHARD (1) 11:18 ridiculous (1) 30:22 rife (1) 87:25 right (25) 13:19;28:12,22; 36:10;39:11;41:15; 43:14,20;45:3; 51:11;54:15;55:2, 17;74:23;77:8;78:3, 5;86:2;88:23;90:6; 97:6;108:18;112:3; 117:10;118:16 right-hand (1) 81:10 rights (1) 98:14 rise (2) 79:22;97:1 risk (20) 20:23;21:7,9;35:9; 49:11;50:2;53:24; 54:25;56:8,10,14; 58:17;60:8,9;69:22; 70:15;104:12,13; 111:1,4 risks (6) 100:21,22;102:20; 113:9;114:10; 117:19 risky (1) 83:13	roadblocks (1) 89:12 role (3) 47:7;93:11;98:1 roll- (1) 55:15 rolled (5) 36:15;37:14;41:2; 74:5;104:22 rolling (1) 103:17 rollover (1) 104:25 room (1) 36:25 ROSE (3) 8:2;79:16,20 round (5) 22:11,13;70:21; 76:17,21 rounds (4) 22:7;78:5;79:4; 108:10 rule (5) 31:6;68:10;95:10, 14;102:1 ruling (2) 92:14;115:25 RULINGS (1) 119:2 run (2) 52:20,20 runs (1) 100:24 Rwanda (1) 19:15 S Sabine (5) 47:6;59:24;63:9; 94:19;112:25 safety (1) 29:17 sale (30) 29:13;47:21,23; 48:4,7;49:12,17,20, 20,25;53:17,24;55:1, 11,11;56:2,9,10,11, 14,14,15,25,25;57:6, 11;58:8,11;73:20; 111:19 Salinas (5) 44:8;87:7;99:13, 15;115:21 same (22) 21:6,8;27:13;29:4; 38:13;51:3;62:15; 72:7;77:15,17,20,21; 83:7;87:6;88:2; 96:11,17;101:10; 104:20;108:8;111:9; 118:12	sanctity (1) 118:5 Satellite (2) 11:3;69:23 Satellites (6) 9:21;34:7,9;45:1; 69:12,17 satisfied (2) 24:5;97:7 satisfy (1) 74:2 Satnet (1) 9:3 save (2) 13:9,19 saw (3) 19:3;21:16;37:12 saying (10) 13:12;20:5;22:22; 27:19;50:8;63:6; 68:2;89:20,25; 107:25 SBG0015823 (1) 18:15 SBG0025843 (1) 20:20 SBG0025849 (1) 21:6 SBG015825 (1) 18:18 SBG25849 (1) 76:7 SBG43 (1) 26:15 scenarios (2) 23:1;92:17 schedule (2) 46:20;108:22 schedules (2) 28:9;73:23 SCHOTZ (3) 8:12;14:20;32:23 score (1) 107:14 scorecard (1) 68:6 scratching (1) 88:9 SDNY (6) 94:20,21;101:3; 102:25;103:3,11 se (2) 98:5,7 seal (1) 75:21 sealed (3) 33:4;39:23;75:2 searched (1) 52:4 seat (2) 21:23;36:25 seats (1) 33:13	second (33) 12:23;16:3;20:14; 21:10;26:13;27:10; 29:1;33:22;34:22; 35:11,25;36:5;38:5, 23;49:15;73:22; 80:14;83:4;88:25; 92:16;93:5,22;94:12, 15;95:23;96:4; 97:11;98:18;103:15; 106:20;109:10; 110:18;112:1 secondly (2) 13:25;105:2 Section (16) 13:24;36:8;41:14; 90:14,18;91:1,2,5, 11,15,19;96:16;98:5, 8;117:7,10 secured (24) 14:25;22:10; 30:23;31:1;36:22; 48:20;49:8;53:16; 54:21;59:4;61:11; 63:21;64:18;65:1,6, 12,17;71:2;76:25; 90:11;96:9;106:1; 110:24;114:15 secureds (1) 29:2 security (4) 31:14;69:4;108:8, 21 seeing (1) 19:3 seek (4) 13:15;44:7;96:17; 97:4 seeking (6) 13:24;14:23; 84:18;91:10;105:8; 113:24 seeks (1) 104:21 seem (1) 113:9 seems (3) 45:16,18;86:17 SEGAL (2) 11:2,2 segues (1) 35:11 self (1) 33:5 seminal (1) 93:23 sense (15) 15:6;21:15;25:3; 41:23;45:7;65:3; 68:5;71:11;82:16; 83:12,19;89:14; 92:13;100:21; 102:17	sensible (2) 47:9;94:18 sensitive (1) 89:24 sent (1) 18:3 sentence (6) 21:8,9,11;38:19; 41:9,14 separate (9) 30:7;60:19;63:21, 25;73:2,7;79:24; 81:14;92:4 separately (1) 96:15 September (1) 46:21 serious (1) 103:8 serves (1) 96:23 service (3) 35:6;36:18,20 Services (1) 11:3 set (4) 21:19;49:2; 103:22;113:20 SETH (4) 8:9,20;14:20; 32:23 sets (2) 52:4;96:15 setting (2) 114:22;116:17 settle (5) 90:9;115:6;116:9; 117:12;118:8 settlement (5) 114:24;115:4,13, 18;117:23 seventy (3) 23:24;24:1;81:12 several (2) 13:11;49:6 severely (1) 42:6 SGN (2) 109:11,22 shaking (1) 63:6 shall (3) 27:14,14;114:2 SHANAHAN (1) 8:19 shape (2) 65:17;100:14 share (1) 106:2 shareholder (11) 98:1;99:10,13,14, 25;102:1,11,14; 105:4,5,13

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

shareholders (1) 31:3	shareholders (1) 98:11	shareholders (1) 17:13;24:4,10	sharply (1) 81:19	sheet (1) 113:2	short (5) 32:16;52:19; 68:19;74:21;113:17	shorten (1) 13:24	shortfalls (1) 34:13	show (11) 28:10;59:12; 64:16;71:17,21;84:5; 6:97:12;102:12; 105:9;109:14	showed (1) 86:10	showing (3) 22:25;97:13,22	shown (1) 97:10	shows (9) 22:24;23:1;27:2; 58:9,13;72:12,18; 86:8;87:19	shrift (1) 68:19	side (6) 87:4,10,11,12,13; 93:15	sides (1) 115:14	sight (1) 53:14	Sigmund (1) 62:6	signed (2) 39:18;72:6	significance (1) 72:15	significant (5) 34:15;35:16; 48:20;101:9;104:19	significantly (3) 48:20,23;51:5	silent (1) 19:22	similar (7) 51:4;75:22;97:20; 102:7;103:8;104:23; 105:12	Similarly (1) 96:14	simple (4) 17:24;47:25; 52:13;58:19	simply (13) 45:25;46:12;50:2; 62:16,21;63:14; 65:17;66:1;102:3; 16;112:4,12;115:6	singled (1) 106:23	sit (3) 58:16;115:13,18	situation (8) 16:19;24:8;40:16; 51:19;68:8;76:22; 84:4;107:11	size (1) 31:22	skeptical (1) 99:6	small (3) 29:25;65:11; 115:11	smaller (1) 51:5	Smoga (2) 82:24;101:2	snippets (1) 64:2	so- (1) 96:6	so-called (2) 100:9;101:21	SoftBank (40) 7:19;22:22;23:13; 14,23,23;26:4,13,17; 27:2;37:23;43:2; 62:4;64:13;67:12; 23;72:13;75:9,15,24; 76:4;84:19;87:3,9; 17,17,20;88:6;98:10; 16,16,19;99:1,1,20; 103:15,16,16;104:4; 5	SoftBank's (4) 20:15;26:14; 60:14;73:15	solely (4) 20:7;98:19;114:3; 3	solicitation (1) 14:8	solvency (1) 56:7	somebody (3) 19:15;26:24,24	somehow (5) 31:22;40:2;46:8; 81:16;104:25	someone (3) 81:25;91:10;93:3	sometimes (3) 62:7;70:6;73:11	somewhat (1) 109:23	somewhere (1)	112:16	soon (1) 88:5	sorry (13) 22:19;27:20;28:5; 39:3;41:10;49:16; 50:14;61:8;66:25; 74:15;79:10;99:23; 111:12	sort (4) 62:6;77:17;89:14; 118:9	sought (4) 44:10;47:22;92:5; 101:21	sound (2) 24:18;107:14	source (4) 17:6;24:15;25:10; 106:25	Southern (1) 90:22	speak (4) 12:5,6;18:17;61:4	speaking (1) 18:20	special (2) 16:9;60:19	specialized (1) 80:21	specific (8) 18:8;28:23;43:14; 61:5;98:7;104:1; 110:3;111:8	specifically (7) 36:5;38:18;61:1; 67:7;73:17;100:18; 116:18	specified (1) 114:4	specifies (1) 114:1	spectrum (6) 69:14,15,19,20,22; 70:3	speculated (1) 113:7	speculative (1) 110:17	spend (4) 13:16;49:19; 52:24;113:6	spent (4) 55:12;62:13; 106:7;109:13	spoken (2) 80:24;82:15	sponsoring (1) 110:23	Square (1) 8:4	stack (1) 85:3	stage (2) 102:23;107:2	stake (3) 36:24;37:24;107:5	stakeholders (1) 48:16	stand (3) 40:7;59:6;83:22	standard (6) 24:9;41:18;70:10; 90:24;93:21;95:6	standing (34) 12:24;14:16,22; 15:9;30:21;33:3,9; 34:19;35:21;37:7; 38:3,12;41:17; 47:11;48:6;90:8; 91:15,17;92:4,6,7, 10,11,14,16,18;93:3, 21;94:3;95:8; 109:22;113:24; 115:2,3	stands (2) 80:10;114:16	Stars (1) 10:14	start (8) 38:15;47:15;62:5; 77:25;86:6;101:23; 102:13;106:18	started (1) 78:7	starting (1) 37:9	starts (2) 20:23;76:9	startup (17) 45:20;62:18,25; 64:8;66:18;68:1,13; 74:7;77:12,21;82:18, 20;87:1;90:1,4; 103:22;107:15	start-up (2) 107:21,23	startup-debt (1) 77:2	startups (4) 67:7;77:3,18;78:7	state (9) 28:8,18,24;47:10; 61:9;91:6,22;96:12; 98:22	stated (5) 38:5;41:23;77:5; 100:8;112:19	statement (7) 14:6;18:15,16; 30:3;46:20,21; 116:15	statements (2) 51:10;62:19	STATES (7) 11:12,13;91:22;	100:7;107:20;108:9; 113:22	status (8) 14:4;17:5;28:13; 36:22;77:4;97:23; 98:7,13	stay (2) 26:1;58:7	steward (1) 93:16	stewards (2) 56:20;58:13	still (16) 20:9,23;21:9; 22:13;26:13;41:10; 55:25,25;62:9;66:11, 14;68:14;74:6;78:7; 103:22;109:10	STN (5) 92:23;93:23; 94:15;95:2;96:12	stock (1) 80:9	stockholder (1) 106:21	stood (1) 35:17	stopped (1) 21:22	stops (1) 76:10	stores (1) 24:22	straits (2) 83:5,19	strategy (1) 110:14	stream (1) 38:9	Street (4) 7:12,20;11:14; 91:22	stretch (1) 43:25	strict (2) 17:9;92:13	strong (2) 15:23;116:13	stronger (1) 38:11	strongly (3) 115:14,17,19	struck (1) 15:13	structure (2) 83:17,23	structured (1) 20:13	struggled (1) 82:15	stuff (1) 86:5	subject (10)

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

35:25;36:4;38:16; 23:41:7,13;50:16,16; 95:19;105:3	65:10;70:4;94:24; 98:23	Systems (1) 95:24	103:8	throughout (2) 51:15;63:24
subjective (1) 86:18	suggest (4) 39:5;115:17,19; 116:11	T	Tese-Milner (2) 103:1,10	Ticketplanetcom (1) 103:10
submicron (5) 82:16;95:23;96:6; 102:18,21	suggested (5) 39:1;53:2;59:8; 80:11,20	table (2) 48:14;49:23	test (9) 20:2;68:9;78:14, 19;79:1;86:13,25; 90:1;102:22	tied (2) 35:18;41:25
submission (1) 94:4	suggesting (1) 53:9	talk (13) 22:23;25:21,23; 31:24;35:7;47:19; 58:18;59:21;76:3; 80:25;81:4,21;85:12	tests (3) 96:20;100:11; 102:20	ties (2) 25:10;106:25
submit (4) 62:23;71:10; 75:21;77:6	suggestion (4) 45:23;46:6;56:20; 58:5	talked (1) 73:1	thanks (2) 13:7;32:21	timeframe (1) 85:14
submitted (3) 12:15;76:2;81:2	suing (1) 93:8	talking (4) 22:13;57:15; 62:13;105:6	theory (4) 46:10;47:6;60:5; 88:24	timely (2) 34:14;114:5
subordinate (1) 90:13	suit (2) 92:20;94:2	talks (2) 25:5;81:8	thereafter (2) 66:4;88:5	Times (7) 8:4;18:23,24; 24:21;82:8;93:6; 107:11
subordinated (2) 97:3,6	Suite (3) 10:15;11:5,15	tapped (1) 18:24	therefore (10) 21:2;23:16;30:9; 89:8;98:6;99:11; 108:8;112:9;115:2; 116:11	timing (2) 14:7;61:13
subordination (16) 14:24;23:9;26:9; 39:2,5,25;40:10; 96:3,16,23;97:2,9, 12;99:17;105:13; 109:23	suits (1) 30:11	Tara (1) 91:21	therein (1) 38:17	TIMOTHY (3) 8:7;79:16,19
subsequent (5) 21:13;46:9;70:11; 108:10,13	sum (1) 112:21	targets (2) 53:15;59:20	there'll (4) 52:16;89:11,11,17	to-date (1) 22:11
subsidiary (1) 80:7	supplement (2) 43:16;46:18	team (1) 57:11	thereof (1) 33:13	today (33) 13:5;22:3;28:8,18, 20;30:5;31:19;33:2, 4,7;34:20;41:17; 50:23;54:20;56:19; 58:17,19;74:22;80:1, 17,24;82:8,9,12,15; 89:13;101:1;104:22; 110:17;112:12; 114:18;115:1;116:7
substance (6) 16:2,5;17:1;96:25; 100:6,20	suppliers (2) 21:21;46:5	tech (2) 107:16,16	thesis (5) 38:15,21;39:8,14; 40:21	today's (2) 98:20;106:11
substantial (9) 23:12;42:12; 57:13;62:24;64:14; 65:25;97:17;106:21; 112:17	support (10) 15:10;39:24; 50:13;63:15;74:8; 88:8;93:25;94:17; 98:4,24	technically (1) 15:1	thinking (2) 85:12;104:12	together (4) 12:7;23:22;27:25; 44:14
substantially (4) 45:10;99:4; 103:23;109:3	supported (2) 60:23;73:13	Technologies (4) 63:20;64:5,19; 66:15	third (15) 34:3;35:24;37:17; 38:16,16;41:23;83:6, 8;92:20,23;93:15; 96:5;102:21;107:3; 111:8	TOGUT (2) 11:2,9
substantiate (1) 64:9	supporting (2) 29:8;101:15	telling (2) 22:10;87:11	third-party (4) 28:11;42:8; 103:20;110:14	ton (1) 77:20
substitute (1) 73:12	supports (2) 62:17;80:6	tells (2) 38:7,20	thirteen (1) 70:15	tons (2) 15:13;89:11
subsumed (1) 94:11	supposed (3) 55:15;70:3;118:7	ten (5) 57:15,24;107:22; 112:17;113:6	thirty (4) 15:1;85:2;89:18; 113:8	top (4) 29:6;35:23;55:3,8
succeed (4) 34:6;38:9;54:25; 113:13	supposition (2) 62:21,21	term (1) 20:8	thirty-percent (1) 31:3	topic (4) 35:11;37:17; 77:14;90:20
succeeded (3) 35:16;38:1;111:14	supremely (1) 109:3	termination (3) 113:21,23;114:2	though (4) 38:24;46:15;73:8; 93:5	topics (1) 33:18
succeeds (1) 54:24	survive (3) 97:9;98:21;104:16	terms (20) 15:9;25:19;31:24; 48:9;55:1;68:20; 70:18,24,25;71:21; 75:10,24;86:16; 99:20;103:14;104:3, 11;109:1,1;111:13	thought (4) 23:5;66:25;67:11, 13	tort (1) 97:15
success (6) 33:24;34:2;35:19; 37:16;94:24;112:13	SWAINE (1) 9:12	terrific (1) 32:22	three (9) 18:4;33:17;37:8; 66:19;81:14;82:9, 11;87:12;106:25	total (4) 22:11,16;24:1; 28:10
successful (7) 31:5;48:11;53:10; 56:3;58:1;60:7; 104:17	swipe (1) 46:12	terrible (2) 32:4,8	three-fourths (1) 75:4	totality (2) 27:7;71:7
sufficient (7) 14:9;19:9;25:12;	switch (1) 28:5	Terrific (1) 32:22	threshold (1) 94:1	totally (1) 31:21
	sympathetic (2) 111:24;112:11	Tese- (1)		touched (1) 76:14
	system (1) 24:8			touching (1) 82:18

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

toward (1) 114:19	16:6,17;23:20; 28:4;53:5,6,7,12,13;	104:16;106:9; 111:10;117:21	37:23,23;80:9; 105:2	28:12;72:1;93:8
towards (1) 76:18	54:23;73:23;75:15; 83:23;86:16,22;	unable (2) 50:3;110:3	unpaid (3) 113:12,13;115:10	validity (2) 61:19;107:10
Tower (1) 10:15	87:14;89:2;100:22; 105:6	under (57) 13:24;14:24; 23:22;31:2;41:17; 20:53;8,9,12,13; 54:21;63:9;69:19; 72:5,9,10,17,23; 73:3;74:5;75:21; 78:4;80:18;83:7; 90:12,14,18;91:1,2, 4,5,8,9,11,15,19; 92:16;95:10,14,14, 21;96:16;97:15; 98:5,7,18;101:8; 102:17,21;109:11; 112:1,9;113:19; 116:22,24;117:7,9	Unsecured (31) 8:13;28:10;29:2,4, 5;31:4;36:19,21; 48:15,21;49:9; 57:13;58:20,25;59:3, 4,5,10,11;90:7,13; 96:19;99:3;105:20, 24,25;106:3;113:4; 115:11;116:25; 117:21	valuable (1) 49:7
TPAC (1) 103:10	truly (1) 114:21			value (4) 57:12;60:8;69:12; 107:4
trade (3) 21:21,23;44:23	Trust (1) 91:22			valve (1) 29:17
traded (1) 80:8	Trustee (2) 11:13;94:12			VAN (23) 8:20;14:20;25:4; 32:15,19,22,23;36:3, 7,11;37:11;38:25; 39:3,6;40:11;41:1,3, 6,11,16;62:12;63:5; 67:11
Trading (3) 63:22;64:7,17	try (6) 71:14;86:5;89:3,6; 92:2;115:18			Varick (1) 11:14
traditional (6) 34:4;40:19;42:18; 69:4;70:25;104:8	trying (1) 89:25		unusual (1) 68:3	variety (1) 73:18
transaction (26) 17:15;19:10,12; 21:13,18;22:2; 48:17;49:7,16;52:4; 61:19;64:25;65:17; 73:7;74:10;96:19; 97:1;100:6,20,22; 110:15,20;111:3,6, 12,23	Tuesday (1) 43:23		unwilling (3) 50:3;53:24;65:24	various (2) 16:15;64:2
transactions (8) 52:15;65:6;68:12, 24;71:5,6,9;73:2	turn (9) 14:15;31:19; 34:22;38:3;40:24; 41:6;43:1;63:3;72:8	undercapitalization (8) 17:4,23,24;19:21, 24,25;101:9;107:12	up (17) 15:17;21:20; 38:23;47:14;55:16; 57:16;61:4;64:19; 65:1;74:6,22; 100:24;104:15; 116:5;117:1,15; 118:4	vast (4) 46:3;48:24;64:12; 78:9
transcript (1) 12:12	turned (1) 62:9	undercapitalized (3) 42:7;101:23; 102:13	upon (10) 26:8;33:24,25; 49:15;57:18;73:20; 99:11;102:8;105:8; 117:17	vastly (1) 64:18
transfer (2) 109:17;117:7	Turning (3) 36:11;92:15;99:2	undercuts (1) 81:18	upside (1) 34:6	VCs (1) 108:4
transform (1) 104:25	turns (1) 31:15	undermined (1) 72:4	urge (4) 30:4;60:12;78:19; 115:14	vehicles (1) 107:23
transitions (1) 76:16	twelve-and-a-half (1) 71:2	undermines (1) 68:20	urging (2) 75:23;79:5	vendor (4) 63:20;64:6; 104:23;113:5
treat (1) 71:17	twenty (2) 89:18;113:8	understandable (1) 50:8	use (11) 17:6;27:20;29:9; 30:12;44:24;45:2; 56:6;58:15;65:24; 69:19,22	vendors (3) 18:25;44:23;46:5
treated (5) 16:16;83:9;85:19; 101:18;109:5	two (33) 12:16;13:21;20:8; 23:1,25;23;38:6; 39:4;46:24,25;56:9; 66:19;68:16,16,23; 72:4;74:21;75:9; 80:10;87:11;88:4,5; 91:9;92:17;95:17, 23;99:7;100:25; 104:6,18,20;106:22; 110:19;116:25	understated (1) 52:25	used (18) 25:20;42:11;46:4; 51:3;55:5,8;64:24, 24;65:4,12,13,16; 66:1;69:15;70:5,19; 71:7;85:11	venture (13) 35:9;39:19;62:25; 66:18;67:5;107:16, 17,23;108:1,2,3,6,9
treatment (3) 16:9,10,11	type (2) 57:6;95:9	understood (10) 33:19;34:13,14; 35:8,15;40:11,20; 55:23;117:24; 118:15	using (3) 20:8;77:15,20	version (2) 27:13;75:13
tremendous (1) 35:10	types (1) 77:3	undertake (1) 84:20	usually (1) 101:9	versus (3) 16:5;81:19;102:19
trial (1) 103:2	typical (2) 15:9;72:16	underway (1) 49:6	utmost (1) 93:2	viability (3) 42:10;70:22;76:18
trick (1) 30:19	Tyson (1) 12:18	unfair (3) 97:14;98:16;99:1	utility (1) 106:13	view (3) 17:15;42:20;49:13
trickles (1) 31:6		unfairness (1) 97:4	valid (3)	viewed (7) 17:20;25:11; 99:21;100:15;101:7, 15;108:7
tried (2) 51:22;87:24		unfunded (1) 58:24		violated (1) 44:3
triggered (1) 72:21		UNITED (3) 11:12,13;91:22		violation (1) 86:15
trio (1) 92:24	U	unjustifiable (3) 45:11,11;47:3	V	virtual (1) 60:13
triply (1) 82:6	UCC (1) 81:3	unjustifiably (5) 92:22;93:7,18; 94:2,13	Va (1) 91:22	virtually (1) 79:22
troubling (1) 88:10	ultimate (4) 33:23;96:18; 99:12;100:5	unless (6) 30:22;35:15; 42:21;45:20;59:19; 97:13		virtue (4) 36:24,25;64:19;
true (19)	ultimately (10) 37:13;70:8;73:19; 93:13;100:17,20;	unlike (4)		

AMERICAN BANKRUPTCY INSTITUTE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

65:10 voice (1) 12:7 void (1) 117:9 volunteer (1) 31:9	West (1) 7:20 Westlaw (1) 83:1 what's (5) 18:19;19:10; 40:25;89:5,16 whereas (2) 36:13;100:22 Whereupon (1) 118:19 whole (3) 50:9;88:12;118:8 who's (1) 67:10 whose (2) 63:20;64:7 who've (1) 82:15 Wiles (4) 82:23;83:2,25; 86:16 Wiles' (1) 101:2 willing (2) 32:9;112:19 win (1) 111:2 wireless (1) 34:8 wish (1) 118:17 wit (1) 63:11 within (2) 69:24;109:2 without (10) 39:23;40:7,15; 50:1;56:25;60:8; 97:12;98:4;100:11, 24 witnesses (2) 52:9,16 WL (1) 101:2 word (2) 41:8,13 words (2) 72:17;82:22 work (4) 38:8;57:6;66:6,8 worked (2) 51:14;98:16 working (1) 118:2 works (1) 28:16 world (7) 17:18;21:25; 22:10;23:6;51:13; 107:16,16 worthless (1) 101:14	wrote (1) 47:7 Y year (1) 37:5 years (6) 39:16;49:6;71:1; 74:1;82:9,12 Yoga (3) 82:24;86:16;101:2 York (11) 7:5,21;8:5,17;9:6, 15,23;10:5;11:6,16; 90:22 Z zero (1) 29:1 ZUMBRO (1) 9:17 1 1 (3) 35:21;38:12;41:10 1.1 (1) 48:18 1.7 (1) 88:19 10 (1) 58:21 10004 (1) 9:23 10014 (1) 11:16 10017 (1) 9:6 10019 (3) 7:21;8:17;9:15 10036 (1) 8:5 1006 (1) 11:15 10119 (1) 11:6 10131 (1) 98:6 10153 (1) 10:5 10166 (1) 7:5 105 (2) 91:1,11 105a (1) 91:8 10th (5) 77:12;91:12; 101:25;102:9,15 11 (7) 8:4;16:16;35:22;	38:13;95:11,12; 113:20 1121 (1) 13:24 1139 (1) 91:12 1147-1149 (1) 91:12 1169 (1) 107:18 1171 (1) 108:5 1173 (2) 108:6,11 11th (1) 28:14 12 (2) 41:7,12 120 (2) 14:1;28:14 13 (2) 83:2,4 1325 (1) 8:15 14 (3) 75:12,14;119:3 15 (1) 73:14 16 (1) 33:12 169 (1) 97:23 17 (1) 33:12 176 (1) 74:14 18th (3) 22:4,10;46:21 195 (1) 74:14 1979 (1) 102:15 1985 (1) 92:24 19th (1) 8:16 2 2 (1) 18:14 2,000 (1) 52:8 2.2 (1) 28:10 20 (3) 28:15;58:22;91:24 200 (2) 7:4;58:22 2000 (2) 10:14;95:25 20036 (1) 7:13	2004 (3) 95:10,14;103:11 2005 (1) 94:21 2006 (2) 95:24;96:22 2007 (1) 60:5 2008 (1) 93:1 201 (1) 11:14 2010 (3) 107:17,18,20 2011 (2) 91:24,25 2012 (1) 101:5 2014 (1) 91:23 2015 (3) 33:12;38:21;91:13 2016 (6) 83:1;94:20;101:2, 3;102:25;103:4 2018 (3) 18:5;69:25;91:22 2019 (21) 19:10;22:4;33:14, 21;35:9,13,17;36:12, 19;37:5;38:22; 39:13;42:5,11;69:20, 24;70:20;81:5,7,15; 103:15 2021 (2) 21:5;84:6 2023 (4) 82:9;84:6,7;86:21 204 (1) 71:25 2050 (1) 7:12 206 (1) 28:9 209 (1) 28:10 21 (1) 101:3 210 (1) 91:24 211 (2) 28:9;94:20 215 (1) 91:21 222 (1) 94:20 222-223 (1) 91:21 225 (1) 96:22 232 (1) 96:22 24 (2)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

ONEWEB GLOBAL LIMITED, et al.
Main Case No. 20-22437-rdd

July 28, 2020

37:6,6 25 (2) 38:3;50:15 25.9 (4) 50:14,16;55:3,4 250 (1) 7:20 25850 (1) 76:7 26 (1) 81:3 269 (1) 95:25 29 (1) 91:23 2d (3) 60:5;92:24;93:1 2nd (1) 46:23	4:30 (1) 118:19 400 (2) 10:15;50:15 408 (1) 70:1 418 (1) 74:14 420 (1) 92:25 424 (2) 93:1,9 432 (1) 95:24 4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	117:9 551 (2) 116:24;117:6 555 (1) 103:3 55th (1) 7:20 562 (1) 94:20 595 (1) 91:21 599 (1) 102:15	83:1;101:3 9
3	4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	6	9 (2) 18:5;76:7 90 (2) 14:1;55:2 900 (1) 69:11 90067 (1) 10:16 901 (1) 92:24 904 (1) 71:25 905 (2) 94:7;95:2 906 (1) 95:2 916 (1) 72:1
3 (2) 76:3,5 3.4 (2) 22:12,15 30 (1) 14:1 300 (2) 81:19;105:21 300-million-dollar (1) 81:14 31 (1) 26:5 313 (1) 103:10 330 (2) 94:21;95:5 331 (1) 28:11 3335 (1) 11:5 364 (3) 70:14;73:25;94:21 369 (2) 94:21;103:3 376 (1) 95:5 389 (1) 102:15 390 (1) 9:5 392 (1) 102:15 3d (1) 95:24	448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	6842 (1) 34:22 6th (1) 95:25	
4	4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	7	
4 (1) 18:18 4.4 (1) 81:9	4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	70 (1) 81:20 72 (1) 91:23 721 (1) 101:5 724 (1) 117:9 726 (1) 95:25 75 (1) 102:25 767 (1) 10:4 779 (3) 92:23;94:7;95:2 789 (2) 91:12;101:25 7g (1) 27:10	
	4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	8	
	4326 (1) 26:16 4339 (1) 26:16 4346 (1) 27:10 4352 (1) 26:16 448 (1) 95:24 453 (1) 96:21 46 (1) 103:10 46.9 (1) 17:10 471 (1) 101:4 493 (1) 60:5 4th (1) 96:22	8 (3) 76:7,8;119:3 80 (1) 97:23 82 (1) 60:5 825 (1) 9:14 832 (1) 97:23 836-838 (1) 97:23 850 (1) 49:1 86 (1) 60:5 8943849 (2)	

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
	:	
In re	:	Chapter 11
	:	
LATAM Airlines Group S.A., <i>et al.</i> , :	:	Case No. 20-11254 (JLG)
	:	
Debtors. ¹	:	(Jointly Administered)
	:	
-----X	:	

**MEMORANDUM DECISION ON DEBTORS' MOTION FOR AN ORDER (I)
AUTHORIZING THE DEBTORS TO (A) OBTAIN POST-PETITION
FINANCING AND (B) GRANT SUPERPRIORITY ADMINISTRATIVE
EXPENSE CLAIMS AND (II) GRANTING RELATED RELIEF**

APPEARANCES:

CLEARY GOTTlieb STEN & HAMILTON LLP

One Liberty Plaza

New York, New York 10006

By: Lisa M. Schweitzer, Esq.
Jeffrey A. Rosenthal, Esq.
Andrew Weaver, Esq.
Thomas S. Kessler, Esq.
Luke A. Barefoot, Esq.
Lina Bensman, Esq.

Attorneys for the Debtors

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014); Piquero Leasing Limited (N/A); TAM S.A. (N/A); TAM Linhas Aéreas S.A. (65-0773334); Aerolinhas Brasileiras S.A. (98-0177579); Prismah Fidelidade Ltda. (N/A); Fidelidade Viagens e Turismo S.A. (27-2563952); TP Franchising Ltda. (N/A); Holdco I S.A. (76-1530348) and Multiplus Corredora de Seguros Ltda. (N/A). For the purpose of these Chapter 11 Cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
By: Marshall S. Huebner, Esq.
Lara Samet Buchwald, Esq.

Attorneys for Delta Airlines, Inc.

DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
By: Allan S. Brilliant, Esq.
Craig P. Druehl, Esq.
Gary J. Mennitt, Esq.

2929 Arch Street
Philadelphia, PA 19104
By: Michael S. Doluisio, Esq.

Attorneys for the Official Creditors' Committee

QUINN EMANUEL URQUHART &
SULLIVAN LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
By: Susheel Kirpalani, Esq.
Victor Noskov, Esq.

Attorneys for Knighthead Capital Management

WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
By: John K. Cunningham, Esq.
Gregory M. Starnier, Esq.
Joshua Weedman, Esq.
- and -
200 South Biscayne Blvd., Suite 4900
Miami, Florida 33131
By: Richard S. Kebrdle, Esq. (admitted pro hac vice)

Attorneys for the Ad Hoc Group of LATAM Bondholders

HOLWELL SHUSTER & GOLDBERG LLP

425 Lexington Avenue

New York, NY 10017

By: Daniel P. Goldberg, Esq.

Scott Danner, Esq.

Attorneys for the Ad Hoc Group of LATAM Bondholders

WHITE & CASE LLP

1221 Avenue of the Americas

New York, New York 10020

By: Kimberly A. Havlin, Esq.

- and -

Southeast Financial Center

200 South Biscayne Boulevard, Suite 4900

Miami, Florida 33131

By: Thomas Lauria, Esq. (admitted pro hac vice)

Attorneys for the Oaktree Capital Management

ORRICK HERRINGTON & SUTCLIFFE LLP

51 West 52nd Street

New York, New York 10019

By: Raniero D'Aversa, Jr. Esq.

Evan C. Hollander, Esq.

Attorneys for Scotiabank Chile

ALSTON & BIRD LLP

90 Park Avenue, 15th Floor

New York, New York 10016

By: Gerard S. Catalanello, Esq.

Attorneys for Qatar Airways Investments (UK) Ltd.

BALLARD SPAHR LLP

919 N. Market Street, 11th Floor

Wilmington, DE 19801

By: Leslie C. Heilman, Esq.

Laurel D. Roglen, Esq.

- and -

20-11254-jlg Doc 1056 Filed 09/10/20 Entered 09/10/20 15:21:57 Main Document
Pg 4 of 142

1735 Market Street, 51st Floor
Philadelphia, PA, 19103-7599
By: Lindsey Zionts, Esq.

Attorneys for Aero Miami I, LLC

PAUL HASTINGS LLP
200 Park Avenue
New York, New York 10166
By: Pedro A. Jimenez, Esq.

Attorneys to Banco del Estado de Chile, in its capacity as indenture trustee under the Chilean Local Bonds Series A through E issued by LATAM Airlines Group S.A.

WONG FLEMING, P.C.
821 Alexander Road, Suite 200
Princeton, NJ 08540
By: Dafney Dubuisson Stokes

Attorneys for Zendesk, Inc.

OFFICE OF THE UNITED STATES TRUSTEE
201 Varick Street, Suite 1006
New York, New York 10014
By: Brian S. Masumoto, Esq.

Office of the United States Trustee

HONORABLE JAMES L. GARRITY, JR.
UNITED STATES BANKRUPTCY JUDGE:

INTRODUCTION

The Debtors collectively are Latin America's leading airline group. The impact of the COVID-19 pandemic on their business was immediate and devastating. In a matter of weeks they suffered the loss of 95% of their passenger business in the wake of COVID-related restrictions on flying throughout Latin America. They commenced their Chapter 11 cases in late May. The matter before the Court are the Debtors' Motions for approval of a \$2.45 billion DIP Credit Agreement provided by Oaktree Capital Management Inc. ("Oaktree"), as Tranche A Lender,² and Qatar Airways Investments (U.K.) Ltd and Costa Verde Aeronautica S.A., as Tranche C Lenders. Oaktree had no relationship with the Debtors prior to signing onto the Tranche A Loan. Its involvement in this matter is non-controversial. It has agreed to make a \$1.3 billion senior secured loan as part of the proposed DIP Facility. The Tranche C Lenders are two of the Debtors' largest shareholders. Together they hold approximately 21% of the Debtors' common stock. When the holdings of their affiliates are accounted for, they hold over 32% of the stock. The Tranche C loan is a \$900 million first loss, undercollateralized junior loan.

The Committee, the Ad Hoc Group of bondholders, and Knighthead (all as those terms are defined below) object to the Tranche C DIP Facility. In substance, they assert that the shareholders are getting a "sweet" deal because they are the Debtors' largest shareholders and that the Court should deny the motion on the grounds that the Debtors have not demonstrated the "entire fairness" of the Tranche C "insider" loan. They say that the loan is overpriced and that it is not the product of good faith, arm's length negotiations. Part of their concern is that the

² Capitalized terms used but not defined in this Introduction are defined in later sections of this decision.

Tranche C DIP Facility provides the Debtors – at their option – with the right to compel the Tranche C Lenders to subscribe to restricted equity in the reorganized Debtor at a 20% discount to plan value. The Debtors say that this Modified Equity Subscription Election (as defined below) is a valuable asset for them, especially if they do not have the cash to pay off the Tranche C DIP Facility at the end of the case. The Objectors (defined below) contend that the election is really a means for the Debtors’ major shareholders to ensure that they will retain their equity interests in the reorganized Debtors at the potential expense of unsecured creditors. They also assert, in any event, that the Court should reject the DIP Credit Agreement as running afoul of the absolute priority rule and the bar to “sub rosa” plans.

In late July, the Court conducted a two-day evidentiary hearing on the Motions. In early August, the Court heard argument on the motion. For the reasons set forth herein, the Court finds that the Debtors have met their burden of proving that the DIP Financing satisfies the “entire fairness” test and that there are grounds under section 364(c) to authorize the Debtors to enter into the DIP Credit Agreement. Further, they have demonstrated that the Tranche A and Tranche C Lenders are entitled to a “good faith” finding under section 364(e) of the Bankruptcy Code. However, the Court finds that Modified Equity Subscription Election gives rise to improper sub rosa plan treatment of the Tranche C Lenders and the Debtors’ equity holders. For that reason, the Court will not approve the DIP Financing.

JURISDICTION

This Court has jurisdiction to consider this matter pursuant to sections 1334(a) and 157(a) of title 28 of the United States Code, and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b).

FACTS**Background**

LATAM Airlines Group, S.A. (“LATAM Parent” or the “Company”) is a publicly traded company in Chile. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶¶ 5, 14.³ On May 26, 2020 (the “Initial Petition Date”), LATAM Parent and certain of its affiliates (the “Initial Debtors”) filed voluntary petitions under chapter 11 of the Bankruptcy Code in this Court (the “Initial Chapter 11 Cases”). On July 7, 2020 and July 9, 2020 (as applicable to each Subsequent Debtor, the “Subsequent Petition Date” and, together with the Initial Petition Date, as applicable to each Debtor, the “Petition Date”), additional LATAM affiliates (the “Subsequent Debtors” and with the Initial Debtors, the “Debtors”) filed voluntary petitions under chapter 11 of the Bankruptcy Code (the “Subsequent Chapter 11 Cases” and together with the Initial Chapter 11 Cases, the “Chapter 11 Cases”).⁴ The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.⁵ On June 5, 2020, the United States Trustee for Region 2 appointed an official committee of unsecured creditors (the “Committee”). No trustee or examiner has been appointed in these Chapter 11 Cases.

³ *See* Trial Ex. 141 (Declaration of Ramiro Alfonsin Balza In Support of First Day Motions and Applications in Compliance With Local Rule 1007-2 [ECF No. 3], the “First Alfonsin Declaration”).

⁴ All of the Debtors are direct or indirect subsidiaries of LATAM Parent. *See* Trial Ex. 267 (Second Declaration of Ramiro Alfonsin Balza In Support of the Subsequent Chapter 11 Cases [ECF No. 483], the “Second Alfonsin Declaration”), Schedule 1.

⁵ The Chapter 11 Cases are jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Bankruptcy Rules and the Order Authorizing Joint Administration of the Debtors’ Chapter 11 Cases [ECF No. 34] entered by the Court in each of the Chapter 11 Cases. *See also* Order Authorizing Joint Administration of the Debtors’ Chapter 11 Cases [ECF No. 511].

LATAM⁶ is primarily involved in the air transportation of passengers and cargo. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 5. It is Latin America's leading airline group, with a history extending back ninety years, and boasting one of the largest route networks in the world. *Id.* ¶ 2. It is the largest passenger airline carrier group in South America, and, measured by passengers carried, it is the fourteenth-largest airline group in the world. *Id.* ¶¶ 2, 5.⁷ Prior to flight disruptions occasioned by the COVID-19 pandemic, LATAM had a total fleet of 340 aircraft (comprised of aircraft operated by LATAM and aircraft that are leased to third parties), and offered passenger transportation services to 145 different destinations in twenty-six countries, including domestic flights in Argentina, Brazil, Chile, Colombia, Ecuador and Perú and international services within Latin America as well as to the United States, Europe, the Caribbean, Oceania, Asia and Africa. *Id.* ¶¶ 3, 16-17.⁸

⁶ LATAM Parent, and its debtor and non-debtor subsidiaries and affiliates are collectively referred to as "LATAM."

⁷ Latin America is comprised of a diverse set of countries with separate aeronautical regulators, route rights, employment legislation, corporate legislation and tax regulation. LATAM is a group of airlines with different Air Operator Certificates operating under the unified brand "LATAM." Trial Ex. 141 (First Alfonsín Decl.) ¶ 4. Under this structure, LATAM has access to six domestic markets and flies from South America to five continents. *Id.*

⁸ The Debtors also have sought and obtained relief in certain non-U.S. jurisdictions. In particular:

On May 27, 2020, the Grand Court of the Cayman Islands granted the applications of certain of the Debtors for the appointment of provisional liquidators pursuant to section 104(3) of the Companies Law (2020 Revision).

On June 4, 2020, the 2nd Civil Court of Santiago, Chile issued an order recognizing the Chapter 11 proceeding with respect to the LATAM Airlines Group S.A., Lan Cargo S.A., Fast Air Almacenes de Carga S.A., Latam Travel Chile II S.A., Lan Cargo Inversiones S.A., Transporte Aéreo S.A., Inversiones Lan S.A., Lan Pax Group S.A. and Technical Training LATAM S.A.

On June 15, 2020, the Superintendence of Companies of Colombia granted the recognition to the Chapter 11 proceedings.

See Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 397] (the "First DIP Motion").

Prepetition Capital Structure

The Debtors' capital structure includes a secured revolving credit facility, a series of local unsecured bank loans, series of unsecured international bonds,⁹ series of domestic Chilean bonds,¹⁰ and a series of financings related to the acquisition of the Debtors' fleet. *See id.* ¶¶ 42, 51-56; Trial Ex. 267 (Second Alfonsín Decl.) ¶¶ 12-21. As of the Petition Date, LATAM had a total of \$7,637 million in financial debt obligations. *See* Trial Ex. 267 (Second Alfonsín Decl.) ¶ 12. In addition, as of the Petition Date, the Debtors had letters of credit outstanding of approximately \$562 million. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 57; Trial Ex. 267 (Second Alfonsín Decl.) ¶ 21.

Equity Structure

The Cueto family is the Company's largest shareholder. It beneficially owns 21.46% of the common shares through a series of companies (collectively, the "Cueto Group"). *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 58. Additionally, the Cueto Group, through entities it controls, is party to a shareholder agreement (the "Cueto-Amaro Agreement") with TEP Chile S.A (the "Amaro Shareholder"), an entity controlled by the Amaro family, which holds just under 2% of the shares of LATAM Parent. Pursuant to the Cueto-Amaro Agreement, the Cueto Group and

⁹ The Debtors identify those bonds as the "LATAM 2024 Bonds" and the "LATAM 2026 Bonds." Pursuant to the indenture dated April 11, 2017, by and among Debtor LATAM Finance Limited ("LATAM Finance") as issuer, LATAM Parent as guarantor and the Bank of New York Mellon Corporation ("BNYM") as Trustee, Registrar Transfer Agent and Paying Agent, LATAM Finance sold 6.875% senior, unsecured notes due April 2024 in principal amount of \$700 million (the "LATAM 2024 Bonds"). Pursuant to the indenture dated February 11, 2019, by and among Debtor LATAM Finance as issuer, LATAM Parent as guarantor and BNYM as Trustee Registrar, Transfer Agent and Paying Agent, LATAM Finance sold 7% senior, unsecured notes due March 2026 in the principal amount of \$800 million (the "LATAM 2026 Bonds"). *See* Trial Ex. 141 (First Alfonsín Decl.) ¶¶ 47-48.

¹⁰ On August 17, 2017, LATAM Parent, as issuer, sold Chilean bonds on the Santiago Stock Exchange in an aggregate principal amount of approximately \$311.5 million (the "Local Bonds"). The Local Bonds originally consisted of four series (the "Series A Local Bonds", the "Series B Local Bonds", the "Series C Local Bonds", and the "Series D Local Bonds"). On July 6, 2019, LATAM Parent issued an additional series of the Local Bonds (the "Series E Local Bonds") for an aggregate principal amount of approximately \$179.0 million. The Local Bonds are Chilean law-governed. *Id.* ¶ 49.

the Amaro Shareholder have agreed to “vote together to elect individuals to our board of directors” and collaborate to reach joint agreement on “all actions to be taken by our board of directors or [at a] shareholders’ meeting”, including any decisions of the company requiring a super-majority vote under Chilean law.¹¹ Costa Verde Aeronáutica S.A. (“Costa Verde”) is part of the Cueto Group. It owns 11.19% of LATAM Parent. *See* Corporate Ownership Statement at 8.¹² Juan José Cueto, is Chairman of Costa Verde.¹³ Until on or about April 1, 2020, he was also a member of the Company’s nine-member board of directors (the “Board”). *See* LATAM 6-K (Apr. 2, 2020). Until March 31, 2020, Enrique Cueto served as CEO of LATAM and its predecessors for the last 25 years. *See* Annual Rpt. at 71. He replaced Juan Cueto on the Board. He and Ignacio Cueto serve respectively as the Chairman and Vice Chairman of the Board. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 58.¹⁴ The Cueto Group is entitled to designate three of the nine members of the Board. *See* Annual Rpt. at 78. The group’s current board representatives are Chairman Ignacio Cueto, Vice-Chairman and former CEO Enrique Cueto, and Henri Philippe Reichstul.¹⁵

Delta Airlines, Inc. (“Delta”) is LATAM Parent’s second largest shareholder. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 59. It holds approximately 19.99% of LATAM Parent’s

¹¹ *See* LATAM Airlines S.A., Amendment No. 6 to Form F-4 (Form F-4) at H-i (May 7, 2012).

¹² *See* Corporate Ownership Statement Pursuant to Federal Rules of Bankruptcy Procedure 1007 and 1007.1 [ECF No. 1] (the “Corporate Ownership Statement”).

¹³ *See* LATAM Airlines Group S.A., Annual Report (Form 20-F) at 72 (March 18, 2020) (the “Annual Report”).

¹⁴ Currently, the members of the Board are: (i) Ignacio Cueto, Chairman; (ii) Enrique Cueto, Vice Chairman; (iii) Giles Agutter; (iv) Nicolás Eblen; (v) Patrick Horn; (vi) Eduardo Novoa; (vii) Enrique Ostalé; (viii) Henri Philippe Reichstul; and (ix) Sonia Villalobos. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 34.

¹⁵ *See* Press Release: Shareholders Meeting (April 30, 2020), available at: www.latamairlinesgroup.net/news-releases/news-release-details/shareholders-meeting-10.

common stock. *Id.*; *see also* Delta Statement ¶ 6, Ex. 4.¹⁶ Delta obtained its equity stake pursuant to a \$1.9 billion tender offer, which closed in December of 2019. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 59. That transaction was memorialized pursuant to a Framework Agreement between the Company and Delta. *Id.* This agreement also contemplated certain codeshare and joint venture agreements with LATAM Parent’s subsidiaries. *Id.* In May of 2020, Delta and LATAM signed a Trans-American Joint Venture Agreement that, pending regulatory approvals, will combine the routes of the two airlines between North and South America. *Id.* In November of 2019, Delta and LATAM entered into an Aircraft Purchase Agreement by which Delta committed to purchase four A350 airplanes from LATAM. That agreement was terminated on May 25, 2020, the day before the Initial Chapter 11 Cases were filed. *See id.* ¶ 41 n.20; *see also* 7/29/20 Hr’g Tr. at 103:12-106:12. In exchange for termination of the Aircraft Purchase Agreement, Delta agreed to pay LATAM \$62 million and not to terminate the Framework Agreement or JV Agreement (in the event that LATAM were to file for chapter 11), provided that LATAM would assume the Delta Framework Agreement and JV Agreement (the “Assumption Commitment”) in the bankruptcy case, within certain timeframes. *See id.* *See also* Jacobson Dep. Tr. at 96:3-6; 7/29/20 Hr’g Tr. at 103:12-106:12.¹⁷ Delta is entitled to designate two members of the Board. *See* Delta Statement ¶ 9.¹⁸

¹⁶ *See* Statement of Delta Air Lines, Inc. In Support of the Debtors’ Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense and (II) Granting Related Relief [ECF No. 669] (the “Delta Statement”), Ex. 4 (Delta Air Lines, Inc., Schedule 13-D, dated Jan. 6, 2020 (describing tender offer that expired on December 26, 2019, and identifying Delta’s holdings as 121,281,538 of 606,874,525 shares of LATAM Parent’s common stock, or a 19.9984615% stake)).

¹⁷ As noted below, section 6.15 of the DIP Credit Agreement (as filed in the First DIP Motion) contained a “Delta Covenant,” which requires the entry of an order approving the assumption of the Delta Framework Agreement and JV Agreement within 105 days of the Petition Date. This timeframe was subsequently revised to November 7, 2020. The failure to comply with this covenant constitutes an Event of Default under the Revised Credit Agreement (as defined below).

¹⁸ *See also* Alfonsín Dep. Tr. at 46:10-23.

As of April 30, 2020, Chilean pension funds and Qatar Airways Investments (UK) Ltd. (“Qatar”) held 15.26% and 10%, respectively, of LATAM Parent’s common stock. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶¶ 60-61.¹⁹ Qatar is the Company’s second largest corporate shareholder and is permitted to nominate one director to LATAM Parent’s Board. *See* Annual Rpt. at 78.²⁰ The three remaining major shareholder groups are: (i) Andes SpA, Inversiones Andres II SpA, Inversiones PIA SpA and Comercial las Vertientes SpA (collectively, the “Eblen Group”) (ii) Axxion S.A. and Inversiones HS SpA (the “Bethia Group”) and (iii) the Amaro Shareholder. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 61. As of April 30, 2020, the Eblen and Bethia Groups held 4.56% and 4.23% of the Company’s common shares, respectively. The Amaro Shareholder held 1.98% of the shares. *Id.* As of April 30, 2020, there were over 1,000 record holders of the Company’s common shares, representing the remaining 18.69% of the equity interest. *Id.* ¶ 62.

Patrick Horn (“Horn”) and Eduardo Novoa Castellon (“Novoa”) are two of the independent members of the Board. Horn is a member of the Economic Council of the Universidad de los Andes with more than 35 years’ experience as an executive. Novoa serves on the board of directors of several companies and was a professor of Finance and Economics at Universidad de Chile and other universities. They have served on the Board since April 2019 and April 2017, respectively. Each was nominated by the Company’s pension group. *See* 7/29/20 Hr’g Tr. at 94:20-24.²¹ The Board has a standing Directors and Audit Committee (the

¹⁹ *See* Press Release: Shareholders Meeting (April 30, 2020), available at: www.latamairlinesgroup.net/news-releases/news-release-details/shareholders-meeting-10.

²⁰ That member is currently Mr. Giles Agutter.

²¹ *See* LATAM Airlines Group S.A., Registration Statement Pursuant to Section 12(b) or (g) of the Securities Exchange act of 1934 (Form 20-F) at 72–73 (Mar. 18, 2020); Eduardo Novoa Castellón profile on LATAM: <http://www.latamairlinesgroup.net/board-member/eduardo-castellon>; Patrick Horn profile on LATAM: <http://www.latamairlinesgroup.net/board-member/patrick-horn>. *See also* 7/29/20 Hr’g Tr. at 37:4-13.

“Directors Committee”) whose purpose is, among other things, to examine related-party transactions brought for Board approval. Horn and Novoa (each an “Independent Director”) sit on that committee with Nicolas Eblen Hirmas. Novoa is the Chairman of the committee.

Company Operations

Over the past decade, LATAM has experienced increasing economic growth and continued to expand its operations throughout the world. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 25. In 2019, LATAM employed approximately 42,000 people worldwide, in the operation of its eight passenger and three cargo airline entities.²² It operated approximately 1,400 flights per day, transported seventy-four million passengers per year and 900,000 tons of cargo per year. *Id.* ¶¶ 2, 22. It generated over \$10 billion in revenues and over \$1 billion of operating cash flow after investments. *Id.* ¶ 3. Its success in 2019 added to a string of three consecutive years of net profits and over \$1 billion of operating cash flow after investments. *Id.* ¶ 6. While the majority of LATAM’s revenues have traditionally come from its passenger airline services, LATAM integrates its passenger network with exclusive cargo destinations to offer cargo-related services to 151 destinations in twenty-nine countries. *Id.* Revenue from the passenger business primarily consists of ticket sales, along with ancillary revenue associated with, for example, passenger baggage fees, lounge passes and/or in-flight purchases. *Id.* ¶ 24.

²² The Debtors include:

Six of LATAM’s eight main passenger airline entities: (i) LATAM Parent, (ii) Transporte Aéreo S.A.; (iii) LATAM Airlines Perú S.A.; (iv) LATAM-Airlines Ecuador S.A.; (v) Aerovías de Integración Regional, Aires S.A. (incorporated in Columbia), and (vi) TAM Linhas Aéreas S.A. (incorporated in Brazil).

LATAM’s three cargo airline entities: (i) Lan Cargo, a company incorporated in Chile, (ii) Línea Aérea Carguera de Colombia S.A., a company incorporated in Colombia, and (iii) Aerolinhas Brasileiras S.A., a cargo company incorporated in Brazil.

Passenger revenue comprised approximately 89% of LATAM's revenue in 2019, while cargo revenues accounted for approximately 11% of LATAM's revenue. *Id.*

At the beginning of 2020, LATAM viewed itself as financially and operationally one of the strongest airline groups in Latin America and poised to continue its upward trajectory, projecting growth in all of its passenger segments, as well as its cargo business. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 64. However, the landscape changed on March 11, 2020, when the World Health Organization declared the widespread outbreak of the novel coronavirus a global pandemic. In the wake of that announcement, countries around the world, including each of those in which the Debtors have their primary operations, announced severe travel restrictions and/or outright closure of their borders. *Id.* ¶ 65. The International Air Transport Association estimated that by April 1, 2020, customers living in countries with severe travel restrictions accounted for 98% of global passenger revenue, and that two-thirds of the world's overall fleet (i.e., more than 8,500 passenger aircraft) had been grounded as a result. *Id.* Air travel generally declined 41% and 60% from levels in 2019 in March and April 2020, respectively. *Id.* Closer to home, LATAM's passenger operations were severely curtailed in the countries where it operates. *Id.* ¶ 66.²³ Beginning in late April of 2020, LATAM's passenger flights were limited to domestic

²³ The Debtors explain that as of the Initial Petition Date:

Argentina suspended air travel for seven months until September.

Colombia restricted domestic flights for four months until the end of June, and restricted international flights for six months until the end of August.

Perú had not provided a clear date for lifting the travel restrictions in place, involving both domestic and international travel.

The U.S. government announced it would deny entry to non-citizens who had traveled to Brazil within fourteen days of seeking entry into the United States.

Ecuador suspended flights for approximately three months until the beginning of June.

Trial Ex. 141 (First Alfonsín Decl.) ¶ 66.

flights in Chile and Brazil and international flights to Miami, which reflect only roughly 4% of LATAM's routes prior to the COVID-19 crisis. *See id.* ¶ 67.²⁴

In substance, the Debtors say that in response to the near cessation of its passenger service, they developed a business strategy that focused on preserving cash, promoting liquidity and seeking new sources of financing in an effort to avoid bankruptcy, while simultaneously assessing LATAM's financing needs in an in-court or out-of-court restructuring, and identifying sources of such financing.

In an effort to reduce costs and preserve liquidity, LATAM (a) deferred or cancelled approximately \$900 million in investments, (b) worked to postpone delivery of new planes for its fleet, and (c) implemented internal cost-cutting measures, including consensual salary reductions of 50% through June for employees, while guaranteeing double the minimum wage in each country. *Id.* ¶ 70. It also implemented a broad early retirement and unpaid leave program, involving 1,800 employees, and has engaged in targeted reductions in its workforce. *Id.* By April of 2020, in response to the precipitous decline in demand for air travel, LATAM reduced its passenger capacity by 95%. *Id.* ¶ 67; *see also* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 5.²⁵ In May of 2020, LATAM laid off 1,850 of its employees. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 70. In the weeks prior to the Initial Petition Date, LATAM successfully negotiated payment plans and payment deferrals with over 500 creditors and counterparties resulting in payment deferrals and payment plans of approximately \$500 million worth of payments throughout the

²⁴ LATAM's cargo operations largely have been unaffected by the COVID-19 pandemic. Indeed, cargo operations have increased in recent months, including to provide much needed medical and other critical supplies to areas affected by the pandemic. *Id.* ¶ 69.

²⁵ *See* Trial Ex. 293 (Supplemental Declaration of Ramiro Alfonsin Balza In Support of Debtors' Motion of an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 671], the "Alfonsin Supplemental Declaration").

first three quarters of this year. *Id.* ¶ 71.²⁶ While it was implementing the cost saving measures, LATAM reached out to government representatives in Chile, Brazil, Peru and Columbia in an effort to obtain financing or other governmental support similar to that received by other airlines around the world. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 6. In doing so, it reasoned that it was in the governments' interests to provide financial assistance given the importance of the airline industry and LATAM's continued operations to the countries' economies, LATAM's economic situation, and the urgent need of that support. *See* Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 19.²⁷ To date, those efforts have proved futile, as no governmental authority has offered to provide financial assistance to LATAM. *Id.*²⁸

**The Company Retains Restructuring Advisors
And Explores Restructuring Alternatives**

In April of 2020, LATAM retained Cleary Gottlieb Steen & Hamilton, LLP (“Cleary Gottlieb”) as restructuring counsel and Evercore Group LLC (“Evercore”), an independent investment banking advisory firm, to assist it in developing strategic in-court and out-of-court

²⁶ Notwithstanding the implementation of those cost-savings and liquidity preserving measures, LATAM's liquidity position continued to deteriorate and, to preserve their assets, the Debtors filed the Chapter 11 Cases. *See* Trial Ex. 141 (First Alfonsin Decl.) ¶ 73 (Debtors filed the cases “in order to, among other things, prevent the exercise of remedies against the Debtors' assets, including their fleet, that could otherwise result from the Debtors' inability to pay certain of their debts.”).

Partially as a result of the various liquidity preserving measures, as of the Initial Petition Date, the Debtors had \$707 million in cash and cash equivalents, while LATAM as a whole had approximately \$1.2 billion in cash and cash equivalents. *See* Trial Ex. 141 (First Alfonsin Decl.) ¶ 42.

²⁷ *See* Trial Ex. 242 (Declaration of Ramiro Alfonsin Balza In Support of Debtors' Motion For an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 399], the “Alfonsin DIP Declaration”).

²⁸ The Debtors contend that throughout those discussions, government authorities made it clear that they expected shareholders to be involved in any company financing or restructuring. *See* Trial Ex. 293 (Alfonsin Suppl. Decl.) ¶ 6. More specifically, Alfonsin explained that certain governments have indicated to LATAM that shareholders must support the Company and provide liquidity if any governmental assistance is to be granted. *See* 7/29/20 Hr'g Tr. at 135:14-138:10. However, Alfonsin also testified that he had not personally discussed LATAM's DIP financing with any particular government, nor did any particular government indicate that it would not support a DIP financing provided by non-shareholder, third-party lenders. *See id.*

alternatives to address LATAM's "cash burn and deteriorating liquidity position." By mid-April of 2020, Ramiro Alfonsín Balza ("Alfonsín"), LATAM Parent's Chief Financial Officer, and his management team began working with Cleary Gottlieb and Evercore to analyze the funding requirements necessary for LATAM to accomplish its restructuring objectives – either in-court or out-of-court – and to maintain its operations and the available options to obtain such financing. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 7. In exploring the viability of an out-of-court restructuring, management reached out to the Company's lessors and vendors in an effort to renegotiate contracts, with the goal of improving the Company's liquidity position. *Id.* The enormity of that challenge was readily apparent to management as it would have to reach new or amended agreements with all the relevant counterparties in a compressed period of time. *Id.* In analyzing LATAM's financing requirements, Alfonsín and his team considered, among other things:

The minimum liquidity needs of the Debtors, and also for the LATAM group as a whole, given that the strength of LATAM's business derives from its pan-Latin America operations and its ability to such services, originating from its Debtor and non-Debtor affiliates to its worldwide passenger and cargo customers;

The fact that the company faces significant uncertainty about future revenues and cash flows until the COVID-19 pandemic allows it to return to its normal operations; and

The company's need to ensure sufficient liquidity is available in order to take advantage of opportunities to increase its operations as restrictions ease and passenger travel increases.

See Trial Ex. 242 (Alfonsín DIP Decl.) ¶¶ 15-16.²⁹

²⁹ *See* Trial Ex. 243 (Declaration of Timothy R. Coleman In Support of Debtor's Motion For An Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 398], the "First Coleman Declaration").

April 30 Board Meeting

On April 30, 2020, after spending three weeks performing “extensive diligence and analysis to understand [the Company’s] business model, liquidity position and go-forward optionality[.]” Evercore and Cleary Gottlieb made a presentation to the Board regarding the in-court and out-of-court restructuring alternatives available to the Company. *See* Trial Ex. 24 (April 30 Board Discussion Materials). In the materials, the advisors noted that the Company was contemplating two paths forward: an out-of-court consensual restructuring transaction (“C.1”), and a court - led process to right size the Company’s balance sheet to meet the go-forward business plan (“C.2”). *Id.* at 5. They explained that the purpose of their presentation “was to provide an overview and comparison of C.1 and C.2 in the subsequent sections to address the Company’s potential strategic pathways and the associated timing of each[.]” *Id.* The materials included an “Overview of U.S. Chapter 11 Process,” and a specific discussion around an in-court Company restructuring. *See id.* at 12-14; 16-24. The discussion of the Chapter 11 Process included a “Debtor in Possession Financing Overview” in which the advisors identified “typical sources” of such financing to include prepetition lenders, third parties specializing in such financing and governmental entities. *Id.* at 14. In describing “Potential Alternatives” for Debtor-in-Possession financing, the advisors laid out a three-tier structure where “equity also may participate on a junior basis” and noting that repayment of the most junior tier indebtedness required “[f]lexibility to take different types of consideration” including “rights offering[s]” and “convertible debt.” *Id.* at 17. They noted that among the “Considerations” for the Board in assessing the merits of a restructuring under chapter 11 was that it was “[l]ikely that existing equity will not have a material recovery,” and that “[e]quity upside in the emerging company will require new capital.” *Id.* at 18.

Directors Ignacio and Enrique Cueto attended the meeting, together with the directors designated by Delta, Qatar and the Eblen family. *See* Trial Ex. 26 (Minutes of the Extraordinary Board Meeting No. 154 of the LATAM Board of Directors, dated 4/30/2020), at 18-19. Representatives of Delta and Costa Verde obtained copies of the April 30 Board Discussion Materials. Paul Jacobson (“Jacobson”) is Delta’s Chief Financing Officer. According to Jacobson, Delta criticized the presentation because “[it] didn’t seem to take into account other alternatives” and did not “qualify as good advice to LATAM.” *See* Jacobson Dep. Tr. at 65:2-8. He says that “Delta made [that] known to LATAM.” *Id.*

The Company Retains PJT Partners

PJT Partners LP (“PJT”) is a global advisory-focused investment bank. The services it provides includes acting as advisor to companies, creditors and financial sponsors in restructurings and bankruptcies. Timothy R. Coleman (“Coleman”) is a Partner and Global Chairman of the Restructurings and Special Situations Group at PJT. He has known Jacobson since 2004, when Coleman (not then with PJT) worked for Delta on its own restructuring. *Id.* at 64:18-25, 67:4-12, 110:9-18; *see also* Coleman Dep. Tr. at 26:8-20; 29:2-9. After discussing the situation with Coleman, Jacobson asked Coleman if PJT could represent Delta in the LATAM matter. *See* 7/29/20 Hr’g Tr. at 233:25-234:3. Coleman had to decline due to a conflict. Thereafter, Jacobson asked Coleman if PJT was able to represent LATAM. *See id.* at 234:4-11. *See also* Jacobson Dep. Tr. at 108:3-18-109:3. After Coleman cleared conflicts, Jacobson recommended PJT to LATAM. *See* 7/29/20 Hr’g Tr. at 234:19-22. Thereafter, LATAM, through Alfonsín, terminated Evercore, and retained Coleman and his team at PJT, effective May 7, 2020. *See* 7/29/20 Hr’g Tr. at 113:21-114:13; Trial Ex. 43 (Minutes of the Ordinary Session No. 454 of the LATAM Board of Directors, dated 5/12/2020), at 1 (noting that changing

Evercore was “mainly due to issues of coordination and agility in the consultancy”). *See also* Jacobson Dep. Tr. at 108:24-109:3; Coleman Dep. Tr. at 29:2-9 (Coleman’s first conversation regarding the LATAM engagement was with Jacobson at Delta).

The Company Determines That Bankruptcy Filing Is Probable And Begins To Explore Sources For DIP Financing

May 12 Board Meeting

PJT was introduced to the Board at the May 12 Board meeting. PJT included the concept of a shareholder funded DIP in the materials that it presented at the May 12 Board meeting. *See* Trial Ex. 39 (LATAM Board of Directors Discussion Materials, dated May 12, 2020, the “May 12 Presentation”). Those materials included a slide titled “Illustrative DIP Approach.” *Id.* at 8. Among the “Considerations” noted by PJT in that slide were “Potential DIP sources, 3rd party investors, government, existing shareholders.” *Id.* The minutes of the meeting reflect that Brent Herlihy of PJT addressed the Board on matters relating to DIP financing. *See* Trial Ex. 43 (Minutes of the Ordinary Session No. 454 of the LATAM Board of Directors, dated 5/12/2020), at 14. Referring to the May 12 Presentation, Mr. Herlihy noted that “[w]ith regard to DIP financing, it explains that the size must be determined, against what loans can be made, what the sources are – potential third parties, shareholders, or governments or combinations of the three of them – how it is properly structured if there are three types of collateral with different interests and different approaches towards the exit . . .” *Id.*

May 16 Meeting With Members of the Cueto Family

On May 16, 2020, PJT attended a meeting with members of the Cueto family and senior executives at LATAM. *See* Trial Ex. 46 (Meeting/Call invitation), at 1; *see also* Coleman Dep. Tr. at 54:2-16. For that meeting, PJT prepared and delivered a slide presentation titled:

“Illustrative Capital Structure Before, During and After Ch. 11.” *See* Trial Ex. 47 (Coleman Email to Alfonsín), at 2-3. The presentation illustrated how a \$2 billion DIP financing “equally split” into two tranches, one of which would be “equitized at plan value” at emergence, could result in the existing equity holders, as lenders to that tranche, receiving either 60% or 100% of the equity in the reorganized LATAM at emergence from chapter 11. *See id.*; *see also* Coleman Dep. Tr. at 63:6-23 (stating that purpose was to explain to the Cueto family that, depending on plan valuation, either “they would have 60 percent of the equity” or they “could end up with a hundred percent of the equity”). PJT shared the presentation with Alfonsín in advance. *See* Trial Ex. 47 (Coleman Email to Alfonsín), at 1.

May 19 Board Meeting

By the time of the May 19 Board meeting, the Company and its advisors had developed a three-tier DIP structure in which the first tranche (Tranche A) would be provided by commercial banks and guaranteed by the Chilean government, the second tranche (Tranche B) would be provided by shareholders, and the third tranche (Tranche C) would be provided by third-party capital providers or financial institutions. *See* Trial Ex. 54 (Extraordinary Board Meeting Minutes No. 156, dated May 19, 2020), at -517; *see also* Trial Ex. 53 (External Advisors’ Discussion Materials Presentation, dated May 19, 2020), at -663 to -664.

The Company Seeks Shareholder DIP Financing

Despite the Company’s best efforts, “LATAM’s liquidity position continued to deteriorate in the wake of the COVID-19 pandemic, necessitating the commencement of the Chapter 11 Cases.” Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 11; *see also* Ex. 141 (First Alfonsín Decl.) ¶¶ 70-71 (detailing measures taken to “protect the company, continue operations and meet its commitments to its employees, customers, and other stakeholders”). Prior to the filing, the

Debtors forecasted they would fall below the minimum liquidity levels needed to run the business by August of 2020, and they were facing significant upcoming payment obligations at the end of May. *See* Trial Ex. 121 (LATAM Board of Directors Financial Update, dated 5/25/2020); Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 17. Given this time constraint, it soon became apparent that an out-of-court restructuring would be impractical. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 7. Together with PJT and FTI, the Debtors determined that at least \$2.15 billion in funding was needed to successfully reorganize in light of the uncertainties surrounding their business in the face of the pandemic, the costs associated with resuming operations, and other factors. *See* Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 16.

In May of 2020, the Company and its advisors concluded that it was probable that LATAM would need to file for bankruptcy by the end of May. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 8. Although the Debtors were not expected to need access to DIP financing immediately upon the commencement of the Chapter 11 Cases, the Company believed that it was important for the Debtors to have at least some of that financing in place when they filed their cases in order to signal financial strength to the market generally, and specifically, to retain the confidence of their customers, employees, and vendors by showing that they would have the necessary working capital to continue operating as they explore their restructuring options. *See* Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 20. That was especially important because most of the Debtors' stakeholders and contractual counterparties likely were unfamiliar with the chapter 11 process. *Id.*

In developing the multi-tier DIP structure, the Company and its advisors believed that it was important to the success of an in-court restructuring that the Company obtain shareholder financing for the following reasons:

First, it would enhance the potential for governmental support (because governments with whom the Debtors were discussing potential financing made clear that shareholder financing was a condition to any government financing). *See, e.g.*, Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 6.³⁰

Second, the Company considered looking to the capital markets for financing, but concluded that (i) it had no viable options to finance the amount of liquidity required to fund its restructuring, including the ability to right size its fleet, because it would not be able to pledge enough collateral to fully secure \$2 billion in new financing; and (ii) it was impractical to seek financing from the capital markets because it was important to keep the planned bankruptcy filing confidential, to avoid third parties from placing liens on or attempting to seize LATAM's property or trying to terminate contracts. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶¶ 7, 9.

Third, because the Company could not pledge assets to fully secure a \$2 billion loan, a lender would need to lend based on an expectation the Debtors would successfully reorganize. The Company reasoned that a substantial shareholder would most likely be a candidate to make such a loan. *See id.* ¶ 7; *see also* Trial Ex. 243 (First Coleman Decl.) ¶ 15 (“The going-concern value of the company is particularly important here, given LATAM has limited hard collateral . . . without a junior tranche of financing, the likelihood of raising the full \$2.15 billion in new funding appears low.”); Trial Ex. 292 (Coleman Reply Decl.) ¶ 7.³¹

Fourth, the Company's financial advisors maintained that the provision of committed funding by shareholders “was an important signal to the market that the shareholders retained their confidence in the business.” Trial Ex. 243 (First Coleman Decl.) ¶ 14. *See also* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 9 (“The Debtors and their advisors thought it important to have fully committed funding when they filed “in order to signal strength to [their] passengers, vendors, lessors, lenders, and the market generally.”). They believed that was especially important for the Company, which has many stakeholders and counterparties who are

³⁰ *See also* Jacobson Dep. Tr. at 25:8–26:15 (Jacobson informed by LATAM “about obtaining some financial support from the government and that a – I wouldn’t describe it as necessarily a prerequisite, but as a condition of support and at the request of the government, the shareholders would have to be invested prior to the government extending any financing. . . . Delta[] knows from its experience in dealing with other global partners that that is a very similar and common request.”); Ho Dep. Tr. at 85:6–12 (“Q. Who told you that if the shareholders provide support for LATAM that the government would also provide support, how did you learn that? A. That was the initial information that we receive from LATAM at the very beginning when we were asked to consider this.”).

³¹ *See* Trial Ex. 292 (Reply Declaration of Timothy Coleman in Support of Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 673], the “Coleman Reply Declaration”).

unfamiliar with the U.S. bankruptcy process. *See* Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 20.³²

The Company viewed shareholder financing as a necessary lifeline in the uncertain COVID environment, not as a means for shareholders to protect their existing investments. *See* Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 9. The shareholders likewise recognized LATAM’s urgent liquidity needs and their ability to support their partner in the industry. *See* Jacobson Dep. Tr. at 36:8–22 (“LATAM is a very important partner of ours, if not a new partner, and there were many considerations that we were undertaking at that time [Y]es, we were seriously considering . . . how Delta could support LATAM.”); *see also id.* at 33:15-16 (“Upon diligence, we quickly came to the conclusion that more was better for [LATAM].”).

After identifying the shareholders as a potential source of DIP financing, the Company reached out to representatives of Delta, Costa Verde and Qatar, and began negotiating the terms of a shareholder DIP financing tranche. After confirming their willingness to provide DIP financing, Costa Verde and Qatar did not involve themselves in the negotiations with LATAM on the terms of the (now named) Tranche C DIP Facility (defined below). Costa Verde was clear to the Company that it would refrain from direct negotiations with the Company and would join in whatever agreement was made between the Company and Qatar. *See* Trial Ex. 72 (Extraordinary Board Meeting Minutes, dated May 22, 2020), at -634; Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 10 (stating that he had no discussions with Costa Verde or the Cueto Group concerning the DIP outside of Board meetings). Neither Enrique nor Ignacio Cueto, one a

³² This belief was borne out by the fact that Oaktree, the proposed Tranche A Lender, has pointed to shareholder support as a reason behind its decision to invest its \$1.3 billion in Tranche A. *See, e.g.*, Statement of Oaktree Capital Management in Support of the Debtors’ Reply [ECF No. 688] (the “Oaktree Statement”) ¶ 3 (“The existence of these shareholders’ commitment to provide subordinate financing was a substantial inducement – not an impediment – to securing the DIP financing that the Debtors badly needed.”).

former LATAM executive and both current Board members, played any role in the negotiations on behalf of either side. Rather, they deferred to the Debtors' management and external advisors on the one hand, and to other shareholders with no involvement in management (first Delta and then Qatar) on the other, to negotiate the financing terms with each other. *See* Alfonsín Dep. Tr. at 221-224; Jacobson Dep. Tr. at 152:6-14. After Qatar's CEO confirmed Qatar's willingness to provide funding to LATAM based on LATAM's initial general request, Qatar did not separately negotiate or provide feedback on the economic terms being negotiated.³³ Thus, Delta and its advisors led the discussions on behalf of the shareholders. Costa Verde and Qatar were not involved. *See* Jacobson Dep. Tr. at 127:6-10 ("Q. How did that come to be that Delta would take the lead? A. I believe – I believe it had to do with our independence since we're not – we're not on the board. We don't have anyone in the boardroom."); *see also id.* at 79:6-9 (explaining that Delta has not appointed anyone to LATAM's board, although it nominated two individuals who were appointed by the shareholders.).

In negotiating the terms of a DIP financing facility that ultimately would result in the "Tranche C Commitment Letter," Delta did not merely accept or deliver terms for the loan; rather it undertook diligence, and LATAM and Delta negotiated the terms of the proposed financing. *See* Jacobson Dep. Tr. at 32:9-21 ("[U]pon initial review of the cash forecast, without an ability to ask any questions, we wanted to ensure that the appropriate diligence had been done and, candidly, that LATAM wasn't coming to Delta because it was a much bigger company and had capital available and it was an easy way out. So as we pressure tested, as we had

³³ *See* Ho Dep. Tr. at 55:13–19 ("Q. Did you have any reaction to those drafts in terms of the economics? A. To the extent that we are comfortable with what was already negotiated, yes, that's the reaction."); *id.* at 56:2-6 ("[O]ur understanding is that [the terms were] already negotiated heavily by LATAM and Delta and the only interest we have is that all three parties end up with the same terms and that's all that we [were] interested in.").

conversations with Ramiro Alfonsín and his finance team, we ultimately came to a similar conclusion as we have come to at Delta that the situation was dire and remains dire in the absence of revenue and that, you know, maximizing liquidity was the best opportunity for them. For LATAM, sorry.”); *id.* at 33:15-16 (“Upon diligence, we quickly came to the conclusion that more was better for the company.”). Hours of arms-length negotiations yielded the original Tranche C Commitment Letter (defined below) to provide a \$900 million junior loan as part of a multi-tranche DIP financing. *See, e.g.*, Trial Ex. 242 (Alfonsín DIP Decl.) ¶ 21; Trial Ex. 243 (First Coleman DIP Decl.) ¶¶ 18-21.³⁴ Through these negotiations, the Debtors were able to “materially improve[]” the original terms of the Tranche C [DIP Facility], including obtaining a waiver of the proposed requirement that there be government financing, the Tranche C lenders’ agreement to vote in favor of the chapter 11 plan, a reduction in rate of the conversion discount and the elimination of a 9% “conversion fee.” Trial Ex. 243 (First Coleman Decl.) ¶ 18. *Compare* Trial Ex. 74 (Tranche C lenders’ original term sheet proposal to Debtors) *with* Trial Ex. 130 (executed version of Tranche C DIP term sheet).

On May 21, 2020, LATAM’s counsel sent the initial draft term sheet and DIP financing letter agreement to Delta’s counsel. *See* Trial Ex. 62 (Email from K. Hailey to M. Steinman, V. Jackson, A. Troconis and K. Huang, dated May 21, 2020, attaching draft DIP Letter Agreement and term sheet). Among other things, the initial draft term sheet provided for a Tranche B DIP³⁵ loan to be funded in an aggregate maximum principal amount of \$1.0 billion, in equal proportion

³⁴ Those negotiations included “multiple drafts of term sheets and debtor in possession loan documents” and “testing of a DIP Budget by the Debtors’ and the Tranche C [] Lenders’ financial advisors.” Trial Ex. 243 (First Coleman Decl.) ¶ 19. For examples of competing term sheets between counsel for the Debtors and counsel for the Tranche C Lenders see Trial Exs. 74, 81, 85 and 105.

³⁵ As noted above, at that time, the junior shareholder tranche loan was referred to as Tranche B. It would later become the present Tranche C.

by Delta, Qatar and Costa Verde, and for the for the shareholders to have the option to receive as repayment of the DIP on effective date of a plan, reorganization common stock of the reorganized LATAM entity at plan valuation. *See id.* Thus, the equity conversion right granted the lenders the right to elect to be paid at the end of the case in shares of the reorganized company rather than in cash. Over the span of several days, the parties, through their respective advisors, exchanged several drafts of the proposed term sheet and commitment letter,³⁶ and negotiated material terms of the loan.³⁷ At the close of the negotiation, the agreed-to equity conversion discount was 32%.

Initially, the parties contemplated that Qatar, Delta, and the Cueto family each would provide one-third of the financing to what is now Tranche C DIP Facility (then Tranche B), in equal shares. *See* Trial Ex. 53 (External Advisors' Discussion Materials Presentation, dated May 19, 2020), at -663 (noting that the lenders will be "[i]n equal proportion, the Cueto family, Qatar

³⁶ *See* Trial Ex. 74 (Email from A. Troconis to K. Hailey, R. Cooper, L. Schweitzer, et al., dated May 23, 2020) (containing Delta comments); Trial Ex. 81 (Email from S. Charles to A. Troconis, K. Hailey, R. Cooper et al, dated May 24, 2020) (highlighting a number of issues to discuss); Trial Ex. 85 (Email from M. Steinman to S. Charles, R. Cooper, K. Hailey, A. Troconis, et al., dated May 24, 2020) (with more Delta comments); Trial Ex. 113 (Email from K. Hailey to M. Steinman, S. Charles, A. Troconis, L. Schweitzer, et al., dated May 25, 2020) (LATAM comments); Trial Ex. 105 (Email from K. Hailey to S. Charles, G. Catalanello and R. Cooper, dated May 25, 2020) (further LATAM comments); Trial Ex. 108 (Email from P. Hespel to K. Hailey, S. Charles, G. Catalanello and R. Cooper, dated May 25, 2020) (Qatar comments); Trial Ex. 109 (Email from M. Steinman to M. Huebner, R. Cooper, K. Hailey, A. Troconis and S. Charles dated May 25, 2020) (Delta comments); Trial Ex. 112 (Email from K. Hailey to M. Steinman, S. Charles, A. Troconis, L. Schweitzer, et al., dated May 25, 2020) (LATAM comments); Trial Ex. 128 (Email from A. Troconis to K. Hailey, M. Steinman, S. Charles, et al., dated May 26, 2020) (Delta comments); Trial Ex. 129 (Email from K. Hailey to A. Troconis, M. Steinman, S. Charles, et al., dated May 26, 2020) (LATAM comments, incorporating feedback from Qatar); Trial Ex. 130 (Email from A. Troconis to J. Meyzaguire and S. Charles, dated May 26, 2020) (executed version).

³⁷ For example, the Debtors made clear that if a certain percentage of Tranche C lenders (then referred to as the tranche B lenders) made the Equity Subscription Election, then all such shareholders should be deemed to do so. *Compare* Trial Ex. 68 (LATAM Airlines Grp. DIP Redline, dated May 23, 2020) at 373 (LATAM comments requiring drag rights) *with* Trial Ex. 130 (Letter from D. Ho, Qatar Airways Invs., to J.C. Mencia, dated May 25, 2020) at -944 (execution version containing drag rights with percentage to be determined subsequently). The Debtors also removed denial of recognition in foreign proceedings as an event of default, as proposed by Delta. *See* Trial Ex. 68 (LATAM Airlines Grp. DIP Redline, dated May 23, 2020) at -379. The parties also negotiated the maturity date and length of an extension option. *Id.* at 364; *see also* Trial Ex. 130 (Email from A. Troconis to J. Meyzaguire and S. Charles, dated May 26, 2020) at 936.

and Delta”). However, by the time the May 25, 2020 Tranche C Commitment Letter was executed (*see* Trial Ex. 130 (Email from A. Troconis to J. Meyzaguirre and S. Charles, dated May 26, 2020)), Delta had concluded that it would not be a lender party to the Tranche C Commitment Letter due to its own unrelated issues, such that Qatar agreed to lend \$600 million of the \$900 million, and Qatar’s counsel, Alston & Bird LLP, began to engage in direct negotiations with LATAM, and Qatar and Costa Verde ultimately became the lender parties under the Tranche C Commitment Letter.

May 25 Board Meeting

Company management presented the Tranche C DIP term sheet for Board approval at the May 25 Board meeting. Before that transactions was presented to the Board, it was presented for review by the Independent Directors at a Directors Committee meeting.³⁸ The subject that was discussed at the May 25 Directors Committee meeting, was the “Approval Of The Execution Of The DIP Financing Tranche B Term Sheet.” *See* Trial Ex. 125 (May 25th Directors Committee Minutes); *see also* Trial Ex. 124 (Statement from the Committee of Directors of LATAM Airlines Group S.A., dated 5/25/2020, “May 25th Directors Committee Statement”). At that meeting, the Independent Directors received a presentation from LATAM’s management and the Company’s financial and legal advisors on the proposed term sheet for the Commitment Letter for the \$900 million Tranche C DIP Facility (the “Tranche C Commitment Letter”), which could be used in conjunction with financing and support from the markets and relevant

³⁸ Mr. Eblen excused himself from reviewing and voting on the transaction because he disclosed that the Eblen Group may be interested in participating in the Tranche C DIP Facility. *See* Trial Ex. 125 (Minutes of the Special Meeting No. 82 of the LATAM Directors Committee, dated 5/25/2020, the “May 25th Directors Committee Minutes”) (“Mr. Nicolás Eblen Hirmas, Director, excused himself from attending because an entity in which he has an interest could participate in the transaction under review.”); *see also* Trial Ex. 123 (May 25th BOD Minutes) (“Finally, Mr. Nicolás EBLEN stated that the companies in which he has an equity interest are shareholders and are considering joining the DIP Financing[.]” and therefore abstained from voting on the transaction.).

governments in two additional proposed tranches in order to provide LATAM's expected \$2 billion liquidity needs. *See* Trial Ex. 122 (LATAM Board of Directors Discussion Materials, dated May 25, 2020, "May 25 BOD Materials").³⁹ In sum, and as set forth in the minutes of the Directors Meeting:

ALVO

- explained that, in the context of the major crisis facing the Company arising from the COVID-19 pandemic, the Company was seeking new financing sources, and that as directed by the Board, management had negotiated a term sheet reflecting the financing conditions that LATAM's shareholders could give the Company in a reorganization under Chapter 11 of the United States Bankruptcy Code (the "DIP Financing");
- explained that LATAM has focused its negotiation of the terms and conditions of the DIP Financing with Qatar, for the purpose of first setting the grounds with such shareholder, and then submitting the same conditions to the other main shareholders who have showed interest in participating in the DIP Financing;
- noted that LATAM has negotiated with Qatar the terms and conditions of a term sheet for the Tranche B of the DIP Financing, which regulates an 18-month loan convertible into shares; and that the term sheet contemplated USD 2.15 billion in financing, including (i) a financing tranche reserved to the shareholders, (ii) a tranche of financing for governmental support, and (iii) a tranche of financing for investors., in a total amount of USD 2.15 billion; and
- advised that in the tranche reserved to shareholders, the amount required by LATAM amounts to USD 900 million, USD 600 of which will be financed by Qatar, and it is expected that the other USD 300 million will be financed by other shareholders, starting with Costa Verde.

Trial Ex. 125 (May 25th Directors Committee Minutes), at 5.

COLEMAN

- made a brief reference to the DIP Financing negotiation process, and indicated that PJT will launch a robust marketing process for the DIP Financing after the Chapter 11 filing,

³⁹ The minutes reflect that the meeting was also attended by Senior Officers Messrs. Roberto Alvo ("Alvo"), CEO, and Mr. Juan Carlos Menció, VP for Legal Matters, who served as *ad hoc* secretary, and external legal counsel José María Eyzaguirre B., partner of Claro & Cía. The following persons joined the meeting via videoconference in order to participate: Richard Cooper, Esq. of Cleary Gottlieb, as LATAM's U.S. counsel, and Tim Coleman, of PJT. Trial Ex. 125 (May 25th Directors Committee Minutes) at 5.

and that the presentation submitted to the Directors Committee will be subject to competitive proposals that may be submitted by other prospective lending parties;

- commented that PJT, together with the Management, have been proactively working on a list of prospective lending parties, who will be contacted in order to raise interest. Coleman stressed, however, that the global pandemic posed by the COVID-19 makes it especially difficult to raise financing, since many companies have substantially restricted their operations and are seeking liquidity in order to remain in business; and
- explained to the Directors Committee that, within such process, as the agreements relating to the DIP Financing must be submitted to the court, it is possible that there are other interested parties that present better offers. Likewise, he presented the key financial conditions considered under these assumptions, i.e. committed amount, commitment fee, upfront fee, interest, PIK and conversion discount, which would be applied at the end of the process.

Id. at 5-6.

The minutes further reflect that in response to questions from Directors Committee members, “Mr. Coleman reported comparable transactions as to their financial cost and equity conversion rate,” and that after the close of the presentations to the Directors Committee, Novoa “indicated that a decision must be made on the term sheet of the Tranche B of the DIP Financing and, especially, if LATAM is interested and if it is consistent with market conditions.” *Id.* at 6.

The minutes summarize the Directors Committee’s deliberations, as follows:

[A]fter a brief discussion, and taking especially into account the matters presented by LATAM’s Management, PJT and Cleary Gottlieb, as well as the conditions of the airline business due to the closing of borders caused by the COVID-19 pandemic, the [Directors] Committee concluded that the subscription of the DIP Financing Tranche B term sheet is in the benefit of the corporate interest and is consistent with conditions comparable with the current market conditions, upon considering the full context surrounding the Company.

It is taken into account that the DIP Financing remains open to third parties who could offer better conditions, and is also subject to approval by the Court in the United States once the Chapter 11 is filed, and that the other shareholders may also participate.

Id. The Directors Committee resolved, by unanimous vote of the attending members, to recommend that the Board approve the execution of the term sheet with the conditions for the Tranche B of the DIP Financing.

The May 25 Board meeting followed the Directors Committee's meeting. At that meeting, Novoa, in his capacity as Chairman of the Directors Committee, made a presentation to the Board on the proposed term sheet and, at the close of his presentation, recommended that the Board approve the Company's execution of the term sheet. *See* Trial Ex. 125 (May 25th Directors Committee Minutes), at 2; Trial Ex. 123 (May 25th BOD Minutes), at 9. The minutes of the meeting reflect that during his presentation, Novoa

stated that the [Directors] Committee concluded that the subscription of the term sheet of Tranche B of the DIP Financing is in for the benefit of the corporate interest and is in conditions comparable to the current market ones considering the complete context in which the Company finds itself today. Additionally, he highlighted that the DIP Financing is kept open for potential third parties that may offer better terms and is also subject to the approval of the US court once the Chapter 11 proceeding has begun. Lastly, he stated that other shareholders would also be allowed to participate.

Id. at 23. Seven of the nine Board members abstained from voting on the grounds that they had been nominated and elected as a director by entities that have or may have an interest in participating in the DIP financing. *See* Trial Ex. 123 (May 25th BOD Minutes), at 10. Only the two Independent Directors – Horn and Novoa - were eligible to vote. They voted unanimously to approve the execution of the term sheet with the conditions for Tranche B of the DIP financing. *See id.*

The Company Files For Bankruptcy

Notwithstanding the successful implementation of the cost-savings and liquidity preserving measures, LATAM's liquidity position continued to deteriorate. The Debtors filed for chapter 11 protection on May 26, 2020. On May 25, 2020, the Board of Directors of LATAM met, under the Chairmanship of Ignacio Cueto, with his brother Enrique Cueto in

attendance, to take the necessary corporate action to file for chapter 11.⁴⁰ The Board of Directors unanimously approved the resolutions, including to file for chapter 11, request the appointment of LATAM Airlines Group S.A. as the foreign representative in non-U.S. proceedings, and to authorize certain company officers as the “Representatives” of the Debtors with the power to take all actions required in connection with the chapter 11 filing, including to obtain secured post-petition financing,⁴¹ and “to exercise the rights of [LATAM Airlines Group S.A.] in its capacity as shareholder, member, partner or investor with respect to any of its subsidiaries and coligadas.”⁴² Partially as a result of the various liquidity preserving measures, as of the Initial Petition Date, the Debtors had \$707 million in cash and cash equivalents, while LATAM as a whole had approximately \$1.3 billion in cash and cash equivalents. *See* Trial Ex. 141 (First Alfonsín Decl.) ¶ 42; *see also* Trial Ex. 267 (Second Alfonsín Decl.) ¶ 12.

Post-Petition Marketing Efforts

On May 26, 2020, the day after the Tranche C Commitment Letter was approved, the Initial Debtors commenced their Chapter 11 Cases. As of the Initial Petition Date, there were a

⁴⁰ *See* Voluntary Petition for Non-Individual Filing For Bankruptcy of LATAM Airlines Group S.A. [ECF No. 1] (the “Voluntary Petition”) at 16.

⁴¹ The minutes of the board meeting describe the proposed financing as follows:

The Term Sheet includes a financing tranche reserved for shareholders, a financing tranche reserved for state support, and a financing tranche reserved for investors, for a total of 2.15 billion. In the tranche reserved for shareholders, the amount required by LATAM is USD 900 million, of which Qatar would finance USD 600 million, and the remaining USD 300 million is expected to be financed by other shareholders, starting with Costa Verde.”

Trial Ex. 123 (May 25th BOD Minutes) at 9.

⁴² *See* Voluntary Petition at 22 (authorizing “Representatives” “to exercise the rights of [LATAM Airlines Group S.A.] in its capacity as shareholder, member, partner or investor a with respect to any of its subsidiaries and coligadas, if any, for the purpose of submitting all or part of such companies to the Chapter 11 Proceeding, including by authorizing, executing and verifying a voluntary petition to commence proceedings under Chapter 11, causing the same to be filed and taking any and all action that they deem necessary, proper and desirable in connection with the Chapter 11 Proceeding. It is resolved that the Representatives shall have the authority to make such assessment and to decide whether to submit one or more such companies to the Chapter 11 Proceeding at their discretion.”).

handful of unresolved issues related to the Tranche C financing. In the wake of the commencement of the Chapter 11 Cases, and in parallel to their negotiation and finalization of the Tranche C DIP Facility, immediately upon filing their bankruptcy petitions, the Debtors and their advisors began a marketing process seeking the full \$2 billion-plus that LATAM required. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 24; Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 9. The Debtors also engaged LarrainVial Servicios Profesionales Limitada, a Latin American financial services firm to help identify and evaluate, to the extent feasible, shareholder investors that are willing to participate in the Tranche C DIP Facility as a part of the Tranche C Increase Commitment,⁴³ which is a part of the overall Tranche C DIP Facility that the Debtors seek approval of. *See* First DIP Motion at 11, n.5.

Thus, after receiving a fully committed Tranche C DIP Facility, the Debtors continued soliciting proposals for the entire \$2 billion plus of funding sought. *See* Trial Ex. 268 (Suppl. Coleman Decl.) ¶ 15⁴⁴ (“PJT has solicited and indicated a willingness to entertain (i) proposals for the full amount of the capital need, (ii) proposals to combine the Tranche A DIP Facility and Tranche C DIP Facility, (iii) proposals to combine the Tranche B DIP Facility, Tranche A DIP

⁴³ The “Tranche C Increase Commitment” is defined in the DIP Credit Agreement to mean:

with respect to each Tranche C Increase Lender, the commitment of such Tranche C Increase Lender to make Tranche C Loans hereunder as reflected in the Tranche C Joinder Agreement. The aggregate amount of the Tranche C Increase Commitment shall be up to \$250,000,000, as provided in the Tranche C Joinder Agreement; provided that, (i) no Tranche C Increase Lender that is an individual shareholder (other than a Tranche C Initial Lender) shall, alone or together with its Affiliates, provide a Tranche C Increase Commitment in excess of \$100,000,000, either in a single installment or in the aggregate, without the consent of each Tranche C Initial Lender, which consent shall not be unreasonably withheld or delayed, and (ii) without the consent of the Majority Tranche C Lenders, no Tranche C Increase Lender shall provide a Tranche C Increase Commitment after the date which is thirty (30) days after the date of the Closing Date.

DIP Credit Agmt. § 1.01.

⁴⁴ *See* Trial Ex. 268 (Declaration of Timothy R. Coleman in Support of Debtors’ Supplemental motion for an Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing and (B) Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 486], the “Supplemental Coleman Declaration”).

Facility, and the Tranche C DIP Facility, and (iv) alternative junior DIP proposals in lieu of the Tranche C DIP.”). The Debtors also made this clear publicly in the First DIP Motion. *See* First DIP Motion ¶ 27 (“The Debtors have sought, and have been open to receiving, proposals for a number of constructs including [] financing the full amount of capital needed, with no Tranche C DIP Facility or other shareholder support....”).

In furtherance of that process, PJT sent “teasers” to over 150 parties. In describing the “Financing Opportunity,” the “teaser” states, as follows:

LATAM Airlines is seeking \$2+ billion in Debtor-in-Possession (“DIP”) financing, structured as a multi-tranche delayed draw term loan, to fund continuing operations through a chapter 11 proceeding.

DIP will be given superpriority administrative claim and is secured by first priority liens on certain of LATAM’s unencumbered assets and junior liens on certain encumbered assets.

Certain existing shareholders have committed to provide \$900mm to serve as the junior-most tranche of the DIP.

Trial Ex. 31 (LATAM DIP Lenders Teaser). Over 80 of those parties signed non-disclosure agreements. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 24; Trial Ex. 276 (PJT contact log); Trial Ex. 292 (Coleman Reply Decl.) ¶ 9 (no party that agreed to sign an NDA been denied access to the data room housing detailed financial and due diligence information about LATAM).

Post-petition, the Board (including the Independent Directors) remained actively involved with respect to the negotiation of the DIP Credit Agreement (defined below), including negotiations with Oaktree in respect of the Tranche A DIP Facility. *See* Trial Exs. 149, 156, 157, 173, 174, 179, 192, 197-201 (post-petition Board and Directors Committee minutes).

June 24 Board Meeting

The Company finalized the terms of the Tranche C DIP Facility and on June 24, 2020, management and the Company’s advisors presented it for approval by the Board. At that

meeting, the Board approved the DIP Financing Proposal for Tranche C (formerly Tranche B) by the shareholders Costa Verde and Qatar. Prior to the Board meeting, the Independent Directors convened a meeting of the Directors Committee to discuss the Tranche C DIP Facility. *See* Trial Ex. 200 (Minutes of the Special Meeting No. 84 of LATAM’s Directors Committee, dated 6/24/2020, the “June 24th Directors Committee Minutes”), at 1.⁴⁵ The minutes of that meeting reflect that Horn identified the purpose of the Directors Committee’s meeting as:

[T]o analyze the background information previously received in connection with the DIP financing structure by shareholders Costa Verde – which also includes the Amaro group and the Eblen group- and Qatar Airways. Said analysis seeks to conclude whether the transaction meets the requirements provided for by the Corporations Act (No. 18.046), namely:

- a) Contribution to the corporate interest; and
- b) Fair market price, terms and market conditions.

Id. The Debtors’ counsel and financial advisor attended the meeting, and at the Independent Directors’ invitation, Coleman gave his opinion on the merits of the financing. In sum he stated that:

[I]n his opinion, the DIP financing under analysis contemplates a price, terms and conditions reasonable under market standards for these very particular kinds of transaction, where comparability is not simple, but it is possible with past cases included in the above mentioned presentation.

Id. at 2.⁴⁶ The minutes reflect that after Coleman finished addressing the committee, and “[f]ollowing a brief discussion, the Committee’s members agreed to submit to the Board of

⁴⁵ The minutes of the meeting reflect that it was also attended by lawyer José María Eyzaguirre, partner of the firm Claro & Cia, Coleman and Mr. Brent Herlihy of the firm PJT Partners, financial advisors, and Kara Harley, Esq., of Cleary Gottlieb. The minutes also reflect that the following officers also were present: Juan Carlos Menció, Senior Legal Vice President, and Mario Roiter, LATAM’s Chief Comptroller, who acted as secretary. *See* Trial Ex. 200 (June 24th Directors Committee Minutes) at 5.

⁴⁶ The minutes reflect that Coleman provided the following context for his opinion:

Mr. COLEMAN noted that within the framework of the COVID 19 contingency affecting the world in general and the aircraft industry in particular (resulting in an almost absolute reduction in revenues), it is very difficult to predict when this situation may be materially reversed. In order to

Directors the recommendation to approve the DIP financial proposal by Costa Verde – including Amaro and Eblen – and Qatar[.]” *Id.* at 6. At the Board meeting, Horn and Novoa addressed the Board on matters relating to the Tranche C DIP Facility. Based upon the materials in their presentation to the Board, Novoa “informed the Board of Directors that the Committee members resolved to recommend to the Board of Directors the approval of the DIP financing proposal by Costa Verde and Qatar[.]” *See* Trial Ex. 198 (Minutes of the Extraordinary Meeting No. 164 of the LATAM Airlines Group S.A., dated 6/24/2020, the “June 24th Board Minutes”), at 11.⁴⁷

Nine board members attended the meeting, but, for the reasons stated at the May 25 meeting, only the non-interested directors Horn and Novoa, “with the favorable opinion of the other

manage this contingency, the Company submitted for a Reorganization Proceeding pursuant to the rules set forth in Chapter 11 of the United States Code (“Chapter 11”), and needs an extraordinary financial support to continue its business and avoid bankruptcy. It is in this so uncertain context that there is no possibility, in the first instance, of obtaining a financing other than by the very existing shareholders (which would subscribe to Tranche “C” – former Tranche “B”). This contribution by the investors is of vital importance as a sign of confidence to allow the possibility to complete the financing necessary by other institutions in the other Tranches, particularly, Tranche “A”. Therefore, there is no doubt that this transaction contributes to the corporate interest as it is key to the business continuity.

Regarding the second matter to be analyzed, Mr. COLEMAN informed that although it was true that the nominal internal rate of return is high, which is constructed based on an up/front fee of 2.5%, a 14,5% PIK interest and a 32% conversion discount, all of them are within market ranges for the comparable transactions that are discussed during the meeting. This analysis should also take into account that this investment has the risk that, in case of bankruptcy, the shareholders would not only lose their initial investment in the Company but also their investment made under the DIP financing structure. Mr. COLEMAN believes the return to be reasonable with respect to other comparable information included in the document he distributed to the Directors. Ms. HAILEY added [redacted text].

Trial Ex. 200 (June 24th Directors Committee Minutes), at 1-2.

⁴⁷ The Directors Committee took their recommendation to the full Board, noting that the Company required extraordinary financial support, that there was no possibility of alternative financing in the first instance and that the shareholder financing was a vital sign of confidence. Trial Ex. 198 (June 24th Board Minutes) at 645. Further, the Independent Directors noted that the rate of return under the agreement was justified in light of risks involved for the lenders and that better financing alternatives could be presented. *Id.* at -645. Following additional presentations from PJT and Cleary Gottlieb, the Independent Directors, on behalf of the Board, unanimously approved the DIP Credit Agreement. *Id.* at -649. (Director Novoa noting that Tranche C DIP Facility remains open with the possibility of other alternatives entering); *see also* Trial Ex. 199 (Board of Directors Statement, dated June 24, 2020); Trial Ex. 197 (External Advisors’ Presentation Discussion Materials, dated June 24, 2020).

directors,” voted unanimously in favor of filing the Tranche C DIP Financing in the amount of \$900 million USD to be provided by the Cueto, Amaro, Eblen and Qatar shareholders. *Id.*

The First DIP Motion

On June 28, 2020, certain of the Debtors filed the First DIP Motion seeking authorization to execute and deliver all final documentation consistent with the terms and conditions of that certain Super-Priority Debtors-in-Possession Term Loan Agreement (the “DIP Credit Agreement”).⁴⁸ As agreed among LATAM and the equity holders, the DIP Credit Agreement contemplates a secured super priority multi-draw term loan facility of up to \$2.15 billion in new money financing (the “DIP Facility”) consisting of (i) a secured Tranche A facility (the “Tranche A DIP Facility”) in an aggregate maximum principal to be determined; (ii) a secured Tranche B facility (the “Tranche B DIP Facility”) in an aggregate maximum principal amount to be determined; and (iii) a secured Tranche C facility (the “Tranche C DIP Facility”) provided by Qatar and Costa Verde and/or their affiliates (in such capacity, the “Tranche C Lenders” or “Tranche C Shareholders,” as appropriate) in an aggregate maximum principal amount of at least \$900 million, subject to the ability of LATAM Parent, as borrower, to increase the Tranche C DIP Facility with a new commitment of up to an additional \$250 million as agreed with the Tranche C DIP Lenders and in accordance with the underlying DIP loan documents. *See* First DIP Motion ¶ 4. The Debtors filed the First DIP Motion with the Tranche C Lenders’ commitments to fund at least \$900 million of the Tranche C DIP Facility, but without funding commitments for the Tranche A and Tranche B DIP Facilities. The disbursement of funds pursuant to the Tranche C DIP Facility is subject to the approval of funding to be provided under

⁴⁸ The parties to the DIP Credit Agreement are LATAM Parent, as borrower, the guarantors party thereto, Qatar Airways Investments (UK) Ltd. or one of more of its Affiliates and Costa Verde Aeronáutica S.A. or one or more of its Affiliates, as lenders, the administrative agent, the local collateral agent.

either the Tranche A DIP Facility or the Tranche B DIP Facility (or both). *See id.* ¶ 6. Thus, although the Debtors could not then access the Tranche C DIP Facility, they nonetheless sought authorization to enter into the DIP Credit Agreement and obtain the Tranche C DIP Facility. They explained that they filed the First DIP Motion because they were acutely aware that their liquidity needs will become more pressing by August 2020 and they believed that approval of the DIP Credit Agreement and the Tranche C DIP Facility would facilitate and streamline then ongoing negotiations for the additional tranches of financing. *Id.* As filed, the principal terms of the Tranche C DIP Facility were as follows:

Commitment	\$900 million committed Up to \$250 million uncommitted (the Tranche C Increase Commitment)
Undrawn Commitment Fee	0.5%
Back End Fee	2.5%
Interest Rate	14.5% PIK
Equitization Process	Tranche C Lenders' option – At the lenders' option, the Company shall repay the Tranche C DIP loans in stock at 32% effective discount to plan value
Events of Default ⁴⁹	Section 8.01(c) provides that it shall be an Event of Default if the Debtors fail to comply with certain covenants, including the covenant set forth in section 6.15, which dictates the entry of a final order approving the assumption of the Delta Agreement within 105 days of the Petition Date (the "Delta Covenant"). Any of the Bankruptcy Events set forth in section 8.01(k) shall occur, including: (a) an order terminating the Debtors' exclusivity period; (b) an order confirming a Chapter 11 Plan other than a Company Approved Reorganization

⁴⁹ As relevant to the Motions and objections.

Plan;⁵⁰ and (c) any of the Obligors shall file or support any pleading seeking relief the grant of which would give rise to an Event of Default.

Failure to meet any of the Bankruptcy Milestones set forth in section 6.17.

July 8 Board Meeting

Before and after the Debtors filed the First DIP Motion, the Debtors, with their advisors, engaged in negotiations with Oaktree and its advisors, among others, regarding a proposed Tranche A DIP Facility. *See* Trial Ex. 268 (Suppl. Coleman Decl.) ¶ 18. By early July 2020, the Debtors completed their negotiations with Oaktree for the Tranche C DIP Facility loan in an amount of up to \$1.3 billion.

On July 8, 2020, the Company and its advisors presented the Tranche A DIP Facility with Oaktree to the Directors Committee. *See* Trial Ex. 265 (Minutes of the Extraordinary Session of the LATAM Directors Committee, dated 7/8/2020, the “July 8th Directors Committee Minutes”), at 1.⁵¹ At that meeting, PJT, made a presentation, reporting that the Tranche A DIP proposal

⁵⁰ Company Approved Reorganization Plan is defined in the DIP Credit Agreement to mean:

a Chapter 11 Plan, as proposed by the Borrower and approved by the board of directors of LATAM, for each of the Obligors that provides for (i) the termination of the DIP Commitments and (ii) (a) if no Equity Subscription Elections have been made, the payment in full of the DIP Obligations (other than contingent indemnification obligations not yet due and payable) and (b) if any Equity Subscription Elections have been made, (x) the payment in full of all Tranche A Obligations and all Tranche B Obligations and all Tranche C Obligations in respect of which an Equity Subscription Election has not been made, subject to the provisions of Schedule 2.12 (other than contingent indemnification obligations not yet due and payable), and (y) in respect of all Tranche C Obligations in respect of which an Equity Subscription Election has been made, subject to the provisions of Schedule 2.12, the satisfaction, in full, of the obligation to issue New Shares in respect of such Tranche C Obligations, all in accordance with Section 2.12, on the Consummation Date of such Chapter 11 Plan.

⁵¹ Also in attendance was Alvo, LATAM’s CEO and director, Alfonsin, LATAM’s CFO, Juan Carlos Menció, VP, and Mario Roiter, Auditor General for LATAM, who acted as secretary. *See* Trial Ex. 265 (July 8th Directors Committee Minutes) at 1.

from Oaktree, among other things, provides the requisite amount of funds needed (i.e., \$1.3 billion), contained “good economic terms,” including allowance of PIK interest, “provides certainty for a seamless contractual closure,” and has been substantially completed through the commitment letter. PJT recommended to the Directors Committee to approve the Tranche A DIP Facility. *Id.* Following a brief debate, the Committee concluded that signing the DIP Tranche “A” financing agreement with Oaktree is “beneficial for the social interest,” and accounts for reasonable market terms, since a “detailed selection process between various bidders” had been undertaken. Based on PJT’s recommendation and the progress reported, the non-interested members of the Directors Committee—i.e., Horn and Novoa—unanimously agreed to recommend to the Board to approve the execution of the Oaktree Tranche A agreement. *See id.* at 2. *See also* Trial Ex. 264 (Notice of the LATAM Airlines Group S.A. Directors Committee, dated 7/8/2020), at 2 (“After a brief discussion, the members of the Committee agreed that the recommendation to approve the DIP Tranche “A” financing proposal with Oaktree will be submitted to the Board, and then submitted to the Judge involved in the Chapter 11 process.”).

The Supplemental DIP Motion

On July 9, 2020, the Debtors filed their Supplemental DIP Motion⁵² seeking to supplement the First DIP Motion and authorization of the consolidated DIP Facility, increasing the overall requested amount from \$2.15 billion to \$2.45 billion. The Debtors consolidated the Tranche A and Tranche C financing into a single credit agreement and filed the Supplemental DIP Motion seeking authorization for the Tranche A DIP Facility as offered by Oaktree (in such

⁵² *See* Debtors’ Supplemental Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 485] (the “Supplemental DIP Motion” and with the First DIP Motion, the “Motions”).

capacity, the “Tranche A Lender” and, together with the Tranche C Lenders, the “DIP Lenders”), along with the Tranche C DIP Facility on the terms set forth in the DIP Credit Agreement.⁵³

The Objections to the DIP Facility

The Committee, Knighthead Capital Management LLC (“Knighthead”), and the Ad Hoc Group⁵⁴ (collectively with the Committee and Knighthead, the “Objectors”) each filed an “initial” and “subsequent” objection to the First DIP Motion.⁵⁵ The Debtors filed a reply to those

⁵³ The Debtors commenced the Subsequent Chapter 11 Cases after they filed the First DIP Motion. The Debtors and the DIP Lenders have agreed to add the Subsequent Debtors that filed their cases on July 9, 2020 as Guarantors under the DIP Credit Agreement (the “Additional Guarantors”). Furthermore, as a part of their agreement to provide the Tranche A DIP Facility, the Tranche A Lender specifically contemplated the additional security provided by having the Additional Guarantors as Guarantors under the DIP Credit Agreement. Therefore, by the Supplemental DIP Motion, the Debtors also seek approval of the addition of the Additional Guarantors as Guarantors under the DIP Credit Agreement.

⁵⁴ The Ad Hoc Group consists of certain holders of the LATAM 2024 Bonds and LATAM 2026 Bonds, and the Series A Local Bonds, Series B Local Bonds, Series C Local Bonds, Series D Local Bonds and the Series E Local Bonds. The 2024 Bonds, 2026 Bonds, Series A Local Bonds, Series B Local Bonds, Series C Local Bonds, Series D Local Bonds, and Series E Local Bonds are collectively referred to herein as the “Bonds.” The members of the Ad Hoc Group hold in the aggregate approximately \$675 million of the Bonds. *See* Second Verified Statement of the Ad Hoc Group of LATAM Bondholders Pursuant to Bankruptcy Rule 2019 [ECF No. 536].

⁵⁵ Those filed objections are as follows:

- Initial Objection of the Official Committee of Unsecured Creditors to the Debtors’ Motion for An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 538] (the “Committee Initial DIP Objection”);
- Supplemental and Restated Objection of the Official Committee of Unsecured Creditors to the Debtors’ Motion for An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 613] (“Committee Supplemental and Restated DIP Objection”);
- Initial Objection of the Ad Hoc Group of LATAM Bondholders To Debtors’ Motion For An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 537] (“Ad Hoc Group Initial DIP Objection”)
- Supplemental Objection of the Ad Hoc Group of LATAM Bondholders To Debtors’ Motion For An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 608] (“Ad Hoc Group Supplemental DIP Objection”)
- Initial Objection of Knighthead Capital Management LLC to the Motion for an Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 535] (“Knighthead Initial DIP Objection”)

objections and in support of the Motion (the “Debtors Reply”).⁵⁶ The Court scheduled an evidentiary hearing on the First DIP Motion and Supplemental DIP Motion to commence on July 28, 2020 (the “Hearing”).

**After The Objections Are Filed Jefferies
Submits Its Tranche C DIP Facility Proposal**

-
- Supplemental Objection of Knighthead Capital Management LLC to the Motion for an Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 599] (“Knighthead Supplemental DIP Objection”)

In addition to the Objections, several other parties also filed objections to the DIP Facility, as follows:

- Initial Objection And Reservation Of Rights Of Scotiabank Chile To Debtors' Motion For An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing And (B) Grant Superpriority Administrative Expense Claims And (II) Granting Related Relief And Debtors Supplemental Motion For An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing And (B) Grant Superpriority Administrative Expense Claims And (II) Granting Related Relief [ECF No. 530]; and Supplemental Objection of Scotiabank Chile to Debtors’ Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief And Debtors’ Supplemental Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 598]
- Limited Objection of Aero Miami I, LLC to Debtors’ Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superiority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 528]
- Joinder and Reservation of Rights of Zendesk, Inc. to Limited Objection of Aero Miami I, LLC to Debtors’ Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superiority Administrative Expense Claims and (II) Granting Related Relief and Initial Objection of Zendesk, Inc. to Debtors’ Supplemental Motion and Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 689]
- Joinder of Banco del Estado de Chile, in its Capacity as Indenture Trustee under the Chilean Local Bonds Series A through E, to Objection of the Ad Hoc Group of LATAM Bondholders to Debtors Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 554]

While Banco Estado de Chile and ScotiaBank joined in the arguments of the Objectors in opposing the Tranche C DIP Facility, AeroMiami and Zendesk raised specific, stand-alone objections, which were consensually resolved by certain agreed-to language incorporated into the Debtors’ proposed order approving the DIP Facility, and the Debtors’ agreement to pay the agreed-to amounts due and owing to Zendesk, as set forth on the record of the Hearing on July 30, 2020, respectively. *See* 7/30/20 Hr’g Tr. at 70:14-72:12.

⁵⁶ *See* Debtors’ Reply In Support Of Motion for An Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 672].

Knighthead is a New York-based registered investment adviser founded in 2008 with over \$4 billion in assets under management. Through funds or accounts it manages and/or advises, Knighthead holds over \$100 million in unsecured bonds issued or guaranteed by LATAM Parent and its subsidiaries. *See* Trial Ex. 280 (Wagner Declaration) ¶ 1.⁵⁷ From the outset of these cases, it has explored avenues for it to act as a DIP lender to the Debtors. Thomas A. Wagner (“Wagner”) is the co-founder and managing member of Knighthead. After the Initial Petition Date, and before the Debtors filed the First DIP Motion, Wagner reached out to Coleman and PJT to discuss Knighthead’s interest in providing the Debtors with Tranche C DIP financing. *See id.* ¶¶ 6-7. Wagner asserts that in response to his overtures, Coleman discussed the possibility of Knighthead’s participation in the Tranche A DIP or a commitment of a combined DIP of \$2-plus billion (Tranche A and Tranche C), even though Wagner explained that Knighthead was not interested in the Tranche A DIP facility given Knighthead’s investment profile in more high-risk/high-reward financings, and that Knighthead did not have the capital for such amounts as it was not a commercial bank or arranger and would have reach out to investment bankers. *See id.* ¶¶ 8-11. According to Wagner, Coleman also indicated that Knighthead could submit its Tranche C DIP proposal only if it were fully committed for its entire size (not less than \$900 million), and if there was a way to solve the “complex Chilean law” issues associated with Tranche C DIP, although Coleman did not specifically explain what those complex Chilean law issues were to Wagner. *See id.* ¶ 12.

⁵⁷ *See* Trial Ex. 280 (Declaration of Thomas A. Wagner In Support of the Supplemental Objection of Knighthead Capital Management LLC to the Motion for an Order (I) Authorizing The Debtors To (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 600], the “Wagner Declaration”) ¶ 1.

Knighthead retained legal and financial advisors to assist it in formulating and formalizing an alternate financing proposal for the Tranche C financing. In support of its initial objection to the Debtors' First DIP Motion, Knighthead represented that it was seeking commitments from third-party unsecured creditors in order to formulate alternative, competing Tranche C financing, and at PJT's suggestion, it would work with the Debtors in good faith discussions on such proposal before publicly filing a term sheet. Knighthead Initial DIP Objection ¶ 7. On July 14, 2020, Knighthead sent the Debtors a detailed term sheet for its creditor-led alternative Tranche C DIP (albeit, not fully committed), along with a draft credit agreement, marked against the credit agreement submitted by the Debtors in connection with the motion to approve Tranche A financing. Knighthead Suppl. DIP Objection ¶ 2; *see also* Trial Ex. 280 (Wagner Decl.) ¶ 19. Knighthead says that in response to that overture, the Debtors served document requests and notices for depositions of Knighthead and Houlihan Lokey, its financial advisor. *See* Trial Ex. 280 (Wagner Decl.) ¶ 20. Wagner asserts that beyond returning a list of "alleged defects" with Knighthead's proposal three days later, the Debtors did not reach out to anyone at Knighthead concerning any aspect of Knighthead's proposal. *See id.*; *see also* Knighthead Suppl. DIP Objection ¶¶ 3, 5.

The Debtors disagree with Knighthead's account. They say on July 15, PJT and FTI, on behalf of the Company, hosted a phone call with Houlihan and Moelis, the financial advisors to Knighthead and the Ad Hoc Group respectively, on which PJT answered diligence questions and also asked questions about the Knighthead draft term sheet, the response to which was that further communications were best had through the attorneys. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶ 13. On July 17, Cleary Gottlieb provided detailed comments on the draft term sheet

(and an accompanying draft credit agreement) to Knighthead's counsel, and the parties'

respective counsel held a telephonic conference to discuss the comments on July 21st. *See id.*⁵⁸

Before and after it submitted its proposal, Knighthead solicited interest in the alternative Tranche C DIP. On July 16th, Wagner inquired of Jefferies Finances LLC ("Jefferies") whether it had any interest in arranging a competing financing proposal for the Debtors' Tranche C DIP Facility, with Knighthead being willing to commit \$300-\$400 million of such arrangement, and Jefferies underwriting the committed \$900 million facility. *See* Trial Ex. 295 (Wagner Suppl. Decl.) ¶ 6. Jefferies agreed to do so, and on July 23, 2020, it submitted its commitment to provide \$900 million in alternative Tranche C DIP financing (the "Initial Jefferies Commitment") to the Debtors, which bid was filed on the docket on July 24, 2020. *See* Notice by the Ad Hoc Group of LATAM Bondholders of Alternative Tranche C DIP Facility Proposal [ECF Nos. 664, 675 (as corrected)]. The commitment consisted of an executed commitment letter (the "Initial Commitment Letter") setting forth the salient terms of the proposed DIP financing, and a draft DIP Credit Agreement (the "Jefferies Credit Agreement"), marked against the Debtors' DIP Credit Agreement as filed in the First DIP Motion.

Without limitation, the terms of the Initial Commitment Letter provided for (i) a single-draw facility under the Tranche C DIP, (ii) Jefferies to act as lead arranger and to syndicate the Tranche C DIP to various banks, financial institutions, and other investors, and (iii) the payment

⁵⁸ Wagner disputes Coleman's version of events. Although Wagner concedes that Houlihan Lokey would not have been familiar with the terms of Knighthead's proposal since Houlihan Lokey was only recently retained and was limited to performing due diligence for Knighthead, Houlihan Lokey did not instruct that "further communication be done through lawyers[.]" but rather suggested that the Debtors' "representatives reach out directly to *Knighthead Capital or Knighthead Capital's counsel*" with respect to the competing Tranche C DIP. Wagner also notes that Coleman was not even on that call with Houlihan Lokey and Moelis. *See* Trial Ex. 295 (Supplemental Declaration of Thomas A. Wagner in Further Support of the Objections of Knighthead Capital Management, LLC to the Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No.678], the "Wagner Supplemental Declaration") ¶ 17.

of the professional fees and expenses of the junior Tranche C DIP lenders, including Knighthead, as a committed junior Tranche C DIP lender for \$400 million, and counsel to the Ad Hoc Group for its role in negotiating and preparing the Jefferies Initial Proposal. *See* Initial Commitment Letter; *see also* Jefferies Credit Agmt. § 2.02. The Objectors say that compared to the Tranche C DIP, the terms of the Initial Commitment Letter would result in savings to the Debtors' estate of approximately \$500,000,000. *See* Knighthead Post-Trial Brief ¶ 2; Committee Post-Trial Brief at 3 ("According to the Debtors' analysis, the first Jefferies proposal would have saved the estate \$454 million versus the original proposed Insider DIP Facility.").⁵⁹

The Debtors Reject Jefferies Proposal

The Debtors deny that the Initial Jefferies Commitment was superior to the shareholders' Tranche C DIP Facility. Coleman asserts that following their review of the Initial Jefferies Commitment, the Debtors' advisors updated the Debtors' management and Independent Directors of its terms. PJT also reached out to Jefferies concerning the Debtors' issues but Jefferies had not timely responded. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶ 14. More specifically, the Debtors believed that the Initial Jefferies Commitment had certain conditions (and reserves to Jefferies the ability to impose additional conditions later) and contained certain requirements, including changes to the agreed credit documents and arrangements with the

⁵⁹ The Debtors filed their Post-Trial Brief simultaneously with the post-trial briefs of the Objectors as follows:

- Post-Trial Brief of Knighthead Capital Management, LLC [ECF No. 752] (the "Knighthead Post-Trial Brief");
- Post-Trial Brief of the Ad Hoc Group of LATAM Bondholders in Opposition to Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 753] (the "Ad Hoc Group Post-Trial Brief"); and
- Post Hearing Brief of UCC in Further Opposition to the Debtors Motion [ECF No. 749] (the "Committee Post-Trial Brief").

Tranche A lender, “which raise[d] serious issues.” The Debtors also maintained that the Initial Jefferies Commitment left “the door open to additional collateral, and at a minimum the Knighthead’s attendant commitment letter explicitly contemplate[d] the inclusion of additional collateral.” *Id.* Alfonsín also similarly testified at trial as to the Debtors’ concerns with the Jefferies Initial Commitment and attempts to discuss same with Jefferies.⁶⁰

The Debtors File Modified Tranche C DIP Facility Proposal

On July 28, 2020, in the wake of the submission of the Initial Commitment Letter, and on the morning that the Hearing was scheduled to commence, the Debtors and Tranche C Lenders agreed to certain modifications to the DIP Credit Agreement (and as further amended, the “Revised Credit Agreement”) that significantly modified the Tranche C DIP Facility (the “Modified Tranche C DIP Facility”). They revised the agreement to give the Debtors the option to repay the Tranche C DIP loan in cash or to exercise the “Equity Election Subscription” to repay the Tranche C DIP loan in stock, at 20% discount to plan value (the “Modified Equity

⁶⁰ At trial, Alfonsin testified, as follows:

Q. What was LATAM's reaction to that commitment letter?

A. We received it late last Thursday, I would say beginning of Friday. We reviewed the document in the early morning of Friday. We sat down with our advisors and then we reached out to -- to the proponents.

Q. And what was your reaction to the terms and conditions being proposed?

A. Well, we identified certain concerns of ours on -- on --on the document, and we wanted to discuss them with -- with Jefferies. And that's why we reach out and ask for a meeting to be held that Friday.

Q. And did Jefferies indeed engage with LATAM up until Sunday?

A. They asked us to postpone the meeting that we asked for Friday to Saturday morning, and we hold that meeting on Saturday morning and send them the issues list that we had identified as major issues for us and asked them to have a reply by Sunday.

Q. And did they in fact reply by Sunday?

A. We received a proposal on late Monday.

Q. So not by Sunday?

A. No.

See 7/29/20 Hr’g Tr. at 89:9-90:5.

Subscription Election”).⁶¹ The principal terms of the Modified Tranche C DIP Facility are as follows:

Commitment	\$900 million committed Up to \$250 million uncommitted
Undrawn Commitment Fee	0.5%
Back End Fee	2.5%
Interest Rate	14.5% PIK; <i>provided, however</i> , that the rate will be different in the event that the Debtors exercise the Cash Payment Election Cash Payment Election The Debtors may elect to repay the “Tranche C Cash Pay Obligations Amount,” in cash, which is equal to the sum of: a. (i) The Tranche C Obligations at the interest rate of LIBOR + 15%; <i>plus</i> (ii) Closing fee of 2.00%; <i>plus</i> (iii) Extension Fee ⁶² (if any) (together, the “Tranche C Recalculated Obligations”); <i>plus</i> b. In lieu of the Back End Fee, an Exit Fee of 3.0%; <i>plus</i> c. A fee of 6.0% on (x) the Tranche C Recalculated Obligations <i>plus</i> (y) the Exit Fee.
Equitization Process	At the Company’s option, the Company shall repay the Tranche C DIP loans in stock at 20% discount to plan value
Events of Default	Section 8.01(c) provides that it shall be an Event of Default if the Debtors fail to comply with certain covenants, including the covenant set forth in section 6.15, which mandates the entry of a final order approving the assumption of the Delta agreements by November 7, 2020.

⁶¹ See Notice of Revised Documents in Connection With Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 708]; *see also* Notice of Further Revised Documents in Connection With Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 746].

⁶² The “Extension Fee” is a fee in cash that shall be payable by the Debtors to the Administrative Agent for the account of each Tranche A Lender on the date of the extension of the Initial Scheduled Maturity Date, equal to 0.50% of the sum of the Tranche A loans. *See* Revised Credit Agmt. § 2.10(c).

Any of the Bankruptcy Events set forth in section 8.01(k) shall occur, including: (a) an order confirming a Chapter 11 Plan other than a Company Approved Reorganization Plan; and (b) any of the Obligors shall file or support any pleading seeking relief the grant of which would give rise to an Event of Default.

Failure to meet any of the Bankruptcy Milestones set forth in section 6.17.

The Revised Credit Agreement modified the Equity Subscription Election in two principal ways. First, the Debtors, not the Tranche C Lenders, are vested with the right to make the election. Second, the discount rate is reduced to 20% discount to plan value. Below, the Court summarizes the procedures for effectuating the Modified Equity Subscription Election under the Revised Credit Agreement.

Section 2.12 of the Revised Credit Agreement contains the Debtors' election to convert the Tranche C DIP Obligations into equity. It provides that the Debtors may elect to require "the Tranche C Lenders to subscribe to stock of the reorganized LATAM entity ... upon repayment of the Tranche C Obligations." Revised Credit Agmt. Sch. 2.12(a)(i). The Equity Subscription Election must be made in accordance with the terms and procedures set forth in Schedule 2.12(a)(i) of the Revised Credit Agreement. *See id.*

Under those terms and procedures, the option may only be exercised by the Debtors and only in connection with a plan approved by the Board -- i.e., a "Company Approved Reorganization Plan." *See id.* § 4(i).⁶³

⁶³ The Revised Credit Agreement defines the term "Company Approved Reorganization Plan" to mean:

Chapter 11 Plan, as proposed by the Borrower and approved by its board of directors, for each of the Obligors that provides for (i) the termination of the DIP Commitments and (ii) (a) if the Equity Subscription Election has not been made, the Payment in Full of the DIP Obligations (other than contingent indemnification obligations not yet due and payable) and (b) if the Equity Subscription Election has been made, (x) the Payment in Full of all Tranche A Obligations and all Tranche B Obligations and (y) subject to the provisions of Schedule 2.12(a)(i), the satisfaction, in full, of the obligation to issue New Shares in respect of such Tranche C Obligations, all in accordance with Section 2.12, on the Consummation Date of such Chapter 11 Plan.

Revised Credit Agmt. § 1.01.

Schedule 2.12 provides that the Debtors must notify the Tranche C Lenders of their election within ten and twenty days before they file a Company Approved Reorganization Plan (hereinafter, the “Chapter 11 Plan”). *See id.* § 4(i). The notice must be accompanied by certain “valuation materials” and drafts of plan documents. Once the notice is delivered to the Tranche C Lenders, it is generally irrevocable, subject to limited exceptions, including if the Chapter 11 Plan is not confirmed. *See id.*

After the Debtors deliver their notice, the Board must hold a meeting to approve the Chapter 11 Plan, disclosure statement, and valuation. *See id.* § 5(i). Within 20 days thereafter, the Debtors will hold a shareholders’ meeting to take steps to “effectuate a Chapter 11 Plan that is a Company Approved Reorganization Plan.” *Id.* § 5(ii).

If the Debtors have elected to repay the Tranche C Lenders in equity, the Company’s shareholders will be asked to approve a capital increase for the amount of newly issued shares required to satisfy the Equity Subscription, including the shares issuable on account of the Tranche C Lenders’ 20% discounted purchase. *See id.*⁶⁴ Such capital increase must be approved by “a majority of LATAM shareholders in attendance” at the meeting. *See id.* *See also* Trial Ex. 337 (Yrarrázaval Decl.) ¶¶ 30-32 (citing Corporations Act, Art. 67).⁶⁵

⁶⁴ The Corporations Act (Law No. 18,046) (defined below) governs Chilean public corporations, like LATAM, and prescribes the rights and powers accorded to shareholders in Chile. To raise equity capital, a public company must amend its bylaws by shareholder vote, and all shareholders have the right to participate in any equity raise on a pro-rata basis through preemptive rights. *See* Corporations Act, Arts. 10, 25, 67. Article 10 of the Corporations Act reads:

The capital stock of a corporation shall be specifically determined in the corporation’s by-laws, and such stock can only be increased or reduced by means of an amendment to the by-laws.

In turn, Article 57 reads:

The special meeting of shareholders shall deal with the following matters:

* * *

2) the transformation, merger and division of the corporation and any amendment to its bylaws

Article 25 states:

Any options to subscribe shares involving a corporation’s capital increase or convertible debentures which may convert to shares of the issuing corporation, or any other security granting future rights over such shares, shall be offered at least once to the shareholders preemptively, in the proportion of their shareholding interest. Any non-paying shares issued by the corporation shall be distributed in the same proportion.

This preemptive right may be waived and transferred.

⁶⁵ Article 67 of the Corporations Act provides:

Resolutions adopted at the special shareholders’ meeting that involve an amendment to the corporate bylaws or the rectification of formal defects causing amendments to be void, shall be adopted by

It would be subject to an order of this Court confirming a Chapter 11 Plan. *See* Revised Credit Agmt. Sch. 2.12(a)(i) § 5(ii).

After this Court has confirmed the Chapter 11 Plan, the reorganized Debtors' board will meet "to set the price of the New Shares to be issued under the Share Increase, which price shall be consistent with the Chapter 11 Plan." *Id.* § 13(i).

Prior to the effective date of the Chapter 11 Plan, the Debtors would launch a "preemptive rights offering" in Chile. *See id.* § 14(i). This Rights Offering would be to all shareholders, even if they did not participate in the financing, and allow all shareholders to purchase shares. *See* Corporations Act, Art. 25, *supra*. Schedule 2.12(a)(i) provides that the "Rights Offering . . . will be a condition to the effectiveness of the Chapter 11 Plan." Revised Credit Agmt. Sch. 2.12(a)(i) § 14(i). The Board will have the right to place any unsubscribed shares from the Rights Offering with the Tranche C Shareholders. *See id.* § 14(ii).

On the effective date of the Chapter 11 Plan, the Debtors will distribute cash to the Tranche C Lenders sufficient to pay the Tranche C Obligations, and the Tranche C Lenders would immediately use that cash to subscribe and pay for the equity distributable under the Equity Subscription Election, including the discounted shares.

The Objectors say that the Company paid dearly for the Tranche C Lenders' agreement to reduce the discount rate from 32% of plan value, since the cost of repaying the Tranche C Lenders in cash under the Modified Tranche C DIP Facility, increased by 44%, or \$106 million. *See* Knighthead Post-Trial Brief ¶ 3 (first citing to Trial Ex. 341 (Second Suppl. Wagner Decl.), at -005; then citing Trial Ex. 295 (Wagner Suppl. Decl.), at -010). It is undisputed that the value to the Tranche C Lenders attributable to the 20% discount upon equitization equals approximately \$282.6 million.⁶⁶

the affirmative vote of the majority to be determined in the bylaws, which, in the case of closely held corporations, may not be less than the absolute majority of issued shares with voting rights.

⁶⁶ *See* Trial Ex. 341 (Second Suppl. Wagner Decl.) at -005 (illustration showing amount attributable to 20% discount upon equitization). The Debtors' analysis quantifies the discount to shareholders at \$279.2 million. *See* Trial Ex. 333 (LATAM Discussion Materials) at -004.

At the request of the Committee, and to give interested parties the opportunity to consider the terms of the Modified Tranche C DIP Facility, the Court postponed the start of the Hearing to July 29, 2020.

Jefferies Files the Amended Jefferies Commitment

That day, Jefferies filed an amended proposal (the “Amended Jefferies Commitment”). *See* Notice by the Ad Hoc Group of LATAM Bondholders of Amended Alternative Tranche C DIP Facility Proposal [ECF No. 692] (the “Amended Jefferies Commitment”). The Debtors advised the Court that they would move forward and seek approval of the Modified Tranche C DIP Facility, and the evidentiary Hearing proceeded accordingly.

At the Hearing, Coleman, testified as to the comparative terms between the Amended Jefferies Commitment and the Modified Tranche C DIP Facility, and as summarized in the presentation prepared by PJT titled “LATAM Discussion Materials” dated July 28, 2020. *See* 7/29/20 Hr’g Tr. at 124:5-124:18; *see also* Trial Ex. 333 (LATAM Discussion Materials). The LATAM Discussion Materials contained a side-by-side comparison of the principal terms of the shareholders’ Modified Tranche C DIP Facility and the Amended Jefferies Commitment, as follows:

	Shareholders DIP	Amended Jeffries Commitment
Commitment:	\$900m, up to \$1,150m	same
Draw Conditions:	Delayed draw (5 draws max, 50% in first draw)	Tranche A and Tranche C fully drawn at closing
Interest:	14.5% PIK with 0.5% LIBOR floor Compounds quarterly and accrues daily based on a 365 day (or 366 when applicable) calendar year	L+ 15.0% PIK with 1.0% LIBOR floor, compounds quarterly and accrues daily based on a 360 day calendar year
Fees:	2.5% Back-End Fee 0.5% Undrawn Commitment Fee	2.0% Closing Fee (PIK) 3.0% Exit Fee (Cash)

	If LATAM elects equity repayment, 20.0% Equity Conversion discount to Plan Valuation If Company elects cash repayment, balance due calculated as principal plus interest at Jefferies rate (L+15.0%) plus Jefferies' closing fee (2.0%) plus Jefferies' exit fee (3.0%) plus 6.0%	2.25% Underwriting / Arranger Fee to Jefferies (Cash) \$175,000 per annum Admin. Fee to Jefferies (Cash) Alternative Transaction Fee for fees owed if Debtors choose another deal within 6 months and/or certain other conditions
Maturity:	18 months with 60 day extension at Borrower's option subject to no Event of Default and bankruptcy milestones met	(same) 18 months with 60 day extension at Borrower's option, subject to following additional maturity date triggers: (i) date a foreign insolvency court orders liquidation of a Borrower / Guarantor and (ii) the date any guarantor that is not a Debtor at the time of entry of the DIP Order files a Chapter 11 petition
Treatment at Exit:	Cash repayment or equity conversion at Debtors' option	Cash repayment/refinance only
Tranche A Negotiation:	No	Yes

Alfonsin testified that after reviewing the two proposed Tranche C DIPs, the Debtors felt that the economic terms of the Amended Jefferies Commitment did not improve, and many non-economic terms still posed issues for the Debtors; and therefore, the Board ultimately decided to reject the Amended Jefferies Commitment, and proceed with the Modified Tranche C DIP Facility.⁶⁷

⁶⁷ Alfonsin testified, in part, as follows:

Q. And what was LATAM's reaction to the Jefferies revised proposal?

A. Well, we reviewed it. Economics -- terms did not change, and the terms and the issues that we had raised have been dealt with in a very limited way. We still had an issues list that was considerable.

Q. And what did LATAM do with the two revised proposals they had received, the Tranche C lender proposal and the Jefferies proposal?

**After Hearing Commences Jefferies Submits
Further Revised Tranche C DIP Facility Proposal**

On July 29, 2020, the Court commenced the Hearing. That day, Jefferies submitted a further revised Tranche C DIP proposal (the “Further Amended Jefferies Commitment”), ostensibly to address the Debtors’ concerns with the Amended Jefferies Commitment. *See* Notice by the Ad Hoc Group of LATAM Bondholders of Further Amended Alternative Tranche C DIP Facility [ECF No. 726]. The Further Amended Jefferies Commitment modified several terms from the Amended Jefferies Commitment, including, without limitation:

- Providing for a dual-draw (as opposed to a single-draw) facility of an initial draw of 50% of the commitment upon closing, with the remainder 50% to be drawn at any time before October 15, 2020;
- Removing a Right to Purchase offered to the Tranche C DIP Lenders to acquire equity interest in the Debtors in the event the Debtors contemplate an equity issuance (*see* Jefferies Credit Agmt. § 6.24);
- Removing the Tranche C DIP Lenders’ right to approve certain of the Debtors’ sale-leaseback transactions above a certain threshold;
- Removing the requirement for Tranche A commitments as a closing condition;
- Loosening certain DIP budget restrictions, financial covenant requirements, and events of default, in sections 2, 7 and 8 of the Jeffries Credit Agreement; and
- Revising the requirement that the Debtors must have assumed certain agreements with Delta by a date certain to requiring the Debtors to use commercially reasonable efforts in seeking the assumption of such agreement.

A. On Tuesday morning, we sat down with our audit committee with the two independent board members and reviewed both proposals.

Q. And was there a recommendation at the end of the meeting?

A. Yes. They -- they recommended to the board that was held after the audit committee -- they recommended to the board to move forward with the revised Tranche C proposal.

Q. And was it in fact presented to the board?

A. I understand they did, yes.

Q. And what was the decision of the board with respect to the revised Tranche C proposal?

A. To move forward with the revised Tranche C proposal from the current parties.

See 7/29/20 Hr’g Tr. at 90:21-91:17.

See Further Amended Jefferies Commitment (Letter). As further support of the Further Amended Jefferies Commitment, Knighthead also filed the Second Supplemental Declaration of Thomas Wagner, in support of the Further Amended Jefferies Commitment, which included, as Exhibit A thereto, an updated “Cost Differential Analysis” comparing the returns to the investors and costs to the Debtors’ estates between the Modified Tranche C DIP Facility and Further Amended Jefferies Commitment.⁶⁸

At the Hearing, Wagner testified with respect to his updated Cost Differential Analysis, concluding that he believed the Further Amended Jefferies Commitment provided better terms, and at a lesser cost to the Debtors’ estates, compared to the Revised Credit Agreement. *See* 7/30/20 Hr’g Tr. at 186:21-22 (“The deal was and remains superior on economic terms to the insider proposal so I don’t know why Jefferies would feel a need to improve the economic terms when they’re already in the lead.”). *See also* Trial Ex. 341 (Second Suppl. Wagner Decl.), Ex. A. Further, Wagner testified that Knighthead was the “anchor” lender under the Jefferies’ alternative DIP and remains committed to provide the \$400 million thereunder. *See* 7/30/20 Hr’g Tr. at 194:5-12.⁶⁹

Notwithstanding Wagner’s and Jefferies’ assertions that the Further Amended Jefferies Commitment was significantly improved and provides better terms than the Modified Tranche C

⁶⁸ *See* Trial Ex. 341 (Second Supplemental Declaration of Thomas A. Wagner in Further Support of the Objections of Knighthead Capital Management, LLC to the Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 727], the “Second Supplemental Wagner Declaration”).

⁶⁹ That exchange was as follows:

A. Do you stand by your commitment for 400 million dollars today?

A. Absolutely.

Q. Okay. You were described by Mr. Rosenthal as the anchor tenant for the Jeffries proposal. Is that how you would also describe yourself?

A. We’re the largest commitment to our knowledge in that facility. So I think that’s a fair characterization.

DIP Facility with the Tranche C Lenders, the Debtors nevertheless rejected the Further Amended Jefferies Commitment. Instead, the Debtors maintain that the DIP Facility is their best and only DIP financing available and continues to seek approval of the Revised Credit Agreement.

ANALYSIS

Relief Requested

The Debtors seek entry of a final order (the “Final DIP Order”), pursuant to sections 105, 362, 363(c), 363(c)(2), 364(c)(3) and 364(e), of title 11 of the United States Code (the “Bankruptcy Code”); Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”); and Rule 4001-2 Local Bankruptcy Rules for the Southern District of New York with respect to the proposed DIP financing, including the Tranche A DIP Facility and the Tranche C DIP Facility, in the form of the Final DIP Order pursuant to the DIP loan documents.

Each of the Objectors denies that the Debtors have demonstrated that they require the DIP Facility; and each challenges the terms of the Tranche C DIP Facility as being above-market, and the Debtors’ good faith in negotiating those terms. They contend that the Tranche C DIP Facility is a transaction between the Debtors and their insiders that fails to satisfy the heightened scrutiny of the “entire fairness” test, and, in any event, runs afoul of section 1129 of the Bankruptcy Code because, among other things, it violates the absolute priority rule and is a sub rosa plan. They also contend that the Debtors have not demonstrated that the Tranche C Lenders are entitled to a “good faith” determination under section 364(e) of the Bankruptcy Code. The Ad Hoc Group and Committee also objected to the Supplemental DIP Motion.⁷⁰ In

⁷⁰ See Objection of the Official Committee of Unsecured Creditors to the Debtors’ Supplemental Motion for an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Superpriority Administrative Expense Claims and (II) Granting Related Relief [ECF No. 658] (the “Committee Tranche A DIP Objection”); and

substance and in brief, the objections to the Tranche A DIP Facility focus on the fact that not only is the Tranche A DIP Facility structurally tied to the Tranche C DIP Facility (in that they are encompassed in one DIP Credit Agreement and cannot be separated and share overlapping terms), but that the Tranche A DIP Facility is economically tied to the Tranche C DIP Facility in that funding under the Tranche A DIP Facility is conditioned upon approval of and funding of the Tranche C DIP Facility, and in particular, the Tranche C DIP Facility with the Tranche C Lenders.⁷¹ Thus, the Objectors assert that approval of the Tranche A DIP Facility would only serve “to further entrench (and benefit) the proposed Tranche C lenders at the expense of the Estate.” Ad Hoc Tranche A DIP Objection ¶ 2. The Objectors maintain that the interdependence of the Tranche A and Tranche C DIP Facilities renders the entire DIP Facility subject to heightened scrutiny (notwithstanding the fact that Oaktree is clearly not an insider), and reviewed in that light, the Debtors cannot show that the DIP Facility terms are entirely fair. *See, e.g.,* Committee Tranche A DIP Objection ¶¶ 6-7; 12-15.⁷²

The Debtors deny those assertions. They reject the absolute priority and sub rosa plan objections as irrelevant to the approval of the DIP Facility, because they say that plan terms are not being dictated and the lenders do not control the plan process. They say that the Tranche C Lenders are instead agreeing to provide shareholder consents in furtherance of an eventual plan process later in the case, which can only serve as a benefit to the Debtors in their reorganization.

Ad Hoc Bondholder Group’s Objection to Debtors’ Supplemental Motion to, Inter Alia, Approve Post-Petition Financing (Dkt. 485) [ECF No. 653] (the “Ad Hoc Tranche A DIP Objection”).

⁷¹ The Ad Hoc Group notes, for example, that one of the “Linking Provisions” that ties Tranche A to Tranche C is that an Event of Default would be triggered under the DIP Credit Agreement if the proposed Tranche C Lenders were replaced by other Tranche C (third party) lenders, such as Jefferies. *See* Ad Hoc Tranche A DIP Objection ¶ 9.

⁷² The Committee also object to the Tranche A DIP Facility, the form of Final DIP Order, as well as the good faith finding as to Oaktree under section 364(e) of the Bankruptcy Code. *See* Committee Tranche A DIP Objection ¶¶ 16-18.

See generally Debtors Reply at 5. Moreover, they contend that the DIP loan does not purport to pay the lenders anything on account of their existing equity. *Id.* The Debtors contend that in attacking the terms of the Tranche C DIP Facility, the Objectors fail to account for either the difficult current environment in the airline industry or the extensive and thorough efforts undertaken by the Debtors and their professionals. *See id.* at 2. They maintain that they sought a financing commitment from their shareholders because they were best placed to provide such a commitment in the run-up to the bankruptcy filing, and that it was important that they commenced the Chapter 11 Cases with the ability to provide assurances to their passengers, vendors, lessors, lenders and others that they had the financing needed to operate the business. *Id.* at 3. They deny that the “entire fairness” standard applies to the DIP Facility – particularly as to the Tranche A DIP Facility – but contend that the DIP Facility passes muster regardless of the standard applied. They assert that the loan terms and the DIP Credit Agreement were negotiated with separate and sophisticated advisors on all sides, where the shareholder lenders and company management separated themselves, and where the proposed financing was reviewed and approved by independent directors at LATAM, who were well educated about the process and had ample opportunity to provide feedback. *See id.* at 3-4. The Debtors maintain that complaints about the scope of claims being released is misplaced because the DIP Order was always intended to provide releases to the lenders “in their capacity as such,” and not the global releases suggested in the objections.

In resolving these matters, the Court will first consider whether the Debtors have established grounds to obtain secured financing in these Chapter 11 Cases.

Discussion

Section 364(c)(3) of the Bankruptcy Code states that:

[i]f the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt . . . (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c). The factors that courts consider in assessing the merits of a debtor’s motion to obtain financing under section 364(c) are:

- (i) whether the debtor is unable to obtain unsecured credit under section 364(b) of the Bankruptcy Code, i.e., by allowing a lender only an administrative claim;
- (ii) whether the credit transaction is necessary to preserve the assets of the estate; and
- (iii) whether the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and proposed lender.

In re Republic Airways Holdings Inc., No. 16-10429(SHL), 2016 WL 2616717, at *11 (Bankr. S.D.N.Y. May 4, 2016) (citing *In re Los Angeles Dodgers LLC*, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011)). To demonstrate that it qualifies to seek secured financing under this section, a debtor need only demonstrate that that “it has reasonably attempted, but failed, to obtain unsecured credit under sections 364(a) or (b).” *In re Ames Dep’t Stores*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990); *see also In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987). “The statute imposes no duty [on a debtor] to seek credit from every possible lender before concluding that such credit is unavailable.” *Bray v. Shenandoah Fed. Savs. & Loan Ass’n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). *See also Pearl-Phil GMT (Far E.) Ltd. v. Caldor Corp.*, 266 B.R. 575, 584 (S.D.N.Y. 2001) (authorizing superpriority administrative expenses where debtor could not obtain credit as an administrative expense).

The Debtors have demonstrated that they are unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code. *See* Trial Ex. 243

(First Coleman Decl.) ¶¶ 11-17; Trial Ex. 268 (Suppl. Coleman Decl.) ¶¶ 13-15. The Objectors do not contend otherwise. Further, the Debtors have demonstrated that they require all of the financing now. It is undisputed that by reason of the adoption of short-term cost savings measures, the Company has exceeded its recent cash forecast projections. *See* 7/29/20 Hr’g Tr. 171:3–7, 179:3–180:1 (Alfonsín).⁷³ Nonetheless, the Company has demonstrated that without financing available, it is at risk that by the end of August, its cash position will drop below the “absolute minimum” needed, and because “the situation . . . is very delicate . . . we must through our efforts[] try to avoid reaching that level.”⁷⁴ Further, it is undisputed that the current lack of confirmed DIP Financing is “providing huge uncertainties” in the Company’s ongoing “negotiations with lessors,” as well as customers and vendors.⁷⁵ The Objectors—all of whom have been provided with the Debtors’ cash flow and liquidity forecasts—offer no evidence that the Debtors’ needs are inflated.⁷⁶ The Court finds that that the Debtors have established that they have an urgent need for financing and that it is appropriate for them to seek approval of the full \$2.45 billion DIP Facility at this time.

⁷³ Alfonsín explained that LATAM has preserved additional cash by, among other things, selling tickets for future trips at a discount, negotiating with vendors to defer expenditures, and postponing refunds. *See* 7/29/20 Hr’g Tr. at 179:5-180:1 (Alfonsín). On the other hand, Mr. Alfonsín also explained that it has become increasingly difficult to negotiate with LATAM’s vendors, as many of them ask for upfront payments and LATAM is only able to defer payments for so long. 7/29/20 Hr’g Tr. at 178:14–179:2 (Alfonsín).

⁷⁴ 7/29/20 Hr’g Tr. at 164:11-15 (Alfonsín), *see also* Trial Ex. 332 (LATAM 18 Month DIP Budget 13 Week Cash Flows) at 005 (consolidated 15-week cash flow); 7/29/20 Hr’g Tr. at 120:3-6, 165:11-17 (Alfonsín) (explaining that the absolute minimum level of liquidity to operate the Company is \$700 million).

⁷⁵ 7/29/20 Hr’g Tr. at 178:25-179:2 (Alfonsín) (“I need to provide comfort to all the different stakeholders that we have financing to [get] through this process, and to restructure the company.”).

⁷⁶ The DIP Lenders also have confirmed LATAM’s need for the full DIP Facility amount. *See* Jacobson Dep. Tr. at 35:18–23 (“And then upon doing the due diligence . . . Delta came to agreement with the conclusion that LATAM needed more capital than . . . Delta’s original view.”); Oaktree Statement ¶ 10 (“Oaktree has performed extensive analysis of the Debtors’ liquidity needs and fully supports the need for DIP financing of this size and at this time, in light of all the circumstances and especially the uncertainty of the Debtors’ business prospects as these Chapter 11 Cases proceed.”).

Still, the Objectors contend that the Court should deny the Motions, because, among other reasons, the terms of the Tranche C DIP Facility are not “fair or reasonable.” The business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quotation marks and citations omitted). It “shields corporate decision-makers and their decisions from judicial second-guessing when the following elements are present: ‘(1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets.’” *Id.* (quoting Dennis J. Block, Nancy E. Barton & Stephen A. Radin, *The Business Judgment Rule* 12 (3d ed. 1991)). Generally, in evaluating the merits of proposed post-petition financing, courts will defer to a debtor’s business judgment provided that the financing does not unduly benefit a party in interest at the expense of the estate. *See In re Ames Dep’t Stores*, 115 B.R. at 40 (approving debtors’ proposed financing in absence of alternative financing and finding that the business judgment standard applies “so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.”); *In re Barbara K. Enters., Inc.*, No. 08-11474 (MG), 2008 WL 2439649, at *14 (Bankr. S.D.N.Y. June 16, 2008) (denying post-petition financing in exercise of the court’s “important oversight role” and finding that the court’s “normal function in reviewing requests for post-petition financing is to defer to a debtor’s own business judgment so long as a request for financing does not ‘leverage the bankruptcy process’ and unfairly cede control of the reorganization to one party in interest.” (citation omitted)). The Debtors say that is so because

the Independent Directors have deliberated and approved of the terms and conditions of the Tranche A and Tranche C DIP Facilities, the Debtors' decision to enter into the Revised Credit Agreement and obtain the Tranche A and Tranche C DIP Facilities is an exercise of their sound business judgment.

By definition, the business judgment rule is not applicable to transactions among a debtor and an insider of the debtor. Those kinds of transactions are inherently suspect because "they are rife with the possibility of abuse." *In re Bidermann Indus. U.S.A. Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (quoting *C & J Clark Am., Inc. v. Carol Ruth, Inc. (In re Wingspread Corp.)*, 92 B.R. 87, 93 (Bankr. S.D.N.Y. 1988)). Instead, courts apply a "heightened scrutiny" test in assessing the *bona fides* of a transaction among a debtor and an insider of the debtor. *See In re MSR Hotels & Resorts, Inc.*, No. 13-11512, 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013) ("[C]ourts in this jurisdiction have generally applied a heightened standard of scrutiny when the transaction [in] question is with an insider of the debtor." (citing *In re Innkeepers USA Tr.*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010)). *See also Pepper v. Litton*, 308 U.S. 295, 306 (1939) (noting that a controlling shareholder's "dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder to not only prove the good faith of the transaction but also to show its inherent fairness..."); *Schubert v. Lucent Techs Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 412 (3d Cir. 2009) ("A claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts." (quoting *Fabricators Inc. v. Tech. Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1465 (5th Cir. 1991))). "In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a

proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration.” *In re Innkeepers USA Tr.*, 442 B.R. at 231.

Thus, an insider’s dealings with the debtor are subject to rigorous scrutiny by the court, with the insider bearing the burden of showing the “entire fairness” of the transaction at issue. *See WHBA Real Estate Ltd. P’ship v. Lafayette Hotel P’ship (In re Lafayette Hotel P’ship)*, 227 B.R. 445, 454 (S.D.N.Y. 1998) (“[S]ince there is an incentive and opportunity to take advantage . . . insiders’ loans in a bankruptcy must be subject to rigorous scrutiny.” (citation omitted)); *In re L.A. Dodgers LLC*, 457 B.R. at 313 (applying “entire fairness” standard in lieu of business judgment rule to financing transaction where principal stood to personally benefit); *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holdings Unsecured Claims (In re Papercraft Corp.)*, 211 B.R. 813, 823 (W.D. Pa. 1997) (“[I]nsider transactions are subjected to rigorous scrutiny and when challenged, the burden is on the insider not only to prove the good faith of a transaction but also to show the inherent fairness from the viewpoint of the corporation and those with interests therein.” (citation omitted)), *aff’d*, 160 F.3d 982 (3rd Cir. 1998). So too will a transaction between a company and its minority shareholder where the shareholder exercises influence and control over the corporation through other means, including board seats or exclusive access to confidential information. *See Nisselson v. Softbank AM Corp. (In re Marketxt Holdings Corp.)*, 361 B.R. 369, 387-88 (S.D.N.Y. 2007) (applying entire fairness standard where shareholder was an insider on account of its minority interest in company and board seats).

The Objectors deny that the business judgment standard is applicable in this case. They say that the Court cannot defer to the Debtors’ business judgment because the Tranche C DIP Facility is the product of an exclusive negotiation among the Company and its controlling

shareholders and that those shareholders are on both sides of the transaction. They argue that in assessing the merits of the DIP Financing, the Court must subject the Debtors' actions to heightened scrutiny and apply the entire fairness standard to the proposed DIP Facility. *See, e.g.*, Committee Tranche A DIP Objection ¶ 6 ("In short, the Debtors structured both the Tranche A process and the Tranche A terms in a manner that entrenched and isolated the positions of their insiders. Close scrutiny of these issues, not deference to the business judgment of Debtors, is necessary here."); Ad Hoc Tranche A DIP Objection ¶ 12 ("The Linking Provisions guarantee that the Court cannot approve Oaktree's proposal to fund the Tranche A DIP Facility without the objectionable terms in the Tranche C DIP Facility; accordingly, the Supplemental DIP Motion must be reviewed under the 'entire fairness' test."). They say that is especially true because the Tranche C DIP Facility is designed to guaranty that the Tranche C Lenders can forego repayment of the Tranche C DIP Facility in cash and instead, take repayment of their Tranche C DIP loans in the form of new equity in the reorganized Debtors at a discount to plan value – all allegedly in violation of the absolute priority rule and the bar to sub rosa plans.

The Bankruptcy Code defines the term "insider" to include an "affiliate, or insider of an affiliate as if such affiliate were the debtor[.]" 11 U.S.C. § 101(31)(E). It defines the term "affiliate" to mean, with an irrelevant exception, "an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor[.]" *Id.* § 101(2)(A). "Courts uniformly treat [section 101(31)] as illustrative of types of insider relationships but not as exclusive, and instead refer to the definition of insider contained in the legislative history: 'one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the

debtor.”” *O’Connell v. Shallo (In re Die Fliedermaus LLC)*, 323 B.R. 101, 111 (Bankr. S.D.N.Y. 2005) (quoting *Pan Am Corp. v. Delta Air Lines*, 175 B.R. 438, 449 (S.D.N.Y. 1994)).

Costa Verde and Qatar are the proposed Tranche C Lenders. Costa Verde holds 11.19% of the Company’s stock. It is part of the Cueto Group which owns or controls approximately 21.46% of the stock and designates three of the nine members of the Board, including the Board’s Chairman and Vice-Chairman. Qatar holds 10% of the stock. It designates one director. Although Delta is not a party to the Tranche C DIP Facility, it was instrumental in negotiating the terms of the transaction and remains interested in the transaction. Delta holds 19.99 % of the Company’s common stock and designates two Board members. Thus, in the aggregate, these shareholders own or control more than 51% of the common stock and designate six of the nine Board members. It bears noting that, as set forth above, at the relevant Board meetings, the Board designees of Qatar, Costa Verde and Delta and the Eblen Group representative abstained from voting on any aspect of the Tranche A and C DIP Facilities on the grounds that they were related parties to those transactions. The Court finds that the Tranche C DIP Facility is an insider transaction that is subject to review under the entire fairness doctrine. *See In re Bidermann Indus. U.S.A. Inc.*, 203 B.R. at 551 (applying heightened scrutiny standard to review of insider sale transaction).

No one contends that that Oaktree is an insider. The Committee and Ad Hoc Group have objected to the Tranche A DIP Facility and argue that the heightened scrutiny standard should apply to that tranche because the Tranche A DIP Facility and Tranche C DIP Facility are intertwined. *See* Committee Tranche A DIP Objection ¶¶ 6-7; *see also* Ad Hoc Tranche A DIP Objection ¶ 15. The Debtors contend that even if the Court reviews the Tranche C portion of the DIP Financing under a heightened scrutiny standard, the Court can approve the remainder of the

financing on a business judgment basis, given the extensive marketing process, competitive bidding and substantial evidence of arms-length bargaining that they contend took place with the Tranche A Lender. *See* Debtors Reply ¶ 31 (citing Suppl. Coleman Decl. ¶¶ 18-21 (describing arms-length negotiation with Tranche A Lender)). However, that cuts against the Debtors' contention that the DIP loan transaction "needs to be assessed holistically, and the record shows that the terms of the Tranche C Facility were essential in raising the Tranche A DIP Facility." Debtors Reply ¶ 56. The evidence confirms the latter point. The Court will apply the entire fairness test in reviewing the Tranche C DIP Facility and the Tranche A DIP Facility.

Whether The DIP Financing Satisfies The "Entire Fairness" Test

To demonstrate that they have satisfied the "entire fairness" standard, the Debtors must show that the Revised Credit Agreement, including the Tranche A DIP Facility and Tranche C DIP Facility results from fair dealing and reflects a fair price. *See In re Innkeepers USA Tr.*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) ("In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration."); *Carlson v. Hallinan*, 925 A.2d 506, 531 (Del. Ch. 2006) ("Entire fairness has two components: fair dealing and fair price." (citation omitted)). *See also In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. at 549 ("[T]he conduct of bankruptcy proceedings not only should be right but must seem right." (citation omitted)). The Objectors contend that the Debtors have not met that burden because they have not demonstrated that the Tranche C DIP Facility is the product of a fair process or that it is fairly priced. *See* Committee Suppl. and Restated DIP Objection ¶ 59; Ad Hoc Group Initial DIP Objection ¶ 26; Knighthood Initial DIP Objection ¶ 28. The Court considers those matters below.

Before addressing the elements of the “entire fairness” test, the Court considers the Objectors’ challenge to the Debtors’ good faith in pursuing the Tranche C DIP Facility. They contend that Delta persuaded the Company to fire Evercore because Delta was not satisfied with the advice Evercore gave the Board during the April 30 meeting. They assert that Delta recommended that the Company hire PJT and, thereafter, PJT introduced the Board to the concept of a shareholder DIP loan with an equity conversion right exercisable by the DIP lender, that would afford the DIP lender the opportunity, through the DIP financing process – and outside of a plan confirmation process – to acquire or retain a substantial interest in the reorganized Debtors’ equity. As noted previously, at the May 16 meeting that it had with members of the Cueto family and Debtors’ management, PJT distributed a document titled “Illustrative Capital Structure Before, During and After Ch. 11.” Trial Ex. 47 (Coleman Email to Alfonsín), at 2-3. It showed that a \$1 billion shareholder DIP facility would convert to between 60% and 100% of the reorganized equity of the Debtors. *See id.* The Objectors say that with the help of that document, at that meeting, PJT sold the group, including the Debtors’ largest shareholders, on the concept of a DIP loan with an equity conversion right, as a means for major shareholders to “protect their investment” in the Debtors (albeit at the price of the DIP loan) and, in doing so, PJT ensured that it would be retained as the Debtors’ investment banker in the Chapter 11 Cases. In substance, the Objectors contend that from that point forward, the Debtors and PJT have promoted the concept of a multi-tranche DIP loan – with one tranche reserved for existing shareholders – for the benefit of the Debtors’ largest shareholders, but to the detriment of the Debtors’ unsecured creditors.

The evidence does not support the Objectors’ assertions. First, Evercore had signaled the possibility of a multi-tranche DIP facility, including funding from stakeholders, in the April 30

Board Discussion Materials. *See* Trial Ex. 24 (April 30 Board Discussion Materials), at 17.

Moreover, in labeling the document that it handed out at the May 16 meeting as “illustrative” or “highly illustrative,” PJT was clear that it does not demonstrate that the Tranche C Lenders would receive any particular equity percentage. More significantly, at the trial, Coleman explained the purpose of the presentation, as follows:

This was an illustrative -- and I underline “illustrative” -- capital structure analysis that we did for investors in the Costa Verde group, many family members who have never been associated with a bankruptcy, much less a U.S. bankruptcy. And they were asking us how do I get repaid if I put this money in because, obviously, Chilean bankruptcies and Brazilian bankruptcies are very different, so we created a chart. . . . We were trying to show them what might happen if their tranche needed to be converted into equity. . . . I would call this Bankruptcy 101. This doesn't anticipate a planned reorganization. It doesn't anticipate anything.

7/29/20 Hr'g Tr. at 220:14-221:10. The Court credits that testimony. Further, PJT was hired prior to the May 12 Board meeting and was introduced to the Board at that meeting. *Id.* at 232:4-7 (stating PJT executed a Retainer on May 20, 2020, effective May 7, 2020.) The minutes of the May 12 Board meeting reflect that Alvo (the Company's CEO), discussed the Company's retention of PJT, and explained to the Board that

Evercore fulfilled in technical terms the task that had been assigned to it, but that the change was mainly due to issues of coordination and agility in the consultancy since, in case of entering [an in-court restructuring], an advisor is required to get used to the pace of the Administration for the next twelve months. We have decided to hire PJT as financial advisors who, in just a few days, have internalized all the information about the Company and the decision process being developed, and the Administration considers that they have been agile, collaborative and that they have provided better advice regarding the DIP financing that shall be commented on later in this session.

Trial Ex. 40 (Minutes of the Ordinary Session No. 454 of the LATAM Airlines Group S.A. Board of Directors, dated 5/12/2020). Later during the May 12 meeting, PJT made a presentation to the Board which, among other things, highlighted that a chapter 11 filing for the

Company likely would be necessary and that the Company should secure commitments for a multi-tranche DIP facility—including a first loss junior shareholder tranche—that the Company and its advisors had already contemplated. In those materials, in a slide titled “Illustrative DIP Approach,” among the “Considerations” noted by PJT were “Potential DIP sources, 3rd party investors, government, existing shareholders.” Trial Ex. 39 (May 12 Presentation), at 8. The minutes of the meeting reflect that Brent Herlihy of PJT addressed the Board on matters relating to DIP financing. Referring to the slides, Herlihy noted that “[w]ith regard to DIP financing, it explains that the size must be determined, against what loans can be made, what the sources are – potential third parties, shareholders, or governments or combinations of the three of them – how it is properly structured if there are three types of collateral with different interests and different approaches towards the exit.” *Id.* at 6. Finally, they had good reasons for approaching their major shareholders for DIP financing. As previously discussed, the Debtors have demonstrated that the benefits to them in obtaining shareholder financing include that such financing (i) potentially creates or enhances opportunities to obtain governmental financial support, (ii) sends a strong message to the market with respect to the viability of the Debtors’ business, and (iii) is a condition to obtaining Tranche A financing. The Court finds no merit to the Objectors’ challenge to the Debtors’ good faith in seeking approval of the Tranche C DIP Facility.

**Whether The DIP Facility, Including
The Tranche C Loan, Resulted From A Fair Process**⁷⁷

⁷⁷ This discussion is supplemented by the Court’s detailed recitation of the facts relevant to the Motions, including, without limitation, its discussion of the Board meetings and the actions by the Debtors, their management and advisors, the Directors and the Board, and the Independent Directors and Directors Committee in connection with the Tranche C DIP Facility and Tranche A DIP Facility.

“Fair dealing focuses on the actual conduct of corporate fiduciaries in effecting a transaction, such as its initiation, structure, and negotiation.” *Carlson v. Hallinan*, 925 A.2d at 531 (internal quotations marks and footnote omitted). The concept of “due care” is directly relevant to the “fair process” prong of the entire fairness test. *In re Innkeepers USA Tr.*, 442 B.R. at 231. It can be established by evidence of careful consideration and process, including but not limited to, financial analyses, independent advice and careful deliberation. *Id.* See also *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1172-76 (Del. 1995) (discussing the initiation, negotiation, structure and disclosure of the transaction in order to determine whether it was the result of fair dealing). The Court considers whether the Debtors have met their burden of demonstrating that the Revised Credit Agreement, including the Tranche C and Tranche A DIP loans, are products of a fair process.

The sudden onset of the COVID-19 pandemic devastated the Debtors’ business in just a matter of weeks, causing millions of dollars in losses every day. See Otton Dep. Tr. at 109:24-110:1 (“And the information we’ve seen so far suggests that LATAM is burning about \$13 million a day.”). The Debtors’ immediate, pre-petition, response to the onset of the pandemic was measured, informed and the product of careful, well-informed deliberation. In response to that shock to the Debtors’ collective system, in the roughly ten weeks between the onset of the pandemic and the filing of the Chapter 11 Cases, the Board met no less than 15 times. At those meetings, the Company’s management and outside advisors presented information to the Board on the Company’s cash flow and liquidity, restructuring alternatives, the possible need to file a chapter 11 bankruptcy under the U.S. Bankruptcy Code, attempts to obtain government financing, DIP financing and other operational and strategic matters. See, e.g., Trial Exs. 7-21, 23-27, 35-37, 39-40, 43, 52-55, 64, 71-73, 121-125 (minutes of LATAM Board meetings). The

Debtors, through their management and the Board, and with the assistance of the Company's legal and financial advisors, implemented a systematic approach in developing a business plan that allowed them to (i) stabilize their business; (ii) assess the viability of an out of court restructuring of that businesses, including, in the first instance, the availability of obtaining prompt financial assistance from governmental units; and (iii) when it was clear that a bankruptcy filing was necessary, to obtain the financing needed to underwrite it.⁷⁸ The record shows that management, with the assistance of the Company's legal and financial advisors, regularly advised the Board of developments impacting the business. When it appeared likely that a bankruptcy filing by the end of May would become necessary, the Company's advisors provided the Board with information and analysis relevant to the chapter 11 process generally, and specifically regarding the need for, and potential sources of, DIP financing, which ultimately evolved into the DIP Credit Agreement. *See, e.g.*, Trial Ex. 53 (External Advisors' Discussion Materials Presentation, dated May 19, 2020). When the Company determined, for good reasons, that it would look to its shareholders to provide a portion of the DIP financing, it structured the

⁷⁸ The Board minutes are particularly instructive on these matters. In early March when the pandemic literally grounded the Debtors' lucrative passenger operations, the Board received regular updates on the impact of the pandemic and the affirmative steps the Company was taking to reduce costs, manage cash flow and respond to the crisis. *See, e.g.*, Trial Ex. 7 (Extraordinary Board Meeting Minutes No. 148, dated Mar. 11, 2020) at -0313. By late April, as the pandemic continued, the Company's management and financial and legal advisors were developing and reporting to the Board on potential paths to address the developing and worsening situation, including an out-of-court restructuring and a possible chapter 11 bankruptcy filing, where the Company remained focused on determining whether an out-of-court solution could succeed. *See, e.g.*, Trial Ex. 19 (Ordinary Meeting of the Board of Directors Minutes No. 152, dated April 21, 2020); Trial Ex. 21 (Alternatives Under Analysis Presentation, dated April 21, 2020) at -8652; Trial Ex. 23 (Ordinary Meeting of the Board of Directors Minutes No. 153, dated April 28, 2020) at -68602; Trial Ex. 26 (Ordinary Meeting of the Board of Directors Minutes No. 154, dated April 30, 2020); Trial Ex. 25 (Financial & Legal Presentation, dated April 30, 2020). The level of board engagement expanded by May, as the directors received detailed assessments of the Company's liquidity positions and efforts to obtain assistance outside of a formal bankruptcy filing, including discussions with various governmental representatives on the potential for financing or other support. *See, e.g.*, Trial Ex. 25 (Financial & Legal Presentation, dated April 30, 2020) at -525 to -561; Trial Ex. 55 (Extraordinary Board Meeting Minutes No. 156, dated May 19, 2020) at -516 to -518; Trial Ex. 39 (May 12 Presentation); Trial Ex. 53 (External Advisors' Discussion Materials Presentation, dated May 19, 2020). The Board received regular and detailed information from the Company's financial advisors, including PJT from the time it was first engaged on May 7, 2020, as well as legal advice from company counsel. *See, e.g.*, Trial Ex. 43 (Ordinary Meeting of the Board of Directors Minutes No. 454, dated May 12, 2020) at -296 to -299; Trial Ex. 39 (May 12 Presentation).

ensuing negotiations among the Debtors and shareholders to ensure that Board representatives were not on either side of the negotiations.⁷⁹ Several draft term sheets and drafts of the Tranche C Commitment Letter were exchanged between the parties, and management updated the Board on the status negotiations of the DIP term sheet. *See, e.g.*, Trial Ex. 72 (Extraordinary Board Meeting Minutes, dated May 22, 2020), at -634 (noting that “negotiations with Qatar Airways have been progressing” and “Costa Verde has expressed interest and has indicated that it will refrain from direct negotiations and will join in what [management] agrees with Qatar”). Finally, the process adopted by the Board in reviewing and ultimately approving the Tranche C DIP term sheet was “by the book.” As discussed below, under Chilean corporate law, public companies like LATAM Parent, must ensure that “related party” transactions, like the Tranche C DIP Facility, are reviewed by the Directors Committee, and are put to a Board vote, excluding interested directors, based on the Directors Committee’s recommendations. Company management brought that “related party” transaction to the Directors Committee for its review at the May 25 Directors Committee meeting and, after approving the transaction, the Independent Directors brought the transaction to the Board for review at the May 25 Board meeting, with only non-conflicted Board members voting on the proposed transaction.⁸⁰

⁷⁹ On the one hand, the Company’s management, including Alfonsin, and its outside advisors Cleary Gottlieb and PJT, negotiated on behalf of the Company. *See* Trial Ex. 72 (Extraordinary Board Meeting Minutes, dated May 22, 2020) at -637. On the other hand, Delta and its counsel negotiated on behalf of the shareholders, while Qatar and Costa Verde (and Enrique and Ignacio Cueto particularly) did not participate in the negotiation of the financing terms, other than that Qatar’s counsel stepped in to negotiations around May 25, when Delta concluded it would not be an initial DIP lender party to the financing. *See* Factual Background, *supra*; Trial Ex. 123 (May 25th BOD Minutes).

⁸⁰ *See* Trial Ex. 125 (May 25th Directors Committee Minutes); Trial Ex. 124 (May 25th Directors Committee Statement); Trial Ex. 123 (May 25th BOD Minutes); Trial Ex. 122 (May 25 BOD Materials).

Immediately upon filing their bankruptcy petitions, the Debtors and their advisors began an extensive marketing process seeking the full \$2 billion plus in DIP financing that the Debtors required. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 24; Trial Ex. 293 (Alfonsín Suppl. Decl.) ¶ 9. *See also* Coleman Dep. Tr. at 92:6-9 (“[W]e did seek to replace all of the Tranche C with anybody that was willing to give, by example, more than \$2 billion in total without tranches.”). PJT sent teasers “seeking \$2+ billion” in DIP financing to over 150 parties seeking financing for the Debtors, with over 80 of those parties signing non-disclosure agreements. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 24; Trial Ex. 276 (PJT contact log); Trial Ex. 292 (Reply Coleman Decl.) ¶ 9 (stating that no party that agreed to sign an NDA had been denied access to the data room housing detailed financial and due diligence information about LATAM). However, notwithstanding the willingness of parties to access the data room, the Debtors did not receive better alternative offers. *See* Coleman Dep. Tr. at 94:23-25 (“My recollection on [the PJT call log] is not one of those parties was willing to come in at a cheaper-better price, if you will, than what was in the Tranche C.”). Several parties reached advanced negotiations with the Debtors on a possible Tranche A DIP loan. The Company received proposals of up to \$1.5 billion, where parties like Oaktree offered significantly more financing than their initial proposal. *See* Oaktree Statement ¶ 8. The Board remained actively engaged in the DIP loan process post-petition. On June 24, after the terms of the Tranche C DIP Facility had been further negotiated and documented, management and the Company’s financial and legal advisors presented the DIP Credit Agreement to the Directors Committee for its review and consideration. The Independent Directors reviewed the transaction, and thereafter, the Directors Committee recommended that the Board approve it. At the June 24 Board meeting, the Independent Directors voted

unanimously to approve it.⁸¹ A few weeks later, the Company finalized its negotiations with Oaktree over the Tranche A financing and on July 8, management and the Company's advisors presented the Tranche A DIP Facility with Oaktree to the Directors Committee. The Independent Directors reviewed the transaction, the Directors Committee recommended that the Board approve it, and, at the Board meeting, the Independent Directors voted unanimously to approve it.⁸²

The Debtors' consideration of the Tranche C DIP Facility did not end after the Board approved it. As detailed previously, in response to Knighthead's overtures regarding alternative DIP sources and Jefferies' submission of the Initial Jefferies Commitment, the Debtors, through their management and advisors engaged Knighthead and Jefferies on the terms of the proposals, considered the merits of the proposals and reported to the Board, as necessary. While that process unfolded, the Debtors re-engaged the Tranche C Lenders over the terms of the Tranche C DIP Facility and thereafter, the parties agreed to the Revised Credit Agreement which reflected the changes to the Tranche C DIP Facility. The Debtors did so while their advisors remained in contact with Jefferies and reviewed and reported to the Board on the modifications to the Initial Jefferies Commitment.

In soliciting interest in the Tranche A and Tranche C DIP Facilities, the Debtors cast a wide net. The process that the Debtors adopted in negotiating and agreeing to the terms of the Tranche A and Tranche C DIP Facilities was "fair," as evidenced by the Debtors' careful, well-informed and open consideration of the issues relating to the DIP financing. Through their

⁸¹ See Trial Ex. 200 (June 24th Directors Committee Minutes); Trial Ex. 198 (June 24th Board Minutes); Trial Ex. 199 (Board of Directors Statement); Trial Ex. 197 (External Advisors' Presentation Discussion Materials, dated June 24, 2020).

⁸² See Trial Ex. 265 (July 8th Directors Committee Minutes).

management and financial advisors, the Debtors widely marketed the Tranche A and C loans, engaged with Jefferies and Knighthouse on alternative loan proposals, and obtained significant modifications to the Tranche C DIP Facility, as reflected in the Revised Credit Agreement. That plainly supports a determination that the Revised Agreement, including the Tranche C and Tranche A DIP Facilities is the product of a “fair process.” Still, the Objectors raise the following four points in contending that the Debtors cannot meet the “entire fairness” test with respect to Debtors’ loan review process.

The Objectors raise

1. The Further Amended Jefferies Commitment is superior to the Tranche C DIP Facility;
2. The Debtors’ failure to market the Tranche C DIP Facility pre-petition precludes a finding that the process was fair;
3. The Independent Directors’ review of the Tranche C DIP Loan Facility did not comply with Chilean law; and
4. The Debtor failed to market the Tranche C DIP Facility post-petition.

The Court considers those matters below.

Whether The Debtors’ Review of the Jefferies Proposals Is Flawed

First, the Committee and Ad Hoc Group maintain that the Debtors’ process was flawed because the Further Amended Jefferies Commitment is “superior” to the Debtors’ proposed Tranche C DIP Facility. *See* Committee Post-Trial Brief at 3. As support, the Committee points to the Debtors’ own analysis showing that the Jefferies proposal “would have saved the estate \$454 million versus the original proposed Insider DIP Facility.” *See id.* at 3-4 (citing Trial Ex. 312 (PJT Presentation dated 7/24/2020 with Tranche C Side-By-Side Comparison), at 006-007 (wherein analysis indicates that, “[a]ll else being equal, current Tranche C lenders would have to reduce the discount to plan value on their equity conversion option from 32.0% to ~11.2% to

equate their total costs with that of Jefferies’ proposal.”)). The Committee further notes that when comparing the cash repayment options “the evidence shows that the Insider Lenders would be vastly overcompensated . . . and entitled to be repaid at an interest rate that is 6% greater than that proposed by Jefferies.” *Id.* at 10. The Committee also contends that the Jefferies proposal is itself “evidence that there was significant untapped interest in the market in providing Tranche C financing on superior terms [and] disproves the Debtors’ repeated assertions that the majority shareholders were uniquely positioned and ‘very critical’ to provide this financing.” *Id.* at 18.

The Debtors disagree that the Further Amended Jefferies Commitment is superior, and maintain that the Revised Credit Agreement (i.e., the combined Tranche A DIP Facility with Oaktree and the Tranche C DIP Facility with the shareholders) is the only and best financing available to the Debtors because it “(i) is unconditional, subject only to this Court’s approval, (ii) provides the entirety of the DIP funds needed by the Debtors, including critically the \$1.3 billion senior Tranche A, (iii) provides the Debtors—at *their option*—with a right to compel the junior lenders to subscribe to restricted equity at a pre-determined discount irrespective of the market discount for such equity at reorganization, (iv) leaves the Debtors virtually unrestricted in their future efforts to seek Tranche B financing from a number of potential sources, and (v) respects the Debtors’ operational challenges and offers critical flexibility to run their business.” Debtors Post-Trial Brief ¶ 2. They say that the Further Amended Jefferies Commitment for an alternative Tranche C DIP loan is “not executable” (*see id.* ¶ 7), and still presents issues for the Debtors, which the Committee’s financial advisor, Charles Otton (“Otton”) at UBS Investment Bank (“UBS”), had failed to consider, as follows:

- The Debtors cannot afford to abandon the hard-fought Tranche A DIP Facility with Oaktree (who has conditioned its commitment and funding upon the current Tranche C DIP Facility with the shareholder Tranche C Lenders), and risk their future prospects and the livelihoods of tens of thousands of employees worldwide

by foregoing a fully funded Tranche A DIP Facility in favor of the hope something that is at best equivalent may be obtainable later. *Id.* ¶ 4.

- The opportunity to seek Tranche B financing from a broad number of potential lenders, whereas, the Jefferies proposal restricts potential lenders to only one, the government of Chile. *Id.*
- Numerous non-financial terms where the Jefferies Proposal does not come close to stacking up to the DIP Facility, including for example the former's unworkable requirement that LATAM maintain cash accounts of no more than \$500 million *in the aggregate* outside the United States, a restriction that shows an alarming failure to comprehend what is required to run a global airline such as LATAM. *Id.*
- The Further Amended Final Jefferies Commitment is "committed in name only." *Id.* ¶ 9.⁸³

The Debtors also say that beyond these non-economic issues, the economic terms of the Jefferies proposal, even by the Objectors' own metrics, are not superior. Specifically, they say that at the Hearing, Otton conceded that with respect to the cash repayment election, "the total cost of repayment of the two proposals is essentially the same." Debtors Post-Trial Brief ¶ 8 (citing 7/30 Hr'g Tr. at 422:4–10;⁸⁴ Ex. 334 (Tranche C Side-by-Side Comparison)). The

⁸³ The Debtors contend that the Further Amended Jefferies Commitment is not fully committed because there are conditionality to funding. At the Hearing, Coleman testified as follows:

Q. I want to ask you what is explained in the first row that's titled "Commitment", that first comparison row?

A. This is the -- both the size of the amount that is potentially committed -- in the case of the Tranche C, it is committed -- and then in case of Jefferies, it's the potential commitment.

Q. And why do you say that it's a potential commitment?

A. It originally started with a lot of conditionality. They have made improvements on a conditionality, but they still have terms which they can introduce that are unknown and could change the face of this deal.

7/29/20 Hr'g Tr. at 204:18-205:3.

⁸⁴ Otton's testimony is as follows:

Q. And Exhibit 334, which is your comparison chart --

A. Yes, sir.

Q. -- and just to make sure my math is right, because I'm not a finance guy, your conclusion from this chart is that the total cost of cash repayments of the two proposals is virtually equal, correct?

A. On a conservative basis, yes. It's in fact, slightly -- it doesn't matter, you don't want a long answer. But yes, cash is -- is very similar.

Debtors further assert that the proposed Revised Credit Agreement provides non-economic advantages that the Objectors have failed to value—including, significantly, the Debtors’ option, under the Tranche C DIP Facility, as revised, to exercise the Equity Subscription Election. They say that “[i]n a global pandemic with little visibility toward resolution,” they need to retain this flexibility in the event that they are unable to refinance the DIP Facility, and that Otton conceded that such option was valuable, although he did not value it. *See id.* They maintain that in addition to the conversion option, there is value to the Debtors’ ability to compel a waiver of the Chilean preemptive rights in the event that the Modified Equity Subscription Election is made under the Modified Tranche C DIP Facility. *See* Revised Credit Agreement § 2.12(b)(ii)(4)(y).

The Court finds merit in the Debtors’ arguments. The evidence before the Court demonstrates that, contrary to the Objectors’ contentions, the Debtors and their advisors, including the Independent Directors, evaluated and considered the Jefferies proposal in good faith, and engaged Jefferies and its professionals. The testimony confirms that, far from ignoring or turning away Jefferies, the Debtors had expressed and communicated to Jefferies a variety of economic and non-economic concerns with respect to its proposal, and these discussions led to improvements in Jefferies’ bid, and culminated in the Further Amended Jefferies Commitment. Although the Debtors did not ultimately choose to pursue the Further Amended Jefferies Commitment over the existing shareholders Tranche C DIP Facility, they have shown that the Tranche C DIP process undertaken vis-à-vis the Jefferies competing bid was nonetheless fair.

Likewise, with respect to the fairness of price, the different terms between the Further Amended Jefferies Commitment and the Tranche C DIP Facility with the shareholders were borne out from the evidence and testimony. While Jefferies’ revised proposals addressed some

7/30/20 Hr’g Tr. at 134:15-24.

of the Debtors' economic and non-economic concerns, many issues still remained unresolved with the Further Amended Jefferies Commitment, including, as noted above, conditionality to funding, the requirement to maintain cash minimums within the United States, and limits on governmental funding under the Tranche B DIP Facility. While the Objectors submit that the Further Amended Jefferies Commitment is superior to the Tranche C DIP Facility, applying "heightened scrutiny" standards, the Court finds that it is not unreasonable for the Debtors to conclude that the Jefferies proposal was "not executable" given its terms and restrictions, and that the proposed Tranche C DIP Facility represents the only available option to the Debtors for such post-petition financing.

Whether The Debtors' Admitted Failure To Market The Tranche C DIP Facility Pre-Petition Precludes A Finding That Its Process Was Entirely Fair

There is no dispute that the Debtors agreed to the Tranche C Term Sheet without first testing the market. The Objectors say that is fatal defect to the process and, as support, they cite to *In re Innkeepers USA Tr.*, 442 B.R. 227 (Bankr. S.D.N.Y. 2010); *In re Los Angeles Dodgers, LLC*, 457 B.R. 308 (Bankr. D. Del. 2011); and *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997). *See* Committee Post-Trial Brief at 16. But those cases are distinguishable because in each case, the bankruptcy court found that the debtor acted in bad faith to the detriment of the estate, in refusing to market the subject transaction.⁸⁵ Although the

⁸⁵ In *Innkeepers*, the debtors sought to assume a plan support agreement (the "PSA"), the terms of which would give its existing shareholder equity in the reorganized debtors. 442 B.R. at 231. The Bankruptcy Court denied the relief, because the debtors failed to shop the PSA (either before or after its execution), and because the evidence showed that (i) the debtors never intended to shop it, (ii) the investment banker was specifically told not to seek any other investors, (iii) the PSA expressly prohibited the debtors from discussions with other parties, and (iv) the debtors essentially hid the PSA terms and its negotiation from their other secured lenders. *Id.* at 231-32.

In *L.A. Dodgers*, the debtors sought approval of a secured DIP loan with the Highbridge Funds ("Highbridge"), its secured lender (such loan, the "Highbridge Loan"). 457 B.R. at 310-11. The debtors' principal had a financial interest in the loan transaction because if the debtors did not seek court approval of the loan, the principal would owe \$5.25 million to Highbridge. *Id.* at 313. Major league baseball objected to the court's approval of the Highbridge Loan and argued that it was prepared to make an unsecured DIP loan on better terms than those in

Debtors did not market the Tranche C DIP Facility pre-petition, as summarized above and fully described in the Court's discussion of the facts and application of the absolute priority rule herein, the Debtors engaged in a robust marketing process post-petition. Moreover, the Debtors have demonstrated that there were good reasons for them not to go to the market with the DIP proposal prior to filing for bankruptcy protection. Briefly, but as previously discussed at length, the Debtors reasonably concluded, among other things, (i) that a DIP underwritten by its major shareholders would enhance the potential for governmental support and send a strong signal to the market that their equity holders had confidence in the Debtors' business; and (ii) that it was impractical to go into the market because it did not have adequate collateral to fully secure a \$2 billion loan. Under these circumstances, the Debtors' failure to market the Tranche C DIP Facility before executing the Tranche C Term Sheet does not support the Objectors' contention that the process fails the entire fairness test.

**Whether The Independent Directors' Review Of
The Tranche C DIP Facility Complied With Chilean Law**

The Objectors also contend that the Debtors cannot establish the "entire fairness" of the process because the Independent Directors allegedly failed to comply with Chilean law when, as members of the Directors Committee, they reviewed and, thereafter, as Board members,

Highbridge Loan, but that the debtors refused to negotiate the terms of such a loan. *Id.* Given the debtors' principal's interest in the Highbridge Loan, the bankruptcy court applied the "entire fairness" standard in evaluating the transaction. It denied the debtors' motion finding, in part, the "[b]aseball's willingness to extend unsecured credit on better terms and [d]ebtors' refusal to negotiate with Baseball precludes a finding of entire fairness." *Id.* at 314.

In *Bidermann*, the Bankruptcy Court declined to approve a letter agreement/memorandum of understanding that proposed an LBO of the debtors by certain entities owned by the debtors' CEO, which would have provided for many advantageous benefits for the CEO and the debtor's principal. 203 B.R. at 551-52. In so doing, the Bankruptcy Court explained that there was little integrity in the process because the debtors had not market tested the transaction at all (and indeed, did not respond to at least one other interested bid), but more importantly, the letter agreement had contained "window shop" provisions and sale procedures designed to discourage other sale bids altogether. *Id.*

approved the Tranche C “related party” loan transaction. *See* Ad Hoc Group Post-Trial Brief ¶ 9. A Chilean publicly-held corporation, such as LATAM Parent, is governed by two key statutes: (a) the Chilean Corporations Act, Law No. 18.046 (Appendix A *Statutes* no. 1, Law No. 18.046 Art. 2, *Ley Sobre Sociedades Anónimas* (the “Corporations Act”), and (b) the Chilean Securities Act (Appendix A *Statutes* no. 2, Law No. 18.045, *Ley de Mercado de Valores* (the “Securities Act”). Trial Ex. 337 (Yrarrázaval Decl.) ¶ 13.⁸⁶ For companies like LATAM Parent, the Corporations Act governs the incorporation of the company and the minimum terms that must be included in its bylaws, and regulates the company’s governance, by the Board of Directors and those matters reserved to the shareholders (*e.g.*, amendments to the bylaws). *Id.* ¶ 15. Title XVI of the Corporations Act (Articles 146-49) sets forth rules governing approval of “related party” transactions in respect of publicly held corporations. *See* Trial Ex. 337 (Yrarrázaval Decl.) ¶ 58. Transactions involving “related parties” are subject to “heightened scrutiny.” Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 13.⁸⁷ As relevant, Article 100 of the Securities Act defines the term “related parties” to include “[t]he corporation’s parent company (*matriz*), or a company that holds 10% or more of the equity interests of the corporation (*coligante*) as these terms are defined in the Corporations Act.” Trial Ex. 337 (Yrarrázaval Decl.) ¶ 59 (citations omitted). Article 146 of the Corporations Act states that for publicly held corporations like LATAM Parent, a related-party transaction includes any negotiation, act, agreement or deal between the corporation and an entity that owns 10% or more of the corporation’s equity. *See* Corporations Act, Art. 146 (1). Article 147 authorizes related party transactions provided that the transactions

⁸⁶ *See* Trial Ex. 337 (Declaration of Arturo Yrarrázaval [ECF No. 674], the “Yrarrázaval Declaration”). Professor Yrarrázaval is the Debtors’ Chilean law expert.

⁸⁷ *See* Trial Ex. 294 (Supplemental Declaration of Octavio Bofill Pursuant to 28 U.S.C. § 1746 [ECF No. 680], the “Bofill Supplemental Declaration”). Professor Bofill is the Ad Hoc Group’s Chilean law expert.

(i) are intended to contribute to the corporation's social interests, and (ii) are consistent in regard to price, terms and conditions with those prevailing in the market at the time the transaction is approved. They also must comply with certain enumerated formalities and procedures. *See* Corporations Act, Art. 147.⁸⁸

The parties agree that provisions of the Tranche C DIP Facility qualify as a "transaction with a related party" under the Corporations Act. *See* Trial Ex. 337 (Yrarrázaval Decl.) ¶ 65; Trial Ex. 294 (Bofill Suppl. Decl.) ¶¶ 11-12. The concept of "corporate interest" is not defined under Chilean law. Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 14. For Professor Bofill, the concept equates with maximizing the value of a company or at least preserving that value.

⁸⁸ Those formalities and procedures are:

- i. The interested directors must immediately inform the board of directors of their conflict of interest;
- ii. The transaction must be approved by an absolute majority of the board members, with the interested directors abstaining (and to be informed to the shareholders afterwards). In case the majority of directors are *interested* directors, the transaction can only be approved by unanimous vote of the remaining directors or in a shareholders' meeting with a quorum of 2/3 of the voting shares;
- iii. In case a shareholders' meeting is called to approve the transaction, the board must appoint at least one independent evaluator to inform the shareholders about the conditions of the operation, its effects and the impact at the company. In their report, the independent evaluators shall express their opinion regarding the matters that the committee of directors expressly requests to be evaluated. The company's committee of directors may appoint an additional independent appraiser in case they do not agree with the selection made by the board of directors;
- iv. The reports of the independent evaluators shall be made available and the company shall communicate them to the shareholders and to the public, by means of a communication to the Chilean market through the CMF.
- v. The members of the board shall inform the shareholders about how beneficial is the transaction for the company's interest;
- vi. In addition, duties of the committee of directors are precisely to examine the background of the transaction and to issue a report in regards to such operations. A copy of the report shall be submitted to the board of directors and shall be voted for approval or rejection.

Id. Professors Bofill and Yrarrázaval agree that where a company is insolvent, consideration of the “corporate interest” requires directors to consider the interests of creditors before shareholders. *Id.*; 7/30/20 Hr’g Tr. at 522:20-25; *id.* at 523:1-3. Professor Bofill contends that to assess whether a transaction conforms to the terms and conditions prevailing in the market, the company must ensure that no better offer is available before it contemplates accepting the insider transaction. *Id.* ¶¶ 15-17. He maintains that to do so, “market testing is required.” *Id.*⁸⁹ In reviewing the actions of the Independent Directors in connection with their consideration of the Tranche C DIP Facility, the parties agree that the Independent Directors:

- Did not retain their own legal counsel, financial advisor, or other professional advisor in connection with the Tranche C Facility.
- Did not direct the Debtors’ management or any of the Debtors’ advisors in connection with the Tranche C Facility.
- Did not engage in any negotiations relating to the Tranche C Facility.

Independent Director Stipulation ¶¶ 2-4.⁹⁰ The parties also agree that (i) the Independent Directors have not identified or produced any documents or other form of written

⁸⁹ Professor Bofill says that market testing is required because:

The company must ensure that no better offer is available before it contemplates accepting the insider transaction. Thus, the evaluation of the “price, terms and conditions adjusted to those prevailing in the market at the time of its approval”, requires to estimate under which conditions the market offers a similar transaction, in order to analyze the convenience of a given transaction.

Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 15.

⁹⁰ See Joint Stipulation of Facts Regarding the Independent Directors [ECF No. 716] (the “Independent Director Stipulation”). During a discovery conference on July 17, 2020, at the Court’s direction, the parties agreed to rely on a stipulation of facts (which became the Independent Director Stipulation) regarding the actions that the Independent Directors took in reviewing the Tranche C DIP Facility. They entered into the stipulation in lieu of the Committee, Knighthead and the Ad Hoc Group deposing the Independent Directors.

communications exchanged amongst themselves, with any advisors, or with other directors of the Board, concerning their evaluation of the Tranche C DIP Facility; and (ii) there is no record of any discussions, deliberations, information received, updates received, or other involvement, by either of the Independent Directors concerning the Tranche C DIP Facility, other than what is contained in the minutes and related materials of the Directors Committee and Board, referenced in the Independent Director Stipulation.

The Ad Hoc Group makes much of the fact that the Directors Committee did not retain independent advisors, notwithstanding the fact that it was provided with a budget for that very purpose. Even though the Independent Directors were not required to retain advisors, the Ad Hoc Committee says that their failure to do so undermines the validity of the decisions that they made with respect to the Tranche C DIP Facility. *See* Ad Hoc Group Post-Trial Brief ¶ 15. Professor Bofill says that “in [his] experience it is customary for the Board of Directors Committee to seek an independent legal and/or financial advice from advisors who are independent from those advising the Board of Directors.” Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 17. Moreover, the Ad Hoc Group asserts that the minutes of the May 25 and June 24 Board meetings reflect that neither the Board nor the Independent Directors discussed the “equity conversion feature” in the DIP or how that feature would affect creditors, let alone whether the Tranche C DIP satisfied the Debtors’ corporate interests or served the interests of creditors. Ad Hoc Group Post-Trial Brief ¶ 11. They say that the minutes show that the directors considered the interests of the Tranche C Lenders as existing shareholders in reaching their decision to submit the Tranche C DIP Facility for Board approval.⁹¹ Professor Bofill advises that based

⁹¹ *See* Trial Ex. 200 (June 24th Directors Committee Minutes) at -77918 (taking note of “the risk that, in the case of bankruptcy, the shareholders would lose . . . their initial investment in the Company”).

upon his review of the minutes of the May 25 and June 24 meetings of the Board of Directors and the Board of Directors Committee, the “Tranche C DIP Facility was not approved in a manner that satisfies the Chilean law requirements for related-party transactions.” Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 18.⁹² In contrast, based upon his review of the minutes, Professor Yrarrázaval found that the LATAM Parent’s Board of Directors (i) effectively considered that the DIP Credit Agreement contributed to the corporation’s interest, and (ii) effectively considered that the DIP Credit Agreement conformed to reasonable market conditions. *See* Trial Ex. 337 (Yrarrázaval Decl.) ¶ 68.

In considering the hallmarks of fair process, courts look to applicable corporate law. *See Pereira v. Cogan*, 267 B.R. 500, 508 (S.D.N.Y. 2001) (looking to Delaware corporate law to define the entire fairness standard, including fair process). The parties do not dispute that under Chilean law, a board of a publicly traded company like LATAM Parent cannot approve a related party transaction like the Tranche C DIP Facility without finding that the related-party transaction is in the corporate interest and that it conforms to the prevailing market terms at the time of the transaction. They also do not dispute that the Board made those findings in approving the Tranche C DIP Facility. Professor Bofill contends that, nonetheless, the transaction was not approved in a manner that satisfies Chilean law requirements because the

⁹² Professor Bofill elaborated on that conclusion, as follows:

The minutes reflect that (i) there was no sufficient review, analysis and discussion on whether the Tranche C DIP Facility satisfies the corporate interest, including minority shareholders or creditors, (ii) did not engage in a thorough analysis of whether the transaction conformed with market conditions since the terms and conditions of the Tranche C DIP Facility appear to have been compared against itself only (in the context of the situation of the company and the air transportation market), and (iii) considering the relevance of the transaction in hand, the Board of Directors Committee do not appear to have received independent legal or financial advice in connection with the approval of the Tranche C DIP Facility.

Trial Ex. 294 (Bofill Suppl. Decl.) ¶ 18.

Independent Directors did not do enough in reviewing the pricing of the transaction, and failed to consider whether the transaction satisfied the corporate interest, including the interests of minority shareholders or creditors. Professor Yrarrázaval disagrees with him. Still, neither the Debtors' nor Ad Hoc Group's experts deny that the clear statutory provision of the Corporations Act control and that in interpreting the law, they do not look beyond the clear language of the statute. *See* 7/30/20 Hr'g Tr. at 235:2-4.

It is clear to the Court that the Independent Directors embraced their roles as members of the Board and Directors Committee. Professor Bofill does not contend that they erred in considering the presentations and analysis of management and the Company's advisors who were not conflicted, at the May 25 and June 24 meetings. *See* Coleman Reply Decl. ¶ 4 (noting the PJT will not receive capital raising fee for financing in connection with shareholder participants in Tranche C). No one contends that in approving the Tranche C DIP Facility, the Independent Directors breached their fiduciary duties under Chilean law. In assessing whether the Debtors' process in agreeing to the Revised Credit Agreement, including the Tranche C and Tranche A DIP Facilities was "entirely fair," the Court will not look behind the Independent Directors' decision and attempt to resolve the dispute between two Chilean law experts over whether the Board's approval of the transaction complied with applicable Chilean law. It need not do so. The Board and Independent Directors treated the DIP loan as a "related party" transaction as required under Articles 146 and 147 of the Corporations Act. There is no dispute that the appropriate procedures were followed, that no party related to the Tranche C DIP Facility (for purposes of Chilean law) played a role in approving the transaction, and that the Board approved the transaction. The Court will consider the dispute between the experts over the Independent Directors' actions in assessing the weight to which the Court will give to the

Independent Directors' role in the transaction in reviewing the "entire fairness" of the transaction.

**Whether The Debtors Marketed The
Tranche C DIP Facility Post-Petition**

The Committee contends that the Debtors failed to adduce any evidence that they conducted a post-petition marketing process for the Tranche C DIP Facility. They say this is so in part because they have not introduced dozens of e-mails and pages upon pages of testimony evidencing (a) solicitation of numerous parties to provide the Tranche C on better terms; and (b) demands to the shareholder lenders to improve their terms. *See* Committee Post-Trial Brief at 16. However, the Debtors plainly conducted a post-petition marketing process as evidenced by the teasers, and the fact that PJT "solicited and indicated a willingness to entertain (i) proposals for the full amount of the capital need, (ii) proposals to combine the Tranche A DIP Facility and Tranche C DIP Facility, (iii) proposals to combine the Tranche B DIP Facility, Tranche A DIP Facility, and the Tranche C DIP Facility, and (iv) alternative junior DIP proposals in lieu of the Tranche C DIP Facility." Trial Ex. 243 (First Coleman Decl.) ¶ 24. It is undisputed that "[o]ver the course of this DIP marketing process, over 80 parties have signed non-disclosure agreements and received access to information on the Company and a virtual data room." *Id.* Nonetheless, the Committee says that the Debtors have admitted that the post-petition marketing process was limited to seeking Tranche A financing. *See* Committee Post-Trial Brief at 16 (citing Coleman Dep. Tr. at 204:23-24 ("we had locked in C the terms were done now we're trying to lock in A")); *id.* at 204:1-3 ("At this stage, we're not focused on trying to find C . . ."). The contention is, at best, confusing, as is the cite to Coleman's testimony. That is because in that exchange, Coleman was testifying with regard to the Company's efforts as of June 30 – more than one month after the Debtors commenced marketing the Tranche A and Tranche C loans. *See*

Coleman Dep. Tr. at 202:9-10. Moreover, the Committee contends that neither Alfonsín nor Coleman could recall ever making an active effort to facilitate a superior Tranche C proposal. *See* Coleman Dep. Tr. at 95:16-25; *id.* at 203:20-204:1 (“throughout” PJT’s documents, there has been no discussion about an “effort” to obtain a “less expensive junior tranche”); 07/29/20 Hr’g Tr. at 133:19-21 (Alfonsín) (“Q. You never called up a lender and said, we’d like you to make a proposal to replace Tranche C specifically, did you? A. Not only for Tranche C, no.”); *see also* Trial Ex. 253 (June 30 board deck), at 002 (stating that “Since signing the Tranche C term sheet with certain shareholders . . . the company and its advisors have focused significant time and effort on identifying and contacting . . . and negotiating with potential Tranche A lenders.”). But that does not detract from the fact that the evidence shows that – before Jefferies emerged – in response to the Debtors’ marketing efforts, the Debtors spoke with parties potentially interested in the Tranche C loan. *See* Coleman Dep. Tr. at 94:23-25 (“My recollection on [the PJT call log] is not one of those parties was willing to come in at a cheaper-better price, if you will, than what was in the Tranche C”). The Committee also contends that the Debtors’ corporate documents confirm that, rather than seeking the best available terms, the proposed Tranche C facility was always intended to be “reserved” for the Debtors’ existing shareholders. *See* Committee Post-Trial Brief at 17-18 (citing Trial Ex. 123 (May 25th BOD Minutes), at 023 (stating that “[t]he term sheet includes a financing tranche reserved for shareholders”); Trial Ex. 96 (May 25 Costa Verde Board Minutes), at 6700 (referring to “the tranche reserved for shareholders” and describing it as “a tranche of financing to which the rest of the shareholders can join”); Trial Ex. 251 (June 30th Costa Verde Board Minutes), at 007 (stating that “The Tranche C financing is reserved for shareholders.”)). However, that disregards the fact that in obtaining approval for the Tranche C Commitment Letter, the Debtors’ advisors informed the

Board that they would conduct a marketing process for both loans and, beginning on the Initial Petition Date, conducted a marketing process. *See* Trial Ex. 122 (May 25 BOD Materials) (“all three tranches will be subject to competing proposals from other lenders”). Further, the Directors noted as much at the May 25, 2020 board meeting. *See* Trial Ex. 125 (May 25th Directors Committee Minutes), at 5 (Coleman stated “PJT will launch a robust marketing process for the DIP Financing after the Chapter 11 filing, and that the presentation submitted to the Committee will be subject to competitive proposals that may be submitted by other prospective lending parties”).

The Objectors also contend that the Debtors discouraged interested parties from bidding on the Tranche C DIP loan by steering them to the Tranche A DIP loan and/or not being responsive to potential bidders. *See, e.g.*, Committee Initial DIP Objection ¶ 48; Ad Hoc Group Post-Trial Brief ¶ 13 (“Here, the Debtors’ failed to undertake any reasonable efforts to market the Insider Tranche C DIP Facility. In fact, the Debtors have dissuaded or at least ignored competing proposals, claiming that the Tranche C ‘economic terms are set’ and that the Insider DIP Facility is ‘designed to allow shareholders to participate in the recovery of the business.’”).

The Court finds no merit to those contentions because at trial, they failed to substantiate those claims. First, neither Otton nor Jamal could testify to a single conversation in which anyone from PJT or the Debtors chilled bidding:

Otton testified he could not report on a single specific conversation in which anyone ever said to anyone at UBS that they were chilled,⁹³ and acknowledged that PJT had consistently told UBS it was open to all offers. *See* 7/30/20 Hr’g Tr. at 130:2-5 (Q. “And in your conversations with PJT, PJT was always very clear that there was no impediment to anyone proposing an alternative C in its entirety on better terms; is that correct?” MR. OTTON: “That’s what they said to us,

⁹³ *See* 7/30/20 Hr’g Tr. at 130:17-23 (Q: “[Y]ou cannot tell this Court of a single statement made to anybody at UBS by a prospective DIP lender who claims to have been discouraged from making a Tranche C offer, can you?” MR. OTTON: “So no . . . is the answer to your question.”).

correct.” Otton also confirmed that PJT was available for regular communications with the Committee’s advisors. 7/30/20 Hr’g Tr. at 130:24-131:1 (Q. “[Y]ou have regular check-ins with PJT?” MR. OTTON: “Yes, sir.”).

Jamal gave similar testimony. *See* 7/30/20 Hr’g Tr. at 57:13-18 (“Q: You personally, as the financial advisor to the Ad Hoc Group, are not aware of a single instance in which anyone reached out to the Debtors and found the Debtors unresponsive; correct? MR. JAMAL: “No one has called me and said, ‘I tried to call the Debtors, and they weren’t responsive to me[.]’”); *id.* at 57:24-58:5 (Q: “You cannot describe for us a single conversation where someone told you that PJT or the Debtors had ever discouraged them from bidding on Tranche C, can you?” MR. JAMAL: “I can recall some frustrations that people expressed, but . . . it’s kind of hard for me to sort of parse the words that you’re describing to say, whether I could -- I would describe that as discouragement or not.”).⁹⁴

Further, the evidence that the Objectors offered at trial did not support their contentions that parties were being discouraged from proposing an alternate Tranche C:

Ottom asserted that one institution submitted an indication of interest to participate in Tranche C but PJT “shut them out of the process.” Trial Ex. 278 (Ottom Decl.) ¶ 63. The Debtors contend, and the Court agrees, that the document cited by Ottom does not support the accusation. It shows that the institution was interested in “providing a commitment for the full \$1.1 billion Tranche A,” and “further analyzing an investment in Tranche C alongside the existing Tranche C investors.” Trial Ex. 170 (Cleaver Sower Email to Tim Coleman, Brent Herlihy, Daniel DeGosztonyi re LATAM Goldman Sachs Indication of Interest), at 002. The evidence also shows that the institution became one of the finalists among those competing to provide the Tranche A, with a Tranche C additional component in its proposal. Trial Ex. 253 (June 30, 2020 BOD Discussion Materials), at 007. However, Ottom could not name anyone from this institution who voiced their frustration that the Debtors or PJT had discouraged them in any respect. 7/30/20 Hr’g Tr. at 57:24-58:5.

Ottom also cited to alleged interest from a hedge fund. *See* Trial Ex. 278 (Ottom Decl.) ¶ 61. However, as the Debtors demonstrate, he bases that assertion on an out-of-context reference to PJT’s own log. The Debtors are correct that Ottom has not cited any communications with the fund where they indicated their interest was discouraged (*see* 7/30/20 Hr’g Tr. at 130:17-23), the fund never even signed an NDA with the Debtors and, notably, the fund is not among the parties committed to the Jefferies proposal.

⁹⁴ Wagner’s testimony undercuts those contentions. He testified that during his conversations with Coleman. Coleman advised him that the Debtors would welcome an alternate Tranche C proposal and only named three requirements: that any financing (i) be committed, (ii) be better than the Tranche C that the Debtors’ proposed and (iii) discuss how it would address any Chilean law issues. *See* 7/30/20 Hr’g Tr. at 163:12-164:3.

Finally, although Otton cites “Tranche A/C Bidder 6” in Exhibit F of his report, the Debtors correctly point out that the document he cites makes clear that the bidder was only willing to offer up to \$50 million in Tranche A and C financing combined, constituting less than 2.5% of the Debtors’ needs. *See* 7/30/20 Hr’g Tr. at 117:11-118:20. Furthermore, the Objectors have not provided any evidence that fund is even participating in the Jefferies proposal.

The Court finds no merit to assertion that the Debtors discouraged and refused to engage potential Tranche C investors.

The evidence demonstrates that the Debtors, through the Board and management, and with the assistance of legal and financial advisors, identified their financial needs, actively marketed the loans, reasonably evaluated other sources of funding, engaged in arm’s length good faith negotiations with prospective lenders, adhered to corporate protocol, and fulfilled their fiduciary duties. The Court finds that the process adopted by the Debtors in connection with the Revised Credit Agreement, including the Tranche A DIP Facility and Tranche C DIP Facility was “fair.” *See In re Innkeepers USA Tr.*, 442 B.R. at 231; *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. at 549.

Whether the DIP Financing Facility Reflects a Fair Price

The Objectors complain that the price and terms of the Tranche C DIP Facility are not “entirely fair” because the pricing is excessive, and the terms broadly deviate from market standards and, in part, are calculated to entrench management, impair the protections to which creditors are entitled, and impinge on this Court’s authority. *See* Committee Suppl. and Restated DIP Objection ¶¶ 70-72. It also contends that the Proposed DIP Order⁹⁵ contains improper

⁹⁵ *See* First DIP Motion, Ex. A (the “Proposed DIP Order”).

releases of the Tranche C Lenders and others from any and all past, present, and future claims, including claims that are unrelated to the DIP Financing. *Id.* ¶¶ 73-76.

Turning first to the last point, paragraph 33 of the Proposed DIP Order is entitled “Release” and contains broad release language.⁹⁶ The Committee asserts that the Court should reject that language as “the Debtors’ back-door attempt to shield their insiders from liability, including for causes of action unrelated to the proposed financing.” *Id.* ¶ 74. In response to the objection, the Debtors have made it clear that the releases contained in the Proposed DIP Order are intended to apply only to claims that the Debtors may have against the Tranche C Lenders, in their capacity as DIP lenders. *See* Debtors Reply ¶ 14. The Debtors agree that the releases will not impact any other claims of the estate against the Tranche C Lenders and have no effect on

⁹⁶ That paragraph reads, as follows:

Release. The Debtors forever and irrevocably (i) release, discharge, and acquit the Tranche C DIP Lenders, and each of their respective former and current officers, employees, directors, agents, representatives, owners, members, partners, financial advisors, legal advisors, shareholders, managers, consultants, accountants, attorneys, affiliates, and predecessors in interest, in each case, solely in their respective capacities as such (collectively, the “Releasees”) of and from any and all claims, demands liabilities, responsibilities, disputes, remedies, causes of action, indebtedness, and obligations, of every type, that the Debtors at any time had, now have or may have, including, without limitation, any claims arising from any actions of the Tranche C DIP Lenders solely in their capacity as Tranche C DIP Lenders pursuant to the terms of the Final DIP Order and the DIP Loan Documents including any equitable subordination claims, relating to any aspect of the relationship between the Tranche C DIP Lenders and the Debtors, including any equitable subordination claims or defenses, with respect to or relating to the DIP Loans, the DIP Loan Documents, the Debtors’ attempts to restructure the DIP Loans, any of the Debtors’ other long-term indebtedness, consent to the terms of this Final DIP Order and the use of the Tranche C DIP Commitment hereunder, any and all claims and causes of action arising under the Bankruptcy Code, and any and all claims regarding the validity, priority, perfection or avoidability of the liens or secured claims of the Tranche C DIP Lenders; and (ii) waive any and all defenses (including, without limitation, offsets and counterclaims of any nature or kind) as to the validity, perfection, priority, enforceability and non-avoidability of the Tranche C DIP Obligations; provided that such release shall not apply to any claims, liabilities, remedies, causes of action, indebtedness, and obligations arising from the willful misconduct or gross negligence of the Releasees. Nothing in this Final DIP Order shall in any way be construed or interpreted to impose or allow the imposition upon the Tranche C DIP Lenders any liability for any claims arising from any and all activities by the Debtors or any of their subsidiaries or affiliates in the operation of their businesses or in connection with their restructuring efforts.

Proposed DIP Order ¶ 33.

third party claims against the lenders. *Id.* ¶ 59 n.27. Accordingly, that objection has been resolved.

As to the terms of the agreement, the Committee notes that the Revised Credit Agreement permits the Debtors to prepay the Tranche A DIP loan, but not the Tranche C DIP loan. *See* Committee Suppl. and Restated DIP Objection ¶ 79; *see also* Revised Credit Agmt. §2.14(a)).⁹⁷ The Committee maintains that the Debtors' lack of prepayment rights is unusual, unreasonable and outrageous because the Tranche C DIP Facility is the most expensive component of the DIP Financing, in contrast with the more standard terms of the Tranche A DIP Facility. *See* Committee Suppl. and Restated DIP Objection ¶ 71. It asserts that the Debtors should be able to pay off the Tranche C DIP first rather than last. *Id.* The Committee contends that to make matters worse, rather than obtaining more financing on better terms, "the Debtors chose to borrow no less than \$900 million from the [Tranche C Lenders] on unprecedented, extremely expensive and shareholder-friendly terms." *Id.* The Court finds no merit to either point. First, as the Debtors note, the Tranche C DIP Facility is a delayed-draw facility. The Debtors are not required to draw down all the funds upfront. They can draw from the facility as needed. Debtors Reply ¶ 59. That diminishes the importance of the right to prepay the Tranche C DIP loan. Moreover, the Debtors tried to increase the size of the Tranche A facility relative to the Tranche C facility. *See* Trial Ex. 268 (Suppl. Coleman Decl.) ¶ 20 ("Through these negotiations [with the Tranche A DIP Lender] the Debtors materially improved the terms of the DIP financing as compared to those originally offered . . . includ[ing] . . . [an] increased Tranche A DIP Facility size."). But, in the end, the Debtors "were cognizant of the need for sufficient liquidity to outlast

⁹⁷ The Committee filed its objection to the Motions before the Debtors filed the Revised Credit Agreement. Accordingly, the objection cites to relevant sections in that now superseded agreement. In analyzing the objection, the Court will cite to provisions in the Revised Credit Agreement, to the extent applicable.

the crisis and had no offers that would reduce the size of Tranche C while satisfying Debtors' capital needs." Debtors Reply ¶ 59.

Finally, in making these arguments, the Committee seeks to separate the terms and price of the Tranche C DIP Facility from the favorable terms of the Tranche A DIP Facility. The Debtors maintain that the Court must assess the transaction holistically, as one integrated transaction, because the record shows that the terms of the Tranche C DIP Facility were essential in raising the Tranche A DIP Facility. The Court credits that contention, as Coleman's position on this is unchallenged: the shareholders' willingness to lend into the subordinated Tranche C DIP Facility demonstrated their faith in, and continuing commitment to, the Company as a going concern, which was necessary in attracting interest in a Tranche A investment. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 16 ("Based on the negotiations with potential Tranche A lenders, it has become apparent that the Debtors' ability to announce to prospective senior lenders that they had secured financing commitments from their shareholders in the form of the Tranche C DIP Facility has been an important factor in other funds' willingness to offer financing."); Trial Ex. 292 (Coleman Reply Decl.) ¶ 7 ("LATAM's limited available hard collateral meant that attracting lenders was dependent on convincing them that the Debtors' business will continue as a going concern, making a vote of confidence from major shareholders critically important . . . discussions with potential Tranche A lenders also confirmed the importance of a preexisting commitment from major shareholders."). "[N]one of the potential Tranche A lenders were willing to provide financing without the Tranche C DIP Facility acting as a first-loss facility." Trial Ex. 268 (Suppl. Coleman Decl.) ¶ 15. The Committee concedes that the Tranche A Facility is "far more standard," (Committee Suppl. and Restated DIP Objection ¶ 71), and it is undisputed that it was "the lowest in terms of pricing compared to each of the other fully

committed proposals received by the Company.” Trial Ex. 268 (Suppl. Coleman Decl.) ¶ 22.

That supports the Debtors’ contention that the terms of the subordinated first loss Tranche C DIP Facility, include the pricing, are fair.

Fair price “relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock.” *Owen v. Cannon*, No. 8860 C.A. (CB), 2015 WL 3819204, at *31 (Del. Ch. June 17, 2015) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)). The Committee challenges the Tranche C DIP Loan as “significantly above market.” Committee Suppl. and Restated Objection ¶ 70. It says that together with the Tranche C Lenders’ ability to convert the Tranche C DIP Facility into the equity of reorganized Debtors at a discount, the terms of the Tranche C DIP loan far exceed acceptable market rates based on comparable DIP financings. *Id.* In assessing the merits of the Committee’s challenge to the pricing of the Tranche C DIP loan, the Court considers a number of factors. First, the Debtors negotiated the loan in the early days of a global pandemic which has no precedent in the history of commercial aviation. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶ 18. Through a combination of government bans on travel and customer cancellations, the pandemic has essentially shut down air travel, and it is unclear when the Debtors will be able to return to normal operations and when demand for air travel will return to pre-pandemic levels. *Id.* Second, the Debtors have limited hard-asset collateral available to secure the DIP Facility. *Id.* ¶ 7. The Court agrees that means that a Tranche C Lender in the junior, first loss, undercollateralized facility, must rely heavily on the survival of the Company as a going concern to see a return on its investment. *See* Debtors Reply ¶ 22. Finally, LATAM is a Latin American airline that is not investment-grade, has not received government financial support, but is seeking

bankruptcy financing in excess of \$2 billion. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶ 19. All of those factors must be accounted for in assessing the fairness of the pricing of the Tranche C DIP Facility.

The Court also agrees with the Debtors that the Committee does not appear to have addressed those issues in assessing the risk that the Tranche C Lenders will assume in making the loan. That is borne out by the fact that the Committee's expert's analysis, relies on "out-of-court, investment-grade financings, often highly capitalized, as well as financings of materially smaller size or taking place over much different time frames," which, are "not comparable or instructive here." *Id.* ¶ 21.⁹⁸ Without limitation, they include comparisons between LATAM and U.S. airlines which have received CARES Act funds. The Court finds merit to the Debtors' assertion that the terms on which those airlines can obtain financing adds very little to a determination of options available to LATAM.⁹⁹ Finally, in his report, Otton assumes that the

⁹⁸ In general, Otton's initial report largely compared the Debtors' proposed financing to non-bankrupt airlines, recipients of billions of dollars of U.S. government aid, and small DIP loans (mostly under \$100 million) about which he had performed no analysis of whether they were under-collateralized, the roll-up of pre-existing debt or possessed any other inapplicable characteristics. *See* Otton Dep. Tr. at 48:5-14 (inapplicable DIPs); *id.* at 88:25-89:6 (same); *id.* at 90:11-15 (received government aid); *id.* at 95:19 (not in bankruptcy); *id.* at 139:21-140:4 (inapplicable DIPs).

At his deposition, Otton acknowledged differences between LATAM and some of his purported comparables. *See, e.g.,* Otton Dep. Tr. at 82:24-83:6 ("Q. So while LATAM is in bankruptcy, none of these airlines listed here at the top of page 11 are in bankruptcy; isn't that correct? THE WITNESS: . . . I said, 'Correct.'"); *id.* 85:8-11 ("Q . . . [B]ut you would agree that the risk profile of a non-bankrupt US Airline that has received government aid would be viewed as better by an investor than the risk profile of a company like LATAM; right? Setting aside degree, the risk profile would be viewed as better? A. Yes."); *id.* at 139:21-140:4 ("Fifty-nine DIPs that you cite in Exhibit D pages 43 to 44 are outside the airline industry; isn't that correct? . . . THE WITNESS: Looking at pages 43 and 44 which are the most recent DIPs, that is indeed true.").

⁹⁹ In particular, Coleman challenges Otton's use of Delta Air Lines, an American airline with a market cap in excess of \$16 billion and that has raised billions of out-of-court financing since the pandemic started, and Raven Air, a small, Alaska-based airline that recently sold the majority of its operating assets pursuant to a liquidating plan, as comparable to LATAM. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶ 22. He points out that both U.S. airlines have received CARES Act funds, and neither has capital needs which are similar to those of the Debtors. *Id.* He argues that "[t]o compare their cost of borrowing because both are airlines is simplistic and a true embodiment of an 'apples to oranges' comparison." *Id.* The Court agrees.

Debtors would not liquidate irrespective of the length and severity of the pandemic. *See* Otton Dep. Tr. at 74:3-10.

Moreover, and in any event, the pricing has been subjected to a thorough marketing test and there are no other proposed transactions that will enable the Debtors to obtain financing on better terms consistent with its liquidity needs. Fair price can also be established by demonstrating that no better alternatives were available. *See Cancan Dev., LLC v. Manno*, No. 6429 C.A. (VCL), 2015 WL 3400789, at *26 (Del. Ch. May 27, 2015) (fairness established where there was no future for the business and alternative transactions left stockholders no better off), *aff'd*, 132 A.3d 750 (Del. 2016); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 76-78 (Del. Ch. 2013) (same); *Blackmore Partners L.P. v. Link Energy LLC*, 864 A. 2d 80, 86 (Del. Ch. 2004) (“Of course, it is also possible to infer (and the record at a later stage may well show) that the Director Defendants made a good faith judgment, after reasonable investigation, that there was no future for the business and no better alternative for the unit holders.”). That is what we have here – the pricing of the Tranche C DIP Facility, and the “fairness” of the terms – were fully vetted through a post-petition market test (described throughout this decision), which the Court has determined to be robust and fair. The Court finds that the terms of the Tranche C DIP Facility reflect a “fair price” that has been negotiated to incorporate the respective parties’ risks and rewards, and more, importantly, thoroughly tested by the market.

The Debtors have established that the Revised Credit Agreement, including the Tranche A DIP Facility and Tranche C DIP Facility results from fair dealing and reflects a fair price. In doing so, they have met their burden to satisfy the heightened scrutiny, “entire fairness” standard applicable to insider transactions. *See Carlson v. Hallinan*, 925 A.2d at 531 (“Entire fairness has two components: fair dealing and fair price.” (citation omitted)). As such, they have met their

burden under § 364(c) to demonstrate that the terms Tranche A DIP Facility and Tranche C DIP Facility are fair, reasonable and adequate. *See In re Republic Airways Holdings Inc.*, No. 16-10429(SHL), 2016 WL 2616717, at *11 (Bankr. S.D.N.Y. May 4, 2016) (noting that court must assess whether proposed DIP financing is “fair, reasonable and adequate” (citation omitted)).

Section 364(e) of the Bankruptcy Code protects a good faith lender’s right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal.

Section 364(e) provides that:

The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e). The term “good faith” is not defined in the Bankruptcy Code. *See In re Pan Am Corp.*, No. 91 CIV. 8319 (LMM), 1992 WL 154200, at *4 (S.D.N.Y. 1992) (“‘Good faith,’ as used in 11 U.S.C. §§ 364(e), is not a defined term.”). Generally, courts do not define what is good faith but rather, what is not. *See Whorl v. Solidus Networks, Inc. (In re Solidus Networks, Inc.)*, No. BAP CC-08-1046-MKKPA, 2008 WL 8462968, at *4 (B.A.P. 9th Cir. Dec. 24, 2008). Specifically, courts will not find good faith where there is fraud, collusion, actions for an improper purpose, or knowledge of illegality of the transaction. *See In re Gen. Growth Props., Inc.*, 423 B.R. 722 (S.D.N.Y. 2010) (stating “the misconduct that would destroy a purchaser’s good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders” and upholding a good faith finding where the postpetition loan was negotiated in good faith). *See*

also *In re Solidus Networks, Inc.*, 2008 WL 8462968, at *4 (explaining that to determine the existence of good faith for purposes of section 364(e), a court should “look to the integrity of an actor’s conduct during the proceedings.” (internal quotation marks and citation omitted)).

The Tranche C Lenders

The Committee contends that the Tranche C Lenders are not entitled to a good faith determination under section 364(e) for two reasons. First, they say that the lenders are “insiders” and that insiders that are parties to DIP loan agreements are not entitled to a good faith finding under section 364(e). *See* Committee Suppl. and Restated DIP Objection ¶¶ 98-99. As support for that argument the Committee misplaces its reliance on *In re Arena Media Networks, LLC*, No. 10-10667(BRL), 2010 WL 5264241, *1 (Bankr. S.D.N.Y. Feb. 25, 2010). That reported “decision” consists of the court’s final order (the “Arena DIP Order”) authorizing the debtor to obtain DIP financing.¹⁰⁰ In that order, the court did not find that an insider lender is *per se* precluded from a good faith determination under section 364(e) of the Bankruptcy Code. Rather, the Arena DIP Order merely includes a finding that the lender subject to that order was not an “insider” or “affiliate” of the debtor. *See id.* at *2.¹⁰¹ There is no merit to the Committee’s first argument.

¹⁰⁰ *See In re Arena Media Networks, LLC*, 2010 WL 5264241 (Final Order Approving Debtor’s Motion for Order (I) Authorizing Debtor to Obtain Postpetition Financing and to Grant Security Interests and Superpriority Administrative Expense Status Pursuant to 11 U.S.C. §§ 105, 364(c) and 364(d); and (II) Modifying the Automatic Stay Pursuant to 11 U.S.C § 362).

¹⁰¹ The relevant language referenced in the Arena DIP Order states:

Business Judgment and Good Faith. The terms of the DIP Loan (including as outlined in the DIP Documents) are fair, just, and reasonable under the circumstances, are appropriate for secured financing to a debtor in possession, reflect the Debtor’s exercise of its prudent business judgments consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration. The terms of the DIP Loan have been negotiated in good faith and at arms’ length by and between the parties, with all parties represented by counsel. Any credit extended under the terms of the DIP Loan is being extended in good faith by the Lender as that term is used in section 364(e) of the Bankruptcy Code. The Lender is also acting in good faith within the meaning of section 364(e) of the Bankruptcy Code in closing the transactions contemplated in the DIP Documents at any time

Second, the Committee contends that the Tranche C Lenders are not entitled to a good faith finding because they intentionally pursued a transaction – i.e., the Tranche C DIP Facility – that, on its face, subverts the principles of absolute priority and constitutes a sub rosa plan. *See* Committee Suppl. and Restated DIP Objection ¶ 100. As support, the Committee cites to *In re EDC Holding Co.*, 676 F.2d 945 (7th Cir. 1982). There, Chase Manhattan Bank (“Chase”), was a secured creditor of Wisconsin Steel (“WS Debtor”). After WS Debtor defaulted on its underlying obligation, Chase set off the funds in its cash account at Chase against the amounts owed. As a result, WS Debtor’s paychecks (issued from the same Chase cash account) bounced. The union representing WS Debtor’s workers sued the debtor and Chase seeking payment of the employees’ unpaid wages. *Id.* at 946. The parties eventually reached a settlement of the lawsuit, which in part called for Chase to lend WS Debtor \$1.7 million, which would be used by WS Debtor to pay the union employee’s wages. *Id.* The settlement provided that \$77,000 of the \$1.7 million would be paid to the union for the cost of the union’s attorneys’ fees and other legal expenses in the lawsuit. It also stated that the entire loan would receive the priority that section 507(a)(3) of the Bankruptcy Code gives to wage claims. *Id.* The Bankruptcy Court approved the \$1.7 million loan as post-petition financing under section 364 of the Bankruptcy Code, including the loan’s priority status under section 507(a)(3), over the objection of the debtor’s creditors committee. The committee argued that the section 507(a)(3) priority should not be extended to the funds earmarked to pay the union’s lawyers. *Id.* at 946-47. The committee appealed, but the District Court dismissed the appeal as moot as the committee did not seek a stay of the

after the entry of this Interim Order. The Lender is not an “insider” or “affiliate” of the Debtor (as such terms are defined in the Bankruptcy Code). The Lender shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision herein is vacated, reversed or modified, on appeal or otherwise.

Bankruptcy Court's order. The committee appealed that dismissal. Thus, the Seventh Circuit had to decide whether Chase had been acting in good faith, for purposes of section 364(e) in lending WS Debtor \$77,000 to pay the union's legal fees. *See id.* at 947.

Chase argued that as long as the terms of the DIP loan are not misrepresented to the bankruptcy judge, the creditor may rely on the bankruptcy judge's order unless it is stayed, irrespective of the errors in the order. *See id.* The Seventh Circuit rejected that argument. First, it read the purpose of section 364(e) to be

to protect not the lender who seeks to take advantage of a lapse in oversight by the bankruptcy judge but the lender who believes his priority is valid but cannot be certain that it is, because of objections that might be upheld on appeal. If the lender knows his priority is invalid but proceeds anyway in the hope that a stay will not be sought or if sought will not be granted, we cannot see how he can be thought to be acting in good faith.

Id. The Court found that the loan agreement gave the union a claim against WS Debtor for \$77,000 in attorneys' fees, and simultaneously paid it in full, and that Chase's priority under section 507(a)(3), meant that the burden would be borne by the estate's general unsecured creditors, rather than by Chase itself. *Id.* However, the Court found that the union's claim could not be paid out of WS Debtor's estate at all. It found that Chase could not have acted in good faith in advancing the \$77,000, because on the face of the loan agreement, that transaction had an intended effect that under well settled law, was improper under the Bankruptcy Code, and that Chase knew it. *Id.* The Court stated, as follows:

Just as Chase would not have been a purchaser in good faith if it had bought from Wisconsin Steel property to which it knew the company did not have good title, so it could not be a lender in good faith in extending credit in exchange for a priority that it knew the company could not properly give it since the transaction amounted to taking money out of the pockets of the general creditors to pay lawyers whose claims were not allowable under bankruptcy law at all.

Id. at 948.

The Committee contends that the Tranche C Lenders are not entitled to a good faith finding under section 364(e) because like Chase in *EDC Holdings*, the lenders have entered into a loan agreement that, on its face has an intended effect that is improper under the Bankruptcy Code, to wit: to violate the absolute priority rule and the bar to sub rosa plans. *See* Committee Suppl. and Restated DIP Objection ¶ 100. (“The Debtors and the [Tranche C Lenders] intentionally sought to violate absolute priority and short-circuit the bankruptcy process by making no meaningful effort to seek financing from third-parties. Because the [Tranche C DIP Facility] has an ‘intended effect that is improper under the Bankruptcy Code,’ the transaction cannot have been concluded in good faith.” (quoting *EDC Holdings*)).

The argument lacks merit. Application of *EDC Holdings* does not bar a good faith finding under section 364(e) because whether the Tranche C DIP Facility is an improper sub rosa plan and/or violates the absolutely priority rule is hotly contested and the subject of this Court’s determination. From the outset, the Debtors have maintained that the Tranche C DIP Facility is not a sub rosa plan and does not violate the absolute priority rule because, among other things, the DIP Facility represents new money invested in the Debtors. In contrast to Chase in *EDC Holdings*, the Tranche C Lenders are not seeking relief that is improper under settled law. The decision in *Burchinal v. Central Washington Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484 (9th Cir. 1987) is instructive. There, creditors appealed from a judgment of the district court affirming the bankruptcy court’s approval of financing that included a cross-collateralization provision. The order was not stayed pending appeal and the creditors argued that by application of section 364(e), the appeal was moot. The Ninth Circuit rejected the creditors’ argument that the fact that the loan included cross-collateralization proved that the lender entered into the loan agreement in bad faith and for an improper purpose. *Id.* at 1490. It found that the lenders did

not act in bad faith because the issue of whether cross collateralization could be employed had not been resolved in the Ninth Circuit. The Ninth Circuit stated:

We do not think that the good faith requirement was intended to deny protection to lenders who can advance reasonable legal arguments in support of their actions, even if their arguments are ultimately deemed unpersuasive. . . . Accordingly, we conclude that [the lender] did not act in bad faith as a matter of law simply because some courts have held cross-collateralization clauses to be illegal per se.

Id. (internal citations omitted). The same principle applies here. The Debtors and the Tranche C Lenders cannot be said to intend to effect an improper transaction because the Tranche C Lenders have reasonable legal bases in support of their position. *See also In re Solidus*, 2008 WL 8462968, at *5 (noting that “the good faith requirement does not deny protection to lenders who can support their actions with reasonable legal arguments, even if these arguments are ultimately unsuccessful.”).

Moreover, in looking to the conduct of the Tranche C Lenders, the Objectors have not cited to any evidence demonstrating that the Tranche C Lenders misused their status as shareholders. Nor is there any evidence that they engaged in fraud or collusion, or attempted to take gross advantage of other bidders which is the typical misconduct giving rise to a finding of bad faith. Instead, the testimonial and documentary evidence already discussed extensively above, shows that the Tranche C DIP Facility is the product of a robust and arm’s-length process where Company’s management had the advice of outside legal counsel and financial advisor in negotiating the terms of the Tranche C DIP, and all decisions were fully vetted and voted upon (unanimously) by the Company’s Directors Committee. *See* Trial Ex. 31 (LATAM DIP Lenders Teaser), sent to over 150+ potential investors; Trial Ex. 243 (First Coleman Decl.) ¶ 24 (describing PJT’s solicitation process); Trial Ex. 276 (PJT contact log); Trial Ex. 292 (Coleman Reply Decl.) ¶ 9 (noting that potential bidders who have signed NDAs were given access to the

Debtors' data room). *See also* Trial Ex. 125 (May 25th Directors Committee Minutes) (discussing whether to approve, *inter alia*, the Tranche B DIP loan (now Tranche C), and receiving advice from legal counsel (Cleary Gottlieb) and investment banker (PJT)); Trial Ex. 124 (May 25th Directors Committee Statement) (same));¹⁰² Trial Ex. 198 (June 24th Board Minutes) (discussing Tranche C DIP loan); Trial Ex. 200 (June 24th Directors Committee Minutes) (reflecting PJT's attendance at meeting and presentation to Board for the Tranche C DIP Facility, and ultimate vote in favor of DIP).

Accordingly, the Court finds that the Tranche C Lenders are entitled to a finding of good faith under section 364(e). *See generally In re MF Glob. Holdings Ltd.*, No. 11-15059 MG, 2011 WL 6210374, at *3 (Bankr. S.D.N.Y. Dec. 14, 2011) ("The record further establishes that the negotiation of the final cash collateral order was conducted in good faith, entitling JPMC to the good faith finding under section 364(e) of the Bankruptcy Code included in the order.").

The Tranche A Lender

The Committee contends that Oaktree is not entitled to a good faith finding under section 364(e). It says that although Oaktree is not a "bad actor" or an insider, it "signed up to participate in an insider transaction that on its face violates the absolute priority rule and constitutes an impermissible *sub rosa* plan." *See* Committee Tranche A DIP Objection ¶ 17. There is no merit to that contention.

First, the Court's analysis of *Arena Media* and *EDC Holdings* with respect to the Tranche C Lenders applies equally to Oaktree. Moreover, the Committee does not allege, and there is no evidence in the record to support a finding that Oaktree engaged in misconduct of any form in

¹⁰² Moreover, the minutes at that same meeting also made clear that the Tranche C DIP Facility was approved, unanimously by both Independent Directors, with any conflicted or related director – i.e., Nicholas Eblen – having duly excused himself.

connection with the Tranche A DIP Facility. To the contrary, the undisputed testimony from Coleman was that, among other things, Oaktree and the Debtors had engaged in good faith, arm's length negotiations, with both sides represented by competent counsel (White & Case LLP for Oaktree) and financial advisors (Ducera Partners for Oaktree); exchanged multiple drafts of term sheets and DIP loan documents; and conducted hours of intense negotiations over the telephone and by video-conference. *See* Trial Ex. 268 (Suppl. Coleman Decl.) ¶¶ 18-20. *See also* Trial Ex. 265 (July 8th Directors Committee Minutes) (noting review and discussion and approval of terms of Tranche A DIP Facility). Coleman testified that through these hard-fought negotiations, both sides gave concessions, and the Tranche A DIP loan was ultimately improved to its current form. In short, the Court finds that the Tranche A Lender is entitled to a good faith finding under section 364(e) of the Bankruptcy Code.

Having determined that the Debtors have established grounds under section 364 to obtain the requested DIP Financing, and that each of the DIP Lenders is entitled to a "good faith" finding under section 364(e), the Court considers whether the DIP Financing violates any applicable Bankruptcy Code principles.

Whether the Tranche C DIP Facility Violates The Absolute Priority Rule

The absolute priority rule is a "bedrock principle of bankruptcy law, under which creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets." *Adler v. Lehman Bros. Holdings, Inc. (In re Lehman Bros. Holdings Inc.)*, 855 F.3d 459, 470 (2d Cir. 2017) (citation omitted). The rule is codified in various provisions of the Bankruptcy Code, and "is particularly prominent in 11 U.S.C. § 1129(b)(2)(B) . . ." *Id.* at 471, n.11. Pursuant to section 1129(b)(1), for a court to confirm a chapter 11 reorganization plan over the vote of a dissenting class of claims, the plan must be "fair and equitable with respect to [each] class of

claims . . . that is impaired under, and has not accepted, the plan.” 11 U.S.C. § 1129(b)(1). A plan will be “fair and equitable” with respect to a class of unsecured claims if --

- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
- (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . . .

11 U.S.C. § 1129(b)(2)(B). In this way, the “fair and equitable” rule “includes a form of the absolute priority rule as a prerequisite.” *DISH Network Co. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 94 (2d Cir. 2011) (hereinafter “*DBSD*”). That is to say, under the rule, a reorganization plan “may not give ‘property’ to the holders of any junior claims or interests ‘on account of’ those claims or interests, unless all classes of senior claims either receive the full value of their claims or give their consent.” *Id.* at 88. *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (“Under current law, no Chapter 11 reorganization plan can be confirmed over the creditors’ legitimate objections . . . if it fails to comply with the absolute priority rule.”).

By its terms, the transfer of “property,” “under a plan,” to an existing shareholder triggers application of section 1129(b)(2)(B), if the transfer is “on account of” the shareholder’s “junior interest.” 11 U.S.C. § 1129(b)(2)(B). The Objectors contend that this Court should apply section 1129(b)(2)(B) to the Tranche C DIP Facility and find that it violates the absolute priority rule because it (a) extends to existing shareholders (i.e., the Tranche C Lenders – on account of their status as shareholders) the exclusive option to acquire the equity of the reorganized Debtors at a discount, and (b) extends to all other shareholders – on account of their status as shareholders – the option to acquire all of the new equity in the reorganized Debtors at plan

value.¹⁰³ *See* Committee Post-Trial Brief at 4-5 (“The proposed financing violates the absolute priority rule by extending to existing shareholders the exclusive option to acquire the equity of the reorganized company at a discount on account of their being shareholders and to all other shareholders at plan value.”). They argue that the Tranche C Lenders are insiders holding controlling interests in the Debtors, and that through the proposed DIP Facility, the Debtors will vest the Tranche C Lenders, on account of their old equity, with the exclusive right to acquire equity in the reorganized debtor, at an untested price and without extending an opportunity to anyone else to compete for equity. *See id.* Knighthood likewise contends that the proposed Tranche C DIP Facility violates the absolute priority rule because it provides potentially for a not-market tested payment of \$282.6 million to the Tranche C Lenders on account of their equity in the Debtors. *See* Knighthood Post-Trial Brief ¶ 10. Knighthood and the Committee maintain that the payments are “on account of” the Tranche C Lenders’ pre-existing equity interests in the Debtors because the Tranche C Lenders only got the opportunity to sign onto the Tranche C DIP Facility because they are the Debtors’ major shareholders.

The Debtors say that the absolute priority rule is irrelevant because section 1129 only applies in a plan confirmation process, which is “still months away,” and that the Tranche C DIP Facility is not an exit-financing under a plan, but rather a pre-confirmation loan with real committed funds and a real risk of little to no recovery as the first loss tranche. *See* Debtors Reply ¶ 72. The Debtors accuse the Objectors of trying to “shoehorn” the Tranche C DIP

¹⁰³ The Objectors say that such preferential treatment for the exclusive benefit of the Tranche C Lenders is compounded by the fact that the Debtors’ other existing shareholders (beyond the Tranche C Lenders) can also participate in these favorable terms through the incremental Tranche C DIP increase of \$250 million, and the rights offering mandated in Schedule 2.12 of the Revised Credit Agreement. *See, e.g.,* Revised Credit Agmt. § 1.01 (definition of “Tranche C Increase Commitment”); Committee Suppl. and Restated DIP Objection ¶ 9 (“Moreover to further privilege prepetition equity holders at the expense of unsecured creditors, the Debtors are proposing to let additional shareholders participate in the Shareholder DIP Facility on the same outrageous terms by giving themselves the right to expand Tranche C by up to an additional \$250 million.”).

Facility “into the type of exit financing governed by § 1129” and maintain that the caselaw does not support such an approach. *Id.* ¶ 73. They also assert, in any event, that the Tranche C Lenders are not entitled to 100% of the reorganized Debtors’ shares upon exit, only a portion of such shares at a certain plan discount, such that there would still be value for other creditors to be determined under a plan. *See id.* As noted previously, the Revised Credit Agreement specifies the terms governing the payment of the Tranche C DIP loan. In seeking approval of the DIP Facility, the Debtors seek to foreclose any later challenge to the terms of the loan, including to the provisions of the loan that are potentially germane to a plan of reorganization. In these circumstances, it is appropriate to consider whether the proposed DIP Facility complies with the absolute priority rule. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 986 (2017) (nothing that debtors may not enter into transactions that “circumvent the Code’s procedural safeguards.” (citation omitted)).

The Debtors also argue that the absolute priority rule is not applicable because under a plan, the Tranche C Lenders will be repaid “based on their lending of at least \$900 million (and up to \$1.15 billion) in superpriority DIP financing of funds,” not on account of their shareholdings. Debtors Post-Trial Brief ¶ 54. They maintain that the Objectors have mischaracterized the absolute priority rule, which mandates that secured lenders such as the Tranche C Lenders get repaid in full before unsecured creditors; therefore, repayment of the Tranche C Lenders under the terms of the Revised Credit Agreement does not contravene the absolute priority rule. *See id.* Moreover, they say that with the Revised Credit Agreement, the Debtors now have the option of exercising the Modified Equity Subscription Election, which provides them with additional flexibility as to the form of repayment. And that even without such a feature, the Tranche C Lenders would still be entitled to repayment before other creditors

receive any distributions. They add that any concerns over the extent of the conversion discount (now at 20%) is simply a challenge to the overall economics of the deal, “and not any larger issue.” *Id.* In substance, they contend that for purposes of section 1129(b)(2)(B), payment to the Tranche C Lenders will be “on account of” the Tranche C DIP loan, not “on account of” their old equity.

“[W]hether a particular plan gives old equity a property interest ‘on account of’ its old ownership interests in violation of the absolute priority rule or for another, permissible reason is a factual question.” *In re Red Mountain Mach. Co.*, 451 B.R. 897, 905 n.18 (Bankr. D. Ariz. 2011) (citation omitted). In *Bank of Am. Nat. Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434 (1999) (hereinafter, “*North LaSalle*”), the Supreme Court construed the phrase “on account of,” as used in 1129(b)(2)(B), to mean some form of “because of.” *Id.* at 450 (“Since the ‘in exchange for’ reading [of the term “on account of”] merits rejection, the way is open to recognize the more common understanding of ‘on account of’ to mean ‘because of.’”). *See also DBSD*, 634 F.3d at 96 (noting that “[t]he existing shareholder received its property ‘because of,’ and thus ‘on account of,’ its prior interest[.]”). The Tranche C DIP Facility calls for the Tranche C Lenders – the Debtors’ majority shareholders – to receive “property” in the form of cash or common stock (at a 20% discount to plan value) of the reorganized debtors. If they are given stock, that will afford the Debtors’ non-lender shareholders the right to purchase stock in the reorganized Debtors at plan value. The non-lender shareholders will be extended rights to purchase the equity under the Rights Offering simply “because” they are shareholders of the Debtor, as Chilean law mandates that the Rights Offering be extended to them. The Tranche C Lenders will receive their “property” in satisfaction of the Tranche C DIP loan. It is undisputed that the Tranche C Lenders are being given the exclusive opportunity to make that loan “because

of” the fact that they are the Company’s largest shareholders. At the Hearing, Coleman was quite clear that the purpose of the Tranche C DIP Facility was to attract shareholders to participate in the DIP financing. *See* 7/29/20 H’rg Tr. at 276:14-277:5.¹⁰⁴ Thus, any payments to the Tranche C Lenders in satisfaction of the Tranche C DIP Facility will be at least “partly” on account of the their equity interests. That is enough to trigger analysis under the absolute priority rule. *See DBSD*, 634 F.3d at 96 (“[A] transfer partly on account of factors other than the

¹⁰⁴ The Debtors have been consistent on that issue from the outset of the Chapter 11 Cases. The Debtors highlighted the importance of the “shareholder” tranche of the DIP financing on the Initial Petition Date (*see* Trial Ex. 141 (First Alfonsin Decl.) ¶ 77), and continue to do so in support of the Motion. *See* Debtors Post-Trial Brief ¶¶ 22-23. In support of the First DIP Motion, the Debtors’ management and outside advisors submitted declarations which, in part, address the Debtors’ focus on negotiating the terms of the Tranche C DIP with its major shareholders. *See, e.g.*, Trial Ex. 242 (Alfonsin DIP Decl.) ¶ 19 (“In the weeks prior to the bankruptcy filing, LATAM separately reached out to its large shareholders to obtain their support of the company through additional financing, both to further the possibility of governmental financing and to retain the confidence of the market in its business in the current economic climate.”); ¶ 20 (“LATAM’s large shareholders were best placed to provide such financing commitments in the short time frame required given their extensive familiarity with LATAM’s business and operations, and their willingness to support the business through the current business cycle.”); Trial Ex. 293 (Alfonsin Suppl. Decl.) ¶ 7 (discussing LATAM’s limited ability to pledge collateral as a reason to seek financing from shareholders); ¶ 9 (noting the need to keep LATAM’s financial distress, impending bankruptcy filing, and funding shortage in confidence); ¶ 15 (explaining that shareholder funding of junior tranche financing would be a positive signal to stakeholders); Trial Ex. 292 (Coleman Reply Decl.) ¶ 5 (“LATAM engaged in a prepetition process designed to achieve DIP financing on the best available terms, negotiating with the key stakeholders who were most likely to make a meaningful commitment in the short window of time remaining to LATAM prior to a bankruptcy filing, and whose public support of LATAM was necessary to securing needed additional financing.”).

That the Tranche C DIP Facility is targeted exclusively at the Debtors’ existing shareholders is bolstered by its terms. First, the Tranche C DIP Facility provides for an additional “Tranche C Increase Commitment” in the amount of up to \$250 million, that could be supplied by a “Tranche C Increase Lender,” which is defined in the Revised Credit Agreement as (i) a Tranche C Initial Lender or (ii) a holder of shares of LATAM as of the Petition Date or as of the date such party executes the Tranche C Joinder Agreement[.]” *See* DIP Credit Agmt. §§ 1.01, 2.27. In other words, only an existing LATAM shareholder may provide the additional commitment under the Tranche C DIP Facility. Second, under the procedures established for the implementation of an Equity Subscription Election, “LATAM will launch the preemptive rights offering in Chile” that would make any new shares issued available for purchase by any and all of the Debtors’ existing shareholders (but not creditors or other third parties). *See* Revised Credit Agmt. Sch. 2.12(a)(i) § 14(i). By definition, this rights offering is available solely to shareholders, *qua* shareholders. *See* Committee Suppl. and Restated DIP Objection at 7 (“Accordingly, even shareholders who are not DIP lenders will share in the exclusive right of old equity holders to purchase equity in the reorganized Debtors, while the rights offering will allow the Insider Lenders to acquire the unsubscribed shares at the discounted price under the Equity Subscription Election.”). Further, any remaining unsubscribed shares following the rights offering, “may be placed by the board of directors of LATAM in accordance with the Chapter 11 Plan, including purchase by the Tranche C Shareholders.” Revised Credit Agmt. Sch. 2.12(a)(i) § 14(ii).

prior interest is still partly ‘on account of’ that interest. ‘If Congress had intended to modify [on account of] with the additional “only,” “solely,” or even “primarily,” it would have done so.’” (quoting *In re Coltex Loop Cent. Three Partners, L.P.*, 138 F.3d 39, 43 (2d Cir. 1998) (“*Coltex II*”). That is what the Bankruptcy Court held in *In re Trenton Ridge Inv'rs, LLC*, 461 B.R. 440 (Bankr. S.D. Ohio 2011). There, the chapter 11 debtors sought confirmation of plans that proposed to, among other things, grant the debtors’ existing equity holders, some of whom held promissory notes against the debtors (such holders, the “Member Noteholders”) pro rata membership interests in the reorganized debtors. *Id.* at 453. The plans also provided for quarterly payments to be made to general unsecured creditors until the earlier of: (1) payment in full of all allowed claims in the class, without interest; or (2) the date that is five years from the applicable petition date. The general unsecured creditors were impaired and did not vote on the plans. *Id.* at 454. The debtors’ largest creditor, PNC Bank, N.A. (“PNC”), which held a partially secured claim, objected to confirmation, contending, *inter alia*, that the debtors failed to provide unsecured creditors with the treatment required by the “absolute priority rule.” *Id.* at 452. As relevant, the debtors argued, among other things, that the proposed plans did not violate the absolute priority rule because Member Noteholders were not receiving membership interests on account of their existing equity, but on account of their promissory notes. The Bankruptcy Court rejected this argument, explaining that while it was “true that the Member Noteholders are not receiving the equity in the reorganized Debtors *solely* on account of their prior equity interests,” the new membership interests were only being offered to them (and to other shareholders who did not hold promissory notes), which would violate the absolute priority rule, especially where the existing equity members did not contribute any new value. *Id.* at 508. *See also In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 489 (Bankr. E.D. Mich. 1995) (stating that absolute

priority rule “does not prevent ‘old equity’ from acquiring such an interest, so long as the acquisition is not wholly or partially ‘on account of’ the pre-existing interest in the debtor.”). *Cf. North LaSalle*, 526 U.S. at 456 (observing that there was no justification for giving old equity the exclusive bargain to acquire debtors’ equity interest unless “the very purpose of the whole transaction is, at least in part, to do old equity a favor.”).

The Debtors having triggered application of the absolute priority rule—because the Tranche C DIP Facility is at least partly being extended and repaid to the Tranche C Lenders (and other shareholders) on account of their pre-existing equity holdings—the Court next considers whether the Debtors may nevertheless invoke the “new value exception” to the absolute priority rule. The new value exception is the proposition that “the objection of an impaired senior class does not bar junior claim holders from receiving or retaining property interests in the debtor after reorganization, if they contribute new capital in money or money’s worth, reasonably equivalent to the property’s value, and necessary for successful reorganization of the restructured enterprise.” *North LaSalle*, 526 U.S. at 442. *See also Liberty Nat’l Enters. V. Ambanc La Mesa Ltd. P’ship (In re Ambanc La Mesa Ltd. P’ship)*, 115 F.3d 650, 654 (9th Cir. 1997) (“Allowing old equity to retain an interest does not violate the absolute priority rule if the former equity holders provide new value to the reorganized debtor, under the ‘new value corollary’ to the absolute priority rule.”). The new value corollary permits a debtor’s old equity holders – in exchange for a new capital contribution – to retain their equity in the company, even as creditors are not paid in full. *See In re RAMZ Real Estate Co., LLC*, 510 B.R. 712, 718 (Bankr. S.D.N.Y. 2014) (“Recognizing that sometimes the best option for all parties is to allow old equity to participate in the reorganized debtor, the ‘new value exception’ was created.” (citation omitted)). Congress did not explicitly codify the new value corollary when it codified

the absolute priority rule. The Supreme Court has left open the possibility that old equity could take under a plan if it invests new value in the reorganized entity, at least as long as a “market valuation” tests the adequacy of its contribution. *See North LaSalle*, 526 U.S. at 458 (“Whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity is a question we do not decide here. It is enough to say, assuming a new value corollary, that plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii).”).

In this Circuit, to invoke the new value corollary, the “the capital contribution by old equity must be (1) new, (2) substantial, (3) money or money’s worth, (4) necessary for a successful reorganization and (5) reasonably equivalent to the property that old equity is retaining or receiving.” *BT/SAP Pool C Assocs. v. Coltex Loop Cent. Three Partners*, 203 B.R. 527, 534 (S.D.N.Y. 1996) (citation omitted), *aff’d*, 138 F.3d 39 (2d Cir. 1998) (hereinafter, “*Coltex I*”); *In re RAMZ Real Estate Co., LLC*, 510 B.R. at 718 (same). *Accord Case v. Los Angeles Lumber Products, Co.*, 308 U.S. 106, 121-22, 60 S. Ct. 1, 10, 84 L. Ed. 110 (1939). The Debtors contend that even if the absolute priority rule has application herein, the proposed Tranche C DIP Facility clears the new value corollary requirements “without issue.” Debtors Reply ¶ 76.

The parties do not dispute that the \$900 million the Tranche C Lenders are loaning to the Debtors is new, substantial money. The first three prongs of the new value test are satisfied herein.¹⁰⁵ To demonstrate that the DIP funds are “necessary,” the Debtors must prove that they

¹⁰⁵ “New” contributions are supposed to be from outside a debtor’s business. *See In re S.A.B.T.C. Townhouse Ass’n Inc.*, 152 B.R. 1005, 1010 (Bankr. M.D. Fla. 1993) (noting that existing equity holders “must contribute something to the debtor that does not already belong to the debtor or to which the debtor is not already entitled”). The DIP Facility plainly qualifies as “new” money. It also qualifies as “substantial” contribution as it is not

need funds to reorganize and that it is necessary for old equity to contribute those funds. *See Coltex I*, 203 B.R. at 535. There, the District Court explained the “necessary” element of new value as follows:

Before a debtor can claim that old equity's participation is “necessary,” the market must be tested for other sources of funding and the debtor must be able to satisfy the bankruptcy court, with tangible proof, that the debtor would be unable to obtain funds from any other source or that no other source was willing to infuse the same amount of capital as old equity. Only upon this showing can it be found that the infusion of new capital by old equity was “necessary” and, therefore, that old equity is not receiving any property “on account of” its prior interests.

Id. See also *North LaSalle*, 526 U.S. at 454 (stating that proposed plan was “doomed ... by its provision for vesting equity in the reorganized business in the Debtor's partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan.”); *In re RAMZ Real Estate Co., LLC*, 510 B.R. at 719 (denying plan confirmation where Debtor had not provided for a competing plan and there was no evidence that any other party was given an opportunity to bid on the interest sought by new equity).

Courts have found that the “reasonably equivalent” prong is not satisfied where the new value contributed by the existing equity-holders is grossly disproportionate to the value of the debtor’s equity or assets. See, e.g., *In re Gramercy Twins Assocs.*, 187 B.R. 112, 127 (Bankr. S.D.N.Y. 1995) (holding that \$250,000 new value contribution in debtor with \$7.65 million in assets in exchange for a 70% equity interest was not reasonably equivalent); *In re 8315 Fourth*

“nominal,” “gratuitous” or a “token” payment. See *Matters of Treasure Bay Corp.*, 212 B.R. 520, 544 (S.D. Miss. 1997) (“The proposed contribution is ‘substantial’ as defined by the courts in that it is not a ‘gratuitous, token cash infusion proposed primarily to buy cheap financing.’” (quoting *In re Snyder*, 967 F.2d 1126, 1131 (7th Cir. 1992)). Cf. *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 762 (Bankr. S.D.N.Y. 1995) (explaining that new value contribution must be “substantial in relation to the claims being disposed of under the Plan[.]” and finding that the proposed \$25,000 contribution was not substantial as it represented 2.3% of the unsecured claims in the case (citation omitted)).

Ave. Corp., 172 B.R. 725, 739 (Bankr. E.D.N.Y. 1994) (finding that new value contribution of \$25,000 in debtor with approximately \$4 million in assets was a “token cash contribution” and not reasonably equivalent to the value of the retained equity). *Cf. In re Treasure Bay Corp.*, 212 B.R. at 544 (explaining that “reasonable equivalent” element requires “comparing the proposed contribution with the interest received.” (citing *Travelers Ins. Co. v. Bryson Props.*, VIII (*In re Bryson Props.*, XVIII), 961 F.2d 496, 505 (4th Cir. 1992))). Furthermore, the Supreme Court made it clear in *North LaSalle* that “the best way to determine value is exposure to a market.” 526 U.S. at 457.

In sum, *Coltex I*, and *North LaSalle* mandate that a debtor market-test a proposed transaction in order to demonstrate that the purported new value was necessary and reasonably equivalent, and was not merely an exclusive opportunity for old equity to gain advantages at the expense of creditors. The Objectors assert that the Debtors cannot satisfy the new value exception because they cannot establish that the Tranche C Lenders are giving “full value” in exchange for the property they will retain under the DIP. They maintain that the Debtors cannot show that the \$900 million for the Tranche C DIP Facility is reasonably equivalent to the property old equity will receive – i.e., the new equity of reorganized LATAM at a plan value discount – because the Debtors failed to market test the Tranche C DIP Facility pre- or post-petition, as required under *North LaSalle* and its progeny. *See, e.g.*, Ad Hoc Group Post-Trial Brief ¶ 13 (“Here, the Debtors’ [*sic*] failed to undertake any reasonable efforts to market the Insider Tranche C DIP Facility.”). *See also* Knighthead Post-Trial Brief ¶ 16 (“Setting aside that the opportunity to participate in the Tranche C financing was given exclusively to the Insider Lenders and the terms of the Modified Insider Financing were not appropriately marketed by the Debtors pre- or post-petition, there is absolutely no dispute that the 20% discount now proposed

by the Insider Lenders did not undergo a market test.” (footnote omitted)); Committee Post-Trial Brief at 15-16 (same). They say that under *North LaSalle*, since the Debtors failed to shop the Tranche C DIP Facility, it is up to this Court to determine whether the Tranche C Lenders are paying “full value,” but that such determination cannot be made at this juncture because that is an issue to be addressed at plan confirmation. See Ad Hoc Group Initial DIP Objection ¶ 12 (“Ultimately, the Debtors’ total enterprise value is a matter to be determined and tested at the plan confirmation stage; however, it is already clear that the Debtors cannot demonstrate that the Tranche C Lenders are paying “top dollar” for their equity subscription rights.”). The Objectors further complain that under the terms of the Tranche C DIP Facility and conversion feature, the Company’s value will be determined by the Tranche C Lenders, who are the Company’s majority shareholders (and hence, insiders) that exert control over the Debtors, and who will be incentivized to value the company as low as possible because it would result in a bigger discount in the conversion. See Revised Credit Agmt. Sch. 2.12(a)(i).¹⁰⁶ See also Knighthead Suppl.

¹⁰⁶ The relevant section of that schedule provides:

No more than twenty (20) days and no less than ten (10) days prior to the Plan Filing Date, LATAM will deliver updated valuation materials and additional Chapter 11 Plan materials, including the Disclosure Statement, and material exhibits to the Chapter 11 Plan, including precedent transactions, public equity multiples and discounted cash flows (“Final Valuation Materials”) to the Tranche C Lenders and will deliver notice to the Tranche C Lenders of its election (the “Election Subscription Notice”) to repay the Tranche C Obligations in (a) cash to be used by the Tranche C Lenders to subscribe the New Shares under the Equity Subscription pursuant to the Equity Subscription Election or (b) cash pursuant to a repayment in cash only, in each case upon the Plan Effective Date. The Equity Subscription Election, once made, and the related Election Subscription Notice, once provided, shall be revocable only (i) with the consent of the Majority Tranche C Lenders, (ii) if there is any change to the Company Approved Reorganization Plan, the Disclosure Statement, the material exhibits to the Company Approved Reorganization Plan or Disclosure Statement or the Final Valuation Materials that would require re-solicitation, as determined by the Bankruptcy Court after notice and a hearing, once the Plan Solicitation (as defined below) has commenced, or (iii) if the Company Approved Reorganization Plan is not confirmed by the Bankruptcy Court. The Borrower shall provide prompt written notice of its determination to revoke any election pursuant to (ii) or (iii), but shall have the right (but not the obligation) to make a new Equity Subscription Election in connection with any subsequent Company Approved Reorganization Plan.

Objection ¶ 15 (“Contrary to the traditional notions of priority in chapter 11 bankruptcy, the Insider Lenders would actually *benefit* from lower plan value because they would be able to exchange their debt (at a 32% discount) for a correspondingly larger portion (and under any number of scenarios, a controlling interest) of equity as plan valuation falls.”).

The Objectors contend that the Debtors failed to conduct any kind of post-petition marketing and solicitation process for the Tranche C DIP, let alone a “robust” and “comprehensive one”. They say that, “[a]t best, the record shows that the Debtors and PJT employed a ‘no-shop’ strategy and did not *actively* seek any Tranche C offers and instead only responded to offers made for the Tranche A DIP Facility.” Ad Hoc Group Post-Trial Brief ¶ 14. At worst, they say the Debtors purposefully worked to discourage any potential interest in an alternative Tranche C DIP. Specifically, they raise several sub-arguments as to why that is.

The Debtors must prove that they market tested the Tranche C DIP Facility. *See, e.g., In re NNN Parkway 400 26, LLC*, 505 B.R. 277, 283 (Bankr. C.D. Cal. 2014) (holding that “debtors bear the burden of showing that the new money offered is the most and best reasonably obtainable after some ‘market testing’ in order to cram down over the objections of a non-consenting class of unsecured creditors. This probably requires, at a minimum, demonstration of a systematic effort designed to ‘market test’ the deal. Debtor bears the burden of persuasion on that point and that burden is not carried in this case.”); *In re Crosscreek Apts., Ltd.*, 213 B.R. 521, 546 (Bankr. E.D. Tenn. 1997) (“Like other confirmation requirements, the burden of

Notwithstanding anything provided for herein, the Equity Subscription Election shall in any case become irrevocable upon the commencement of any Rights Offering (as defined below) in respect of any such Equity Subscription Election.

Revised Credit Agmt. Sch. 2.12(a)(i), § 4(i) (emphasis added).

proving these new value elements lies with the plan proponent.” (citing *In re Montgomery Court Apts. of Ingham Cty., Ltd.*, 141 B.R. 324, 346 (Bankr. S.D. Ohio 1992))).

The Objectors contend that the Debtors adduced no evidence, such as emails or communications or “pages upon pages of testimony” evidencing the solicitation of numerous parties to provide the Tranche C DIP Facility on better terms, or demands to the Tranche C Lenders to improve their terms; and that they cannot do so, because there were, in fact, none. *See* Committee Post-Trial Brief at 16-17.

Second, they point to the testimony from Otton, the Committee’s financial advisor, who explained that the Debtors’ marketing process was flawed because, *inter alia*, (1) the Debtors’ marketing materials provided that Tranche C was “already being committed by the insider shareholders” without seeking lenders to participate in Tranche C on better terms or to replace it altogether; and (2) the Debtors “did not aggressively seek out” parties who participate in DIP loans and “ask them to bid on the Tranche C and tell them [that] Tranche C was available to go to the party with the best terms.” *See* Trial Ex. 278 (Otton Decl.) ¶ 60.

Third, the Objectors claim that the Debtors’ own documentary and testimonial evidence confirms that they did not actively seek to market the Tranche C DIP post-petition, but were limited to seeking a Tranche A lender. They say that Coleman’s deposition and trial testimony, and board minutes and email correspondence clearly show that from the beginning, the Debtors erroneously believed that a shareholders only Tranche C DIP Facility was “critical” and “uniquely positioned” and thus failed to actively seek a replacement Tranche C DIP Facility on better terms.¹⁰⁷

¹⁰⁷ As support for their position, the Objectors cite to the testimony of Coleman and Alfonsin, as follows:

- Coleman Dep. Tr. at 204:23-24 (“[W]e had locked in C the terms were one now we’re trying to lock in A...”); *id.* at 204:1-3 (“At this stage, we’re not focused on trying to find C[.]”); Coleman Dep. Tr. at

Fourth, the Objectors say that when interested parties such as Knighthead sought to participate in the Tranche C DIP on competitive terms, PJT directed them towards investing in Tranche A. They contend that PJT further dissuaded efforts towards an alternative Tranche C DIP by indicating that the Debtors would only consider competitive financings for the entire DIP – i.e., \$2 billion-plus; or for the entire Tranche C, rather than portions of Tranche C. *See* Committee Post-Trial Brief at 17 (citing Trial Ex. 280 (Wagner Decl.) ¶¶ 6, 8, 9-12).

The Debtors disagree, and say that the Tranche C DIP Facility provides new value that was “necessary” to their reorganization in that the evidence establishes that the proposed

203:20-204:1 (discussing how “throughout” PJT’s documents, there has been no discussion about an “effort” to obtain a “less expensive junior tranche”); Coleman Dep. Tr. at 95:18-25 (does not recall ever trying “to facilitate a group of Tranche C investors getting together to as a group replace Tranche C.”); Coleman Dep. Tr. at 238:4-13 (stating that PJT marketed Tranche A as dependent on the shareholder Tranche C);

- Trial Ex. 243 (First Coleman Decl.) ¶¶ 23-24 (“In addition, and as already discussed, the Tranche C DIP Lenders have agreed to subordinated treatment and several contractual undertakings. Importantly, the contractual undertakings described above can only be agreed to by the company’s shareholders and, therefore, these are benefits to the Debtors that could not be obtained through financing provided by other lenders.”)
- 7/29/20 Hr’g Tr. at 133:19-21 (“Q. You never called up a lender and said, we’d like you to make a proposal to replace Tranche C specifically, did you? A. [Alfonsin] Not only for Tranche C, no.”)

The Objectors also point to the Board minutes as support, as follows:

- Trial Ex. 253 (Board of Directors presentation dated June 30, 2020), at 002 (“Since signing the Tranche C term sheet with certain shareholders . . . the company and its advisors have focused significant time and effort on identifying and contacting . . . and negotiating with potential Tranche A lenders.”)
- Trial Ex. 123 (May 25 BOD Minutes), at 023 (“The term sheet includes a financing tranche reserved for shareholders.”)
- Trial Ex. 96 (May 25 Costa Verde Board Minutes), at 6700 (referring to “the tranche reserved for shareholders” and describing it as “a tranche of financing to which the rest of the shareholders can join”)
- Trial Ex. 251 (June 30 Costa Verde Board Minutes), at 007 (“The Tranche C financing is reserved for shareholders.”)
- Trial Ex. 169 (Email from Javier Grana to Ramiro Alfonsin attaching DIP Common Questions Update) (stating “claiming that the Tranche C “economic terms are set” and that the DIP facility is “designed to allow shareholders to participate in the recovery of the business.”)

Tranche C DIP Facility represents the best possible financing available to them (after a market test), and that the Jefferies proposal is not a viable alternative. *See* Debtors Reply ¶¶ 79-80. The Debtors also contend that the \$900 million Tranche C DIP Facility meets the “reasonably equivalent” requirement because it is not a “token or grossly disproportionate figure[,]” but rather it is the result of an arms’ length negotiations. *Id.* ¶ 80; *see also* Debtors Post-Trial Brief ¶ 58. They contend, in any event, that the undisputed caselaw (under *North LaSalle* and its progeny) requiring a market test of the Tranche C DIP Facility has been satisfied because “[that] is exactly what happened here.” Debtors Reply ¶ 79. To that end, the Debtors contend that the post-petition marketing process¹⁰⁸ for the Tranche C DIP was “incredibly robust.” Debtors Post-Trial Brief ¶ 17. The Debtors say that together with their advisors, including PJT, they engaged in an “extensive marketing process seeking the full \$2 billion-plus” that the Debtors needed, whereby PJT contacted over 150 parties seeking financing post-petition for the Debtors, which resulted in over 80 interested parties signing non-disclosure agreements. *Id.* ¶ 36. As a result of PJT’s efforts, the Debtors received proposals of up to \$1.5 billion for the Tranche A DIP loan, which is \$400 million more than what the Debtors initially sought. *See id.* ¶ 37.¹⁰⁹

¹⁰⁸ That the Tranche C DIP Facility was not marketed, at all, pre-petition, is clear from the testimonial evidence in the record. *See* 7/29/20 Hr’g Tr. at 250:19-25 (Coleman) (“Q. Okay. Now, prior to the bankruptcy, Tranche C was not marketed to anyone other than the three major shareholders we’ve talked about, correct, Delta, [Qatar], and Costa Verde? A. Well, just to be clear, this Tranche B is the – what became a Tranche C, and so -- Q. Yes. A. -- the answer is that’s correct. That’s correct.”); *id.* at 251:15-19 (Q. But again, you didn’t mark the junior equitized tranche to anyone other than the three major shareholders, Delta -- A. The -- 18 Q. -- Costa Verde -- A. Yeah, that -- that crowd. That’s correct.”). *See also* 7/29/20 Hr’g Tr. at 132:4-7 (Alfonsin) (“Q. And prior to the bankruptcy filing, Tranche C wasn’t marketed to anyone other than the few existing shareholders; isn’t that right? A. That is correct.”).

¹⁰⁹ As support for their contentions, the Debtors cite declarations submitted by Alfonsin and Coleman, as follows:

- Trial Ex. 243 (First Coleman Decl.) ¶ 24 (“In an effort to obtain the most attractive financing available to LATAM, an extensive marketing process was launched immediately after the Petition Date. More than 150 parties have been contacted in order to seek proposals for the Debtors’ \$2.15 billion capital need.”)
- Trial Ex. 293 (Alfonsin Suppl. Decl.) ¶ 9 (“It was important to keep the planned bankruptcy filing confidential, to avoid third parties from placing liens on or attempting to seize LATAM’s property or trying to terminate contracts. It was also important to have a significant portion of LATAM’s debtor-in-

As part of this marketing process, PJT sent a “teaser” to every interested investor stating that the Debtors were “seeking \$2+ billion in [DIP] financing, structured as a multi-tranche delayed draw term loan[.]” *See* Trial Ex. 31 (LATAM Teaser). In particular, the teaser indicated that “[c]ertain existing shareholders have committed to provide \$900mm to serve as the junior-most tranche of the DIP[.]” (*id.*) which the Debtors maintain was intended to “inform potential competitors what any higher and better offer must beat.” Debtors Post-Trial Brief ¶ 38. The Debtors also say that in the First DIP Motion, they made clear that they were open to “proposals for a number of constructs including (i) financing the full amount of capital needed, with no Tranche C DIP Facility or other shareholder support, (ii) financing for the Tranche A DIP Facility to combine with the Tranche C DIP Facility, (iii) financing for the Tranche B DIP Facility to combine with both the Tranche A DIP Facility and the Tranche C DIP Facility and (iv) alternative junior proposals in lieu of the Tranche C DIP Facility.” First DIP Motion ¶ 27.

The Debtors dispute the Objectors’ contention that they had discouraged potential investors and creditors from competing for the Tranche C DIP or directed potential interests towards the Tranche A DIP.¹¹⁰ They note that at the Hearing, none of the financial advisors to

possession financing committed prior to any filing, in order to signal strength to our passengers, vendors, lessors, lenders, and the market generally. Accordingly, LATAM and PJT initially marketed what would become the Tranche C DIP Facility to our main shareholders.”)

- Trial Ex. 292 (Coleman Reply Decl.) ¶ 9 (“I reject the Objecting Parties’ suggestions that PJT or the Debtors neither sought nor were open to alternative proposals. Nor did PJT or the Debtors discourage potential lenders from proposing alternatives to the existing Tranche C Facility. Quite the opposite, PJT and the Debtors have been and continue to be clear that they are open to, and will consider, any proposal that meets the Debtors’ capital needs. Throughout the postpetition marketing process, PJT has continuously updated the LATAM Board of Directors, including separately, the disinterested independent directors committee as to its activities and negotiations with potential lenders.” (footnotes omitted))

¹¹⁰ The Debtors also challenge the Objectors’ criticism that PJT’s Call Log (Trial Ex. 276 [redacted]) shows that PJT did not actively solicit interest in the Tranche C DIP. *See* Debtors Post-Trial Brief ¶ 42 (citing 7/29/20 Hr’g Tr. at 264:16-21 (Coleman)). They explain that the call log does not capture PJT’s message to interested lenders, which is already reflected in the LATAM Teaser. The Debtors further dispel the Objectors’ criticism that PJT did not try to coordinate an alternative lender group for the Tranche C DIP from the bidders with interests in smaller participations, contending that it was reasonable for PJT to properly focus on obtaining commitments for the Tranche A DIP Facility. *See id.*

the Committee¹¹¹ and the Ad Hoc Group,¹¹² nor Knighthead's representative, could recall a specific instance in which an interested investor was turned away, or that PJT had been unresponsive in engaging in discussions.¹¹³

Lastly, the Debtors maintain that they were responsive and engaged in good faith with both Knighthead and Jefferies concerning their potential proposals for an alternative Tranche C DIP loan. More specifically, they say that the testimony revealed that Wagner admitted that PJT had met with Knighthead's financial advisor, Houlihan Lokey, only to be told by Houlihan Lokey that they were unfamiliar even with the terms of Knighthead's proposal, and that the Debtors' efforts to engage Knighthead were unfruitful. *See* 7/30/20 Hr'g Tr. at 174:12-182:24. Further, the Debtors say that notwithstanding the late submission of Jefferies' proposal, the

¹¹¹ *See*, for example, Otton's testimony:

- 7/30/20 Hr'g Tr. at 131:2-5 (Q. "And in your conversations with PJT, PJT was always very clear that there was no impediment to anyone proposing an alternative C in its entirety on better terms; is that correct? A. [Otton] That's what they said to us, correct.")
- 7/30/20 Hr'g Tr. at 130:24-131:1 (Q. "[Y]ou have regular check-ins with PJT? A. [Otton] Yes, sir.")
- 7/30/20 Hr'g Tr. at 130:16-23 ("Q. In fact, sir, even if I broaden this question, you cannot tell this Court of a single statement made to anybody at UBS by a prospective DIP lender who claims to have been discouraged from making a tranche C offer; can you? A. [Otton] I can name a series of investors who are interested in new C, yes. So no -- Q. Okay. A. -- is the answer to your question.")

¹¹² *See*, for example, Jamal's testimony:

- 7/30/20 Hr'g Tr. at 57:13-18 ("Q. You personally, as the financial advisor to the ad hoc group, are not aware of a single instance in which anyone reached out to the Debtors and found the Debtors unresponsive, correct? A. [Jamal] Yeah, no one has called me and said, 'I tried to call the Debtors, and they weren't responsive to me.'")
- 7/30/20 Hr'g Tr. at 57:24-58:5 ("Q. You cannot describe for us a single conversation where someone told you that PJT or the Debtors had ever discouraged them from bidding on Tranche C, can you? A. [Jamal] I can recall some frustrations that people expressed, but . . . it's kind of hard for me to sort of parse the words that you're describing to say, whether I could -- I would describe that as discouragement or not.")

¹¹³ *See, e.g.*, Wagner's testimony: 7/30/20 Hr'g Tr. at 163:12-16 ("Q. And isn't it true that Mr. Coleman explicitly told you in one of those conversations that the debtors would consider a bid for Tranche C financing from Knighthead, but it had to meet three requirements? A. [Wagner] That is correct.").

Debtors engaged in discussions with Jefferies. In that regard, they maintain that after receipt of the Jefferies proposal, the Debtors immediately reviewed the commitment letter overnight, and LATAM's management and board met the next day to discuss and attempted to connect with Jefferies, who was not available until the next day, the 25th. *See* 7/29/20 Hr'g Tr. at 89:9-90:1 (Alfonsín). They say on the morning of July 25th, the Debtors' advisors discussed the Debtors' concerns with Jefferies and urged a further proposal to be submitted no later than Sunday evening, but that Jefferies failed to do, only submitting their revised proposal the evening of July 27th, and then only making minor changes that did not address all of the Debtors' concerns. *See id.* at 89:22–90:3. The Debtors assert that while Jefferies continued to submit further revised proposals over the course of Wednesday and later, Jefferies never improved the economic terms of their proposal nor addressed the Debtors' primary issues with its proposal. *See* Debtors Post-Trial Brief ¶ 44.

The Court credits the Debtors' contentions. A review of the record of the Motions and Chapter 11 Cases and the above described evidence cited by the Debtors and Objectors amply demonstrates that Debtors adequately market tested the Tranche C DIP Facility post-petition. The uncontroverted testimony from Coleman, which the Court found to be credible, was that PJT and, to a lesser extent, Cleary Gottlieb, as advisors to the Debtors, made clear to market participants, that the Debtors were seeking post-petition DIP financing, including for the junior Tranche C DIP. To that end, PJT actively solicited over 150+ interested parties in good faith and set up a data room to those interested parties who have executed non-disclosure agreements to conduct due diligence. *See* Trial Ex. 243 (First Coleman Decl.) ¶ 24 ("In an effort to obtain the most attractive financing available to LATAM, an extensive marketing process was launched immediately after the Petition Date. More than 150 parties have been contacted in order to seek

proposals for the Debtors' \$2.15 billion capital need.”). Although the LATAM teaser indicated that the Tranche C DIP Facility was fully committed (a fact that was true), the Debtors' message to creditors and parties in interest, was that they were open to any proposals for any combination of financing structures, including “(i) financing the full amount of capital needed, with no Tranche C DIP Facility or other shareholder support, (ii) financing for the Tranche A DIP Facility to combine with the Tranche C DIP Facility, (iii) financing for the Tranche B DIP Facility to combine with both the Tranche A DIP Facility and the Tranche C DIP Facility and (iv) alternative junior proposals in lieu of the Tranche C DIP Facility.” First DIP Motion ¶ 27. *See also* 7/29/20 Hr'g Tr. at 264:8-22 (Coleman).¹¹⁴ Moreover, contrary to the Objectors' assertion that the Debtors meant to protect this sweetheart DIP financing for their shareholders, the Debtors' internal meeting minutes confirm that the Debtors, through PJT, intended to market test all aspects of the DIP Facility, including the Tranche C DIP. *See* Trial Ex. 123 (May 25th BOD Minutes) (“Mr. COLEMAN made a brief reference to the DIP Financing negotiating process and pointed out that PJT will launch a robust marketing process of the DIP Financing tomorrow, wherefore the three Tranches, A, B and C, will be subject to competitive proposals that may be made by other creditors.”); Trial Ex. 125 (May 25th Directors Committee Minutes) (“Mr. COLEMAN, from PJT, made a brief reference to the DIP Financing negotiation process,

¹¹⁴ Coleman's testimony was as follows:

Q. Okay. And specifically I went through and found the call log entries indicating that a number of potential investors had interest in Tranche C, correct?

A. I don't agree with that.

Q. Do you know if there's anything in the call log or otherwise in writing that documents any PJT employee actively soliciting Tranche C interest or pressing investors interested in Tranche C to offer better terms?

A. The -- the -- well, first of all, I -- the -- the call log does not record what we're typically saying, unless we're answering somebody's comment or question. So it wouldn't have in it what we were saying to all the holders about, you know, here's an A, here's a B, here's a C; you can invest in all or some. So I don't have a recollection of the call log, because it wouldn't exist that way.

7/29/20 Hr'g Tr. at 264:8-22.

and indicated that PJT will launch a robust marketing process for the DIP Financing after the Chapter 11 filing, and that the presentation submitted to the Committee will be subject to competitive proposals that may be submitted by other prospective lending parties.”).

There is also no support for the Objectors’ contention that the Debtors and their professionals were non-responsive to any expressed interest in the Tranche C DIP Facility or that PJT discouraged potential bidders from submitting proposals for the Tranche C DIP. *See, e.g.*, Trial Ex. 292 (Coleman Reply Decl.) ¶ 10 (“I note that the Objecting Parties have not identified any concrete action through which PJT or the Debtors have prevented or discouraged them from proposing an alternative to the Tranche C Facility, either on their own or in combination with others. For example, no one willing to execute a non-disclosure agreement has been prevented from accessing the data room through which the Debtors have made significant nonpublic financial and other information available to potential lenders.”). Coleman’s testimony is confirmed by the Objectors’ professionals. *See* 7/30/20 Hr’g Tr. at 131:2-5 (Otton) (Q. And in your conversations with PJT, PJT was always very clear that there was no impediment to anyone proposing an alternative C in its entirety, on better terms, correct? A. That’s what they said to us, correct.”). Indeed, Wagner’s testimony with regard to Knighthead’s experience in the post-petition marketing process, was that he had more than one conversation with Coleman at PJT concerning Knighthead’s interest in providing the Tranche C DIP. *See* Trial Ex. 280 (Wagner Decl.) ¶¶ 6-11. In that regard, when Knighthead submitted its written proposal for a competing Tranche C DIP, the Debtors, through PJT and Cleary Gottlieb, attempted to engage in negotiations with Knighthead’s professionals over its terms. *See* Trial Ex. 292 (Coleman Reply Decl.) ¶¶ 13-14. The testimony also establishes that upon receiving the Initial Jefferies Commitment, the Debtors promptly reviewed, considered, and reached out to Jefferies

concerning their issues with the Jefferies' proposal, and did so with the subsequent revisions or improvements submitted by Jefferies. *See* 7/29/20 Hr'g Tr. at 89:5-90:5.¹¹⁵ Notwithstanding the revised proposals, Jefferies did not materially improve the economic terms of its alternative Tranche C DIP, and did not meaningfully address the Debtors' concerns with the terms of the Jefferies proposals.¹¹⁶ As such, for the reasons already discussed herein, the Debtors concluded that the Tranche C DIP Facility with the shareholders is superior and represents the only viable

¹¹⁵ That testimony from Alfonsin was as follows:

Q. [Debtors' counsel] Mr. Alfonsin -- excuse me. Mr. Alfonsin, I want to focus you on recent developments since last Thursday. Did LATAM receive a commitment letter from Jefferies last Thursday?
A. Yes.
Q. What was LATAM's reaction to that commitment letter?
A. We received it late last Thursday, I would say beginning of Friday. We reviewed the document in the early morning of Friday. We sat down with our advisors and then we reached out to -- to the proponents.
Q. And what was your reaction to the terms and conditions being proposed?
A. Well, we identified certain concerns of ours on -- on -- on the document, and we wanted to discuss them with -- with Jefferies. And that's why we reach out and ask for a meeting to be held that Friday.
Q. And did Jefferies indeed engage with LATAM up until Sunday?
A. They asked us to postpone the meeting that we asked for Friday to Saturday morning, and we hold that meeting on 24 Saturday morning and send them the issues list that we had identified as major issues for us and asked them to have a reply by Sunday.
Q. And did they in fact reply by Sunday?
A. We received a proposal on late Monday.
Q. So not by Sunday?
A. No.

¹¹⁶ For example, Wagner testified that he believed the Jefferies proposal was economically superior and did not need to be improved. *See, e.g.*, 7/30/20 Hr'g Tr. at 186:22-23 ("I don't know why Jefferies would feel the need to improve [it]."); *id.* at 189:3-9 ("Q. Let me put it more simply. Is there anything from the time the first Jefferies proposal was made until today, on any of its provisions, that improve -- but that it made those terms better for the debtors than they were on Monday? A. No. They -- they were better than the original insider proposal. They have not changed. And they remain better than the revised insider proposal."); *id.* at 186:21-24 ("The deal was and remains superior on economic terms to the insider proposal so I don't know why Jefferies would feel a need to improve the economic terms when they're already in the lead.").

Alfonsin also testified to the Company's concerns with the revised Jefferies proposal as follows:

Q. And I believe you mentioned that LATAM also received a subsequent proposal from Jefferies on Monday; is that correct?
A. Yes.
Q. And what was LATAM's reaction to the Jefferies revised proposal?
A. Well, we reviewed it. Economics -- terms did not change, and the terms and the issues that we had raised have been dealt with in a very limited way. We still had an issues list that was considerable.

7/29/20 Hr'g Tr. at 90:18-91:1.

Tranche C DIP with terms that they find acceptable.¹¹⁷ The Court has no reason to challenge that determination, and in any event, such determination is not a basis for concluding that the Debtors did not undertake an active market test of the Tranche C DIP Facility. Moreover, the evidence in the record more than confirms that other than Jefferies, no other party came forward with a committed offer, let alone a better offer, for an alternative Tranche C DIP, in the amount of \$900 million.¹¹⁸

The Court also finds unconvincing the Committee's argument that the Court cannot take into account the marketing efforts of the Committee. *See, e.g.*, Committee Post-Trial Brief at 18 ("Finally, the Debtors cannot rely on the marketing efforts of the Creditors Committee—which could not provide confidential information or management meetings and had an unfairly limited period of time to market—as a substitute for its own obligations."). While the burden and obligation to establish a robust post-petition marketing of the Tranche C DIP loan is indisputably with the Debtors, they are not relying on UBS's efforts as a substitution for their obligation,

¹¹⁷ More specifically, the Debtors submit that the proposed Tranche C DIP Facility is superior because "(i) is unconditional, subject only to this Court's approval, (ii) provides the entirety of the DIP funds needed by the Debtors, including critically the \$1.3 billion senior Tranche A, (iii) provides the Debtors—at their option—with a right to compel the junior lenders to subscribe to restricted equity at a pre-determined discount irrespective of the market discount for such equity at reorganization, (iv)[] leaves the Debtors virtually unrestricted in their future efforts to seek Tranche B financing from a number of potential sources, and (v) respects the Debtors' operational challenges and offers critical flexibility to run their business[.]" (*see* Debtors' Post-Trial Brief ¶ 2), whereas, the Jefferies Final Commitment is "not executable" because (a) the Debtors risked losing the Tranche A DIP Facility with Oaktree (who has conditioned its commitment and funding upon the current shareholders Tranche C DIP Facility) if they went with the Jefferies proposal; (b) the Jefferies proposal restricts potential Tranche B lenders to the government of Chile; (c) the Jefferies proposal contains numerous non-financial terms that are unworkable for the Debtors, including, for example, the requirement LATAM maintain cash accounts of no more than \$500 million in the aggregate outside the United States, a restriction that shows an alarming failure to comprehend what is required to run a global airline such as LATAM; the Final Jefferies Commitment is "committed in name only"; and (d) the Jefferies proposal does not provide for the Modified Equity Subscription Election, which the Debtors contend gives them flexibility to determine the form of repayment of the Tranche C DIP loan if they are unable to obtain favorable exit financing.

¹¹⁸ *See, e.g.*, Coleman Dep. Tr. at 94:23-25 ("My recollection on [the PJT call log] is not one of those parties was willing to come in at a cheaper—better price, if you will, than what was in the Tranche C"); Wagner Dep. Tr. at 271:2-6 ("Q. [I]s there any entity on [Knighthead's call log] at all that you can testify as committed to providing DIP financing to the Debtors? A. No.").

which the Court finds has been satisfied, but as additional affirmation that even with the marketing efforts of UBS, no higher or better Tranche C DIP proposal is available. That UBS and Moelis separately reached out on their own to potentially interested DIP providers does not detract from, but rather lends further support to, the fact that a fulsome marketing process was undertaken with respect to the Tranche C DIP Facility.

Finally, there is likewise no merit to the Objectors' criticism that PJT should have tried more to coordinate the various interests of potential bidders in smaller participations or sought an underwriter to arrange the Tranche C DIP Facility or the full DIP Facility. That a different investment banker or professional would have undertaken a different marketing strategy with respect to the Tranche C DIP is of no moment. The issue before the Court is not whether the Debtors' marketing process should have been a process that the Objectors would have undertaken; all that is required under *North LaSalle* and *Coltex I*, for the Tranche C DIP Facility to satisfy the required elements of reasonable equivalence and necessity for purposes of the new value exception is that the Debtors ultimately market tested the Tranche C DIP Facility to third parties other than the existing shareholders.

Based upon all of the foregoing, the Court is satisfied that the Tranche C DIP Facility was negotiated at arms-length and underwent an extensive post-petition market test, the end result of which supports the Court's conclusion that no third-party creditor came forward with a competing Tranche C DIP Facility. The total pricing of the loan, including the equity conversion feature, reflects this value of the risk undertaken by the Tranche C Lenders in making this loan, and the fact that Jefferies' alternative Tranche C DIP financing was not viable demonstrates that the \$900 million provided by the Tranche C DIP Lenders was reasonably equivalent and necessary because the shareholders were the "last resort." See *Coltex I*, 203 B.R. 527, 535 ('In

other words, under the ‘necessary’ requirement of the new value exception, old equity must be willing to contribute more money than any other source or it must be the lender of ‘last resort.’” (citation omitted)). In sum, application of the absolute priority rule is not grounds to deny the Motions. The Debtors have carried their burden to satisfy all of the elements of the new value exception in that the Tranche C DIP Facility represents new, substantial money that is necessary for a successful reorganization and reasonably equivalent to the value of that which the Tranche C Lenders will be receiving.

The Court will next address the Objectors’ arguments that the Tranche C DIP Facility must be denied as containing impermissible sub rosa elements by dictating future plan terms and impinging on creditors’ rights under a plan confirmation process.

Whether the Tranche C DIP Facility Is an Improper Sub Rosa Plan

A debtor cannot enter into a transaction that “would amount to a *sub rosa* plan of reorganization” or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization. *Motorola, Inc. v Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007) (citing *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983)). The term “sub rosa” is not defined in the Bankruptcy Code. The Fifth Circuit applied it in *Braniff* in reversing the district court’s order approving a sale of the debtors’ assets under section 363 of the Bankruptcy Code. The circuit found that the proposed sale was a “plan sub rosa ” because if approved, it would have dictated some of the terms of any future reorganization plan, restructured the rights of creditors, and required all parties to release all claims against the debtor, its officers, directors, and secured creditors. *In re Braniff Airways, Inc.*, 700 F.2d at 939-40. Concerns about sub rosa plans are not limited to transactions involving section 363 asset

sales. They are germane to any transaction by a debtor that adversely impacts on interested parties' rights to participate in the restructuring process. "The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, 'short circuit the requirements of Chapter 11 for confirmation of a reorganization plan.'" *Iridium*, 478 F.3d at 466 (quoting *In re Braniff Airways, Inc.*, 700 F.2d at 940). The Objectors contend that is precisely the effect of the Modified Equity Subscription Election and, as such, the Tranche C DIP Facility must be rejected as an improper *sub rosa* plan.

Under the DIP Credit Agreement, the Tranche C Lenders had the exclusive right to exercise the Equity Subscription Election at a 32% discount to plan value. The Objectors challenged that version of the DIP Facility as a *sub rosa* plan that violated the absolute priority rule because, among other things, through that election:

The Tranche C DIP Facility locked in arbitrary recoveries to the Debtors' existing shareholders based on negotiations among the Debtors and their major shareholders without any market test to assess the fairness of the transaction and in violation of the absolute priority rule;

The DIP Credit Agreement gave complete discretion to the Tranche C Lenders to choose, under any plan, whether to be paid in full in cash on the plan's effective date, or to exchange their debt into equity at a 32% discount to yet-to-be-determined plan value; and

The DIP loan imposed a requirement that any plan must be approved by a shareholder vote, and that only a "Company Approved Reorganized Plan" may be proposed and confirmed in these cases.

See, e.g., Knighthead Initial DIP Objection ¶¶ 2, 33. The Objectors argued that if the Tranche C DIP Facility was approved, the Tranche C Lenders would be able to direct how and when the Debtors will emerge from bankruptcy, and, in their discretion, reserve for themselves, a windfall distribution and potential role in the go-forward business. *See id.* ¶¶ 1, 2. *See also* Committee Suppl. and Restated DIP Objection ¶ 79 (complaining that Tranche C DIP Facility dictates key

terms of eventual plan of reorganization by prematurely allocating reorganization value to insider equity holders.); Ad Hoc Group Initial DIP Objection ¶ 16 (“The Tranche C DIP Facility would impermissibly convert the bankruptcy process from one designed to benefit all creditors, to one designed to benefit existing shareholders at the expense of not only the Ad Hoc Group but all unsecured creditors.”).

The Revised Credit Agreement modified the Equity Subscription Election in two principal ways. First, the Debtors, not the Tranche C Lenders, are vested with the right to make the election. Second, the discount rate is reduced to 20% discount to plan value. The Committee asserts that the equity of a reorganized debtor is a form of plan “currency” and that it is only through the chapter 11 plan process that the parties and the Court can determine the proper allocation of that “currency” among a debtor’s creditors and equity holders. *See* Committee Post-Trial Brief at 5. It complains that the Modified Equity Subscription Election subverts that process because the discount is not market-tested, the Debtors can make this election and profit from the discount, without the approval or oversight of the Court, and that the election dictates key terms of an eventual plan of reorganization by prematurely allocating reorganization value to insider equity holders. It maintains that through the proposed Tranche C DIP Facility, the Debtors are proposing to vest the Tranche C Lenders with the exclusive right to acquire equity in the reorganized debtor, without extending an opportunity to anyone else to compete for the reorganized equity. *See id.* at 4-5. Thus, the Committee contends that the election “short-circuits Chapter 11 safeguards by taking what belongs to the plan negotiation and confirmation process (i.e., allocation of the equity of the reorganized company as a form of plan currency) and prematurely allocating it to existing shareholders.” *See id.* at 8. *See also* Knighthead Post-Trial Brief ¶ 17 (“The Modified Insider Financing therefore necessarily determines plan terms—

giving shareholders an unmarketed discount that would never be subject to judicial review—and infringes on creditor rights to object to any ‘choice’ made by the Debtors to put this option into effect.”). Further, the Objectors say that the purported “improvement” that “flips” this option to the Debtors (from the prior iteration where the Tranche C Lenders held the option), is “of no moment,” because the “evidence demonstrates that the [Tranche C Lenders] control the Debtors and direct their management.” Committee Post-Trial Brief at 5. In sum and substance, the Objectors contend that, with the Modified Equity Subscription Election, the Tranche C DIP Facility is no less a *sub rosa* plan that violates the absolute priority rule than its predecessor. *Id.* at 2 (“Among other things, [the election] eviscerates the creditors’ right to reject a plan that proposes to distribute the equity in the reorganized debtors to shareholders at an unfair price, as well as other safeguards of the confirmation process.”). *See also* Knighthood Post-Trial Brief ¶ 10 (“Just like the Insider Financing, the Modified Insider Financing is a *sub rosa* plan that violates the absolute priority rule. Indeed, testimony elicited at trial only proved that the Modified Insider Financing provides \$282.6 million in value to the Debtors’ controlling shareholders on account of their old equity.”)

The Objectors also complain that the covenants in the DIP Facility are calculated to ensure that only a Company Approved Reorganization Plan may be proposed and confirmed in these cases. *See* Committee Post-Trial Brief at 8 (“In addition, through a variety of covenants, the transaction would vest the insiders with excessive control over plan process itself. This is legally impermissible in its own right because it circumvents critical chapter 11 safeguards in the manner of a *sub rosa* plan.”). In particular, it shall be an Event of Default under the Revised Credit Agreement if, among other things, (i) the Debtors fail to comply with the Bankruptcy Milestones set forth in section 6.17, including the milestone that the Debtors (a) shall file a

Chapter 11 Plan, which shall be a Company Approved Reorganization Plan, no later than fifteen (15) months after the Petition Date, and (b) this Court shall have entered an order confirming the Company Approved Reorganization Plan no later than thirty (30) days prior to the maturity date under the Revised Credit Agreement; and (ii) the occurrence of a “Bankruptcy Event,” including, among others, that “an order shall be entered by the Bankruptcy Court confirming a Chapter 11 Plan other than a Company Approved Reorganization Plan.” *See* Revised Credit Agmt. § 6.17 (milestones), § 8.01(k) (events of default). The Committee contends that these covenants effectively prevent any other plan proponent from filing an alternative plan that does not contain the equity conversion feature. *See* Committee Post-Trial Brief at 1 (“In addition, the option can only be exercised as part of a plan that has been approved by the insider-controlled board, not by any other plan proponent.”). It asserts that “if the DIP Facility is approved, it will ensure (under penalty of default) that the only plan of reorganization that can be confirmed is one that has been approved by the Debtors’ lender-controlled board that gives the Insider Lenders the full benefit of their exclusive option.” *See id.* at 9.

Finally, the Objectors say that the Rights Offering feature under the terms of the Modified Equity Subscription Election adds to the improper recovery guaranteed to the Debtors’ existing equity holders, and undermines the Debtors’ arguments that any recovery under the Tranche C DIP Facility is not on account of equity interests, but on account of new value. That is because under the procedures for implementing the Modified Equity Subscription Election, LATAM’s shareholders must engage in a Chilean Rights Offering, whereby any new capital raises must be offered to all of the Debtors’ shareholders (i.e., including non-Tranche C Lender/Shareholders), and any remaining unsubscribed shares may be placed with the Tranche C

Shareholders. *See* Revised Credit Agmt. Sch. 2.12(a)(i) § 14.¹¹⁹ Thus, the Committee contends that approval of the Tranche C DIP Facility is an approval now, of the future right of the Debtors' other shareholders who are not Tranche C Lenders and who have not put new money into the Debtors, to acquire shares of the reorganized debtors upon exit from these bankruptcy proceedings. *See* Committee Post-Trial Brief at 9 ("The Debtors have made it plain that they intend to lock in the Court's approval of the conversion feature now, including the obligation to do a shareholder rights offering, and that any and all substantive objections would be foreclosed.").

DIP financings sometimes trigger sub rosa plan issues. "[A] bankruptcy court cannot, under the guise of section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements." *Resolution Tr. Corp. v. Official Unsecured Creditors Comm. (In re Def. Drug Stores, Inc.)*, 145 B.R. 312, 317 (9th Cir. BAP 1992) (citation omitted). To put a finer point on it, "[w]hile certain favorable terms [under a

¹¹⁹ That section provides:

(i) As soon as practicable following completion of the New Shares Registration and the Second Board Meeting, LATAM will launch the preemptive rights offering in Chile (the "Rights Offering"). If LATAM makes an Equity Subscription Election that has not been revoked in accordance with the terms hereof, no later than the last day of the Rights Offering, the Tranche C Shareholders (including those LATAM stockholders who are party to the Support Agreement) shall waive in full their preemptive rights to subscribe for New Shares in the Rights Offering, which will allow LATAM to offer, upon the expiration of the Rights Offering, those unsubscribed shares to Tranche C Lenders in accordance with the Equity Subscription Election. The Rights Offering will remain open for 30 days and will be a condition to the effectiveness of the Chapter 11 Plan.

(ii) Immediately after the expiration of the Rights Offering, the board of directors of LATAM shall place New Shares among the Tranche C Lenders in accordance with the Equity Subscription Election, and the Tranche C Lenders shall purchase such unsubscribed New Shares at the same price offered in the Rights Offering in a number sufficient to effectuate in full the Equity Subscription with respect to their Tranche C Obligations. Any remaining unsubscribed New Shares after the effectuation of the Equity Subscription may be placed by the board of directors of LATAM in accordance with the Chapter 11 Plan, including purchase by the Tranche C Shareholders.

Revised Credit Agreement Sch. 2.12(a)(i) § 14.

financing agreement] may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender. . .” *Id.* (citation omitted). The touchstone consideration in conducting that analysis is “whether the proposed terms would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest[.]” *Id.* (citation omitted). *See also In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting that “the court’s discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.”). Thus, courts will reject proposed DIP loans as improper sub rosa plans where the terms of the loan include concessions to creditors or parties in interest that are unauthorized under, or in conflict with, provisions under the Bankruptcy Code. *See, e.g., In re Belk Props., LLC*, 421 B.R. 221, 225-26 (Bankr. N.D. Miss. 2009) (denying motion to approve secured DIP facility where DIP term sheet (i) called for lender to act as debtor’s chief manager and obtain at least 51%, and as much as 90% of reorganized equity, and (ii) loosely detailed the manner in which existing creditors were to be treated; court found that before DIP lender “will consent to infusing the post-petition funding, it requires a final, non-appealable order approving the post-petition financing proposal which obviously incorporates the conditions set forth on the Term Sheet. In the opinion of the court, once the financing order is final and non-appealable, the plan of reorganization is a *fait accompli*, that is, it is an accomplished fact for all practical

purposes.”); *In re Chevy Devco*, 78 B.R. 585, 589 (Bankr. C.D. Cal. 1987) (denying motion to obtain secured DIP financing that called for DIP loan to subordinate existing secured debt where debtor “admitted . . . that the proposal that was brought to [the] Court [was] equivalent to its plan of reorganization[.]” and stipulated “that if this subordination proposal had been put forward in a plan of reorganization, the plan could not be confirmed over [objector’s] rejection.”).

The Debtors say that those types of cases are not applicable here because the Tranche C DIP Facility does not constitute a sub rosa plan since plan terms are not being dictated under the Tranche C DIP Facility, and the Tranche C Lenders do not control the plan process. They also contend that provisions in a credit agreement establishing the terms for repayment of the debt do not dictate the treatment of the claims of other creditors and do not circumvent the protections provided to creditors as a part of the plan confirmation process. *See* Debtors Reply ¶ 67.

The Debtors assert that the fact that they have the option of distributing reorganized equity (at a discount) in satisfaction of the Tranche C DIP loan does not further the Objectors’ sub rosa plan argument. As support, they point to *In re Chrysler*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009). *See* Debtors Reply ¶ 68 (“Particularly relevant here, a lender’s right to receive equity in exchange for its postpetition loan does not amount to a sub rosa plan.”); *see also* Debtors Post-Trial Brief ¶ 55, n.35 (bankruptcy court found no sub rosa plan where “Governmental Entities’ receipt of an equity interest in New Chrysler is not based on prepetition claims It reflects additional consideration to the Governmental Entities for making the \$6.2 billion loan to New Chrysler[.]”) (citing *In re Chrysler LLC*, 405 B.R. at 100)). In that case, the United Auto Workers (“UAW”), the voluntary employees’ beneficiary association established in conjunction with the UAW (“VEBA,” and with the UAW, the “Unions”), and certain Governmental Entities were prepetition creditors of the Chrysler debtors and creditors of New Chrysler, the entity

established prepetition to purchase Chrysler's assets out of bankruptcy pursuant to a section 363 asset sale. *In re Chrysler LLC*, 405 B.R. at 92. Pursuant to that sale, New Chrysler paid Chrysler \$2 billion in cash and assumed certain liabilities of Chrysler, and Chrysler transferred substantially all of its operating assets to New Chrysler. *Id.* At the closing of the sale transaction, New Chrysler gave the Unions and the Governmental Entities equity interests in New Chrysler, in satisfaction of their claims against New Chrysler. The Debtors highlight that in rejecting contentions that the asset sale was a sub rosa plan, the *Chrysler* court noted that the stock distributions to the Unions and the Governmental Entities were not on account of those entities' prepetition claims against the Chrysler debtors, but rather, were on account of their claims against New Chrysler. *See id.* at 100 ("Similarly, the Governmental Entities' receipt of an equity interest in New Chrysler is not based upon their prepetition claims against Old Chrysler. Rather, it is an unrelated transaction that was negotiated between New Chrysler and the source of its funds—the Governmental Entities. It reflects additional consideration to the Governmental Entities for making the \$6.2 billion loan to New Chrysler to fund the purchase of Old Chrysler's business and its ongoing operations."). The Debtors overstate the significance of that determination. The transaction had no impact on, and was irrelevant to, the Chrysler estate and its creditors. The bankruptcy court found that the provision of the ownership interests in New Chrysler was "neither a diversion of value from the Debtors' assets nor an allocation of the proceeds from the sale of the Debtors' assets. The allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests." *Id.* at 99. In contrast, a determination now that the Debtors are free to allocate the reorganized equity to their shareholders (and at a 20% discount to some of them) is relevant to the estate's economic interests generally, and specifically to the rights of all estate creditors under the plan process.

The Debtors assert that the Tranche C DIP Facility is not a sub rosa plan, but rather is “influencing” the restructuring because it is “paving the way towards or otherwise narrowing the [D]ebtors’ options for a restructuring[.]” Debtors Reply ¶ 68. As support they cite to *In re Iridium Operating LLC*. In that case, a consortium of lenders (the “ILenders”) asserted liens over the bulk of Iridium’s assets. 478 F.3d at 456. Iridium’s official committee of unsecured creditors (the “IUCC”) contested those liens; in particular, the IUCC objected to the ILenders’ claim to Iridium’s remaining cash held in accounts at JPMorgan Chase Bank. The IUCC also sought to pursue claims against Motorola, Inc. (“Motorola”), Iridium’s former parent company, but lacked money to fund the litigation. Motorola was an administrative creditor of the Iridium estates. *Id.* The IUCC and the ILenders agreed to settle their disputes and sought court approval of their settlement (the “ISettlement”) under Bankruptcy Rule 9019. The settlement conceded the validity of the ILenders’ liens and, among other things, divided the estate’s cash into three funds. One fund split \$130 million between the ILenders (\$92.5 million) and a litigation trust (the “ILLC”) (\$37.5 million) that served as the funding vehicle for all Motorola litigation. Iridium’s unsecured creditors were the trust beneficiaries. *See id.* at 459. If the IUCC and the estate prevailed against Motorola, 62.5% of the recovery would go to the estate to be distributed according to a future, as-yet-confirmed reorganization plan, with administrative creditors – such as Motorola – taking first. Motorola objected to the ISettlement, in part, on the grounds that it was an impermissible sub rosa plan. *Id.* at 466. The Second Circuit rejected the argument. In doing so, it noted that in this circuit the sale of an asset of the estate under § 363 is permissible if the court expressly finds a good business reason for allowing the sale. *See id.* (citing *Comm. of Equity Sec. Holders v. Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)). In rejecting the sub rosa plan argument, the bankruptcy court identified a proper business justification for the

ISettlement, to wit: “By allowing the [ILenders] to take \$92.5 million and redirect another \$37.5 million to the ILLLC in exchange for the [IUCC] dropping the challenge to the liens, the [IUCC] has cleared the way for implementation of a reorganization plan. The Estate stands to gain significantly more from the action against Motorola than it might if it or the [IUCC] were forced to fund the litigation themselves at some much later date.” *Id.* at 467. In essence, the *Iridium* court found that, but for the ISettlement, the Iridium estate would not have had the means for proposing and implementing a reorganization plan. Although the ISettlement afforded the unsecured creditors indirect access to funds that they could not have accessed outside of the terms of the ISettlement (i.e., the funds to underwrite the Motorola litigation), it did so without altering plan confirmation requirements, or prejudicing Motorola’s right to payment of its administrative expense claim, ahead of any distribution to unsecured creditors. In that light, the Second Circuit found that the Settlement was not a sub rosa plan, but rather, was “a step towards possible confirmation of a plan of reorganization and not an evasion of the plan confirmation process.” *Id.* In a similar vein, there are cases in which courts have rejected sub rosa plan arguments and approved settlements which effectively fix the treatment of some, but not all, classes of claims in yet to be filed reorganization plans, but do so without running roughshod over the rights of the remaining claimants, and the Code’s plan confirmation procedures. *See, e.g., Official Committee of Unsecured Creditors v. Tower Automotive, Inc. (In re Tower Auto. Inc.)*, 241 F.R.D. 162, 169 (S.D.N.Y. 2006) (finding no sub rosa plan because the transaction did not dispose of all of debtor’s assets for distribution or prevent recovery to other creditors).¹²⁰

¹²⁰ In that case, Tower filed a motion pursuant to sections 1113 and 1114 of the Bankruptcy Code to reject a collective bargaining agreement and modify retiree benefits, respectively. *In re Tower Auto. Inc.*, 241 FRD at 163. The unions and retirees objected, and the parties eventually resolved the objections pursuant to the terms of a settlement. In part, under the settlement, Tower agreed that in its reorganization plan, it would provide for the payment of cash or equity in an amount equal to not less than 20% of the unsecured claims asserted by the union and retirees, in full satisfaction of those claims. *See id.* at 165. The bankruptcy court approved the settlement over the

The Debtors have demonstrated that there is a proper business justification for the Tranche C DIP Facility. Without it, they will lack the funding needed to operate their business. The Tranche C DIP Facility is not a substitute for a reorganization plan like the DIP loans in *In re Belk*, 421 B.R. at 225; and *In re Chevy Devco*, 78 B.R. at 589. However, it contains provisions that will give the Debtors a leg up in the plan confirmation process. In contrast to the situation in *Iridium*, the Debtors are not asking the Court to approve a transaction that will merely bring them a step closer to plan confirmation in the same fashion as the *Iridium* debtor. They are asking the Court to approve a transaction that will fix now, some of the terms of a plan yet to be filed. If approved, the Tranche C DIP Facility locks into place the 20% discount to plan value on the stock to be issued to the Tranche C Lenders in satisfaction of the Tranche C DIP loan, if the Debtors elect to distribute stock, in lieu of cash, in satisfaction of that obligation. There is no way of knowing now whether that discount is appropriate. Yet, if the DIP is approved, neither the Debtors' decision to make that election, nor the 20% discount, will be subject to creditor comment or Court review. The Court assumes that the Debtors will act in good faith in determining whether to exercise the election, but the fact remains that the Tranche C DIP Facility necessarily determines plan terms giving the Debtors the right to distribute equity in the reorganized Debtors to the Tranche C Lenders – at a 20% discount to plan value – that

creditors committee's objection. *Id.* On appeal, the creditors committee argued that the settlement should be denied as a *sub rosa* plan. The court rejected that argument since the settlement did not dispose of all of the debtor's assets. The Court explained that "[e]vidence admitted at the trial . . . indicates that Tower expects to emerge from bankruptcy with an enterprise value of approximately \$1.2 billion. . . . The Creditors Committee emphasizes that the [unions'] \$150 million claim alone represents 56 percent of Tower's total unsecured claims While payment of at least 20 percent on this significant claim may represent a substantial portion of Tower's unencumbered estate (although this is disputed), the Retiree Settlements cannot be said to dispose of all or substantially all of Tower's assets." *Id.* at 169 (citation omitted). Here, there is no evidence regarding the Debtors' enterprise value, and such a valuation analysis is simply not possible at this stage of the bankruptcy. Thus, there is no record upon which the Court can determine what value or assets, if any, is left for distribution to other creditors of the LATAM estates. To the contrary, the evidence in the record indisputably establish that *all* of the equity interests in reorganized LATAM would be distributed exclusively to the existing shareholders if the Equity Subscription Election is exercised by the Debtors.

will not be subject to court review. That “short circuits” the chapter 11 plan review process under the Bankruptcy Code, by establishing plan terms sub rosa in the Tranche C DIP Facility. There is a domino effect to the Debtors’ exercise of the Modified Equity Subscription Election that exacerbates that problem. Pursuant to the Rights Offering called for under section 2.12 of the Revised Credit Agreement, all of the Debtors’ shareholders (whether or not acting as a DIP Lender) are entitled to acquire stock in the reorganized at plan value. That violates the absolute priority rule since the shareholders will be receiving the stock solely by reason of their status as shareholders, and without the benefit of market testing the transaction. *See North LaSalle*, 526 U.S. 434, 456 (finding that partner’s exclusive opportunity to acquire equity of reorganized debtor, without market scrutiny or competing bids, rendered such property interest granted “on account of” old equity and thus, violative of the absolute priority rule). This likewise establishes plan terms sub rosa. Moreover, the covenants under the Revised Credit Agreement mandate that only a Company Approved Reorganization Plan may be confirmed in these Chapter 11 cases, regardless of exclusivity, or an Event of Default will be triggered. Those provisions effectively lock up any future plan of reorganization to be only the Debtors’ plan providing for the equity conversion. Although the Tranche C DIP Facility does not include provisions limiting the rights of creditors to vote on a plan, it indirectly impacts creditor rights of franchise by mandating that only a Company Approved Reorganization Plan may be confirmed in these Chapter 11 cases. The court finds that the Modified Equity Subscription Election subverts the reorganization process because the discount is not market-tested, the Debtors can make this election without the approval or oversight of the Court, and that the election dictates key terms of an eventual plan of reorganization by prematurely allocating reorganization value to LATAM’s existing equity holders. That aspect of the Tranche C DIP Facility is problematic and bars approval of the

Revised Credit Agreement. *See In re Def. Drug Stores, Inc.*, 145 B.R. at 317 (denying post-petition DIP financing where proposed terms would prejudice the powers and rights of creditors under the Bankruptcy Code and leverage the Chapter 11 process unduly prejudice the rights of parties).

CONCLUSION

Based on the foregoing, the Court finds that the price and terms of the Revised Credit Agreement, including the Tranche A DIP Facility and Tranche C DIP Facility, are entirely fair, and there are grounds under section 364(c) of the Bankruptcy Code to authorize the Debtors to enter into the DIP Credit Agreement. Further, the DIP Lenders are entitled to a good faith finding under section 364(e) of the Bankruptcy Code. However the Court finds that the Modified Equity Subscription Election gives rise to improper sub rosa plan treatment of the Tranche C Lenders and the Debtors' equity holders. For that reason the Court will not approve the Motions.

IT IS SO ORDERED.

Dated: September 10, 2020
New York, New York

/s/ James L. Garrity, Jr.
Honorable James L. Garrity, Jr.
United States Bankruptcy Judge

LATAM Airlines

Judge Garrity Will Not Approve LATAM Airlines' DIP Facility, Concludes Equity Subscription Election Gives Rise to Improper Sub Rosa Treatment of Tranche C Lenders, Debtors' Equity Holders

Thu 09/10/2020 19:20 PM

Relevant Document: [Opinion](#)

In a 142-page opinion issued this afternoon, Judge James Garrity Jr. declined to approve LATAM Airlines' proposed DIP facility, concluding that the facility's equity subscription election gives rise to improper *sub rosa* plan treatment of the tranche C DIP lenders and debtors' equity holders.

The ruling comes despite findings by the court that (i) the price and terms of the revised DIP credit agreement, including the tranche A DIP facility and the tranche C DIP facility, were "entirely fair," (ii) there were grounds under section 364(c) of the Bankruptcy Code to authorize the debtors to enter into the DIP credit agreement and (iii) the DIP lenders were entitled to a good faith finding under section 364(e) of the Bankruptcy Code.

The opinion states that the modified equity subscription election subverts the reorganization process because the discount that the subscription election provides to the tranche C lenders is not market-tested, the debtors have the discretion to make the election without court approval or oversight, and the election sets forth key terms of an eventual reorganization plan by "prematurely allocating reorganization value to LATAM's existing equity holders." Judge Garrity characterized that aspect of the tranche C DIP facility as problematic, saying that it bars approval of the revised DIP credit agreement.

Further, covenants under the revised credit agreement mandate that only a company approved reorganization plan may be confirmed in the chapter 11 cases, regardless of exclusivity, or an event of default will be triggered. These provisions "effectively lock up any future plan of reorganization to be only the Debtors' plan providing for the equity conversion," Judge Garrity states.

Judge Garrity finds that the absolute priority rule was not grounds to deny the debtors' motions, concluding that the debtors satisfied the elements of the new value exception to the absolute priority rule since the proposed tranche C DIP facility represents "new, substantial money that is needed for a successful reorganization, and reasonably equivalent to the value of that which the tranche C lenders will be receiving."

As part of his ruling, Judge Garrity also observed that with regard to short term cost savings, LATAM exceeded its recent cash flow forecast projections. Nevertheless, without available financing, the debtors' cash could drop below the minimum level needed to run the business by August. Therefore, the court finds that the debtors established that they have an urgent need for financing, and that it was appropriate for the debtors to seek approval of the full \$2.5 billion DIP facility.

"Entire Fairness" Test

A key component of the opinion is Judge Garrity's analysis of whether to apply the entire fairness test in reviewing the tranche C DIP facility and tranche A DIP facility with the court ultimately concluding that "the Tranche C DIP Facility is an insider transaction that is subject to review under the entire fairness doctrine." Judge Garrity also elected to apply the entire fairness standard to the tranche A facility to be provided by Oaktree. None of the parties contended that Oaktree was an insider, the opinion explains. However, the debtors contended that the court can approve the tranche A on a business judgment basis even if the court applies the heightened standard to tranche C. Judge Garrity

said the debtors' contention cuts against their earlier argument that the DIP loan transaction "needs to be assessed holistically."

Regarding whether the transaction involved insiders of the debtor, the opinion notes the following:

- Costa Verde and Qatar are the proposed DIP lenders. Costa Verde holds 11.2% of the company's stock. Costa Verde is part of the Cueto Group which owns or controls about 21.5% of the stock and designates three of nine board members, including the board's Chairman and Vice-Chairman;
- Qatar holds 10% of stock and designates one director; and
- Delta, though not a party to the tranche C DIP, was instrumental in negotiating transaction terms, remains interested in the transaction, holds 19.99% of the company's common stock, and designates two board members.

In the aggregate, the motion remarks, the shareholders control or own more than 51% of the common stock and designate six of nine board members.

To satisfy the entire fairness test, the opinion explains, the debtors must show that the revised credit agreement resulted from fair dealing and reflects a fair price.

Fair Process

The court notes that the debtors and their advisors evaluated and considered the alternative Jefferies proposal in good faith and engaged Jefferies and its professionals. "Far from ignoring or turning away Jefferies," Judge Garrity observes, the debtors communicated a variety of economic and non-economic concerns to Jefferies with regard to Jefferies' proposal. Although the debtors did not choose to pursue the amended Jefferies commitment over the existing shareholders' tranche C facility, the court finds that the debtors were able to demonstrate that the tranche C process undertaken vis-a-vis Jefferies' competing bid was fair.

The court finds also that it was not unreasonable for the debtors to conclude that Jefferies' proposal could not be executed given its terms and restrictions, and that the proposed tranche C DIP facility represented the only available option for the debtors for the postpetition financing.

Next, the court turns to the assertion that the debtors' process was flawed because the debtors agreed to the tranche C term sheet without testing the market. The court reasons that the debtors demonstrated there were good reasons for their decision to not market the DIP before filing for chapter 11 protection. Specifically, the opinion says, the debtors reasonably reached the conclusions that (i) "a DIP underwritten by its major shareholders would enhance the potential for governmental support and send a strong signal to the market that their equity holders had confidence in the Debtors' business" and (ii) "that it was impractical to go into the market because it did not have adequate collateral to fully secure a \$2 billion loan." Judge Garrity finds that under the circumstances, the debtors' failure to market the tranche C DIP facility before executing the tranche C term sheet "does not support the Objectors' contention that the process fails the entire fairness test."

Next, Judge Garrity addresses the argument that the debtors cannot establish the entire fairness of the process because the independent directors allegedly failed to comply with Chilean law when, as members of the directors committee, they reviewed and thereafter, as board members, approved the tranche C DIP.

The opinion explains that Chile's Corporations and Securities Acts govern the LATAM Parent. Expert witnesses put forth by the debtors and objecting parties disagree over whether the board's approval of the transaction complied with applicable Chilean law. However, as the opinion explains, it is unnecessary for the court to attempt to resolve the dispute between the two Chilean law experts because the board and the independent directors treated the DIP loan as a "related party" transaction under Articles 146 and 147 of the Chilean Corporations Act. As a result, no party related to the tranche C DIP facility played a role in approving the transaction. However, in the ruling, Judge Garrity acknowledges that the court will consider the experts' dispute over the independent directors' actions in assessing the weight that the court will give to the independent directors' role in the transaction in reviewing the transaction's entire fairness.

Regarding whether the debtors marketed the tranche C DIP postpetition, the court finds that the evidence demonstrates that the debtors, through the board and management, assisted by legal and financial advisors, identified their financial needs, actively marketed the loans, reasonably evaluated other funding sources, engaged in arm's length good faith negotiations with prospective lenders, adhered to corporate protocol, and fulfilled their fiduciary duties.

While the objectors contend that the debtors discouraged interested parties from bidding on the tranche C DIP loan by steering them to the tranche A or not being responsive to potential bidders, Judge Garrity finds that these contentions have no merit because, at trial, the objecting parties could not substantiate such claims.

Fair Price

Discussing fair price, the opinion explains that the court considers a number of factors:

- The debtors negotiated the loan in the early days of the unprecedented global pandemic;
- Government bans have shut down air travel and it is unclear when the debtors will be able to resume normal operations and when demand will return to pre-pandemic levels;
- The debtors have limited hard-asset collateral available to secure the DIP facility, meaning a tranche C lender in the junior, first loss facility must rely heavily on the company's survival as a going concern; and
- LATAM is a Latin American airline that is not investment grade, and has not received government financial support, but is seeking over \$2 billion of financing.

Judge Garrity finds that the debtors met their burden to satisfy the heightened entire fairness standard applicable to insider transactions.

In addition, the court finds that contrary to the objecting parties argument, the tranche C lenders are entitled to a finding of good faith under section 364(e) of the Bankruptcy Code because there is no evidence demonstrating that the tranche C lenders misused their status as shareholders. Further, there is no evidence that the tranche C lenders engaged in fraud or collusion, or attempted to take gross advantage of other bidders, "which is the typical misconduct giving rise to a finding of bad faith," the opinion says. Rather, the court continues, the evidence supports the finding that the tranche C facility resulted from a robust and arm's length process where the company's management had the advice of outside counsel and a financial advisor in negotiating the tranche C terms, and all decisions were fully vetted and voted upon by LATAM Airlines' directors' committee.

Next, the opinion indicates that there is no merit to the contention that Oaktree, as tranche A lender, is not entitled to a good faith finding under section 364(e) of the Bankruptcy Code because Oaktree "signed up to participate in an insider transaction that on its face violates the absolute priority rule and constitutes an impermissible *sub rosa* plan."

Sub Rosa Plan Analysis

Regarding whether the tranche C DIP facility is an improper sub rosa plan, Judge Garrity finds that the DIP includes provisions that will give the debtors a "leg up" in the confirmation process. Judge Garrity explains that the debtors are asking the court to approve a transaction that will "fix now, some of the terms of a plan yet to be filed." The opinion points out that if the tranche C DIP facility is approved, it will lock into place a 20% discount to plan value on the equity to be issued to the tranche C lenders in satisfaction of the tranche C DIP loan, if lenders elect to distribute stock in lieu of cash.

According to Judge Garrity, "the Tranche C DIP Facility necessarily determines plan terms giving the Debtors the right to distribute equity in the reorganized Debtors to the Tranche C Lenders – at a 20% discount to plan value – that will not be subject to court review."

The opinion finds that if the debtors exercise the modified equity subscription election, all the debtors' shareholders are entitled to purchase stock in the reorganized company at plan value, which violates the absolute priority rule because the shareholders will be receiving the stock solely by reason of their status as shareholders, without the benefit of a market testing the transaction.

Absolute Priority Rule

Since payments to the tranche C lenders will be at least partly on account of their equity interests, that is enough to trigger analysis under the absolute priority rule, the opinion says. The court considered whether the debtors can invoke the new value exception to the absolute priority rule, which is the proposition that “the objection of an impaired senior class does not bar junior claim holders from receiving or retaining property interests in the debtor after reorganization, if they contribute new capital in money or money’s worth, reasonably equivalent to the property’s value, and necessary for successful reorganization of the restructured enterprise.”

“In this circuit,” Judge Garrity explained, to invoke the new value corollary, the “capital contribution by old equity must be: 1) new; 2) substantial; 3) money or money’s worth; 4) necessary for a successful reorganization, and 5) reasonably equivalent to the property that old equity is retaining or receiving.”

The court finds that the tranche C DIP facility was negotiated at arm’s length, and underwent an extensive postpetition market test, stating that the \$900 million provided by the tranche C DIP lenders was reasonably equivalent and necessary because the shareholders were the “last resort.”

Thus, application of the absolute priority rule is not grounds to deny the motions since the debtors have carried their burden to satisfy the elements of the new value exception given that the tranche C DIP facility represents new, substantial money that is needed for a successful reorganization, and reasonably equivalent to the value of that which the tranche C lenders will be receiving.

This publication has been prepared by Reorg Research, Inc. or one of its affiliates (collectively, “Reorg”) and is being provided to the recipient in connection with a subscription to one or more Reorg products. Recipient’s use of the Reorg platform is subject to Reorg’s [Terms of Use](#) or the user agreement pursuant to which the recipient has access to the platform (the “Applicable Terms”). The recipient of this publication may not redistribute or republish any portion of the information contained herein other than with Reorg’s express written consent or in accordance with the Applicable Terms. The information in this publication is for general informational purposes only and should not be construed as legal, investment, accounting or other professional advice on any subject matter or as a substitute for such advice. The recipient of this publication must comply with all applicable laws, including laws regarding the purchase and sale of securities. Reorg obtains information from a wide variety of sources, which it believes to be reliable, but Reorg does not make any representation, warranty, or certification as to the materiality or public availability of the information in this publication or that such information is accurate, complete, comprehensive or fit for a particular purpose. Recipients must make their own decisions about investment strategies or securities mentioned in this publication. Reorg and its officers, directors, partners and employees expressly disclaim all liability relating to or arising from actions taken or not taken based on any or all of the information contained in this publication. © 2020 Reorg. All rights reserved. Reorg® is a registered trademark of Reorg Research, Inc.

© Copyright 2012 - 2020



KeyCite Yellow Flag - Negative Treatment

Distinguished by [In re Washington Mut., Inc.](#), Bankr.D.Del., September 13, 2011

271 B.R. 228

United States Bankruptcy Court, D. Delaware.

In re CORAM HEALTHCARE CORP. and Coram, Inc., Debtors.

Nos. 00–3299(MFW), 00–3300(MFW).

|
Dec. 21, 2001.

Synopsis

Chapter 11 debtors filed request for confirmation of their second joint plan of reorganization, and official committee of equity holders objected. The Bankruptcy Court, [Mary F. Walrath](#), J., held that continuous conflict of interest under which debtors' chief executive officer and president had been operating, in receiving almost \$1 million per year under his separate employment agreement with one of debtors' largest creditors, tainted debtors' entire reorganization effort, including their negotiations toward plan, and prevented court from confirming plan on “good faith” grounds.

Confirmation denied.

Attorneys and Law Firms

*229 [Laura Davis Jones](#), Rachel S. Lowy, [Christopher J. Lhulier](#), Pachulski Stang Ziehl Young & Jones, P.C., Wilmington, DE, [David M. Friedman](#), [Athena Foley](#), [Adam L. Shiff](#), Kasowitz, Benson, Torres & Friedman, LLP, New York City, for debtors and debtors in possession.

[Mark D. Collins](#), [Deborah E. Spivack](#), Richards Layton & Finger, P.A., Wilmington, DE, [Chaim J. Fortgang](#), [Theodore Gewertz](#), Wachtell Lipton Rosen & Katz, New York City, for Committee of Unsecured Creditors.

[Mark Minuti](#), [Tara Lattomus](#), Saul Ewing, LLP, Wilmington, DE, [Richard F. Levy](#), [Theodore J. Low](#), [Benjamin D. Schwartz](#), Altheimer & Gray, Chicago, IL, for Equity Committee.

[Karen C. Bifferato](#), Connolly, Bove, Lodge & Hutz, Wilmington, DE, [Allen B. Miller](#), Weil Gotshal & Manges, LLP, New York City, for Senior Noteholders.

[Kenneth Eckstein](#), [Philip Bentley](#), [Marjorie Sheldon](#), Kramer Levin Naftalis & Frankel, LLP, New York City, for Goldin Associates, LLC.

[Edwin J. Harron](#), Young Conaway Stargatt & Taylor, LLP, Wilmington, DE, for Coram Resource Network.

[Elio Battista, Jr.](#), The Bayard Firm, Wilmington, DE, [Gregory D. Saputelli](#), Obermayer Rebmann Maxwell & Hippel, LLP, Cherry Hill, NJ, for Coram Resource *230 Network Committee of Unsecured Creditors.

[Don A. Beskrone](#), Office of U.S. Trustee, Wilmington, DE.

OPINION¹

[MARY F. WALRATH](#), Bankruptcy Judge.

This case is before the Court on the request of Coram Healthcare Corporation (“CHC”) and Coram, Inc. (“Coram” and collectively with CHC “the Debtors”) for approval of their Second Joint Plan of Reorganization, dated August 1, 2001 (“the Second Plan”). The Official Committee of Equity Security Holders of CHC objected to confirmation of the Second Plan. For the reasons set forth below, we deny confirmation of the Second Plan.

I. FACTUAL BACKGROUND

A. *The Business of CHC and Coram*

Through acquisitions in the mid 1990's, the Debtors became a leading provider of alternative site infusion therapy services in the United States. Infusion therapy involves the intravenous administration of drug therapies for nutrition, anti-infection, HIV, blood factor, pain management, chemotherapy and other conditions. The Debtors financed their acquisitions by amassing large amounts of debt. As a result of that debt, the Debtors had financial difficulties through much of the late 1990's.

B. *Crowley, Cerberus and the Debtors*

In April 1997, Cerberus Partners, L.P. (“Cerberus”), Goldman Sachs Credit Partners, L.P. (“Goldman”) and Foothill Capital Corporation (“Foothill” and collectively with Cerberus and Goldman “the Noteholders”) purchased unsecured Notes issued by the Debtors with a face amount of \$250 million. Cerberus, Goldman and Foothill acquired approximately 36%, 45% and 19% of the Notes, respectively. Subsequently, the Debtors agreed to allow a principal of Cerberus, Stephen Feinberg (“Feinberg”), to represent the interests of the Noteholders on the CHC board of directors. Feinberg served as a director from June 1998 until July 24, 2000.

During 1998, Feinberg met David D. Crowley, a turnaround consultant with a focus in the healthcare field (“Crowley”). In 1998 or early 1999 Crowley joined Cerberus' “bench” of CEO consultants, who are available to work for Cerberus with troubled companies on a project-by-project basis. In July 1999, Crowley and Feinberg struck an oral agreement by which Cerberus agreed to pay Crowley \$80,000 a month plus expenses to serve as a consultant to distressed companies in which Cerberus had a stake. Shortly thereafter, in August 1999, at the suggestion of Cerberus, the Debtors hired Crowley as a consultant to their CEO.

During the fall of 1999, the Debtors were experiencing severe financial difficulties. As a result, their CEO resigned. In November 1999, the Debtors executed a restructuring and forbearance agreement with the Noteholders. As a condition to that agreement, the Debtors agreed to hire Crowley as their new CEO. The Debtors began negotiating with Crowley about the terms of his employment agreement, which the Debtors described as very difficult because of Crowley's compensation demands.

***231** On November 12, 1999, while the negotiations with the Debtors were still ongoing, Crowley sent a “Personal & Confidential” letter to Feinberg, requesting additional compensation from Cerberus, in the form of incentive bonuses for consulting work he was doing on Cerberus' behalf for other distressed companies. That additional compensation was to be paid in consideration for Crowley signing an employment contract with the Debtors.

On November 18, 1999, Crowley signed a three year employment agreement with the Debtors. On November 19, 1999, Crowley executed a Consulting Agreement memorializing his oral agreement with Feinberg and Cerberus (by which Cerberus agreed to pay Crowley \$80,000 a month) and increasing the performance-based bonus due to Crowley for his work on another distressed company, Winterland Productions, Inc. (“Winterland”).

Section 2.3 of the Consulting Agreement with Cerberus states that Crowley “will have such duties as are assigned or delegated ... by ... Feinberg,” that he “will devote his entire business time, attention, skill and energy exclusively to the business of [Cerberus] (or any ... Companies ... to which [he] is assigned by [Cerberus]);” and that he “will use his best efforts to promote the success of [Cerberus'] business (or the business of such ... Company).”

Under section 6.3 of the Consulting Agreement, Cerberus had the right to terminate Crowley “for cause,” including Crowley’s “failure to follow the reasonable instructions of [Cerberus] ..., Feinberg, or the Board of Directors of [the Debtors].”

Section 3.1 of the Consulting Agreement states that Crowley’s salary “shall be reduced and offset ... for any directors fees, salary, consulting payments, bonuses or other cash incentive payments that [Crowley] may receive from any [of Cerberus’ business] other than [the Debtors].”

Neither Crowley, nor Feinberg (who was a director of the Debtors at the time) disclosed the terms of the Consulting Agreement between Cerberus and Crowley to the Debtors.²

C. Financial Difficulties

Despite efforts to cut costs, the Debtors faced enormous financial difficulties by the end of 1999. As a result, the Debtors began contemplating restructuring options and consulted with bankruptcy counsel. On June 9, 2000, the Debtors sold their pharmacy business, generating approximately \$38 million in net cash proceeds. Those proceeds were used in part to pay down the Debtors’ secured revolving line of credit, which had been provided by the Noteholders. On July 14, 2000, the Debtors, at the direction of Crowley, made a \$6.3 million interest payment in cash to the Noteholders for their unsecured Notes. Under the terms of the Notes, the Debtors could have paid the interest payment “in kind,” i.e., by adding it to the outstanding principal balance of the Notes. Crowley did not tell the board of directors, or bankruptcy counsel, about the cash payment to the Noteholders until after it had been made.

A few days later on July 24, 2000, Feinberg resigned from the Debtors’ board of directors. On August 8, 2000, as a result of their mounting financial difficulties, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. ***232** Since then, the Debtors have continued to operate their businesses in the ordinary course of business as debtors-in-possession pursuant to [sections 1107](#) and [1108 of the Bankruptcy Code](#). Crowley has continued to serve as CEO of the Debtors.

As of the bankruptcy filing date, the Noteholders were owed in excess of \$252 million and the trade creditors were owed approximately \$7.5 million. On August 22, 2000, the United States Trustee appointed an Official Committee of Unsecured Creditors (“the Creditors’ Committee”). The Creditors’ Committee includes two Noteholders and one trade creditor. On October 18, 2000, the United States Trustee appointed an Official Committee of Equity Security Holders to represent the interests of the holders of CHC common stock (“the Equity Committee”).

D. First Plan of Reorganization

On the petition date, the Debtors filed their First Joint Plan of Reorganization (“the First Plan”). The First Plan provided for the cancellation of all shareholder interests and the issuance of the stock of the Debtors to the Noteholders. The First Plan proposed paying the rest of the general unsecured creditors \$2 million. The First Plan was supported by the Noteholders and the Creditors’ Committee but was opposed by the Equity Committee.

In December, 2000, a hearing was held over five days to consider confirmation of the First Plan. During discovery related to those hearings, the terms of Crowley’s Consulting Agreement with Cerberus were revealed for the first time.

At the conclusion of the confirmation hearings, we found that Crowley’s Consulting Agreement with Cerberus created an actual conflict of interest on his part. We further held that the conflict of interest “has ... tainted the Debtors’ restructuring of its debt, the Debtors’ negotiations towards a plan, even the Debtors’ restructuring of its operations.” (Dec. 21, 2000 N.T. at p. 88.) We concluded that “the ultimate fairness of the process in bankruptcy is a paramount principle to be protected by the Bankruptcy Court” and that that process had been tainted by Crowley’s conflict of interest. (*Id.* at p. 87.) As a result, we concluded that we were unable to find that the Debtors had proposed their plan in good faith in accordance with [section 1129\(a\)\(3\) of the Bankruptcy Code](#) and, accordingly, denied confirmation of the First Plan.³

E. The Goldin Report and the Special Committee

Following denial of confirmation of the First Plan, the Debtors created a special committee of independent directors (“the Special Committee”). The Special Committee appointed Harrison J. Goldin of Goldin Associates, L.L.C. (“Goldin”), a financial advisory firm specializing in distressed situations, to perform an impartial evaluation of the Debtors’ affairs, Crowley’s relationship with Cerberus, and other issues relating to confirmation of a plan.

On February 26, 2001, we granted the Debtors’ motion to retain Goldin to investigate the extent of Crowley’s conflict of interest and the damage, if any, which was done to the Debtors as a result. At that time, we also directed the parties to stay ^{*233} litigation between them ⁴ and directed that Goldin attempt to mediate a plan.

After his investigation, Goldin circulated to the parties a draft report and solicited comments in June, 2001. On July 11, 2001, Goldin issued his final report (“the Goldin Report”). Again, this was circulated to the parties, but not filed with the Court. The Goldin Report concluded that:

1. Crowley and Feinberg should have disclosed the full extent of the Crowley/Cerberus relationship to the Debtors’ other directors and officers and the failure to do so was a breach of their respective fiduciary duties.
2. There was no evidence that the Debtors’ books and records were compromised or materially impaired by Crowley’s conflict of interest.
3. There was no evidence that Crowley or Feinberg intended or expected that Crowley would seek to advance Cerberus’ interests to the detriment of the Debtors.
4. There was no evidence that Cerberus (or the other Noteholders) ever instructed Crowley to act contrary to the Debtors’ interests.
5. Crowley did advance the interests of Cerberus at the expense of the Debtors by making the \$6.3 million cash payment to the Noteholders on July 14, 2000, at a time when the Debtors’ cash was low and a bankruptcy filing was under active consideration. Nonetheless, Goldin concluded that the cash payment did not affect the Debtors’ solvency, the Noteholders’ position vis-a-vis other creditors or impact other creditors.
6. The Debtors did suffer damages caused by the undisclosed conflict of interest, namely, the professional fees (\$5 to \$6 million) and possible business losses (\$7 to \$9 million) resulting from the Debtors’ inability to obtain confirmation of the First Plan.
7. Crowley’s bonus compensation under his agreement with the Debtors should be reduced by \$7.5 million, resulting in Crowley receiving a \$5.9 million bonus in addition to his base salary of \$650,000.

F. The Second Plan of Reorganization

The Special Committee, after consultation with Goldin, determined to incorporate Goldin’s recommendations into a revised plan of reorganization. Under the Second Plan, the Noteholders will again receive all the equity in CHC. The Second Plan provides that Crowley’s compensation will be reduced as recommended by the Goldin Report. The Second Plan also provides that the shareholders will receive a distribution of \$10 million in cash so long as their class votes in favor of the Second Plan and the creditors do not object to confirmation on the basis of the absolute priority rule.

The shareholders did not, however, accept the Second Plan by the percentages required by the Code. Once again, the Equity Committee opposed confirmation of the Plan. ⁵

G. Second Plan Confirmation Hearing

Hearings to consider confirmation of the Second Plan were held on seven days over *234 the past two months. Mr. Goldin testified regarding the focus and scope of his examination. Specifically, he limited his investigation to events prior to the confirmation hearing in December, 2000. He did not investigate any of the activities of the Debtors since that time. Significantly, he did not determine whether Crowley continued to receive compensation under the Cerberus agreement. He did not ask and no one disclosed that fact. Nor did Goldin determine whether there was any ongoing harm to the Debtors by the continuation of Crowley as CEO and president of the Debtors after December 2000, as a result of his continued compensation by Cerberus under his Consulting Agreement. Mr. Goldin testified, however, that he assumed Crowley would do no harm to the Debtors after his arrangement with Cerberus had been revealed because he had done no harm prior to it being disclosed.

Mr. Amaral, a member of the board of directors and the Special Committee⁶, testified that Goldin was hired to “sprinkle holy water on the situation” and make everything all right. Other than hire Goldin and review his report, the Special Committee took no other action in response to denial of confirmation of the First Plan. Significantly, it did not conduct any investigation of Crowley's conflict of interest, did not require that Crowley cease accepting any compensation from Cerberus and did not even ask Crowley if the conflict persisted.⁷

II. DISCUSSION

A. Lack of Good Faith Under [Section 1129\(a\)\(3\)](#)

In order for a court to confirm a plan it must be “proposed in good faith and not by any means forbidden by law.” [11 U.S.C. § 1129\(a\)\(3\)](#).

“The good faith standard requires that the plan be ‘proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code.’ ” [In re Zenith Electronics Corp.](#), 241 B.R. 92, 107 (Bankr.D.Del.1999) (quoting [In re Sound Radio, Inc.](#), 93 B.R. 849, 853 (Bankr.D.N.J.1988))⁸. In evaluating the totality of circumstances surrounding a plan a court has “ ‘considerable judicial discretion’ in finding good faith, with the most important feature being an inquiry into the ‘fundamental fairness’ of the plan.” [In re American Family Enterprises](#), 256 B.R. 377, 401 (D.N.J.2000)(quoting [In re New Valley Corp.](#), 168 B.R. 73, 80–81 (Bankr.D.N.J.1994)).

At the conclusion of the hearing on the First Plan, we concluded that the Debtors' CEO and President had an actual conflict of interest by virtue of the fact that he had a separate employment contract with one *235 of the Debtors' largest creditors under which he was being paid almost \$1 million per year. Because the Consulting Agreement required that Crowley obey the instructions of Cerberus and because the compensation being paid him under that agreement was not insubstantial⁹, we concluded that the Consulting Agreement created an actual conflict of interest.

Today we are faced with a similar task. Nothing, in fact, has changed since the first confirmation hearing. Crowley continues to receive almost \$1 million a year from one of the Debtors' largest creditors, while serving as the Debtors' CEO and President. Under his agreement with Cerberus, he is required to obey its instructions or risk having the agreement terminated and losing his \$1 million. This is an actual conflict of interest, as we concluded at the first confirmation hearing.¹⁰

B. Duty of Loyalty Owed by Debtors' CEO

A debtor in possession is bound by a duty of loyalty that includes an obligation to refrain from self dealing, to avoid conflicts of interests and the appearance of impropriety. See e.g., [Lopez-Stubbe v. Rodriguez-Estrada \(In re San Juan Hotel Corp.\)](#), 847 F.2d 931, 950 (1st Cir.1988); [Bennett v. Gemmill \(In re Combined Metals Reduction Co.\)](#), 557 F.2d 179, 196–97 (9th Cir.1977).

The duty of loyalty owed by a debtor in possession is also owed by its senior officers. As the Supreme Court articulated in *Wolf v. Weinstein*:

The concept of leaving the Debtor in possession, as a “receivership without a receiver,” was designed to obviate the need to appoint a trustee for the supervision of every small corporation undergoing reorganization, even though it appeared capable of carrying on the business during the proceeding But so long as the Debtor remains in possession, it is clear that the corporation bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession. Moreover, the duties which the corporate Debtor in possession must perform during the proceeding are substantially those imposed upon the trustee. It is equally apparent that in practice *these fiduciary responsibilities fall not upon the inanimate corporation, but upon the officers and managing employees who must conduct the Debtor's affairs under the surveillance of the court.* If, therefore—as seems beyond dispute from the very terms of the statute—the trustee is himself a fiduciary ... logic and consistency would certainly suggest that those who perform similar tasks and incur like obligations to the creditors and shareholders should not be treated differently under the statute for this purpose.

[*Wolf v. Weinstein*, 372 U.S. 633, 649–50, 83 S.Ct. 969, 10 L.Ed.2d 33 \(1963\)](#)(emphasis *236 added).¹¹

Crowley, as Chief Executive Officer and President of the Debtors, has a fiduciary duty to the estate, which includes the duty of loyalty and an obligation to avoid any direct actual conflict of interest. In this case, Crowley's actual conflict of interest goes beyond the mere appearance of impropriety. Crowley cannot serve the interests of both the Debtors and a large creditor, Cerberus. Under the Consulting Agreement, Cerberus has the discretion to fire Crowley if he fails to follow its instructions, resulting in the loss of \$1 million per year in compensation to Crowley. That control over Crowley, and indirectly the Debtors, is simply not proper.

Crowley himself demonstrated the insidious effect of that conflict when he caused the Debtors to pay in cash, rather than Notes, the \$6.3 million interest payment due to the Noteholders immediately before the bankruptcy filing. Crowley's explanation that the payment was made to maintain the Noteholders' support is unconvincing. The Debtors, under Crowley's direction, had recently repaid the Noteholders almost \$38 million and had no legal obligation to pay the \$6.3 million in cash. Crowley's assertion that he preferred to pay cash rather than add the amount to the Debtors' debt structure is also incredible. The Debtors have argued that they are hopelessly insolvent; therefore it would make no difference if the Debtors were underwater by an additional \$6.3 million in debt.

In contrast, Mr. Goldin readily admitted that every company facing the prospect of a bankruptcy filing seeks to conserve cash. Having cash available at the early stages of a bankruptcy case gives a debtor significant operational advantages, as well as an enhanced negotiating position vis-a-vis its creditors. At a minimum, the actions of Crowley denied the Debtors that option.

Crowley asserts, however, that the Consulting Agreement with Cerberus deals not with his services as CEO of the Debtors but for work which he is performing for Cerberus in connection with another company, Winterland. We, quite simply, do not believe this. Crowley testified that he is working “more than full time” on the Debtors' affairs for a base compensation of \$650,000. This is in contrast to compensation of \$1 million allegedly for serving only as chairman of the board of Winterland.¹² We do not accept Crowley's assertion that his compensation from Cerberus under the Consulting Agreement is solely for his work for Winterland.¹³

Actual conflicts of interest of debtor's officers in bankruptcy are usually found in the context of prosecution of avoidance actions which the debtor may have against the officers themselves or against creditors whose debt was guaranteed by the officers.

Such a conflict of interest may warrant appointment of an impartial trustee. *See, e.g., In re Tel-Net Hawaii, Inc.*, 105 B.R. 594, 595 (Bankr.D.Hawaii 1989) (controlling shareholder as fiduciary to estate had *237 a conflict of interest where preferential transfers were made for liabilities guaranteed by controlling shareholder warranting appointment of an impartial trustee); *In re Sal Caruso Cheese, Inc.*, 107 B.R. 808, 820 (Bankr.N.D.N.Y.1989) (president's failure to pursue preferential transfers against supplier for liabilities guaranteed by president warranted conversion of case to chapter 7 for bad faith).

There is a similar conflict of interest here, though more attenuated. In this case, the \$6.3 million payment to the Noteholders might be avoidable as a preference. The Debtors have taken no action to pursue that preference and, while the Second Plan preserves such actions, since the Noteholders would own the Debtors post-confirmation it is unlikely they will sue themselves. Crowley's contractual relationship with Cerberus, just like a guarantee, creates a disincentive for him to cause the Debtors to pursue such an action.

While a debtor in possession has discretion not to pursue avoidance actions, the fact that the Debtors' CEO has a contractual impediment to pursuing that action raises questions about the reasons the Debtors in this case chose not to pursue that action. As we noted in the first confirmation hearing, given the actual conflict of interest which the Debtors' CEO has, we are unable to conclude that any action taken by the Debtors which may impact on the rights of Cerberus were taken without any undue consideration of the interests of Cerberus. Consequently, we must once again deny confirmation of the Debtors' Plan because we are unable to determine under all of the circumstances that the Debtors' Second Plan has been proposed in good faith under [section 1129\(a\)\(3\)](#).

C. Harm to the Debtors

The Debtors argue that we must confirm the Debtors' Second Plan because they hired an independent investigator who concluded that the conflict of interest did not result in any harm to the Debtors. We cannot accept this "no harm, no foul" argument for several reasons.

First, there is really no evidence that there was no harm resulting from the conflict of interest. In fact, Mr. Goldin concluded that the Debtors did suffer harm as a result of Crowley's conflict because it caused a delay in confirmation of the Debtors' First Plan, thereby resulting in loss of profits and additional expenses to the Debtors' estates of \$12 to \$15 million.

Furthermore, although Mr. Goldin concluded that the \$6.3 million payment to the Noteholders on the eve of bankruptcy did not cause harm to the Debtors, we disagree. All responsible advisors to companies contemplating a bankruptcy filing recommend that cash be conserved (not spent) on the eve of bankruptcy. Having cash gives the debtor the ability to continue to operate and a position of strength in negotiations with creditors. That position of strength was eroded by Crowley's directing the Debtors to pay the Noteholders in cash, when they could have paid in Notes.

In addition, Goldin investigated only the actions of Crowley prior to the confirmation hearing on the First Plan in December, 2000. ¹⁴ Mr. Goldin stated that he *238 believed his job was limited to determining whether any harm was caused by the conflict of interest as of that date. There was no investigation by Goldin (or the Debtors) ¹⁵ of Crowley's continued conflict of interest or whether any harm has been suffered by the Debtors since then. This is particularly highlighted by the fact that neither Goldin nor the Debtors' Special Committee even asked Crowley whether he continued to be compensated by Cerberus.

Thus, there is absolutely no evidence from which the Court can conclude that the Debtors have suffered no harm from Crowley's continued conflict of interest. Mr. Goldin's assertion that there must be no harm since the disclosure of the relationship because no harm was caused by Crowley when the relationship was hidden is not logical, nor is it borne out by the facts. Crowley did cause harm to the Debtors while his relationship with Cerberus was hidden and there is no reason to assume he did not cause harm to the Debtors when that relationship was disclosed.

Finally, even if there were no evidence of harm to the Debtors, appropriate sanctions may still be warranted. In a corporate reorganization proceeding, where a fiduciary was serving more than one master or was subject to conflicting interests, liability may be imposed, notwithstanding lack of fraudulent intent or harm. See *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U.S. 262, 268, 61 S.Ct. 493, 85 L.Ed. 820 (1941) (“Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries ‘at a level higher than that trodden by the crowd’.”). In *Woods*, the Supreme Court denied compensation to an attorney who had a conflict of interest, notwithstanding that no actual harm was shown.

In *Mosser v. Darrow*, the Supreme Court stated that “Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting.” *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S.Ct. 680, 95 L.Ed. 927 (1951) (personal dealings in securities adverse to the interests of the debtor by employees of the trustee imposed liability on the employees, despite lack of evidence of any wrongdoing).

Therefore, we conclude that the actual conflict of interest mandated that the Debtors do more than they did in this case. Notwithstanding the fact that the Debtors learned in December, 2000, that Crowley had a conflict of interest, neither the Debtors nor their Special Committee required that Crowley disassociate himself from Cerberus. In fact, they did not even ask whether he continued to be bound by the Consulting Agreement. Given the fact that Crowley had not disclosed the agreement in the first place, the Debtors should have asked for full disclosure and required that Crowley sever all agreements with Cerberus as a condition of continued employment. The “don’t ask, don’t tell” approach adopted by the Debtors and their Special Committee does not fulfill their fiduciary duty to these estates.

D. Disclosure Does Not Cure the Conflict of Interest

The Debtors argue that any problem caused by the conflict of interest has been *239 cured by its disclosure. They note that the agreement between Cerberus and Crowley has now been disclosed in the Debtors’ filings with the SEC and in the Disclosure Statement accompanying the Second Plan.

However, the Court cannot help but observe that the disclosure came only after the agreement came to light in discovery in connection with the First Plan. Neither Cerberus nor Crowley voluntarily disclosed the agreement to the Debtors or to the Court. As noted, the failure to disclose was a violation of the Debtors’ corporate policy.¹⁶

Further, even disclosure of the conflict may not be sufficient to permit approval of a transaction involving an actual conflict of interest. See, e.g., *In re Allied Gaming Management, Inc.*, 209 B.R. 201, 203 (Bankr.W.D.La.1997) (debtor’s former accountant and general manager could not acquire estate property under reorganization plan because there is an absolute bar on fiduciaries acquiring estate property and it “created an impermissible appearance of impropriety”); *In re Grodel Mfg., Inc.*, 33 B.R. 693, 696 (Bankr.D.Conn.1983) (former trustee could not purchase stock in a reorganized company under a proposed plan of reorganization, based upon the appearance of impropriety).

The Debtors argue that the actions of the Special Committee were consistent with the guidance provided in our decision in *Zenith*, 241 B.R. 92. We find that case easily distinguishable. *Zenith* involved a prepackaged Chapter 11 plan negotiated between a debtor-corporation and its controlling shareholder. Under the plan the shareholder was to receive 100% of the equity in the reorganized debtor in exchange for its forgiveness of \$200 million of debt and new funding of \$60 million. In analyzing “good faith” under section 1129(a)(3), we concluded that that section was “broad” and incorporated non-bankruptcy law such as Delaware corporate law, as well as principles of bankruptcy law. *Id.* at 108. Under Delaware corporate law, we concluded that we were required to determine whether the plan was “entirely fair” because it dealt with a transaction between a company and its controlling shareholder. *Id.* Under Delaware corporate law this requires both a fair process and a fair price.

Applying those principles, we concluded that the price paid by the shareholder to acquire its new equity interest in the debtor was fair in light of the debtor’s value as a going concern. We also held that the process was fair because the plan was negotiated and approved, after appropriate disclosures, by separate counsel representing the debtor and the controlling shareholder. *Id.*

This case is distinguishable. Here initially there were not appropriate disclosures of the conflict of interest of Crowley. Furthermore, there can be no finding that the Debtors have acted in good faith in this case because Crowley has continued to serve as the Debtors' CEO. This is not a situation, like *Zenith*, where the conflict related to one transaction, the plan; the conflict in this case transcends every single thing Crowley does on behalf of the Debtors. Because Cerberus is such a large creditor of this estate and because the Consulting Agreement requires that Crowley follow the directions of Cerberus, *240 to determine "entire fairness" in this case would require that every single action of the Debtors be examined or that Crowley be excluded from consideration of every decision that could affect Cerberus' interests. This has not been done, and cannot be done, given the CEO's pervasive role in the affairs of a corporation.

While the Special Committee and the Goldin Report focused on disclosure, they failed to enforce the separate boundaries necessary between a debtor and creditor in formulating a Chapter 11 plan of reorganization.

We easily conclude from the totality of circumstances surrounding the Second Plan that a continuous conflict of interest by the CEO of the Debtor precludes the Debtors from proposing a plan in good faith under 1129(a)(3). As we held in denying confirmation of the First Plan, Crowley's conflict of interest is a violation of his fiduciary duty to the Debtors and the estate and is so pervasive as to taint the "Debtors' restructuring of its debt, the Debtors' negotiations towards a plan, even the Debtors' restructuring of its operations." (Dec. 21, 2000 N.T. at p. 88.) The Debtors' hiring of Goldin to "sprinkle holy water on the situation" does not cure the conflict or evidence good faith.

IV. CONCLUSION

For all the foregoing reasons, we cannot conclude that the Second Plan satisfies the requirements of [section 1129\(a\)\(3\) of the Bankruptcy Code](#) as being proposed in good faith. An appropriate Order is attached.

ORDER

AND NOW, this 21ST day of DECEMBER, 2001, for the reasons set forth in the accompanying opinion, it is hereby

ORDERED that confirmation of the Second Joint Plan of Reorganization of Coram Healthcare Corporation and Coram, Inc., under Chapter 11 of the Bankruptcy Code filed on August 1, 2001, is hereby **DENIED**.

All Citations

271 B.R. 228

Footnotes

- [1](#) This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to [Federal Rule of Bankruptcy Procedure 7052](#), which is made applicable to contested matters by [Federal Rule of Bankruptcy Procedure 9014](#).
- [2](#) Crowley testified that he did disclose to the Debtors that he "had a relationship with Cerberus." However, he, Feinberg and all the members of the Debtors' board of directors testified that the terms of that relationship were not disclosed.
- [3](#) The Equity Committee had also opposed confirmation of the First Plan on the basis that the Debtors were undervaluing their enterprise worth and that there was equity for shareholders. Although we expressed some doubt as to the Equity Committee's valuation testimony, we did not address this issue since we concluded that the Debtors' Plan was unconfirmable at any rate.
- [4](#) The Equity Committee had filed a Motion seeking authority to prosecute an action *inter alia* against Crowley for breach of fiduciary duty.

- [5](#) The Official Committee of Unsecured Creditors appointed in the Coram Resource Network, Inc. ("R-Net") case also objected to confirmation. That objection was resolved by the agreement of the Debtors that confirmation of the Second Plan would not release any claim R-Net or its Committee might have against the Debtors.
- [6](#) Although he is a member of the Special Committee, Mr. Amaral was formerly the CEO of the Debtors, was integral to bringing in Crowley, and negotiated the terms of Crowley's compensation for the Debtors.
- [7](#) Although Crowley testified that he told the Board of Directors that he continued to receive compensation from Cerberus, we do not credit that testimony. All of the directors testified in their depositions that he did not tell them (nor did they ask him) whether he continued to receive that compensation.
- [8](#) See also *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310, 1315 (8th Cir.1987)(must have reasonable likelihood plan will achieve result consistent with the Code); *Connell v. Coastal Cable T.V., Inc.*, 709 F.2d 762, 764 (1st Cir.1983)(plan must bear some relationship to Code's objective of resuscitating a financially troubled company); *In re Mortgage Inv. Co.*, 111 B.R. 604, 611 (Bankr.W.D.Tex.1990)(good faith requires a legitimate, honest purpose to reorganize and a reasonable probability of success).
- [9](#) The Debtors, Noteholders and Crowley argued that the \$1 million compensation being paid to Crowley under the Consulting Agreement was not high considering his expertise in troubled companies in the healthcare industry. However, it is certainly more than a de minimis amount and is more than the base salary which the Debtors themselves were paying Crowley.
- [10](#) At the second confirmation hearing, evidence was presented that the agreement between Crowley and Cerberus is also contrary to the express provisions of the Debtors' corporate policy which at all relevant times provided that actual conflicts of interest must be avoided and that any action that might create a potential conflict of interest must be disclosed and approved in advance.
- [11](#) The Supreme Court reaffirmed this standard for debtors in possession under chapter 11 of the Bankruptcy Code in *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 355, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).
- [12](#) Both the agreements provide incentive bonuses for Crowley based on the companies' performance.
- [13](#) It was also disclosed in the confirmation hearings held on the Second Plan that Winterland is itself in a bankruptcy proceeding. Given the failure of Cerberus and Crowley to disclose the Consulting Agreement in this case, we are forwarding a copy of this Opinion to Judge Randall Newsome who is handling the Winterland case to apprise him of these facts.
- [14](#) The Equity Committee also criticizes the method used by Goldin in investigating the conflict situation: by using informal interviews with the interested parties rather than by formal discovery and depositions under oath and by failing to investigate why the Debtors' performance was so much worse than its competitors during this period. (The Equity Committee's theory is that Crowley did not operate the Debtors to their optimum in order to keep their value low to justify stripping equity of any ownership interest.) While we make no conclusion about which method is better, we do note that Goldin discovered nothing that the Equity Committee had not already discovered in the discovery taken by it in connection with the Debtors' confirmation proceedings in December, 2000.
- [15](#) The members of the Special Committee testified in their depositions that they did nothing with respect to the conflict of interest other than hire Goldin.
- [16](#) Even if the Debtors' corporate policy did not require such disclosure, the Court would expect a debtor in possession to disclose to the Court and its creditors any agreement which its senior management might have with its largest creditors similar to the agreement at issue here.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [In re Residential Capital, LLC](#), Bankr.S.D.N.Y., June 27, 2013

442 B.R. 227

United States Bankruptcy Court,
S.D. New York.

In re INNKEEPERS USA TRUST, et al., Debtors.

No. 10-13800.

|

Dec. 20, 2010.

Synopsis

Background: Chapter 11 debtor and its affiliated debtors and debtors-in-possession moved for authorization to assume prepetition plan support agreement (PSA) with mortgagee, which supported plan term sheet that provided, inter alia, for mortgagee to receive, in satisfaction of its secured claims, all issued and outstanding new shares of common stock to be issued by reorganized debtors. Other creditors and creditor committees objected or filed reservations of rights.

Holdings: The Bankruptcy Court, [Shelley C. Chapman](#), J., held that:

PSA was not disinterested business transaction, under business judgment rule;

PSA was not entered into with due care;

debtors did not act in good faith in making decision to enter into PSA with mortgagee and providing transparency to their creditors; and

alleged benefits to estates from PSA did not outweigh power over debtors' cases given to mortgagee under PSA.

Motion denied.

Attorneys and Law Firms

*229 Kirkland & Ellis LLP, By: [Paul M. Basta](#), Esq., New York, NY, By: Anup Sathy, P.C., Esq., [Marc J. Carmel](#), Esq., Chicago, IL, By: [Daniel T. Donovan](#), Esq., Washington, DC, for the Debtors and Debtors-in-Possession.

Bryan Cave LLP, By: [Lawrence P. Gottesman](#), Esq., New York, NY, for LNR Partners, LLC.

Dechert LLP, By: [Michael J. Sage](#), Esq., [Kevin J. O'Brien](#), Esq., [Brian E. Greer](#), Esq., New York, NY, for Lehman ALI Inc., and Michael Lascher.

Dewey & LeBoeuf LLP, By: [Martin Bienenstock](#), Esq., [Irena M. Goldstein](#), Esq., [Timothy Q. Karcher](#), Esq., New York, NY, for the Ad Hoc Committee of Preferred Shareholders.

Haynes and Boone LLP, By: [Lenard M. Parkins](#), Esq., New York, NY, By: [John D. Penn](#), Esq., Forth Worth, TX, By: [Philip M. Bridwell](#), Esq., [Mark Elmore](#), Esq., Dallas, TX, for Midland Loan Services, Inc.

Kasowitz, Benson, Torres & Friedman LLP, By: [David M. Friedman](#), Esq., [Adam L. Shiff](#), Esq., [Daniel A. Fliman](#), Esq., New York, NY, for Five Mile Capital Partners LLC.

Kilpatrick Stockton LLP, By: [Todd C. Meyers](#), Esq., Atlanta GA, for TriMont Real Estate Advisors, Inc.

Morrison & Foerster LLP, By: [Lorenzo Marinuzzi](#), Esq., New York, NY, for the Official Committee of Unsecured Creditors.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, By: [Alan W. Kornberg](#), Esq., [Andrew J. Ehrlich](#), Esq., New York, NY, for Apollo Investment Corporation.

Perkins Coie LLP, By: [David M. Neff](#), Esq., Chicago, IL, for C-III Asset Management and CWC Capital Asset Management.

Sidley Austin LLP, By: [Lee S. Attanasio](#), Esq., [John G. Hutchinson](#), Esq., New York, NY, for Appaloosa Investment L.P.I.

U.S. Department of Justice, By: [Paul K. Schwartzberg](#), Esq., New York, NY, Office of the United States Trustee.

BENCH DECISION DENYING DEBTORS' MOTION TO ASSUME PLAN SUPPORT AGREEMENT¹

[SHELLEY C. CHAPMAN](#), Bankruptcy Judge.

Before the Court is the motion (the “Motion”) of Innkeepers USA Trust and its affiliated debtors and debtors in possession (the “Debtors”) for an order authorizing the Debtors to assume a plan support agreement, dated July 17, 2010 (the “PSA”), entered into with Lehman ALI Inc. (“Lehman”). Objections to the Motion were filed by (i) Midland Loan Services, Inc. (“Midland”), (ii) the Property *230 Level Lenders,² (iii) the Ad Hoc Equity Committee of Preferred Shareholders, (iv) TriMont Real Estate Advisors, Inc., (v) CWC Capital Asset Management LLC, (vi) C-III Asset Management LLC, (vii) Five Mile Capital Partners LLC (“Five Mile”), and (viii) Appaloosa Investment L.P.I. Reservations of rights regarding the Motion were also filed by Marriott International, Inc. (“Marriott”) and the Official Committee of Unsecured Creditors. The Debtors filed an omnibus reply in support of the Motion and in response to the objections, along with the Declaration of Marc Beilinson, the Debtors' Chief Restructuring Officer. At the hearing, Mr. Beilinson gave additional live testimony. The objectors also presented the testimony of Mr. Ronald Greenspan, Mr. Michael Lascher, and Mr. Kevin Semon.

The PSA supports a plan term sheet that provides, among other things, for Lehman to receive, in satisfaction of its secured mortgage claims of approximately \$238 million in floating mortgage loan debt (comprised of approximately \$220 million in prepetition debt and an anticipated \$17.5 million in DIP financing), 100% of the issued and outstanding new shares of common stock to be issued by the reorganized Debtors. The new shares will include all equity in all ninety-two of the Debtors, notwithstanding that Lehman currently is secured by collateral of only twenty of the Debtors. Under the plan term sheet, the remaining property level secured lenders would receive new secured notes with a value that is not less than the value of the collateral securing their prepetition debt. The plan dictated by the PSA proposes to assign a value to those secured notes, providing Midland, for example, with a \$550 million note on account of its approximately \$825 million secured claim.

Section 6 of the PSA sets forth a list of termination events (the “Termination Events”) which include, among other things, (i) the Debtors' failure to meet any of the Plan Milestones³ set forth in the PSA, (ii) Lehman's failure to execute a definitive agreement with respect to the sale of 50% of its newly received shares for a price of at least \$107.5 million, (iii) the filing of any motion to approve a disclosure statement or plan that incorporates a *pro forma* capital structure or any other terms inconsistent with the terms and conditions set forth in the plan term sheet, and (iv) the material breach by any party of any of their undertakings, representations, warranties, or covenants set forth in the PSA. Upon the occurrence of any of the Termination Events, even those outside of the Debtors' control (such as Lehman's failure to consummate the so-called “New Equity Sale Transaction” no later than 270 days after the Petition Date⁴), Lehman may terminate the PSA and the consensual use of its cash collateral. Further, upon the occurrence of select Termination Events, the PSA forces the Debtors to choose between (a) immediate stay

relief in favor of Lehman (which would permit it to exercise any and all remedies with respect to the Floating Rate Collateral⁵ without further *231 Court approval) or (b) a section 363 sale of the Floating Rate Collateral at which Lehman would have the right to credit bid the unpaid balance of the Floating Rate Mortgage Loan.

The parties disagree on whether the Debtors' decision to assume the PSA should be evaluated under the business judgment standard or under the "heightened scrutiny" standard which closely examines transactions involving insiders. It appears to me that the heightened scrutiny/entire fairness standard, such as that employed by the *Bidermann* court, may apply in this situation. See *In re Bidermann Indus. U.S.A., Inc. (In re Bidermann)*, 203 B.R. 547, 551 (Bankr.S.D.N.Y.1997). I need not, however, decide which standard is applicable here because I believe that the Debtors have failed to meet their burden for assumption of the PSA under either "heightened scrutiny" or under the less stringent "business judgment" test.

In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration. The business judgment rule's presumption shields corporate decision makers and their decisions from judicial second-guessing only when the following elements are present: (i) a business decision, (ii) disinterestedness, (iii) due care, (iv) good faith, and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets. See *In re: Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y.1992). My decision will encompass the components of both standards.

First, the negotiations surrounding the PSA preclude me from finding that it was a disinterested business transaction. Indeed, it is clear from the evidence presented that, even as early as April 2010, Apollo Investment Corporation ("Apollo"), the holder of 100% of the equity in Debtor Grand Prix Holdings, LLC and the Debtors' ultimate parent, was always intended to receive equity as part of the transaction—either directly, as a back-stop party, or through a side deal with Lehman negotiated just before the Petition Date. Apollo also appears to have been directly and inextricably involved in the negotiations and concept of the plan-related transactions from the time the deal, as described by Mr. Beilinson, was "a peppercorn."⁶

I also cannot conclude that the PSA was entered into with "due care," and I note that the "due care" prong is also directly relevant to the "fair process" inquiry of the entire fairness test. As one objector pointed out, the transaction not only has to be fair, but it has to look fair as well. The testimony of Mr. Beilinson is that the deal embodied in the plan term sheet was not "shopped" in the market prior to signing the PSA, nor did Mr. Beilinson have any intention of shopping it or of disclosing to the other secured parties the potential Lehman deal that was on the table during the prepetition period. It is troubling that, when Mr. Beilinson and his team met with Midland on April 28, they neglected to disclose the potential Lehman deal that had been outlined at a meeting with Lehman and Apollo the prior *232 week, through which Lehman would receive the equity in all of the Debtors, including those securing Midland's debt, and would sell a portion of this equity to an investor.

The Debtors did not run any marketing process, and in fact, Moelis & Company LLC ("Moelis"), the Debtors' investment banker, was told not to pursue other bidders or transactions. While the Debtors state that they communicated with both Midland and Five Mile during the prepetition period, it does not appear that Innkeepers has contacted any potential investors outside the capital structure or meaningfully interacted with their secured creditors regarding plan proposals. Section 5(c) of the PSA specifically prohibits such negotiations by providing that neither party to the PSA shall directly or indirectly seek, solicit, negotiate, support, or engage in any discussions relating to or enter into any agreements relating to, any restructuring or plan of reorganization other than as set forth in the plan term sheet; and section 4(a)(ii) contains a similar restriction, stating that, prior to the Termination Date of the PSA, no party will directly or indirectly seek, solicit, negotiate, vote for, consent to, support, or participate in the formulation of any plan of reorganization or other restructuring other than the Plan. When asked whether he believed the Debtors could provide due diligence materials to Five Mile without violating section 4(a)(ii) of the PSA, Mr. Beilinson stated "probably not,"⁷ although he suggested that the Fiduciary Out⁸ in section 25(a) of the PSA would protect his conduct because of the "notwithstanding anything to the contrary" opening language. Mr. Beilinson's testimony was not credible on this point. Indeed, when questioned by the Court, Mr. Beilinson acknowledged that even participating in discussions with Five Mile—on which he now asserts he is ready to embark—may well constitute a Termination Event under the PSA.

Moreover, it is not clear to me whether the Debtors have fully analyzed the value of the Floating Rate Mortgage Loan vis-à-vis the value of the new shares Lehman and Apollo will receive. This question goes directly to the “fair price” prong of the entire fairness test. Mr. Beilinson has stated that he has not valued the shares Lehman will receive, only that he believes that Lehman is not getting more than it is entitled to. He did not perform a valuation, nor did he direct his advisors to do so. No value has been ascribed to the new equity other than the \$150 million to \$190 million estimate contained in the April 22, 2010 presentation given by Moelis. Indeed, notwithstanding that valuation, the imputed value of the new equity would appear to be at least \$215 million, based on the price Apollo has agreed to pay to purchase 50% of the equity.

In light of the substantial limitations in the PSA on the Debtors' ability to engage in discussions regarding a restructuring with any of their other major creditors, I cannot conclude that the Debtors exercised due care in electing to move forward with the current plan term sheet and the proposed valuation implied therein. The testimony *233 of Mr. Beilinson on these points reveals only that Lehman wielded great power in the negotiations and that Mr. Beilinson seems to have succumbed to virtually all of their demands.

With respect to the PSA and the proposed plan, it is difficult to understand what the rush is. The DIPs are now approved.⁹ The hotels are generally performing well. The relationship with Marriott is on track. In fact, Mr. Beilinson testified that the need to secure the DIPs and the Marriott agreement, two interrelated transactions, was one key reason why the Debtors entered into the PSA. As each of those agreements has been executed, and the Marriott adequate assurance agreement was in fact only tied to the DIP agreements and not dependent on the PSA, this justification vanishes. The only dark cloud in an otherwise pretty sunny picture (and it is a large dark cloud) is that \$1.2 billion in secured debt is extremely unhappy with the proposed plan. They deserve more of a process than what has been provided thus far. The Debtors have not set forth justification as to why, at this very early stage in the cases, the Debtors need to lock themselves into the proposed plan prior to either (a) seeking higher and better offers which may benefit the entire creditor constituency in these cases, and as Mr. Meyers correctly observed, *each* of the Debtors in these cases,¹⁰ or (b) at a minimum, negotiating with their existing creditors regarding a restructuring transaction.

While the Debtors state in their reply that they are aware of no potential alternative that would provide creditors with richer recoveries, it does not appear from the evidence presented that they have canvassed the possible alternatives at this point. Despite the Debtors' failure to shop for alternatives, attached to the Midland objection¹¹ is a restructuring proposal submitted by Five Mile, which Mr. Beilinson states he has not yet received or had a chance to really review. It strains credulity to believe that Mr. Beilinson has not really reviewed this proposal or would stand on ceremony and take the position that he has not received it. This is not an appropriate position for a fiduciary of these estates.

Next, I find that the Debtors have not shown that they acted good faith in (i) making the decision to enter into the PSA and (ii) providing transparency to their creditors. The good faith inquiry is relevant to both the heightened scrutiny and business judgment standards. Virtually all of the other parties in interest in the Debtors' capital structure (aside from Lehman) complain of having been shut out of the process, and even those parties who wanted to make a restructuring proposal were denied access to a data room that was set up by the Debtors for Lehman's use only. The intention for Apollo to end up with half of the Debtors' equity, which has been on the table since April, has been, at best, downplayed and, at worst, obfuscated from parties in interest. For example, the Debtors' largest creditor, Midland, was not informed about the agreement to transfer 50% of the new equity to Apollo until just a few days before *234 the Petition Date. Yet email correspondence introduced into evidence clearly reflects Mr. Beilinson's knowledge that Apollo's role in the related transactions was essential. Lehman wanted Apollo in the deal. And Mr. Beilinson knew it.

Nor did the Debtors share the specifics of the plan term sheet, including the proposed write-downs of the secured loans in the non-Lehman tranches, with the other secured creditors. Due, at least in part, to the lack of transparency in the process, the proposed PSA has spurred extensive discovery requests and a motion for an examiner. One objector has—in my view, correctly—argued that the PSA breeds contempt rather than fostering negotiations.¹² This is not what chapter 11 is supposed to be

about. To the contrary, a number of the objectors point out that a debtor's exclusive period was intended by Congress to provide for an opportunity for the debtor to negotiate with its constituents and reach a consensual plan, a successful plan. Others cite to cases in this District for the proposition that exclusivity should not be employed as a tactical device to put pressure on parties to yield to a plan they consider unsatisfactory. The PSA has had such an effect on the Debtors' estates by tying all parties to a plan which lacks support from nearly the entire capital structure and preventing the Debtors from negotiating in good faith with their numerous constituents who will eventually be required to vote on a plan.

Finally, I will look at the alleged benefit to the Debtors' estates in assumption of the PSA and whether the Debtors have complied with their fiduciary duties in pursuing the proposed plan transaction thus far. The general standard under section 365, which certain of the objectors argue is not applicable here, requires the Court to determine whether assumption of the agreement at issue would be a good business decision, based on a review of the totality of the circumstances. Here, the PSA affords minimal benefit to the Debtors, and there is little basis for me to conclude it is beneficial for the estates of the Debtors, and in particular, the non-floating rate Debtors. The Debtors assert that, by equitizing Lehman's over \$200 million in secured debt, this confers a benefit on the estates by (i) creating substantial unencumbered assets and (ii) freeing up substantial cash flow that would otherwise go to pay debt service. In this manner, they assert, equitization of Lehman's debt would thus allow for the remaining CMBS pools of secured debt to take debt. I do not believe, however, that the alleged advantages conferred by the equitization outweigh giving Lehman the amount of power over these cases that the PSA confers.

The broad Termination Events contained in the PSA permit Lehman to walk away and terminate the consensual use of its cash collateral upon the occurrence of a laundry list of different events, even in a variety of situations over which the Debtors have no control. In exchange for Lehman's "support," the Debtors have agreed to (i) refrain from seeking competitive proposals which could maximize the value of these estates, (ii) reimburse Lehman's costs, and (iii) in certain instances, consent to a lifting of the stay to allow Lehman to exercise its remedies without further Court approval.

The Debtors argue that, up until the 240th day after the Petition Date, in the case of a breach, Lehman's only remedies are to terminate consensual use of cash collateral or to seek enforcement of the PSA. If the Termination Events merely ***235** triggered the loss of Lehman's "support" for the proposed restructuring, this would be typical of many plan support agreements approved in this District. Because, however, such events also trigger a termination of the consensual use of Lehman's cash collateral and, in certain instances, a lifting of the stay, they cannot be sustained. Simply put, to allow Lehman to wield that much power over the fate of these cases is unacceptable. Lehman's eleventh hour assurance that Lehman will not exercise a right to terminate in certain instances is of little comfort, nor do I believe it changes the result here dictated.

Finally, and of paramount importance, I believe that the so-called Fiduciary Out, as written, is flawed. It prohibits the Debtors from taking action consistent with their fiduciary obligations. Fiduciaries owe duties of care and loyalty, and courts have held that these duties apply with equal or greater force in the context of a sale of assets. Even without section 25(c) of the PSA, the fact that the Debtors agreed to this provision causes me to question the Debtors' honest interest in exercising due care.

In a bankruptcy case, it is "Bankruptcy 101" that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate, and each of the estates in a multi-debtor case. As Judge Gerber held in [Adelphia](#), in a case with multiple debtors, the debtors, as fiduciaries, have duties to refrain from favoring or appearing to favor one or another of their estates and its creditors over another. See [In re Adelphia Communications Corp.](#), 336 B.R. 610, 669–71 (Bankr.S.D.N.Y.2006). The Debtors have not done so here.

While the Debtors focus on the "Fiduciary Out" contained in section 25(a) of the PSA, which provides that the Company or its directors or officers shall be entitled to take any action, or refrain from taking any action, including a decision to terminate the PSA, that such person determines in good faith is consistent with its or their fiduciary obligations under applicable law, the Debtors repeatedly seem to ignore the effect of section 25(c) on this provision. Section 25(c) of the PSA is an exception to the Fiduciary Out set forth in section 25(a), and, as asserted by nearly all of the objectors, it curtails its effectiveness and prohibits the Debtors and their directors and officers from fully complying with their fiduciary duties. It provides that the Fiduciary Out

shall not apply and cannot be used to “annul, modify, amend, or otherwise alter” any of the Plan Milestones set forth in the PSA unless the Debtors are doing so in pursuit of an alternative transaction that will provide *Lehman* with a higher and better recovery than that proposed under the plan contemplated by the PSA. While the Debtors argue that section 25(c) provides only that the Fiduciary Out cannot be used to amend certain Plan Milestones unilaterally, this is a restriction that I cannot approve, given that it ties the Debtors to the proposed plan unless Lehman, a creditor, receives a better recovery. I am aware of no other court-approved plan support agreement which contains such a provision.

Further, I believe that section 25(c) prevents the Debtors from electing to fully exercise their fiduciary duties to maximize the value of each of the Debtors' estates, particularly seventy-two of the ninety-two Debtors who do not count Lehman as one of their creditors. In fact, Mr. Beilinson testified that he has not permitted other parties (aside from Lehman) to conduct due diligence,¹³ despite the fact that he acknowledged that he has fiduciary duties *236 not solely to the Lehman tranche of debt but to all of the Debtors' creditors. This Court has heard no evidence that the Debtors believe that discussing a plan other than the PSA plan or that providing due diligence access to other parties in compliance with their fiduciary duties would not trigger a Termination Event under the PSA.

As the Debtors have not articulated a sufficient business justification for entry into the PSA, I cannot grant their motion to assume it. I do not believe this is a case where a smaller group of out-of-the-money constituents is opposing the Debtors' motion in an effort to extract hold-up value from those constituents that are “in the money.” Instead, and I am repeating myself but this point is important, unlike most plan support agreements, the PSA only “locks up” approximately \$200 million of the total \$1.4 billion in secured debt in these cases—the support of only one creditor among the critical mass of creditors needed to support a successful restructuring in these cases. After today, without the burden of the restrictions imposed by the PSA, the Debtors will have a wide berth to fulfill their fiduciary duties to conduct a plan process which maximizes value for all of the estates and treats the various tranches of debt with greater neutrality. And here again I will invoke *Adelphia* and its substantial teachings regarding the fine art of being a debtor with multiple, separate tranches of debt secured by separate collateral pools. There is a level of neutrality required; I do not believe the process leading to the PSA reflects the more even-handed approach required in this case. To be sure, the Debtors do not have to be paralyzed in an attempt to make everyone happy. If they believe the plan underlying the PSA is a good, confirmable plan, they can and should file it and prosecute it. It will either survive attacks vis-à-vis valuation, new value, substantive consolidation, and whatever else the creditor body asserts—or it will not. And, if Lehman still wants to support the plan, it is free to do so.

For the reasons stated above, the Debtors' motion to assume the PSA is denied.

All Citations

442 B.R. 227

Footnotes

- ¹ This decision was dictated on the record at the conclusion of the hearing held on September 1, 2010. It has been modified only in the following respects: (i) typographical and transcription errors have been corrected, (ii) full citations have been added, and (iii) defined terms have been added for the purposes of clarity. Because this decision was initially a bench decision dictated in open court and written without the benefit of more leisurely drafting, it has fewer citations and footnotes, and a more conversational tone than a memorandum decision.
- ² The “Property Level Lenders” are comprised of Wells Fargo Bank, N.A., as Trustee for the registered holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2007–C1 and U.S. Bank National Association, as Trustee for the registered holders of ML–CFC Commercial Mortgage Trust 2006–4, Commercial Mortgage Pass-Through Certificates, Series 2006–4.
- ³ The Plan Milestones are set forth in section 6(a) of the PSA.
- ⁴ The Debtors' chapter 11 petitions were filed on July 19, 2010 (the “Petition Date”).

- [5](#) The “Floating Rate Collateral” is defined in the PSA as the twenty properties securing the Debtors' obligations under that certain mortgage loan agreement, dated as of June 29, 2007, among Lehman and the affiliates of the Debtor parties thereto, collateralized by such properties (and the loan described herein, the “Floating Rate Mortgage Loan”).
- [6](#) Tr. of Hrg. of Sept. 1, 2010, at 203–4.
- [7](#) Tr. of Hrg. of Sept. 1, 2010, at 181.
- [8](#) Section 25(a) of the PSA provides that, notwithstanding anything to the contrary therein, at any time prior to the Confirmation Date [as defined in the PSA], the Debtors or any directors or officers of the Debtors, in such person's capacity as a director or officer of the Debtors, shall be entitled to take any action, or to refrain from taking any action, including a decision to terminate the PSA, that such person determines in good faith, after consultation with counsel, is consistent with its or their fiduciary obligations under applicable law (the “Fiduciary Out”).
- [9](#) On September 1, 2010, the Court entered the Final Order (I) Authorizing Floating Rate Debtors to Obtain Postpetition Financing and (II) Granting Liens and Super–Priority Claims (Docket No. 385). On September 2, 2010, the Court entered the Final Order Authorizing the Debtors to Obtain Postpetition Senior Secured Super–Priority Debtor–In–Possession Financing From Five Mile Capital II Pooling International LLC, which was approved on the record on September 1, 2010 (Docket No. 400).
- [10](#) Tr. of Hrg. of Sept. 1, 2010, at 391–3.
- [11](#) Docket Nos. 260 and 367.
- [12](#) Tr. of Hrg. of Sept. 1, 2010, at 391.
- [13](#) Tr. of Hrg. of Sept. 1, 2010, at 181 and 206–8.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

NEW COTAI HOLDINGS, LLC, *et al.*,

Debtors.¹

Chapter 11

Case No. 19-22911 (RDD)

(Jointly Administered)

**ORDER AUTHORIZING EMPLOYMENT AND RETENTION
OF DLA PIPER LLP (US) AS SPECIAL COUNSEL TO THE DEBTORS**

Upon the application (the “**Application**”)² of the Debtors for entry of an order under section 327(a) of the Bankruptcy Code, authorizing the employment and retention of DLA Piper LLP (US) (“**DLA Piper**”) as special counsel for the Debtors to represent the Debtors, by their independent director, in investigating certain potential claims of the Debtors’ estates (as more specifically defined in this Order, the “**Potential Claims**”); and upon the objections to the Application by the Ad Hoc Group of Noteholders (the “**Ad Hoc Group**”) and the United States Trustee; and upon the record of and representations made at the hearing held by the Court on the Application on August 15, 2019; and it being clear that the objections to the Application were not based on DLA Piper’s qualifications or disinterestedness but, rather, the process and proper party to be conferred standing to investigate and potentially prosecute or settle the Potential Claims on behalf of the Debtors’ estates; and the standing and process issues having been resolved by the Debtors and the Ad Hoc Group consistent with applicable law; and upon the

¹ The Debtors in these chapter 11 cases, along with the last four digits of their respective tax identification numbers, are as follows: New Cotai Holdings, LLC (3056); New Cotai, LLC (2582); New Cotai Capital Corp. (3641); New Cotai Ventures, LLC (9385). The Debtors’ corporate address is c/o New Cotai, LLC, Two Greenwich Plaza, Greenwich, Connecticut 06830.

² Unless otherwise defined, capitalized terms used herein shall have the meanings ascribed to them in the Application.

Califano Declaration and the Brecker Declaration and the proposed revisions to DLA's retention; and upon the supplemental objections of the United States Trustee, dated September 23, 2019; and, after due deliberation, the Court being satisfied that DLA Piper neither holds nor represents an interest adverse to the estates with respect to the matters upon which it is being retained, that it is a "disinterested person" as that term is defined in section 101(14) of the Bankruptcy Code, that its retention as provided herein is necessary and in the best interests of the Debtors' estates and creditors, and that the agreed process for investigating and potentially prosecuting and/or settling the Potential Claims is in the best interests of the Debtors' estates and creditors and appropriately resolves the parties' disputes over standing and process with respect to the Potential Claims; and due and sufficient notice of the Application and the Debtors' request for entry of this Order having been given under the circumstances, and it appearing that no other or further notice or hearing is required; and good and sufficient cause appearing, it is hereby

ORDERED, THAT:

1. The Application is GRANTED as set forth herein.
2. The Debtors, as debtors and debtors in possession, are authorized to employ and retain William P. Wall, designated by the members of the Ad Hoc Group,³ as an independent fiduciary in accordance with the engagement agreement attached hereto as **Exhibit A** (the "**Fiduciary Retention**").
3. Pursuant to section 327(a) of the Bankruptcy Code, the Debtors, as debtors and debtors in possession, are authorized to employ and retain DLA Piper as special counsel to the Debtors' two independent fiduciaries, John Brecker and William P. Wall (together, the

³ The Ad Hoc Group is the ad hoc group of certain unaffiliated beneficial holders or investment advisors or managers of beneficial holders of the Debtors' 10.625% Senior Pay-In-Kind Notes due 2019 under that certain indenture dated as of April 19, 2013.

“**Independent Fiduciaries**”), jointly in their capacities as independent fiduciaries of the Debtors’ estates with respect to the Potential Claims, effective as of July 15, 2019, in accordance with the Application (as modified herein), the engagement agreement attached hereto as **Exhibit B** (the “**Engagement Agreement**”), and this Order.

4. The requirements for conferring joint standing upon the Independent Fiduciaries to investigate, prosecute, and/or settle the Potential Claims (defined below) on behalf of the Debtors’ estates and subject to the terms of this Paragraph 4 have been satisfied in accordance with *Glinka v. Murad (In re Housecraft Industries USA, Inc.)*, 310 F.3d 64 (2d Cir. 2002) (“**Housecraft**”). The Independent Fiduciaries are hereby conferred joint standing pursuant to *Housecraft* on the following terms:

(a) The Independent Fiduciaries shall have standing to investigate, prosecute, and/or settle (i) any and all potential claims of the Debtors related to or arising from the initial public offering of Studio City International Holdings Limited (the “**Studio City International IPO**”), and prepetition events relating to the conduct of the Debtors and their controlling shareholders, and (ii) any other matters in relation to which the Independent Fiduciaries jointly determine (or, in the event of a disagreement between the Independent Fiduciaries, as may be determined by the Court) a conflict exists with respect to Skadden, Arps, Slate, Meagher & Flom LLP in its capacity as counsel to the Debtors (together, the “**Investigation**” of the “**Potential Claims**”); provided, that the Independent Fiduciaries shall not seek to prosecute or settle any Potential Claims until the Independent Fiduciaries have issued a report setting forth the conclusions of the Investigation with respect to such Potential Claims.

(b) Following the issuance of a report by the Independent Fiduciaries setting forth the conclusions of the Investigation with respect to any Potential Claim, if the Independent Fiduciaries unanimously determine that prosecuting or settling any such Potential Claim would be in the best interests of the Debtors’ estates, the Independent Fiduciaries may seek this Court’s approval to prosecute or settle any such Potential Claim pursuant to section 363 of the Bankruptcy Code, Bankruptcy Rule 9019, or other applicable authority and upon proper notice to parties-in-interest. If the Independent Fiduciaries are unable to come to an agreement regarding whether to seek to prosecute or settle any Potential Claim, either Independent Fiduciary may seek the Court’s intervention.

5. Each of the Independent Fiduciaries is a fiduciary of the Debtors’ estates for the purposes of the Debtors’ attorney client privilege, including the right to access the Debtors’

attorney client privileged and work product information, with respect to the Investigation and/or Potential Claims. Either Independent Fiduciary may also share such attorney client privileged and work product information with DLA Piper, as counsel to the Independent Fiduciaries, without waiving such privilege. The Independent Fiduciaries may unanimously agree to waive the Debtors' attorney client privilege with respect to materials or information that are within the scope of the Investigation if, in their discretion, they deem doing so would be in the best interests of the Debtors' estates. If the Independent Fiduciaries are unable to come to an agreement regarding whether the waiver of privilege is warranted, then either of them may seek the Court's intervention to approve a disputed action, and neither of them may waive privilege until the Court has determined the matter.

6. Promptly following the entry of this Order, the Independent Fiduciaries and DLA Piper shall implement a protocol for sharing information and documents relating to the Investigation on an equal basis with Akin Gump Strauss Hauer & Feld LLP and FTI Consulting, Inc., as advisors to the Ad Hoc Group, and Skadden, Arps, Slate, Meagher & Flom LLP and Houlihan Lokey, Inc., as advisors to the Debtors in a manner which shall be designed to maintain the integrity of the Investigation and applicable privilege, unless waived pursuant to the terms of this Order.

7. DLA Piper shall be compensated and reimbursed by the Debtors in accordance with sections 330 and 331 of the Bankruptcy Code, as the case may be, and the applicable Bankruptcy Rules, Local Bankruptcy Rules, and orders and fee and expense guidelines of the Court.

8. Prior to applying any increases in its hourly rates beyond the rates set forth in the Application, DLA Piper shall provide ten days' notice of any such increases to the Independent

Fiduciaries, the Debtors, the United States Trustee, and any official committee appointed in the Chapter 11 Cases. All parties in interest retain all rights to object to such a rate increase, and the Court retains the right to review any rate increase. To the extent the Application, the Engagement Agreement, and the Independent Director Agreement, dated as of April 29, 2019, between the Debtors and John Brecker, are inconsistent with this Order, the terms of this Order shall govern.

9. Such other services as may be requested by the Independent Fiduciaries and agreed to by DLA Piper may be compensated as set forth in the foregoing paragraph without further Court order.

10. Notwithstanding any stay that might be imposed by Bankruptcy Rule 6004(h) or otherwise, this Order shall be effective and enforceable immediately upon entry hereof.

11. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Application.

12. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, enforcement, or modification of this Order.

Dated: White Plains, New York
September 26, 2019

/s/ Robert D. Drain
HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

19-22911-rdd Doc 215 Filed 09/26/19 Entered 09/26/19 12:22:24 Main Document
Pg 6 of 7

EXHIBIT A

Fiduciary Retention

19-22911-rdd Doc 215 Filed 09/26/19 Entered 09/26/19 12:22:24 Main Document
Pg 7 of 7

EXHIBIT B

Engagement Agreement

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 1 of 13

EXHIBIT A

Fiduciary Retention

INDEPENDENT FIDUCIARY AGREEMENT

THIS INDEPENDENT FIDUCIARY AGREEMENT (the “Agreement”) is made as of September 20, 2019, by and between New Cotai Holdings, LLC (“NCH”), a Delaware limited liability company, New Cotai, LLC (“NC”), a Delaware limited liability company, New Cotai Ventures, LLC (“NCV”), a New York limited liability company, and New Cotai Capital Corp. (“NCCC”), a British Virgin Islands company limited by shares (collectively, the “Companies”), and William P. Wall (“Fiduciary”).

BACKGROUND

WHEREAS, on April 29, 2019, John Brecker (“Director”) was appointed as an independent manager of NCV and an independent director of NCCC.

WHEREAS, on May 1, 2019, each of the Companies commenced a case by filing a petition for relief under chapter 11 of title 11 of the United States Code in the Bankruptcy Court for the Southern District of New York (the “Court”).

WHEREAS, at the hearing held on August 15, 2019, the Court instructed the Companies to hire an independent fiduciary selected by the ad hoc group of certain unaffiliated beneficial holders or investment advisors or managers of beneficial holders of the Companies’ 10.625% Senior Pay-In-Kind Notes due 2019 under that certain indenture dated as of April 19, 2013 (the “Ad Hoc Group”) to serve as a representative of the Companies to investigate potential claims of the Debtors related to or arising from (i) the initial public offering of Studio City International Holdings Limited (the “Studio City International IPO”) and prepetition events relating to the conduct of the Debtors and their controlling shareholders, and (ii) any other matter in relation to which Fiduciary and Director jointly determine (or, in the event of a disagreement between Fiduciary and Director, as may be determined by the Court) a conflict exists with respect to Skadden, Arps, Slate, Meagher & Flom LLP in its capacity as counsel to the Companies (together, the “Investigation” of the “Claims”).

WHEREAS, at the hearing held on August 15, 2019, the Court set forth a framework pursuant to which the Director and Fiduciary would retain DLA Piper LLP (US) (“DLA Piper”), subject to entry of an order by the Court, to assist the Director and Fiduciary with the Investigation.

WHEREAS, in accordance with the Court’s directive, the Companies desire and have requested that Fiduciary and Director jointly serve as independent fiduciaries of the Companies in connection with the Investigation.

WHEREAS, the Companies and Fiduciary are entering into this Agreement to set forth certain understandings between the parties.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual agreements and promises contained herein, and other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Companies and Fiduciary hereby agree as follows:

1. **DUTIES.**

(a) Fiduciary and the Companies agree that Fiduciary shall be appointed as an officer of the Companies, and serve as an independent fiduciary of the Companies, solely in connection with the Investigation and Claims. Together with Director, Fiduciary shall have standing to investigate, prosecute, and/or settle the Claims; provided, however, that if, following the issuance of a report by Fiduciary and Director setting forth the conclusions of the Investigation with respect to any Claim, Fiduciary and Director unanimously determine that prosecuting or settling any such Claim would be in the best interests of the Companies' chapter 11 estates, Fiduciary and Director must unanimously seek the Court's approval to prosecute and/or settle such Claims pursuant to section 363 of title 11 of the United States Code, Rule 9019 of the Federal Rules of Bankruptcy Procedure, or other applicable authority and upon proper notice to parties-in-interest. If Fiduciary and Director are unable to come to an agreement regarding whether to seek to prosecute or settle any Claim, then either Fiduciary or Director may seek the Court's intervention and shall be entitled to use DLA Piper as counsel in connection therewith. Fiduciary is a fiduciary of the Companies for the purposes of the Companies' attorney client privilege, including the right to access the Companies' attorney client privileged and work product information. Fiduciary may also share such attorney client privileged and work product information with DLA Piper, as counsel to the Fiduciary and Director, without waiving such privilege. Director and Fiduciary may unanimously agree to waive the Debtors' attorney client privilege with respect to materials or information that are within the scope of the Investigation if, in their discretion, they deem doing so would be in the best interests of the Debtors' estates. If Director and Fiduciary are unable to come to an agreement regarding whether the waiver of privilege is warranted, then either Director or Fiduciary may seek the Court's intervention to approve a disputed action (and shall be entitled to use DLA Piper as counsel in connection therewith), and neither Director nor Fiduciary may waive privilege until the Court has determined the matter.

(b) The Companies acknowledge that Fiduciary currently holds other positions and agree that Fiduciary may maintain such positions and any future positions ("Other Employment"), provided that such Other Employment shall not materially interfere with Fiduciary's obligations under this Agreement. Fiduciary confirms that he will be able to devote sufficient time and attention to the Companies as is reasonably necessary to fulfill his responsibilities as an officer and independent fiduciary of the Companies in connection with the Investigation and that the Other Employment will not in any way impact the Fiduciary's independence. Such time and attention shall include, without limitation, participation upon due notice in telephonic and/or in-person meetings of the Companies' board of managers, directors or other applicable governing bodies. Fiduciary also represents that the Other Employment shall not interfere with Fiduciary's obligations under this Agreement. Without limiting the generality of the foregoing, Fiduciary confirms that he is independent (as such term has been construed under Delaware law with respect to directors of Delaware corporations). Fiduciary also confirms that (i) he does not possess material business, close personal relationships or other affiliations, or any history of any such material business, close personal relationships or other affiliations, with the Companies' equity holders, any holders of debt issued by the Companies, or any of their respective corporate affiliates that would cause Fiduciary to be unable to (a) exercise independent judgment based on the best interests of each respective the Company or (b) make decisions and carry out his responsibilities as an officer and independent fiduciary of the Companies in connection with the Investigation, in each case, in accordance with applicable law. The Companies acknowledge and

understand, and waive all objections to the fact that, the Fiduciary was formerly employed by the investment manager of certain holders of debt issued by the Company, which employment terminated in 2003. The parties hereto acknowledge and agree that Fiduciary is only being engaged to serve as an officer and fiduciary of the Companies in connection with the Investigation and is not being engaged to serve, and shall not serve, the Companies in any other capacity, and shall not be subject to any contractual or other obligations to the Companies other than as specifically set out in this Agreement.

2. **TERM.** Notwithstanding anything in this Agreement to the contrary, the term of this Agreement shall continue until the earlier of (i) the completion of Fiduciary's services in connection with the Investigation, or (ii) such time as Fiduciary resigns or is removed by order of the Court.

3. **COMPENSATION.** For all services to be rendered by Fiduciary hereunder, and so long as Fiduciary remains an officer and independent fiduciary of the Companies in connection with the Investigation, and subject to receipt of any necessary court approval of this Agreement, NC agrees to pay Fiduciary, on behalf of itself and each of the other Companies, an initial fee of \$50,000 (the "Initial Fee"), payable upon execution of this Agreement, and, thereafter, commencing on December 15, 2019, a monthly fee, payable in advance, of \$15,000; provided, that any monthly fee payable hereunder, but not the Initial Fee, shall be pro-rated as necessary. To the extent Fiduciary's services are required or requested following the completion of Fiduciary's services in connection with the Investigation, Fiduciary shall be compensated on terms to be agreed upon at such time by the Fiduciary and the Companies, each acting in good faith.

4. **EXPENSES.** The Companies will reimburse Fiduciary for reasonable business related expenses incurred in good faith in the performance of Fiduciary's duties for the Companies. Such payments shall be made by the Companies upon submission by Fiduciary of a signed statement itemizing the expenses incurred. Such statement shall be accompanied by sufficient documentary matter to support the expenditures.

5. **CONFIDENTIALITY.** The Companies and Fiduciary each acknowledge that in order for Fiduciary to perform his duties in connection with the Investigation, Fiduciary shall necessarily be obtaining access to certain confidential information concerning and/or provided by the Companies and their affiliates ("Confidential Information"). Director, Fiduciary, and DLA Piper shall implement a protocol for sharing information relating to the Investigation on an equal basis with Akin Gump Strauss Hauer & Feld LLP and FTI Consulting, Inc., as advisors to the Ad Hoc Group, and Skadden, Arps, Slate, Meagher & Flom LLP and Houlihan Lokey, Inc., as advisors to the Companies (the "Information Sharing Protocol") as is deemed appropriate while maintaining the integrity of the Investigation. With the exception of information shared pursuant to the Information Sharing Protocol, Fiduciary covenants that he shall not, either directly or indirectly, in any manner, utilize or disclose to any person, firm, corporation, association or other entity any Confidential Information, except (i) to seek legal advice from DLA Piper, (ii) as required by law, (iii) pursuant to a subpoena or order issued by a court, governmental body, agency or official, or (iv) to the extent such information (A) is generally known to the public, (B) was known to Fiduciary prior to its disclosure to Fiduciary by the Companies, (C) was obtained by Fiduciary from a third party which, to Fiduciary's knowledge, was not prohibited from disclosing such information to Fiduciary pursuant to any contractual, legal or fiduciary obligation, or (D) was independently derived by Fiduciary without any use of Confidential Information. This Section 5

shall continue in effect after Fiduciary has ceased acting as an officer and independent fiduciary of the Companies.

6. **INDEMNIFICATION.**

(a) **Certain Definitions.** For purposes of this Section 6, the term:

“Expenses” means all expenses, liabilities and losses (including, without limitation, attorneys' fees, retainers, expert and witness fees, disbursements and expenses of counsel and Fiduciary, judgments, fines, excise taxes or penalties and amounts paid or to be paid in settlement) actually and reasonably incurred or suffered by Fiduciary or on Fiduciary's behalf in connection with a Proceeding.

“Proceeding” means any threatened, pending, actual or completed action, suit, inquiry or proceeding (including, for the avoidance of doubt, any motion or request for Court intervention pursuant to Section 1(a) of this Agreement), whether civil, criminal, administrative or investigative, whether public or private, and, including any such threatened, pending, actual or completed action, suit, inquiry or proceeding by or in the right of any Company.

(b) **Indemnification.** In the event that Fiduciary was or is made a party or is threatened to be made a party to or is involved (including, without limitation, as a witness) in any Proceeding by reason of the fact that Fiduciary is or was an independent representative of the Companies in connection with the Investigation, the Companies shall indemnify and hold harmless Fiduciary to the fullest extent authorized by Delaware law or any other applicable law or rule, but no less than to the extent set forth herein, against all Expenses; provided, however, that the Companies shall indemnify Fiduciary only if Fiduciary provides written notice of the Proceeding to the Companies as promptly as is reasonably practicable; and provided, further, that the Companies shall indemnify Fiduciary only if Fiduciary acted honestly and in good faith on behalf of the Companies and in a manner reasonably believed to be within the scope of authority conferred on Fiduciary by this Agreement and with a view to the best interests of the Companies and did not engage in fraud, gross negligence or willful misconduct or, in the case of criminal Proceedings, Fiduciary had no reasonable cause to believe his conduct was unlawful; and provided, further, that the Companies shall indemnify Fiduciary in connection with a Proceeding (or claim or part thereof) initiated by Fiduciary only if (i) such Proceeding is a suit or other action seeking to enforce Fiduciary's rights under this Agreement or right to advancement of expenses and/or indemnification under this Agreement, (ii) such Proceeding (or claim or part thereof) was authorized by the board of managers, directors or other applicable governing bodies of the Companies, or (iii) such Proceeding is a motion or request by Fiduciary for Court intervention pursuant to Section 1(a) of this Agreement.

(e) **Suit to Recover Indemnification.** If a claim under Section 6(b) or Section 6(h) of this Agreement is not paid in full by the Companies within thirty days after a written claim has been received by the Companies, Fiduciary may at any time thereafter bring suit against the Companies to recover the unpaid amount of the claim. It shall be a defense to any such suit (other than a suit brought to enforce a claim for Expenses incurred in defending any Proceeding in advance of its final disposition where the required undertaking has been tendered to the Companies) that Fiduciary has not met the standards of conduct set forth in Section 6(b), but the burden of proving such defense and its applicability shall be on the Companies. Neither the failure of the Companies (including its board of managers or directors or equity holders) to have

made a determination prior to the commencement of such suit that indemnification of Fiduciary is proper in the circumstances because Fiduciary has met the standard of conduct as set forth in Section 6(b), nor an actual determination by the Companies (including its board of directors or equity holders) that Fiduciary has not met such applicable standard of conduct, shall be a defense to the suit or create a presumption that Fiduciary has not met the applicable standard of conduct. The Expenses incurred by Fiduciary in bringing such suit (whether or not Fiduciary is successful) shall be paid by the Companies unless a court of competent jurisdiction determines that each of the material assertions made by Fiduciary in such suit was not made in good faith or was frivolous.

(f) **Rights Not Exclusive; Rights Continue.** The right to indemnification and the advancement of expenses incurred in defending any Proceeding in advance of its final disposition conferred in this Agreement shall not be exclusive of, or limit in any manner whatsoever, any other right which Fiduciary may have or hereafter acquire under any statute, agreement, vote of the board of directors, other applicable governing bodies or equity holders or otherwise. The indemnification, expense advancement and other rights of Fiduciary herein shall continue after Fiduciary ceases to be an officer and independent fiduciary for so long as Fiduciary may be subject to any possible claim for which he would be entitled to indemnification under this Agreement or otherwise as a matter of law, and shall not be amended, modified, terminated, revoked or otherwise altered without Fiduciary's prior written consent.

(g) **Insurance.** The Companies or one of their affiliates (which, in the case of an affiliate, shall include coverage of directors, officers, and fiduciaries of the Companies) shall maintain insurance to protect the Companies and any director, officer, fiduciary, or trustee of the Companies against any expense, liability or loss, and such insurance shall cover Fiduciary in his capacity as an officer of the Companies in connection with the Investigation to at least the same extent as Director and any other Director of the Companies; provided that the Companies shall maintain customary director and officer insurance in form and amounts substantially similar to the insurance maintained by the Companies as of the date hereof. Fiduciary shall have the right to receive a copy of any policy for such insurance upon request.

(h) **Advancement of Defense Costs.** The Companies shall promptly pay Fiduciary the Expenses actually and reasonably incurred in defending or prosecuting any Proceeding in advance of its final disposition without requiring any preliminary determination of the ultimate entitlement of Fiduciary to indemnification; provided, however, the payment of such expenses so incurred by Fiduciary in advance of the final disposition of any Proceeding shall be made only upon delivery to the Companies of an unsecured undertaking in the form attached hereto as Exhibit A by or on behalf of Fiduciary, to repay (without interest) all amounts so advanced if it shall ultimately be determined that Fiduciary is not entitled to be indemnified under this Agreement.

(i) **Subrogation.** In the event of payment under this Agreement, the Companies shall be subrogated to the extent of such payment to all of the rights of recovery of Fiduciary, who shall, at the Companies' expense, execute all papers required and take all action necessary to secure such rights, including the execution of such documents necessary to enable the Companies effectively to bring suit to enforce such rights.

(j) **No Duplication of Payments.** The Companies shall not be liable under this Agreement to make any payment in connection with any Proceeding against Fiduciary to the

extent Fiduciary has otherwise actually received payment (under any insurance policy, contract, agreement, or otherwise) of the amounts otherwise indemnifiable hereunder.

(k) **Contribution.** If the indemnification provided in Section 6(b) and the advancement provided in Section 6(h) should under Delaware law be unenforceable or insufficient to hold Fiduciary harmless in respect of any and all Expenses with respect to any Proceeding, then the Companies shall, subject to the provisions of this Section 6(k) and for purposes of this Section 6(k) only, upon written notice from Fiduciary, be treated as if it were a party who is or was threatened to be made a party to such Proceeding (if not already a party), and the Companies shall contribute to Fiduciary the amount of Expenses incurred by Fiduciary in such proportion as is appropriate to reflect the relative benefits accruing to the Companies and all of its directors, trustees, officers, employees and agents (other than Fiduciary) treated as one entity on the one hand, and Fiduciary on the other, which arose out of the event(s) underlying such Proceeding, and the relative fault of the Companies and all of its directors, trustees, officers, employees and agents (other than Fiduciary) treated as one entity on the one hand, and Fiduciary on the other, in connection with such event(s), as well as any other relevant equitable considerations.

No provision of this Section 6(k) shall: (i) operate to create a right of contribution in favor of Fiduciary if it is judicially determined that, with respect to any Proceeding, Fiduciary engaged in willful misconduct or (ii) limit Fiduciary's rights to indemnification and advancement of Expenses, whether under this Agreement or otherwise.

The Companies hereby waive any right of contribution from Fiduciary for Expenses incurred by the Companies with respect to any Proceeding in which the Companies are or are threatened to be made a party. The Companies shall not enter into any settlement of any Proceeding in which the Companies are jointly liable with Fiduciary (or would be if joined in such Proceeding) unless such settlement provides for a full and final release of all claims asserted against Fiduciary and does not contain an admission of wrongdoing by Fiduciary.

7. **MISCELLANEOUS.** Fiduciary confirms that the execution and performance of this Agreement shall not be in violation of any agreement or obligation (whether or not written) that Fiduciary may have with or to any person or entity. In the event Fiduciary knows or has reason to know that any of the statements made herein is not true or will not be true in the future, Fiduciary shall immediately report such finding to the Companies. Fiduciary hereby acknowledges and agrees that this Agreement shall be an obligation solely of the Companies, and Fiduciary shall have no recourse whatsoever against the Companies' equity holders or any of their respective affiliates with regard to this Agreement.

8. **INFORMATION.**

(a) The Companies shall provide to Fiduciary access to all documents and information over which the Companies have possession, custody, and control; provided, however, that Fiduciary may not (x) use or disclose such documents and information for any purpose inconsistent with his role as Fiduciary or (y) waive any privilege relating to such documents and information unless such documents and information are relevant to the Investigation and any decision to use, disclose, or waive privilege is made jointly with Director. If Director and Fiduciary are unable to agree upon any such use, disclosure, or waiver, then either Director or Fiduciary may seek the Court's intervention, and neither Director nor Fiduciary may use or

disclose such documents and information or waive privilege relating to such documents or information absent Court approval.

(b) Prior to using or disclosing any documents or information, or waiving the privilege relating to any documents or information, Fiduciary shall provide reasonable advance notice to the Companies. If the Companies and Fiduciary disagree about whether any documents or information are relevant, then the Companies shall have the right to seek Court intervention, and Fiduciary shall not use or disclose such documents and information or attempt to waive privilege regarding such documents and information absent Court approval. Additionally, the Companies shall take commercially reasonable efforts to make available to Fiduciary reasonable access to all current personnel of the Companies. For the avoidance of doubt, and subject to the provisions relating to the waiver of privilege set forth above in Section 1, any documents or information that are subject to a claim of privilege shall not be withheld.

9. **EFFECT OF WAIVER.** The waiver by either party of the breach of any provision of this Agreement shall not operate as or be construed as a waiver of any subsequent breach thereof.

10. **GOVERNING LAW.** This Agreement shall be interpreted in accordance with, and the rights of the parties hereto shall be determined by, the laws of the state of Delaware without reference to its conflicts of laws principles.

11. **ASSIGNMENT.** The rights and benefits of the Companies under this Agreement shall not be transferable except by operation of law without Fiduciary's consent, and all the covenants and agreements hereunder shall inure to the benefit of, and be enforceable by or against, its successors and permitted assigns. The duties and obligations of Fiduciary under this Agreement are personal and therefore Fiduciary may not assign any right or duty under this Agreement without the prior written consent of the Companies.

12. **BINDING EFFECT; SUCCESSORS AND ASSIGNS.** This Agreement shall be binding upon and inure to the benefit of and be enforceable by each of the parties hereto and their respective successors, permitted assigns (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business or assets of the Companies), heirs and personal legal representatives. The Companies shall require and cause any successor (whether direct or indirect, and whether by purchase, merger, consolidation or otherwise) to all, substantially all, or a substantial part, of the business or assets of the Companies, by written agreement in form and substance reasonably satisfactory to Fiduciary, expressly to assume and agree to perform this Agreement in the same manner and to the same extent that the Companies would be required to perform if no such succession had taken place.

13. **SEVERABILITY; HEADINGS.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid as applied to any fact or circumstance, it shall be modified by the minimum amount necessary to render it valid, and any such invalidity shall not affect any other provision, or the same provision as applied to any other fact or circumstance. The headings used in this Agreement are for convenience only and shall not be construed to limit or define the scope of any Section or provision.

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 9 of 13

14. **COUNTERPARTS; AMENDMENT.** This Agreement may be executed in one or more counterparts, each of which shall be considered one and the same agreement. No amendment to this Agreement shall be effective unless in writing signed by each of the parties hereto.

15. **ENTIRE AGREEMENT.** This Agreement contains the entire understanding between the Parties regarding the subject matter hereof and shall be binding on each of the Parties in accordance with their terms.

[Signature page follows]

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 10 of 13

The parties hereto have caused this Agreement to be executed on the date first above written.

New Cotai Holdings, LLC

By: 

New Cotai, LLC

By: 

New Cotai Ventures, LLC


By: _____

New Cotai Capital Corp.

By: 

Fiduciary

Name: William P. Wall

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 11 of 13

The parties hereto have caused this Agreement to be executed on the date first above written.

New Cotai Holdings, LLC

By: _____

New Cotai, LLC

By: _____

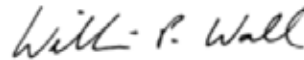
New Cotai Ventures, LLC

By: _____

New Cotai Capital Corp.

By: _____

Fiduciary



Name: William P. Wall

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 12 of 13

EXHIBIT A

FORM OF UNDERTAKING

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-1 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Fiduciary Agreement Pg 13 of 13

Undertaking to Repay

The undersigned hereby acknowledges his undertaking to repay any amounts advanced to him by the Companies under Section 6(i) of the Independent Fiduciary Agreement between him and New Cotai Holdings, LLC, New Cotai, LLC, New Cotai Ventures, LLC and New Cotai Capital Corp. (the “Agreement”) in connection with **[insert description of proceeding]** (the “Proceeding”), if it is ultimately determined that he is not entitled to be indemnified with respect to the Proceeding under the Agreement.

Dated _____

Signature

Name (please print)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 1 of 14

EXHIBIT B

Engagement Agreement

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 2 of 14



1251 Avenue of the Americas
27th Floor
New York, New York 10020-1104
www.dlapiper.com

Thomas R. Califano
Thomas.Califano@dlapiper.com
T 212.335.4990
F 212.884.8690

September 20, 2019

NEW COTAI VENTURES, LLC
Attention: Mr. John Brecker, Independent Director
Two Greenwich Plaza
First Floor
Greenwich, Connecticut 06830

William P. Wall, Independent Fiduciary
2 Blueberry Hill Road
Andover, MA 01810

Re: Engagement and Conflict Waiver Letter for Legal Services

Dear John & William:

We are pleased that you (the "Client" or "you") are engaging DLA Piper LLP (US) ("DLA Piper," "we," or the "Firm") to represent you as the independent director for New Cotai Ventures, LLC (NCV") and New Cotai Capital Corp. ("NCCC"), and the independent fiduciary for New Cotai Holdings, LLC ("NCH"), New Cotai, LLC ("NC"), NCV, and NCC (together, with the independent director, the "Independent Fiduciaries") in connection with the investigation into all aspects of the October 2018 Studio City International IPO and in other matters in the debtors' bankruptcy cases which you determine pose a conflict of interest (the "Matter"). NCV, NCCC, NCH, and NC are referred to collectively herein as the "Companies".

Scope of Engagement

DLA Piper will serve as special counsel to you, the debtors' Independent Fiduciaries, for the limited purpose of assisting you in your investigation into: (i) the initial public offering of Studio City International Holdings Limited (the "Studio City International IPO") and prepetition events relating to the conduct of the Debtors and their controlling shareholders; and (ii) any other matter in relation to which you jointly (or, in the event of a disagreement between Fiduciary and Director, as may be determined by the Court) determine a conflict exists with respect to Skadden, Arps, Slate, Meagher & Flom LLP in its capacity as counsel to the Companies.

General Terms

The terms and conditions set forth in the Terms of Service accompanying this letter are incorporated herein with the exception of any terms and conditions herein that differ from those in the Terms of Service. Where the terms and conditions differ, this letter shall control.

We understand that the Companies are currently the subject of chapter 11 proceedings pending in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") and that

Mr. John Brecker & Mr. William P. Wall
September 20, 2019
Page Two

our retention will be subject to the approval of the Bankruptcy Court. The terms of any order approving our retention shall control over the terms of this letter.

Fees and Expenses

Brett Ingerman and I will be responsible for and actively involved in the Matter. Additional lawyers, will be added to the Matter on an as-needed basis. Any significant additions to staffing will be discussed with you in advance.

The Firm's fees will be based on the time involved in the Matter and our internal time charges. My standard hourly fee is \$1,205.00 and Brett's is \$1,070.00. As part of the Firm's ordinary business practices, hourly time charges are reviewed annually, and may be revised for work beginning in January.

We understand that payment of our fees will be subject to the Order Granting Debtors' Motion for Order Pursuant to Bankruptcy Code Sections 105(a) and 331, Bankruptcy Rule 2016, and Local Bankruptcy Rule 2016-1 Establishing Procedures for Interim Compensation and Reimbursement for Expenses of Professionals entered by the Bankruptcy Court on June 13, 2019.

We will submit statements for services rendered on a monthly basis. In addition, our billing statements will include charges and disbursements incurred by us in the course of providing services. These items will be billed in accordance with our standard practice, as described in the attached summary, which may be periodically updated.

Confidentiality

We understand that you may provide us with confidential information of the Companies as is necessary in the course of our representation of you. We have reviewed the provisions of the Independent Director Agreement dated as of April 29, 2019, and the Independent Fiduciary Agreement, and agree that any such material provided to us will be treated as confidential within the terms of those agreements and consistent with any Retention Order issued by the Court. We also understand that you may provide us with privileged information of the Companies as is necessary in the course of our representation of you. We will maintain the privilege of such information unless and until we receive (1) written confirmation that such privilege is being unanimously waived by both of you on behalf of the Companies or (2) an order of the Court at the request of either of you authorizing the waiver of such privileged information.

We understand that the Companies have agreed to pay the fees, charges and disbursements in connection with the Matter. No attorney-client relationship with the Companies is being established by virtue of the payment arrangements. The applicable Rules of Professional Conduct require us to obtain your written consent to our accepting payment on your behalf from a third party. Acceptance of payment

DLA Piper LLP (US)

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 4 of 14



Mr. John Brecker & Mr. William P. Wall
September 20, 2019
Page Three

for your legal expenses from the Companies will not interfere with the exercise of our independent professional judgment in representing you.

Yours very truly,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read 'Tom Califano', written over the printed name.

Thomas R. Califano

I have read the above engagement and conflict waiver letter and agree and accept the terms and conditions set forth therein.

Date: September ____, 2019

JOHN BRECKER

WILLIAM P. WALL

DLA Piper LLP (US)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 5 of 14

Mr. John Brecker & Mr. William P. Wall
September 20, 2019
Page Three

for your legal expenses from the Companies will not interfere with the exercise of our independent professional judgment in representing you.

Yours very truly,

DLA Piper LLP (US)

Thomas R. Califano

I have read the above engagement and conflict waiver letter and agree and accept the terms and conditions set forth therein.

Date: September 22, 2019



JOHN BRECKER

WILLIAM P. WALL

DLA Piper LLP (US)

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 6 of 14

Mr. John Brecker & Mr. William P. Wall
September 16, 2019
Page Three

Yours very truly,

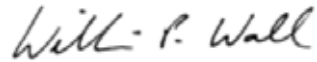
DLA Piper LLP (US)

Thomas R. Califano

I have read the above engagement and conflict waiver letter and agree and accept the terms and conditions set forth therein.

Date: September 20, 2019

JOHN BRECKER



WILLIAM P. WALL

DLA Piper LLP (US)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 7 of 14

Mr. John Brecker & Mr. William P. Wall
September 20, 2019
Page Four

SOLELY WITH RESPECT TO PAYMENT OBLIGATIONS:

NEW COTAI HOLDINGS, LLC

By: 

Its: By New Cotai Ventures, LLC, its Managing Member: Independent Board Member

NEW COTAI, LLC

By: 

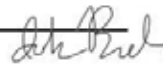
Its: By New Cotai Ventures, LLC, its Manager: Independent Board Member

NEW COTAI VENTURES, LLC

By: 

Its: Independent Board Member

NEW COTAI CAPITAL CORP.

By: 

Its: Independent Board Member

AMERICAN BANKRUPTCY INSTITUTE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 8 of 14

DLA Piper LLP (US)

Client-Reimbursable Expenses and Other Charges *Effective January 1, 2017*

DLA Piper LLP (US) bills clients for reasonable charges and disbursements incurred in connection with a matter. Clients are billed for disbursements based on the actual cost billed by the vendor or, as noted below, at rates below or comparable to outside vendor charges.

I. Research Services. The Firm has built digital libraries which enable lawyers to perform many research functions without incurring any additional expenses. These functions include pulling cases, court filings and law reviews and reading treatises in digital format. Only complex research requiring the use of Lexis or Westlaw initiates an additional cost to the client. The Firm has negotiated substantial discounts for such services which are passed on to clients at cost.

II. Duplication. Photocopying services (including copying, collating, tabbing and binding) performed in-house are charged at \$0.15 per page. Color photocopies or prints are charged at \$.95 per page. Photocopying projects performed by outside vendors are billed at the actual invoice amount.

III. Electronic Data/Document Management. Electronic Data obtained from the client will be processed (e.g., scanning, CD/DVD creation, file conversion) by the Firm's Litigation Support staff and billed at the current Firm rates, or other client negotiated rates. Should the client direct that the work be performed by an outside third party, the cost to the client is the actual invoice amount and will be billed directly by the third party to the client (per section VI below).

Hosting of electronic data internally by the Firm, in excess of 10 gigabytes, will be billed at \$18 per gigabyte per month. If directed by the client that data hosting be performed by an outside third party, the cost to the client is the actual invoice amount and will be billed directly by the third party to the client (per section VI below).

IV. Travel Expenses. Travel expenses are billed at actual cost and include air or rail travel, mileage, lodging, meals, car rental, taxi or car service, tips and other reasonable miscellaneous costs associated with travel. Corporate and/or negotiated discounted rates are passed on to the client. Certain retrospective rebates may not be passed along.

V. Postage and Courier Services. Outside messenger and express courier services are charged at the actual vendor invoice amount. The Firm negotiates, uses, and passes along volume discount rates whenever practicable. Where the Firm uses in-house messengers, there is a standard transaction charge.

VI. Direct Payment by Clients of Other Disbursements. Major disbursements incurred in connection with a matter will be paid directly by the client. Examples of such major disbursements that clients will pay directly include:

Professional Fees (including disbursements for local counsel, accountants, witnesses and other professionals)

Filing/Court Fees (including disbursements for agency fees for filing documents, standard witness fees, juror fees)

DLA Piper LLP (US)

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

19-22911-rdd Doc 215-2 Filed 09/26/19 Entered 09/26/19 12:22:24 Exhibit
Engagement Agreement Pg 9 of 14

Transcription Fees (including disbursements for outside transcribing agencies and deposition/courtroom stenographer transcripts)

Other Disbursements (including third party services, e.g. hosting of client data, litigation support/eDiscovery services, etc., and other required out-of-pocket expenses incurred for the successful completion of the matter)

TERMS OF SERVICE

1. INTRODUCTION

These Terms of Service set forth the terms and conditions under which DLA Piper LLP (US) ("the Firm") will act as your counsel for all existing and future matters (collectively, the "Engagement").

The Firm has issued or will issue an engagement letter, setting forth the scope of the representation, the fee agreement, and other matter-specific terms ("Engagement Letter"). These Terms of Service should be read and understood in conjunction with the Engagement Letter. The Terms of Service and Engagement Letter are collectively referred to as "the Engagement Terms." Where there is any inconsistency between these Terms of Service and the Engagement Letter, the latter will control.

The Terms of Service supersede all prior agreements between you and the Firm with respect to the Engagement. The Terms of Service can only be altered or amended by a writing signed by both you and the Firm.

The words "you" and "your" refer to the client(s) specified in the relevant engagement letter. The words "we," "us" and "our" refer to the Firm.

2. CLIENT(S) REPRESENTED

You agree and acknowledge that the Firm's representation of you does not create an attorney-client relationship with any other entity or person, including without limitation, your corporate parents, subsidiaries, affiliates, other entities owned, in whole or in part by you, entities that hold direct or indirect interests in you, or any of your directors, officers, stockholders, employees, or agents, unless such entities or persons are specifically named in the Engagement Letter.

DLA Piper LLP (US)

In representing corporations, we may provide information or advice to directors, officers, or employees in their corporate capacities. The provision of such information or advice does not create an attorney-client relationship between us and the individual(s) other than in their corporate capacities.

In representing partnerships, we may provide information or advice to partners, officers or employees in their capacities as your representatives. The provision of such information or advice does not create an attorney-client relationship between us and the individual(s) other than in their representative capacities.

In representing limited liability companies, we may provide information or advice to members, officers or employees in their capacities as your representatives. The provision of such information or advice does not create an attorney-client relationship between us and the individual(s) other than in their representative capacities.

In the event that you are acquired or are otherwise subject to a change in control (including by a person or group becoming a controlling affiliate of yours) after the inception of the Engagement, it is understood that the Firm does not represent the acquiring entity or such controlling affiliate or establish an attorney-client relationship with such entities or affiliates.

The Firm's representation of an association or trade group does not create an attorney-client relationship with any of the association or trade group's constituents, members, affiliates or participants individually.

3 . COUNSEL GUIDELINES

You agree and acknowledge that the Engagement Terms shall control over terms contained in your outside counsel guidelines or similar instructions supplied by you at any time.

4 . CONFLICTS OF INTEREST

The Firm and its affiliated entities represent clients in a broad range of industries and in a wide variety of legal matters, nationally and internationally. Absent an effective conflict of interest waiver, conflicts of interest could arise that could deprive you or other clients of the right to select the Firm as their counsel, and preclude us from representing you or other clients in ongoing or future matters. In undertaking the Engagement, the Firm wants to be fair to you and to our other clients. Accordingly, you acknowledge and agree that the Firm and its affiliated entities may, now or in the future, represent other persons or entities on matters adverse to you or any of your current or future affiliates, including, without limitation, in commercial transactions, auctions, mergers and acquisitions, intellectual property matters, restructuring or bankruptcy matters, litigation, arbitration or other dispute resolution procedure, other than those for which the Firm had been or is then engaged by you. Such matters shall be referred to as "Allowed Adverse Representation." You understand that the foregoing examples are illustrative, not exhaustive.

You agree that you will not, for yourself, or any other entity or person, assert the Firm's representation of you or any of its current or future affiliates as a basis for disqualifying the Firm from representing another party in an Allowed Adverse Representation. You further agree that an Allowed Adverse Representation does not breach any duty that the Firm owes to you or any of your affiliates. You may consult

with independent counsel regarding this section before agreeing to it.

You agree that this section does not expand the scope of the Engagement to encompass your affiliates unless expressly agreed by the Firm.

5 . CONFIDENTIALITY

The Firm has a professional obligation not to disclose your confidential information or to use it for another party's benefit without your consent. These obligations are subject to certain exceptions, including laws and regulations relating to money laundering and terrorist financing. Under certain circumstances, the Firm may be obligated to disclose information to governmental authorities, and we may be prohibited from informing you that disclosure has been made or the reasons for such disclosure. We may have to cease work for you for a period of time and not be able to inform you of the reason. Provided that the Firm acts consistent with its duty of confidentiality, subject to the exceptions noted in this section and those set forth in the applicable Rules of Professional Conduct, you agree that you shall not assert that the Firm's possession of such confidential information is a basis for disqualifying the Firm from representing another of its clients in any matter in which you have an interest, or that it constitutes a breach of any duty owed by the Firm, even though the information may relate to a matter in which the Firm is representing another client or may be known to someone at the Firm working on the matter.

If the Firm receives a subpoena or request for information that is within our custody or control, or the custody or control of our agents or representatives, we will, to the extent permitted by applicable law, advise you before responding so that you have the opportunity to intervene or assert any objections. Should you object to the production of such information, the Firm may

provide such information only to the extent authorized by you or required by a court or other governmental body of competent jurisdiction. You agree to pay the Firm for services rendered and charges and disbursements incurred in responding to any such request for information at the Firm's customary billing rates and pursuant to the Firm's charges and disbursements policies.

You consent and agree that the Firm may disclose the fact of the Engagement and related general information to the extent that such disclosure does not convey any confidential and or non-public information and is not adverse to your interests.

6 . ARBITRATION OF DISPUTES

Any dispute or claim between you and the Firm arising out of or relating to the Engagement Terms or their breach, including, without limitation, claims for breach of contract, professional negligence, breach of fiduciary duty, misrepresentation, fraud and disputes regarding attorney fees and/or costs charged under this Agreement (except to the extent provided below) shall be submitted to binding arbitration before the American Arbitration Association, and subject to the Commercial Arbitration Rules. This provision shall not apply to any ethics or disciplinary proceedings against the Firm. The parties shall bear their own legal fees and costs for all claims.

The existence and content of the arbitration proceedings, as well as any arbitration rulings and awards, shall be maintained by the parties as strictly confidential, except (i) to the extent that disclosure is required by a court or other governmental body of competent jurisdiction; (ii) to the extent necessary to confirm, vacate, challenge, or enforce the award in bona fide legal proceedings before a court of competent jurisdiction or other judicial authority; (iii) for

disclosure in confidence to the parties' respective attorneys, tax advisors, insurance agents or companies, senior management, and other agents or employees on a need to know basis; or (iv) with the written consent of all parties.

You acknowledge that by agreeing to this Arbitration provision, you are giving up the right to litigate claims against the Firm, and important rights that would be available in litigation, including the right to trial by judge or jury, to extensive discovery and to appeal an adverse decision. You acknowledge that you have read and understand this arbitration provision, and that you voluntarily agree to binding arbitration.

NOTE: You are entitled to consult an independent lawyer to review this arbitration provision before agreeing to it. By accepting these Engagement Terms, you acknowledge that you have consulted with independent counsel, or if not, that you had the opportunity to do so.

7 . CLIENT IDENTIFICATION

Many jurisdictions have adopted or are in the process of changing or creating anti-money laundering, counter-terrorist financing, embargo, trade sanctions or similar policies or laws. As part of the Firm's responsibility for compliance with such laws, rules, regulations or policies, the Firm is obliged to take detailed steps to verify the identity of our clients and sources of payment. Accordingly, prior to commencement of work, the Firm will have already requested, or will be requesting shortly, that you provide us with required identification documents. A delay or failure to provide information required for verification purposes may prevent us from commencing or require us to suspend work on the matter. It is also necessary for us to reserve the right to request additional information believed necessary, advisable or appropriate to

verify identity and/or to ensure the Firm's compliance with applicable laws, rules, regulations, best practices and anti-money laundering matters from time to time.

8 . DATA TRANSFER CONSENT

Due to legal obligations applicable to the Firm or our affiliated offices, and to efficiently maintain information provided to us, the Firm may transfer some or all of any personal or other data and information ("Data") that you provide to the Firm to one or more DLA Piper offices in other countries that may not be subject to data protection laws similar to those in the jurisdiction in which the Data is first received. By signing this letter, you give us specific consent to obtain and transfer such Data, and confirm that you have obtained and grant us all required consents to allow the Firm to do so.

9 . ONLINE COLLABORATION PLATFORMS

With your consent, the Firm may employ web-based tools (eRooms) and cloud-based collaboration platforms (HighQ) to facilitate sharing of electronic data with you and others, by invitation. If you consent to the use of an online collaboration platform, the Firm will charge you a one-time fee of \$400 for administration and storage.

10 . TERMINATION

Either of us may terminate the Firm's representation of you in a particular ongoing matter, or in the Engagement, at any time. Unless otherwise terminated by you or the Firm, our representation of you with respect to a particular matter will terminate upon conclusion of the Firm's active involvement in the matter (even if the Firm continues active involvement in other matters on your behalf). Upon termination, we will have no further duty to inform you of future developments or changes in law as may

be relevant to such matter. Further, unless you and the Firm mutually agree in writing to the contrary, we will have no obligation to monitor renewal, expiration, or notice dates or similar deadlines which may arise from the matters for which we had been retained.

If, at any time, our engagement is limited to a specific matter, and at the time such matter is completed, we are not representing you in any other matters, our attorney-client relationship will be deemed terminated whether or not we send you a letter to confirm such termination. Thereafter, if you and the Firm mutually agree to engage on a matter or matters, these Terms of Service (and any applicable Engagement Letter) would then become effective.

If permission for withdrawal is required by a court, we shall apply promptly for such permission and termination shall coincide with the court order for withdrawal.

11 . CLIENT FILES AND RECORDS RETENTION/DISPOSAL

The Firm maintains files relating to the matter(s) in which we represent you. These files may contain materials received from you. They may also include other materials not received from you, but which are reasonably necessary to our representation of you. Such other materials may include, for instance, correspondence with you or third-parties on your behalf, executed copies of agreements, filings, pleadings, deposition transcripts, and closing binders. Together, these materials are your Client File. The Client File is your property. The Client File does not include materials or documents that include our attorney work product, mental impressions, notes, drafts, or internal firm correspondence or emails (together, "Work Product"). You agree that Work Product shall be and remain our property and shall not be considered part of your Client File.

At the conclusion of a matter (which is defined as the time that our work on any matter subject to the Engagement Terms has been completed), you have the right to take possession of your Client File (not including Work Product) or direct us to dispose of the files. We will be entitled to make and retain copies of all or part of the Client File, at our own discretion and expense.

Furthermore, at the conclusion of a matter, we may request that you consent to the return of documents, data or other property received from you or from third parties. You agree to cooperate in the return by the Firm of any such materials.

If you do not take possession of or direct us to dispose of the Client File at the conclusion of a matter, the Firm will store the Client File at its expense for a period of seven (7) years following the conclusion of the matter. You agree that we may dispose of the Client File following the end of that seven (7) year period, consistent with maintaining confidentiality, without further notice or obligation to you. Our retention of the Client File shall not constitute or be deemed to indicate the existence of an ongoing attorney-client relationship.

12 . CONSULTATION WITH COUNSEL

We may consult with our own counsel, whether outside counsel or attorneys inside the Firm who do not perform work for you on the matter, regarding our representation of you. These consultations may be on our own behalf and will not be charged to you. To the extent that we are addressing the Firm's own rights or responsibilities regarding the matter, a conflict of interest might be deemed to exist between the Firm and you. You hereby consent to such consultation, and waive any claim of conflict of interest based on such consultation or resulting communications that could otherwise disqualify us from continuing to represent you or from acting on our own behalf, even if doing so might

be deemed adverse to your interests. You acknowledge that the communications related to the consultations are protected by the Firm's own attorney-client privilege from disclosure to you.

13 . SEVERABILITY

If any provision of the Engagement Terms is held invalid or unenforceable by any court or arbitrator of competent jurisdiction, the other provisions of the Engagement Terms shall remain in full force and effect. Any provision of the Engagement Terms held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable. Our waiver of any of the Engagement Terms shall not be deemed a further or continuing waiver of such term or any other term, unless specifically stated.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re :
SEARS HOLDINGS CORPORATION, *et al.*, : Chapter 11
: Case No. 18-23538 (RDD)
: (Jointly Administered)
Debtors.¹ :
-----X

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN
POST-PETITION FINANCING, (B) GRANT SENIOR SECURED PRIMING LIENS
AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, AND (C) UTILIZE
CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION TO THE
PREPETITION SECURED PARTIES; (III) MODIFYING THE AUTOMATIC STAY;
AND (IV) GRANTING RELATED RELIEF**

Upon the motion (the "Motion") of Sears Holdings Corporation ("Holdings") and
its affiliated debtors, as debtors and debtors-in-possession (collectively, the "Debtors") in the
above-captioned chapter 11 cases (the "Chapter 11 Cases") pending in the United States
Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking entry

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); and Sears Brands Management Corporation (5365). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

of an interim order (the "Interim Order") and a final order (this "Final Order" and, together with the Interim Order, the "DIP Orders") providing for, among other things, the following relief:

- (i) authorizing Sears Roebuck Acceptance Corp., a Delaware corporation, ("SRAC"), and Kmart Corporation, a Michigan corporation ("Kmart"), and together with SRAC, the "DIP ABL Borrowers") to borrow, and each of the other Loan Parties (as defined in the DIP ABL Credit Agreement), to guarantee (in such capacity and together with the DIP ABL Borrowers, the "DIP ABL Loan Parties"), a senior secured superpriority priming non-amortizing debtor-in-possession asset-based credit facility (the "DIP ABL Facility"), in an aggregate principal amount of up to \$1,830,378,380 on the terms and conditions set forth, initially, in the DIP ABL Term Sheet, an execution copy of which is attached to the Motion as Exhibit B (including any subsequent amendments thereto, the "DIP ABL Term Sheet") and, from and after the Final Closing Date (as defined in the DIP ABL Term Sheet), the Superpriority Senior Secured Debtor-In-Possession Asset-Based Credit Agreement (the "DIP ABL Credit Agreement"), among the Debtors, Bank of America, N.A., as administrative agent (in such capacity, the "DIP ABL Administrative Agent"), Bank of America, N.A. and Wells Fargo Bank, National Association, each as a co-collateral agent (each in such capacity, a "DIP ABL Co-Collateral Agent"), and together with the DIP ABL Administrative Agent, the "DIP ABL Agents"), the revolving lenders from time to time party thereto (the "DIP ABL Revolving Lenders"), and the term lenders from time to time party thereto (the "DIP ABL Term Lenders"), and together with the DIP ABL Revolving Lenders, the "DIP ABL Lenders" and, together with the DIP ABL Agents and the DIP ABL Cash Management/Bank Product Providers, the "DIP ABL Credit Parties") attached hereto as Exhibit A, allocated and made available to the DIP ABL Borrowers as follows:
 - (a) upon entry of the Interim Order, subject to the terms and conditions set forth in the DIP ABL Term Sheet and the Interim Order, (x) an asset-based revolving credit facility with aggregate initial commitments of \$188,110,759 (such commitments, the "Incremental DIP ABL Revolving Commitments," the advances made pursuant thereto, the "Incremental DIP ABL Revolving Advances," and such facility, the "Incremental DIP ABL Revolver"), including (i) a \$50 million letter of credit subfacility made available upon entry of the Interim Order (the "Incremental DIP ABL L/C Subfacility"), and (ii) a \$25 million discretionary swingline subfacility (the "Incremental DIP ABL Swingline Subfacility"), the Incremental DIP ABL Revolving Advances, together with the obligations under the Incremental DIP ABL L/C Subfacility and the Incremental DIP ABL Swingline Subfacility, the "Incremental DIP ABL Revolving Extensions of Credit"), and (y) an asset-based term loan facility in an aggregate initial principal amount of \$111,889,241 (the "Incremental DIP ABL Term Loan," and together with the Incremental DIP ABL Revolving Extensions of Credit, the "Incremental DIP ABL Obligations");

- (b) upon entry of this Final Order, subject to the terms and conditions set forth in the DIP ABL Credit Agreement, the DIP ABL Loan Documents (as defined below), and this Final Order, a roll up of (i) all of the Prepetition ABL Revolving Extensions of Credit (as defined below) beneficially owned by the DIP ABL Revolving Lenders that have agreed to participate in the Incremental DIP ABL Revolver (together with their permitted assignees, the "Roll Up DIP ABL Revolving Lenders"), at 11:59 p.m. (prevailing Eastern time) on November 5, 2018 (the "Roll Up DIP ABL Revolving Extensions of Credit"), and together with the Incremental DIP ABL Revolving Extensions of Credit, the "DIP ABL Revolving Extensions of Credit"; and such loans, the "Roll Up DIP ABL Revolving Advances", and together with the Incremental DIP ABL Revolving Advances, the "DIP ABL Revolving Advances", the commitments to make such DIP ABL Revolving Advances, the "DIP ABL Revolving Commitments"), which, with respect to participations in prepetition letters of credit issued under the Prepetition ABL Credit Agreement, such participations shall roll into a letter of credit subfacility (the Incremental DIP ABL L/C Subfacility, together with such rolled up participations, the "DIP ABL L/C Subfacility") and any prepetition letters of credit shall be deemed issued under the DIP ABL L/C Subfacility, (ii) all of the Prepetition ABL Term Loans (as defined below) beneficially owned by (a) the DIP ABL Term Lenders that have agreed to participate in the Incremental DIP ABL Term Loan and make such loan on the Effective Date (as defined in the DIP ABL Credit Agreement) and (b) the Sears Holdings Pension Trust (together with their permitted assignees, the "Roll Up DIP ABL Term Lenders"), and together with the Roll Up DIP ABL Revolving Lenders, the "Roll Up DIP ABL Lenders"), in each case, at 11:59 p.m. (prevailing Eastern time) on November 5, 2018 (the "Roll Up DIP ABL Term Loans"), and together with the Incremental DIP ABL Term Loan, the "DIP ABL Term Loans" and the Roll Up DIP ABL Term Loans together with the Roll Up DIP ABL Revolving Extensions of Credit, the "Roll Up DIP ABL Obligations," and such transactions, the "ABL Roll Up"), and (iii) bank products (other than those under the Prepetition LC Facility Agreement (as defined below)) and cash management obligations entered into with any Prepetition ABL Cash Management/Bank Product Provider (as defined below) (the "Roll Up DIP ABL Cash Management/Bank Product Obligations") outstanding under the Prepetition ABL Credit Agreement (the Roll Up DIP ABL Cash Management/Bank Product Obligations, collectively with Bank Products (as defined in the DIP ABL Credit Agreement) and Cash Management Obligations (as defined in the DIP ABL Credit Agreement, the "DIP ABL Cash Management/Bank Product Obligations") entered into with any DIP ABL Lender, any DIP ABL Agent or any of their respective affiliates as of the Petition Date or at the time of entering into such arrangements (each, a "DIP ABL Cash Management/Bank Product Provider"), the Roll Up DIP ABL Obligations, the Incremental DIP ABL Obligations, the DIP ABL

Cash Management/Bank Product Obligations and all other obligations under the DIP ABL Loan Documents, the "DIP ABL Secured Obligations");

- (ii) authorizing the DIP ABL Loan Parties to execute, deliver and abide by (w) the DIP ABL Term Sheet pending entry of this Final Order, (x) the DIP ABL Credit Agreement upon entry of this Final Order, (y) the DIP Intercreditor Agreement (as defined below), and (z) any other agreements, instruments, pledge agreements, guarantees, control agreements and other loan documents related to any of the foregoing (including any security agreements, intellectual property security agreements, notes, blocked account agreements, deposit account control agreements, securities account control agreements, credit card acknowledgements, credit card agreements, collateral access agreements, landlord agreements, warehouse agreements, bailee agreements, carrier agency agreements, customs broker agency agreements, subordination agreements (including any intercompany subordination agreements), and freight forwarder agreements, and all Uniform Commercial Code filings and all filings with the United States Patent and Trademark Office or the United States Copyright Office with respect to the recordation of an interest in the intellectual property of the Debtors) (each of the foregoing, as amended, restated, supplemented, waived, and/or modified from time to time, and collectively, with the DIP ABL Term Sheet (prior to the date of the Final Order) and the DIP ABL Credit Agreement (after entry of this Final Order), the "DIP ABL Loan Documents"), and to perform such other acts as may be necessary or desirable in connection with the DIP ABL Loan Documents;
- (iii) authorizing the DIP ABL Administrative Agent to terminate any of its obligations under the DIP ABL Loan Documents upon the occurrence and continuance of a Termination Event (as defined below), which includes an Event of Default (as defined in the DIP ABL Loan Documents);
- (iv) as collateral security for all DIP ABL Secured Obligations, granting to the DIP ABL Control Co-Collateral Agent, for itself and for the benefit of all DIP ABL Credit Parties, in accordance with the relative priorities set forth in the DIP Orders and in that certain DIP Intercreditor Agreement (the "DIP Intercreditor Agreement"), by and among the DIP ABL Agents and the Junior DIP Agent (as defined below), and in each case subject to the Carve-Out (as defined below):
 - (a) pursuant to sections 364(c)(1), 503(b), and 507(a)(2) of title 11 of the United States Code (the "Bankruptcy Code"), joint and several superpriority allowed administrative priority expense claims in each of the DIP ABL Loan Parties' Chapter 11 Cases and any Successor Cases (as defined below); *provided, however*, that such claims shall be of equal priority to the Junior DIP Superpriority Claims granted to the Junior DIP Agent under the Junior DIP Order;
 - (b) pursuant to section 364(c)(2) of the Bankruptcy Code, an automatically perfected first priority security interest in and lien on all property of the DIP ABL Loan Parties' estates (including proceeds thereof) that is not

subject to a valid and perfected lien on the Petition Date and, upon entry of this Final Order, the Avoidance Action Proceeds (as defined below), subject to Senior Permitted Liens (as defined below);

- (c) pursuant to section 364(c)(3) of the Bankruptcy Code, an automatically perfected junior security interest in and lien on all property (including all proceeds thereof) of the DIP ABL Loan Parties' estates (other than Prepetition ABL Collateral (as defined below)) that is subject to valid and perfected security interests in and liens on in favor of third parties existing on the Petition Date (as defined below), subject to (i) such valid and perfected security interests in and liens on such property in favor of such third parties as of the Petition Date, and (ii) Senior Permitted Liens (as defined below); and
- (d) pursuant to section 364(d) of the Bankruptcy Code, a perfected first priority priming security interest and lien on the Prepetition ABL Collateral, subject only to any "Senior Permitted Liens" (as defined in the DIP ABL Credit Agreement) (the "Senior Permitted Liens");
- (v) authorizing and directing the DIP ABL Loan Parties to pay the principal, interest, fees, expenses and other amounts payable under the DIP ABL Loan Documents as they are earned, due and payable in accordance with the terms of the DIP ABL Loan Documents and the DIP Orders;
- (vi) authorizing the DIP ABL Loan Parties, solely in accordance with the Approved Budget (as defined below), the DIP ABL Loan Documents and the DIP Orders, to use the Prepetition ABL Collateral, including "Cash Collateral" (as defined in section 363 of the Bankruptcy Code) of the Prepetition Credit Parties;
- (vii) granting adequate protection to the Prepetition Credit Parties (as defined below) for any diminution in value resulting from the imposition of the automatic stay, the DIP ABL Loan Parties' use, sale, or lease of the Prepetition Collateral and the priming of their respective liens and interests in the Prepetition Collateral (including by the Carve-Out);
- (viii) solely upon entry of this Final Order, the waiver by the DIP ABL Loan Parties of (a) any right to surcharge the DIP ABL Collateral and the Prepetition ABL Collateral pursuant to section 506(c) of the Bankruptcy Code, (b) any rights under the "equities of the case" exception in section 552(b) of the Bankruptcy Code, and (c) the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP ABL Collateral and Prepetition ABL Collateral;
- (ix) vacating and modifying the automatic stay under section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms of the DIP Orders and the DIP ABL Loan Documents; and
- (x) pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), requesting an initial hearing on the Motion be held before the Bankruptcy Court to consider entry of

the Interim Order (the "Interim Hearing") to authorize on an interim basis (a) borrowing under the DIP ABL Loan Documents in an aggregate amount of up to \$300 million and (b) the use of the Prepetition ABL Collateral, including Cash Collateral in accordance with the Approved Budget; and

- (xi) scheduling a final hearing (the "Final Hearing") to approve the Motion and consider entry of the Final Order.

The Interim Hearing having been held before the Bankruptcy Court on October 15, 2018 and the Final Hearing having been held before the Bankruptcy Court on November 27, 2018, each pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), and upon the record made by the DIP ABL Loan Parties at the Interim Hearing and the Final Hearing and the representations made thereat; and after due deliberation and consideration and sufficient cause appearing therefor:

THE BANKRUPTCY COURT HEREBY FINDS AND CONCLUDES AS FOLLOWS:²

A. *Petition Date.* On October 15, 2018 (the "Petition Date"), each of the Debtors except for SHC Licensed Business LLC and SHC Promotions LLC filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court. On October 18, 2018, SHC Licensed Business LLC filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court. On October 22, 2018, SHC Promotions LLC filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court.

B. *Joint Administration.* On the Petition Date, the Bankruptcy Court entered an order approving the joint administration of the Chapter 11 Cases. On November 6, 2018, the Bankruptcy Court entered an order approving the joint administration of the chapter 11 cases of

² The findings and conclusions set forth herein constitute the Bankruptcy Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052. To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are adopted as such.

SHC Licensed Business LLC and SHC Promotions LLC with the other Debtors' chapter 11 cases.

C. *Debtors in Possession.* The Debtors are continuing in the management and operation of their businesses and properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

D. *Official Committees.* No trustee or examiner has been appointed in these Chapter 11 Cases as of the date of this Final Order. The Official Committee of Unsecured Creditors (the "Creditors' Committee") was appointed in these Chapter 11 Cases on October 24, 2018 [Docket No. 276].

E. *Jurisdiction and Venue.* The Bankruptcy Court has jurisdiction over these proceedings pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Bankruptcy Court may enter a final order consistent with Article III of the United States Constitution. Venue for the Chapter 11 Cases is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief set forth herein are sections 105, 361, 362, 363(c), 363(e), 364(c), 364(d), 364(e), 503, 506 and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014, and Rule 4001-2 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Bankruptcy Rules").

F. *Notice.* Adequate and sufficient notice of the Motion has been provided in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules, and no other or further notice of the Motion or the entry of the Interim Order or this Final Order shall be required.

G. *Junior DIP Facility.* Substantially concurrently herewith, the Bankruptcy Court entered the *Interim Junior DIP Order (I) Authorizing The Debtors To (A) Obtain Post-Petition*

Financing And (B) Grant Secured Priming Liens And Superpriority Administrative Expense Claims; (II) Modifying The Automatic Stay; (III) Scheduling Final Hearing; And (IV) Granting Related Relief (the "Interim Junior DIP Order," and any order approving the Debtors' entry into the Junior DIP Facility on a final basis, the "Final Junior DIP Order," and together with the Interim Junior DIP Order, the "Junior DIP Order"). Pursuant to the Interim Junior DIP Order, the DIP ABL Loan Parties have been authorized, on an interim basis, to enter into Junior DIP Credit Agreement (as defined in the Interim Junior DIP Order, the "Junior DIP Credit Agreement," and such credit facility, the "Junior DIP Facility"), among the Junior DIP Loan Parties (as defined in the Interim Junior DIP Order, the "Junior DIP Loan Parties"), the Junior DIP Lenders (as defined in the Interim Junior DIP Order, the "Junior DIP Lenders") and Cantor Fitzgerald Securities, as administrative agent (as defined in the Interim Junior DIP Order, the "Junior DIP Agent" and together with the Junior DIP Lenders and the other "Credit Parties" as defined in the Junior DIP Credit Agreement, the "Junior DIP Credit Parties"). Pursuant to the Junior DIP Credit Agreement and the other "Loan Documents" (as defined in the Junior DIP Credit Agreement, the "Junior DIP Loan Documents"), in respect of the "Obligations" (as defined in the Junior DIP Credit Agreement, the "Junior DIP Secured Obligations"), the Junior DIP Loan Parties will grant to the Junior DIP Credit Parties certain superpriority claims (the "Junior DIP Superpriority Claims") and liens (the "Junior DIP Liens") as described in the Interim Junior DIP Order, subject in all respects to this Final Order.

H. Debtors' Stipulations. After consultation with their attorneys and financial advisors, the Debtors, on their behalf and on behalf of their estates, admit, acknowledge, agree, and stipulate to the following (collectively, the "Debtors' Stipulations"), subject to the provisions of paragraphs 41 and 42 and subsection (g) below:

a. ***Prepetition ABL Credit Facilities.*** Pursuant to the Third Amended and Restated Credit Agreement, dated as of July 21, 2015 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Prepetition ABL Credit Agreement" and, together with all Loan Documents (as defined in the Prepetition ABL Credit Agreement), each as has been or may be amended, restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date, the "Prepetition ABL Loan Documents"), by and among (i) SRAC and Kmart, as borrowers (the "Prepetition ABL Borrowers"), (ii) Holdings, as a guarantor (Holdings, together with the "Subsidiary Guarantors" (as defined in the Prepetition ABL Credit Agreement), the "Prepetition ABL Guarantors" and, together with the Prepetition ABL Borrowers, the "Prepetition ABL Loan Parties"), (iii) the banks, financial institutions and other institutional lenders from time to time party thereto, as lenders (collectively, the "Prepetition ABL Lenders"), (iv) the "Issuing Lenders" (as defined in the Prepetition ABL Credit Agreement) from time to time party thereto (the "Prepetition ABL Issuing Lenders"), (v) Bank of America, N.A., as administrative agent (in such capacity, the "Prepetition ABL Administrative Agent"), as a co-collateral agent, and as swingline lender, (vi) Wells Fargo Bank, National Association, as a co-collateral agent (in such capacity, together with Bank of America, N.A. in such capacity, the "Prepetition ABL Co-Collateral Agents", and together with the Prepetition ABL Administrative Agent, the "Prepetition ABL Agents", and the Prepetition ABL Agents together with the Prepetition ABL Lenders, the swingline lender the Prepetition ABL Issuing Lenders, and the Prepetition ABL Cash Management/Bank Product Providers (as defined below) and the Prepetition LC Facility Credit Parties (as defined below), the "Prepetition ABL Credit Parties"), and (vii) the other parties from time to time party thereto, the Prepetition ABL Credit Parties provided the Prepetition ABL Loan Parties with a \$1.5 billion

asset-based revolving credit facility including a \$1.0 billion letter of credit subfacility (the "Prepetition ABL Revolving Facility"), a term loan facility in an aggregate original principal amount of \$1 billion (the "Prepetition ABL Term Loan Facility"), a term loan facility in an aggregate original principal amount of \$750 million (the "Prepetition ABL 2016 Term Loan Facility"), and a "first-in, last-out" facility in an aggregate original principal amount of \$125 million (the "Prepetition ABL 2018 FILO Facility," and the lenders under the Prepetition ABL 2018 FILO Facility, the "2018 FILO Lenders," and the Prepetition ABL 2018 FILO Facility, together with the Prepetition ABL Revolving Facility, the Prepetition ABL Term Loan Facility, and the Prepetition ABL 2016 Term Loan Facility, the "Prepetition ABL Facilities").

b. ***Prepetition ABL Obligations.*** As of the Petition Date, the aggregate principal amount outstanding under the Prepetition ABL Facilities was \$1,530,378,380, comprised of (i) \$836,034,649 outstanding amount of all Advances, including Swingline Advances under, and each as defined in, the Prepetition ABL Revolving Facility (the "Prepetition ABL Revolving Advances"); (ii) \$123,567,481 outstanding amount of all L/C Obligations under, and as defined in, the Prepetition ABL Revolving Facility (together with the Prepetition ABL Revolving Advances, the "Prepetition ABL Revolving Extensions of Credit"); (iii) \$0 outstanding principal amount of term loans under the Prepetition ABL Term Loan Facility; (iv) \$570,776,250 outstanding principal amount of term loans under the Prepetition ABL 2016 Term Loan Facility (the "Prepetition ABL Term Loans"); and (v) \$125,000,000 outstanding principal amount of the Prepetition ABL 2018 FILO Facility; and together with accrued and unpaid interest, outstanding letters of credit and bankers' acceptances, any fees, expenses and disbursements (including attorneys' fees, accountants' fees, auditor fees, appraisers' fees and financial advisors' fees, and related expenses and disbursements), indemnification

obligations, guarantee obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of any of the Prepetition ABL Borrowers' or the Prepetition ABL Guarantors' obligations pursuant to, or secured by, the Prepetition ABL Loan Documents, cash management services and bank products (the "Prepetition ABL Cash Management/Bank Product Obligations") entered into with any Prepetition ABL Lender, any Prepetition ABL Agent or any of their respective affiliates (each, a "Prepetition ABL Cash Management/Bank Product Provider"), including all obligations under that certain Letter of Credit and Reimbursement Agreement, dated as of December 28, 2016 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Prepetition LC Facility Agreement" and which constitutes a Prepetition ABL Loan Document), among Holdings, the Prepetition ABL Borrowers, JPP, LLC, JPP II, LLC, Crescent 1, L.P., Canary SC Fund, L.P., CYR Fund, L.P., CMH VI, L.P., and Cyrus Heartland, L.P., as L/C lenders (the "Prepetition LC Lenders"), and Citibank, N.A., as administrative agent and as issuing bank (in such capacity, the "Prepetition LC Facility Administrative Agent," and together with the Prepetition LC Lenders, the "Prepetition LC Facility Credit Parties"), under which, as of the Petition Date, \$271 million of letters of credit are outstanding thereunder, and which obligations constitute Bank Products and an "Other LC Facility" under and as defined in the Prepetition ABL Credit Agreement, and including all "Obligations" as defined in the Prepetition ABL Credit Agreement, and all other amounts that may become allowed or allowable under section 506(b) of the Bankruptcy Code, including interest, fees, prepayment premiums, costs and other charges, (the "Prepetition ABL Obligations").

c. ***Prepetition ABL Liens and Prepetition ABL Collateral.*** Pursuant to the Prepetition ABL Credit Agreement and the other applicable Prepetition ABL Loan Documents, each of the Prepetition ABL Guarantors unconditionally guaranteed, on a joint and several basis, the punctual and complete performance, payment and satisfaction when due and at all times thereafter of all of the Prepetition ABL Obligations. Pursuant to the Prepetition ABL Credit Agreement and the other applicable Prepetition ABL Loan Documents, the Prepetition ABL Borrowers and the Prepetition ABL Guarantors granted to Bank of America, N. A., in its capacity as a Prepetition ABL Co-Collateral Agent and as agent for the other Prepetition ABL Co-Collateral Agent (in such capacity, the "Prepetition ABL Control Co-Collateral Agent"), for the benefit of itself and all of the other Prepetition ABL Credit Parties, a first priority security interest in and continuing lien on (the "Prepetition ABL Liens") all of the collateral identified in the Prepetition ABL Loan Documents, including, but not limited to, inventory, credit card accounts receivables, pharmacy receivables, prescription lists, deposit accounts, cash and cash equivalents, and proceeds, insurance claims and supporting obligations of the foregoing, together with Cash Collateral, in all cases whether then owned or existing or thereafter acquired (including any such property acquired after the Petition Date) and wherever located (but excluding, for the avoidance of doubt, any Cash Collateral posted to the Prepetition LC Facility Administrative Agent, in its capacity as issuing bank, by the Prepetition LC Lenders under the Prepetition LC Facility Agreement) (collectively, the "Prepetition ABL Collateral").

d. ***Agreement Among Lenders.*** JPP, LLC, JPP II, LLC, GACP II, L.P., and Benefit Street 2018 LLC, as 2018 FILO lenders, ESL Investments, Inc., Wells Fargo Bank, National Association, as a Prepetition ABL Co-Collateral agent, and Bank of America, N.A., as Prepetition ABL Administrative Agent and as a Prepetition ABL Co-Collateral Agent, entered

into an Agreement Among Lenders, dated as of March 21, 2018 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Agreement Among Lenders").

e. ***Validity, Perfection, and Priority of Prepetition ABL Liens and Prepetition ABL Obligations.*** The Debtors hereby further acknowledge and agree that as of the Petition Date:

- (i) The Prepetition ABL Obligations constitute legal, valid, binding, and non-avoidable obligations of the Prepetition ABL Loan Parties enforceable in accordance with the terms of the Prepetition ABL Loan Documents;
- (ii) The Prepetition ABL Liens on the Prepetition ABL Collateral are valid, binding, enforceable, non-avoidable, and properly perfected and were granted to the Prepetition ABL Control Co-Collateral Agent, for the benefit of itself and all of the other Prepetition ABL Credit Parties for fair consideration and reasonably equivalent value;
- (iii) The Prepetition ABL Liens are senior in priority over any and all other liens on the Prepetition ABL Collateral, subject only to certain liens senior by operation of law or otherwise permitted to be senior under the Prepetition ABL Loan Documents (solely to the extent any such permitted liens were valid, properly perfected, non-avoidable, and senior in priority to the Prepetition ABL Liens as of the Petition Date) (the "Permitted Prior Liens");
- (iv) No portion of the Prepetition ABL Liens, the Prepetition ABL Obligations or any payments made to any Prepetition ABL Credit Party or applied to or paid on account of the Prepetition ABL Obligations prior to the Petition Date is subject to any contest, set-off, avoidance, impairment, disallowance, recharacterization, reduction, subordination (whether equitable, contractual, or otherwise), recoupment, recovery, rejection, attack, effect, counterclaims, cross-claims, defenses, or any other challenge or claim (as defined in the Bankruptcy Code) of any kind, any cause of action or any other challenge of any nature under or pursuant to the Bankruptcy Code or any other applicable domestic or foreign law or regulation or otherwise by any person or entity;
- (v) The Debtors and their estates have no claims, objections, challenges, causes of action, and/or choses in action, including any Avoidance Actions, against any of the Prepetition ABL Credit Parties or any of their respective Representatives;
- (vi) The Debtors have, on behalf of each of their estates and any party that may try to claim by, through, or on behalf of the Debtors' estates, waived,

discharged, and released any right to challenge any of the Prepetition ABL Obligations or the validity, extent and priority of the Prepetition ABL Liens;

- (vii) The Prepetition ABL Obligations constitute allowed, secured claims within the meaning of sections 502 and 506 of the Bankruptcy Code; and
- (viii) The Debtors have been and are in default of their obligations under the Prepetition ABL Loan Documents, including as a result of the Chapter 11 Cases, and an Event of Default (as defined in the Prepetition ABL Credit Agreement) has occurred and is continuing.

f. ***Intercreditor Agreement.*** The Prepetition ABL Agents, for themselves and the other Prepetition ABL Credit Parties, and the Prepetition Second Lien Collateral Agent, for itself and the other Prepetition Second Lien Credit Parties, entered into a Second Amended and Restated Intercreditor Agreement, dated as of March 20, 2018 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Intercreditor Agreement").

g. ***Application to ESL.*** None of the Debtors' Stipulations shall apply to ESL Investments, Inc. or any of its affiliates (including any fund in which ESL or any affiliate of ESL acts as investment manager, investment advisor, general partner, managing member or in any similar capacity, the "ESL Affiliates," and together with ESL Investments, Inc., "ESL") or any other insider or such insider's affiliates (a "Non-ESL Insider"). For the avoidance of doubt, any reference to "insider" or "Non-ESL Insider" in this Final Order, shall not include the Sears Holdings Pension Plan.

I. *Certain Second Lien Debt.* The following descriptions are set forth herein for definitional purposes only:

a. ***Prepetition Second Lien 2010 Notes.*** Pursuant to the Indenture, dated as of October 12, 2010 (as amended, restated, supplemented or otherwise modified from time to

time prior to the Petition Date, the "Prepetition Second Lien 2010 Indenture" and, together with all notes, agreements and other documents executed or delivered in connection therewith, each as has been or may be amended, restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date, the "Prepetition Second Lien 2010 Indenture Documents", together with the Prepetition Second Lien 2018 Indenture Documents (as defined below), the "Prepetition Second Lien Notes Documents", by and among (i) Holdings, as issuer (in such capacity, and as issuer of the Prepetition Second Lien Convertible Notes (as defined below), the "Prepetition Second Lien Notes Issuer"), (ii) certain subsidiaries of Holdings, as guarantors (in such capacity, and as guarantors of the Prepetition Second Lien Convertible Notes (as defined below), the "Prepetition Second Lien Notes Guarantors") and (iii) Wilmington Trust, National Association, as trustee (in such capacity, the "Prepetition Second Lien 2010 Indenture Trustee") and as collateral agent (in such capacity, the "Prepetition Second Lien Collateral Agent"), the Prepetition Second Lien Notes Issuer issued 6 5/8% Senior Secured Notes (as defined in the Prepetition Second Lien 2010 Indenture), due 2018 (together with any Exchange Securities (as defined in the Prepetition Second Lien 2010 Indenture) and any Additional Notes (as defined in the Prepetition Second Lien 2010 Indenture) issued under the Prepetition Second Lien 2010 Indenture, the "Prepetition Second Lien 2010 Notes" and the holders of such Prepetition Second Lien 2010 Notes, the "Prepetition Second Lien 2010 Notes Holders") and, pursuant to an Offering Memorandum (as defined in the Prepetition Second Lien 2010 Indenture), the Prepetition Second Lien Notes Issuer exchanged some of the Prepetition Second Lien 2010 Notes for the Prepetition Second Lien Convertible Notes (as defined below).

b. ***Prepetition Second Lien 2010 Notes Obligations.*** As of the Petition Date, according to the Debtors' books and records, certain principal amounts of the obligations in

respect of the Prepetition Second Lien 2010 Notes totaling approximately \$89 million were outstanding, together with accrued and unpaid interest, costs, fees and expenses (the "Prepetition Second Lien 2010 Notes Obligations").

c. ***Prepetition Second Lien Convertible Notes.*** Pursuant to the Indenture, dated as of March 20, 2018, (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Prepetition Second Lien 2018 Indenture" and, together with all notes, agreements and other documents executed or delivered in connection therewith, each as has been or may be amended, restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date, the "Prepetition Second Lien 2018 Indenture Documents"), by and among (i) the Prepetition Second Lien Notes Issuer, (ii) the Prepetition Second Lien Notes Guarantors and (iii) Computershare Trust Company, N.A. as trustee (in such capacity, the "Prepetition Second Lien 2018 Indenture Trustee" and, together with the Prepetition Second Lien 2010 Indenture Trustee, the "Prepetition Second Lien Trustees", and, the Prepetition Second Lien Trustees, together with the Prepetition Second Lien Credit Agreement Agent and the Prepetition Second Lien Collateral Agent, the "Prepetition Second Lien Agents" and, together with the Prepetition ABL Administrative Agent, and the Prepetition LC Facility Administrative Agent, the "Prepetition Agents"), the Prepetition Second Lien Notes Issuer issued 6 5/8% Senior Secured Convertible PIK Toggle Notes due 2019 (as defined in the Prepetition Second Lien 2018 Indenture) (together with any PIK Interest Notes (as defined in the Prepetition Second Lien 2018 Indenture) (or any increase in the principal amount of a Global Note (as defined in the Prepetition Second Lien 2018 Indenture) related to PIK Interest (as defined in the Prepetition Second Lien 2018 Indenture)) and any Additional Notes (as defined in the Prepetition Second Lien 2018 Indenture) issued under the Prepetition Second Lien

2018 Indenture, the "Prepetition Second Lien Convertible Notes" and the holders of such Prepetition Second Lien Convertible Notes, the "Prepetition Second Lien Convertible Notes Holders" and, together with the Prepetition Second Lien 2010 Notes Holders, the "Prepetition Second Lien Notes Holders").

d. ***Prepetition Second Lien Convertible Notes Obligations.*** As of the Petition Date, according to the Debtors' books and records, certain principal amounts of obligations were outstanding in respect of the Prepetition Second Lien Convertible Notes, together with accrued and unpaid interest, costs, fees and expenses (the "Prepetition Second Lien Convertible Notes Obligations", together with the Prepetition Second Lien 2010 Notes Obligations, the "Prepetition Second Lien Notes Obligations").

e. ***Prepetition Second Lien Credit Agreement.*** Pursuant to the Second Lien Credit Agreement, dated as of September 1, 2016 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "Prepetition Second Lien Credit Agreement" and, together with all Loan Documents (as defined in the Prepetition Second Lien Credit Agreement) and all other agreements and documents executed or delivered in connection therewith, each as has been or may be amended, restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date, the "Prepetition Second Lien Credit Agreement Documents"), by and among (i) Sears Roebuck Acceptance Corp. and Kmart Corporation, as borrowers (the "Prepetition Second Lien Credit Agreement Borrowers"), (ii) Holdings and the other Guarantors party thereto (as defined in the Prepetition Second Lien Credit Agreement) (the "Prepetition Second Lien Credit Agreement Guarantors" and, together with the Prepetition Second Lien Credit Agreement Borrowers, the "Prepetition Second Lien Credit Agreement Loan Parties", and the Prepetition Second Lien Credit Agreement Loan Parties,

together with the Prepetition Second Lien Notes Issuer and the Prepetition Second Lien Notes Guarantors, the "Prepetition Second Lien Loan Parties"), (iii) the lenders from time to time party thereto (collectively, the "Prepetition Second Lien Credit Agreement Lenders"), (iv) JPP, LLC, as administrative agent and collateral administrator (in such capacities, the "Prepetition Second Lien Credit Agreement Agent"), together with the Prepetition Second Lien Credit Agreement Lenders and the Prepetition Second Lien Collateral Agent, the "Prepetition Second Lien Credit Agreement Credit Parties" and, the Prepetition Second Lien Credit Agreement Credit Parties, together with the Prepetition Second Lien Trustees and the Prepetition Second Lien Notes Holders, the "Prepetition Second Lien Credit Parties", and, the Prepetition Second Lien Credit Parties, together with the Prepetition ABL Credit Parties, the "Prepetition Credit Parties") and (vi) the other parties from time to time party thereto, the Prepetition Second Lien Credit Agreement Credit Parties provided the Prepetition Second Lien Credit Agreement Borrowers with a secured term loan (the "Prepetition Second Lien Credit Agreement Term Facility"), and line of credit loans (the "Prepetition Second Lien Credit Agreement Line of Credit Facility" and, collectively with the Prepetition Second Lien Credit Agreement Term Facility, the "Prepetition Second Lien Credit Agreement Facilities").

f. ***Prepetition Second Lien Credit Agreement Facilities Obligations.*** As of the Petition Date, according to the Debtors' books and records, certain principal amounts were outstanding under the Prepetition Second Lien Credit Agreement Facilities, comprised of (i) certain amounts under the Prepetition Second Lien Credit Agreement Term Facility and (ii) certain amounts under the Prepetition Second Lien Credit Agreement Line of Credit Facility, together with accrued and unpaid interest, outstanding letters of credit and bankers' acceptances, any fees, expenses and disbursements (including attorneys' fees, accountants' fees, auditor fees,

appraisers' fees and financial advisors' fees, and related expenses and disbursements), treasury, cash management, bank product and derivative obligations, indemnification obligations, guarantee obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of any of the Prepetition Second Lien Credit Agreement Borrowers' or the Prepetition Second Lien Credit Agreement Guarantors' obligations pursuant to, or secured by, the Prepetition Second Lien Credit Agreement Documents, including all "Obligations" as defined in the Prepetition Second Lien Credit Agreement, and all other amounts that may become allowable under section 506(b) of the Bankruptcy Code, including interest, fees, prepayment premiums, costs and other charges, the "Prepetition Second Lien Credit Agreement Obligations", together with the Prepetition Second Lien Notes Obligations, the "Prepetition Second Lien Obligations", and, together with the Prepetition ABL Obligations, the "Prepetition Obligations").

g. ***Prepetition Second Lien Facilities Liens and Prepetition Second Lien Facility Collateral.*** Pursuant to the Prepetition Second Lien Notes Documents and the Prepetition Second Lien Credit Agreement Documents (collectively, the "Prepetition Second Lien Credit Documents") and, together with the Prepetition ABL Loan Documents and the Intercreditor Agreement, the "Prepetition Loan Documents"), each of the Prepetition Second Lien Notes Guarantors and the Prepetition Second Lien Credit Agreement Guarantors (collectively, the "Prepetition Second Lien Guarantors") unconditionally guaranteed, on a joint and several basis, the due and punctual payment of all the Prepetition Second Lien Obligations. Pursuant to the Prepetition Second Lien Credit Documents, the Prepetition Second Lien Notes Guarantors and the Prepetition Second Lien Credit Agreement Credit Parties granted to the Prepetition Second Lien Collateral Agent, for the benefit of itself, all of the Prepetition Second

Lien Credit Parties, a second priority security interest in and continuing lien on (the "Prepetition Second Lien Facilities Liens", and together with the Prepetition ABL Liens, the "Prepetition Liens") all of the collateral identified in the Prepetition Second Lien Credit Documents, in all cases whether then owned or existing or thereafter acquired (collectively, the "Prepetition Second Lien Collateral," and together with the Prepetition ABL Collateral, the "Prepetition Collateral," and the property that constitutes Prepetition ABL Collateral, but which is not Prepetition Second Lien Collateral, the "Specified Non-Prepetition Second Lien Collateral").

J. *Validity of Prepetition Second Lien Obligations/Prepetition Second Lien Facilities Liens.* Nothing herein shall constitute a finding or ruling by this Court that any alleged Prepetition Second Lien Obligation and/or Prepetition Second Lien Facilities Lien is valid, senior, enforceable, prior, perfected, or non-avoidable. Moreover, nothing shall prejudice the rights of any party-in-interest, including, but not limited to the Debtors or, the Creditors' Committee, to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged Prepetition Second Lien Obligation, Prepetition Second Lien Facilities Lien and/or security interests, *provided, however*, no such challenge shall have any effect or impact on the Prepetition ABL Obligations or Prepetition ABL Liens, or any adequate protection granted to the Prepetition ABL Credit Parties. For the avoidance of doubt, solely after the payment in full of the DIP ABL Secured Obligations and the Prepetition ABL Obligations, nothing herein shall be deemed a waiver of (a) the provisions of section 506(c) of the Bankruptcy Code, (b) any "equities of the case" under section 552(b) of the Bankruptcy Code, or (c) the equitable doctrine of "marshaling" or any similar doctrine with respect to the Prepetition Second Lien Obligations, Prepetition Second Lien Facilities Liens or Prepetition Second Lien Collateral.

K. *Validity of Prepetition Obligations/Prepetition Collateral related to ESL and Any Other Insider.* Nothing herein shall constitute a finding or ruling by this Court in favor of ESL, or any Non-ESL Insider, that any Prepetition Obligation and/or Prepetition Lien in respect of any Prepetition Obligations owned by ESL (collectively, the "ESL Debt"), or any Non-ESL Insider, is valid, senior, enforceable, prior, perfected, or non-avoidable, *provided*, however there shall be no effect or impact on (i) any Prepetition ABL Obligations owed to any person or entity other than ESL, or any Non-ESL Insider, (ii) any of the Prepetition ABL Liens, or (iii) any adequate protection granted to the Prepetition ABL Credit Parties pursuant to and in accordance with the terms of the DIP ABL Orders; notwithstanding anything to the contrary herein, with respect to (ii) or (iii) of this proviso, ESL, or any Non-ESL Insider, shall not be entitled to any proceeds or other distributions on account of such Prepetition ABL Liens, Adequate Protection Liens, prepetition claims, or Adequate Protection Claims absent further order of the Bankruptcy Court; *provided* that this sentence shall not apply to the cash payment of post-petition interest on the Prepetition ABL Obligations as adequate protection, subject to any rights of the Debtors or the Creditors' Committee to seek disgorgement of any such adequate protection payments from ESL, any Non-ESL Insider, or any of their respective immediate or mediate transferees. Moreover, nothing shall prejudice the rights of any party-in-interest, including, but not limited to the Debtors or the Creditors' Committee, to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged ESL Debt and/or related security interests or Prepetition Obligations and/or related security interests owned by any Non-ESL Insiders, *provided*, however there shall be no effect or impact on (i) any Prepetition ABL Obligations owed to any person or entity other than ESL, or any Non-ESL Insider, (ii) any of the Prepetition ABL Liens, or (iii) any Adequate Protection Liens granted to the Prepetition ABL

Credit Parties; notwithstanding anything to the contrary herein, with respect to (ii) or (iii) of this proviso, ESL, or any Non-ESL Insider, shall not be entitled to any proceeds or other distributions on account of such Prepetition ABL Liens, Adequate Protection Liens, prepetition claims, or Adequate Protection Claims absent further order of the Bankruptcy Court; *provided* that this proviso shall not apply to the cash payment of post-petition interest on the Prepetition ABL Obligations as adequate protection, subject to any rights of the Debtors or the Creditors' Committee to seek disgorgement of any such adequate protection payments from ESL, any Non-ESL Insider, or any of their respective immediate or mediate transferees. For the avoidance of doubt, nothing herein shall be deemed a waiver of (a) the provisions of section 506(c) of the Bankruptcy Code, (b) any "equities of the case" under section 552(b) of the Bankruptcy Code, or (c) the equitable doctrine of "marshaling" or any similar doctrine with respect to any ESL Debt or Prepetition Obligations owned by any Non-ESL Insider, collateral securing any ESL Debt, or Prepetition Obligations owned by Non-ESL Insider, in each case, after payment in full of all DIP ABL Secured Obligations and Prepetition ABL Obligations not constituting ESL Debt or Prepetition Obligations owned by any Non-ESL Insider. Nothing in this paragraph shall affect or impact the Prepetition ABL Obligations that are not owned by ESL, or any Non-ESL Insider, or Prepetition ABL Liens securing such obligations, or any adequate protection granted to the Prepetition ABL Credit Parties other than ESL or any Non-ESL Insider.

L. *Cash Collateral.* The DIP ABL Loan Parties represent that all of the DIP ABL Loan Parties' cash, including the cash in their deposit accounts, wherever located, whether as original collateral or proceeds of other Prepetition ABL Collateral, constitutes Cash Collateral and is Prepetition ABL Collateral but not Prepetition Second Lien Collateral.

M. *Permitted Prior Liens.* Nothing herein shall constitute a finding or ruling by this Court that any alleged Permitted Prior Lien is valid, senior, enforceable, prior, perfected, or non-avoidable. Moreover, nothing shall prejudice the rights of any party-in-interest, including, but not limited to the Debtors, the DIP ABL Credit Parties, the Junior DIP Credit Parties, the Prepetition Credit Parties, or the Creditors' Committee, to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged Permitted Prior Lien and/or security interests. For the avoidance of doubt, nothing herein shall be deemed a waiver of (a) the provisions of section 506(c) of the Bankruptcy Code, (b) any "equities of the case" under section 552(b) of the Bankruptcy Code, or (c) the equitable doctrine of "marshaling" or any similar doctrine with respect to the Permitted Prior Liens, *provided that* the lack of such a waiver shall not adversely affect in any manner the Prepetition ABL Credit Parties, the DIP ABL Credit Parties, or the Junior DIP Credit Parties, *provided, further* that any attempts or efforts to invoke the provisions referenced in clauses (a) through (c) of this sentence shall be subject in all respects to the prior written consent of the DIP ABL Agents and the Prepetition ABL Agents until the payment in full in cash of all DIP ABL Secured Obligations and Prepetition ABL Obligations, respectively.

N. *Agreement Among Lenders and Intercreditor Agreement.* Pursuant to section 510 of the Bankruptcy Code, the Agreement Among Lenders, the Intercreditor Agreement and any other intercreditor or subordination provisions contained in the Prepetition ABL Loan Documents shall (i) remain in full force and effect, (ii) continue to govern the relative priorities, rights, and remedies of, in the case of the Intercreditor Agreement, the Prepetition Credit Parties, and, in the case of the Agreement Among Lenders, the Prepetition ABL Credit Parties (including the relative priorities, rights and remedies of such parties with respect to the

replacement liens and administrative expense claims and superpriority administrative expense claims granted, or amounts payable, by the Debtors under the DIP Orders or otherwise and the modification of the automatic stay), and (iii) not be deemed to be amended, altered, or modified by the terms of the DIP Orders or the DIP ABL Loan Documents, unless expressly set forth herein or therein. Solely for purposes of the Intercreditor Agreement, any repayment of the Prepetition ABL Obligations pursuant to the DIP Orders shall not be deemed to constitute a "Discharge of ABL Obligations" as such term is used in the Intercreditor Agreement.

O. Findings Regarding DIP Financing and Use of Cash Collateral.

a. **Good Cause.** Good cause has been shown for the entry of this Final Order, each Debtor's decision to seek to obtain such relief is an exercise of good business judgment, and the Debtors have satisfied each of the applicable requirements of section 364 of the Bankruptcy Code in connection therewith.

b. **Request for Post-Petition Financing and Use of Cash Collateral.** The DIP ABL Loan Parties have sought authority to enter into the DIP ABL Loan Documents. The DIP ABL Credit Parties shall have no obligation to make or be deemed to have made loans, advances or other extensions of credit under the DIP ABL Facility except to the extent required under the respective DIP ABL Loan Documents and shall have no obligation to waive any conditions required thereunder. The DIP ABL Loan Parties have sought authority to use Cash Collateral on the terms described herein, and in accordance with the Approved Budget, to administer their Chapter 11 Cases and fund their operations.

c. **Need for Post-Petition Financing and Use of Cash Collateral.** The Debtors' need to use Cash Collateral and to obtain credit as set forth in the DIP ABL Loan Documents is immediate and critical in order to, among other things, enable the Debtors to

continue operations and to administer and preserve the value of their estates. The ability of the Debtors to maintain business relationships, pay employees, protect the value of their assets and otherwise finance their operations requires the availability of working capital from the DIP ABL Facility and the use of Cash Collateral, the absence of either of which would immediately and irreparably harm the Debtors, their estates, creditors and other stakeholders, and the possibility for maximizing the value of their businesses. The Debtors do not have sufficient available sources of working capital and financing to operate their business or to maintain their properties in the ordinary course of business without the DIP ABL Facility and continued use of Cash Collateral. Consummation of the financing contemplated by the DIP ABL Loan Documents and the use of the Prepetition ABL Collateral, including Cash Collateral, pursuant to the terms of the DIP Orders therefore are in the best interests of the Debtors' estates.

d. ***No Credit Available on More Favorable Terms.*** Given their current financial condition, financing arrangements, and capital structure, despite diligent efforts, the DIP ABL Loan Parties are unable to reasonably obtain post-petition financing from sources other than the DIP ABL Lenders on terms more favorable than those set forth in the DIP ABL Loan Documents. The DIP ABL Loan Parties have been unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The DIP ABL Loan Parties have also been unable to obtain secured credit from other sources on better terms: (a) solely having priority over that of administrative expenses of the kind specified in sections 503(b), 507(a) and 507(b) of the Bankruptcy Code; (b) secured only by a lien on property of the DIP ABL Loan Parties and their estates that is not otherwise subject to a lien; or (c) secured solely by a junior lien on property of the DIP ABL Loan Parties and their estates that is already subject to a prepetition lien. Further, the Required Lenders (as defined in the

Prepetition ABL Credit Agreement) are supportive of the priming of the Prepetition ABL Liens and the use of their Cash Collateral only to the extent provided herein and under the DIP ABL Loan Documents. Financing on a post-petition basis is not otherwise available without: (x) granting the DIP ABL Control Co-Collateral Agent, for itself and for the benefit of all of the other DIP ABL Credit Parties (i) perfected security interests in and liens on (each as provided herein) all of the DIP ABL Loan Parties' existing and after-acquired assets with the priorities set forth herein; (ii) superpriority claims; and (iii) the other protections set forth in the DIP Orders, and (y) upon entry of this Final Order, providing for the roll up of (i) all of the Prepetition ABL Revolving Extensions of Credit beneficially owned by the applicable DIP ABL Revolving Lenders and (ii) all of the Prepetition ABL Term Loans beneficially owned by the applicable DIP ABL Term Lenders, in each case, upon the terms set forth in this Final Order and in the DIP ABL Credit Agreement.

e. ***Use of Proceeds; Approved Budget.*** As a condition to entry into the DIP ABL Loan Documents, the extensions of credit under the DIP ABL Facility and the authorization to use Cash Collateral, the DIP ABL Lenders and Prepetition ABL Agents require, and the DIP ABL Loan Parties have agreed, that proceeds of the DIP ABL Facility and Cash Collateral shall be used in accordance with the terms of the DIP ABL Loan Documents, including the Approved Budget, which shall be subject to (a) such variances as may be permitted by the DIP ABL Loan Documents, (b) the DIP Orders, and (c) the Carve-Out. The DIP ABL Loan Parties shall not directly or indirectly pay any expense or other disbursement other than those set forth herein, in the Approved Budget or the Carve-Out. The proceeds of the DIP ABL Facility and Cash Collateral shall be used solely as provided in the DIP ABL Loan Documents and solely in accordance with the Approved Budget (subject to the Carve-Out), including, to the

extent provided therein, (i) for the ongoing working capital and general corporate purposes of the DIP ABL Loan Parties, in each case consistent with, subject to, and within the limitations contained in, the Approved Budget; (ii) to pay fees, costs and expenses incurred in connection with the transactions contemplated hereby and other administration costs incurred in connection with the Chapter 11 Cases (including all fees, charges and disbursements of all counsel and advisors to the DIP ABL Agents and the DIP ABL Lenders to the extent provided in the DIP ABL Loan Documents) as set forth in the DIP ABL Loan Documents; (iii) payment of other such prepetition obligations as set forth in the Approved Budget, and as approved by the Bankruptcy Court; and (iv) payment of certain adequate protection amounts to the Prepetition ABL Credit Parties as set forth in paragraph 19 hereof.

f. ***Willingness to Provide Financing.*** The DIP ABL Lenders have indicated a willingness to provide financing to the DIP ABL Loan Parties, conditioned upon entry of this Final Order, including findings that such financing and use of Cash Collateral is essential to the DIP ABL Loan Parties' estates, that the DIP ABL Lenders are extending credit to the DIP ABL Loan Parties as set forth in the DIP ABL Loan Documents in good faith, that the Prepetition ABL Credit Parties are permitting the use of Cash Collateral in good faith, and that the DIP ABL Credit Parties' and the Prepetition ABL Credit Parties' claims, superpriority claims, security interests, liens, rights, and other protections will have the protections provided in section 364(e) of the Bankruptcy Code and will not be affected by any subsequent reversal, modification, vacatur, amendment, reargument or reconsideration of the Interim Order, this Final Order or any other order. As a condition to the entry into the DIP ABL Loan Documents and the extensions of credit under the DIP ABL Facility, the DIP ABL Loan Parties, the DIP ABL Agents, and the other DIP ABL Credit Parties have agreed that proceeds of DIP ABL Collateral and all payments

and collections received by the DIP ABL Loan Parties shall be applied solely as set forth in the DIP ABL Loan Documents and the DIP Orders.

g. ***Business Judgment and Good Faith Pursuant to Section 364(e).*** The extension of credit under the DIP ABL Facility and the DIP ABL Loan Documents, and the authorization to use Cash Collateral on the terms set forth herein, are fair, reasonable, and the best available to the DIP ABL Loan Parties under the circumstances, reflect the DIP ABL Loan Parties' exercise of sound and prudent business judgment, are supported by reasonably equivalent value and consideration, and were entered into at arm's-length, under no duress, and without undue influence, negligence or violation of public policy or law. The DIP ABL Loan Documents, the DIP ABL Facility and the provisions regarding the use of Cash Collateral were negotiated in good faith and at arm's length among the DIP ABL Loan Parties, certain of the Prepetition ABL Credit Parties and the DIP ABL Credit Parties, under no duress, and without undue influence, in respect of all actions taken by them in connection with or related in any way to negotiating, implementing, documenting, or obtaining the requisite approvals of the DIP ABL Facility, and the use of Cash Collateral, including in respect of the granting of the DIP ABL Liens and the Adequate Protection Liens (as defined below), any challenges or objections to the DIP ABL Facility or the use of Cash Collateral, and all documents related to any and all transactions contemplated by the foregoing. Use of Cash Collateral and any credit to be extended as set forth in either of the DIP Orders and in the DIP ABL Loan Documents shall be deemed to have been so allowed, advanced, made, used or extended in good faith, and for valid business purposes and uses, within the meaning of section 364(e) of the Bankruptcy Code, and the DIP ABL Credit Parties and the Prepetition ABL Credit Parties are therefore entitled to the protections and benefits of section 364(e) of the Bankruptcy Code and the DIP Orders, and

therefore, the claims, security interests, liens, and other protections granted pursuant to the DIP Orders should be preserved to the extent provided for in the DIP Orders.

h. ***Priming of Prepetition Liens.*** The priming of the Prepetition Liens on the Prepetition ABL Collateral by the DIP ABL Liens to the extent set forth in the DIP ABL Loan Documents and the DIP Orders will enable the DIP ABL Loan Parties to obtain the DIP ABL Facility and to continue to operate their businesses for the benefit of their estates and creditors. The Required Lenders (as defined in the Prepetition ABL Credit Agreement) support such priming liens solely to the extent set forth in the DIP ABL Loan Documents and the DIP Orders, subject to receipt of adequate protection of their respective interests in the Prepetition ABL Collateral as set forth herein. The Required Lenders (as defined in the Prepetition ABL Credit Agreement) have acted in good faith in supporting the (i) DIP ABL Loan Parties' use of the Prepetition ABL Collateral, including Cash Collateral, pursuant to the terms of the DIP Orders, (ii) priming of the Prepetition Liens by the DIP ABL Liens on Prepetition ABL Collateral to the extent set forth in the DIP ABL Loan Documents and the DIP Orders, and (iii) entry of the DIP Orders and the granting of the relief set forth therein, and their reliance on the assurances referred to herein is in good faith.

i. ***Adequate Protection for Prepetition Credit Parties.*** The Prepetition Credit Parties are entitled to, and shall receive, adequate protection as set forth in paragraphs 17 through 19 below solely to the extent of the aggregate net diminution in value of their interests in the Prepetition ABL Collateral, pursuant to sections 361, 362, 363, 364 and 507(b) of the Bankruptcy Code. The adequate protection provided to the Prepetition Credit Parties pursuant to the terms of the DIP Orders are necessary and appropriate in light of, among other things, (a) the DIP ABL Loan Parties' proposed use and sale of the Prepetition ABL Collateral, including Cash

Collateral, (b) the granting of priming liens on the Prepetition ABL Collateral in connection with the DIP ABL Facility, (c) the potential decline in the value of the Prepetition ABL Collateral, (d) the imposition of the automatic stay, and (e) the subordination of the Prepetition Obligations to the Carve-Out.

j. **Sections 506(c) and 552(b).** The Debtors waive, for the benefit of the DIP ABL Credit Parties and the Prepetition ABL Credit Parties, (a) the provisions of section 506(c) of the Bankruptcy Code, (b) any "equities of the case" under section 552(b) of the Bankruptcy Code, and (c) the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP ABL Collateral and the Prepetition ABL Collateral, except to the extent set forth in paragraph 13 below and with respect to their rights under the DIP Intercreditor Agreement, in light of (i) the subordination of their liens and superpriority claims, as applicable, to the Carve-Out, (ii) the use of Cash Collateral and the subordination of the Prepetition Obligations, Prepetition Liens, Adequate Protection Claims (as defined below) and Adequate Protection Liens (as defined below) to the Carve-Out, the DIP ABL Liens and the DIP ABL Superpriority Claims (as defined below), as applicable, and (iii) the Approved Budget covering all administrative costs projected by the DIP ABL Loan Parties.

k. **Notice.** Notice of the Final Hearing and the relief requested in the Motion has been provided by the Debtors, whether by facsimile, email, overnight courier or hand delivery, to certain parties in interest as set forth in the Motion and the Interim Order. The notice given by the Debtors of the Motion, the relief requested therein, and the Final Hearing constitutes adequate notice thereof and complies with Bankruptcy Rules 4001(b) and (c) and the Local Bankruptcy Rules, and no further notice of the relief granted herein is necessary or required.

Based upon the foregoing findings and conclusions, the Motion and the record before the Bankruptcy Court with respect to the Motion, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that:

1. ***Motion Granted.*** The Motion is granted on a final basis to the extent set forth herein.

2. ***Use of Prepetition ABL Collateral Approved.*** Subject to and consistent with the terms of the DIP ABL Loan Documents, the DIP Orders, and the Approved Budget, the DIP ABL Loan Parties are hereby authorized to use the Prepetition ABL Collateral (including Cash Collateral) until the Termination Date to the extent set forth herein; provided, however, that during the Remedies Notice Period (as defined herein), the DIP ABL Loan Parties may use Cash Collateral solely to meet payroll obligations (but not severance obligations) and pay expenses that the DIP ABL Agents approve as critical to keeping the DIP ABL Loan Parties' business operating in accordance with the Approved Budget, or as otherwise agreed by the DIP ABL Agents in their sole and absolute discretion, and the Carve-Out shall be funded following delivery of the Carve-Out Trigger Notice (as defined herein) as provided in paragraph 21 of this Final Order.

3. ***Objections Overruled.*** All objections to and reservations of rights with respect to the relief sought in the Motion and to the entry of this Final Order to the extent not withdrawn or resolved are hereby overruled on the merits in their entirety.

DIP ABL Facility Authorization

4. ***Authorization of the DIP ABL Loan Documents.*** The DIP ABL Loan Parties are hereby authorized to execute, issue, deliver, enter into, and adopt, as the case may be, the DIP ABL Loan Documents to be delivered pursuant hereto or thereto or in connection

herewith or therewith. The DIP ABL Loan Parties are hereby authorized to borrow money and issue letters of credit under the applicable DIP ABL Loan Documents, on a final basis in accordance with and subject to the terms and conditions of the DIP Orders and the DIP ABL Loan Documents, and to perform all other obligations hereunder and thereunder.

5. ***ABL Roll Up.*** Upon entry of this Final Order, the following transactions will be deemed to take place: (a) all Prepetition ABL Revolving Extensions of Credit beneficially owned by a Roll Up DIP ABL Revolving Lender as of 11:59 p.m. Eastern Time on November 5, 2018 shall be converted to Roll Up DIP ABL Revolving Extensions of Credit, and with respect to participations in prepetition letters of credit issued under the Prepetition ABL Credit Agreement, such participations and letters of credit shall be deemed issued under the DIP ABL L/C Subfacility, (b) all Prepetition ABL Term Loans beneficially owned by a Roll Up DIP ABL Term Lender at 11:59 p.m. Eastern Time on November 5, 2018 shall be converted to Roll Up DIP ABL Term Loans, and (c) Roll Up DIP ABL Cash Management/Bank Product Obligations shall become obligations under the DIP ABL Facility; *provided* that the transactions described in this paragraph shall be subject to the reservation of rights of parties in interest in paragraphs 41 and 42 below, and upon expiration of the Challenge Period (as defined below) without a Challenge Proceeding (as defined below) having been brought, or the final resolution of a Challenge Proceeding brought in compliance with the provisions of the DIP Orders (where such Challenge Proceeding did not have the effect of successfully impairing any of the Prepetition ABL Revolving Extensions of Credit, the Prepetition ABL Term Loans or the liens securing any of such obligations), the DIP ABL Loan Parties' ABL Roll Up shall be deemed indefeasible (or, in the event that such a Challenge Proceeding is timely and properly commenced in respect of the Prepetition ABL Revolving Extensions of Credit, the Prepetition

ABL Term Loans or the liens securing any of such obligations, on the date on which any order entered by the Bankruptcy Court in favor of the applicable Prepetition ABL Credit Party in such Challenge Proceeding becomes final and non-appealable). Notwithstanding anything to the contrary contained in this Final Order, in the event there is a timely and successful Challenge Proceeding by any party in interest in accordance with paragraph 41 hereof, this Court may unwind the ABL Roll Up with respect to the applicable Prepetition ABL Obligations to the extent that (i) the ABL Roll Up resulted in the conversion of any Prepetition ABL Obligations consisting of an unsecured claim or other claim or amount not allowable under Section 502 of the Bankruptcy Code into a DIP ABL Secured Obligation, and (ii) such conversion unduly advantaged the applicable Prepetition ABL Credit Party. Notwithstanding the foregoing, but subject to the preceding sentence, a successful Challenge Proceeding shall not in any way affect the validity, enforceability or priority of the DIP ABL Secured Obligations or the DIP ABL Liens and no obligation, payment, transfer or grant of security under the DIP ABL Credit Agreement, the other DIP ABL Loan Documents or this Final Order shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or under any applicable law (including, without limitation, under section 502(d) of the Bankruptcy Code), or be subject to any defense, reduction, setoff, recoupment or counterclaim.

6. ***Syndication of Commitments and Loans.*** The procedures for syndicating the DIP ABL Facility set forth in Exhibit B hereto are hereby approved (the "Procedures"). Allocations of the DIP ABL Revolver, the DIP ABL Term Loan and the Roll Up DIP ABL Obligations made by the DIP ABL Administrative Agent in accordance with the Procedures will be final and binding. In furtherance of the foregoing and in connection with the consummation of the DIP ABL Facility, the ABL Roll Up and the related DIP ABL Loan Documents, the

performance of such acts as set forth in the Procedures and related documentation is hereby authorized and approved. For the avoidance of doubt, ESL shall neither be a permitted assignee of the DIP ABL Credit Parties nor a permitted participant in the DIP ABL Secured Obligations pursuant to the Procedures or otherwise.

7. ***Authorized Action.*** In furtherance of the foregoing and without further approval of this Court, each Debtor is authorized to perform all acts, to make, execute and deliver all instruments and documents that may be necessary or required for performance by the DIP ABL Loan Parties under the DIP ABL Loan Documents and the creation and perfection of the DIP ABL Liens described in, provided for and perfected by the DIP Orders and the DIP ABL Loan Documents. Subject to paragraphs 19(f) and 20(a), the DIP ABL Loan Parties are hereby authorized to pay, in accordance with the DIP Orders, the principal, interest, fees, expenses and other amounts described in the DIP ABL Loan Documents as such become due and without need to obtain further Court approval, including administrative agent fees, underwriting fees, commitment fees, letter of credit fees, and the fees and disbursements of the DIP ABL Agents' attorneys, advisers, accountants and other consultants. All fees shall be payable in accordance with the DIP ABL Loan Documents.

8. ***Validity of DIP ABL Secured Obligations.*** The DIP ABL Loan Documents represent valid, binding and unavoidable obligations of the DIP ABL Loan Parties, enforceable against the DIP ABL Loan Parties and their estates in accordance with their terms, subject to the terms of the DIP Orders and the DIP Intercreditor Agreement. The DIP ABL Loan Documents and the DIP Orders constitute and evidence the validity and binding effect of the DIP ABL Secured Obligations of the DIP ABL Loan Parties, which DIP ABL Secured Obligations shall be enforceable, jointly and severally, against the DIP ABL Loan Parties, their estates and

any successors thereto, including any trustee or other estate representative appointed in the Chapter 11 Cases or any case under chapter 7 of the Bankruptcy Code upon the conversion of any of the Chapter 11 Cases (each, a "Successor Case"). Subject to paragraphs 41 and 42, no obligation, payment, transfer, or grant of a security or other interest to the DIP ABL Control Co-Collateral Agent or any other DIP ABL Credit Party under the DIP ABL Loan Documents or the DIP Orders shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or any applicable law (including under sections 502(d), 544, 548 or 549 of the Bankruptcy Code), or subject to any defense, reduction, set-off, recoupment, claim or counterclaim. The DIP ABL Secured Obligations include all loans and any other indebtedness or obligations, contingent or absolute, now existing or hereafter arising, which may from time to time be or become owing by the DIP ABL Loan Parties to the DIP ABL Credit Parties under the DIP ABL Loan Documents, all DIP ABL Cash Management/Bank Product Obligations, and, in the case of each of the foregoing, including all principal, interest, costs, fees, expenses and other amounts owed in connection therewith or otherwise pursuant to the DIP ABL Loan Documents.

9. ***No Obligation to Extend Credit.*** The DIP ABL Credit Parties shall have no obligation to make loans or advances under the DIP ABL Facility unless and until the conditions precedent to the closing and the making of such extensions of credit under the DIP ABL Loan Documents have been satisfied in full or waived in accordance with the terms of the DIP ABL Loan Documents.

10. ***Use of DIP ABL Facility Proceeds.*** From and after the Petition Date, the DIP ABL Loan Parties are authorized, subject to the satisfaction of the terms and conditions set forth in the DIP ABL Loan Documents, to use proceeds of extensions of credit under the DIP ABL Facility only for the purposes specifically set forth in the DIP Orders and the DIP ABL

Loan Documents (i) for the ongoing working capital and general corporate purposes of the DIP ABL Loan Parties, in each case consistent with, subject to, and within the limitations contained in, the Approved Budget; and (ii) to pay fees, costs and expenses incurred in connection with the transactions contemplated hereby and other administration costs incurred in connection with the Chapter 11 Cases (including all fees, charges and disbursements of all counsel and advisors to the DIP ABL Agents and the DIP ABL Lenders).

11. ***No Obligation to Monitor.*** No DIP ABL Credit Party shall have any obligation or responsibility to monitor any Debtor's use of the DIP ABL Facility, and each DIP ABL Credit Party may rely upon each Debtor's representations that the amount of debtor-in-possession financing requested at any time, and the use thereof, are in accordance with the requirements of the DIP Orders and the DIP ABL Loan Documents.

12. ***DIP ABL Superpriority Claims.*** Subject to the Carve-Out and the last sentence of this paragraph 12, pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP ABL Secured Obligations shall constitute allowed administrative expense claims against each of the DIP ABL Loan Parties' estates, jointly and severally, with equal priority to the Junior DIP Superpriority Claims and otherwise with priority over any and all administrative expenses, including any superpriority claims associated with any other postpetition financing facility, all Adequate Protection Claims and, to the fullest extent permitted under the Bankruptcy Code, all other claims against the DIP ABL Loan Parties, now existing or hereafter arising, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy, or attachment (the "DIP ABL Superpriority Claims"), which DIP ABL Superpriority Claims shall be payable from and have recourse to all prepetition and post-petition property of the DIP ABL Loan Parties and their estates and all proceeds thereof, subject only to liens secured

thereby and the Carve-Out. The DIP ABL Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Final Order or any provision hereof is vacated, reversed, amended or otherwise modified, on appeal or otherwise. Notwithstanding anything to the contrary herein, the DIP ABL Superpriority Claims shall be of equal priority to the Junior DIP Superpriority Claims.

DIP ABL Liens and DIP ABL Collateral.

13. Effective immediately upon entry of the Interim Order and as more fully set forth in the DIP ABL Loan Documents, as security for the full and prompt performance and payment when due (whether at the stated maturity, by acceleration or otherwise) of the DIP ABL Secured Obligations, the DIP ABL Control Co-Collateral Agent was granted, for itself and for the benefit of all of the DIP ABL Credit Parties, continuing valid, binding, enforceable, non-avoidable, automatically and properly perfected, post-petition security interests in and liens (the "DIP ABL Liens") on all DIP ABL Collateral *nunc pro tunc* to the Petition Date without the necessity of the execution by the DIP ABL Loan Parties (or recordation or other filing or notice) of security agreements, control agreements, pledge agreements, copyright security agreements, trademark security agreements, patent security agreements, financing statements, mortgages, schedules or other similar documents, or the possession or control by the DIP ABL Agents or any other DIP ABL Credit Party of any DIP ABL Collateral. The term "DIP ABL Collateral" means Prepetition ABL Collateral and all other assets of the DIP ABL Loan Parties, whether now owned or hereafter acquired, and all proceeds thereof, including all deposit accounts, securities accounts, cash and cash equivalents of the DIP ABL Loan Parties; *provided, that* DIP ABL Collateral excludes any of the following (collectively, the "Excluded Property"): (i) (a) leases of real property except as permitted in the applicable lease or pursuant to applicable non-bankruptcy law (but in no event shall DIP ABL Collateral exclude the proceeds of such leases),

and (b) any security deposits or the Debtors' interests, if any, in pre-paid rent, unless liens on such security deposits or pre-paid rent are expressly permitted pursuant to the underlying lease documents; *provided, however*, that solely in the event the Debtors subsequently seek by separate motion and obtain by final order liens on all of their leases of real property in connection with a debtor-in-possession financing facility other than the DIP ABL Facility (including in connection with the Junior DIP Facility), the DIP ABL Collateral shall include all leases of real property and the DIP ABL Liens and Adequate Protection Liens shall be first in priority and senior to any other liens thereon (other than leases of real property that are Specified Collateral which the Junior DIP Liens and DIP ABL Liens shall share *pari passu*); (ii) the DIP ABL Loan Parties' claims and causes of action arising under sections 502(d), 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code and any other avoidance or similar action under the Bankruptcy Code or similar state law (the "Avoidance Actions"), but not the proceeds thereof ("Avoidance Action Proceeds"); *provided*, for the avoidance of doubt, that the DIP ABL Collateral shall include any proceeds or property recovered, unencumbered or otherwise the subject of successful Avoidance Actions whether by judgment, settlement or otherwise, (iii) any Intellectual Property (as defined in the DIP ABL Credit Agreement) consisting of intent-to-use trademark applications and rights in and to such applications, prior to the filing of a "Statement of Use" or "Amendment to Allege Use" to the extent that a grant of security interest in such application would impair validity or enforceability, (iv) any property to the extent that the grant of a security interest therein would violate applicable law, require a consent not obtained of any Governmental Authority (as defined in the DIP ABL Credit Agreement) or constitute a breach or default under, or result in the termination of or require a consent not obtained under, any contract, non-real property lease, license or other agreement evidencing or giving rise to such

property, or result in the invalidation of such property or provide any party to such contract, non-real property lease, license or agreement with a right of termination of such contract, non-real property lease, license or agreement (in each case, after giving effect to applicable provisions of the New York UCC, the Bankruptcy Code or other applicable law), (v) any and all claims or causes of action against current or former directors and officers of any DIP ABL Loan Party, including without limitation, any claim for or relating to a breach of fiduciary duty by any such director or officer (the "D&O Claims"), but not proceeds thereof, (vi) the Carve-Out Account, and (vii) proceeds and products of any of the foregoing Excluded Property described in clauses (i), (iii) through (iv) above solely to the extent such proceeds and products would constitute property or assets of the type described in clauses (i), (iii) through (iv) above; *provided that* in each case of property described in clause (iv) of this definition, such property shall constitute "Excluded Property" only to the extent and for so long as such contract, non-real property lease, license or other agreement or applicable law prohibits the creation of a lien on such property in favor of the DIP ABL Control Co-Collateral Agent, and, upon termination of such prohibition, such property shall cease to constitute "Excluded Property". Each of the Junior DIP Agent, DIP ABL Agents, their respective lenders and the Debtors are bound by the DIP Intercreditor Agreement; *provided*, that the DIP ABL Agents and the Junior DIP Agent and each of their respective lenders are contractually obligated to comply with the DIP Intercreditor Agreement, and the DIP ABL Agents and DIP ABL Lenders may enforce such agreement against the Junior DIP Agent and its respective lenders in these Chapter 11 Cases without the need for any further order of the Bankruptcy Court; *provided, further*, that the Debtors and their estates shall be deemed to be express third party beneficiaries of, and shall be entitled to enforce the provisions of Section 4.1(b)(iii) and Section 4.1(b)(iv) of the DIP Intercreditor Agreement and the

immediately succeeding sentence of this paragraph 13 (collectively, the "Reverse Marshaling Provisions"), which Reverse Marshaling Provisions shall remain enforceable by the Debtors and their estates until the repayment in full in cash of the DIP ABL Obligations and the Junior DIP Obligations. The DIP ABL Agents shall not apply proceeds of any Prepetition Unencumbered Collateral received in connection with any Exercise of Secured Creditor Remedies (as defined in the DIP Intercreditor Agreement) or from any sale, transfer or other disposition of such assets pursuant to section 363 or section 1129 of the Bankruptcy Code (or any similar provision under the law applicable to the Chapter 11 Cases or any other Insolvency Proceeding (as defined in the DIP Intercreditor Agreement) or under a court order in respect of measures granted with similar effect under any foreign Debtor Relief Laws (as defined in the DIP Intercreditor Agreement)) to the repayment of obligations under the DIP ABL Facility until (x) all but a de minimis amount of Prepetition ABL Collateral of the type that is eligible to be included in the term "Borrowing Base" in the DIP ABL Credit Agreement as in effect on the date of the DIP Intercreditor Agreement (but without giving effect to any changes or adjustments to the Borrowing Base or the eligibility criteria therefor, in each case, that any DIP ABL Agent may make in its "Permitted Discretion" (as defined in the DIP ABL Credit Agreement as in effect on the date of the DIP Intercreditor Agreement)) has been sold, transferred or otherwise been disposed of and the proceeds thereof applied in accordance with the DIP Intercreditor Agreement or (y) all but a de minimis amount of Prepetition ABL Collateral of the type that is eligible to be included in the term "Borrowing Base" in the DIP ABL Credit Agreement as in effect on the date of the DIP Intercreditor Agreement (but without giving effect to any changes or adjustments to the Borrowing Base or the eligibility criteria therefor, in each case, that any DIP ABL Agent may make in its "Permitted Discretion" (as defined in the DIP ABL Credit Agreement as in effect on

the date of the DIP Intercreditor Agreement)) is otherwise no longer available to be used to apply to and satisfy the DIP ABL Secured Obligations; *provided, however*, that if the proceeds of any Prepetition Unencumbered Collateral (including Specified Collateral) are used to satisfy any DIP ABL Secured Obligations or Prepetition ABL Obligations in accordance with this paragraph 13, notwithstanding anything in this Final Order to the contrary, after the Discharge of Senior DIP Obligations and the Discharge of Prepetition ABL Obligations (as each such term is defined in the DIP Intercreditor Agreement), all ensuing proceeds of Prepetition ABL Collateral shall be deemed to be proceeds of Prepetition Unencumbered Collateral (including Specified Collateral) until such proceeds equal the amount of Prepetition Unencumbered Collateral (including Specified Collateral) that were used to satisfy any DIP ABL Secured Obligations or Prepetition ABL Obligations. No amendment, modification or waiver of the Reverse Marshaling Provisions, Section 7.4 of the DIP Intercreditor Agreement or clause (y) of Section 7.10 of the DIP Intercreditor Agreement, nor consent to any departure of such provisions by any person, shall be effective, nor shall any amendment or modification to any defined term used or incorporated by reference in the Reverse Marshaling Provisions, or any component definition thereof, be given effect in such Reverse Marshaling Provisions, unless in each case it is in a written agreement executed by the Debtors and approved by the Creditors' Committee or the Bankruptcy Court. In addition, no amendment, modification or waiver of Section 4.1(b)(i) or Section 4.1(b)(ii) of the DIP Intercreditor Agreement, nor any consent to any departure of such provisions by any person, shall be effective, nor shall any amendment or modification to any defined term used or incorporated by reference in Section 4.1(b)(i) or Section 4.1(b)(ii) of the DIP Intercreditor Agreement, or any component definition thereof, be given effect in such Section 4.1(b)(i) or Section 4.1(b)(ii) of the DIP Intercreditor Agreement, unless in each case the

Creditors' Committee has been given at least three (3) days prior written notice of such proposed amendment, modification, waiver or departure.

Priority of DIP ABL Liens

14. The DIP ABL Liens on the DIP ABL Collateral shall in each case be subject to the Carve-Out and otherwise have the following priority:

- (a) pursuant to section 364(c)(2) of the Bankruptcy Code, first priority liens on and security interests in all DIP ABL Collateral that is not otherwise subject to a valid, perfected and non-avoidable security interest or lien as of the Petition Date (collectively, the "Prepetition Unencumbered Collateral"), which liens shall be *pari passu* with the Junior DIP Liens on Prepetition Unencumbered Collateral which constitute "Specified Collateral" (as defined in the DIP Intercreditor Agreement, the "Specified Collateral") but subject to any Senior Permitted Liens; *provided*, that the proceeds of such Specified Collateral shall be shared by the Junior DIP Lenders and the DIP ABL Credit Parties pro rata based on the aggregate commitment amount under the Junior DIP Facility (*i.e.*, \$350,000,000) and aggregate incremental commitments and extensions of credit under the DIP ABL Facility (*i.e.*, \$300,000,000) without giving regard to the roll-up portion thereof, respectively;
- (b) pursuant to section 364(c)(3) of the Bankruptcy Code, junior liens on and security interests in all DIP ABL Collateral (other than Prepetition ABL Collateral) that is not subject to Prepetition ABL Liens but is subject to valid and perfected security interests in favor of third parties as of the Petition Date (the "Prepetition Encumbered Collateral") and any Senior Permitted Liens; and
- (c) pursuant to section 364(d) of the Bankruptcy Code, first priority priming security interests and liens on the Prepetition ABL Collateral of each Debtor on which the Prepetition ABL Lenders held a first priority security interest and lien (such liens and security interests, the "DIP ABL Priming Liens"), in each case to the extent that such Prepetition ABL Collateral is subject to Prepetition ABL Liens and such DIP ABL Priming Liens shall be (x) senior in all respects to the interests in such property of the Prepetition ABL Credit Parties under the Prepetition ABL Credit Agreement and the other "secured parties" referred to therein, (y) senior to the Adequate Protection Liens, and (z) subject to any Senior Permitted Liens.

15. Notwithstanding anything to the contrary herein, the following table sets forth the relative priorities of the Carve-Out, the Senior Permitted Liens, the DIP ABL Liens, the

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955 Filed 11/30/18 Entered 11/30/18 13:13:14 Main Document
Pg 43 of 118

Junior DIP Liens, the Adequate Protection Liens, and the Prepetition Liens on the DIP ABL
Collateral:

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955 Filed 11/30/18 Entered 11/30/18 13:13:14 Main Document
Pg 44 of 118

Prepetition ABL Collateral	Prepetition Encumbered Collateral ³	Prepetition Unencumbered Collateral (Other than Specified Collateral)	Specified Collateral
Carve-Out	Carve-Out	Carve-Out	Carve-Out
Senior Permitted Liens	All valid and perfected security interests in favor of third parties as of the Petition Date and any Senior Permitted Liens	Senior Permitted Liens	Senior Permitted Liens
DIP ABL Liens	DIP ABL Liens	DIP ABL Liens	DIP ABL Liens, <i>pari passu</i> with Junior DIP Liens
Prepetition ABL Facilities Adequate Protection Liens	Junior DIP Liens	Junior DIP Liens	Prepetition ABL Facilities Adequate Protection Liens
2018 FILO Adequate Protection Liens	Prepetition ABL Facilities Adequate Protection Liens	Prepetition ABL Facilities Adequate Protection Liens	2018 FILO Adequate Protection Liens
Prepetition LC Facility Adequate Protection Liens	2018 FILO Adequate Protection Liens	2018 FILO Adequate Protection Liens	Prepetition LC Facility Adequate Protection Liens
Prepetition ABL Liens	Prepetition LC Facility Adequate Protection Liens	Prepetition LC Facility Adequate Protection Liens	Postpetition Intercompany Liens
Postpetition Intercompany Liens	Postpetition Intercompany Liens	Postpetition Intercompany Liens	Prepetition Second Lien Adequate Protection Liens (only with respect to property of Prepetition Second Lien Loan Parties)

³ The priorities set forth in this column are subject to paragraph 65.

Prepetition Second Lien Adequate Protection Liens	Prepetition Second Lien Adequate Protection Liens (only with respect to property of Prepetition Second Lien Loan Parties)	Prepetition Second Lien Adequate Protection Liens (only with respect to property of Prepetition Second Lien Loan Parties)	
Prepetition Second Lien Facilities Liens (except on Specified Non-Prepetition Second Lien Collateral)			
Junior DIP Liens			

16. ***Treatment of DIP ABL Liens.*** Other than as set forth herein, the DIP ABL Liens shall not be made subject to or *pari passu* with any lien or security interest heretofore or hereafter granted in the Chapter 11 Cases or any Successor Case. The DIP ABL Liens shall be valid and enforceable against any trustee or other estate representative appointed in the Chapter 11 Cases or any Successor Case, upon the conversion of any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code (or in any other Successor Case), and/or upon the dismissal of any of the Chapter 11 Cases or any Successor Case. No lien or interest avoided and preserved for the benefit of the DIP ABL Loan Parties' estates pursuant to section 551 of the Bankruptcy Code shall be *pari passu* with or senior to the DIP ABL Liens.

Adequate Protection

17. ***Adequate Protection Liens.***

(a) ***Prepetition ABL Adequate Protection Liens.*** Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition ABL Credit Parties (other than the 2018 FILO Lenders and the Prepetition LC Facility Credit Parties) in the Prepetition ABL Collateral, including Cash Collateral, against the

aggregate net diminution in value of the Prepetition ABL Credit Parties' (other than the 2018 FILO Lenders and the Prepetition LC Facility Credit Parties) interests in the entirety of the Prepetition ABL Collateral resulting from the DIP ABL Loan Parties' use, sale or lease (or other decline in value to the extent permitted under the Bankruptcy Code) of such collateral, the imposition of the automatic stay, the priming of the Prepetition ABL Liens and the subordination to the Carve-Out (collectively, "ABL Diminution in Value"), the DIP ABL Loan Parties, pursuant to the Interim Order, granted and hereby grant to the Prepetition ABL Control Co-Collateral Agent on behalf of itself and all of the other Prepetition ABL Credit Parties (other than the 2018 FILO Lenders and the Prepetition LC Facility Credit Parties) to the extent of any ABL Diminution in Value, if any, a valid and perfected replacement and additional security interest in, and liens on (the "Prepetition ABL Facilities Adequate Protection Liens") all DIP ABL Collateral. The Prepetition ABL Facilities Adequate Protection Liens are and shall be valid, binding, enforceable and fully perfected *nunc pro tunc* to the Petition Date (without the necessity of the execution by the DIP ABL Loan Parties of mortgages, control agreements, security agreements, pledge agreements, financing statements, or other agreements) and shall (i) solely with respect to the Prepetition ABL Collateral, be subject and subordinate only to the Carve-Out, the Senior Permitted Liens and the DIP ABL Liens, (ii) solely with respect to the Prepetition Encumbered Collateral, be subject to the Carve-Out, valid and perfected security interests in favor of third parties as of the Petition Date (including any Senior Permitted Liens), the DIP ABL Liens, and the Junior DIP Liens, (iii) solely with respect to Prepetition Unencumbered Collateral, subject to the Carve-Out, any Senior Permitted Liens, the DIP ABL Liens, and the Junior DIP Liens and (iv) otherwise be senior to all other security interests in, liens on, or claims against any of the DIP ABL Collateral.

(b) *Prepetition 2018 FILO Adequate Protection Liens.* Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, as adequate protection of the interests of the 2018 FILO Lenders in the Prepetition ABL Collateral, including Cash Collateral, against the aggregate net diminution in value of the 2018 FILO Lenders' interests in the entirety of the Prepetition ABL Collateral resulting from the DIP ABL Loan Parties' use, sale or lease (or other decline in value to the extent permitted under the Bankruptcy Code) of such collateral, the imposition of the automatic stay, the priming of the Prepetition ABL Liens and the subordination to the Carve-Out (collectively, the "2018 FILO ABL Diminution in Value"), the DIP ABL Loan Parties, pursuant to the Interim Order, granted and hereby grant to the Prepetition ABL Control Co-Collateral Agent, on behalf of the 2018 FILO Lenders to the extent of any 2018 FILO ABL Diminution in Value, if any, a valid and perfected replacement and additional security interest in, and liens on (the "2018 FILO Adequate Protection Liens") all DIP ABL Collateral. The 2018 FILO Adequate Protection Liens are and shall be valid, binding, enforceable and fully perfected *nunc pro tunc* to the Petition Date (without the necessity of the execution by the DIP ABL Loan Parties of mortgages, control agreements, security agreements, pledge agreements, financing statements, or other agreements) and shall (i) solely with respect to the Prepetition ABL Collateral, be subject and subordinate only to the Carve-Out, the Senior Permitted Liens, the DIP ABL Liens, and the Prepetition ABL Facilities Adequate Protection Liens, (ii) solely with respect to the Prepetition Encumbered Collateral, be subject to the Carve-Out, valid and perfected security interests in favor of third parties as of the Petition Date (including any Senior Permitted Liens), the DIP ABL Liens, the Junior DIP Liens and the Prepetition ABL Facilities Adequate Protection Liens, (iii) solely with respect to Prepetition Unencumbered Collateral, subject to the Carve-Out, any Senior Permitted Liens, the DIP ABL

Liens, the Junior DIP Liens, and the Prepetition ABL Facilities Adequate Protection Liens and (iv) otherwise be senior to all other security interests in, liens on, or claims against any of the DIP ABL Collateral.

(c) *Prepetition LC Facility Adequate Protection Liens.* Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition LC Facility Credit Parties in the Prepetition ABL Collateral, including Cash Collateral, against the aggregate net diminution in value of the Prepetition LC Facility Credit Parties' interests in the entirety of the Prepetition ABL Collateral resulting from the Prepetition LC Facility Credit Parties' use, sale or lease (or other decline in value to the extent permitted under the Bankruptcy Code) of such collateral, the imposition of the automatic stay, the priming of the Prepetition ABL Liens and the subordination to the Carve-Out (collectively, the "Prepetition LC ABL Diminution in Value"), the DIP ABL Loan Parties, pursuant to the Interim Order, granted and hereby grant to the Prepetition LC Facility Administrative Agent on behalf of itself and all of the other Prepetition LC Facility Credit Parties to the extent of any Prepetition LC ABL Diminution in Value, if any, a valid and perfected replacement and additional security interest in, and liens on (the "Prepetition LC Facility Adequate Protection Liens") all DIP ABL Collateral. The Prepetition LC Facility Adequate Protection Liens are and shall be valid, binding, enforceable and fully perfected *nunc pro tunc* to the Petition Date (without the necessity of the execution by the DIP ABL Loan Parties of mortgages, control agreements, security agreements, pledge agreements, financing statements, or other agreements) and shall (i) solely with respect to the Prepetition ABL Collateral, be subject and subordinate only to the Carve-Out, the Senior Permitted Liens, the DIP ABL Liens, the Prepetition ABL Facilities Adequate Protection Liens, and the 2018 FILO Adequate Protection Liens, (ii) solely

with respect to the Prepetition Encumbered Collateral, be subject to the Carve-Out, valid and perfected security interests in favor of third parties as of the Petition Date (including any Senior Permitted Liens), the DIP ABL Liens, the Junior DIP Liens, the Prepetition ABL Facilities Adequate Protection Liens and the 2018 FILO Adequate Protection Liens, (iii) solely with respect to Prepetition Unencumbered Collateral, subject to the Carve-Out, any Senior Permitted Liens, the DIP ABL Liens, the Junior DIP Liens, the Prepetition ABL Facilities Adequate Protection Liens and the 2018 FILO Adequate Protection Liens, and (iv) otherwise be senior to all other security interests in, liens on, or claims against any of the DIP ABL Collateral.

(d) *Second Lien Adequate Protection Liens.* Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition Second Lien Credit Parties in the Prepetition Second Lien Collateral, against the aggregate net diminution in value, if any, resulting from the DIP ABL Loan Parties' use, sale or lease (or other decline in value to the extent permitted under the Bankruptcy Code) of such collateral, the imposition of the automatic stay, the priming of the Prepetition Second Lien Facilities Liens and the subordination to the Carve-Out (collectively, the "Second Lien Diminution in Value," and, collectively with the ABL Diminution in Value, the 2018 FILO ABL Diminution in Value and the Prepetition LC ABL Diminution in Value, the "Diminution in Value"), each Prepetition Second Lien Loan Party, pursuant to the Interim Order, granted and hereby grants to the Prepetition Second Lien Collateral Agent on behalf of itself and the other Prepetition Second Lien Credit Parties to the extent of any applicable Second Lien Diminution in Value, if any, a valid and perfected replacement and additional security interest in, and liens on (the "Prepetition Second Lien Adequate Protection Liens," and together with the Prepetition ABL Facilities Adequate Protection Liens, the 2018 FILO Adequate Protection Liens, and the

Prepetition LC Facility Adequate Protection Liens, the "Adequate Protection Liens") all DIP ABL Collateral owned by the Prepetition Second Lien Loan Parties. For the avoidance of doubt, notwithstanding the Interim Order, the Prepetition Second Lien Adequate Protection Liens shall solely attach to property or other interests of the Prepetition Second Lien Loan Parties. The Prepetition Second Lien Adequate Protection Liens are and shall be valid, binding, enforceable and fully perfected *nunc pro tunc* to the Petition Date (without the necessity of the execution by the Prepetition Second Lien Loan Parties of mortgages, control agreements, security agreements, pledge agreements, financing statements, or other agreements) and shall (i) solely with respect to the Prepetition ABL Collateral, be subject and subordinate only to the Carve-Out, the Senior Permitted Liens, the DIP ABL Liens, the Prepetition ABL Facilities Adequate Protection Liens, the 2018 FILO Adequate Protection Liens, the Prepetition LC Facility Adequate Protection Liens the Prepetition ABL Liens, and the Post-Petition Intercompany Liens (ii) solely with respect to the Prepetition Encumbered Collateral, be subject to the Carve-Out, valid and perfected security interests in favor of third parties as of the Petition Date (including any Senior Permitted Liens), the DIP ABL Liens, the Junior DIP Liens, the Prepetition ABL Facilities Adequate Protection Liens, the 2018 FILO Adequate Protection Liens, the Prepetition LC Facility Adequate Protection Liens, and the Post-Petition Intercompany Liens (iii) solely with respect to Prepetition Unencumbered Collateral, subject to the Carve-Out, any Senior Permitted Liens, the DIP ABL Liens, the Junior DIP Liens, the Prepetition ABL Facilities Adequate Protection Liens, the 2018 FILO Adequate Protection Liens, the Prepetition LC Facility Adequate Protection Liens and the Post-Petition Intercompany Liens and (iv) otherwise be senior to all other security interests in, liens on, or claims against any of the DIP ABL Collateral. The Prepetition Second Lien Secured Parties shall not apply proceeds of any Prepetition Unencumbered Collateral to satisfy any

adequate protection claims hereunder until all of the Prepetition Second Lien Collateral has been sold, transferred or otherwise been disposed of or is otherwise no longer available to be used to apply to, or is determined by the Bankruptcy Court to be insufficient to satisfy the Prepetition Second Lien Obligations.

(e) *Treatment of Adequate Protection Liens.* Other than as set forth in the DIP Orders, the Adequate Protection Liens shall not be made subject to or *pari passu* with any lien or security interest heretofore or hereinafter granted in the Chapter 11 Cases or any Successor Case. The Adequate Protection Liens shall be valid and enforceable against any trustee or other estate representative appointed in the Chapter 11 Cases or any Successor Case, upon the conversion of any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code (or in any other Successor Case), and/or upon the dismissal of any of the Chapter 11 Cases or any Successor Case. The Adequate Protection Liens shall not be subject to sections 510, 549 or 550 of the Bankruptcy Code. No lien or interest avoided and preserved for the benefit of the estate pursuant to section 551 of the Bankruptcy Code shall be *pari passu* with or senior to the Prepetition Liens or the Adequate Protection Liens.

18. *Adequate Protection Superpriority Claims.*

(a) *Prepetition ABL Superpriority Claims.* Pursuant to section 507(b) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition ABL Credit Parties (other than the 2018 FILO Lenders and the Prepetition LC Facility Credit Parties) in the Prepetition ABL Collateral, including Cash Collateral, the Prepetition ABL Control Co-Collateral Agent, for itself and for the benefit of all of the other Prepetition ABL Credit Parties (other than the 2018 FILO Lenders and the Prepetition LC Facility Credit Parties), pursuant to the Interim Order, was granted an allowed administrative claim against the DIP ABL Loan

Parties' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(a) and (b) of the Bankruptcy Code (the "Prepetition ABL Adequate Protection Claims") to the extent of any ABL Diminution in Value. Except as set forth herein, the Prepetition ABL Adequate Protection Claims shall have priority over all administrative expense claims and priority general unsecured claims against the DIP ABL Loan Parties or their estates, now existing or hereafter arising, to the fullest extent permitted under the Bankruptcy Code; provided, however, that the Prepetition ABL Adequate Protection Claims shall be junior to (i) the Carve-Out, (ii) the DIP ABL Superpriority Claims, and (iii) the Junior DIP Superpriority Claims.

(b) *Prepetition 2018 FILO Superpriority Claims.* Pursuant to section 507(b) of the Bankruptcy Code, as adequate protection of the interests of the 2018 FILO Lenders in the Prepetition ABL Collateral, including Cash Collateral, the Prepetition ABL Control Co-Collateral Agent, on behalf of the 2018 FILO Lenders, pursuant to the Interim Order, was granted an allowed administrative claim against the DIP ABL Loan Parties' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(a) and (b) of the Bankruptcy Code (the "Prepetition 2018 FILO Adequate Protection Claims") to the extent of any 2018 FILO Diminution in Value. Except as set forth herein, the Prepetition 2018 FILO Adequate Protection Claims shall have priority over all administrative expense claims and priority general unsecured claims against the DIP ABL Loan Parties or their estates, now existing or hereafter arising, to the fullest extent permitted under the Bankruptcy Code; *provided, however*, that the Prepetition 2018 FILO Adequate Protection Claims shall be junior to (i) the Carve-Out, (ii) the DIP ABL Superpriority Claims, (iii) the Junior DIP Superpriority Claims, and (iv) the Prepetition ABL Adequate Protection Claims.

(c) *Prepetition LC Facility Superpriority Claims.* Pursuant to section 507(b) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition LC Facility Credit Parties in the Prepetition ABL Collateral, including Cash Collateral, the Prepetition LC Facility Administrative Agent, for itself and for the benefit of all of the other Prepetition LC Facility Credit Parties, pursuant to the Interim Order, was granted an allowed administrative claim against the DIP ABL Loan Parties' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(a) and (b) of the Bankruptcy Code (the "Prepetition LC Facility Adequate Protection Claims") to the extent of any Prepetition LC Diminution in Value. Except as set forth herein, the Prepetition LC Facility Adequate Protection Claims shall have priority over all administrative expense claims and priority general unsecured claims against the DIP ABL Loan Parties or their estates, now existing or hereafter arising, to the fullest extent permitted under the Bankruptcy Code; provided, however, that the Prepetition LC Facility Adequate Protection Claims shall be junior to (i) the Carve-Out, (ii) the DIP ABL Superpriority Claims, (iii) the Junior DIP Superpriority Claims, (iv) the Prepetition ABL Adequate Protection Claims, and (v) the Prepetition 2018 FILO Adequate Protection Claims.

(d) *Second Lien Facilities Superpriority Claims.* Pursuant to section 507(b) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition Second Lien Credit Parties in the Prepetition Second Lien Collateral, including any Cash Collateral, on behalf of itself and the other Prepetition Second Lien Credit Parties, the Prepetition Second Lien Collateral Agent, pursuant to the Interim Order, was granted an allowed administrative claim against the Prepetition Second Lien Loan Parties' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(a) and (b) of the Bankruptcy Code to the extent of any Second Lien Diminution in Value (the "Prepetition Second Lien Facilities Adequate

Protection Claims," and together with the Prepetition ABL Adequate Protection Claims, the Prepetition 2018 FILO Adequate Protection Claims, and the Prepetition LC Facility Adequate Protection Claims, the "Adequate Protection Claims") to the extent that the Prepetition Second Lien Adequate Protection Liens are insufficient to protect the Prepetition Second Lien Credit Parties' interests in the Prepetition Second Lien Collateral. For the avoidance of doubt, notwithstanding the Interim Order, the Prepetition Second Lien Facilities Adequate Protection Claims shall only be against the estates of the Prepetition Second Lien Loan Parties. Except as set forth herein, the Prepetition Second Lien Facilities Adequate Protection Claims shall have priority over all administrative expense claims and priority general unsecured claims against the Prepetition Second Lien Loan Parties or their estates, now existing or hereafter arising, to the fullest extent permitted under the Bankruptcy Code; provided, however, that the Prepetition Second Lien Facilities Adequate Protection Claim shall be junior to (i) the Carve-Out, (ii) the DIP ABL Superpriority Claims, (iii) the Junior DIP Superpriority Claims, (iv) the Prepetition ABL Adequate Protection Claims, (v) the Prepetition LC Facility Adequate Protection Claims, (vi) the Prepetition 2018 FILO Adequate Protection Claims, and (vii) the Postpetition Intercompany Obligations (as defined below).

19. ***Additional Adequate Protection.***

(a) *Prepetition ABL Credit Parties.* As additional adequate protection of the Prepetition ABL Credit Parties' security interests in the Prepetition ABL Collateral, the DIP ABL Loan Parties are authorized and directed to provide adequate protection in the form of (i) current cash reimbursement of reasonable and documented fees and expenses and other disbursements of the Prepetition ABL Administrative Agent, the Prepetition ABL Co-Collateral Agents, and the Prepetition LC Facility Administrative Agent whether incurred before, on or

after the Petition Date, including the reasonable documented fees and expenses of its professional advisors subject to the procedures set forth in paragraph 19(f) hereof, Skadden, Arps, Slate, Meagher & Flom LLP, Choate, Hall & Stewart LLP, Davis Polk & Wardwell LLP and Berkeley Research Group, LLC, whether incurred before, on or after the Petition Date; (ii) continued maintenance and insurance of the Prepetition ABL Collateral and the DIP ABL Collateral in amounts and for the risks, and by the entities, as required under the Prepetition ABL Loan Documents, the DIP ABL Loan Documents and the DIP Orders; (iii) reporting and information rights equivalent to those granted to the DIP ABL Agents pursuant to the DIP ABL Loan Documents, the Prepetition ABL Loan Documents and paragraph 22 of this Final Order; (iv) cash payment of post-petition interest on the Prepetition ABL Obligations under the Prepetition ABL Credit Agreement and the Prepetition LC Facility Agreement as such interest becomes due and payable at the applicable non-default rate thereunder; *provided* that in the event of a final determination that the Prepetition ABL Credit Parties or the Prepetition LC Facility Credit Parties, as applicable are undersecured as of the Petition Date, payments received by the applicable undersecured Prepetition ABL Credit Parties or the Prepetition LC Facility Credit Parties, pursuant to this clause (iv) may be recharacterized and applied as payments of principal and may be subject to disgorgement; and (v) the DIP ABL Borrowers' daily calculation, reporting and certification to the Prepetition ABL Administrative Agent of, and compliance with, the Maximum Loan to Value (Term/Revolver) Ratio and the Maximum Loan to Value (Prepetition) Ratio (each as defined below).

(b) If on any day the DIP ABL Loan Parties are not in compliance with the Maximum Loan to Value (Term/Revolver) Ratio or the Maximum Loan to Value (Prepetition) Ratio, the DIP ABL Loan Parties shall immediately and irrevocably repay in cash

(i) first, DIP ABL Revolving Advances until paid in full, (ii) second, to cash collateralize letters of credit under the DIP ABL Facility, (iii) third, to the DIP ABL Term Loans until paid in full (with a pro rata reduction in DIP ABL Revolving Commitments), and (iv) after the payment in full of the DIP ABL Facility, the Prepetition ABL Obligations, in each case, until the DIP ABL Loan Parties are in compliance with the Maximum Loan to Value (Term/Revolver) Ratio or the Maximum Loan to Value (Prepetition) Ratio, as applicable. In the case of clause (iv), such amounts shall be paid to the Prepetition ABL Administrative Agent and applied in accordance with Section 6.4 of the Collateral and Guarantee Agreement (as defined in the Prepetition ABL Credit Agreement). For the avoidance of doubt, a failure of the DIP ABL Borrowers to deliver to the DIP ABL Administrative Agent or Prepetition ABL Administrative Agent, as applicable, the cash when and in such amounts required in accordance with the immediately preceding sentence shall constitute a Termination Event (as defined below) hereunder, and the DIP ABL Administrative Agent or the Prepetition ABL Administrative Agent, as applicable, shall be permitted to exercise all rights and remedies available pursuant to the DIP ABL Loan Documents or Prepetition ABL Loan Documents, as applicable, and the DIP Orders subject to the terms of paragraphs 33 and 34.

(c) The "Maximum Loan to Value (Term/Revolver) Ratio" means that the DIP ABL Loan Parties shall not permit the sum of (a) the outstanding principal amount of Advances (as defined in the Prepetition ABL Credit Agreement), plus (b) the outstanding principal amount of Swingline Advances (as defined in the Prepetition ABL Credit Agreement), plus (c) the amount of L/C Obligations (as defined in the Prepetition ABL Credit Agreement), plus (d) the outstanding principal amount of the outstanding 2016 Term Loans (as defined in the Prepetition ABL Credit Agreement) (the sum of clauses (a) through (d), the "Prepetition

Revolving/Term Exposure"), plus (e) Total Extensions of Credit (as defined in the DIP ABL Loan Documents), plus (f) Availability Reserves (as defined in the DIP ABL Loan Documents), plus (g) the Borrowing Base Carve-Out Reserve (as defined in the DIP ABL Loan Documents), plus (h) the Prepetition FILO Reserve (as defined in the DIP ABL Loan Documents), at any time to exceed 87.5% of the sum of (1) the aggregate outstanding Eligible Credit Card Receivables (as defined in the DIP ABL Loan Documents) at such time, plus (2) the aggregate Eligible Pharmacy Receivables (as defined in the DIP ABL Loan Documents) at such time, plus (3) (i) the Net Orderly Liquidation Value (as defined in the DIP ABL Loan Documents) of Net Eligible Inventory (as defined in the DIP ABL Loan Documents) (other than Eligible Inventory (as defined in the DIP ABL Loan Documents) at stores to be closed pursuant to Specified Store Closing Sales (as defined in the DIP ABL Loan Documents)) at such time and (ii) the Store Closing Net Orderly Liquidation Value (as defined in the DIP ABL Loan Documents) of Net Eligible Inventory at Stores to be closed pursuant to Specified Store Closing Sales at such time (the sum of clauses (1) through (3), the "LTV Formula Amount").

(d) The "Maximum Loan to Value (Prepetition) Ratio" means that the DIP ABL Loan Parties shall not permit the sum of Prepetition Revolving/Term Exposure, plus the outstanding 2018 FILO Extensions of Credit (as defined in the Prepetition ABL Credit Agreement), plus the Total Extensions of Credit (as defined in the DIP ABL Loan Documents), plus Availability Reserves (as defined in the DIP ABL Loan Documents), plus the Borrowing Base Carve-Out Reserve (as defined in the DIP ABL Loan Documents), plus the Prepetition FILO Reserve (as defined in the DIP ABL Loan Documents), at any time to exceed 97.5% of the LTV Formula Amount at such time.

(e) *Second Lien Credit Parties.* As additional adequate protection of certain of the Prepetition Second Lien Credit Parties' security interest in the Prepetition Second Lien Collateral, the Prepetition Second Lien Loan Parties are authorized and directed to provide adequate protection in the form of (i) current cash reimbursement of up to \$250,000 of reasonable and documented fees and expenses and other disbursements of the Prepetition Second Lien 2010 Indenture Trustee, including the reasonable and documented fees and expenses of Seyfarth Shaw LLP, subject to the procedures set forth in paragraph 19(f) hereof, whether incurred before, on or after the Petition Date, and (ii) reporting and information rights for the Prepetition Second Lien Agents equivalent to those granted to the DIP ABL Agents pursuant to paragraph 22 of this Final Order.

(f) Payment of all professional fees and expenses of the DIP ABL Credit Parties, the Prepetition ABL Administrative Agent, the Prepetition LC Facility Administrative Agent, the Prepetition Second Lien 2010 Indenture Trustee (subject to the limitations set forth in paragraph 19(e) hereof) and the Prepetition Consolidated Loan Agent addressed in the DIP Orders shall not be subject to allowance by the Bankruptcy Court. Notwithstanding the foregoing, at the same time such invoices are delivered to the Debtors, the professionals for the DIP ABL Credit Parties, the Prepetition ABL Administrative Agent, the Prepetition LC Facility Administrative Agent, the Prepetition Second Lien 2010 Indenture Trustee and the Prepetition Consolidated Loan Agent shall deliver a copy of their respective invoices to counsel for any Creditors' Committee, the U.S. Trustee (as defined below), and the DIP ABL Administrative Agent. The invoices for such fees and expenses shall not be required to comply with any particular format and may be in summary form only and may include redactions. For the avoidance of doubt, the provision of such invoices shall not constitute a

waiver of the attorney-client privilege or any benefits of the attorney work product doctrine. The DIP ABL Loan Parties or, with respect to invoices received in respect of fees and expenses payable to professionals for the Prepetition Consolidated Loan Agent, the Prepetition Consolidated Loan Parties, shall pay such invoice within ten (10) calendar days (if no written objection is received within such ten calendar day period) after such professional has delivered such invoice to the DIP ABL Loan Parties, the Creditors' Committee, the DIP ABL Administrative Agent, and the U.S. Trustee. Any written objections raised by the DIP ABL Loan Parties, the U.S. Trustee, the DIP ABL Administrative Agent or any Creditors' Committee with respect to such invoices within ten (10) calendar days of receipt thereof will be resolved by the Bankruptcy Court (absent prior consensual resolution thereof). Pending such resolution, the undisputed portion of any such invoice shall be promptly paid by the DIP ABL Loan Parties or, with respect to invoices received in respect of fees and expenses payable to professionals for the Prepetition Consolidated Loan Agent, the Prepetition Consolidated Loan Parties. The fees and expenses subject to the procedures in this paragraph 19(f) shall not be subject to any offset, defense, claim, counterclaim or diminution of any type, kind or nature whatsoever, and shall not be subject to compliance with the U.S. Trustee fee guidelines or the provisions of sections 327, 328, 329, 330 or 331 of the Bankruptcy Code. Notwithstanding the foregoing, the Debtors are authorized and directed to pay on the Effective Date (as defined in the DIP ABL Credit Agreement) all costs and expenses of the DIP ABL Credit Parties required to be paid as a condition precedent to the effectiveness of the DIP ABL Credit Agreement without the need for any professional engaged by such parties to first deliver a copy of its invoice as set forth in this paragraph 19(f).

20. ***Costs, Fees, Expenses, and Indemnification.***

(a) *DIP ABL Credit Parties.* The DIP ABL Loan Parties are authorized to pay any and all reasonable and documented fees and expenses of the DIP ABL Agents (including, without limitation, the reasonable and documented fees and expenses of Skadden, Arps, Slate, Meagher & Flom LLP, Choate, Hall & Stewart LLP, and Berkeley Research Group LLC) in connection with the DIP ABL Facility and as provided for in the DIP ABL Loan Documents, whether incurred before, on or after the Petition Date and whether or not the transactions contemplated hereby are consummated or such fees and expenses are set forth in the Approved Budget, including fees and expenses incurred in connection with (i) the preparation, negotiation and execution of the DIP ABL Loan Documents; (ii) the syndication and funding of the DIP ABL Facility; (iii) the creation, perfection or protection of the liens under the DIP ABL Loan Documents (including all search, filing and recording fees); (iv) the on-going administration of the DIP ABL Loan Documents (including the preparation, negotiation and execution of any amendments, consents, waivers, assignments, restatements or supplements thereto) and the Chapter 11 Cases; (v) the enforcement of the DIP ABL Loan Documents; (vi) any refinancing or restructuring of the DIP ABL Facility; and (vii) any legal proceeding relating to or arising out of the DIP ABL Facility or the other transactions contemplated by the DIP ABL Loan Documents, including the Chapter 11 Cases. Payment of all such professional fees and expenses shall not be subject to allowance by the Bankruptcy Court or to the U.S. Trustee guidelines, but shall be subject to the procedures set forth in paragraph 19(f) herein. Such fees and expenses shall not be subject to any offset, defense, claim, counterclaim or diminution of any type, kind or nature whatsoever.

(b) *Indemnification of DIP ABL Credit Parties.* The DIP ABL Credit Parties shall have no liability to any third party relating to the DIP ABL Loan Documents, the

DIP ABL Facility and DIP ABL Loan Parties' use of the financing provided thereunder, and shall not, by virtue of making the extensions of credit under the DIP ABL Facility, extending funds thereunder, or otherwise complying with the DIP ABL Loan Documents, be deemed to be in control of the operations of Debtors, to owe any fiduciary duty to the Debtors, their respective creditors, shareholders, or estates or to be acting as a "responsible person" or managing agent with respect to the operation or management of the Debtors. The DIP ABL Loan Parties shall, and are hereby authorized to, indemnify and hold harmless the DIP ABL Credit Parties and their respective affiliates and Representatives from and against all losses, liabilities, claims, damages, penalties, actions, judgments, suits, expenses or disbursements of any nature whatsoever arising out of or relating to the DIP ABL Loan Documents, including the syndication of any obligations thereunder, and the DIP ABL Loan Parties' use of the financing provided thereunder, *provided, however*, that the foregoing indemnity shall not apply to any actions of any indemnified parties determined in a final non-appealable judgment of a court of competent jurisdiction to constitute gross negligence or willful misconduct. This indemnification shall survive and continue for the benefit of all such persons or entities.

Provisions Common to DIP Financing and Use of Cash Collateral Authorizations

21. ***Carve-Out.***

(a) *Carve-Out.* As used in this Final Order and the DIP ABL Loan Documents, the "Carve-Out" shall be comprised of the following components:

(i) Clerk and U.S. Trustee Fees. All fees required to be paid to the Clerk of this Court and to the Office of the United States Trustee (the "U.S. Trustee") under section 1930(a) of title 28 of the United States Code and 31 U.S.C. § 3717 (collectively, "Clerk and UST Fees").

(ii) Chapter 7 Trustee Fees. All reasonable fees and expenses up to \$500,000 incurred by a trustee under section 726(b) of the Bankruptcy Code (the "Chapter 7 Trustee Fee Cap").

(iii) Committee Member Expenses. All reasonable, documented, out-of-pocket expenses of individual members of the Committee solely in their capacity as such (but expressly excluding any and all fees and expenses of professional persons employed by such committee members individually) in an aggregate amount not to exceed \$200,000 (the "Committee Member Expense Cap").

(iv) Allowed Professional Fees Incurred Prior to a Carve-Out Trigger Notice. To the extent allowed at any time, whether by interim order, final order, procedural order, or otherwise, all paid and earned and accrued and unpaid fees and expenses (the "Allowed Professional Fees") incurred by persons or firms retained by the Debtors, including the Subcommittee of the Debtors' Restructuring Committee, pursuant to section 327, 328 or 363 of the Bankruptcy Code (the "Debtor Professionals") and the Creditors' Committee pursuant to section 328 or 1103 of the Bankruptcy Code (together with the Debtor Professionals, the "Professional Persons") at any time before or on the date of delivery by the DIP ABL Administrative Agent of a Carve-Out Trigger Notice (as defined below), whether allowed by this Court prior to or after delivery of a Carve-Out Trigger Notice. For purposes of the Carve-Out, Allowed Professional Fees shall exclude (i) any restructuring, sale, consummation, success or similar fee of any Professional Person and (ii) fees and expenses of any third party professionals employed by any individual member of the Creditors' Committee.

(iv) Allowed Professional Fees Incurred After a Carve-Out Trigger Notice. Allowed Professional Fees of Professional Persons incurred on and after the first business day following delivery by the DIP ABL Administrative Agent of the Carve-Out Trigger Notice shall be subject to an aggregate cap of \$20 million (the "Post Trigger Notice Carve-Out Fee Cap").

(b) *Carve-Out Trigger Notice.* Upon the occurrence and during the continuance of any Termination Event, the DIP ABL Administrative Agent may deliver a written notice invoking the Post Trigger Notice Carve-Out Fee Cap (the "Carve-Out Trigger Notice") to the Debtors, the Debtors' lead restructuring counsel, the U.S. Trustee, and lead counsel for the Creditors' Committee. The Carve-Out Trigger Notice may be delivered by email (or any other means permitted under the DIP ABL Loan Documents).

(c) *Delivery of Weekly Fee Estimates.* Not later than 7:00 p.m. New York time on the third business day of each week starting with the first full calendar week following the Petition Date, each Professional Person shall deliver to the Debtors a statement (each such statement, a "Weekly Statement") setting forth a good-faith estimate of the amount of fees and expenses incurred during the preceding week by such Professional Person (through

Saturday of such week, the "Calculation Date"), along with a good-faith estimate of the cumulative total amount of unpaid fees and expenses incurred through the applicable Calculation Date (collectively, "Estimated Fees and Expenses") and a statement of the amount of such fees and expenses that have been paid to date by the Debtors from the Carve-Out Account (as defined below). No later than one business day after the delivery of a Carve-Out Trigger Notice, each Professional Person shall deliver one additional statement to the Debtors setting forth a good-faith estimate of the amount of fees and expenses incurred during the period commencing on the calendar day after the most recent Calculation Date for which a Weekly Statement has already been delivered and concluding on the date of the Carve-Out Trigger Notice.

(d) *Failure to Deliver Weekly Fee Estimates.* If any Professional Person fails to deliver a Weekly Statement when due (such Professional Person, a "Defaulting Professional Person"), such Professional Person's entitlement (if any) to any amount of the Carve-Out with respect to the aggregate unpaid amount of Allowed Professional Fees for the applicable periods for which such Professional Person failed to deliver a Weekly Statement shall be limited to the aggregate unpaid amount of Allowed Professional Fees for such Professional Person included in the Approved Budget, *provided* that such Defaulting Professional Person may cure its failure to provide a Weekly Statement so long as a Carve-Out Trigger Notice has not been delivered.

(e) *Carve-Out Reserve.* The DIP ABL Administrative Agent shall be entitled to maintain at all times a reserve (the "Carve-Out Reserve") in an amount (the "Carve-Out Reserve Amount") equal to the sum of the following: (i) estimated amounts for Clerk and UST Fees, the Chapter 7 Trustee Fee Cap, and the Committee Member Expense Cap, plus (ii) the Post Trigger Notice Carve-Out Fee Cap, plus (iii) the aggregate amount of Allowed

Professional Fees in the Approved Budget remaining unpaid through the most recent Calculation Date or, if greater, the aggregate unpaid amount of Estimated Fees and Expenses included in all Weekly Statements timely received by the Debtors and reported to the DIP ABL Administrative Agent, plus (iv) an amount equal to the Allowed Professional Fees set forth in the Approved Budget for the two-week period occurring after the most recent Calculation Date, plus (v) \$29.5 million less any Permitted Carve-Out Success Fees (as defined below) paid by the Debtors pursuant to an order of the Bankruptcy Court. Not later than 7:00 p.m. New York time on the fourth business day of each week starting with the first full calendar week following the Petition Date, the Debtors shall deliver to the DIP ABL Administrative Agent a report setting forth the Carve-Out Reserve Amount as of such time, and, in setting the Carve-Out Reserve, the DIP ABL Administrative Agent shall be entitled to, but shall not be required to, rely upon such reports in determining the Carve-Out Reserve.

(f) *Carve-Out Account.* Upon the entry of the Interim Order, the Debtors established a segregated account with the DIP ABL Administrative Agent (the "Carve-Out Account"), which was and shall continue to be funded in an amount up to the Carve-Out Reserve Amount less (i) the Clerk and UST Fees, (ii) the Chapter 7 Trustee Fee Cap, (iii) the Committee Member Expense Cap, (iv) the Post Trigger Notice Carve-Out Fee Cap (the "Carve-Out Account Required Balance") first with cash on hand and any availability or proceeds of any other postpetition financing facility, and if such sources are insufficient to fully fund the Carve-Out Account, with borrowings under the DIP ABL Facility. Bank of America shall not be responsible or have any liability for, or have any duty to ascertain, inquire into, monitor or enforce, compliance with the Carve-Out Account. Amounts in the Carve-Out Account shall be held in trust to pay all amounts included the Carve-Out. On each Friday after the date hereof (or

if such day is not a business day, then the next business day), the Debtors shall deposit into the Carve-Out Account an amount sufficient to cause the balance in the Carve-Out Account to equal the Carve-Out Account Required Balance. All Allowed Professional Fees of Professional Persons shall be paid to the applicable Professional Person first from the Carve-Out Account in accordance with the order or orders of the Bankruptcy Court allowing such Allowed Professional Fees. Notwithstanding anything to the contrary in this or any other Court order, the Carve-Out Account and the amounts on deposit in the Carve-Out Account shall be available and used only to satisfy obligations of Professional Persons benefitting from the Carve-Out, and, thereafter, as provided in paragraph 21(g)(v). Prior to a Carve-Out Trigger Notice, in no event shall the total balance in the Carve-Out Account ever exceed the Carve-Out Account Required Balance. The failure of the Carve-Out Account to satisfy Allowed Professional Fees in full shall not affect the priority of the Carve-Out.

(g) *Carve-Out Funding After a Carve-Out Trigger Notice.* The following provisions with respect to the Carve-Out Account shall apply only upon delivery of a Carve-Out Trigger Notice:

(i) On the date of the Carve-Out Trigger Notice, the Carve-Out Trigger Notice shall be deemed to constitute a demand to the Debtors to utilize all cash on hand as of such date and any availability or proceeds of any other postpetition financing facility to fund the Carve-Out Account in an amount equal to the full Carve-Out Reserve Amount (to the extent not previously funded into the Carve-Out Account) to be held in trust to pay all amounts included the Carve-Out.

(ii) On or after the date of a Carve-Out Trigger Notice, the DIP ABL Administrative Agent shall not sweep or foreclose on cash of the Debtors (including cash received as a result of the sale or other disposition of any assets) until the Carve-Out Account has been fully funded. To the extent such cash on hand and availability and/or proceeds of any other postpetition financing facility are not sufficient to fully fund the Carve-Out Account, the Carve-Out Trigger Notice shall be deemed to constitute a draw request and notice of borrowing by the Debtors for DIP ABL Revolving Advances under the DIP ABL Loan Documents (on a pro rata basis based on the then outstanding DIP ABL Revolving Commitments) to fully fund the Carve-Out Account. On the first business day after delivery of the Carve-Out Trigger Notice,

notwithstanding anything in the DIP ABL Loan Documents to the contrary, including with respect to the existence of a Default (as defined in the DIP ABL Loan Documents) or Event of Default (as defined in the DIP ABL Loan Documents), the failure of the Debtors to satisfy any or all of the conditions precedent for DIP ABL Revolving Advances under the DIP ABL Revolver, any termination of the commitments thereunder following an Event of Default at the direction of the DIP ABL Administrative Agent, each DIP ABL Revolving Lender with an outstanding DIP ABL Revolving Commitments (on a pro rata basis based on the then outstanding DIP ABL Revolving Commitments) shall make available to the DIP ABL Administrative Agent such DIP ABL Revolving Lender's pro rata share with respect to the borrowings required to fully fund the Carve-Out Account in accordance with the DIP ABL Revolver; *provided, however*, that in no event shall the DIP ABL Credit Parties be required to fund the Carve-Out Account to the extent such funding would cause Excess Availability (as defined in the DIP ABL Loan Documents and determined as if the DIP ABL Revolving Commitments were not terminated due to an Event of Default (as defined in the DIP ABL Loan Documents)) to be less than zero. Any such funding of the Carve-Out shall be added to, and made a part of, the DIP ABL Secured Obligations secured by the DIP ABL Collateral and shall otherwise be entitled to the protections granted under the DIP Orders, the DIP ABL Loan Documents, the Bankruptcy Code, and applicable law.

(iii) In no event shall the DIP ABL Administrative Agent or the DIP ABL Lenders be required to (x) extend DIP ABL Revolving Advances to fund the Carve-Out other than pursuant to this paragraph 21(g), (y) extend DIP ABL Revolving Advances pursuant to a deemed draw and borrowing pursuant to this paragraph in an aggregate amount exceeding the Carve-Out Reserve Amount, or (z) pay in the aggregate more than the Carve-Out Reserve Amount for all fees and expenses included in the Carve-Out.

(iv) All funds in the Carve-Out Account shall be used first to pay the obligations set forth in the definition of the Carve-Out set forth above until paid in full. All payments and reimbursements made from the Carve-Out Account shall permanently reduce the Carve-Out on a dollar-for-dollar basis.

(v) To the extent any funds remain in the Carve-Out Account after payment of all amounts included in the Carve-Out, such funds shall first be used to pay the DIP ABL Administrative Agent for the benefit of the DIP ABL Lenders, unless the DIP ABL Secured Obligations have been indefeasibly paid in full, in cash, all commitments under the DIP ABL Facility have been terminated, and all Letters of Credit (as defined in the DIP ABL Loan Documents) have been cancelled (or all such Letters of Credit have been fully cash collateralized or otherwise backstopped to the satisfaction of the DIP ABL Administrative Agent in its sole and absolute discretion), in which case any such excess shall next be paid to the Prepetition Credit Parties and/or the Junior DIP Agent in accordance with their rights and priorities under this Final Order and the Junior DIP Order.

(h) *Carve-Out Limitations.* For purposes of the Carve-Out, (i) any success, restructuring, consummation, sale or other similar fees shall not be included except for such fees in an aggregate amount up to \$19.5 million that become Allowed Professional Fees of

Lazard Freres & Co. LLC, M-III Advisory Partners, LP and/or Houlihan Lokey Capital Inc. (the "Permitted Carve-Out Consummation Fees") or any other success, restructuring, consummation, sale or other similar fees agreed to by the DIP ABL Agents in their sole and absolute discretion and (ii) Allowed Professional Fees shall exclude fees and expenses of any third party professionals employed by any individual member of the Creditors' Committee. Further notwithstanding anything to the contrary herein, the Carve-Out shall not include, apply to or be available for any fees or expenses incurred by any party in connection with (a) the investigation, initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation (i) against any of the DIP ABL Credit Parties, Prepetition ABL Credit Parties,⁴ or any Representatives of any of the foregoing, or (ii) challenging the amount, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset to, the obligations and the liens and security interests granted under the DIP ABL Loan Documents or, the Prepetition ABL Loan Documents, including, in each case for lender liability or pursuant to sections 105, 510, 544, 547, 548, 549, 550, or 552 of the Bankruptcy Code, applicable non-bankruptcy law or otherwise; (b) attempts to modify any of the rights granted to the DIP ABL Credit Parties or the Prepetition ABL Credit Parties under the DIP ABL Loan Documents, the Prepetition ABL Loan Documents or the DIP Orders; (c) attempts to prevent, hinder or otherwise delay any of the DIP ABL Credit Parties' or the Prepetition ABL Credit Parties' assertion,

⁴ Notwithstanding anything to the contrary in this Final Order, the DIP ABL Loan Documents, or the Prepetition Loan Documents, but subject to the Approved Budget, the Debtors, acting through the Restructuring Committee and Restructuring Subcommittee, as applicable, of the Board of Directors of Holdings, and the Creditors' Committee shall not be prohibited from investigating or pursuing any estate causes of action against ESL Investments, Inc., in any capacity, or any of its affiliates, or from funding such actions from the proceeds of the DIP ABL Facility or the Carve-Out so long as it does not affect in any manner the Prepetition ABL Credit Parties or the DIP ABL Credit Parties, in each case, other than ESL Investments, Inc. For purposes of this paragraph 20(h), the Prepetition ABL Credit Parties do not include ESL Investments, Inc. in any capacity or any of its affiliates.

enforcement or realization upon any of the Prepetition Collateral or DIP ABL Collateral in accordance with the DIP ABL Loan Documents, the Prepetition ABL Loan Documents, and the DIP Orders other than to seek a determination that a Termination Event has not occurred or is not continuing; (d) paying any amount on account of any claims arising before the commencement of the Chapter 11 Cases unless such payments are specifically approved by an order of the Bankruptcy Court; (e) any success, completion, back-end or similar fees other than the Permitted Carve-Out Success Fees or any other success, restructuring, consummation, sale or other similar fees agreed to by the DIP ABL Agents in their sole and absolute discretion; and/or (f) anything else prohibited by the DIP ABL Loan Documents, the Prepetition ABL Loan Documents or any order of the Bankruptcy Court, as applicable. In no way shall the Carve-Out, the Carve-Out Account, the Approved Budget or any of the forgoing be construed as a cap or limitation on the amount of Allowed Professional Fees due and payable by the Debtors or the amount of Allowed Professional Fees that may be allowed by the Bankruptcy Court at any time (whether by interim order, final order or otherwise).

(i) *No Direct Obligation to Pay Allowed Fees; No Waiver of Right to Object to Fees.* Other than the funding of the Carve-Out with the proceeds of the DIP ABL Facility as provided herein and in the DIP ABL Loan Documents, the DIP ABL Credit Parties shall not be responsible for the payment or reimbursement of any fees or disbursements of any Professional Person incurred in connection with these Chapter 11 Cases, any Successor Cases, or otherwise. Nothing in the DIP Orders, the Junior DIP Order or otherwise shall be construed: (i) to obligate the DIP ABL Credit Parties, the Junior DIP Credit Parties, or the Prepetition ABL Credit Parties, in any way, to pay compensation to, or to reimburse expenses of, any Professional Person or to guarantee that the Debtors have sufficient funds to pay such compensation or

reimbursement, other than the Carve-Out Reserve Amount; (ii) as consent to the allowance of any fees and expenses of Professional Persons; or (iii) to affect the rights of the DIP ABL Credit Parties, the Junior DIP Credit Parties, the Prepetition ABL Credit Parties or any other party-in-interest to object to the allowance and payment of such fees and expenses.

(j) *Payment of Compensation.* The Debtors shall be permitted to pay fees and expenses allowed and payable by order of the Bankruptcy Court (that has not been vacated or stayed, unless the stay has been vacated) under sections 330 and 331 of the Bankruptcy Code, as the same may be due and payable from the Carve-Out Account. Such payments prior to a Carve-Out Trigger Notice shall not reduce the Post Trigger Notice Carve-Out Fee Cap.

22. *Budget and Borrowing Base Reporting; Budget Compliance*

(a) The DIP ABL Loan Parties have delivered and/or shall deliver to the Creditors' Committee, DIP ABL Agents and the DIP ABL Lenders: (i) a budget depicting, on a weekly and line item basis, (1) (A) projected cash receipts (including from asset sales), (B) projected disbursements (including ordinary course operating expenses, bankruptcy-related expenses (including professional fees and expenses of the professionals and advisors of the Debtors and the Creditors' Committee), and any other fees and expenses relating to the DIP ABL Loan Documents or the Junior DIP Loan Documents), (C) projected Net Cash Flow (as defined below), (D) projected inventory receipts and levels, and (E) the projected Borrowing Base (as defined in the DIP ABL Loan Documents) and Excess Availability (as defined in the DIP ABL Loan Documents), (2) a report listing the stores subject to Specified Store Closing Sales and the other remaining stores, and (3) such other information requested by the DIP ABL Agents for the first thirteen (13) week period from the Petition Date (the "Approved Budget"), (ii) on October

31, 2018 and every Wednesday thereafter, a Budget for the immediately following consecutive 13 weeks (each, a "Rolling Budget"), (iii) on October 31, 2018 and every Wednesday thereafter, reports detailing operating and financial performance (the "Weekly Flash Reporting Package") which shall include cash flow performance compared to the Approved Budget for the previous week together with accompanying schedules supporting line items included in the weekly cash flow results (such as roll-forward of inventory sales and receipts, roll-forward of merchandise and other payables of each DIP ABL Loan Party as of the end of the prior week, in each case, in reasonable detail), (iv) other customary information and documents, including approval rights with respect thereto, to be set forth in the DIP ABL Loan Documents, and (v) other information as may be reasonably requested by the DIP ABL Agents or the Creditors' Committee. The DIP ABL Loan Parties shall be required to comply with such Approved Budget, including having made all scheduled payments to the Prepetition ABL Credit Parties and the DIP ABL Credit Parties, as applicable, and when required, subject to the Permitted Variance (as defined below). The Approved Budget is attached hereto as Exhibit C. The Approved Budget shall be updated, modified or supplemented by the DIP ABL Loan Parties (x) with the written consent of the DIP ABL Agent and each DIP ABL Co-Collateral Agent in their sole and absolute discretion and (y) upon the request of DIP ABL Agent or any DIP ABL Co-Collateral Agent from time to time (which request may, without limitation, be made in connection with any Specified Transaction or the commencement, or during the continuation, of the Specified Stores Closing Sales (each as defined in the DIP ABL Credit Agreement)); *provided, however*, that in the event the DIP ABL Agent, the DIP ABL Co-Collateral Agents and the DIP ABL Loan Parties cannot agree as to an updated, modified or supplemented budget, the then current Approved Budget shall continue in effect, with weekly details for any periods after the 13-week period covered by the then current

Approved Budget to be derived in a manner satisfactory to the DIP ABL Agent and the DIP ABL Co-Collateral Agents in their sole and absolute discretion based on the then current Approved Budget (each such period so approved, an "Extended Budget Period"), and such disagreement shall give rise to an Event of Default upon the later of (x) the end of the period covered by the then current Approved Budget and (y) the end of the then current Extended Budget Period.

(b) The DIP ABL Loan Parties shall deliver to the DIP ABL Administrative Agent and the Creditors' Committee a borrowing base certificate presenting the DIP ABL Borrowers' computation of the Borrowing Base (as defined in the DIP ABL Loan Documents) (including appropriate supporting data therefor) (a "Borrowing Base Certificate") as soon as available, but in no event later (i) in the case of a draft of the Borrowing Base Certificate, 5:00 p.m. (Central Time) on Wednesday of each week and (ii) in the case of a final Borrowing Base Certificate, 5:00 p.m. (Central Time) on Thursday of each week (or, if Thursday is not a business day, on the next succeeding business day), in each case, as of the close of business on the immediately preceding Saturday. The initial Borrowing Base Certificate was delivered as a condition precedent to the Initial Closing Date (as defined in the DIP ABL Term Sheet). In connection with any disposition or series of related dispositions of any DIP ABL Collateral of a type that is included in the Borrowing Base with a value in excess of \$7,500,000 in the aggregate (other than inventory in the ordinary course of business and intercompany transfers among DIP ABL Loan Parties), the DIP ABL Loan Parties shall deliver to the DIP ABL Administrative Agent a roll forward of Eligible Inventory and pro forma Borrowing Base Certificate giving effect to such sale at least one (1) business day prior to the closing of such sale. In addition, not later than the tenth (10th) day of each month (or later with the consent of the DIP ABL Agents),

commencing with the first full month immediately following the Petition Date, an updated inventory appraisal shall be delivered to the DIP ABL Administrative Agent.

(c) The DIP ABL Loan Parties shall also provide a budget variance report (the "Budget Variance Report") for delivery to the DIP ABL Agents and the Creditors' Committee by Wednesday of every week for the most recently ended four-week period included in the Approved Budget showing by line item actual cash receipts, disbursements, inventory receipts and consignment receipts for such four-week period, in comparable form to the Approved Budget, noting therein all the variance, on a cumulative basis, of the DIP ABL Borrowers' total net cash flow excluding proceeds from asset sales (except for proceeds from the sale of inventory) and excluding fees and expenses of the professionals and advisors of the Debtors and the Creditors' Committee, and financing related items (the "Net Cash Flow") for such four-week period in the Approved Budget, including explanations for any material variance (including whether such variance is permanent in nature or timing related) for such four-week period. Each Budget Variance Report delivered following a Budget Testing Date (as defined below) shall contain an analysis demonstrating compliance with the Approved Budget subject to the Permitted Variance. The DIP ABL Borrowers will supplement the Weekly Flash Reporting Package and the Budget Variance Report from time to time upon the request of the DIP ABL Agents or the Creditors' Committee.

(d) The DIP ABL Loan Parties shall be required to comply with each Approved Budget in all material respects, including having made all scheduled payments to the DIP ABL Credit Parties and the Prepetition ABL Credit Parties, as applicable, as and when required, subject to the following (the "Permitted Variance"): the DIP ABL Borrowers' Net Cash Flow shall not be less than an amount equal to the Net Cash Flow set forth in the Approved

Budget minus \$42 million. Such covenant shall be tested on Saturday each second week (commencing on November 10, 2018) (but shall be reported each week) on a cumulative basis from the Petition Date until the fourth (4th) week after the Petition Date and then on a rolling four (4) week basis, in accordance with the Budget Variance Report delivered by the DIP ABL Borrowers to the DIP ABL Agents and the Creditors' Committee (each such date, a "Budget Testing Date").

(e) The DIP ABL Loan Parties shall arrange for separate weekly (unless waived by the DIP ABL Agents and the Creditors' Committee in their sole and absolute discretion) conference calls with the DIP ABL Agents and their professional advisors and the Creditors' Committee's professional advisors discussing and analyzing (A) the Approved Budget or the Budget Variance Reports and/or any other reports or information delivered pursuant to the DIP ABL Loan Documents, (B) the financial operations and performance of the DIP ABL Loan Parties' business, (C) the status of landlord negotiations, (D) the status of any Specified Store Closing Sales, (E) the status of the Chapter 11 Cases generally, (F) progress in achieving compliance with the Case Milestones (as defined below) and the Go Forward Plan (as defined in the DIP ABL Loan Documents) or (G) such other matters relating to the Debtors as the DIP ABL Agents or the Creditors' Committee (or either of their respective agents or advisors) shall reasonably request.

23. ***Winddown Account.*** (a) Upon the consummation of any sales of Prepetition Unencumbered Collateral, the DIP ABL Loan Parties shall (i) deposit or cause to be deposited the net aggregate cash proceeds in respect of such sales into the Winddown Account⁵

⁵ The Winddown Account will be held at Bank of America, N.A. in an account ending in 8965.

until \$240,000,000 in the aggregate has been funded into the Winddown Account; *provided* that in no event shall more than \$240,000,000 be funded into such account, (ii) deposit or cause to be deposited any remaining net aggregate cash proceeds in respect of such sales into a cash collateral account maintained with Bank of America, N.A. (the "Senior DIP Cash Collateral Account") to secure the payment of the DIP ABL Secured Obligations (including (A) with respect to amounts available to be drawn under outstanding letters of credit issued or deemed issued under the DIP ABL Facility (or indemnities or other undertakings issued pursuant thereto in respect of such outstanding letters of credit), an amount equal to 105% of the aggregate undrawn amount of such letters of credit, and (B) with respect to Bank Products and Cash Management Services (each as defined in the DIP ABL Loan Documents) included in the DIP ABL Secured Obligations (or indemnities or other undertakings issued pursuant thereto in respect thereof), an amount of cash collateral in compliance with the terms of the DIP ABL Credit Agreement), and (iii) upon and after the indefeasible payment in full in cash of the DIP ABL Secured Obligations as described in clause (ii) above, deposit or cause to be deposited any remaining net cash proceeds in respect of such sales into a cash collateral account designated by the Junior DIP Agent (the "Junior DIP Cash Collateral Account") to secure the payment of the Junior DIP Facility, and (b) upon the consummation of any sales of Specified Collateral, the Junior DIP Obligors shall (i) as contemplated in paragraph 23(a)(i), deposit or cause to be deposited the net cash proceeds in respect of such sales into the Winddown Account until \$240,000,000 in the aggregate has been funded into the Winddown Account; *provided* that in no event shall more than \$240,000,000 be funded into such account, and (ii) deposit or cause to be deposited any remaining net cash proceeds in respect of such sales to the Senior DIP Cash Collateral Account and to the Junior DIP Cash Collateral Account, on a pro rata basis based on

the aggregate commitment under the Junior DIP Facility (i.e., \$350,000,000) and the aggregate incremental commitments and extensions of credit under the DIP ABL Facility (i.e., \$300,000,000) without giving regard to the roll-up portion thereof, until either the indefeasible payment in full in cash of the DIP ABL Secured Obligations or the Junior DIP Obligations has occurred, after which all such net cash proceeds shall be applied to the payment of the DIP ABL Secured Obligations or the Junior DIP Obligations, respectively, provided that nothing contained in this paragraph 23 shall impair or modify the Reverse Marshaling Provisions and no payments shall be made on the DIP ABL Secured Obligations or the Junior DIP Obligations in contravention thereof. "Winddown Account" shall mean a deposit account at Bank of America, N.A. that, prior to the discharge and indefeasible payment in full of all obligations under the DIP ABL Facility and the Junior DIP Facility, may only be used to pay winddown costs of the DIP ABL Loan Parties at the discretion of the DIP ABL Loan Parties following entry of this Final Order. Notwithstanding anything to the contrary in this or any other Bankruptcy Court order, the Winddown Account and the amounts on deposit in the Winddown Account shall be available and used only to satisfy winddown costs and shall not be subject to any prepetition liens or any liens or superpriority claims granted hereunder, including liens or superpriority claims granted to the DIP ABL Credit Parties or Junior DIP Credit Parties or as Adequate Protection. For the avoidance of doubt, the Winddown Account and the amounts on deposit in the Winddown Account shall not constitute DIP ABL Collateral, Junior DIP Collateral or Cash Collateral. Bank of America shall not be responsible or have any liability for, or have any duty to ascertain, inquire into, monitor or enforce, compliance with the provisions of this definition.

24. ***Modification of DIP ABL Loan Documents.*** Upon no less than three (3) business days' notice to the Creditors' Committee and the Junior DIP Agent (in each case, only to

the extent reasonably practicable), the DIP ABL Loan Parties and the DIP ABL Agents are hereby authorized, subject to the DIP ABL Loan Documents, to implement, in accordance with the terms of the respective DIP ABL Loan Documents, any amendments, waivers, consents or other modifications to or under the DIP ABL Loan Documents (including any change in the number or composition of the DIP ABL Lenders) without further order of this Court unless such amendment, waiver, consent or other modification (a) restricts, limits or prohibits any payments required pursuant to paragraph 19 of this Final Order, (b) shortens the maturity or the scheduled termination date thereunder or (c) effects or relates to the Reverse Marshaling Provisions.

25. ***Right to Credit Bid.*** Subject to Section 363(k) of the Bankruptcy Code, the DIP ABL Agent and the Prepetition ABL Administrative Agent (subject to obtaining any required consent or direction of the requisite number or percentage of the Prepetition ABL Credit Parties) shall have the right to "credit bid" up to the full allowed amount of their respective claims and outstanding obligations in connection with any sale of all or any portion of the DIP ABL Collateral, including any sale occurring pursuant to section 363 of the Bankruptcy Code or included as part of a restructuring plan subject to confirmation under section 1129(b)(2)(A)(ii) of the Bankruptcy Code or a sale or disposition by a chapter 7 trustee for any Debtor under section 725 of the Bankruptcy Code or otherwise. For the avoidance of doubt, any such credit bid for all or any portion of the DIP ABL Collateral must, upon closing of such sale transaction, provide for payment in full of all senior security interests in and liens on all of the DIP ABL Collateral being acquired in such sale transaction, absent waiver by the DIP ABL Agents.

26. ***Automatic Perfection of DIP ABL Liens and Adequate Protection Liens.***

(a) This Final Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of all liens granted herein, including the DIP ABL Liens and the

Adequate Protection Liens, without the necessity of filing or recording financing statements, intellectual property filings, mortgages, notices of lien or similar instruments in any jurisdiction, taking possession of or control over cash, deposit accounts, securities, or other assets, or the taking of any other action (including, for the avoidance of doubt, entering into any deposit account control agreement, customs broker agreement or freight forwarding agreement) to validate or perfect (in accordance with applicable non-bankruptcy law) the DIP ABL Liens and the Adequate Protection Liens, or to entitle the DIP ABL Credit Parties or the Prepetition Credit Parties to the priorities granted herein.

(b) Notwithstanding the foregoing, the DIP ABL Agents and the Prepetition Agents each are hereby authorized, but not required, to file or record (and to execute in the name of the applicable DIP ABL Loan Parties, as their true and lawful attorneys, with full power of substitution, to the maximum extent permitted by law) financing statements, intellectual property filings, mortgages, notices of lien or similar instruments in any jurisdiction, take possession of or control over cash, deposit accounts, securities, or other assets, or take any other action, as they may elect, in order to validate and perfect the liens and security interests granted to them hereunder. Whether or not the DIP ABL Agents or the Prepetition Agents (as applicable) choose, in their sole discretion, to file such financing statements, intellectual property filings, mortgages, notices of lien or similar instruments, take possession of or control over any cash, deposit accounts, securities, or other assets, or otherwise confirm perfection of the liens and security interests granted to the DIP ABL Control Co-Collateral Agent and the Prepetition ABL Control Co-Collateral Agent, respectively, hereunder, such liens and security interests were deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge,

dispute or subordination (subject to the priorities set forth in this Final Order) immediately upon entry of this Final Order, except as set forth in Paragraphs 41 and 42.

(c) The DIP ABL Loan Parties are authorized to execute and deliver promptly upon demand to the DIP ABL Agents or the Prepetition Agents all such financing statements, mortgages, control agreements, notices and other documents as the DIP ABL Agents or the Prepetition Agents may reasonably request. The DIP ABL Loan Parties are authorized to, and shall, execute and deliver to the DIP ABL Agents and the Prepetition Agents such agreements, financing statements, mortgages, instruments and other documents as the DIP ABL Agents or the Prepetition Agents may reasonably request to evidence, confirm, validate, or perfect the DIP ABL Liens or the Adequate Protection Liens; and the failure by the DIP ABL Loan Parties to execute or deliver any documentation relating to the DIP ABL Liens or the Adequate Protection Liens shall in no way affect the validity, enforceability, nonavoidability, perfection, or priority of such liens.

(d) As set forth in the DIP ABL Loan Documents, Wells Fargo Bank, National Association has appointed Bank of America, N.A., in its capacity as a DIP ABL Co-Collateral Agent, as agent to the DIP ABL Co-Collateral Agents for purposes of filing financing statements, mortgages, control agreements, notices and other documents, in connection with the perfection of a security interest in the DIP ABL Collateral which was granted for the benefit of the DIP ABL Credit Parties (the "DIP ABL Control Co-Collateral Agent"). Each Debtor acknowledges that any and all actions to be taken by the DIP ABL Co-Collateral Agents under the DIP Orders and the DIP ABL Loan Documents, may be taken individually by the DIP ABL Control Co-Collateral Agent, and all such actions shall have the full force and effect as though taken jointly by both of the DIP ABL Co-Collateral Agents. The financing statements described

above may describe the DIP ABL Collateral in the same manner as described herein, in the DIP ABL Term Sheet and in the DIP ABL Credit Agreement, or may contain an indication or description of the DIP ABL Collateral that describes such property in any other manner as the DIP ABL Control Co-Collateral Agent may determine is necessary, advisable or prudent, including describing such property as "all assets and all personal property whether now owned or hereafter acquired" of the applicable Debtor or words of similar effect.

(e) The DIP ABL Agents and the Prepetition Agents, each in their discretion, may file a photocopy of this Final Order as a financing statement or other notice of lien or similar instrument, with any filing or recording office or with any registry of deeds or similar office, and accordingly, each officer is authorized to accept and record the photocopy of this Final Order, in addition to or in lieu of such financing statements, notices of lien or similar instrument. Each Debtor is authorized to execute and deliver to the DIP ABL Agents or Prepetition Agents, mortgages in recordable form with respect to any real estate constituting DIP ABL Collateral and identified by any of the DIP ABL Agents or Prepetition Agents on terms reasonably satisfactory to the DIP ABL Agents or Prepetition Agents, as applicable.

27. ***Other Automatic Perfection Matters.*** To the extent that any Prepetition Agent is the secured party under any account control agreements, listed as loss payee or additional insured under any of the DIP ABL Loan Parties' insurance policies, or is the secured party under any Prepetition Loan Document, each of the DIP ABL Agents, for itself and on behalf of the DIP ABL Credit Parties is also deemed to be the secured party under such account control agreements, loss payee or additional insured under the DIP ABL Loan Parties' insurance policies, and the secured party under each such Prepetition Loan Document (in any such case with the same priority of liens and claims thereunder relative to the priority of (a) the DIP ABL

Liens, and (b) the Prepetition Liens and Adequate Protection Liens, in each case, as set forth in this Final Order), and shall have all rights and powers in each case attendant to that position (including rights of enforcement but subject in all respects to the terms of this Final Order), and shall act in that capacity and distribute any proceeds recovered or received in accordance with the terms of the DIP Orders and the DIP ABL Loan Documents. The Prepetition ABL Control Co-Collateral Agent or the Prepetition Second Lien Collateral Agent, as applicable, shall serve as agent for the DIP ABL Agents for purposes of perfecting the DIP ABL Agents' security interests in and liens on all DIP ABL Collateral that is of a type such that perfection of a security interest therein may be accomplished only by possession or control by a secured party. All existing blocked account agreements, deposit account control agreements, securities account control agreements, credit card acknowledgements, credit card agreements, collateral access agreements, landlord agreements, warehouse agreements, bailee agreements, carrier agency agreements, customs broker agency agreements, subordination agreements (including any intercompany subordination agreements), and freight forwarder agreements constituting Prepetition ABL Loan Documents, and all existing Uniform Commercial Code filings and all existing filings with the United States Patent and Trademark Office or the United States Copyright Office with respect to the recordation of an interest in the intellectual property of the Debtors, which in each case were filed by any Prepetition ABL Agent, shall in each case be deemed to be delivered and/or filed in connection with the DIP ABL Facility, shall constitute DIP ABL Loan Documents and shall remain in full force and effect without any further action by the Debtors, any DIP ABL Agent or any other person, and in each case the DIP ABL Agents shall be deemed to be a party thereto.

28. ***Proceeds of Subsequent Financing.*** If any of the DIP ABL Loan Parties, any trustee, any examiner with enlarged powers, any responsible officer or any other estate representative subsequently appointed in any of the Chapter 11 Cases or any Successor Case, shall obtain credit or incur debt in breach of the DIP ABL Loan Documents, at any time prior to the repayment in full in cash of all DIP ABL Secured Obligations, or all Prepetition ABL Obligations, including subsequent to the confirmation of any plan of reorganization or liquidation with respect to the DIP ABL Loan Parties and the DIP ABL Loan Parties' estates, then all cash proceeds derived from such credit or debt shall immediately be turned over to the DIP ABL Agents, or if the DIP ABL Secured Obligations have been paid in full in cash, to the Prepetition ABL Administrative Agent, to be applied in accordance with the this Final Order and the DIP ABL Loan Documents, the Prepetition ABL Loan Documents and the Prepetition Loan Documents, as applicable.

29. ***Maintenance and Disposition of DIP ABL Collateral / Cash Management.*** Until the indefeasible payment in full in cash of all DIP ABL Secured Obligations, and the termination of the obligation of the DIP ABL Credit Parties to extend credit under the DIP ABL Facility, the DIP ABL Loan Parties shall (a) maintain and insure the DIP ABL Collateral in amounts, for the risks, and by the entities as required under the DIP ABL Loan Documents, (b) except as set forth in this paragraph 29, maintain their cash management system as in effect as of the Petition Date, (i) subject to the DIP ABL Loan Documents; (ii) subject to the Cash Management Order,⁶ as may be modified, with the prior written consent

⁶ "Cash Management Order" means an interim or final order granting the *Motion Of Debtors For Authority To (I) Continue Using Existing Cash Management System, Bank Accounts, And Business Forms, (II) Implement Ordinary Course Changes To Cash Management System, (III) Continue Intercompany Transactions, And (IV) Provide Administrative Expense Priority For Postpetition Intercompany Claims And Related Relief.*

of the DIP ABL Agents by any order that may be entered by this Court; and (iii) in a manner which, in any event, shall be satisfactory to the DIP ABL Agents. Other than as expressly required pursuant to the DIP ABL Loan Documents, the Cash Management Order or the DIP Orders, no modifications to the DIP ABL Loan Parties' cash management system existing as of the Petition Date may be made without the prior approval of the DIP ABL Agents. Further, the DIP ABL Loan Parties shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP ABL Collateral or Prepetition ABL Collateral other than in the ordinary course of business without the prior consent of the DIP ABL Agents and Prepetition ABL Agents, as applicable (and no consent shall be implied, from any other action, inaction or acquiescence by the DIP ABL Agents or Prepetition ABL Agents, or from any order of this Court), except as otherwise provided for in the DIP ABL Loan Documents or otherwise ordered by the Bankruptcy Court.

30. ***Bank Products and Cash Management Services.*** From and after the date of the entry of the Interim Order, and consistent with the DIP Orders and the DIP ABL Loan Documents in all respects, any DIP ABL Cash Management/Bank Product Provider is deemed a Secured Party (as defined in the DIP ABL Loan Documents) and a DIP ABL Credit Party with respect to any claims related to such Bank Products and Cash Management Services (each as defined under the DIP ABL Loan Documents) to the extent provided for under the DIP ABL Loan Documents, and any such Bank Products and Cash Management Services shall constitute a DIP ABL Secured Obligation. From and after the date of the entry of the Interim Order, the DIP ABL Loan Parties were and continue to be authorized to request the continuation of letters of credit issued under the Prepetition LC Facility Agreement that are outstanding as of the Petition Date (but no new letters of credit), subject to and in accordance with the terms of the Prepetition

LC Facility Agreement. Claims of the Prepetition LC Facility Credit Parties under the Prepetition LC Facility Agreement shall continue to be secured by the Prepetition ABL Liens in the Prepetition ABL Collateral.

31. ***Application of Proceeds of Collateral, Payments and Collections.*** After repayment in full in cash of all DIP ABL Secured Obligations, any remaining proceeds of the DIP ABL Collateral shall be applied to the DIP ABL Loan Parties' remaining outstanding and unpaid obligations, in a manner consistent with the Bankruptcy Code and, except as may be otherwise ordered in one or more orders of this Court, in accordance with the rights and priorities set forth in the DIP Orders.

32. ***Case Milestones.*** The DIP ABL Loan Parties shall comply with the case milestones set forth in the DIP ABL Loan Documents (as may be amended from time to time in accordance with the DIP ABL Loan Documents, the "Case Milestones"). For the avoidance of doubt, the failure of the DIP ABL Loan Parties to comply with any of the Case Milestones shall (a) constitute an Event of Default under the DIP ABL Loan Documents and this Final Order; (b) subject to the expiration of the Remedies Notice Period (as defined below), result in the automatic termination of the DIP ABL Loan Parties' authority to use Cash Collateral under this Final Order; and (c) permit the DIP ABL Administrative Agent, subject to paragraph 34, to exercise the rights and remedies provided for in this Final Order and the DIP ABL Loan Documents.

33. ***Termination Event.*** (a) The occurrence of any Event of Default (as defined in the DIP ABL Loan Documents), or (b) noncompliance of the DIP ABL Loan Parties in any material respect or in a manner adverse to the DIP ABL Credit Parties with any of the

terms, provisions, conditions, covenants or obligations under the DIP Orders are each referred to herein as a "Termination Event."

34. ***Rights and Remedies Following a Termination Event.***

(a) *Termination.* Immediately upon the occurrence and during the continuation of a Termination Event, with no further action of this Court, the DIP ABL Administrative Agent may (or at the direction of the Required Lenders (as defined in the DIP ABL Loan Documents) shall), notify the DIP ABL Loan Parties, the Junior DIP Agent and the Creditors' Committee in writing that a Termination Event has occurred and is continuing (such notice, a "Termination Notice," and the date of any such notice, the "Termination Notice Date").

(b) *Notice of Termination.* Any Termination Notice shall be given by electronic mail (or other electronic means) to counsel to the Debtors, counsel to the Junior DIP Agent, counsel to the Creditors' Committee, the U.S. Trustee, and counsel to each of the Prepetition Agents. The Remedies Notice Period shall commence on the Termination Notice Date and shall expire five (5) business days after the Termination Notice Date (the "Remedies Notice Period" and the date of the expiration of the Remedies Notice Period, the "Termination Date").

(c) Without limiting the rights and remedies of the DIP ABL Agents and the other DIP ABL Credit Parties under the DIP ABL Loan Documents, the DIP ABL Administrative Agent may, at its option, and/or shall, upon the direction of the Required Lenders (as defined in the DIP ABL Loan Documents), as applicable, immediately upon the occurrence of and during the continuation of a Termination Event following the issuance of a Termination Notice, *inter alia*, without notice and unless the Bankruptcy Court orders otherwise, (a) declare, subject to expiration of the Remedies Notice Period, all obligations owing under the applicable

DIP ABL Loan Documents to be immediately due and payable, without presentment, demand, protest, or other notice of any kind, all of which are expressly waived by the DIP ABL Loan Parties, (b) declare the termination, reduction or restriction of any further commitment to extend credit to the DIP ABL Loan Parties to the extent any such commitment remains, (c) terminate the DIP ABL Facility and the applicable DIP ABL Loan Documents as to any future liability or obligation of the DIP ABL Agents, any DIP ABL Lender, or any other DIP ABL Credit Party, but without affecting any of the liens or the obligations and/or (d) declare a termination, reduction or restriction on the ability of the DIP ABL Loan Parties to use any Cash Collateral and exercise all other rights and remedies provided in the DIP ABL Loan Documents and applicable law, including to require the DIP ABL Loan Parties to cash collateralize any letters of credit outstanding under the DIP ABL Facility in accordance with the DIP ABL Loan Documents (any of the actions set forth in the foregoing (a), (b), (c) and (d), a "Termination").

(d) During the Remedies Notice Period, the DIP ABL Loan Parties shall be entitled to seek an emergency hearing with this Court for the purpose of contesting a Termination or for the contested use of Cash Collateral; *provided* that the sole issues that may be raised before the Bankruptcy Court at such emergency hearing are whether a Termination Event has occurred and/or is continuing and the contested use of Cash Collateral. During the Remedies Notice Period, the DIP ABL Loan Parties may continue to use the DIP ABL Collateral, including Cash Collateral, solely to meet payroll obligations (excluding any severance obligations) and pay expenses that the DIP ABL Agents approve as critical to keeping the DIP ABL Loan Parties' business operating in accordance with the Approved Budget, or as otherwise agreed by the DIP ABL Administrative Agent in its sole and absolute discretion and it being understood that none of the DIP ABL Credit Parties shall have any obligation to make an extension of credit under the

DIP ABL Facility, or otherwise to fund the Carve-Out Account. Upon expiration of the Remedies Notice Period, the DIP ABL Credit Parties or, upon payment in full of the DIP ABL Secured Obligations, the Prepetition ABL Credit Parties, shall be permitted to exercise all remedies set forth herein, in the DIP ABL Loan Documents or the Prepetition ABL Loan Documents, as applicable, and as otherwise available at law without further order of or application or motion to the Bankruptcy Court. Upon the occurrence and during the continuation of a Termination Event and the expiration of the Remedies Notice Period, the DIP ABL Administrative Agent, or upon payment in full of the DIP ABL Secured Obligations, the Prepetition ABL Administrative Agent, and any liquidator or other professional acting on their behalf will have the right to access and utilize, on a royalty-free basis, any trade names, trademarks, copyrights or other intellectual property and any warehouse, distribution centers, store or other locations that the DIP ABL Loan Parties have a right to occupy to the extent necessary or appropriate in order to sell, lease or otherwise dispose of any of the DIP ABL Collateral, including pursuant to any Court approved sale process. Notwithstanding the foregoing, the DIP ABL Agents' or Prepetition ABL Agents' exercise of remedies pursuant to this paragraph with respect to real property leases shall be subject to: (i) any agreement in writing between any of the DIP ABL Agents or the Prepetition ABL Agents, as applicable, and any applicable landlord, (ii) pre-existing rights of any of the DIP ABL Agents or any of the Prepetition ABL Agents, as applicable, and any applicable landlord under applicable non-bankruptcy law, (iii) consent of the applicable landlord, or (iv) further order of the Bankruptcy Court following notice and a hearing.

35. ***Modification of Automatic Stay.*** The automatic stay imposed under section 362(a) of the Bankruptcy Code is hereby modified as necessary to effectuate all of the

terms and provisions of the DIP Orders, including to (a) permit the DIP ABL Loan Parties to grant the DIP ABL Liens, the DIP ABL Superpriority Claims, the Adequate Protection Liens and the Adequate Protection Claims; (b) permit the DIP ABL Agents, the Prepetition LC Facility Administrative Agent, or the Prepetition ABL Agents, as applicable, to take any actions permitted hereunder, including but not limited to the actions set forth in paragraph 26 hereof; and (c) authorize the DIP ABL Loan Parties to pay, and the DIP ABL Credit Parties and the Prepetition ABL Credit Parties to retain and apply, payments made in accordance with the DIP Orders and the DIP Intercreditor Agreement.

36. ***Good Faith.***

(a) *Good Faith Under Section 364 of the Bankruptcy Code.* The DIP ABL Credit Parties have acted in good faith in connection with the DIP Orders, including the negotiation and approval of the DIP Intercreditor Agreement, the Interim Junior DIP Order, the Junior DIP Loan Documents and their reliance on the DIP Orders, the Interim Junior DIP Order, the Junior DIP Loan Documents and DIP Intercreditor Agreement is in good faith. Based on the findings set forth in the DIP Orders 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 the DIP Orders are hereafter modified, amended or vacated by a subsequent order of the Bankruptcy Court, or any other court, the DIP ABL Credit Parties are entitled to the protections provided in section 364(e) of the Bankruptcy Code. Any such modification, amendment or vacatur shall not affect the validity and enforceability of the DIP ABL Secured Obligations or any lien, claim or priority authorized or created thereby, the DIP Intercreditor Agreement, and/or any of the DIP ABL Documents. Any liens or claims granted to the DIP ABL Credit Parties hereunder arising prior to the effective date of any such

modification, amendment or vacatur of the DIP Orders shall be governed in all respects by the original provisions of the DIP Orders, including entitlement to all rights, remedies, privileges and benefits granted therein.

(b) *Prepetition ABL Credit Parties.* The Prepetition ABL Credit Parties have acted in good faith in connection with the DIP Orders, the Interim Junior DIP Order, the Junior DIP Loan Documents and their reliance on the DIP Orders, Interim Junior DIP Order, and Junior DIP Loan Documents is in good faith. Based on the findings set forth in the DIP Orders 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 the DIP Orders are hereafter modified, amended or vacated by a subsequent order of the Bankruptcy Court, or any other court, the Prepetition ABL Credit Parties are entitled to the protections provided in section 364(e) of the Bankruptcy Code. Any such modification, amendment or vacatur shall not affect the validity and enforceability of the Prepetition ABL Obligations, or any lien, claim or priority authorized or created thereby. Any liens or claims granted to the Prepetition ABL Credit Parties hereunder arising prior to the effective date of any such modification, amendment or vacatur of the DIP Orders shall be governed in all respects by the original provisions of the DIP Orders, including entitlement to all rights, remedies, privileges and benefits granted therein.

37. ***Proofs of Claim.*** Any order entered by the Bankruptcy Court establishing a bar date for any claims (including administrative claims) in any of the Chapter 11 Cases or any Successor Case shall not apply to any DIP ABL Credit Party or any Prepetition ABL Credit Party (for purposes of this paragraph 37, in their respective capacities as such). The DIP ABL Credit Parties and the Prepetition ABL Credit Parties shall not be required to file proofs of claim

or requests for approval of administrative expenses authorized by the DIP Orders in any of the Chapter 11 Cases or any Successor Case, and the provisions of the DIP Orders relating to the amount of the DIP ABL Secured Obligations, the Prepetition ABL Obligations, the Adequate Protection Claims, the Adequate Protection Liens, any adequate protection payments pursuant to the DIP Orders, the Prepetition ABL Liens, the DIP ABL Liens and the DIP ABL Superpriority Claims shall constitute a sufficient and timely filed proof of claim and/or administrative expense request in respect of such obligations and such secured status. For the avoidance of doubt, subject to the reservation of rights set forth in paragraphs 41 and 42 hereof, the books and records of the DIP ABL Agents, the Prepetition ABL Administrative Agent and the Prepetition LC Facility Administrative Agent and each of their respective successors and assigns shall be deemed conclusive as to the amount of the claims of each such party. However, in order to facilitate the processing of claims, to ease the burden upon the Bankruptcy Court and to reduce an unnecessary expense to the DIP ABL Loan Parties' estates, the Prepetition ABL Administrative Agent is authorized, but not directed or required, to file in the Prepetition ABL Loan Parties' lead chapter 11 case, a single, master proof of claim on behalf of themselves and the Prepetition ABL Credit Parties on account of any and all of their respective claims arising under the Prepetition ABL Loan Documents, as applicable, and hereunder (the "Master Proof of Claim") against each of the Prepetition ABL Loan Parties. Upon the filing of the Master Proof of Claim against each of the Prepetition ABL Loan Parties, the Prepetition ABL Administrative Agent, and the Prepetition ABL Credit Parties, shall be deemed to have filed a proof of claim in the amount set forth opposite its name therein in respect of its claim of any type or nature whatsoever with respect to the Prepetition ABL Loan Documents, and the claim of each Prepetition ABL Credit Party (and each of its respective successors and assigns) named in the

Master Proof of Claim shall be treated as if such entity had filed a separate proof of claim in each of the applicable Chapter 11 Cases. The Prepetition ABL Administrative Agent shall not be required to identify whether any Prepetition ABL Credit Party acquired its claim from another party and the identity of any such party or to amend the Master Proof of Claim to reflect a change in the holders of the claims set forth therein or a reallocation among such holders of the claims asserted therein resulting from the transfer of all or any portion of such claims. The provisions of this paragraph 37 and the Master Proof of Claim are intended solely for the purpose of administrative convenience and shall not affect the right of any Prepetition ABL Credit Party (or its successor in interest) to vote separately on any plan proposed in any of the applicable Prepetition ABL Loan Parties' Chapter 11 Cases. The Prepetition ABL Administrative Agent shall not be required to attach any instruments, agreements or other documents evidencing the obligations owing by each of the Prepetition ABL Loan Parties to the Prepetition ABL Credit Parties, as applicable, which instruments, agreements or other documents will be provided upon written request to counsel to the Prepetition ABL Administrative Agent.

38. ***Rights of Access and Information.*** Without limiting the rights of access and information afforded the DIP ABL Credit Parties under the DIP ABL Loan Documents, the DIP ABL Loan Parties shall be, and hereby are, required to afford Representatives, agents and/or employees of the DIP ABL Agents reasonable access to: (a) the DIP ABL Loan Parties' premises, (b) knowledgeable officers of the DIP ABL Loan Parties, (c) the DIP ABL Loan Parties' books and records, and (d) the DIP ABL Loan Parties' properties and other collateral of any Debtor against whom such parties are granted DIP ABL Liens, DIP ABL Superpriority Claims, Adequate Protection Liens, or Adequate Protection Claims under the DIP Orders and the DIP ABL Loan Parties shall reasonably cooperate, consult with, and provide to such persons all

such information as may be reasonably requested. Without limiting any other rights or remedies of the DIP ABL Agents or the other DIP ABL Credit Parties, or otherwise available at law or in equity, and subject to the terms of the DIP ABL Loan Documents unless otherwise ordered by the Bankruptcy Court, upon three (3) business days' written notice to counsel to the DIP ABL Loan Parties, counsel to the Creditors' Committee and any landlord, lienholder, licensor, or other third party owner of any leased or licensed premises or intellectual property, after the expiration of the Remedies Notice Period, that a Termination Event has occurred and is continuing, the DIP ABL Agents, (i) may, unless otherwise expressly provided in any separate agreement by and between the applicable landlord or licensor and the DIP ABL Agents (the terms of which shall be reasonably acceptable to the parties thereto), enter upon any leased or licensed premises of the DIP ABL Loan Parties for the purpose of exercising any remedy with respect to DIP ABL Collateral located thereon, and (ii) shall be entitled to all of the DIP ABL Loan Parties' rights and privileges as lessee or licensee under the applicable license and to use any and all trademarks, trade names, copyrights, licenses, patents, or any other similar assets of the DIP ABL Loan Parties, which are owned by or subject to a lien of any third party and which are used by DIP ABL Loan Parties in their businesses, in either the case of (i) or (ii), without interference from lienholders or licensors thereunder; *provided, however*, that the DIP ABL Agents (on behalf of the applicable DIP ABL Lenders) shall pay only rent and additional rent, fees, royalties, or other monetary obligations of the DIP ABL Loan Parties under, and solely as required by, the applicable lease and any amendments thereto that accrue during the period of such occupancy or actual use by DIP ABL Agents calculated on a per diem basis. Nothing herein shall require the DIP ABL Loan Parties, the DIP ABL Agents or the other DIP ABL Credit Parties, to assume any lease or license under Bankruptcy Code section 365(a) as a precondition to the rights afforded to

the DIP ABL Agents and the other DIP ABL Credit Parties herein. Notwithstanding the foregoing, the DIP ABL Agents' or Prepetition ABL Agents' exercise of remedies pursuant to this paragraph with respect to real property leases shall be subject to: (i) any agreement in writing between any of the DIP ABL Agents or the Prepetition ABL Agents, as applicable, and any applicable landlord, (ii) pre-existing rights of any of the DIP ABL Agents or any of the Prepetition ABL Agents, as applicable, and any applicable landlord under applicable non-bankruptcy law, (iii) consent of the applicable landlord, or (iv) further order of the Bankruptcy Court following notice and a hearing.

39. ***Intercompany Obligations.*** To the extent any Debtor owes any post-petition intercompany obligation or indebtedness to any other Debtor (the "Intercompany Obligations"), such Intercompany Obligations shall, subject to the reservation of rights set forth in paragraphs 41 and 42 hereof, be subordinated only to the DIP ABL Secured Obligations, until the DIP ABL Secured Obligations are indefeasibly repaid in full in cash and the Junior DIP Secured Obligations until the Junior DIP Secured Obligations are indefeasibly paid in full. All Intercompany Obligations incurred after the Petition Date ("Postpetition Intercompany Obligations") shall be secured by an automatically perfected security interest in and lien on, as to any Debtor transferee, all DIP ABL Collateral including all Prepetition ABL Collateral, Prepetition Encumbered Collateral and Prepetition Unencumbered Collateral of the transferee for the benefit of the Debtor transferor (the "Postpetition Intercompany Liens") junior to the Carve-Out, the DIP ABL Liens, the Senior Permitted Liens, the Junior DIP Liens, the Adequate Protection Liens (other than the Prepetition Second Lien Adequate Protection Liens), and the Prepetition ABL Liens, and senior to all other liens, and as to any non-Debtor transferee, liens on all assets and property of such transferee. For the avoidance of doubt, any reference in this Final

Order to payment (or repayment) in full shall mean: (a) indefeasible repayment of all outstanding obligations in full in cash, (b) termination or expiration of all commitments under any applicable DIP ABL Loan Documents or Prepetition ABL Loan Documents and termination or expiration of any other commitment of any DIP ABL Credit Parties or Prepetition ABL Credit Parties to make extensions of credit to any of the DIP ABL Loan Parties under any such DIP ABL Loan Documents or Prepetition ABL Loan Documents, respectively, (c) all letters of credit issued or deemed issued under the DIP ABL Loan Documents have been canceled or have expired, and all amounts drawn thereunder have been reimbursed in full in cash (or other arrangements with respect thereto satisfactory to the DIP ABL Agents in their sole discretion shall have been made), and (d) solely with respect to the Prepetition ABL Obligations (i) if no Challenge Proceeding has been timely and properly commenced with respect to the prepetition obligations subject to the ABL Roll Up, the expiration of the Challenge Period, or (ii) the date on which any order entered by the Bankruptcy Court in favor of the applicable secured party in such Challenge Proceeding becomes final and non-appealable. For the avoidance of doubt, any Intercompany Obligations shall be subordinated to the DIP ABL Secured Obligations, the DIP ABL Liens, the Adequate Protection Liens (other than Second Lien Facilities Adequate Protection Liens), and the Adequate Protection Claims (other than Second Lien Facilities Superpriority Claims), except to the extent set forth on the lien priority chart in paragraph 15. The Debtors shall establish reasonable procedures (reasonably acceptable to the Creditors' Committee, the DIP ABL Agents, and the Prepetition Second Lien Credit Parties) to trace cash proceeds from the sale of inventory of the Debtors and to track liabilities and payables of the Debtors, including shared services and professional fees and costs (collectively, the "Allocable Costs"), on an entity by entity basis, including without limitation between obligors and non-obligors under the Prepetition Second

Lien Obligations, and to report the same to the Creditors' Committee, the DIP ABL Agents and the Prepetition Second Lien Credit Parties on a monthly basis. At the time of repayment or treatment of the Postpetition Intercompany Obligations pursuant to a chapter 11 plan or otherwise, the Debtors, the Creditors' Committee, the DIP ABL Agents and the Prepetition Second Lien Credit Parties agree to cooperate in good faith to propose and adopt a fair and reasonable allocation of all Allocable Costs on an entity by entity basis.

40. ***Prohibited Use of DIP ABL Facility, DIP ABL Collateral, Cash Collateral, Carve-Out, etc.*** Notwithstanding anything herein, prior to indefeasible payment in full in cash of the DIP ABL Secured Obligations and the Prepetition ABL Obligations, except as otherwise expressly provided in this Final Order, the DIP ABL Facility, the DIP ABL Collateral, the Cash Collateral, the Prepetition ABL Collateral, proceeds of any of the foregoing, and the Carve-Out may not be used:

- (a) for the payment of interest and principal with respect to Prepetition Obligations or any other prepetition indebtedness of the Debtors, except for: (i) the Carve-Out; (ii) prepetition employee wages, benefits and related employee taxes as of the Petition Date; (iii) prepetition sales, use and real property taxes; (iv) prepetition amounts due in respect of insurance financings, premiums and brokerage fees; (v) payment of certain expenses (which expenses shall include fees and expenses of professionals) of the Prepetition ABL Agents and the Prepetition ABL Credit Parties (solely as required under the Prepetition Loan Documents); (vi) other "first day" interim and final orders permitting payment of prepetition claims, in the case of (ii) through (vi) pursuant to an order or orders of the Bankruptcy Court in form and substance acceptable to the DIP ABL Agents in their sole and absolute discretion and subject to and in accordance with the Approved Budget; (vii) the ABL Roll Up; and (viii) other indebtedness to the extent authorized by the Bankruptcy Court and set forth in the Approved Budget;
- (b) subject to this Final Order in connection with or to finance in any way any action, suit, arbitration, proceeding, application, motion or other litigation or threatened litigation (including any investigation in connection with

such litigation or threatened litigation) of any type adverse to the rights, remedies, claims or defenses of the DIP ABL Credit Parties⁷ or the Joint Lead Arrangers under the DIP ABL Loan Documents or the Prepetition ABL Credit Parties under the Prepetition ABL Loan Documents, and/or the DIP Orders, including for the payment of any services rendered by the professionals retained by the Debtors or the Creditors' Committee in connection with the assertion of or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defense or other contested matter, the purpose of which is to seek, or the result of which would be to obtain, any order, judgment determination, declaration or similar relief (A) invalidating, setting aside, avoiding, challenging, or subordinating, in whole or in part, the DIP ABL Secured Obligations, DIP ABL Liens, the Prepetition ABL Obligations, the Prepetition ABL Liens, the Adequate Protection Claims, the Adequate Protection Liens, or any adequate protection payments pursuant to the DIP Orders; (B) for monetary, injunctive, declarative or other affirmative relief against the DIP ABL Credit Parties or the Prepetition ABL Credit Parties or their respective collateral; or (C) preventing, hindering or otherwise delaying the exercise by the DIP ABL Credit Parties or the Prepetition ABL Credit Parties of any rights and remedies under the DIP Orders, the DIP ABL Loan Documents, the Prepetition ABL Loan Documents or applicable law, or the enforcement or realization (whether by foreclosure, credit bid, further order of the Bankruptcy Court or otherwise) by the DIP ABL Credit Parties or the Prepetition ABL Credit Parties upon any of their respective collateral;

- (c) to make any payment in settlement of any claim, action or proceeding, before any court, arbitrator or other governmental body, without prior written consent of the DIP ABL Agents, unless otherwise set forth in the Approved Budget;
- (d) to pay any fees or similar amounts to any person who has proposed or may propose to purchase interests of the Debtors (including so-called "topping fees," "exit fees" and other similar amounts), except as approved by the Bankruptcy Court, without prior written consent by the DIP ABL Agents, unless otherwise included in the Approved Budget;
- (e) to object to, contest, or interfere with, in any way, the DIP ABL Credit Parties' or the Prepetition ABL Credit Parties' enforcement or realization upon any of the Prepetition ABL Collateral or DIP ABL Collateral once a Termination Event has occurred, except as provided for in the DIP Orders, or seek to prevent the DIP ABL Credit Parties or the Prepetition ABL Credit Parties from credit bidding in connection with any proposed plan of

⁷ For the purposes of this paragraph 40 and paragraphs 41, 44, 45 and 46 the Prepetition ABL Credit Parties do not include ESL or any Non-ESL Insider, in any capacity.

reorganization or liquidation or any proposed transaction pursuant to section 363 of the Bankruptcy Code;

- (f) unless in connection with the repayment in full, in cash of the DIP ABL Facility, or the Prepetition ABL Obligations, as applicable, to use or seek to use Cash Collateral while the DIP ABL Secured Obligations, the Prepetition ABL Obligations and/or any of the DIP ABL Credit Parties' commitments under the DIP ABL Loan Documents remain outstanding, without the consent of the DIP ABL Agents, or the Prepetition ABL Administrative Agent, as applicable, other than during the Remedies Notice Period during which period the DIP ABL Loan Parties may only use Cash Collateral in accordance with the terms of the DIP Orders;
- (g) to use or seek to use any insurance or tax refund proceeds constituting DIP ABL Collateral or Prepetition ABL Collateral other than solely in accordance with the Approved Budget and the DIP ABL Loan Documents;
- (h) to incur indebtedness other than in accordance with the Approved Budget or the DIP ABL Loan Documents without the prior consent of the DIP ABL Agent;
- (i) to object to or challenge in any way the claims, liens, or interests held by or on behalf of the DIP ABL Credit Parties or the Prepetition ABL Credit Parties; provided, however, that not more than \$100,000 in the aggregate of proceeds of the Carve-Out, any Cash Collateral, or any proceeds of the DIP ABL Facility, the DIP ABL Collateral or the Junior DIP Facility may be used by the Creditors' Committee for purposes of investigating such claims, liens, or interests of the Prepetition ABL Credit Parties pursuant to paragraphs 41 and 42 (but not to litigate any of the foregoing);
- (j) to assert, commence, prosecute or support any claims or causes of action whatsoever, including any Avoidance Action, against the DIP ABL Credit Parties or the Prepetition ABL Credit Parties; *provided*, that the foregoing shall not be construed to prohibit the Debtors from responding to discovery requests as required in their reasonable business judgment in consultation with legal counsel;
- (k) to prosecute an objection to, contest in any manner, or raise any defenses to, the validity, perfection, priority, or enforceability of, or seek equitable relief from any of the Adequate Protection Claims, the Adequate Protection Liens, any adequate protection payments pursuant to the DIP Orders or any other rights or interests of the DIP ABL Credit Parties or the Prepetition ABL Credit Parties;
- (l) to prosecute an objection to, contest in any manner, or raise any defenses to, the validity, extent, amount, perfection, priority, or enforceability of, or seek equitable relief from, any of the DIP ABL Secured Obligations, the DIP ABL Liens, the Prepetition ABL Obligations, the Prepetition ABL Liens, or the DIP ABL Superpriority Claims;

- (m) to sell or otherwise dispose of the DIP ABL Collateral or the Prepetition ABL Collateral other than as contemplated by the DIP ABL Loan Documents or the Prepetition ABL Loan Documents, as applicable; or
- (n) for any purpose otherwise limited by the DIP ABL Loan Documents or the Prepetition ABL Loan Documents, as applicable.

41. ***Reservation of Certain Third-Party Rights and Bar of Challenges and***

Claims. The stipulations and admissions contained in the DIP Orders, including the Debtors' Stipulations, shall be binding on the Debtors and any successors thereto in all circumstances. The Debtors' Stipulations shall be binding on the Debtors' estates and each other party in interest, including the Creditors' Committee, unless, and solely to the extent that (a) any such party in interest, including any statutory or non-statutory committees appointed or formed in these Chapter 11 Cases (including the Creditors' Committee), and any other person or entity acting or seeking to act on behalf of the Debtors' estates, including any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors, with standing and requisite authority, has timely commenced an adversary proceeding (subject to the limitations set forth in paragraphs 41 and 42 hereof) against the Prepetition ABL Credit Parties or their respective subsidiaries, officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other professionals and the respective successors and assigns thereof, in each case in their respective capacity as such (the "Representatives") in connection with any matter related to the Prepetition ABL Loan Documents or the Prepetition ABL Collateral (a "Challenge Proceeding") by no later than on or before 60 days after entry of this Final Order (the "Challenge Period"); and (b) there is a final and non-appealable order in favor of the plaintiff in any such timely filed Challenge Proceeding, *provided that* in the event that the Creditors' Committee files a motion seeking standing to pursue a Challenge Proceeding against any Prepetition Credit Party (a "Standing Motion") by no later

than on or before 60 days after entry of this Final Order, the Challenge Period shall be extended, solely with respect to the Challenge Proceeding for which the Creditors' Committee seeks standing pursuant to the Standing Motion, to the date that is the earlier of entry of a final non-appealable order (i) denying any Standing Motion or (ii) finding against the Creditors' Committee in connection with any Challenge Proceeding; *provided, further*, that the hearing with respect to the Standing Motion shall not be adjourned without the written consent of the DIP ABL Agents unless otherwise ordered by the Bankruptcy Court. Any complaint or motion for standing filed in, or in connection with, any Challenge Proceeding shall set forth with specificity the basis for such challenge or claim and include a substantially final complaint, and any challenges or claims not so specified in the standing motion shall be deemed forever waived, released, and barred and the Challenge Period shall not be extended for such challenges or claims. Upon the expiration of the Challenge Period, without the filing of a Challenge Proceeding:

- (a) any and all such Challenge Proceedings and objections by any party (including any Creditors' Committee, any chapter 11 trustee, and/or any examiner or other estate representative appointed in the Chapter 11 Cases, and any chapter 7 trustee and/or examiner or other estate representative appointed in any Successor Case), shall be deemed to be forever waived, released and barred;
- (b) all matters not subject to the Challenge Proceedings, including all findings, the Debtors' Stipulations, all waivers, releases, affirmations and other stipulations as to the priority, extent, and validity as to the Prepetition ABL Credit Parties' claims, liens, and interests shall be of full force and effect and forever binding upon the Debtors, the Debtors' estates and all creditors, interest holders, and other parties in interest in the Chapter 11 Cases and any Successor Case;
- (c) any and all prepetition claims or causes of action against the Prepetition ABL Credit Parties, as applicable, relating in any way to the Prepetition ABL Loan Parties or the Prepetition ABL Loan Documents, as applicable, shall be forever waived and released by the Debtors, the Debtors' estates, all creditors, interest holders and other parties in interest in the Chapter 11 Cases and any Successor Case;

- (d) to the extent not theretofore repaid, the Prepetition ABL Obligations shall constitute allowed claims, not subject to counterclaim, setoff, subordination, recharacterization, reduction (except as may be provided by section 506(a) of the Bankruptcy Code), defense or avoidance, for all purposes in these Chapter 11 Cases or any Successor Case;
- (e) the Prepetition ABL Liens on the Prepetition ABL Collateral shall be deemed to have been, as of the Petition Date, and to be, legal, valid, binding, perfected, not subject to defense, counterclaim, recharacterization, subordination or avoidance; and
- (f) the obligations under the Prepetition ABL Loan Documents and the Prepetition ABL Liens on the Prepetition ABL Collateral shall not be subject to any other or further challenge by the Debtors, the Creditors' Committee or any other party in interest, each of whom shall be enjoined from seeking to exercise the rights of the Debtors' estates, including any successor thereto (including any estate representative or a chapter 7 or chapter 11 trustee and/or examiner appointed or elected for any of the Debtors with respect thereto).

42. If any Challenge Proceeding is timely commenced, the admissions and stipulations contained in the DIP Orders, including the Debtors' Stipulations, shall nonetheless remain binding and preclusive (as provided in this paragraph) on the Debtors, the Creditors' Committee, and any other person or entity, except as to any such findings and admissions that were expressly and successfully challenged (pursuant to a final, non-appealable order) in such Challenge Proceeding. Nothing in the DIP Orders vests or confers on any Person (as defined in the Bankruptcy Code), including the Creditors' Committee, standing or authority to pursue any cause of action belonging to the Debtors or their estates, including claims and defenses with respect to the Prepetition ABL Loan Documents and the Prepetition ABL Liens on the Prepetition ABL Collateral. Notwithstanding anything to the contrary in the DIP Orders, the DIP ABL Loan Documents, or the Prepetition Loan Documents, but subject to the Approved Budget, none of the Debtors, acting through the Restructuring Committee and Restructuring Subcommittee, as applicable, of the Board of Directors of Holdings or the Creditors' Committee shall be prohibited from investigating or pursuing any estate causes of action against ESL, in any

capacity, or from funding such actions from the proceeds of the DIP ABL Facility or the Carve-Out so long as it does not affect in any manner the Prepetition ABL Credit Parties or the DIP ABL Credit Parties, in each case, other than ESL.

43. ***No Third Party Rights.*** Except as explicitly provided for herein, this Final Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect, or incidental beneficiary.

44. ***Limitations on Charging Expenses.*** No costs or expenses of administration which have been or may be incurred in the Chapter 11 Cases or any Successor Cases at any time shall be charged against the DIP ABL Credit Parties with respect to the DIP ABL Collateral or the Prepetition ABL Credit Parties with respect to the Prepetition ABL Collateral (including Cash Collateral) pursuant to sections 105 or 506(c) of the Bankruptcy Code or any other legal or equitable doctrine (including unjust enrichment) or any similar principle of law, without the prior written consent of each of the DIP ABL Agents, any DIP ABL Credit Party, and/or any Prepetition ABL Credit Party, as applicable, and no such consent shall be implied from this Final Order or any other action, inaction, or acquiescence by any such agents or lenders.

45. ***Section 552(b).*** The "equities of the case" exception under section 552(b) of the Bankruptcy Code shall not apply to the DIP ABL Credit Parties or the Prepetition ABL Credit Parties, with respect to proceeds, products, offspring or profits of any of the Prepetition ABL Collateral or the DIP ABL Collateral.

46. ***No Marshaling/Applications of Proceeds.*** Neither the DIP ABL Credit Parties nor the Prepetition ABL Credit Parties shall be subject to the equitable doctrine of

"marshaling" or any other similar doctrine with respect to any of the DIP ABL Collateral or the Prepetition ABL Collateral except as set forth herein.

47. ***Discharge Waiver.*** The Debtors expressly stipulate, and the Bankruptcy Court finds and adjudicates that, none of the DIP ABL Secured Obligations, the DIP ABL Superpriority Claims, the DIP ABL Liens, the Adequate Protection Claims, the Adequate Protection Liens, or any adequate protection payment obligations pursuant to the DIP Orders, shall be discharged by the entry of an order confirming any plan of reorganization, notwithstanding the provisions of section 1141(d) of the Bankruptcy Code, unless the DIP ABL Secured Obligations and the Adequate Protection Claims have been indefeasibly paid in full in cash on or before the effective date of a confirmed plan of reorganization.

48. ***Rights Preserved.*** Other than as expressly set forth in the DIP Orders, any other rights, claims or privileges (whether legal, equitable or otherwise) of the DIP ABL Credit Parties and the Prepetition ABL Credit Parties are preserved. Nothing contained herein shall be deemed to prevent the Prepetition ABL Credit Parties from requesting additional adequate protection or from arguing that the adequate protection granted herein does not in fact adequately protect the Prepetition ABL Credit Parties against any post-petition diminution in value of the Prepetition ABL Collateral.

49. ***Release.*** Subject to paragraphs 41 and 42 and as further set forth in the DIP ABL Loan Documents, the Debtors, on behalf of themselves and their estates (including any successor trustee or other estate representative in these Chapter 11 Cases or any Successor Case) and any party acting by, through, or under any of the Debtors or any of their estates, hereby stipulate and agree that they forever and irrevocably (a) release, discharge, waive, and acquit the current or future DIP ABL Agents and other current or future DIP ABL Credit Parties, the Joint

Lead Arrangers (as defined in the DIP ABL Loan Documents), the current or future Prepetition ABL Administrative Agent, Prepetition LC Facility Administrative Agent and other current or future Prepetition ABL Credit Parties and each of their respective participants and each of their respective affiliates, and each of their respective Representatives (each of the foregoing only in their capacity as such), from any and all claims, demands, liabilities, responsibilities, disputes, remedies, causes of action, indebtedness, and obligations, rights, assertions, allegations, actions, suits, controversies, proceedings, losses, damages, injuries, attorneys' fees, costs, expenses, or judgments of every type, whether known, unknown, asserted, unasserted, suspected, unsuspected, accrued, unaccrued, fixed, contingent, pending, or threatened, including all legal and equitable theories of recovery, arising under common law, statute or regulation or by contract, of every nature and description, arising out of, in connection with, or relating to the DIP ABL Facility, the DIP ABL Loan Documents, the Prepetition ABL Facility, the Prepetition ABL Loan Documents, or the transactions and relationships contemplated hereunder or thereunder, including (i) any so-called "lender liability" or equitable subordination claims or defenses, (ii) any and all claims and causes of action arising under the Bankruptcy Code, and (iii) any and all claims and causes of action regarding the validity, priority, perfection, or avoidability of the liens or secured claims of the DIP ABL Agents, the other DIP ABL Credit Parties, the Prepetition ABL Agents, the Prepetition LC Facility Administrative Agent and the other Prepetition ABL Credit Parties; and (b) waive any and all defenses (including offsets and counterclaims of any nature or kind) as to the validity, perfection, priority, enforceability, and nonavoidability of the DIP ABL Secured Obligations, the DIP ABL Liens, the DIP ABL Superpriority Claims, the Prepetition ABL Obligations, the Prepetition ABL Liens, the Adequate Protection Claims, the Adequate Protection Liens, and any adequate protection payment

obligations pursuant to the DIP Orders, *provided, however*, that the foregoing release shall not release any claims for fraud or willful misconduct, *provided, further* that ESL or any Non-ESL Insider, in any capacity, shall not be entitled to a release pursuant to this paragraph; *provided further*, that ESL shall not be permitted to become a DIP ABL Credit Party, other than in its capacity as a Prepetition LC Facility Credit Party, without a further order of the Bankruptcy Court. For the avoidance of doubt, the foregoing release shall not constitute a release of any rights arising under the DIP ABL Loan Documents or of ESL or any Non-ESL Insider. Furthermore, any releases or exculpation required to be granted under an Acceptable Plan of Reorganization, as defined in the in the DIP ABL Credit Agreement, shall not be required to include ESL and Non-ESL Insiders.

50. ***No Waiver by Failure to Seek Relief.*** The failure or delay of the DIP ABL Credit Parties or the Prepetition Credit Parties to seek relief or otherwise exercise their respective rights and remedies under the DIP Orders, the Prepetition Loan Documents, the DIP ABL Loan Documents, or applicable law, as the case may be, shall not constitute a waiver of any of the rights hereunder, thereunder, or otherwise of the DIP ABL Credit Parties or the Prepetition Credit Parties.

51. ***Binding Effect of Final Order; Successors and Assigns.*** Immediately upon entry by the Bankruptcy Court (notwithstanding any applicable Bankruptcy Rules or any other law or rule to the contrary), the terms and provisions of this Final Order, including the liens granted herein shall, *nunc pro tunc* to the Petition Date, become valid and binding upon and inure to the benefit of the Debtors, the DIP ABL Credit Parties, and the Prepetition ABL Credit Parties, and their respective successors and assigns; *provided* that ESL shall not be permitted to have any interest in any DIP ABL Secured Obligations either directly or indirectly, including by

participation or otherwise, and any such interest shall be void *ab initio*. The DIP ABL Agents shall not be responsible or have any liability for, or have any duty to ascertain, inquire into, monitor or enforce, compliance with the provisions of this Final Order or the DIP ABL Loan Documents relating to whether a prospective transferee, assignee or participant is an eligible assignee or permitted participant, nor shall the DIP ABL Agents have any liability with respect to or arising out of any assignment or participation of loans or commitments, or disclosure of confidential information, to any person that is not an eligible assignee; *provided* that any transfer, assignment, participation or other similar transaction to a person that is not an eligible assignee shall be void *ab initio*. To the extent there is any applicable stay of this Final Order, it is hereby waived.

52. ***No Modification of Final Order.*** The Debtors irrevocably waive the right to seek and shall not seek or consent, directly or indirectly without the prior written consent of the DIP ABL Agents and the Prepetition ABL Agents, which consent of the DIP ABL Agents or Prepetition ABL Agents may be refused in their sole and absolute discretion: (a) any modification, stay, vacatur or amendment to the DIP Orders; (b) other than the Carve-Out, a priority claim for any administrative expense or unsecured claim against the Debtors to the fullest extent permitted under the Bankruptcy Code in the Chapter 11 Cases or any Successor Case, equal or superior to the Adequate Protection Claims and the DIP ABL Superpriority Claims; (c) any order allowing use of Cash Collateral constituting DIP ABL Collateral other than the DIP Orders; (d) any lien on any of the DIP ABL Collateral, with priority equal or superior to the Adequate Protection Liens (other than the Permitted Prior Liens and the DIP ABL Liens). The Debtors irrevocably waive any right to seek any amendment, modification or extension of the DIP Orders without the prior written consent of the DIP ABL Agents and the Prepetition

ABL Agents, as applicable, and no such consent shall be implied by any other action, inaction or acquiescence of the Prepetition ABL Credit Parties or the DIP ABL Credit Parties.

53. ***Final Order Controls.*** In the event of any inconsistency between the terms and conditions of the DIP ABL Loan Documents or this Final Order, the provisions of this Final Order shall govern and control.

54. ***Survival.*** The provisions of this Final Order and any actions taken pursuant hereto shall survive entry of any order which may be entered: (a) confirming any plan of reorganization in the Chapter 11 Cases; (b) converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code; (c) dismissing any of the Chapter 11 Cases or any Successor Case; or (d) pursuant to which the Bankruptcy Court abstains from hearing the Chapter 11 Cases or any Successor Case. The terms and provisions of this Final Order, subject to paragraphs 41 and 42, including the claims, liens, security interests and other protections granted to the Prepetition Credit Parties and the DIP ABL Credit Parties pursuant to this Final Order and/or the Prepetition Loan Documents (other than as modified hereby), notwithstanding the entry of any such order, shall continue in the Chapter 11 Cases, in any Successor Case, or following dismissal of any of the Chapter 11 Cases or any Successor Case, and shall maintain their priority as provided by this Final Order until all DIP ABL Secured Obligations, all Prepetition ABL Obligations, all Prepetition Second Lien Obligations, all Adequate Protection Claims, and any adequate protection payment obligations pursuant to this Final Order, have been paid in full.

55. ***Preservation of Rights Granted Under this Final Order.***

(a) Except as expressly provided herein or in the DIP ABL Loan Documents, no claim (to the fullest extent permitted under the Bankruptcy Code) or lien having a

priority senior to or *pari passu* with that granted by the DIP Orders to the DIP ABL Credit Parties shall be granted while any portion of the DIP ABL Secured Obligations remain outstanding, and the DIP ABL Liens shall not be subject to or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code or subordinate to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise.

(b) Unless all DIP ABL Secured Obligations and Prepetition ABL Obligations shall have been indefeasibly paid in full in cash, the Debtors shall not seek, and it shall constitute an Event of Default under the DIP ABL Loan Documents and shall terminate the right of the DIP ABL Loan Parties to use Cash Collateral if any of the Debtors seek, or if there is entered (i) any stay, vacatur, rescission, modification, amendment, or extension of the Interim Order or this Final Order without the prior written consent of the DIP ABL Agents, and no such consent shall be implied by any other action, inaction or acquiescence by the DIP ABL Agents; (ii) an order converting any of these Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code or dismissing any of these Chapter 11 Cases; (iii) [reserved]; or (iv) any other order granting adequate protection or authorizing the use of Cash Collateral without the prior written consent of the DIP ABL Agents and the Prepetition ABL Agents, and no such consent shall be implied by any other action, inaction, or acquiescence by any of the DIP ABL Agents and the Prepetition ABL Agents. If an order dismissing or converting any of these Chapter 11 Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered this Court shall retain jurisdiction, to the extent it has jurisdiction, notwithstanding such dismissal or conversion, for the purposes of enforcing the claims, liens and security interests referred to paragraph 54.

(c) If any or all of the provisions of the DIP Orders are hereafter reversed, modified, vacated or stayed or any order is entered dismissing any of the Chapter 11 Cases or converting any of these Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code, such reversal, stay, modification, vacatur, conversion, or dismissal shall not affect (i) the validity, priority or enforceability of any DIP ABL Secured Obligations, the Adequate Protection Claims, or any adequate protection payment obligations pursuant to the DIP Orders incurred prior to the actual receipt of written notice by the DIP ABL Agents or the Prepetition Agents, as applicable, of the effective date of such reversal, stay, modification or vacatur, or (ii) the validity, priority, or enforceability of the DIP ABL Liens or the Adequate Protection Liens. Notwithstanding any such reversal, stay, modification or vacatur, any use of DIP ABL Collateral and Prepetition ABL Collateral (including Cash Collateral), any DIP ABL Secured Obligations, any Adequate Protection Claims, or any adequate protection payment obligations pursuant to the DIP Orders incurred by the DIP ABL Loan Parties to the DIP ABL Agents, the other DIP ABL Credit Parties, the Prepetition ABL Agents, and/or the Prepetition ABL Credit Parties, as the case may be, prior to the actual receipt of written notice by the DIP ABL Agents and/or the Prepetition ABL Agents, as the case may be, of such reversal, stay, modification or vacatur shall be governed in all respects by the original provisions of the DIP Orders, and the DIP ABL Credit Parties and the Prepetition ABL Credit Parties shall be entitled to all of the rights, remedies, privileges and benefits granted in section 364(e) of the Bankruptcy Code, the DIP Orders, and pursuant to the DIP ABL Loan Documents with respect to all such uses of the DIP ABL Collateral (including the Cash Collateral), all DIP ABL Secured Obligations, all Adequate Protection Claims, and all adequate protection payment obligations pursuant to the DIP Orders.

56. ***Retention of Jurisdiction.*** The Bankruptcy Court shall retain jurisdiction to enforce this Final Order according to its terms to the fullest extent permitted by applicable law.

Reservations of Rights

57. ***Chubb.*** For the avoidance of doubt, (i) the DIP ABL Credit Parties shall not have a security interest or lien on any collateral provided by or on behalf of the Debtors to ACE American Insurance Company and ACE Fire Underwriters Insurance Company (together, with each of their affiliates and each of their and their affiliates' successors, "Chubb"), (ii) the Debtors may not grant liens and/or security interests in such property to any other party, (iii) this Final Order does not grant the Debtors any right to use any property (or the proceeds thereof) held by Chubb as collateral to secure obligations under insurance policies and related agreements; *provided* that to the extent any such property reverts to the Debtors, such property shall be subject to the terms of this Final Order; and (iv) nothing, including the DIP ABL Credit Agreement and/or this Final Order, alters or modifies (a) the terms and conditions of any insurance policies or related agreements issued by Chubb or any notices of non-renewal related thereto; (b) Chubb's right to decline to renew any insurance policies or to decline to issue replacement insurance policies for any expiring insurance policies, or (c) the expiration of any insurance policies issued by Chubb pursuant to their terms or any notices of non-renewal related thereto.

58. ***United States of America.***

- (a) In determining to make any loan under the DIP ABL Credit Agreement or in exercising any rights or remedies as and when permitted pursuant to this Final Order or the DIP ABL Loan Documents, the DIP ABL Credit Parties shall not be deemed to be in control of the operations of the Debtors or to

be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors, so long as the DIP ABL Credit Parties' actions do not constitute, within the meaning of 42 U.S.C. § 9601(20)(F), actual participation in the management or operational affairs of a vessel or facility owned or operated by a Debtor, or otherwise cause liability to arise to the federal or state government or the status of responsible person or managing agent to exist under applicable law (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., as amended, or any similar federal or state statute).

- (b) Nothing in this Final Order or the DIP ABL Loan Documents shall permit the Debtors to violate 28 U.S.C. § 959(b).
- (c) As to the United States, its agencies, departments, or agents, nothing in this Final Order or the DIP ABL Loan Documents shall discharge, release or otherwise preclude any valid right of setoff or recoupment that any such entity may have, and the Debtors and all other parties in interest, including the DIP ABL Credit Parties, reserve all rights to challenge the validity of any such purported right of setoff or recoupment.

59. ***Setoff and Recoupment.*** Except as specifically set forth in paragraph 41(d) with respect to the Prepetition ABL Obligations, notwithstanding anything to the contrary in this Final Order, nothing herein is intended to, and shall not: (a) waive, modify, prejudice, limit or otherwise impair the right of any party to exercise rights of setoff or recoupment, if any, under the Bankruptcy Code (including, without limitation, pursuant to section 553 of the Bankruptcy Code) or any other applicable non-bankruptcy law, subject, however, to section 546(c) of the Bankruptcy Code, (b) provide any party with any greater or lesser setoff or recoupment rights, if any, than they would have under the Bankruptcy Code or any other applicable non-bankruptcy law, or eliminate the need to seek relief from the automatic stay where required before exercising any such rights, or (c) waive, modify, prejudice, limit or otherwise impair any defenses or objections of the DIP ABL Agents or any of the other DIP ABL Credit Parties, the Prepetition ABL Agents or any of the other Prepetition ABL Credit

Parties, the Debtors and any other party in interest to such setoff and recoupment rights or the exercise thereof.

60. **Reclamation.** To the extent a seller of goods (a "Reclamation Creditor") asserts rights of reclamation pursuant to and in accordance with both section 2-702(2) of the Uniform Commercial Code (the "UCC") and section 546(c) of the Bankruptcy Code (each a "Reclamation Claim" and, collectively, the "Reclamation Claims") requesting that the Debtors return certain goods identified in the Reclamation Claims (the "Reclamation Goods"), the rights of such Reclamation Creditor (the "Reclamation Rights") in either Reclamation Goods or the proceeds thereof (the "Reclamation Proceeds") and the priority of such Reclamation Rights as against any other interest in the Reclamation Goods or the Reclamation Proceeds shall be preserved solely to the extent a Challenge Proceeding with respect to the Prepetition ABL Revolving Extensions of Credit, the Prepetition ABL Term Loans or the liens securing any of such obligations has been successfully brought in compliance with the provisions of this Final Order and determined by an order entered by the Bankruptcy Court that becomes final and non-appealable; *provided that* in no event shall any alleged Reclamation Claim or Reclamation Right be deemed or treated hereunder as a Permitted Prior Lien rather, any such alleged Reclamation Claim or Reclamation Right shall have the same rights and priority with respect to the DIP ABL Facility, DIP ABL Liens and DIP ABL Collateral as such rights and claims had with respect to the Prepetition ABL Facilities, Prepetition ABL Liens and Prepetition ABL Collateral (subject to paragraphs 41 and 42 of this Order). Notwithstanding anything herein to the contrary, nothing herein shall determine, or be deemed a determination of the validity or extent of any Reclamation Rights or Reclamation Claims and all parties rights with respect thereto are expressly reserved.

61. *Specified Governmental Unit Assets.* As adequate protection for the claims of the Specified Governmental Units,⁸ the Debtors either will pay such claims directly or fund a segregated account (the "Specified Governmental Units Account"), in each case from the proceeds of the Store Closing Sales located in the jurisdictions subject to the authority of the Specified Governmental Units. The liens asserted by the Specified Governmental Units shall attach to the Specified Governmental Units Account in the same amount, to the same extent and with the same priority, validity and enforceability, and subject to the same defenses, as the liens the Specified Governmental Units now have against such assets of the Debtors. Further, nothing in this Final Order or any final orders with respect to post-petition financing, use of cash collateral, the closing of certain store locations or the sale of debtors' assets shall affect the priority of the ad valorem tax liens of the Specified Governmental Units, if any, which may arise during the pendency of these cases. The Specified Governmental Units Account shall be maintained solely for the purpose of providing adequate protection and shall constitute neither

⁸ For purposes of this Order "Specified Governmental Units" means Allen ISD, Angelina County, Aransas County, Atascosa County, Atlanta, Atlanta ISD, Bee County, Bexar County, Blanco CAD, Cameron County, Cleveland ISD, Cypress-Fairbanks ISD, Dallas County, Del Rio, Eagle Pass, Eagle Pass ISD, El Paso, Ellis County, Fort Bend County, Frisco, Galveston County, Grayson County, Gregg County, Harlingen, Harlingen CISD, Harris County, Hidalgo County, Hood CAD, Hopkins County, Hunt County, Irving ISD, Jasper County, Jefferson County, Jim Wells CAD, Kaufman County, Lewisville ISD, Matagorda County, McAllen, McLennan County, Montgomery County, Navarro County, Nueces County, Parker CAD, Pecos County, Pleasanton, Polk County, Rockwall CAD, San Patricio County, Smith County, Stephenville, Stephenville ISD, Sulphur Springs, Sulphur Springs ISD, Tarrant County, Tom Green CAD, Val Verde County, Van Zandt CAD, Victoria County, Wharton Co. Jr. College Dist., Wilson County, Wise CAD, Wise County, Wood County, Nolan County, City Sweetwater, Sweetwater Independent School District (ISD), Palo Pinto County, City Mineral Wells, Mineral Wells ISD, Johnson County, City Cleburne, Cleburne ISD, Arlington ISD, Crowley ISD, Eagle Mountain-Saginaw ISD, City Grapevine, Grapevine-Colleyville ISD, Richardson ISD, Carrollton-Farmers Branch ISD, City of Garland, Lubbock Central Appraisal District, Midland County, Tyler ISD, Cass County, Houston County, Mineola ISD, Nacogdoches County ISD, Austin County Appraisal District, Brazoria County Tax Office, Brazoria County Municipal Utility District (MUD) #35, Brazoria County Tax Office, Fort Bend ISD, Fort Bend County Levee Improvement District #2, First Colony MUD #10, Clear Creek ISD, Galveston County Mgmt. Dist. #1, Dickinson ISD, Interstate MUD, Clear Creek ISD, Galveston County Mgmt Dist. #1, Dickinson ISD, Interstate MUD, Clear Creek ISD, City of Houston, Galena Park ISD, HC MUD 285, Clear Creek ISD, City of Houston, Galena Park ISD, Spring Branch ISD, Spring ISD, Alief ISD, Tomball ISD, City of Tomball, Midtown Mgmt District, City of Jasper, City of Cleveland, Bay City ISD, Kerr County, Kendall County, Fayette County, Maverick County, Uvalde County, Weslaco City, Weslaco ISD, Randall County Tax Office, Potter County Tax Office, Gray County Tax Office, Garland ISD, Humble ISD, Harris County MUD 109, and Maricopa County Treasurer.

the allowance of the claims of the Specified Governmental Units, nor a floor or cap on the amounts the Specified Governmental Units may be entitled to receive. All parties' rights to object to the priority, validity, amount, and extent of the claims and liens asserted by the Specified Governmental Units are fully preserved. Funds in the Specified Governmental Units Account may be distributed upon agreement between the Specified Governmental Units and the Debtors, with the consent of the DIP ABL Administrative Agent, or by subsequent order of the Bankruptcy Court, duly noticed to the Specified Governmental Units.

62. ***Consignment Merchandise*** To the extent of any conflict between paragraphs 36 through 41 of the *Final Order Approving (I) Procedures For Store Closing Sales And (II) Assumption Of Liquidation Consulting Agreement* [Docket No. 876] (the "GOB Order") and this Final Order, paragraphs 36 through 41 of the GOB Order shall control.

63. ***American Greetings Corporation.*** Nothing in this Final Order shall affect or impair (i) the rights of American Greetings Corporation and its affiliates ("AG") in and to certain greetings cards and related products sold by AG to the Debtors on a scan-based method of sale (the "AG Products"), (ii) AG's rights in the proceeds of the AG Products (the "AG Proceeds"), (iii) AG's claims against the Debtors, the DIP ABL Lenders, or any other party relating to the AG Products, including, without limitation, AG's claims to recover the AG Proceeds, or (iv) any defenses or objections to such claims or rights that may be asserted by the Debtors, the DIP ABL Lenders or any other party in interest, all of which rights, claims, defenses and objections are hereby preserved.

64. ***School District Unit 300.*** Notwithstanding anything to the contrary contained herein, and consistent with the record of the hearing held before the Court on

November 28, 2018, all rights of Community Unit School District 300 with respect to any ongoing stayed litigation and the transactions and events referenced therein, including the right to assert a constructive trust or a senior secured lien, and all defenses or objections of the Debtors and/or any and all other parties thereto, shall be preserved, and nothing herein shall waive, modify, prejudice, limit or otherwise impair any such rights, defenses or objections as the case may be, or be deemed a determination as to the validity, priority or extent of any such rights, claims or liens (if any) and all parties' rights with respect thereto are also expressly reserved.

65. ***SHLD, Cyrus and Relator Carl Ireland.*** Notwithstanding anything to the contrary contained herein (including, but not limited to, paragraphs iv, 14, and 15 hereof), nothing herein, including the Carve-Out, shall be deemed to prime or otherwise made senior or *pari passu* to any valid, perfected and non-avoidable security interests or liens held by (i) SHLD Lendco, LLC or Cyrus Capital Partners, L.P. under the IP/Ground Lease Term Loan, or (ii) Relator Carl Ireland, Administrator of the Estate of James Garbe, and the other parties to the Garbe settlement agreement sharing in that security interest with Garbe (such security interests and liens the "Specified Security Interests"). All parties' rights to object to the priority, validity, amount, and extent of the Specified Security Interests and the claims secured thereby (and all objections and defenses of the holders of the Specified Security Interests) are hereby fully preserved. All rights and remedies of the Debtors in respect of the Specified Security Interests, including, but not limited to, the right to seek to surcharge and to seek to impose the remedy of marshaling (and, in each case, all objections and defenses of the holders of the Specified Security Interests) are hereby fully preserved. All rights of the holders of the Specified Security Interests to seek relief from the automatic stay of section 362 of the Bankruptcy Code, to seek adequate protection of the Specified Security Interests, and/or other permissible secured creditor rights,

including the right to object to any relief sought pursuant to the Debtors' reserved rights, are hereby fully reserved.

66. ***Clover.*** Notwithstanding anything to the contrary contained herein, all rights of Clover Technologies Group, LLC ("Clover") with respect to any proceeds remitted to the Debtors prior to the Petition Date pursuant to that certain agreement between Clover and certain of the Debtors governing the distribution and retail sales of certain inventory on a scan-based trading method of sales (as further described the objection filed by Clover under ECF No. 212) shall be preserved, and the rights of the Debtors and any other party in interest to object are also hereby preserved.

67. ***Luxottica.*** At the time of submission of this Order, the Debtors, the DIP Agents and Luxottica Retail North America, Inc. ("Luxottica") are continuing to formulate language addressing the issues raised by Luxottica's objection (ECF No. 757) (the "Luxottica Objection"). If the Debtors, the DIP Agents and Luxottica reach an agreement on that language, the Debtors will file a stipulation with the Bankruptcy Court, which stipulation shall govern to the extent of any inconsistency with this order. If the Debtors, the DIP Agents and Luxottica cannot agree on such language, the parties will request a hearing before the Bankruptcy Court. Neither the entry of this Order nor passage of time shall prejudice the Luxottica Objection in any way. In addition, neither the entry of this Order nor the passage of time shall prejudice Luxottica's right to argue that an agreement resolving the Luxottica Objection was reached, and further shall not prejudice Luxottica's ability to enforce the terms of such agreement; provided that the Debtors' and the DIP Agents' rights to object to the same shall be preserved in every respect.

Dated: November 30, 2018
White Plains, New York

/s/Robert D. Drain
Robert D. Drain
United States Bankruptcy Judge

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955 Filed 11/30/18 Entered 11/30/18 13:13:14 Main Document
Pg 116 of 118

Exhibit A

DIP ABL Credit Agreement

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955 Filed 11/30/18 Entered 11/30/18 13:13:14 Main Document
Pg 117 of 118

Exhibit B

Syndication Procedures

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955 Filed 11/30/18 Entered 11/30/18 13:13:14 Main Document
Pg 118 of 118

Exhibit C

Approved Budget

**SUPERPRIORITY SENIOR SECURED DEBTOR-IN-POSSESSION ASSET-BASED
CREDIT AGREEMENT**

Dated as of November 29, 2018

among

SEARS HOLDINGS CORPORATION,
a debtor and a debtor-in-possession,
as Holdings,

SEARS ROEBUCK ACCEPTANCE CORP.
and

KMART CORPORATION,
each debtors and debtors-in-possession,
as Borrowers,

THE LENDERS NAMED HEREIN,

THE ISSUING LENDERS NAMED HEREIN,

BANK OF AMERICA, N.A.,
as Administrative Agent, Co-Collateral Agent and Swingline Lender

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Co-Collateral Agent,

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Syndication Agent,

CITIGROUP GLOBAL MARKETS INC.,
as Documentation Agent,

and

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
CITIBANK, N.A., and WELLS FARGO BANK, NATIONAL ASSOCIATION,

As Joint Lead Arrangers and Bookrunners

TABLE OF CONTENTS

Page

ARTICLE I

DEFINITIONS AND ACCOUNTING TERMS

Section 1.01	Certain Defined Terms.....	3
Section 1.02	Computation of Time Periods.....	57
Section 1.03	Accounting Terms.....	57
Section 1.04	Other Interpretive Provisions.....	57

ARTICLE II

AMOUNTS AND TERMS OF THE ADVANCES AND THE TERM LOAN

Section 2.01	The Revolving Advances and the Term Loan.	58
Section 2.02	Making the Revolving Advances.....	59
Section 2.03	The Swingline Advances	60
Section 2.04	Making the Swingline Advances	61
Section 2.05	Commitment Fee; Other Fees	62
Section 2.06	Optional Termination or Reduction of the Revolving Commitments	63
Section 2.07	Repayment of Extensions of Credit.....	63
Section 2.08	Interest.....	63
Section 2.09	Interest Rate Determination	65
Section 2.10	Optional Conversion of Revolving Advances, Term Loan Borrowings.....	66
Section 2.11	Optional and Mandatory Prepayments of Revolving Advances and Term Loan; Mandatory Reduction of the Revolving Commitments.....	66
Section 2.12	Increased Costs	68
Section 2.13	Illegality.....	69
Section 2.14	Payments and Computations.....	70
Section 2.15	Taxes	71
Section 2.16	Sharing of Payments, Etc.....	75
Section 2.17	Use of Proceeds of Advances and Term Loan.....	75
Section 2.18	Permitted Overadvances	76
Section 2.19	Superpriority Claims; Security and Priority of Liens	76
Section 2.20	MIRE Event.	77

ARTICLE III

AMOUNT AND TERMS OF THE LETTERS OF CREDIT

Section 3.01	L/C Commitment	77
Section 3.02	Procedure for Issuance of Letter of Credit.....	78
Section 3.03	Fees and Other Charges	78
Section 3.04	Letter of Credit Participations.....	79

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 3 of 161

Section 3.05	Reimbursement Obligation of the Borrowers	80
Section 3.06	Obligations Absolute	80
Section 3.07	Letter of Credit Payments	81
Section 3.08	Applications	81
Section 3.09	Use of Letters of Credit.....	81

ARTICLE IV

CONDITIONS TO EFFECTIVENESS

Section 4.01	Conditions Precedent to Effectiveness.....	81
Section 4.02	Conditions Precedent to Each Extension of Credit.....	84

ARTICLE V

REPRESENTATIONS AND WARRANTIES

Section 5.01	Representations and Warranties of Holdings and the Borrowers	86

ARTICLE VI

COVENANTS

Section 6.01	Affirmative Covenants.....	95
Section 6.02	Negative Covenants	112
Section 6.03	Approved Budget.....	116

ARTICLE VII

EVENTS OF DEFAULT

Section 7.01	Events of Default	117
Section 7.02	Remedies.....	123
Section 7.03	Application of Proceeds.....	124
Section 7.04	Lift of Automatic Stay	126
Section 7.05	License; Cooperation	126

ARTICLE VIII

THE AGENT AND CO-COLLATERAL AGENTS

Section 8.01	Appointment	126
Section 8.02	Delegation of Duties; Agent Advisors	127
Section 8.03	Exculpatory Provisions	127
Section 8.04	Reliance by Agent.....	128
Section 8.05	Notice of Default.....	128
Section 8.06	Non-Reliance on Agents and Other Lenders	128
Section 8.07	Reports and Financial Statements.....	129

Section 8.08	Indemnification of Agent Indemnitees	130
Section 8.09	Agent in Its Individual Capacity	131
Section 8.10	Successor Agent	131
Section 8.11	Documentation Agent and Syndication Agent; Bank Product and Cash Management Services Providers	132
Section 8.12	Defaulting Lenders	132
Section 8.13	Certain ERISA Matters	135
Section 8.14	Credit Bidding	136

ARTICLE IX

MISCELLANEOUS

Section 9.01	Amendments, Etc	137
Section 9.02	Notices, Etc	139
Section 9.03	No Waiver; Remedies	141
Section 9.04	Costs and Expenses	141
Section 9.05	Right of Set-off	143
Section 9.06	Binding Effect; Effectiveness	143
Section 9.07	Assignments and Participations	143
Section 9.08	Confidentiality	147
Section 9.09	Governing Law	148
Section 9.10	Execution in Counterparts	148
Section 9.11	Jurisdiction, Etc	148
Section 9.12	WAIVER OF JURY TRIAL	148
Section 9.13	Release of Collateral or Guarantee Obligation	149
Section 9.14	PATRIOT Act Notice	149
Section 9.15	Integration	149
Section 9.16	Replacement of Lenders	149
Section 9.17	No Advisory or Fiduciary Capacity	150
Section 9.18	Acknowledgement and Consent to Bail-In of EEA Financial Institutions	151
Section 9.19	Interim DIP Term Sheet Amended and Restated	151
Section 9.20	Keepwell	151
Section 9.21	DIP Intercreditor Agreement; Financing Orders	152

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 5 of 161

SCHEDULES

<u>Schedule I</u>	Bank Products/Cash Management Services
<u>Schedule 1.01</u>	Revolving Lenders; Revolving Commitments
<u>Schedule 1.02</u>	Existing Letters of Credit
<u>Schedule 1.04</u>	Existing Debt
<u>Schedule 1.05</u>	Existing Investments
<u>Schedule 1.06</u>	Existing Liens
<u>Schedule 1.07</u>	Initial Specified Store Closing Locations
<u>Schedule 1.08</u>	Secondary Specified Store Closing Locations
<u>Schedule 1.09</u>	Go Forward Stores
<u>Schedule 4.01</u>	Effective Date Loan Documents
<u>Schedule 5.01(l)(A)</u>	Owned and Ground Leased Unencumbered Real Property
<u>Schedule 5.01(l)(B)</u>	Leased Unencumbered Real Property
<u>Schedule 5.01(n)</u>	Pension Plan Issues
<u>Schedule 5.01(p)</u>	UCC Filing Jurisdictions
<u>Schedule 5.01(s)</u>	Equity Interests in Subsidiaries
<u>Schedule 5.01(t)</u>	Labor Matters
<u>Schedule 6.01(q)</u>	Post-Effective Date Requirements
<u>Schedule 6.01(r)(i)</u>	Case Milestones
<u>Schedule 6.01(r)(ii)</u>	Go Forward Plan

EXHIBITS

Exhibit A	Form of Notice of Borrowing
Exhibit B	Form of Assignment and Acceptance
Exhibit C	Form of Borrowing Base Certificate
Exhibit D	Form of Debtor-in-Possession Guarantee and Collateral Agreement

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 6 of 161

Exhibit E	Form of Credit Card Notification
Exhibit F	Form of DIP Intercreditor Agreement
Exhibit G	Form of Customs Broker Agreement
Exhibit H	Form of Third Party Payor Notification
Exhibit I	Form of Compliance Certificate
Exhibit J	Form of Approved Budget
Exhibit K	Form of Final Financing Order
Exhibit M	Form of Budget Certificate

SUPERPRIORITY SENIOR SECURED DEBTOR-IN-POSSESSION ASSET-BASED CREDIT AGREEMENT (this “**Agreement**”), dated as of November 29, 2018, among SEARS HOLDINGS CORPORATION, a Delaware corporation and a debtor and debtor-in-possession (“**Holdings**”), SEARS ROEBUCK ACCEPTANCE CORP., a Delaware corporation and a debtor and debtor-in-possession (“**SRAC**”), KMART CORPORATION, a Michigan corporation and a debtor and debtor-in-possession (“**Kmart Corp.**”; Kmart Corp. together with SRAC, the “**Borrowers**”), the banks, financial institutions and other institutional lenders listed on the signature pages hereof or through an assignment as provided in Section 9.07 hereof, as Revolving Lenders or Term Lenders, as applicable (collectively, the “**Lenders**”), the ISSUING LENDERS party hereto, BANK OF AMERICA, N.A. (“**Bank of America**”), as administrative agent (in such capacity, the “**Agent**”), co-collateral agent, and Swingline Lender, WELLS FARGO BANK, NATIONAL ASSOCIATION, as co-collateral agent (collectively with Bank of America in such capacity, the “**Co-Collateral Agents**”) WELLS FARGO BANK, NATIONAL ASSOCIATION, as syndication agent (in such capacity, the “**Syndication Agent**”), CITIGROUP GLOBAL MARKETS INC., as documentation agent (in such capacity, the “**Documentation Agent**”), and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (“**MLPFS**”), CITIBANK, N.A. and WELLS FARGO BANK, NATIONAL ASSOCIATION, as joint lead arrangers and bookrunners (in such capacities, the “**Joint Lead Arrangers**”).

W I T N E S S E T H:

WHEREAS, on October 15, 2018 (the “**Petition Date**”), Holdings, SRAC, Kmart Corp. and certain of the Borrowers’ Subsidiaries (together with any Subsidiary joining in the Chapter 11 Cases after the Petition Date, collectively, the “**Debtors**”) filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of New York (together with any other court having jurisdiction over the Chapter 11 Cases or any proceeding therein from time to time, the “**Bankruptcy Court**”);

WHEREAS, the Debtors are continuing to operate their businesses and manage their properties as debtors-in-possession under Sections 1107 and 1108 of the Bankruptcy Code;

WHEREAS, prior to the Petition Date, the Lenders provided loans and other financial accommodations to the Borrowers pursuant to the Prepetition First Lien ABL Credit Agreement (as defined herein);

WHEREAS, on the Petition Date, the outstanding principal amount of the Prepetition 2016 Term Loan Facility (as defined herein) was \$570,776,250 and the outstanding principal amount of the Prepetition Revolving Facility (as defined herein), including outstanding Prepetition L/C Obligations (as defined herein) was \$959,602,130;

WHEREAS, on October 16, 2018, pursuant to the Interim DIP Term Sheet and the Interim Financing Order, the Initial Lenders provided to the Borrowers a senior secured superpriority priming post-petition debtor-in-possession asset-based credit facility (the “**Interim DIP Facility**”) consisting of (a) a new money asset-based term loan in an aggregate principal

amount of \$111,889,241 (the “**Incremental DIP Term Loan**”) and (b) a new money asset-based revolving credit facility with aggregate revolving commitments of \$188,110,759 (the “**Incremental DIP Revolving Commitments**”); and the revolving loans made thereunder, (the “**Incremental DIP Revolving Loans**”) for operating, working capital and general corporate purposes of the Loan Parties, in each case consistent with, subject to and within the limitations contained in, the Approved Initial Budget (as defined in the Interim DIP Term Sheet), including to pay fees, costs and expenses incurred in connection with the transactions contemplated thereby and other administration costs incurred in connection with the Chapter 11 Cases;

WHEREAS, the Borrowers have requested, and the Lenders have agreed, on the terms set forth herein, that the Interim DIP Facility be amended and restated in its entirety to (a) refinance the Interim DIP Facility, (b) increase the facility size to refinance certain amounts under the Prepetition 2016 Term Loan Facility and the Prepetition Revolving Facility, as well as to refinance certain Prepetition L/C Obligations, and (c) more fully set forth the terms of the Total Extensions of Credit hereunder;

WHEREAS, each Borrower and each other Loan Party has agreed to secure all of its Obligations under the Loan Documents by granting to the Control Co-Collateral Agent, for the benefit of the Co-Collateral Agents and the other Credit Parties, a security interest in and lien upon substantially all of their existing and after-acquired personal and real property;

WHEREAS, the business of the Borrowers and the other Loan Parties is a mutual and collective enterprise and the Borrower and the other Loan Parties believe that the Total Extensions of Credit and other financial accommodations provided to the Borrowers under this Agreement will enhance the aggregate borrowing powers of the Borrowers and facilitate the administration of the Chapter 11 Cases and their loan relationship with the Agent, the Co-Collateral Agents and the Lenders, all to the mutual advantage of the Borrowers and the other Loan Parties;

WHEREAS, each Borrower and each other Loan Party acknowledges that it will receive substantial direct and indirect benefits by reason of the making of Extensions of Credit and other financial accommodations to the Borrowers as provided in this Agreement and the Financing Orders; and

WHEREAS, the willingness of the Agent, the Co-Collateral Agents and the Lenders to extend financial accommodations to the Borrowers, as more fully set forth in this Agreement and the other Loan Documents, is done solely as an accommodation to the Borrowers and the other Loan Parties and at the request of the Borrowers and the other Loan Parties and in furtherance of the mutual and collective enterprise of the Borrowers and the other Loan Parties.

NOW, THEREFORE, in consideration of the mutual conditions and agreements set forth in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged (these recitals being an integral part of this Agreement), the parties hereto hereby agree as follows:

ARTICLE I

DEFINITIONS AND ACCOUNTING TERMS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

“**Acceptable Plan of Reorganization**” means a plan of reorganization for each of the Chapter 11 Cases that (i) provides for the termination of the Revolving Commitments and the payment in full in cash and full discharge of the Obligations (including L/C Obligations and Obligations related to Bank Products and Cash Management Services) and Prepetition ABL Obligations at emergence, (ii) contains releases and other exculpatory provisions for the Credit Parties, Prepetition Credit Parties, the Joint Lead Arrangers and each of their respective affiliates in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion and (iii) is otherwise in form and substance reasonably satisfactory to the Agent with respect to any provision related to the payment of Prepetition ABL Obligations or that may adversely affect the DIP Credit Parties and/or the Prepetition Credit Parties.

“**ACH**” means automated clearing house transfers.

“**Acquisition**” means, with respect to any Person (a) a purchase or other acquisition of more than 50% of, or other controlling interest in, the Equity Interests of any other Person, (b) a purchase or other acquisition of all or substantially all of the assets or properties of, another Person or of any business unit of another Person, or (c) any merger or consolidation of such Person with any other Person or other transaction or series of transactions resulting in the acquisition of all or substantially all of the assets of any Person, or more than 50% of, or other controlling interest in, the Equity Interests of any Person, in each case in any single transaction or series of related transactions.

“**Adequate Protection Liens**” has the meaning assigned to the term “Adequate Protection Liens” in the Final Financing Order.

“**Adequate Protection Superpriority Claims**” has the meaning assigned to the term “Adequate Protection Claims” in the Final Financing Order.

“**Adjusted Revolving Exposure**” means, at any time of determination, an amount equal to the lesser of (i) the then-outstanding Aggregate Revolving Commitments and (ii) the sum of (A) \$50,000,000 plus (B) the Borrowing Base minus (C) the principal amount of Term Loan outstanding as of such time of determination.

“**Advance**” means any advance by a Revolving Lender to any Borrower as part of a Borrowing.

“**Adverse Proceeding**” means any action, suit, proceeding (whether administrative, judicial or otherwise), governmental investigation or arbitration (whether or not purportedly on behalf of Holdings, any Borrower, and Subsidiary Guarantor or any Subsidiary of the foregoing), at law or in equity, or before or by any Governmental Authority, domestic or foreign, whether pending or, to the knowledge of Holding, any Borrower or any Subsidiary Guarantor, threatened

against Holdings, any Borrower, any Subsidiary Guarantor or any Subsidiary of the foregoing or any property thereof.

“**Affiliate**” means, as to any Person, any other Person, (a) that directly or indirectly, controls, is controlled by or is under common control with such Person or is a director or officer of such Person, (b) that beneficially owns 10% or more of the Voting Stock or any class of Equity Interests of such first Person; (c) at least 10% of whose Voting Stock or any class of Equity Interests is beneficially owned, directly or indirectly, by such first Person; or (d) who is an officer, director, partner or managing member of such first Person. For purposes of this definition, the term “control” (including the terms “controlling”, “controlled by” and “under common control with”) of a Person means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of such Person by contract or otherwise.

“**Agent**” has the meaning specified in the Preamble.

“**Agent Advisors**” has the meaning specified in Section 8.02(b).

“**Agent Indemnitees**” means the Agent, each Co-Collateral Agent and their respective Related Parties.

“**Agent Professionals**” means attorneys, accountants, appraisers (including real estate appraisers), auditors, business valuation experts, environmental engineers or consultants, turnaround consultants, and other professionals and experts retained by the Agent or the Co-Collateral Agents, including, for the avoidance of doubt, the Agent Advisors.

“**Agent’s Account**” means the account of the Agent maintained by the Agent at Bank of America, N.A., designated by the Agent in writing to the Borrowers, the Co-Collateral Agents and the Lenders.

“**Agreement**” has the meaning specified in the Preamble.

“**Aggregate Revolving Commitments**” means the Revolving Commitments of all the Revolving Lenders.

“**AML Laws**” means (i) the Currency and Foreign Transactions Reporting Act, its amendments, and other statutes relating to the subject matter of that Act (which have come to be collectively referred to as the Bank Secrecy Act), including applicable provisions of the PATRIOT Act, and regulations promulgated under any of the foregoing, including 31 C.F.R. Chapter X; and (ii) similar laws, regulations, directives adopted by the European Union, any European Union Member State, the United Kingdom, and any jurisdiction where any Group Member operates.

“**Applicable Lending Office**” means, with respect to each Lender, such Lender’s Domestic Lending Office in the case of a Base Rate Advance, and such Lender’s Eurodollar Lending Office in the case of a Eurodollar Rate Advance.

“**Applicable Margin**” means (a) 4.50% per annum for Eurodollar Rate Advances and (b) 3.50% per annum for Base Rate Advances.

“**Application**” means an application, in such form as the applicable Issuing Lender may specify from time to time, requesting such Issuing Lender to open a Letter of Credit.

“**Approved Budget**” means the budget prepared by the Borrowers in the form of Exhibit J and which is approved by, and in form and substance satisfactory to, the Co-Collateral Agents, each in its sole discretion, as the same may be updated, modified or supplemented from time to time as provided in Section 6.03.

“**Approved Fund**” means any Fund that is administered or managed by (a) a Lender, (b) an Affiliate of a Lender or (c) an entity or an Affiliate of an entity that administers or manages a Lender.

“**Assignment and Acceptance**” means an assignment and acceptance entered into by a Lender and an Eligible Assignee, and accepted by the Agent, in substantially the form of Exhibit B hereto.

“**Authorized Officer**” means, as to Holdings, any Borrower or any other Loan Party, its Chief Restructuring Officer, president, chief executive officer, chief financial officer, vice president and controller, vice president and treasurer, vice president, finance or executive vice president, finance. Any document delivered hereunder that is signed by an Authorized Officer of a Loan Party shall be conclusively presumed to have been authorized by all necessary corporate, partnership and/or other action on the part of such Loan Party and such Authorized Officer shall be conclusively presumed to have acted on behalf of such Loan Party.

“**Automatic Stay**” means the automatic stay provided under Section 362 of the Bankruptcy Code.

“**Availability Reserves**” means, without duplication of any other reserves or items that are otherwise addressed or excluded through eligibility criteria, such reserves as any Co-Collateral Agent from time to time determines in its Permitted Discretion as being appropriate (a) to reflect the impediments to the Co-Collateral Agents’ ability to realize upon the Collateral, (b) to reflect claims and liabilities that such Co-Collateral Agent determines may need to be satisfied in connection with the realization upon the Collateral, (c) to reflect criteria, events, conditions, contingencies or risks which adversely affect any component of the Borrowing Base or (d) to reflect that a Default or an Event of Default then exists. Without limiting the generality of the foregoing, Availability Reserves may include, in any Co-Collateral Agent’s Permitted Discretion (but are not limited to) reserves based on: (i) customs duties, and other costs to release Inventory which is being imported into the United States, (ii) accrued and unpaid Taxes and other governmental charges, including, but not limited to, ad valorem, real property, excise, personal property sales, use and other Taxes and claims of the PBGC that any Co-Collateral Agent determines rank senior to or pari passu with (in payment or Lien priority) the Obligations or the Prepetition ABL Obligations, (iii) salaries, wages and benefits due to employees of any Loan Party, (iv) reasonably anticipated changes in the Net Orderly Liquidation Value and/or Store Closing Net Orderly Liquidation Value between appraisals, (v) warehousemen’s or bailees’

charges and other Permitted Encumbrances, (vi) Cash Management Reserves, (vii) Bank Product Reserves, (viii) amounts due to vendors on account of consigned goods, (ix) rent expense at leased Stores and DC locations, (x) royalties payable to non-Loan Parties in respect of licensed merchandise, (xi) the Gift Card Liability Reserve, (xii) Customer Deposits Reserve, (xiii) PACA Liability Reserves, (xiv) PASA Liability Reserves, (xv) amounts due to any state's lottery commission or other equivalent agency, authority or entity, or to any other Governmental Authority involved in the administration or regulation of lotteries, (xvi) Credit Card Receivables owed to Sears Protection Company (PR), Inc. and its Subsidiaries, (xvii) amounts due to Sears Authorized Hometown Stores, LLC, Sears Home Appliance Showrooms, LLC, Sears Outlet Stores, LLC and their subsidiaries, (xviii) amounts of any court-ordered charges or other liabilities that any Co-Collateral Agent determines rank senior to or pari passu with (in payment or Lien priority) the Obligations or Prepetition ABL Obligations, (xix) amounts in respect of any reclamation, setoff, recoupment or similar claims as may relate to or arise during the Chapter 11 Cases that are or that any Co-Collateral Agent reasonably believes may become senior to the Liens securing the Obligations, (xx) accrued and unpaid interest or fees on the Obligations, (xxi) the Credit Card Accounts Receivable Reserve and (xxii) amounts due with respect to fees of any professional for any liquidation, going out of business or similar sale. Upon the determination by any Co-Collateral Agent that an Availability Reserve should be established or modified, such Co-Collateral Agent shall notify the Agent in writing and the Agent shall thereupon establish or modify such Availability Reserve and, to the extent practicable, promptly provide the Borrowers with notice thereof; provided that failure to provide such notice shall not impair the effectiveness of such Availability Reserve.

"Available Commitment" means as to any Revolving Lender at any time, an amount equal to the excess, if any, of (a) such Revolving Lender's Revolving Commitment then in effect over (b) such Revolving Lender's Revolving Extensions of Credit then outstanding; provided, that in calculating any Revolving Lender's Revolving Extensions of Credit for the purpose of determining such Revolving Lender's Available Commitment pursuant to Section 2.05(a), the aggregate principal amount of Swingline Advances then outstanding shall be deemed to be zero.

"Bail-In Action" means the exercise of any Write-Down and Conversion Powers by the applicable EEA Resolution Authority in respect of any liability of an EEA Financial Institution.

"Bail-In Legislation" means with respect to any EEA Member Country implementing Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, the implementing law for such EEA Member Country from time to time which is described in the EU Bail-In Legislation Schedule.

"Bank of America" has the meaning specified in the Preamble.

"Bank Products" means any services or facilities provided to any Loan Party by any Lender or any of its Affiliates on account of (a) each Swap Contract that is entered into after the date hereof with any counterparty that is a Credit Party at the time such Swap Contract is entered into, (b) leasing facilities, and (c) other banking products or services (other than Letters of Credit and excluding Cash Management Services) to or for the benefit of any Loan Party agreed by the Agent and the Borrowers as being a **"Bank Product"** for purposes of this Agreement, provided that in each case, such Bank Product is added to Schedule I by the Borrowers (which addition

may be made by the Borrowers by notice to the Agent in writing); provided further, that such notice shall be deemed given with respect to any Bank Products provided by the Agent or its Affiliates.

“Bank Product Reserves” means such reserves as any Co-Collateral Agent may from time to time determine in its Permitted Discretion as being appropriate to reflect the liabilities and obligations of the Loan Parties with respect to Bank Products then provided or outstanding.

“Banker’s Acceptance” means a time draft or bill of exchange or other deferred payment obligation relating to a Commercial L/C which has been accepted by the applicable Issuing Lender.

“Bankruptcy Code” has the meaning specified in the recitals to this Agreement.

“Bankruptcy Court” has the meaning specified in the recitals to this Agreement.

“Base Rate” means, for any day, a fluctuating rate per annum equal to the highest of (a) the Federal Funds Rate plus one-half of one percent (0.50%), (b) the Eurodollar Rate (calculated utilizing a one-month Interest Period) plus one percent (1.00%), or (c) the rate of interest in effect for such day as publicly announced from time to time by Bank of America as its “prime rate.” The **“prime rate”** is a rate set by Bank of America based upon various factors including Bank of America’s costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such rate announced by Bank of America shall take effect at the opening of business on the day specified in the public announcement of such change.

“Base Rate Advance” means an Advance or a Term Loan Borrowing that bears interest as provided in Section 2.08(a)(i) or Section 2.08(b)(i), as applicable.

“Beneficial Ownership Certification” means a certification regarding beneficial ownership required by the Beneficial Ownership Regulation.

“Beneficial Ownership Regulation” means 31 C.F.R. § 1010.230.

“Benefit Plan” means any of (a) an “employee benefit plan” (as defined in ERISA) that is subject to Title I of ERISA, (b) a “plan” as defined in Section 4975 of the Code or (c) any Person whose assets include (for purposes of ERISA Section 3(42) or otherwise for purposes of Title I of ERISA or Section 4975 of the Code) the assets of any such “employee benefit plan” or “plan”.

“Blocked Accounts” means any deposit accounts that become subject to Blocked Account Agreements pursuant to Section 6.01(i)(iii).

“Blocked Account Agreement” means with respect to a Blocked Account established by a Loan Party, an agreement, in form and substance reasonably satisfactory to the Co-Collateral Agents, establishing control (as defined in the UCC) of such account by the Agent (as **“Control Co-Collateral Agent”**) and whereby the bank maintaining such account agrees to comply only with the instructions originated by the Agent (or any other Co-Collateral Agent which shall

succeed the Agent as “Control Co-Collateral Agent” thereunder), without the further consent of any other Person.

“**Blocked Account Bank**” means Bank of America, N.A. and each other bank with whom deposit accounts are maintained in which funds of any of the Loan Parties are concentrated and with whom a Blocked Account Agreement has been, or is required to be, executed in accordance with the terms hereof.

“**Board of Governors**” means the Board of Governors of the Federal Reserve System.

“**Borrower Information**” has the meaning specified in Section 9.08.

“**Borrower Materials**” has the meaning specified in Section 9.02(d).

“**Borrowers**” has the meaning specified in the Preamble.

“**Borrowing**” means a borrowing consisting of simultaneous Advances of the same Type made by each of the applicable Lenders pursuant to Section 2.01 or Section 2.03 provided that no more than six (6) Interest Periods in the aggregate for Borrowings and Term Loan Borrowings constituting Eurodollar Rate Advances may be outstanding at any time.

“**Borrowing Base**” means, at any time, an amount equal to (a) 87.5% of the aggregate outstanding Eligible Credit Card Accounts Receivable at such time, plus (b) 87.5% of the Eligible Pharmacy Receivables at such time plus (c) (i) 87.5% of the Net Orderly Liquidation Value of Net Eligible Inventory (other than Eligible Inventory at a Store being closed) at such time and (ii) 87.5% of the Store Closing Net Orderly Liquidation Value of Net Eligible Inventory at Stores being closed, minus (d) 100% of the then Availability Reserves, minus (e) the Borrowing Base Carve-Out Reserve, minus (f) Prepetition Revolver/Term Exposure, minus (g) the Prepetition FILO Reserve; it being understood that the Agent may, in its Permitted Discretion, adjust Availability Reserves and Inventory Reserves and any other reserves used in computing the Borrowing Base.

“**Borrowing Base Carve-Out Reserve**” means, at any time, (a) the Carve-Out Reserve Amount (as defined in paragraph 21(e) of the Final Financing Order) minus (b) the then current balance of the Carve-Out Account.

“**Borrowing Base Certificate**” means a certificate, signed by an Authorized Officer of Holdings, substantially in the form of Exhibit C or another form which is reasonably acceptable to the Co-Collateral Agents in their Permitted Discretion.

“**Borrowing Base Loan Party**” means each Borrower and each guarantor of the Obligations under the Guarantee and Collateral Agreement that is also a “Subsidiary Guarantor” under and as defined in the Prepetition First Lien ABL Credit Agreement.

“**BRG**” means Berkeley Research Group, LLC, in its capacity as an Agent Advisor.

“**Budget Certificate**” mean a certificate, substantially in the form of Exhibit M hereto, by which Holdings certifies, among other things, compliance with the covenants contained in Section 6.03(b).

“**Budget Variance Report**” means a weekly report certified by an Authorized Officer of Holdings to the Agent and the Co-Collateral Agents (a) showing, in each case, by line item the actual cash receipts, disbursements, inventory receipts and consignment receipts for each week, in a comparable form to the Approved Budget, noting therein the variance of the Borrower’s Net Cash Flow, on a cumulative basis, for the Cumulative Four-Week Period, from the projected Net Cash Flow set forth for the Cumulative Four-Week Period in the Approved Budget, (b) including explanations for all material variances (including whether such variance is permanent in nature or timing related) and (b) for any report delivered on the Wednesday following a Budget Testing Date, containing an analysis demonstrating the Borrowers are in compliance with the budget covenant set forth in Section 6.03(b), all in a form, and containing such supporting information, as is satisfactory to the Agent and the Co-Collateral Agents in their sole discretion.

“**Budget Testing Date**” has the meaning specified in Section 6.03(b).

“**Business Day**” means a day of the year on which banks are not required or authorized by law to close in New York, New York or Boston, Massachusetts and, if the applicable Business Day relates to any Eurodollar Rate Advances, a day of the year on which dealings are carried on in the London interbank market.

“**Capital Lease Obligations**” means, with respect to any Person for any period, the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as liabilities on a balance sheet of such Person under GAAP and the amount of which obligations shall be the capitalized amount thereof determined in accordance with GAAP.

“**Carve-Out**” has the meaning specified in paragraph 21(a) of the Final Financing Order.

“**Carve-Out Account**” has the meaning specified in paragraph 21(f) of the Final Financing Order.

“**Carve-Out Reserve**” has the meaning specified in paragraph 21(e) of the Final Financing Order.

“**Case Milestones**” has the meaning specified in Section 6.01(r)(i).

“**Cash Collateral**” means cash delivered to Agent to Cash Collateralize any Obligations, and all interest, dividends, earnings and other proceeds relating thereto.

“**Cash Collateralize**” means the delivery of cash to Agent, as security for the payment of Obligations, in an amount equal to 105% of the aggregate L/C Obligations. “**Cash Collateralization**” has a correlative meaning.

“Cash Equivalents” means (a) marketable obligations issued or unconditionally guaranteed by, and backed by the full faith and credit of, the U.S. government, maturing within 12 months of the date of acquisition; (b) certificates of deposit, time deposits and bankers’ acceptances maturing within 12 months of the date of acquisition, and overnight bank deposits, in each case which are issued by Bank of America or a commercial bank organized under the laws of the United States or any state or district thereof, rated A-1 (or better) by S&P or P-1 (or better) by Moody’s at the time of acquisition, and (unless issued by a Lender) not subject to offset rights; (c) repurchase obligations with a term of not more than 30 days for underlying investments of the types described in clauses (a) and (b) entered into with any bank described in clause (b); (d) commercial paper issued by Bank of America or rated A-1 (or better) by S&P or P-1 (or better) by Moody’s, and maturing within nine months of the date of acquisition; and (e) shares of any money market fund that has substantially all of its assets invested continuously in the types of investments referred to above, has net assets of at least \$500,000,000 and has the highest rating obtainable from either Moody’s or S&P.

“Cash Management Order” means that certain *Interim Order Authorizing Debtors to (I) Continue Using Existing Cash Management System, Bank Accounts, and Business Forms, (II) Implement Ordinary Course Changes to Cash Management System, (III) Continue Intercompany Transactions, and (IV) Provide Administrative Expense Priority for Postpetition Intercompany Claims and Granting Related Relief*, (Docket No. 102) entered by the Bankruptcy Court on October 16, 2018 and any similar final order entered by the Bankruptcy Court.

“Cash Management Reserves” means such reserves as any Co-Collateral Agent, from time to time, determines in its Permitted Discretion as being appropriate to reflect the reasonably anticipated liabilities and obligations of the Loan Parties with respect to Cash Management Services then provided or outstanding.

“Cash Management Services” means any one or more of the following types of services or facilities provided to any Loan Party by any Lender or any of its Affiliates: (a) ACH transactions, (b) cash management services, including, without limitation, controlled disbursement services, treasury, depository, overdraft, and electronic funds transfer services, (c) foreign exchange facilities, (d) credit card processing services and private label letters of credit, (e) credit or debit cards, and (f) purchase cards; provided that in each case, such Cash Management Service is added to Schedule I by the Borrowers (which addition may be made by the Borrowers by notice to the Agent in writing); provided further, that such notice shall be deemed given with respect to any Bank Products provided by the Agent or its Affiliates.

“Class” means (a) the class consisting of Revolving Lenders and (b) the class consisting of Term Lenders. For clarity, except as expressly provided herein, each Lender shall have the same rights and obligations under this Agreement and the other Loan Documents.

“Change in Law” means the occurrence, after the date hereof, of (a) the adoption, taking effect or phasing in of any law, rule, regulation or treaty; (b) any change in any law, rule, regulation or treaty or in the administration, interpretation or application thereof; or (c) the making, issuance or application of any request, guideline, requirement or directive (whether or not having the force of law) by any Governmental Authority; provided, however, that “Change in Law” shall include, regardless of the date enacted, adopted or issued, all requests, rules,

guidelines, requirements or directives (i) under or relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act, or (ii) promulgated pursuant to Basel III by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any similar authority) or any other Governmental Authority.

“Chapter 11 Cases” means the chapter 11 cases of the Debtors pending in the Bankruptcy Court.

“Co-Collateral Agents” has the meaning specified in the Preamble.

“Collateral” means all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is purported to be created by any Security Document, including the Prepetition ABL Collateral and all other assets of the Loan Parties, whether now owned or hereafter acquired, and all proceeds thereof, including, without limitation, any claims and causes of action of the Loan Parties of any kind or nature (including proceeds of any actions for preferences, fraudulent conveyances and other avoidance power claims under Sections 502(d), 544, 545, 547, 548, 549, 550 and 553 of the Bankruptcy Code); it being understood that “Collateral” shall include all such property irrespective of whether any such property was excluded pursuant to the Prepetition Loan Documents.

“Commercial L/C” means a commercial documentary Letter of Credit under which an Issuing Lender agrees to make payments in Dollars for the account of any Borrower, on behalf of any Group Member, in respect of obligations of such Group Member in connection with the purchase of goods or services in the ordinary course of business.

“Commitments” means, collectively, the Revolving Commitments and the Term Commitments.

“Commodity Exchange Act” means the Commodity Exchange Act (7 U.S.C. § 1 et seq.).

“Commonly Controlled Entity” means an entity, whether or not incorporated, that is under common control with any Borrower within the meaning of Section 4001 of ERISA or is part of a group that includes any Borrower and that is treated as a single employer under Section 414 of the Internal Revenue Code.

“Convert”, **“Conversion”** and **“Converted”** each refers to a conversion of Advances or a Term Loan Borrowing of one Type into Advances or a Term Loan Borrowing of the other Type pursuant to Section 2.09 or 2.10.

“Control Co-Collateral Agent” has the meaning specified in the Guarantee and Collateral Agreement.

“Credit Card Accounts Receivable” means each Account or Payment Intangible (each as defined in the UCC) together with all income, payments and proceeds thereof, owed by a credit card payment processor or an issuer of credit cards to a Loan Party resulting from charges by a customer of a Loan Party on credit cards processed by such processor or issued by such

issuer in connection with the sale of goods by a Loan Party or services performed by a Loan Party, in each case in the ordinary course of its business.

“**Credit Card Accounts Receivable Reserve**” means reserves, established by the Agent in its Permitted Discretion, to reflect factors that may negatively impact the value of Credit Card Accounts Receivable (including, without limitation, for chargeback or other accrued liabilities or offsets by Credit Card Processors and amounts to adjust for material claims, offsets, defenses or counterclaims or other material disputes with an account debtor).

“**Credit Card Notification**” has the meaning specified in Section 6.01(m)(iii).

“**Credit Card Processors**” means the credit card clearinghouses and processors used by the Loan Parties and listed in the Perfection Certificate as of the date of this Agreement, or otherwise disclosed in writing to the Agent by the Loan Parties from time to time following the date of this Agreement.

“**Credit Party**” or “**Credit Parties**” means (a) individually, (i) each Lender and its Affiliates, (ii) the Agent, (iii) each Co-Collateral Agent, (iv) each Issuing Lender, and (v) each Joint Lead Arranger and (b) collectively, all of the foregoing.

“**Cumulative Four-Week Period**” means the four-week period up to and through the Saturday of the most recent week then ended.

“**Customer Deposits Reserve**” means, at any time, a reserve calculated in a manner consistent with past practice under the Prepetition First Lien ABL Credit Agreement.

“**Customs Broker Agreement**” means an agreement in substantially the form attached hereto as Exhibit G, or such other form as the Co-Collateral Agents may reasonably agree, among a Loan Party, a customs broker or other carrier, and the Co-Collateral Agents, in which the customs broker or other carrier acknowledges that it has control over and holds the documents evidencing ownership of the subject Inventory for the benefit of the Co-Collateral Agents and agrees, upon notice from the Co-Collateral Agents, to hold and dispose of the subject Inventory solely as directed by the Co-Collateral Agents.

“**DC**” means any distribution center owned or leased and operated by any Loan Party.

“**DDA**” means each checking, savings or other demand deposit account maintained by any of the Loan Parties.

“**De Minimis Asset Sale Order**” means the *(CORRECTED) Order Signed on 11/21/2018 Authorizing and Establishing Procedures for De Minimis Asset Sales and De Minimis Asset Abandonments* (Docket No. 856) entered by the Bankruptcy Court on November 21, 2018.

“**Debt**” of any Person means, without duplication, (a) all indebtedness of such Person for borrowed money, (b) all obligations of such Person for the deferred purchase price of property or services (other than trade payables incurred and being paid in the ordinary course of such Person’s business), (c) all obligations of such Person evidenced by notes, bonds, debentures or

other similar instruments, (d) all direct and contingent obligations of such Person arising under banker's acceptances, letters of credit (including standby and commercial), bank guaranties, surety bonds and similar instruments, (e) all obligations of such Person created or arising under any conditional sale or other title retention agreement (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (f) all obligations of such Person as lessee under leases that have been or should be, in accordance with GAAP, recorded as Capital Lease Obligations, (g) all direct recourse payment obligations of such Person in respect of any accounts receivable sold by such Person, (h) all net obligations of such Person under any Swap Obligations, (i) all obligations of such Person in respect of Disqualified Equity Interests, (j) all Debt of others referred to in clauses (a) through (i) above or clause (k) below and other payment obligations guaranteed directly or indirectly in any manner by such Person, or in effect guaranteed directly or indirectly by such Person through an agreement (1) to pay or purchase such Debt or to advance or supply funds for the payment or purchase of such Debt, (2) to purchase, sell or lease (as lessee or lessor) property, or to purchase or sell services, primarily for the purpose of enabling the debtor to make payment of such Debt or to assure the holder of such Debt against loss, (3) to supply funds to or in any other manner invest in the debtor (including any agreement to pay for property or services irrespective of whether such property is received or such services are rendered) or (4) otherwise to assure a creditor against loss, and (k) all Debt referred to in clauses (a) through (i) above secured by (or for which the holder of such Debt has an existing right, contingent or otherwise, to be secured by) any Lien on property (including accounts and contract rights) owned by such Person, even though such Person has not assumed or become liable for the payment of such Debt.

"Debtor Advisors" has the meaning specified in Section 6.01(s).

"Debtor Relief Laws" means the Bankruptcy Code and all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief laws of the United States or other applicable jurisdictions from time to time in effect and affecting the rights of creditors generally.

"Debtors" has the meaning specified in the recitals to this Agreement.

"Default" means any Event of Default or any event or condition that, with the lapse of time or giving of notice or both, would constitute an Event of Default.

"Defaulting Lender" means any Lender (as reasonably determined by the Agent) that (a) has failed to fund any portion of the Advances, participations in Letters of Credit or participations in Swingline Advances required to be funded by it hereunder within two Business Days of the date required to be funded by it hereunder, (b) has otherwise failed to pay over to the Agent or any other Lender any other amount required to be paid by it hereunder within two Business Days of the date when due, (c) has failed, within three Business Days after request by the Agent, to confirm in writing that it will comply with the terms of this Agreement relating to its Commitments, provided that such Lender shall cease to be a Defaulting Lender under this clause (c) upon the Agent's receipt of such confirmation, (d) has notified the Borrowers, the Agent, the Issuing Banks or the Swingline Lender in writing that it does not intend to comply

with its funding obligations hereunder, or has made a public statement to that effect, or (e) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law or Bail-In Action, or (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets, including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any Equity Interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender.

“**DIP ABL Facility**” means the superpriority senior secured debtor-in-possession asset-based credit facility provided by the Credit Parties to the Borrowers hereunder.

“**DIP Intercreditor Agreement**” means the DIP Intercreditor Agreement dated the date hereof among the Agent and the Co-Collateral Agents, as Senior DIP Agents, the Junior DIP Term Loan Agent, as Junior DIP Agent, and the Loan Parties, substantially in the form of Exhibit F hereto and as amended, restated, supplemented or otherwise modified from time to time.

“**DIP Superpriority Claims**” has the meaning specified in Section 2.19(a).

“**Disposition**” means any sale, transfer, license, lease or other disposition (including any sale and leaseback transaction), whether in one transaction or in a series of transactions, of any property (including, without limitation, the issuance or sale, transfer or other disposition of any Equity Interests).

“**Disqualified Equity Interests**” of any Person means any class of Equity Interests of such Person that, by its terms, or by the terms of any related agreement or of any security into which it is convertible, puttable or exchangeable, is, or upon the happening of any event or the passage of time would be, required to be redeemed by such Person, whether or not at the option of the holder thereof, or matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, in whole or in part, in each case on or prior to the date that is 91 days after the Scheduled Termination Date.

“**Dollars**” and “**\$**” refers to lawful money of the United States.

“**Documentation Agent**” has the meaning specified in the Preamble.

“**Domestic Lending Office**” means, with respect to any Lender, the office of such Lender specified as its “Domestic Lending Office” on the signature pages hereof or in the Assignment and Acceptance pursuant to which it became a Lender, or such other office of such Lender as such Lender may from time to time specify to the Borrowers and the Agent.

“Domestic Subsidiary” means any Subsidiary organized under the laws of the United States of America, any State thereof or the District of Columbia (excluding, for the avoidance of doubt, any Subsidiary organized under the laws of Puerto Rico).

“EEA Financial Institution” means (a) any credit institution or investment firm established in an EEA Member Country that is subject to the supervision of an EEA Resolution Authority; (b) any entity established in an EEA Member Country that is a parent of an institution described in clause (a) above; or (c) any financial institution established in an EEA Member Country that is a subsidiary of an institution described in the foregoing clauses and is subject to consolidated supervision with its parent.

“EEA Member Country” means any of the member states of the European Union, Iceland, Liechtenstein and Norway.

“EEA Resolution Authority” means any public administrative authority or any Person entrusted with public administrative authority of an EEA Member Country (including any delegatee) having responsibility for the resolution of any EEA Financial Institution.

“Effective Date” means the first day on which all of the conditions precedent set forth in Section 4.01 are satisfied or waived in accordance with the terms hereof.

“Eligible Assignee” means (a) a commercial bank or any other Person (other than a natural Person) engaged in the business of making asset based or commercial loans, or (other than in the case of a Revolving Commitment) any fund or other Person (other than a natural Person) that invests in loans, which bank, Person or fund, together with its Affiliates, has a combined capital and surplus in excess of \$1,000,000,000 and which bank, Person or fund is approved by the Agent in its discretion, (b) an existing Lender or an Affiliate of an existing Lender or an Approved Fund; provided that neither the Borrowers nor any Affiliate of the Borrowers, nor any Permitted Holder Lender, nor any holder of any Debt under the Prepetition Second Lien Facilities or the Junior DIP Term Loan Facility, nor any other Loan Party, nor any Subsidiary of any of the foregoing, shall qualify as an Eligible Assignee under clauses (a) or (b) of this definition and (c) during any Event of Default, any other Person (other than a natural Person) acceptable to Agent in its discretion.

“Eligible Credit Card Accounts Receivable” means at the time of any determination thereof, each Credit Card Account Receivable that satisfies the following criteria at the time of its creation and continues to meet the same at the time of such determination: such Credit Card Account Receivable (i) has been earned and represents the bona fide amounts due to a Borrowing Base Loan Party from a Credit Card Processor and/or credit card issuer, and in each case originated in the ordinary course of business of the applicable Borrowing Base Loan Party and (ii) is not ineligible for inclusion in the calculation of the Borrowing Base pursuant to any of clauses (a) through (k) below. Without limiting the foregoing, to qualify as an Eligible Credit Card Account Receivable, a Credit Card Account Receivable shall indicate no person other than a Borrowing Base Loan Party as payee or remittance party. In determining the amount to be so included, the face amount of a Credit Card Account Receivable shall be reduced by, without duplication, to the extent not reflected in such face amount, (i) the amount of all accrued and actual discounts, claims, credits or credits pending, promotional program allowances, price

adjustments, finance charges, credit card processor fees or other allowances (including any amount that the applicable Borrowing Base Loan Party may be obligated to rebate to a customer, a Credit Card Processor, or credit card issuer pursuant to the terms of any agreement or understanding (written or oral)) and (ii) the aggregate amount of all cash received in respect of such Credit Card Account Receivable but not yet applied by the applicable Borrowing Base Loan Party to reduce the amount of such Credit Card Account Receivable. Unless otherwise approved from time to time in writing by the Co-Collateral Agents in their Permitted Discretion, no Credit Card Account Receivable shall be Eligible Credit Card Account Receivable if, without duplication:

(a) such Credit Card Account Receivable is not owned by a Borrowing Base Loan Party and such Borrowing Base Loan Party does not have good or marketable title to such Credit Card Account Receivable;

(b) such Credit Card Account Receivable does not constitute a “payment intangible” or “account” (as defined in the UCC) or such Credit Card Account Receivable has been outstanding for more than five (5) Business Days from the date of sale;

(c) the issuer or payment processor of the applicable credit card with respect to such Credit Card Account Receivable is the subject of any bankruptcy or insolvency proceedings;

(d) such Credit Card Account Receivable is not the valid, legally enforceable obligation of the applicable issuer with respect thereto;

(e) such Credit Card Account Receivable is subject to any Lien whatsoever other than Liens in favor of the Co-Collateral Agents and Liens of the types specified in clauses (a), (g), (h), (m), (s), (t) and (u) of the definition of Permitted Liens;

(f) such Credit Card Account Receivable is not subject to a valid and perfected Lien in favor of the Co-Collateral Agents, for the benefit of the Credit Parties, senior in priority to all other Liens other than Liens of the types specified in clauses (a), (g), (h) and (t) of the definition of Permitted Liens;

(g) the Credit Card Account Receivable does not conform to all representations, warranties, covenants or other provisions in the Loan Documents relating to Credit Card Account Receivable;

(h) such Credit Card Account Receivable is subject to a right to repurchase or risk of set-off, non-collection or not being processed due to unpaid and/or accrued credit card processor fee balances, limited to the lesser of the balance of Credit Card Account Receivable or unpaid credit card processor fees;

(i) such Credit Card Account Receivable is evidenced by “chattel paper” or an “instrument” of any kind unless such “chattel paper” or “instrument” is subject to the perfected security interest of the Co-Collateral Agents;

(j) such Credit Card Account Receivable does not meet such other reasonable eligibility criteria for Credit Card Account Receivable as the Agent (or any Co-Collateral Agent upon written notice to the Agent) may determine from time to time in its Permitted Discretion; or

(k) such Credit Card Account Receivable is disputed between a Borrower and a Credit Card Processor, or with respect to which a claim, counterclaim, offset or chargeback has been asserted by the related Credit Card Processor (but only to the extent of such dispute, claim, counterclaim, offset or chargeback).

Notwithstanding the above, the Agent reserves the right, at any time and from time to time after the Effective Date, to adjust the criteria set forth above, to establish new criteria and to adjust the applicable advance rate with respect to Eligible Credit Card Accounts Receivable, in its Permitted Discretion, subject to the approval of the Supermajority Lenders in the case of adjustments of criteria or establishment of new criteria which have the effect of making more credit available, and subject to the approval of all Lenders in the case of adjustments to the advance rate.

“Eligible In-Transit Inventory” means, as of any date of determination thereof, without duplication of other Eligible Inventory, finished goods Inventory:

(a) for which full payment has been delivered to the vendor of such Inventory and evidence of such payment has been received by the Agent; provided that in transit Inventory purchased under “private label” letters of credit issued by SRAC or Letters of Credit issued hereunder shall be deemed Eligible In-Transit Inventory, subject to (x) an Inventory Reserve equal to (i) such percentage as the Agent may determine in its Permitted Discretion, *multiplied by* (ii) the Inventory Value of such Inventory, and (y) satisfaction of all of the other conditions of this definition;

(b) which has been shipped from a location outside of the United States, Puerto Rico or the U.S. Virgin Islands for receipt by any Borrowing Base Loan Party, but which has not yet been delivered to such Borrowing Base Loan Party, which Inventory has been in transit for sixty (60) days or less from the date of shipment of such Inventory;

(c) for which the purchase order is in the name of any Borrowing Base Loan Party and title has passed to such Borrowing Base Loan Party;

(d) for which the document of title reflects a Borrowing Base Loan Party as consignee or, if requested by a Co-Collateral Agent, names the Co-Collateral Agents as consignee, and in each case as to which a Co-Collateral Agent has control over the documents of title which evidence ownership of the subject Inventory (such as, if requested by a Co-Collateral Agent, by the delivery of a Customs Broker Agreement);

(e) which is insured as required pursuant to Section 6.01(c) hereof; and

(f) which would not be excluded from the definition of “Eligible Inventory” by any of clauses (a), (c) through (g) or (i) through (s) of the definition thereof;

provided that the Agent, or any Co-Collateral Agent upon written notice to the Agent, may, in its Permitted Discretion, exclude any particular Inventory from the definition of “Eligible In-Transit Inventory” in the event the Agent or such Co-Collateral Agent determines that such Inventory is subject to any Person’s right or claim which is (or is capable of being) senior to, or *pari passu* with, the Lien of the Co-Collateral Agents (such as, without limitation, a right of stoppage in transit) or may otherwise adversely impact the ability of the Co-Collateral Agents to realize upon such Inventory. The Agent or any Co-Collateral Agent upon written notice to the Agent, shall have the right (without limiting any of its other rights as provided herein) to exclude Eligible In-Transit Inventory described in clause (b) above (in whole or in part) from the determination of the Borrowing Base in the event that the Agent, or any Co-Collateral Agent upon written notice to the Agent, determines in its Permitted Discretion that the Borrowers have commenced, or have determined to commence, a full-chain liquidation, including a Specified Full-Chain Liquidation.

“**Eligible Inventory**” means at any time, without duplication (i) Eligible In-Transit Inventory, and (ii) items of Inventory of any Borrowing Base Loan Party that are held for retail sale to the public in the ordinary course of business, merchantable, and readily saleable to the public in the ordinary course of business, that is not ineligible for inclusion in the calculation of the Borrowing Base pursuant to any of clauses (a) through (s) below. Without limiting the foregoing, to qualify as “Eligible Inventory” no Person other than the Borrowing Base Loan Parties shall have any direct or indirect ownership, interest or title to such Inventory and no Person other than the Borrowing Base Loan Parties shall be indicated on any purchase order or invoice with respect to such Inventory as having or purporting to have an interest therein. Unless otherwise from time to time approved in writing by the Agent (or any Co-Collateral Agent upon written notice to the Agent) in its Permitted Discretion, no Inventory shall be deemed Eligible Inventory if, without duplication:

(a) the Borrowing Base Loan Parties do not have sole and good, valid and unencumbered title thereto (except for Liens of the types described in clauses (a), (b), (c), (e), (g), (m), (s), (t) or (u) of the definition of Permitted Liens); or

(b) it is not located in the United States, Puerto Rico, Guam or U.S. Virgin Islands; or

(c) it is not located at property owned or leased by the Borrowing Base Loan Parties (except to the extent such Inventory is (i) in transit between such locations, or (ii) is at a customer location and is deemed eligible pursuant to clause (g) below) or is located at a third party warehouse or is located at a closed Store or is located at a closed DC; or

(d) it is not subject to a valid and perfected Lien in favor of the Co-Collateral Agents for the benefit of the Credit Parties, senior in priority to all other Liens other than Liens of the types described in clauses (a), (b), (c), (g) and (t) of the definition of Permitted Liens; or

(e) it is subject to any Lien whatsoever other than Liens in favor of the Co-Collateral Agents and Permitted Liens of the types described in clauses (a), (b), (c), (e), (g), (m), (s), (t) or (u) of the definition thereof; or

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 25 of 161

(f) it is Inventory located at a Store which is being closed; provided however that such Inventory will be deemed eligible for the first ten (10) weeks after commencement of the Specified Store Closing Sale for such Store unless extended by the Co-Collateral Agents in their sole and absolute discretion; or

(g) it is consigned from a vendor or is at a customer location but still accounted for in the applicable Borrowing Base Loan Party's inventory balance; or

(h) it is in-transit (other than Eligible In-Transit Inventory) from a vendor and has not yet been received into a DC or Store; or

(i) it is identified in the stock ledger of the applicable Borrowing Base Loan Party as any of the following departments or consists of Inventory which is ordinarily classified by such Borrowing Base Loan Party consistent with its historical practices as the following: floral; gasoline; live plants; miscellaneous or other as classified on the Borrowing Base Loan Party's stock ledger; produce; books; magazines; restaurant operations; or seafood; or it is identified per the applicable Borrowing Base Loan Party's stock ledger as candy; or

(j) it is Inventory that has been packed-away and stored for more than 12 months at a DC or a Store for future sale, including merchandise of Sears and its Subsidiaries that has been carried over for more than 12 months as currently reported as "XOM" status per the RIM merchandising system; or

(k) it is identified as wholesaler freight fees; or

(l) it is Inventory on layaway or is Inventory which has been sold but not delivered or as to which any Borrowing Base Loan Party has accepted a deposit from a third party; or

(m) it is identified per the Borrowing Base Loan Parties' stock ledger as Inventory that is in a leased department, including Lands' End, digital imaging, photofinishing and 1 hour lab; or

(n) it is otherwise deemed ineligible by the Co-Collateral Agents in their Permitted Discretion; or

(o) it is (i) operating supplies, packaging or shipping materials, cartons, labels or other such materials not considered used for sale in the ordinary course of business by the Agent in its Permitted Discretion (ii) work-in-process, raw materials, (iii) not in material compliance with all standards imposed by any Governmental Authority having regulatory authority over such Inventory, its use or sale, or (iv) bill and hold goods; or

(p) it is Inventory which exhibits, includes or is identified by any trademark, tradename or other Intellectual Property right which trademark, tradename or other Intellectual Property right (i) is subject to a restriction that could reasonably be expected to adversely affect the Agent's ability to liquidate such Inventory or (ii) the relevant Borrowing Base Loan Party does not have the right to use in connection with the sale of such Inventory, either through direct ownership or through a written license or sublicense; or

(q) it is Inventory that is not insured in compliance with the provisions of Section 6.01(c); or

(r) it is Inventory that does not conform to all representations, warranties, covenants or other provisions in the Loan Documents relating to Inventory; or

(s) it is Inventory acquired outside of the ordinary course of business and the Co-Collateral Agents have not completed their diligence with respect thereto.

“Eligible Pharmacy Receivables” means each Pharmacy Receivable that satisfies the following criteria at the time of creation and continues to meet the same at the time of such determination: such Pharmacy Receivable (i) has been earned and represents the bona fide amounts due to a Borrowing Base Loan Party from Third Party Payors, and other Persons reasonably acceptable to the Co-Collateral Agents, and in each case originated in the ordinary course of business of the applicable Borrowing Base Loan Party (ii) is non-recourse to the Borrowing Base Loan Parties and has been adjudicated or is otherwise due to a Borrowing Base Loan Party for pharmacy related services, and (iii) is not ineligible for inclusion in the calculation of the Borrowing Base pursuant to any of clauses (a) through (m) below. Without limiting the foregoing, to qualify as an Eligible Pharmacy Receivable, an Account shall indicate no person other than a Borrowing Base Loan Party as payee or remittance party. In determining the amount to be so included, the face amount of an Account shall be reduced by, without duplication, to the extent not reflected in such face amount, (i) the amount of all accrued and actual discounts, claims, credits or credits pending, promotional program allowances, price adjustments, finance charges, processing fees or other allowances (including any amount that the applicable Borrowing Base Loan Party may be obligated to rebate to a customer, or to pay to the Third Party Payors, direct customers or other Persons pursuant to the terms of any agreement or understanding (written or oral)) and (ii) the aggregate amount of all cash received in respect of such Account but not yet applied by the applicable Borrowing Base Loan Party to reduce the amount of such Pharmacy Receivable. Unless otherwise approved from time to time in writing by the Co-Collateral Agents in their Permitted Discretion, none of the following Pharmacy Receivables shall be an Eligible Pharmacy Receivable:

(a) Pharmacy Receivables that have been outstanding for more than ninety (90) days past the invoice date or that are more than sixty (60) days past due;

(b) Pharmacy Receivables due from any Third Party Payor to the extent that fifty percent (50%) or more of all Pharmacy Receivables from such Third Party Payor are not Eligible Pharmacy Receivables under clause (a) above;

(c) Pharmacy Receivables which do not constitute an “Account” (as defined in the UCC);

(d) Pharmacy Receivables with respect to which a Borrowing Base Loan Party does not have good, valid and marketable title thereto;

(e) Pharmacy Receivables that are not subject to a valid and perfected Lien in favor of the Co-Collateral Agents, for the benefit of the Credit Parties, senior in priority

to all other Liens other than Liens of the types described in clauses (a), (g) and (t) of the definition of Permitted Liens;

(f) Pharmacy Receivables that are subject to any Lien whatsoever other than Liens in favor of the Co-Collateral Agents for the benefit of the Credit Parties and Liens of the types described in clauses (a), (e), (m), (s), (t) and (u) of the definition of Permitted Liens;

(g) Pharmacy Receivables which are disputed, are with recourse, or with respect to which a claim, counterclaim, offset or chargeback has been asserted (to the extent of such claim, counterclaim, offset or chargeback);

(h) Pharmacy Receivables due from Medicare, Medicaid and other Governmental Authorities;

(i) Pharmacy Receivables due from a Third Party Payor who is not duly authorized to conduct business in the United States of America, Puerto Rico, United States Virgin Islands or Guam, as applicable;

(j) Pharmacy Receivables which are acquired outside of the ordinary course of business unless and until the Co-Collateral Agents have completed an appraisal and audit of such Pharmacy Receivables and otherwise agree that such Pharmacy Receivables shall be deemed Eligible Pharmacy Receivables;

(k) Pharmacy Receivables as to which (i) the Borrowing Base Loan Party making the sale giving rise to such Pharmacy Receivables does not have a valid and enforceable agreement with the Third Party Payor providing for payment to such Borrowing Base Loan Party or there is a default thereunder that could be a basis for such Third Party Payor ceasing or suspending any payments to such Borrowing Base Loan Party, or (ii) the prescription drugs sold giving rise to such Pharmacy Receivables are not of the type that are covered under the agreement with the Third Party Payor or the party receiving such goods is not entitled to coverage under such agreement, (iii) the Borrowing Base Loan Party making the sale giving rise to such Pharmacy Receivables has not received confirmation from such Third Party Payor that the party receiving the prescription drugs is entitled to coverage under the terms of the agreement with such Third Party Payor and the Borrowing Base Loan Party is entitled to reimbursement for such Pharmacy Receivables, (iv) the amount of such Pharmacy Receivables exceeds the amounts to which the Borrowing Base Loan Party making such sale is entitled to reimbursement for the prescription drugs sold under the terms of such agreements (but solely to the extent of such excess), (v) there are contractual or statutory limitations or restrictions on the rights of the Borrowing Base Loan Party making such sale to assign its rights to payment arising as a result thereof or to grant any security interest therein which limitations or restrictions have not been satisfied or waived, (vi) all authorization and billing procedures and documentation required in order for the Borrowing Base Loan Party making such sale to be reimbursed and paid on such Pharmacy Receivables by the Third Party Payor have not been properly completed and satisfied to the extent required for such Borrowing Base Loan Party to be so reimbursed and paid, and (vii) the terms of the sale giving rise to such Pharmacy Receivables and all practices of such Borrowing Base Loan Party with respect to such Pharmacy Receivables do not comply in all material respects with applicable federal, state, and local laws and regulations;

(l) Pharmacy Receivables which do not conform to all representations, warranties, covenants, or other provisions in the Loan Documents relating to Pharmacy Receivables; or

(m) Pharmacy Receivables which the Co-Collateral Agents determine in their Permitted Discretion to be uncertain of collection or which do not meet such other reasonable eligibility criteria for Pharmacy Receivables as the Agent (or any Co-Collateral Agent upon written notice to the Agent) may determine in its Permitted Discretion.

“Employee Wage Order” means the *Final Order (I) Authorizing But Not Directing the Debtors to (A) Pay Certain Prepetition Wages and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Other Benefits, and (C) Continue Employee Benefits Programs, and (II) Granting Related Relief* (Docket No. 798) entered by the Bankruptcy Court on November 16, 2018.

“Enforcement Action” means any rightful action to enforce any Obligations or Loan Documents or to realize upon any Collateral (whether by judicial action, self-help, notification of account debtors, exercise of setoff or recoupment, or otherwise).

“Environmental Action” means any action, suit, demand, demand letter, claim, notice of non-compliance or violation, notice of liability or potential liability, investigation, proceeding, consent order or consent agreement relating in any way to any Environmental Law, Environmental Permit or Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment, including (a) by any governmental or regulatory authority for enforcement, cleanup, removal, response, remedial or other actions or damages and (b) by any governmental or regulatory authority or any third party for damages, contribution, indemnification, cost recovery, compensation or injunctive relief.

“Environmental Law” means any federal, state, local or foreign statute, law, ordinance, rule, regulation, code, order, judgment, decree or judicial or agency interpretation, policy or guidance relating to pollution or protection of the environment, health, safety or natural resources, including those relating to the use, handling, transportation, treatment, storage, disposal, release or discharge of Hazardous Materials.

“Environmental Liability” means any liability, contingent or otherwise (including any liability for damages, costs of environmental investigation or remediation, fines, penalties or indemnities), of Holdings, the Borrowers, or any of their Subsidiaries directly or indirectly resulting from or based upon (a) violation of any Environmental Law, (b) the presence, generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials, (c) exposure to any Hazardous Materials, (d) the release or threatened release of any Hazardous Materials into the environment or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

“Environmental Permit” means any permit, approval, identification number, license or other authorization required under any Environmental Law.

“Equity Interests” means, with respect to any Person, all of the shares of capital stock of (or other ownership or profit interests in) such Person, all of the warrants, options or other rights for the purchase or acquisition from such Person of shares of capital stock of (or other ownership or profit interests in) such Person, and all of the other ownership or profit interests in such Person (including partnership, member or trust interests therein), whether voting or nonvoting.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended from time to time, and the regulations promulgated and issued thereunder.

“ERISA Affiliate” means any Person that for purposes of Title IV of ERISA is a member of any Borrower’s controlled group, or under common control with such Borrower, within the meaning of Section 414 of the Internal Revenue Code.

“ERISA Event” means (a) (i) the occurrence of a Reportable Event, as defined herein, or (ii) the requirements of subsection (1) of Section 4043(b) of ERISA (without regard to Section 4043(b)(2)) are met with respect to a contributing sponsor, as defined in Section 4001(a)(13) of ERISA, of a Plan, and an event described in paragraph (9), (10), (11), (12) or (13) of Section 4043(c) of ERISA is reasonably expected to occur with respect to such Plan within the following 30 days; (b) the application for a minimum funding waiver with respect to a Plan; (c) the provision by the administrator of any Plan of a notice of intent to terminate such Plan pursuant to Section 4041(a)(2) of ERISA (including any such notice with respect to a plan amendment referred to in Section 4041(e) of ERISA); (d) the cessation of operations at a facility of any Borrower or any ERISA Affiliate in the circumstances described in Section 4062(e) of ERISA; (e) the withdrawal by any Borrower or any ERISA Affiliate from a Multiple Employer Plan during a plan year for which it was a substantial employer, as defined in Section 4001(a)(2) of ERISA; (f) the conditions for the imposition of a lien under Sections 303(k) or 4068(a) of ERISA shall have been met with respect to any Plan; (g) the institution by the PBGC of proceedings to terminate a Plan pursuant to Section 4042 of ERISA, or the occurrence of any event or condition described in Section 4042 of ERISA that constitutes grounds for the termination of, or the appointment of a trustee to administer, a Plan, or (h) the Borrowers or any ERISA Affiliate incur liabilities under Section 4069 of ERISA.

“EU Bail-In Legislation Schedule” means the EU Bail-In Legislation Schedule published by the Loan Market Association, as in effect from time to time.

“Eurocurrency Liabilities” has the meaning assigned to that term in Regulation D of the Board of Governors, as in effect from time to time.

“Eurodollar Lending Office” means, with respect to any Lender, the office of such Lender specified as its “Eurodollar Lending Office” on the signature pages hereof or in the Assignment and Acceptance pursuant to which it became a Lender (or, if no such office is specified, its Domestic Lending Office), or such other office of such Lender as such Lender may from time to time specify to the Borrowers and the Agent.

“Eurodollar Rate” means,

(a) for any Interest Period with respect to a Eurodollar Rate Advance, the rate per annum equal to the London Interbank Offered Rate (“**LIBOR**”) or a comparable or

successor rate, which rate is chosen by the Agent, as published on the applicable Bloomberg screen page (or such other commercially available source providing such quotations as may be designated by the Agent from time to time) at approximately 11:00 a.m., London time, two Business Days prior to the commencement of such Interest Period, for Dollar deposits (for delivery on the first day of such Interest Period) with a term equivalent to such Interest Period; and

(b) for any interest calculation with respect to a Base Rate Advance on any date, the rate per annum equal to LIBOR, at or about 11:00 a.m., London time determined two Business Days prior to such date for U.S. Dollar deposits with a term of one month commencing that day; and

provided that (i) to the extent a comparable or successor rate is selected by the Agent in connection herewith, the approved rate shall be applied in a manner consistent with market practice; provided, further that to the extent such market practice is not administratively feasible for the Agent, such approved rate shall be applied in a manner as otherwise reasonably determined by the Agent and (ii) in the event that the Eurodollar Rate as determined above would otherwise be less than 0.00%, such Eurodollar Rate shall be deemed to be 0.00%.

“Eurodollar Rate Advance” means an Advance or Term Loan Borrowing that bears interest as provided in Section 2.08(a)(ii) or Section 2.08(b)(ii), as applicable.

“Eurodollar Rate Reserve Percentage” for any Interest Period for a Eurodollar Rate Advance by any Lender means the reserve percentage applicable to such Lender two Business Days before the first day of such Interest Period under regulations issued from time to time by the Board of Governors for determining the minimum reserve requirement (including any emergency, supplemental or other marginal reserve requirement) with respect to liabilities or assets consisting of or including Eurocurrency Liabilities (or with respect to any other category of liabilities that includes deposits by reference to which the interest rate on Eurodollar Rate Advances is determined) having a term equal to such Interest Period.

“Events of Default” has the meaning specified in Section 7.01.

“Excess Availability” means, at any time, an amount equal to the (A) the Line Cap, minus (B) the Total Extensions of Credit.

“Excluded Accounts” means payroll, trust and Tax withholding accounts funded in the ordinary course of business.

“Excluded Swap Obligation” means, with respect to any Loan Party, any Swap Obligation if, and to the extent that, all or a portion of the guaranty of such Loan Party under the Guarantee and Collateral Agreement of, or the grant under a Loan Document by such Loan Party of a security interest to secure, such Swap Obligation (or any guaranty thereof) is or becomes illegal under the Commodity Exchange Act (or the application or official interpretation thereof) by virtue of such Loan Party’s failure for any reason to constitute an “eligible contract participant” as defined in the Commodity Exchange Act (determined after giving effect to Section 9.20 hereof and any and all guarantees of such Loan Party’s Swap Obligations by other Loan Parties) at the time the guaranty of such Loan Party, or grant by such Loan Party of a

security interest, becomes effective with respect to such Swap Obligation. If a Swap Obligation arises under a Master Agreement governing more than one Swap Contract, such exclusion shall apply only to the portion of such Swap Obligation that is attributable to Swap Contracts for which such guaranty or security interest becomes illegal.

“Excluded Taxes” means any of the following Taxes imposed on or with respect to any Recipient or required to be withheld or deducted from a payment to a Recipient, (a) Taxes imposed on or measured by net income (however denominated and including any Taxes imposed in lieu of income Taxes), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of such Recipient being organized under the laws of, or having its principal office or, in the case of any Lender, its Applicable Lending Office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that are Other Connection Taxes, (b) U.S. federal withholding Taxes imposed on amounts payable to or for the account of such Recipient with respect to an applicable interest in any Extension of Credit or Commitment pursuant to a law in effect on the date on which (i) such Recipient acquires such interest in such Extension of Credit or Commitment (other than pursuant to an assignment request by the Borrower under Section 9.16) or (ii) in the case of a Lender, such Lender changes its Applicable Lending Office, except in each case to the extent that, pursuant to Section 2.15, amounts with respect to such Taxes were payable either to such Lender’s assignor immediately before such Lender became a party hereto or to such Lender immediately before it changed its Applicable Lending Office, (c) Taxes attributable to such Recipient’s failure to comply with Section 2.15(e) or Section 2.15(f) and (d) any U.S. federal withholding Taxes imposed pursuant to FATCA.

“Existing Letters of Credit” means each of the Letters of Credit described on Schedule 1.02 issued and outstanding under the Prepetition First Lien ABL Credit Agreement or the Interim DIP Term Sheet immediately prior to the Effective Date.

“Extensions of Credit” means as to any Lender at any time, an amount equal to the sum of (a) the aggregate Revolving Extensions of Credit of such Lender and (b) the outstanding principal amount of the Term Loan held by such Lender.

“Extraordinary Expenses” means all reasonable and documented out-of-pocket costs, expenses or advances that the Agent or any Co-Collateral Agent may incur, whether prior to or after the occurrence and continuance of a Default or Event of Default, and whether prior to, after or during the pendency of the Chapter 11 Cases or any other Insolvency Proceeding of any Loan Party, including those relating to (a) any audit, inspection, repossession, storage, repair, appraisal, insurance, manufacture, preparation or advertising for sale, sale, collection, or other preservation of or realization upon any Collateral; (b) any action, arbitration or other proceeding (whether instituted by or against the Agent, the Co-Collateral Agents, any Lender, any Loan Party, any representative of creditors of a Loan Party or any other Person) in any way relating to any Collateral (including the validity, perfection, priority or avoidability of the Control Co-Collateral Agent’s Liens with respect to any Collateral), Loan Documents or Obligations, including any lender liability or other claims; (c) the exercise, protection or enforcement of any rights or remedies of Agent or the Co-Collateral Agents in, or the monitoring of, any Insolvency Proceeding; (d) settlement or satisfaction of any taxes, charges or Liens with respect to any Collateral; (e) any Enforcement Action; (f) negotiation and documentation of any modification, waiver, workout, restructuring or forbearance with respect to any Loan Documents or

Obligations; or (g) Overadvances. Such costs, expenses and advances include transfer fees, taxes, storage fees, insurance costs, permit fees, utility reservation and standby fees, legal fees, financial advisor fees, appraisal fees, brokers' fees and commissions, auctioneers' fees and commissions, accountants' fees, environmental study fees, wages and salaries paid to employees of any Loan Party or independent contractors in liquidating any Collateral (including the Liquidation Agent), and travel expenses.

"FATCA" means Sections 1471 through 1474 of the Internal Revenue Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) of the Internal Revenue Code and any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement, treaty or convention among Governmental Authorities implementing such sections of the Internal Revenue Code.

"Fee Letter" means the Fee Letter, dated October 15, 2018, among Holdings, the Borrowers, and each Joint Lead Arranger.

"Federal Funds Rate" means, for any period, a fluctuating interest rate per annum equal for each day during such period to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System, as published for such day (or, if such day is not a Business Day, for the next preceding Business Day) by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average of the quotations for such day on such transactions received by the Agent from three Federal funds brokers of recognized standing reasonably selected by it; provided, that if such rate shall be less than zero, the Federal Funds Rate shall be deemed to be zero for the purposes of this Agreement and the other Loan Documents.

"Final Financing Order" means an order of the Bankruptcy Court, in the form of Exhibit K, with any changes thereto that are satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion, which order shall have been entered not later than November 29, 2018, authorizing and approving the DIP ABL Facility on a final basis in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion.

"Financing Orders" means, collectively, the Interim Financing Order and the Final Financing Order.

"Flood Documentation" means, for any Real Property, (i) evidence as to whether the applicable Real Property is located in a Special Flood Hazard Area pursuant to a completed "life-of-loan" Federal Emergency Management Agency standard flood hazard determination form ordered and received by Agent (and if the flood hazard determination states that such Real Property is located in a Special Flood Hazard Area, the applicable Loan Party's written acknowledgment of receipt of written notification from the Co-Collateral Agents), (ii) in the event such Real Property is located in a Special Flood Hazard Area with respect to which flood insurance has been made available under the Flood Insurance Laws, evidence of flood insurance in an amount and otherwise sufficient to comply with the applicable rules and regulations

promulgated pursuant to the Flood Insurance Laws, in form and substance reasonably acceptable to Agent, and (iii) any other reasonable documents or information reasonably requested by any Lender (through the Agent) to enable such Lender to comply, in the determination of the Co-Collateral Agents, with any applicable Flood Insurance Laws.

“Flood Insurance Laws” means, collectively, (i) the National Flood Insurance Act of 1968, (ii) the Flood Disaster Protection Act of 1973, (iii) the National Flood Insurance Reform Act of 1994, (iv) the Flood Insurance Reform Act of 2004 and (v) the Biggert-Waters Flood Insurance Reform Act of 2012.

“Fronting Exposure” means, at any time there is a Defaulting Lender, (a) with respect to the Issuing Lenders, such Defaulting Lender’s Revolving Commitment Percentage of the outstanding L/C Obligations other than L/C Obligations as to which such Defaulting Lender’s participation obligation has been reallocated to other Revolving Lenders or Cash Collateralized in accordance with the terms hereof, and (b) with respect to the Swingline Lender, such Defaulting Lender’s Revolving Commitment Percentage of Swingline Advances other than Swingline Advances as to which such Defaulting Lender’s participation obligation has been reallocated to other Revolving Lenders in accordance with the terms hereof.

“Fund” means any Person (other than a natural person) that is (or will be) engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in the ordinary course of its business.

“GAAP” has the meaning specified in Section 1.03.

“Gift Card Liability Reserve” means, at any time, and without duplication of any other Availability Reserves or Inventory Reserves, a reserve equal to the aggregate remaining value at such time of (i) outstanding gift certificates and gift cards of the Borrowing Base Loan Parties entitling the holder thereof to use all or a portion of the certificate or gift card to pay all or a portion of the purchase price for any Inventory and (ii) outstanding merchandise credits.

“Global Bidding Procedures Order” means that certain *Order Signed on 11/19/2018 Approving Global Bidding Procedures and Granting Related Relief* (Docket No. 816) entered by the Bankruptcy Court.

“Go Forward Plan” means that certain Go Forward Plan of the Debtors attached hereto as Schedule 6.01(r)(ii).

“Go Forward Stores” means the stores identified on Schedule 1.09.

“Go Forward Stores Qualified Bid” means (i) a Qualified Stalking Horse Bid, (ii) any subsequently submitted non-contingent and fully-financed (with committed financing containing customary limited conditionality consistent with acquisition financing commitments (e.g., SunGard-style certain funds provisions)) qualified bid or bids accepted by the Debtors as the highest or best bid or bids for the Go Forward Stores in accordance with the Global Bidding Procedures Order and otherwise reasonably acceptable to the Administrative Agent and Co-Collateral Agents, and (iii) any bid accepted by Debtors as a replacement or substitute bid for any of the foregoing, so long as it meets the requirements of a Qualified Stalking Horse Bid or

the requirements set forth in clause (ii) above; in each case of clauses (i), (ii) and (iii), that will result, individually or in the aggregate, in Net Proceeds to satisfy in full, in cash, all Obligations (after taking into account the funding in full of the Winddown Account with the proceeds of any Prepetition Unencumbered Assets included in such bids).

“Governmental Authority” means any nation or government, any state or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank), any group or body charged with setting regulatory capital rules or standards (including the Bank for International Settlements or the Basel Committee on Banking Supervision or any successor or similar authority to any of the foregoing) and any securities exchange and any self-regulatory organization (including the National Association of Insurance Commissioners).

“Group Members” means, collectively, Holdings, the Borrowers and their respective Subsidiaries.

“Guarantee and Collateral Agreement” means a Debtor-in-Possession Guarantee and Collateral Agreement in the form of Exhibit D.

“Hazardous Materials” means (a) petroleum and petroleum products, byproducts or breakdown products, radioactive materials, asbestos-containing materials, polychlorinated biphenyls and radon gas and (b) any other chemicals, materials or substances designated, classified or regulated as hazardous, toxic; a pollutant, contaminant or words of a similar import under any Environmental Law.

“Holdings” has the meaning specified in the Preamble.

“Incremental DIP Revolving Commitments” has the meaning specified in the recitals to this Agreement.

“Incremental DIP Revolving Loans” has the meaning specified in the recitals to this Agreement.

“Incremental DIP Term Loan” has the meaning specified in the recitals to this Agreement.

“Indemnified Taxes” means Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of any Loan Party under any Loan Document.

“Indemnified Party” has the meaning specified in Section 9.04(b).

“Initial Lenders” means Bank of America, N.A., Wells Fargo Bank, National Association and Citibank, N.A.

“Initial Term Loan” means the term loan made by the Term Lenders pursuant to Section 2.01(b) in an aggregate principal amount of \$111,889,241 as further described on Schedule 1.01.

“Insolvency” means with respect to any Multiemployer Plan, the condition that such Plan is insolvent within the meaning of Section 4245 of ERISA.

“Insolvency Proceeding” means any case or proceeding (other than the Chapter 11 Cases) commenced by or against a Person under any state, federal or foreign law for, or any agreement of such Person to, (a) the entry of an order for relief under the Bankruptcy Code, or any other insolvency, debtor relief or debt adjustment law; (b) the appointment of a receiver, trustee, liquidator, administrator, conservator or other custodian for such Person or any part of its Property; or (c) an assignment or trust mortgage for the benefit of creditors.

“Insolvent” means pertaining to a condition of Insolvency.

“Intellectual Property” has the meaning specified in the Guarantee and Collateral Agreement.

“Interest Period” means, for each Eurodollar Rate Advance comprising part of the same Borrowing or Term Loan Borrowing, the period commencing on the date of such Eurodollar Rate Advance or the date of the Conversion of any Base Rate Advance into such Eurodollar Rate Advance and ending on the last day of the period selected by the applicable Borrower pursuant to the provisions below and, thereafter, each subsequent period commencing on the last day of the immediately preceding Interest Period and ending on the last day of the period selected by the applicable Borrower pursuant to the provisions below. The duration of each such Interest Period shall be two weeks or one month, as the applicable Borrower may, upon notice received by the Agent not later than 12:00 noon on the third Business Day prior to the first day of such Interest Period, select; provided, however, that:

(a) a Borrower may not select any Interest Period with respect to a Revolving Advance or Term Loan Borrowing that ends after the Scheduled Termination Date;

(b) Interest Periods commencing on the same date for Eurodollar Rate Advances comprising part of the same Borrowing shall be of the same duration;

(c) whenever the last day of any Interest Period would otherwise occur on a day other than a Business Day, the last day of such Interest Period shall be extended to occur on the next succeeding Business Day, provided, however, that, if such extension would cause the last day of such Interest Period of one month or longer to occur in the next following calendar month, the last day of such Interest Period shall occur on the next preceding Business Day; and

(d) whenever the first day of any Interest Period occurs on a day of an initial calendar month for which there is no numerically corresponding day in the calendar month that succeeds such initial calendar month by the number of months equal to the number of months in such Interest Period, such Interest Period shall end on the last Business Day of such succeeding calendar month.

“**Interim DIP Facility**” has the meaning specified in the recitals to this Agreement.

“**Interim DIP Term Sheet**” means the \$1,830,000,000 Senior Secured Superpriority Priming Debtor-in-Possession Asset Based Credit Facility Summary of Terms and Conditions, dated October 15, 2018, by and among Holdings, the Borrowers, the other Loan Parties, and the Initial Lenders, as amended, restated, supplemented or otherwise modified from time to time.

“**Interim Financing Order**” means that certain *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, (B) Grant Senior Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modifying the Automatic Stay; (IV) Scheduling Final Hearing; and (V) Granting Related Relief* (Docket No. 101), entered by the Bankruptcy Court on October 16, 2018.

“**Internal Revenue Code**” means the Internal Revenue Code of 1986, as amended from time to time, and the regulations promulgated and rulings issued thereunder.

“**Inventory**” has the meaning specified in the UCC.

“**Inventory Reserves**” means the following:

(a) a reserve for shrink, or discrepancies that arise between Inventory quantities on hand per the Borrowing Base Loan Parties’ unit inventory system, and physical counts of the Inventory which will be equal to the greater of (i) the mathematical average of the historical shrink results expressed as a percent of sales, multiplied by sales for the relevant year-to-date period and adjusted for the cost complement for the relevant year-to-date period, but only to the extent such amount exceeds reserves already netted out of the Inventory Value per the stock ledger; or (ii) an amount determined by the Agent in its Permitted Discretion or any Co-Collateral Agent in its Permitted Discretion upon written notice to the Agent, and the Agent shall, to the extent practicable, promptly provide the Borrowers with notice thereof; provided that failure to provide such notice shall not impair the effectiveness of such Inventory Reserve;

(b) a reserve for intracompany profit, equal to the most recent three (3) fiscal months of capitalized cost of the foreign buying offices owned and operated by any Borrowing Base Loan Party, with the time frame subject to change based on Inventory performance, or the Agent’s (or any Co-Collateral Agent’s upon written notice to the Agent) Permitted Discretion;

(c) to the extent not already netted out of the Inventory Value per the stock ledger or not treated as ineligible pursuant to the definition of Eligible Inventory, a reserve determined in the Agent’s (or any Co-Collateral Agent upon written notice to the Agent) Permitted Discretion for (i) hard (permanent) markdowns, (ii) seasonal merchandise (including, without limitation, seasonal apparel which is more than four weeks past a specified selling season, and Inventory for sale during a specified holiday or event (other than seasonal apparel), after the specified holiday or event has occurred), (iii) discontinued and clearance merchandise, (iv) change in product mix of merchandise, (v) change in pricing strategy or markon percentages, (vi) damaged merchandise, (vii) price changes, or (viii) other adjustments as deemed appropriate;

(d) a reserve established in the Agent's (or any Co-Collateral Agent's upon written notice to the Agent) Permitted Discretion for Inventory returned (other than as a result of reclamations) to either the return goods center ("RGC"), the vendor, given to charity, or otherwise considered non-saleable, whether defective or non-defective, and the Agent shall, to the extent practicable, promptly provide the Borrowers with notice thereof; provided that failure to provide such notice shall not impair the effectiveness of such Inventory Reserve. This reserve is to be calculated as the monthly average for the most recent rolling 12 fiscal month period of return (other than as a result of reclamations) activity to the vendors, the RGC, given to charity, or otherwise considered non-saleable, whether defective or non-defective, both from the Stores and DCs, and is subject to change at the Agent's (or any Co-Collateral Agent's upon written notice to the Agent) Permitted Discretion; and such reserve is to be recalculated on the Thursday after each Prior Week and to be reflected on each Borrowing Base Certificate delivered by Holdings on such date;

(e) without duplication of any Reserve imposed under clause (a) of the definition of "Eligible In-Transit Inventory", a reserve for that in transit Inventory purchased under "private label" letters of credit issued by SRAC or Letters of Credit issued hereunder; and

(f) a reserve for Inventory ordinarily classified as repair services.

"Inventory Value" means, with respect to any Inventory of the Borrowing Base Loan Parties, the value of such Inventory valued at the lower of cost or market value on a basis consistent with the Borrowing Base Loan Parties' current and historical accounting practice in effect on the date of this Agreement, per the stock ledger (without giving effect to LIFO reserves and general ledger reserves for discontinued inventory, markdowns, intercompany profit, rebates and discounts, any cut off adjustments, revaluation adjustments, purchase price adjustments or adjustments with respect to the capitalization of buying, occupancy, distribution and other overhead costs reflected on the balance sheet of the Borrowing Base Loan Parties in respect of Inventory). The value of the Inventory as set forth above will be calculated net of the reserve established by the Borrowing Base Loan Parties on a basis consistent with the Borrowing Base Loan Parties' current and historical practices, in effect on the date of this Agreement, in respect of lost, misplaced or stolen Inventory (but the establishment of such reserves by the Borrowers shall not preclude the Co-Collateral Agents, in their Permitted Discretion, from establishing other or larger Inventory Reserves with respect to such Inventory as otherwise provided herein).

"Investment" means, as to any Person, any direct or indirect acquisition or investment by such Person, whether by means of (a) the purchase or other acquisition of Equity Interests of another Person, (b) a loan, advance or capital contribution to, guarantee or assumption of debt of, or purchase or other acquisition of any other debt or interest in, another Person, or (c) any Acquisition.

"Issuing Lender" means, collectively, Bank of America, N.A. and Wells Fargo Bank, National Association, it being understood that with the consent of the requesting Borrower (not to be unreasonably withheld) the Issuing Lender may arrange for one or more Letters of Credit to be issued by Affiliates of such Issuing Lender, in which case the term "Issuing Lender" shall include any such affiliate with respect to Letters of Credit issued by such Affiliate. Each

reference herein to “**the Issuing Lender**” shall be deemed to be a reference to the relevant Issuing Lender with respect to the relevant Letter of Credit.

“**Joint Lead Arrangers**” has the meaning specified in the Preamble.

“**Junior DIP Final Financing Order**” means an order of the Bankruptcy Court, satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion, which order shall have been entered” not later than December 28, 2018, authorizing and approving the Junior DIP Term Loan Facility on a final basis in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion.

“**Junior DIP Financing Orders**” means the Junior DIP Interim Financing Order and the Junior DIP Final Financing Order.

“**Junior DIP Interim Financing Order**” means that certain *Interim Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Secured Priming Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Parties; (III) Modifying the Automatic Stay; (IV) Scheduling Final Hearing; and (V) Granting Related Relief* entered by the Bankruptcy Court on November 29, 2018.

“**Junior DIP Term Loan Facility**” means the secured debtor-in-possession multiple draw term loan facility provided pursuant to and evidenced by the Junior DIP Term Loan Agreement and the other Junior DIP Term Loan Documents.

“**Junior DIP Term Loans**” means the loans or other extensions of credit made by or on behalf of any lender under the Junior DIP Term Loan Agreement or by the Junior DIP Term Loan Agent pursuant to the Junior DIP Term Loan Agreement.

“**Junior DIP Term Loan Agent**” means Cantor Fitzgerald Securities.

“**Junior DIP Term Loan Agreement**” means that certain Superpriority Junior Lien Secured Debtor-in-Possession Credit Agreement dated the date hereof among the Junior DIP Term Loan Agent and the Loan Parties, as amended, restated, supplemented or otherwise modified from time to time as permitted herein.

“**Junior DIP Term Loan Documents**” means the Junior DIP Term Loan Agreement, any note issued thereunder, the Junior DIP Financing Orders, and the other “Loan Documents” under and as defined in the Junior DIP Term Loan Agreement, as each may be amended, restated, supplemented or otherwise modified from time to time as permitted herein.

“**Junior DIP Term Loan Obligations**” means the “Obligations” as defined in the Junior DIP Term Loan Agreement.

“**Kmart**” means Kmart Holding Corporation, a Delaware corporation.

“**Kmart Corp.**” has the meaning specified in the Preamble.

“**L/C Commitment**” means \$50,000,000 plus the amount of Prepetition L/C Obligations refinanced hereunder pursuant to Section 2.01(d)(iii).

“**L/C Obligations**” means at any time, an amount equal to the sum of (a) the aggregate then undrawn and unexpired amount of the then outstanding Letters of Credit and (b) the aggregate amount of drawings under Letters of Credit that have not then been reimbursed or discharged pursuant to Section 3.05.

“**Lease**” means any agreement, whether written or oral, no matter how styled or structured, and all amendments, guaranties and other agreements relating thereto, pursuant to which a Loan Party is entitled to the use or occupancy of any Real Property for any period of time.

“**Lenders**” has the meaning specified in the Preamble.

“**Letters of Credit**” means the collective reference to Commercial L/Cs, Banker’s Acceptances, and Standby L/Cs; individually, a “**Letter of Credit**”. Without limiting the foregoing, the Existing Letters of Credit shall be deemed Letters of Credit issued under this Agreement.

“**Lien**” means any lien, security interest, mortgage or other charge or encumbrance of any kind or any other type of preferential arrangement, including the lien or retained security title of a conditional vendor, and any easement, right of way or other encumbrance on title to real property, but excluding consignments or bailments of goods of third parties and the interests of lessors under operating leases.

“**Line Cap**” means, at any time of determination, the lesser of (i) the Aggregate Revolving Commitments plus the principal amount of the Term Loan outstanding at such time and (ii) the Borrowing Base.

“**Liquidation**” means the exercise by the Agent or the Co-Collateral Agents of those rights and remedies accorded to the Agent and/or the Co-Collateral Agents under the Loan Documents and applicable law as a creditor of the Loan Parties with respect to the realization on the Collateral, including (after the occurrence and continuation of an Event of Default) the conduct by the Loan Parties acting with the consent of the Agent and the Co-Collateral Agents, of any public, private or “going-out-of-business”, “store closing” or other similar sale or any other Disposition of the Collateral for the purpose of liquidating the Collateral.

“**Liquidation Agent**” has the meaning assigned to such term in Section 6.01(s).

“**Loan Documents**” means this Agreement, the Security Documents, the DIP Intercreditor Agreement, the Notes, the Fee Letter, the Financing Orders, any Application, each Borrowing Base Certificate, each Approved Budget, each Rolling Budget, any other document or instrument now or hereafter designated by the Borrowers and the Agent as a “**Loan Document**” and any amendment, waiver, supplement or other modification to any of the foregoing.

“**Loan Parties**” means each Group Member that is a party to a Loan Document.

“**LTV Formula Amount**” means, at any time, (a) the aggregate outstanding Eligible Credit Card Accounts Receivable at such time, plus (b) the Eligible Pharmacy Receivables at such time plus (c) (i) the Net Orderly Liquidation Value of Net Eligible Inventory (other than Eligible Inventory at Stores to be closed pursuant to Specified Store Closing Sales) at such time and (ii) the Store Closing Net Orderly Liquidation Value of Net Eligible Inventory at Stores to be closed pursuant to Specified Store Closing Sales at such time.

“**LTV Provisions**” means the ratios set forth in Section 6.02(n).

“**Luxottica Reserve Account**” has the meaning specified in paragraph 67(b) of the Final Financing Order.

“**Material Adverse Effect**” means the effect of any event, condition, circumstance or contingency that, taken alone or in conjunction with other events, conditions, circumstances or contingencies (in each case, other than as customarily occurs as a result of events leading up to and following the commencement of a proceeding under chapter 11 of the Bankruptcy Code and the commencement of the Chapter 11 Cases), has or could reasonably be expected to have a material adverse effect on (a) the business, condition (financial or otherwise), operations or assets of Holdings and its Subsidiaries taken as a whole, (b) the ability of the Loan Parties taken as a whole to perform their obligations under the Loan Documents or (c) the validity or enforceability of the Loan Documents or the rights and remedies of the Agent, the Co-Collateral Agents or the Lenders thereunder (including, but not limited to, the enforceability or priority of any Liens granted to the Co-Collateral Agents under the Loan Documents).

“**Material Documents**” means all pleadings, documents, proposed forms of order, or other items filed by the Debtors in the Chapter 11 Cases that relate to the following: (a) rejection or assumption of material leases, (b) any plan of reorganization or liquidation, (c) any debtor-in-possession financing or use of cash collateral that does not result in payment in full in cash of all Obligations and Prepetition First Lien ABL Obligations upon consummation of such financing or use of cash collateral, (d) any sale or other disposition of Collateral outside of the ordinary course of business, (e) any other item that would materially and adversely affect the Credit Parties’ or Prepetition Credit Parties’ claims or (f) the Junior DIP Term Loan Facility.

“**MLPFS**” has the meaning specified in the Preamble.

“**Mortgaged Properties**” means each Real Property that, upon request of the Co-Collateral Agents, shall be encumbered by a Mortgage pursuant to Section 6.01(i)(v).

“**Mortgages**” means, collectively, the mortgages, trust deeds, deeds of trust, deeds to secure debt, assignments of leases and rents, debentures, and other security documents securing the Obligations (including amendments to any of the foregoing) executed and delivered by a Loan Party to the Co-Collateral Agents with respect to Mortgaged Properties (either as stand-alone documents or forming part of other Security Documents), each in form and substance satisfactory to the Co-Collateral Agents and the Borrowers, in each case, as amended, supplemented or otherwise modified from time to time.

“**Multiemployer Plan**” means a multiemployer plan, as defined in Section 4001(a)(3) of ERISA, to which Holdings or any ERISA Affiliate is making or accruing an obligation to make

contributions, or has within any of the preceding five plan years made or accrued an obligation to make contributions.

“Multiple Employer Plan” means a single employer plan, as defined in Section 4001(a)(15) of ERISA, that (a) is maintained for employees of Holdings or any ERISA Affiliate and at least one Person other than Holdings and the ERISA Affiliates or (b) was so maintained and in respect of which Holdings or any ERISA Affiliate could have liability under Section 4064 or 4069 of ERISA in the event such plan has been or were to be terminated.

“Net Cash Flow” means, for any Cumulative Four-Week Period, the Borrowers’ total net cash flow, excluding (i) proceeds from Dispositions, except for proceeds from the sale of Inventory, and (ii) financing related items.

“Net Eligible Inventory” means, at any time, an amount equal to the Inventory Value of Eligible Inventory less Inventory Reserves.

“Net Proceeds” means, (a) with respect to any Disposition by any Loan Party or any of its Subsidiaries of any property (other than property disposed of pursuant to clauses (a), (b), (c), (e), (f) or (h) of the definition of Permitted Dispositions) or any casualty or condemnation of such property, the excess, if any, of (i) the sum of cash and cash equivalents received in such transaction (including any cash or cash equivalents received by way of deferred payment pursuant to, or by monetization of, a note receivable or otherwise, but only as and when so received) over (ii) the sum of (A) the principal amount of any Debt (other than Debt owed to Holdings or any of its Subsidiaries, the payment of which in connection with any Permitted Disposition or other transaction shall not, for the avoidance of doubt, be deemed to reduce the amount of Net Proceeds for any purposes under this Agreement) that is secured by the applicable asset by a Lien permitted hereunder which is senior to the Co-Collateral Agents’ Lien, if any, on such asset and that is required, and permitted under this Agreement, to be repaid (or to establish an escrow for the future repayment thereof) in connection with such transaction, (B) the reasonable and customary out-of-pocket expenses incurred by such Loan Party or such Subsidiary in connection with such transaction (including, without limitation, reasonable and customary attorneys’ fees, accountants’ fees, investment banking fees, appraisals, and brokerage, legal, title and recording or transfer Tax expenses and commissions) paid by any Loan Party or any of its Subsidiaries to third parties (other than Affiliates), (C) transfer Taxes paid as a result thereof and (D) amounts required to be paid by any Loan Party or any of its Subsidiaries pursuant to the Financing Orders or other applicable order of the Bankruptcy Court in order to consummate such transaction, and (b) with respect to any issuance of Equity Interests of any Loan Party or capital contribution made to any Loan Party (other than an issuance of Equity Interests to a Loan Party or a capital contribution made by a Loan Party) or any incurrence of Debt other than Permitted Debt, the excess, if any, of (i) the sum of cash and cash equivalents received in connection with such transaction over (ii) the underwriting discounts and commissions, and other reasonable and customary out-of-pocket expenses, incurred by such Loan Party in connection therewith.

“Net Orderly Liquidation Value” means the product of (x) clause (i) of Net Recovery Rate and (y) the Net Eligible Inventory.

“Net Recovery Rate” means (i) with respect to Eligible Inventory located at Stores not subject to a Store closing (the **“Appraised Go Forward Stores”**), the appraised blended net orderly liquidation value (the **“Go Forward Stores Net Recovery Rate”**) (on an “as is, where is” basis) of each Borrowing Base Loan Party’s Eligible Inventory that is to be sold through Appraised Go Forward Stores on a wholesale basis, net of costs and expenses estimated to be incurred in connection with such liquidation, which value is expressed as a percentage of the Inventory Value of Eligible Inventory located at the Appraised Go Forward Stores and shall be determined by the Co-Collateral Agents from time to time based on the most recent appraisal provided by an independent third-party appraiser retained by the Co-Collateral Agents in accordance with Section 6.01(k), and (ii) with respect to Eligible Inventory located at Stores that are closing (including Stores closing pursuant to the Initial Store Rationalization (as defined on Schedule 6.01(r)(ii)), the Secondary Store Rationalization (as defined on Schedule 6.01(r)(ii)) any Specified Store Closing Sale or Specified Full Chain Liquidation), the lesser of (x) the Go Forward Stores Net Recovery Rate for such Eligible Inventory determined as if such store was a Go Forward Store and (y) the appraised orderly liquidation value (on an “as is, where is” basis) for the applicable week of the scheduled Store closing events of each Borrowing Base Loan Party’s Eligible Inventory located at such closing Stores, net of costs and expenses estimated to be incurred in connection with such liquidation, which value is expressed as a percentage of the Inventory Value of Eligible Inventory located at such Stores that are closing and shall be determined by the Co-Collateral Agents from time to time in consultation with BRG and an independent third-party appraiser based on the most recent appraisal provided by an independent third-party appraiser retained by the Co-Collateral Agents in accordance with Section 6.01(k).

“Non-Consenting Lender” has the meaning specified in Section 9.16.

“Non-Defaulting Lender” means, at any time, each Lender that is not a Defaulting Lender at such time.

“Note” means a promissory note of any Borrower payable to any Lender evidencing the Revolving Commitment or Term Loan of such Lender, as applicable.

“Notice of Borrowing” has the meaning specified in Section 2.02(a).

“Obligations” has the meaning set forth in the Guarantee and Collateral Agreement.

“Other Connection Taxes” means, with respect to any Recipient, Taxes imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising solely from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced any Loan Document, or sold or assigned an interest in any Extension of Credit or Loan Document pursuant to an assignment request by the Borrowers under Section 9.16).

“Other Taxes” has the meaning specified in Section 2.15(b).

“Overadvance” means any Advance to the extent that, immediately after its having been made, Excess Availability is less than zero.

“**PACA**” means the Perishable Agricultural Commodities Act of 1930, as amended.

“**PACA Liability Reserve**” means an amount calculated on a monthly basis by the Agent to provide for vendor liabilities pursuant to PACA.

“**Participant Register**” has the meaning specified in Section 9.07(f).

“**Participating Prepetition Lender**” has the meaning specified in Section 2.01(d).

“**PASA**” means the Packers and Stockyards Act of 1921, as amended.

“**PASA Liability Reserve**” means the liability for vendor liabilities pursuant to PASA.

“**PATRIOT Act**” means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Title III of Pub. L. 107-56 (signed into law October 26, 2001)).

“**PBGC**” means the Pension Benefit Guaranty Corporation (or any successor).

“**Pension Plan**” means any “employee pension benefit plan” (as such term is defined in Section 3(2) of ERISA), other than a Multiemployer Plan, that is subject to Title IV of ERISA and is sponsored or maintained by Holdings or any ERISA Affiliate or to which Holdings or any ERISA Affiliate contributes or has an obligation to contribute, or in the case of a multiple employer or other plan described in Section 4064(a) of ERISA, has made contributions at any time during the immediately preceding five plan years.

“**Perfection Certificate**” means a certificate dated as of the Effective Date with respect to the Borrowers and the other Loan Parties in form reasonably satisfactory to the Co-Collateral Agents.

“**Permitted Debt**” means each of the following as long as no Default or Event of Default exists at the time of incurrence thereof or would arise from the incurrence thereof:

(a) Debt outstanding on the date of this Agreement and listed on Schedule 1.04;

(b) Debt of any Loan Party to any other Loan Party;

(c) Debt of any Group Member to any Subsidiary of Holdings which is not a Loan Party; provided, that (1) at the time of incurrence of any such Debt and immediately after giving pro forma effect thereto, no Default or Event of Default shall have occurred and be continuing and (2) such Debt is by its terms subordinated or junior in right of payment or security to the Obligations on terms acceptable to the Agent in its reasonable discretion;

(d) the Obligations;

(e) Debt under the Junior DIP Term Loan Agreement as in effect on the date hereof and subject at all times to the Financing Orders and the DIP Intercreditor Agreement;

(f) Debt in respect of performance bonds, bid bonds, appeal bonds, surety bonds and completion guarantees and similar obligations (including, in each case, letters of credit issued to provide such bonds, guaranties and similar obligations), in each case provided in the ordinary course of business, including those incurred to secure health, safety and environmental obligations in the ordinary course of business;

(g) Debt arising from the honoring by a bank or other financial institution of a check, draft or similar instrument drawn against insufficient funds in the ordinary course of business; provided, that (x) such Debt is extinguished within ten Business Days of notification to the applicable Loan Party of its incurrence and (y) such Debt is subject to the Cash Management Order;

(h) Debt arising from agreements providing for indemnification, adjustment of purchase price or similar obligations incurred in connection with any Specified Store Closing Sales or any Specified Sale Transaction, in each case on terms and pursuant to documentation (including documentation regarding subordination) acceptable to the Agent and the Co-Collateral Agents in their sole and absolute discretion; and

(i) any other Debt in an aggregate principal amount not to exceed \$1,000,000 at any one time outstanding.

Notwithstanding the foregoing, and except for the Carve-Out and except for the Junior DIP Superpriority Claims (as defined in the Final Financing Order), no Permitted Debt shall be permitted to have an administrative expense claim status under the Bankruptcy Code senior to or pari passu with the superpriority administrative expense claims of (i) the Credit Parties in respect of the Obligations and (ii) the Prepetition Credit Parties in respect of the Prepetition ABL Obligations, in each case as set forth in the Financing Orders, as applicable.

“Permitted Discretion” means a determination made in good faith and in the exercise of commercially reasonable business judgment (from the perspective of a secured, asset-based lender).

“Permitted Dispositions” means any of the following, as long as, if so required pursuant to Section 2.11 or Section 6.01(m), as applicable, all Net Proceeds are remitted to Agent for application to the Obligations:

(a) transfers and Dispositions of Inventory in the ordinary course of business (it being agreed and understood that bulk sales, “going-out-of-business sales,” store closing sales and similar sales are not in the ordinary course of business);

(b) transfers and Dispositions among the Loan Parties;

(c) transfers and Dispositions by any Subsidiary of Holdings which is not a Loan Party to any Loan Party;

(d) the sale of surplus, obsolete or worn out equipment or other property (other than Inventory) in the ordinary course of business by the Borrowers or any Subsidiary;

(e) transfers and Dispositions which constitute Permitted Investments that are otherwise permitted hereunder;

(f) subleases of real property existing as of the Petition Date and entered into in the ordinary course of business of any Loan Party;

(g) the sale or Disposition of defaulted receivables and the compromise, settlement and collection of receivables in the ordinary course of business or in bankruptcy or other proceedings concerning the other account party thereon and not as part of an accounts receivable financing transaction;

(h) any surrender or waiver of contract rights or the settlement, release, recovery on or surrender of contract, tort or other claims of any kind (other than, in each case, with respect to rights to license Intellectual Property, unless the limited license granted to the Co-Collateral Agents in such Intellectual Property pursuant to the Loan Documents remains in effect and is acknowledged by the licensee) to the extent that any of the foregoing could not reasonably be expected to have a Material Adverse Effect;

(i) sales of Inventory (other than Eligible Inventory) determined by the management of the applicable Loan Party not to be saleable in the ordinary course of business of such Loan Party or any of the Loan Parties;

(j) non-exclusive licenses to Intellectual Property granted to third parties in the ordinary course of business or in connection with a Disposition permitted under Section 6.02(i), and which do not materially interfere with the ordinary conduct of business of the Loan Parties;

(k) dispositions in the ordinary course of business consisting of the abandonment of Intellectual Property rights which, in the reasonable good faith determination of the Borrowers, are no longer economically practicable to maintain or useful in the conduct of the business of the Loan Parties;

(l) the Specified Store Closing Sales; and

(m) any Specified Sale Transaction.

“Permitted Encumbrances” means Permitted Liens of the types described in clauses (a), (b), (e), (g), (j) or (t) of the definition thereof.

“Permitted Holder” means ESL Investments, Inc. and any of its Affiliates other than a Group Member.

“Permitted Holder Lender” means (x) any Permitted Holder and/or (y) any Significant Holder, provided, that, the Permitted Holder Lenders shall not (taken as a whole) at any time hold more than the amount of the Aggregate Revolving Commitments and the principal amount of the Term Loans held by such Permitted Holder Lenders on the Effective Date; provided, further, that, such Permitted Holder Lender shall execute a waiver in form and substance reasonably satisfactory to the Agent that it shall have no right whatsoever with respect to that

portion of the Aggregate Revolving Commitments, the Advances or the Term Loan which it holds (a) to consent to any amendment, modification, waiver, consent or other such action with respect to any of the terms of any Loan Document, (b) otherwise to vote on any matter related to any Loan Document, (c) to require Agents or any Lender to undertake any action (or refrain from taking any action) with respect to any Loan Document, (d) to attend any meeting with the Agent or any Lender or receive any information from the Agent or any Lender, (e) to the benefit of any advice provided by counsel to the Agents or the other Lenders or to challenge the attorney-client privilege of the communications between the Agents, such other Lenders and such counsel, or (f) make or bring any claim, in its capacity as Lender, against any Agent with respect to the fiduciary duties of such Agent or Lender and the other duties and obligations of the Agents hereunder; except that no amendment, modification or waiver to any Loan Document shall, without such Permitted Holder Lender's consent, deprive any Permitted Holder Lender of its pro rata share of any payments to which the Lenders as a group (or any Class thereof) are otherwise entitled hereunder or otherwise single out, or intentionally discriminate against the Permitted Holder Lender, as such. For purposes of this definition, plural references to "**Agents**" contained in clauses (c) through (f) shall have the meaning set forth in Section 8.03, and references to "**such Agent**" or "**any Agent**" shall have corresponding meanings, as the context shall require.

"**Permitted Investments**" means each of the following as long as no Default or Event of Default exists at the time of the making such of Investment or would arise from the making of such Investment:

(a) Investments existing on the date of this Agreement and listed on Schedule 1.05;

(b) (i) Investments by any Loan Party and its Subsidiaries in their respective Subsidiaries outstanding on the date of this Agreement and described in the Perfection Certificate, (ii) Investments by any Loan Party and its Subsidiaries in Loan Parties, and (iii) Investments by Subsidiaries that are not Loan Parties in Holdings or any Subsidiary provided that in the case of this clause (iii), if such Investment is a loan it is subordinated to the Obligations on subordination terms satisfactory to the Agent in its reasonable discretion;

(c) Investments in connection with Specified Sale Transactions and any Specified Store Closing Sales; provided that such Investments are made pursuant to agreements, documents or instruments, as applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion;

(d) Investments arising out of the receipt of non-cash consideration for the sale of assets otherwise permitted under this Agreement;

(e) Cash Equivalents that are subject to Agent's Lien and control, pursuant to documentation in form and substance satisfactory to Agent;

(f) to the extent not prohibited by applicable law, (1) advances to officers, directors and employees and consultants of the Loan Parties made for travel, entertainment, relocation and other ordinary business purposes and (2) advances to officers, directors and employees and consultants of non-Loan Parties made for travel, entertainment,

relocation and other ordinary business purposes, provided, in the case of this clause (2), such advances are made by non-Loan Parties and not with the proceeds of any Investments made by any Loan Party in such non-Loan Party unless otherwise permitted hereunder; provided that such Investments shall not exceed \$1,000,000 in the aggregate at any one time outstanding;

(g) Investments received in connection with the bankruptcy or reorganization of, or settlement of delinquent accounts and disputes with or judgments against, customers and suppliers, in each case in the ordinary course of business or Investments acquired by any Group Member as a result of a foreclosure by any Loan Party with respect to any secured Investments or other transfer of title with respect to any secured Investment in default;

(h) accounts receivable, security deposits and prepayments arising and trade credit granted in the ordinary course of business;

(i) Guarantees by Holdings or any Subsidiary of operating leases (other than Capital Lease Obligations) or of other obligations that do not constitute Debt, in each case entered into by Holdings or any Subsidiary in the ordinary course of business;

(j) (1) advances in the form of a prepayment of expenses of any Loan Party, so long as such expenses are being paid in accordance with customary trade terms of the applicable Loan Party and (2) advances in the form of a prepayment of expenses of any non-Loan Party, so long as such expenses are being paid in accordance with customary trade terms of the applicable non-Loan Party, provided, in the case of this clause (2), such advances are made by non-Loan Parties and not with the proceeds of any Investments made by any Loan Party in such non-Loan Party unless otherwise permitted hereunder; and

(k) other Investments in an amount not to exceed \$1,000,000 in the aggregate outstanding at any time; provided that any cash returns on such Investments shall be applied to the Obligations in accordance with Section 2.11(c)(i).

“Permitted Liens” means:

(a) Liens for Taxes, assessments and governmental charges or levies to the extent such Taxes, assessments or governmental charges are being contested in good faith and by proper proceedings and as to which appropriate reserves are being maintained;

(b) Liens imposed by law, such as materialmen’s, mechanics’, carriers’, workmen’s and repairmen’s Liens and other similar Liens arising in the ordinary course of business securing obligations that are not overdue for a period of more than 30 days or that are being contested in good faith by appropriate proceedings and as to which appropriate reserves are being maintained;

(c) Landlords’ Liens arising in the ordinary course of business securing (i) rents not yet due and payable, (ii) rent for Stores in an amount not to exceed the monthly base rent due for the immediately preceding calendar month and (iii) rents for Stores in excess of the amount set forth in the preceding clause (ii) so long as such amounts are being contested in good faith by appropriate proceedings and as to which appropriate reserves are being maintained;

(d) any attachment or judgment lien not constituting an Event of Default under Section 7.01(e);

(e) Liens presently existing or hereafter created in favor of the Co-Collateral Agents, on behalf of the Credit Parties;

(f) Liens arising by the terms of commercial letters of credit, entered into in the ordinary course of business to secure reimbursement obligations thereunder, provided that such Liens only encumber the title documents and underlying goods relating to such letters of credit or cash;

(g) claims under PACA and PASA;

(h) Liens in favor of issuers of credit cards arising in the ordinary course of business securing the obligation to pay customary fees and expenses in connection with credit card arrangements;

(i) Liens incurred or deposits made by any Group Member in the ordinary course of business in connection with workers' compensation and other casualty insurance lines, unemployment insurance and other types of social security, or to secure the performance of tenders, statutory obligations, bids, leases, government contracts, performance and return-of-money bonds and other similar obligations (exclusive of obligations for the payment of borrowed money);

(j) easements, rights-of-way, covenants, conditions, restrictions (including zoning restrictions), declarations, rights of reverter, minor defects or irregularities in title and other similar charges or encumbrances, whether or not of record, that do not, in the aggregate, interfere in any material respect with the ordinary course of business, or in respect of any Real Property over which the Co-Collateral Agents have a Mortgage, any title defects, liens, charges or encumbrances (other than monetary Liens) which the title company is prepared to endorse or insure by exclusion or affirmative endorsement reasonably acceptable to the Agent and which is included in any Title Policy;

(k) any interest or title of a lessor or sublessor under, and Liens arising from precautionary UCC financing statements (or equivalent filings, registrations or agreements in foreign jurisdictions) relating to, leases and subleases permitted by this Agreement;

(l) normal and customary rights of setoff upon deposits of cash or other Liens originating solely by virtue of any statutory or common law provision, or ordinary course contractual obligation, relating to bankers' liens, rights of setoff or similar rights in favor of banks or other depository institutions;

(m) Liens existing on the Effective Date and set forth on Schedule 1.06;

(n) Liens granted to consignors who have properly perfected on consigned Inventory owned by such consignors and created in the ordinary course of business;

(o) [reserved];

(p) deposits (including retainers or other similar deposits provided to professionals retained by any Group Member in connection with providing services in the ordinary course of business) and other customary Liens to secure the performance of bids, trade contracts (other than for Debt), leases (other than Capital Lease Obligations), statutory and regulatory obligations, surety and appeal bonds, performance and return of money bonds, bids, leases, government contracts, agreements with utilities, and other obligations of a like nature incurred in the ordinary course of business, including those incurred to secure health, safety and environmental obligations in the ordinary course of business;

(q) Liens that are contractual rights of set-off relating to the establishment of depository relations with banks not given in connection with the issuance of Debt;

(r) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods;

(s) the Adequate Protection Liens and the Adequate Protection Superpriority Claims;

(t) the Carve-Out;

(u) Liens securing the obligations under the Junior DIP Term Loan Agreement; provided that such Liens shall be subject at all times to the Financing Orders and the DIP Intercreditor Agreement; and

(v) non-exclusive licenses to Intellectual Property granted to third parties in the ordinary course of business or in connection with a Disposition permitted under Section 6.02(i), and which do not materially interfere with the ordinary conduct of business of the Loan Parties.

“Permitted Overadvance” means an Overadvance made by the Agent, in its Permitted Discretion, or at the direction of any Co-Collateral Agent, which:

(a) (i) is made to maintain, protect or preserve the Collateral and/or the Credit Parties’ rights under the Loan Documents or which is otherwise for the benefit of the Credit Parties;

(ii) is made to enhance the likelihood of, or to maximize the amount of, repayment of the Obligations; or

(iii) is made to pay any other amount chargeable to any Loan Party hereunder; and

(b) together with all other Permitted Overadvances then outstanding, shall not (i) exceed five percent (5%) of the Borrowing Base (calculated without giving effect to clauses (f) or (g) thereof) at any time or (ii) unless a Liquidation is occurring, remain outstanding for more than thirty (30) consecutive Business Days, unless in each case, the Required Lenders otherwise agree;

provided, however, that the foregoing shall not (i) modify or abrogate any of the provisions of Article III regarding any Revolving Lender's obligations with respect to Letters of Credit, or (ii) result in any claim or liability against the Agent or the Co-Collateral Agents (regardless of the amount of any Overadvance) for "**inadvertent Overadvances**" (i.e. where an Overadvance results from changed circumstances beyond the control of the Agent or the Co-Collateral Agents (such as a reduction in the collateral value)), and such "inadvertent Overadvances" shall not reduce the amount of Permitted Overadvances allowed hereunder, and further, provided, that in no event shall the Agent make an Overadvance, if after giving effect thereto, the principal amount of the Revolving Extensions of Credit would exceed the Aggregate Revolving Commitments (as in effect prior to any termination of the Revolving Commitments pursuant to Section 2.06 hereof).

"**Permitted Prior Liens**" means valid, perfected and unavoidable liens (other than Primed Liens) in favor of third parties that were in existence immediately prior to the Petition Date and permitted under the Prepetition First Lien ABL Credit Agreement.

"**Permitted Variance**" means, for any Cumulative Four-Week Period, the Borrowers' actual Net Cash Flow for such period shall not be less than the Net Cash Flow for such period set forth in the Approved Budget minus \$42,000,000.

"**Person**" means an individual, partnership, corporation (including a business trust), joint stock company, trust, unincorporated association, joint venture, limited liability company or other entity, or a government or any political subdivision or agency thereof.

"**Petition Date**" has the meaning specified in the recitals to this Agreement.

"**Pharmacy Receivables**" means Accounts arising from the sale of prescription drugs or other Inventory which can be dispensed only through an order of a licensed professional.

"**Plan**" means a Single Employer Plan or a Multiple Employer Plan.

"**Prepetition**" means the time period ending immediately prior to the filing of the Chapter 11 Cases.

"**Prepetition 2016 Term Loans**" has the meaning specified in the definition of "Prepetition First Lien ABL Credit Agreement."

"**Prepetition 2016 Term Loan Facility**" has the meaning specified in the definition of "Prepetition First Lien ABL Credit Agreement."

"**Prepetition ABL Agent**" has the meaning specified in the definition of "Prepetition First Lien ABL Credit Agreement."

"**Prepetition ABL Collateral**" means the "Collateral" as defined in the Prepetition First Lien ABL Credit Agreement, including any "cash collateral" as defined in Section 363 of the Bankruptcy Code, and which includes, for the avoidance of doubt, all "Collateral" now owned or hereafter acquired, notwithstanding the filing of the Chapter 11 Cases.

“Prepetition ABL Guarantee and Collateral Agreement” means the Third Amended and Restated Guarantee and Collateral Agreement, dated as of July 21, 2015, among Holdings, the Borrowers, the other grantors party thereto, the Prepetition ABL Agent and the Prepetition ABL Co-Collateral Agents, as the same has been amended, restated, supplemented or otherwise modified prior to the date of this Agreement.

“Prepetition ABL Lenders” has the meaning specified in the definition of “Prepetition First Lien ABL Credit Agreement.”

“Prepetition ABL Obligations” means “Obligations” as such term is defined in the Prepetition First Lien ABL Credit Agreement.

“Prepetition Credit Parties” has the meaning specified in the definition of “Prepetition First Lien ABL Credit Agreement.”

“Prepetition Facilities” has the meaning specified in the definition of “Prepetition First Lien ABL Credit Agreement.”

“Prepetition FILO Loan Cap” means the sum of (i) 10% of the Net Orderly Liquidation Value of Net Eligible Inventory at Stores other than closing Stores plus (ii) 10% of the Store Closing Net Orderly Liquidation Value of Net Eligible Inventory at closing Stores minus (iii) liabilities and obligations of the Loan Parties with respect to Bank Products and Cash Management Services at such time to the extent not already implemented and maintained as an Availability Reserve.

“Prepetition FILO Reserve” means a reserve in an amount equal to the excess of \$125,000,000 over the Prepetition FILO Loan Cap (but no event less than zero). The Borrowers shall include reporting on the Prepetition FILO Reserve in each Borrowing Base Certificate.

“Prepetition First Lien ABL Credit Agreement” means the certain Third Amended and Restated Credit Agreement, dated as of July 21, 2015 (as amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the **“Prepetition First Lien ABL Credit Agreement”**), by and among Holdings, the Borrowers, the banks, financial institutions and other institutional lenders from time to time party thereto (collectively, the **“Prepetition ABL Lenders”**), the Issuing Lenders (as defined therein) from time to time party thereto (the **“Prepetition Issuing Lenders”**), and Bank of America, as administrative agent (in such capacity, the **“Prepetition ABL Agent”**), as a co-collateral agent, and as swingline lender, Wells Fargo Bank, National Association, as a co-collateral agent (together with Bank of America in such capacity, the **“Prepetition Co-Collateral Agents,”** and together with the Prepetition ABL Lenders, the Prepetition Administrative Agent, and the Prepetition Issuing Lenders, the **“Prepetition Credit Parties”**), and the other parties from time to time party thereto, providing for a \$1,500,000,000 asset-based revolving credit facility (the **“Prepetition Revolving Facility”**); and the revolving loans thereunder, the **“Prepetition Revolving Advances”**), a term loan facility in an aggregate original principal amount of \$750,000,000 (the **“Prepetition 2016 Term Loan Facility”**); and the term loans thereunder, the **“Prepetition 2016 Term Loans”**), and a “first-in, last-out” facility in an original principal amount of \$125,000,000 (the **“Prepetition FILO**

Facility,” and collectively with the Prepetition Revolving Facility and the Prepetition 2016 Term Loan Facility, the **“Prepetition Facilities”**).

“Prepetition First Lien ABL Credit Agreement Primed Parties” has the meaning specified in Section 2.19(d).

“Prepetition L/C Obligations” means “L/C Obligations” as such term is defined in the Prepetition First Lien ABL Credit Agreement.

“Prepetition Loan Documents” means “Loan Documents” as such term is defined in the Prepetition First Lien ABL Credit Agreement.

“Prepetition Revolver/Term Exposure” means the sum of (a) the outstanding principal amount of Advances (under and as defined in the Prepetition First Lien ABL Credit Agreement), plus (b) the outstanding principal amount of Swingline Advances (under and as defined in the Prepetition First Lien ABL Credit Agreement), plus (c) the amount of Prepetition L/C Obligations plus (d) the outstanding principal amount of outstanding Prepetition 2016 Term Loans.

“Prepetition Revolving Advances” has the meaning specified in the definition of “Prepetition First Lien ABL Credit Agreement.”

“Prepetition Revolving Facility” has the meaning specified in the definition of “Prepetition First Lien ABL Credit Agreement.”

“Prepetition Second Lien Cash Notes Indenture” means that certain Indenture, dated as of October 12, 2010 (as amended, supplemented or otherwise modified from time to time), by and among Holdings, certain guarantors from time to time party thereto, and Wilmington Trust, National Association, as successor trustee and collateral agent thereunder.

“Prepetition Second Lien Credit Agreement” means that certain Second Lien Credit Agreement, dated as of September 1, 2016 (as amended, supplemented or otherwise modified from time to time) by and among Holdings, the Borrowers, as borrowers, and the lenders from time to time party thereto.

“Prepetition Second Lien Collateral” means, collectively, Collateral (as defined in the Prepetition Second Lien Security Agreement).

“Prepetition Second Lien Facilities” means the Prepetition Second Lien Credit Agreement, the Prepetition Second Lien Cash Notes Indenture, and the Prepetition Second Lien PIK Notes Indenture.

“Prepetition Second Lien PIK Notes Indenture” means that certain Indenture, dated as of March 20, 2018 (as amended, supplemented or otherwise modified from time to time) by and among Holdings, certain guarantors from time to time party thereto, and Computershare Trust Company, N.A., as trustee thereunder.

“Prepetition Second Lien Primed Parties” has the meaning specified in Section 2.19(d).

“Prepetition Second Lien Secured Parties” means the secured parties under the Prepetition Second Lien Facilities.

“Prepetition Second Lien Security Agreement” means that certain Amended and Restated Security Agreement, dated as of March 20, 2018, by and among Holdings, certain guarantors from time to time party thereto, in favor of Wilmington Trust, National Association, in its capacity as collateral agent for the Prepetition Second Lien Secured Parties, as amended, amended and restated, supplemented or otherwise modified from time to time.

“Prepetition Total Extensions of Credit” means the “Total Extensions of Credit” as defined in the Prepetition First Lien ABL Credit Agreement.

“Prepetition Unencumbered Assets” has the meaning specified in Section 2.19(b).

“Prepetition Unencumbered Assets Proceeds Account” means a fully blocked segregated account established with Bank of America for the benefit of the Lenders and otherwise on terms and conditions satisfactory to the Co-Collateral Agents in their sole discretion, for the purpose of holding the Net Proceeds of Prepetition Unencumbered Assets.

“Primed Liens” has the meaning specified in Section 2.19(d).

“Priming Liens” has the meaning specified in Section 2.19(d).

“Prior Week” means, as of any date of determination, the immediately preceding week ended on a Saturday and commencing on the prior Sunday.

“Pro Rata Basis” means, with respect to any prepayment of the Term Loan pursuant to Section 2.11(a)(ii), and corresponding reduction in the Aggregate Revolving Commitments pursuant to the proviso thereto, that (i) the principal amount of such prepayment as a percentage of the aggregate outstanding principal amount of the Term Loan immediately prior to such prepayment is equal to (ii) the aggregate amount of such reduction as a percentage of the Aggregate Revolving Commitments immediately prior to such reduction.

“Pro Rata Share” means, as to any Lender as of any date of determination, a percentage equal to (i) the sum of such Lender’s Revolving Commitment and/or share of the outstanding principal amount of the Term Loan divided by (ii) the Aggregate Revolving Commitments and the aggregate outstanding principal amount of the Term Loan as of such date or, following termination of the Revolving Commitments, a percentage equal to (x) the Extensions of Credit of such Lender divided by the Total Extensions of Credit of all Lenders then outstanding.

“Public Lender” has the meaning specified in Section 9.02(d).

“Qualified ECP Guarantor” means, at any time, each Loan Party with total assets exceeding \$10,000,000 or that qualifies at such time as an “eligible contract participant” under

the Commodity Exchange Act and can cause another Person to qualify as an “eligible contract participant” at such time under Section 1a(18)(A)(v)(II) of the Commodity Exchange Act.

“**Qualified Stalking Horse Bid**” has the meaning specified in Schedule 6.01(r)(ii).

“**Rebalancing Date**” means every other Friday, (i) beginning on Friday, December 21, 2018, if no Go Forward Stores Qualified Bid is obtained and found acceptable by the Debtors on or prior to December 15, 2018 or (ii) if a Go Forward Stores Qualified Bid is obtained and found acceptable by the Debtors on such date, beginning on the second Friday following the date on which there ceases to be in full force and effect a Go Forward Stores Qualified Bid.

“**Recipient**” means the Agent, the Co-Collateral Agents, any Lender, any Issuing Lender or any other recipient of any payment to be made by or on account of any obligation of any Loan Party hereunder.

“**Real Property**” means, collectively, all right, title and interest (including any leasehold estate) in and to any and all parcels of or interests in real property owned in fee simple or leased by any Loan Party, whether by lease, license or other means, together with, in each case, all easements, hereditaments and appurtenances relating thereto, all improvements and appurtenant fixtures and equipment, incidental to the ownership, lease or operation thereof.

“**Refunded Swingline Advances**” has the meaning specified in Section 2.04(b).

“**Register**” has the meaning specified in Section 9.07(e).

“**Reimbursement Obligation**” means the obligation of the Borrowers to reimburse the Issuing Lenders pursuant to Section 3.05 for amounts drawn under Letters of Credit.

“**Related Parties**” with respect to any Person, such Person’s Affiliates and the partners, directors, officers, employees, agents, trustees, attorneys and advisors of such Person and of such Person’s Affiliates.

“**Remedies Notice Period**” has the meaning specified in paragraph 34(b) of the Final Financing Order.

“**Reportable Event**” means any of the events set forth in Section 4043(c) of ERISA, other than those events as to which the thirty day notice period is waived under subsections .27, .28, .29, .30, .31, .32, .34 or .35 of PBGC Reg. § 4043.

“**Required Lenders**” means, at any time, the holders of more than 50% of the sum of the Aggregate Revolving Commitments then in effect and the principal amount of the Term Loan then outstanding (other than the portion of the Term Loan held by Permitted Holder Lenders) or, if the Aggregate Revolving Commitments have been terminated, the holders of more than 50% of the Total Extensions of Credit then outstanding (other than Extensions of Credit held by Permitted Holder Lenders), provided, that the Extensions of Credit of any Defaulting Lender shall be disregarded in determining Required Lenders at any time.

“Requirements of Law” means as to any Person, the Certificate of Incorporation and By-Laws or other organizational or governing documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

“Restricted Payment” means any (a) dividend or other distribution (whether in cash, securities or other property) with respect to any Equity Interests in Holdings or any Subsidiary of Holdings, (b) any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, acquisition, cancellation or termination of any such Equity Interests in Holdings or any Subsidiary of Holdings or (c) any option, warrant or other right to acquire any such Equity Interests in Holdings or any Subsidiary of Holdings.

“Revolving Advance” has the meaning specified in Section 2.01. A Revolving Advance may be a Base Rate Advance or a Eurodollar Rate Advance (each of which shall be a **“Type”** of Revolving Advance).

“Revolving Availability Date” means any date after the Effective Date and prior to the Termination Date on which the balance in the Term Loan Proceeds Account is zero.

“Revolving Commitment” means, as to any Revolving Lender, the obligation of such Revolving Lender to make Revolving Advances and participate in Swingline Advances and Letters of Credit in an aggregate principal amount and/or face amount up to (a) the amount set forth opposite such Revolving Lender’s name on Schedule 1.01 or (b) if such Revolving Lender has entered into any Assignment and Acceptance, the amount set forth for such Revolving Lender in the Register maintained by the Agent pursuant to Section 9.07(d), as such amount may be reduced pursuant to Section 2.06.

“Revolving Commitment Percentage” means, as to any Revolving Lender at any time, the percentage which such Revolving Lender’s Revolving Commitment then constitutes of the Aggregate Revolving Commitments or, at any time after the Aggregate Revolving Commitments shall have expired or terminated, the percentage which the aggregate principal amount of such Revolving Lender’s Advances then outstanding plus such Revolving Lender’s participation in Swingline Advances and L/C Obligations constitutes of the aggregate principal amount of the Advances, Swingline Advances and L/C Obligations then outstanding.

“Revolving Extensions of Credit” means as to any Revolving Lender at any time, an amount equal to the sum of (a) the aggregate principal amount of all Revolving Advances held by such Revolving Lender then outstanding, (b) such Revolving Lender’s Revolving Commitment Percentage of the aggregate principal amount of Swingline Advances then outstanding and (c) such Revolving Lender’s Revolving Commitment Percentage of the L/C Obligations then outstanding.

“Revolving Lenders” means, collectively, any Persons signatory hereto as a Revolving Lender, and each Person that shall become a party hereto as a revolving lender pursuant to Section 9.07.

“Rolling Budget” means a 13-week cash flow forecast delivered pursuant to Section 6.03.

“Sanctions” means economic or financial sanctions or trade embargoes imposed, administered or enforced from time to time by (a) the U.S. government, including those administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury or the U.S. Department of State, or (b) the United Nations Security Council, the European Union, any European Union Member State, Her Majesty’s Treasury of the United Kingdom, or any jurisdiction where any Group Member operates.

“Sanctioned Country” means at any time, a country or territory which is itself the subject or target of any Sanctions (at the time of this Agreement, Crimea, Cuba, Iran, North Korea and Syria).

“Sanctioned Person” means, at any time, (a) any Person listed in any Sanctions-related list of sanctioned Persons maintained by the Office of Foreign Assets Control of the U.S. Department of the Treasury or the U.S. Department of State, or by the United Nations Security Council, the European Union, any European Union Member State, Her Majesty’s Treasury of the United Kingdom, or by any jurisdiction where any Group Member operates; (b) any Person located, organized or resident in a Sanctioned Country; or (c) any Person directly or indirectly owned fifty percent or more or otherwise controlled by any such Person or Persons described in the foregoing clauses (a) and (b).

“Scheduled Termination Date” has the meaning specified in the definition of “Termination Date.”

“Sears” means Sears, Roebuck and Co., a New York corporation.

“Sears Holdings Pension Plan” means collective reference to the Sears Holdings Pension Plan 1, as amended and restated effective January 1, 2014, and the Sears Holdings Pension Plan 2, as amended and restated effective December 1, 2016.

“SEC” means the United States Securities and Exchange Commission.

“Security Documents” means the collective reference to the Guarantee and Collateral Agreement, each of the Mortgages, any short-form intellectual property security agreement entered into in connection with the Guarantee and Collateral Agreement, the Financing Orders and all other documents hereafter delivered to the Co-Collateral Agents purporting to grant or granting a Lien on any property of any Person to secure the obligations and liabilities of any Loan Party under any Loan Document.

“Senior Permitted Liens” means all Permitted Prior Liens, Permitted Liens to the extent such liens are required to be senior pursuant to applicable law, and Permitted Liens described in clauses (j) and (t) in the definition thereof.

“Significant Holder” means (i) any “person” or “group” (as such terms are used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, but excluding any employee benefit plan of such person or its Subsidiaries, and any Person or entity acting in its capacity as

trustee, agent or other fiduciary or administrator of any such plan), which is the “beneficial owner” (as defined in Rules 13d-3 and 13d-5 under the Securities Exchange Act of 1934) of 10% or more of the equity securities of Holdings entitled to vote for members of the Board of Directors of Holdings on a fully-diluted basis (and taking into account all such securities that such person or group has the right to acquire pursuant to any option right), and (ii) any Affiliate of any such Person described in clause (i) above.

“**Single Employer Plan**” means a single employer plan, as defined in Section 4001(a)(15) of ERISA, that (a) is maintained for employees of any Borrower or any ERISA Affiliate and no Person other than such Borrower and the ERISA Affiliates or (b) was so maintained and in respect of which any Borrower or any ERISA Affiliate could have liability under Section 4069 of ERISA in the event such plan has been or were to be terminated.

“**Special Flood Hazard Area**” has the meaning assigned to such term in Section 6.01(c)(vi).

“**Specified Full-Chain Liquidation**” means a liquidation on an equity basis (or, if approved by the Agent and the Co-Collateral Agents in their sole and absolute discretion, on a fee basis) of the entire chain of Stores (or the entire chain of Stores remaining after completion of, or not contemplated to be included in, the Specified Going Concern Sale) of the Debtors and all of the assets relating thereto under Section 363 of the Bankruptcy Code. The Specified Full-Chain Liquidation shall be conducted pursuant to bidding procedures, sales procedures, approval orders, purchase agreements, agency documents or other agreements, documents or instruments, as applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (or, with respect to price, satisfactory to the Agent and the Co-Collateral Agents in their reasonable discretion).

“**Specified Going Concern Sale**” means a sale, in one or a series of related transactions, of all or substantially all of (or, if approved in writing by the Agent, certain of) the assets of the Debtors as a going concern under Section 363 of the Bankruptcy Code in accordance with the section of the Go Forward Plan entitled “Go Forward Stores Sale Process.” The Specified Going Concern Sale shall be conducted pursuant to bidding procedures, sales procedures, approval orders, purchase agreements, agency documents or other agreements, documents or instruments, as applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (or, with respect to price, satisfactory to the Agent and the Co-Collateral Agents in their reasonable discretion).

“**Specified Loan Party**” means any Loan Party that is not then an “eligible contract participant” under the Commodity Exchange Act (determined prior to giving effect to Section 9.20).

“**Specified IP Sale**” means a sale, in one or a series of related transactions, of all of the Intellectual Property of the Debtors under Section 363 of the Bankruptcy Code to the extent such assets are not otherwise included in any Specified Going Concern Sale or Specified Full-Chain Liquidation required to be consummated pursuant to the Go Forward Plan. The Specified IP Sale shall be conducted pursuant to bidding procedures, sales procedures, approval orders, purchase agreements, agency documents or other agreements, documents or instruments, as

applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (or, with respect to price, satisfactory to the Agent and the Co-Collateral Agents in their reasonable discretion).

“Specified Other Assets Sale” means the sale of any or all remaining assets of the Debtors under Section 363 of the Bankruptcy Code (including mortgaged Real Property interests and leasehold Real Property interests) to the extent such assets are not otherwise included in any Specified Going Concern Sale or Specified Full-Chain Liquidation required to be consummated pursuant to the Go Forward Plan. The Specified Other Assets Sale shall be conducted pursuant to bidding procedures, sales procedures, approval orders, purchase agreements, agency documents or other agreements, documents or instruments, as applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (or, with respect to price, satisfactory to the Agent and the Co-Collateral Agents in their reasonable discretion).

“Specified Sale Transaction” means any or all of a Specified Going Concern Sale, a Specified Full-Chain Liquidation, a Specified IP Sale, or a Specified Other Assets Sale.

“Specified Store Closing Sale” means (a) certain store closures listed on Schedule 1.07 in accordance with the Initial Store Rationalization described in the Go Forward Plan and (b) certain store closures listed on Schedule 1.08 in accordance with the Secondary Store Rationalization described in the Go Forward Plan, and (c) the closure of any additional Stores approved in writing by the Co-Collateral Agents in their discretion (subject to the performance of a desktop appraisal in form and substance acceptable to the Co-Collateral Agents), and the liquidation of assets related thereto by the Liquidation Agent, pursuant to a liquidation agreement approved by the Agent and the Co-Collateral Agents (including with respect to any augmentation arrangements) and any Specified Store Closing Sales shall be conducted pursuant to bidding procedures, sales procedures, approval orders, purchase agreements, agency documents or other agreements, documents or instruments, as applicable, in form and substance and on terms satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (or, with respect to price, satisfactory to the Agent and the Co-Collateral Agents in their reasonable discretion).

“Specified Subsidiaries” mean SRC Sparrow 1 LLC, a Delaware limited liability company, SRC Sparrow 2 LLC, a Delaware limited liability company, SRC O.P. LLC, a Delaware limited liability company, SRC Facilities LLC, a Delaware limited liability company, SRC Real Estate (TX) LLC, a Delaware limited liability company, and KCD IP, LLC, a Delaware limited liability company.

“SRAC” has the meaning specified in the Preamble.

“Standby L/C” means an irrevocable letter of credit or similar instrument under which the Issuing Lender agrees to make payments in Dollars for the account of any Borrower, on behalf of any Group Member in respect of obligations of such Group Member incurred pursuant to contracts made or performances undertaken or to be undertaken or like matters relating to contracts to which such Group Member is or proposes to become a party, including, without

limiting the foregoing, for insurance purposes or in respect of advance payments or as bid or performance bonds or for any other purpose for which a standby letter of credit might be issued.

“**Store**” means any store owned or leased and operated by any Loan Party.

“**Store Closing Net Orderly Liquidation Value**” means the product of (x) clause (ii) of Net Recovery Rate and (y) the Net Eligible Inventory.

“**Store Footprint Plan**” means, collectively, Schedule 1.07, Schedule 1.08, and Schedule 1.09.

“**Subsidiary**” means, with respect to any Person, any corporation, partnership, joint venture, limited liability company, association or other business entity (a) of which a majority of the shares of Voting Stock is at the time beneficially owned by such Person, (b) over which such Person has the ability to direct the management, or (c) whose financial results are consolidated into the financial statements of such Person. Unless otherwise specified, all references herein to a “Subsidiary” or to “Subsidiaries” shall refer to a Subsidiary or Subsidiaries of the Borrower.

“**Subsidiary Guarantor**” means each direct or indirect wholly owned Domestic Subsidiaries of Holdings that have commenced Chapter 11 Cases, except for Specified Subsidiaries.

“**Supermajority Lenders**” means, at any time, the holders of 66-2/3% or more of the sum of the Aggregate Revolving Commitments then in effect and the principal amount of the Term Loan then outstanding or, if the Aggregate Revolving Commitments have been terminated, the holders of 66-2/3% or more of the Total Extensions of Credit then outstanding, provided, that the Extensions of Credit of any Defaulting Lender shall be disregarded in determining Supermajority Lenders at any time.

“**Survey**” has the meaning assigned to such term in Section 6.01(i)(v)(3)(B).

“**Swap Contract**” means (a) any and all rate swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, spot contracts, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement, and (b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., any International Foreign Exchange Master Agreement, or any other master agreement (any such master agreement, together with any related schedules, a “**Master Agreement**”), including any such obligations or liabilities under any Master Agreement.

“Swap Obligations” means with respect to any Loan Party any obligation to pay or perform under any agreement, contract or transaction that constitutes a “swap” within the meaning of Section 1a(47) of the Commodity Exchange Act.

“Swap Termination Value” means, in respect of any one or more Swap Contracts, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Contracts, the termination value thereof.

“Swingline Advances” has the meaning specified in Section 2.03.

“Swingline Commitment” means the obligation of the Swingline Lender to make Swingline Advances pursuant to Section 2.03 in an aggregate principal amount at any one time outstanding not to exceed \$25,000,000.

“Swingline Lender” means Bank of America, in its capacity as the lender of Swingline Advances.

“Swingline Participation Amount” has the meaning specified in Section 2.04(c).

“Syndication Agent” has the meaning specified in the Preamble.

“Target Sharing Ratio” means (i) if no Go Forward Stores Qualified Bid is obtained and found acceptable on or prior to December 15, 2018, the ratio of the Adjusted Revolving Exposure to the principal amount of Term Loan outstanding, calculated by the Co-Collateral Agents as of 5 p.m. on December 15, 2018, and (ii) if a Go Forward Stores Qualified Bid is obtained and found acceptable on or prior to December 15, 2018, but thereafter on any date there ceases to be in full force and effect a Go Forward Stores Qualified Bid, the ratio of the Adjusted Revolving Exposure to the principal amount of Term Loan outstanding, calculated by the Co-Collateral Agents as of 5 p.m. on the date such Go Forward Stores Qualified Bid ceases to be in full force and effect.

“Taxes” means all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

“Term Commitment” means, as to any Term Lender, the obligation of such Term Lender to make its portion of the Term Loan on the Effective Date.

“Term Lenders” means, collectively, any Persons party hereto as a Term Lender (whether by a signature page hereto or by a joinder agreement hereto), and each Person that shall become a party hereto as a Term Lender pursuant to Section 9.07.

“Term Loan” means, collectively, (i) the Initial Term Loan, (ii) the term loans outstanding hereunder pursuant to Section 2.01(d)(ii) and (ii) as used in the definitions of “Required Lenders” and “Supermajority Lenders”, the sum of (x) the term loans of all the Term Lenders.

“**Term Loan Borrowing**” means a portion of the Term Loan of a particular Type; provided that no Term Loan Borrowing shall be in an aggregate principal amount of less than \$5,000,000 and each Term Loan Borrowing constituting a Eurodollar Rate Advance shall be in a principal amount that is an integral multiple of \$1,000,000 (unless no portion of the Term Loan constitutes a Base Rate Advance), and no more than six (6) Interest Periods in the aggregate for Borrowings and Term Loan Borrowings constituting Eurodollar Rate Advances may be outstanding at any time.

“**Term Loan Margin**” means (a) with respect to any outstanding portion of the Term Loan that is a Eurodollar Rate Advance, 8.00% per annum, and (b) with respect to any outstanding portion of the Term Loan that is a Base Rate Advance, 7.00% per annum.

“**Term Loan Proceeds Account**” means the escrow account of the Borrowers maintained at the Agent and designated by the Borrowers and the Agent as the Term Loan Proceeds Account.

“**Termination Date**” means the earliest of (a) October 16, 2019 (such date, the “**Scheduled Termination Date**”), (b) the substantial consummation (as defined in Section 1101 of the Bankruptcy Code and which for purposes hereof shall be no later than the “effective date” thereof) of a plan of reorganization filed in the Chapter 11 Cases that is confirmed pursuant to an order entered by the Bankruptcy Court, (c) the consummation of a sale of all or substantially all of the Collateral of a type that is included in the Borrowing Base, (d) the date of termination in whole of the Aggregate Revolving Commitments and the acceleration of the Total Extensions of Credit pursuant to Section 2.06 or Section 7.02 and (e) the occurrence of the “termination date” or “maturity date” (or any similar term having the same meaning) under the Junior DIP Term Loan Agreement.

“**Third Party Payor Notification**” has the meaning specified in Section 6.01(m)(iii).

“**Third Party Payors**” means any private health insurance company that is obligated to reimburse or otherwise make payments to pharmacies which sell prescription drugs to eligible patients under any insurance contract with such private health insurer.

“**Title Insurer**” has the meaning specified in Section 6.01(i)(v)(3)(A).

“**Title Policy**” has the meaning specified in Section 6.01(i)(v)(3)(A).

“**Total Extensions of Credit**” means at any time, the aggregate amount of the Extensions of Credit of the Lenders outstanding at such time.

“**Total Revolving Extensions of Credit**” means at any time, the aggregate amount of the Revolving Extensions of Credit of the Lenders outstanding at such time.

“**Trading With the Enemy Act**” means 50 U.S.C. § 1 et seq., as amended.

“**Type**” means either a Base Rate Advance or a Eurodollar Rate Advance.

“UCC” means the Uniform Commercial Code as from time to time in effect in the State of New York, provided, however, that if a term is defined in Article 9 of the Uniform Commercial Code differently than in another Article thereof, the term shall have the meaning set forth in Article 9 thereof; provided further that, if by reason of mandatory provisions of law, perfection, or the effect of perfection or non-perfection, of a security interest in any Collateral or the availability of any remedy hereunder is governed by the Uniform Commercial Code as in effect in a jurisdiction other than New York, “Uniform Commercial Code” means the Uniform Commercial Code as in effect in such other jurisdiction for purposes of the provisions hereof relating to such perfection or effect of perfection or non-perfection or availability of such remedy, as the case may be.

“Unfunded Pension Liability” means the excess of a Pension Plan’s benefit liabilities under Section 4001(a)(16) of ERISA, over the current value of that Pension Plan’s assets, determined in accordance with the assumptions used for funding the Pension Plan pursuant to Section 412 of the Internal Revenue Code for the applicable plan year.

“Utility Deposit Adequate Assurance Accounts” mean collectively, the deposit accounts of any Loan Party and any cash deposited therein solely to the extent such cash is deposited for the benefit of certain utilities pursuant to and consistent with that certain *Order (I) Approving Debtors’ Proposed Form of Adequate Assurance of Payment to Utility Providers, (II) Establishing Procedures For Determining Adequate Assurance of Payment For Future Utility Services, and (III) Prohibiting Utility Providers From Altering, Refusing, or Discounting Utility Service (Docket No. 461)*.

“Voting Stock” means capital stock issued by a corporation, or equivalent interests in any other Person, the holders of which are ordinarily, in the absence of contingencies, entitled to vote for the election of directors (or persons performing similar functions) of such Person, even if the right so to vote has been suspended by the happening of such a contingency.

“Weekly Flash Reporting Package” means reports detailing operating and financial performance, which shall include cash flow performance compared to the Approved Budget for the Prior Week together with accompanying schedules supporting line items included in the weekly cash flow results (such as rollforward of inventory sales and receipts, rollforward of merchandise and other payables of each Loan Party as of the end of the Prior Week, in each case, in reasonable detail).

“Winddown Account” means a deposit account at Bank of America that, prior to the discharge in full of all obligations under the DIP ABL Facility, may only be used to pay winddown costs of the Loan Parties at the discretion of the Borrowers following entry of the Final Financing Order. Bank of America shall not be responsible or have any liability for, or have any duty to ascertain, inquire into, monitor or enforce, compliance with the provisions of this definition.

“Write-Down and Conversion Powers” means the write-down and conversion powers of the applicable EEA Resolution Authority from time to time under the Bail-In Legislation for the applicable EEA Member Country, which powers are described in the EU Bail-In Legislation Schedule.

Section 1.02 Computation of Time Periods. In this Agreement, unless otherwise specified, (a) in the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including” and the words “to” and “until” each mean “to but excluding” (b) “including” means “including without limitation”; and (c) any reference to a time of day means Eastern time.

Section 1.03 Accounting Terms. All accounting terms not specifically defined herein or in the other Loan Documents shall be construed in accordance with U.S. generally accepted accounting principles (“GAAP”) which shall be consistently applied. If at any time any change in U.S. generally accepted accounting principles would affect the computation of any financial ratio or requirement set forth herein, and either the Borrowers or the Required Lenders shall so request, the Agent, the Lenders and the Borrowers shall negotiate in good faith to amend such ratio or requirement to preserve the original intent thereof in light of such change in GAAP (subject to the approval of the Required Lenders which shall not be unreasonably withheld), provided that, until so amended, (i) such ratio or requirement shall continue to be computed in accordance with GAAP prior to such change in principles, and (ii) the Borrowers shall provide to the Agent and the Lenders financial statements and other documents required under this Agreement or as reasonably requested hereunder setting forth a reconciliation between calculations of such ratio or requirement made before and after giving effect to such change in GAAP. For the avoidance of doubt, no retroactive change in GAAP shall apply to the construction of accounting terms under this Agreement in the absence of an amendment hereto in accordance with the terms of this Section 1.03.

Section 1.04 Other Interpretive Provisions. With reference to this Agreement and each other Loan Document, unless otherwise specified herein or in such other Loan Document, the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Unless the context requires otherwise, (i) any definition of or reference to any agreement, instrument or other document shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein or in any other Loan Document), (ii) any reference herein to any Person shall be construed to include such Person’s successors and assigns, (iii) the words “herein,” “hereof” and “hereunder,” and words of similar import when used in any Loan Document, shall be construed to refer to such Loan Document in its entirety and not to any particular provision thereof, (iv) all references in a Loan Document to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, the Loan Document in which such references appear, (v) any reference to any law shall include all statutory and regulatory provisions consolidating, amending, replacing or interpreting such law and any reference to any law or regulation shall, unless otherwise specified, refer to such law or regulation as amended, modified or supplemented from time to time, and (vi) the words “**asset**” and “**property**” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

ARTICLE II

AMOUNTS AND TERMS OF THE ADVANCES AND THE TERM LOANSection 2.01 The Revolving Advances and the Term Loan.

(a) The Revolving Advances. Each Revolving Lender severally agrees, on the terms and conditions hereinafter set forth, to make revolving advances (the “**Revolving Advances**”) to the Borrowers from time to time on any Business Day during the period from the Effective Date until the Termination Date, in an aggregate amount at any one time outstanding which, when added to such Lender’s Revolving Commitment Percentage of the sum of (i) the aggregate principal amount of the Swingline Advances then outstanding and (ii) the L/C Obligations then outstanding, equals the amount of such Lender’s Revolving Commitment; provided, that the aggregate principal amount of any Borrowing made at any time, when aggregated with all other then outstanding Extensions of Credit, shall not exceed the Line Cap at such time. Each Borrowing under this Section 2.01 shall be in an aggregate amount of \$5,000,000 or an integral multiple of \$1,000,000 in excess thereof (provided, that the Swingline Lender may request, on behalf of the applicable Borrower, Borrowings that are Base Rate Advances in other amounts pursuant to Section 2.04(b)) and shall consist of Revolving Advances of the same Type made on the same day by the Revolving Lenders ratably according to their respective Revolving Commitments. Within the limits set forth in this Section 2.01, the Borrowers may borrow under this Section 2.01, prepay pursuant to Section 2.11 and reborrow under this Section 2.01.

(b) The Initial Term Loan. Each Term Lender severally agrees to make the Initial Term Loan available to the Borrowers on the Effective Date in a principal amount not to exceed its Term Commitment and the Term Commitments of each Lender shall be subsequently reduced to zero. The Initial Term Loan Borrowing shall consist of a Base Rate Advance requested by the Borrowers in a Notice of Borrowing delivered not later than 1:00 p.m. on the second Business Day prior to the Effective Date.

(c) Refinancing of the Interim DIP Facility. Subject to the terms of this Agreement and the Final Financing Order:

(i) from and after the Effective Date, the Incremental DIP Revolving Commitments shall be refinanced as Revolving Commitments hereunder and shall be allocated to the Revolving Lenders as set forth on Schedule 1.01; and

(ii) on the Effective Date, the Incremental DIP Term Loans shall be refinanced with the proceeds of the Initial Term Loan made to the Borrowers under this Agreement.

(d) Refinancing of Certain Prepetition Facilities on the Effective Date. Notwithstanding anything to the contrary contained in this Agreement or any other Loan Document, on the Effective Date for each Lender with Incremental DIP Revolving Commitments or an Initial Term Loan hereunder (each, a “**Participating Prepetition Lender**”):

(i) the aggregate principal amount of such Participating Prepetition Lender's Prepetition Revolving Advances shall be refinanced as and constitute Revolving Advances under this Agreement on the Effective Date;

(ii) the aggregate principal amount of such Participating Prepetition Lender's Prepetition 2016 Term Loans shall be refinanced as and constitute part of the Term Loan under this Agreement on the Effective Date; and

(iii) the outstanding amount of such Participating Prepetition Lender's Prepetition L/C Obligations shall be refinanced as and constitute L/C Obligations under this Agreement on the Effective Date (including all Existing Letters of Credit issued under the Prepetition First Lien ABL Credit Agreement being deemed issued under this Agreement on the Effective Date).

(e) Cashless Settlement. The refinancing of the Interim DIP Facility, the Prepetition Revolving Advances and the Prepetition 2016 Term Loan Facility as described in Section 2.01(c) and Section 2.01(d) may be made pursuant to a cashless settlement mechanism approved by the Agent.

(f) Outstandings on the Effective Date. After the refinancings described in Section 2.01(c) and Section 2.01(d) above, (i) all Revolving Loans shall constitute one Class, (ii) the Term Loan shall constitute one Class, (iii) the Aggregate Revolving Commitments are as set forth on Schedule 1.01; (iv) the Outstanding Revolving Advances are \$959,602,131, (v) the aggregate L/C Obligations outstanding are \$120,205,977 and (vi) the aggregate outstanding amount of the Term Loan is \$682,665,490.69. Any portion of the Term Loan that is prepaid or repaid may not be reborrowed.

Section 2.02 Making the Revolving Advances.

(a) Each Borrowing under Section 2.01 shall be made on notice, given not later than (x) 12:00 noon on the third Business Day prior to the date of the proposed Borrowing in the case of a Borrowing consisting of Eurodollar Rate Advances or (y) 1:00 p.m. on the date of the proposed Borrowing in the case of a Borrowing consisting of Base Rate Advances, by the applicable Borrower to the Agent, which shall give to each Revolving Lender prompt notice thereof by email attachment or telecopier. Each such notice of a Borrowing (a "**Notice of Borrowing**") shall be by telephone, confirmed immediately in writing, by email attachment or by telecopier, in substantially the form of Exhibit A hereto, specifying therein the requested (i) date of such Borrowing, (ii) Type of Revolving Advances comprising such Borrowing, (iii) aggregate amount of such Borrowing, and (iv) in the case of a Borrowing consisting of Eurodollar Rate Advances, initial Interest Period for each such Revolving Advance. Each Notice of Borrowing shall be irrevocable and binding on the applicable Borrower. Each Revolving Lender shall, before 2:00 p.m. on the date of such Borrowing make available for the account of its Applicable Lending Office to the Agent at the Agent's Account, in same day funds, such Revolving Lender's ratable (in accordance with its Revolving Commitment Percentage) portion of such Borrowing. After the Agent's receipt of such funds and upon fulfillment of the applicable conditions set forth in Article IV, the Agent will make such funds

available to the Borrower requesting such Borrowing at the Agent's address for Revolving Advances referred to in Section 9.02.

(b) Anything in subsection (a) above to the contrary notwithstanding, (i) a Borrower may not select Eurodollar Rate Advances for any Borrowing if the aggregate amount of such Borrowing is less than \$5,000,000 or if the obligation of the Lenders to make Eurodollar Rate Advances shall then be suspended pursuant to Section 2.09 or 2.13 and (ii) the Eurodollar Rate Advances may not be outstanding as part of more than six (6) separate Borrowings and Term Loan Borrowings.

(c) Unless the Agent shall have received notice from a Revolving Lender prior to the time of any Borrowing that such Revolving Lender will not make available to the Agent such Revolving Lender's ratable portion of such Borrowing, the Agent may assume that such Revolving Lender has made such portion available to the Agent on the date of such Borrowing in accordance with subsection (a) of this Section 2.02 and the Agent may, in reliance upon such assumption, make available to the applicable Borrower on such date a corresponding amount. If and to the extent that such Revolving Lender shall not have so made such ratable portion available to the Agent, such Revolving Lender and the applicable Borrower severally agree to repay to the Agent forthwith on demand such corresponding amount together with interest thereon, for each day from the date such amount is made available to such Borrower until the date such amount is repaid to the Agent, at (i) in the case of such Borrower, the interest rate applicable at the time to Revolving Advances comprising such Borrowing and (ii) in the case of such Revolving Lender, the Federal Funds Rate. If such Revolving Lender shall repay to the Agent such corresponding amount, such amount so repaid shall be made available to the applicable Borrower and shall constitute such Revolving Lender's Revolving Advance as part of such Borrowing for purposes of this Agreement.

(d) The failure of any Revolving Lender to make the Revolving Advance to be made by it as part of any Borrowing shall not relieve any other Revolving Lender of its obligation, if any, hereunder to make its Revolving Advance on the date of such Borrowing, but no Revolving Lender shall be responsible for the failure of any other Revolving Lender to make the Revolving Advance to be made by such other Revolving Lender on the date of any Borrowing.

Section 2.03 The Swingline Advances.

(a) Subject to the terms and conditions hereof, the Swingline Lender may, in its sole and absolute discretion, make a portion of the credit otherwise available to the Borrowers under the Revolving Commitments from time to time during the period from the Effective Date until the Termination Date by making swing line advances ("**Swingline Advances**") to the Borrowers; provided that (i) the aggregate principal amount of Swingline Advances outstanding at any time shall not exceed the Swingline Commitment then in effect (notwithstanding that the Swingline Advances outstanding at any time, when aggregated with the Swingline Lender's other outstanding Revolving Advances, may exceed the Swingline Commitment then in effect) and (ii) the amount of any Swingline Advance made at any time, when aggregated with all other then outstanding Extensions of Credit, shall not exceed the Line Cap at such time; provided that the Swingline Lender shall not be obligated to make any

Swingline Advance at any time when any Revolving Lender is at such time a Defaulting Lender hereunder, and the Swingline Lender has, or after giving effect to such Swingline Advance, may have Fronting Exposure. During the period from the Effective Date until the Termination Date, the Borrowers may use the Swingline Commitment by borrowing, repaying and reborrowing, all in accordance with the terms and conditions hereof. Swingline Advances shall only be available as Base Rate Advances.

(b) Each Borrower shall repay to the Swingline Lender the then unpaid principal amount of each Swingline Advance made to it weekly, on Wednesday of each week; provided that on each date that a Revolving Advance is borrowed by a Borrower, such Borrower shall repay all Swingline Advances then outstanding, if any, and may use all or a portion of such Revolving Advance to fund such repayment. In all events the unpaid principal balance of all Swingline Advances shall be repaid in full on the Termination Date.

Section 2.04 Making the Swingline Advances.

(a) Each Borrowing under Section 2.03 shall be made on notice, given not later than 1:00 p.m. on the date of the proposed Borrowing, by the applicable Borrower to the Agent and Swingline Lender. Each such Notice of a Borrowing shall be by telephone, confirmed immediately in writing, by email attachment or by telecopier, in substantially the form of Exhibit A hereto, specifying therein the requested (i) date of such Borrowing and (ii) aggregate amount of such Borrowing. Each Borrowing under the Swingline Commitment shall be in an amount equal to \$500,000 or a whole multiple of \$100,000 in excess thereof. Subject to Section 2.03(a), not later than 3:00 p.m. on the date of the proposed Borrowing, the Swingline Lender shall make available to the Agent at the Agent's Account an amount in immediately available funds equal to the amount of the Swingline Advance to be made by the Swingline Lender. Upon fulfillment of the applicable conditions set forth in Article IV, the Agent shall make the proceeds of such Swingline Advance available to the Borrower requesting such Borrowing at the Agent's address referred to in Section 9.02.

(b) The Swingline Lender, at any time and from time to time in its sole and absolute discretion may, on behalf of the Borrowers (which hereby irrevocably direct the Swingline Lender to act on their behalf), by notice given by the Swingline Lender no later than 1:00 p.m., request each Revolving Lender to make, and each Revolving Lender hereby agrees to make, a Revolving Advance, in an amount equal to such Lender's Revolving Commitment Percentage of the aggregate amount of the Swingline Advances (the "**Refunded Swingline Advances**") outstanding on the date of such notice, to repay the Swingline Lender. Each Revolving Lender shall make the amount of such Revolving Advance available to the Agent at the Agent's Account in same day funds, not later than 2:00 p.m. on the date of such notice. The proceeds of such Revolving Advances shall be immediately made available by the Agent to the Swingline Lender for application by the Swingline Lender to the repayment of the Refunded Swingline Advances. Each Borrower irrevocably authorizes the Swingline Lender to charge such Borrower's accounts with the Agent (up to the amount available in each such account) in order to immediately pay the amount of such Refunded Swingline Advances to the extent amounts received from the Revolving Lenders are not sufficient to repay in full such Refunded Swingline Advances.

(c) If prior to the time a Revolving Advance would have otherwise been made pursuant to Section 2.04(b), one of the events described in Section 7.01 shall have occurred and be continuing or if for any other reason, as determined by the Swingline Lender in its sole discretion, Revolving Advances may not be made as contemplated by Section 2.04(b), each Revolving Lender shall, on the date such Revolving Advance was to have been made pursuant to the notice referred to in Section 2.04(b), purchase for cash an undivided participating interest in the then outstanding Swingline Advances by paying to the Swingline Lender an amount (the “**Swingline Participation Amount**”) equal to (i) such Revolving Lender’s Revolving Commitment Percentage multiplied by (ii) the sum of the aggregate principal amount of Swingline Advances then outstanding that were to have been repaid with such Revolving Advances.

(d) Whenever, at any time after the Swingline Lender has received from any Revolving Lender such Revolving Lender’s Swingline Participation Amount, the Swingline Lender receives any payment on account of the Swingline Advances, the Swingline Lender will distribute to such Revolving Lender its Swingline Participation Amount to reflect the period of time during which such Revolving Lender’s participating interest was outstanding and funded and, in the case of principal and interest payments, to reflect such Revolving Lender’s pro rata portion of such payment if such payment is not sufficient to pay the principal of and interest on all Swingline Advances then due; provided, however, that in the event that such payment received by the Swingline Lender is required to be returned, such Revolving Lender will return to the Swingline Lender any portion thereof previously distributed to it by the Swingline Lender.

(e) Each Revolving Lender’s obligation to make the Advances referred to in Section 2.04(b) and to purchase participating interests pursuant to Section 2.04(c) shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any set-off, counterclaim, recoupment, defense or other right that such Revolving Lender or any Borrower may have against the Swingline Lender, any Borrower or any other Person for any reason whatsoever, (ii) the occurrence or continuance of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Article IV, (iii) any adverse change in the condition (financial or otherwise) of any Borrower or any other Loan Party, (iv) any breach of this Agreement or any other Loan Document by any Borrower, any other Loan Party or any other Lender or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

Section 2.05 Commitment Fee; Other Fees.

(a) The Borrowers jointly and severally agree to pay to the Agent for the account of each Revolving Lender a commitment fee on the average daily amount of the Available Commitment of such Lender during the period for which payment is made at a rate per annum equal to 0.75%, payable in arrears monthly on the 5th day subsequent to the last day of each month and on the Termination Date.

(b) Other Fees. Holdings and the Borrowers shall pay to the Agent, the Co-Collateral Agents and the Joint Lead Arrangers, as applicable, the fees set forth in the Fee Letter in the amounts and at the times specified therein.

Section 2.06 Optional Termination or Reduction of the Revolving Commitments.

(a) The Borrowers shall have the right, without penalty or premium and upon at least three Business Days' irrevocable notice to the Agent, to permanently terminate in whole or permanently reduce in part the unused portions of the respective Revolving Commitments of the Revolving Lenders, provided that no such termination or reduction of the Revolving Commitments shall be permitted if, after giving effect thereto and to any prepayments of the Advances made on the effective date thereof, the Total Extensions of Credit would exceed the aggregate amount of the Revolving Commitments as so reduced. Any partial reduction of the Revolving Commitments shall be in the aggregate amount of \$5,000,000 or an integral multiple of \$1,000,000 in excess thereof.

(b) If, after giving effect to any reduction of the Aggregate Revolving Commitments, the L/C Commitment or the Swingline Commitment exceeds the amount of the Aggregate Revolving Commitments, such L/C Commitment or Swingline Commitment shall be automatically reduced by the amount of such excess.

(c) The Agent will promptly notify the Revolving Lenders of any termination or reduction of the Aggregate Revolving Commitments under Section 2.06(a). Upon any reduction of the Aggregate Revolving Commitments, the Revolving Commitment of each Revolving Lender shall be reduced by such Revolving Lender's Revolving Commitment Percentage of such reduction amount.

Section 2.07 Repayment of Extensions of Credit. Notwithstanding the provisions of Section 362 of the Bankruptcy Code, and subject to the applicable provisions of the Financing Orders, upon the Termination Date (whether by acceleration or otherwise), (i) each Borrower shall repay to the Agent, for the ratable account of the Lenders on the Termination Date, the aggregate principal amount then outstanding of the Total Extensions of Credit made to it by the Lenders and (ii) the Agent, the Co-Collateral Agents, the Issuing Lenders and the Lenders shall be entitled to immediate payment of all Obligations and, subject to the Remedies Notice Period, as applicable, to enforce the remedies provided for under this Agreement and the other Loan Documents or under applicable law, in each case, without further notice, motion or application to, hearing before, or order from, the Bankruptcy Court.

Section 2.08 Interest.

(a) Scheduled Interest Owed to Revolving Lenders and Swingline Lender. Each Borrower shall pay interest on the unpaid principal amount of each Advance made to it and owing to each Revolving Lender and Swingline Lender from the date of such Advance until such principal amount shall be paid in full, at the following rates per annum:

(i) Base Rate Advances. During such periods as such Advance is a Base Rate Advance, a rate per annum equal at all times to the sum of (x) the Base Rate in effect from time to time plus (y) the Applicable Margin for Base Rate Advances, payable (I) in the case of any Base Rate Advance (other than a Swingline Advance), in arrears monthly on the 5th day subsequent to the

last day of each month during such periods and on the date such Base Rate Advance shall be Converted or paid in full and (II) in the case of any Swingline Advance, on the date that such Swingline Advance is required to be repaid.

(ii) Eurodollar Rate Advances. During such periods as such Advance is a Eurodollar Rate Advance, a rate per annum equal at all times during each Interest Period for such Advance to the sum of (x) the Eurodollar Rate for such Interest Period for such Advance, plus (y) the Applicable Margin for Eurodollar Rate Advances, payable in arrears on the last day of such Interest Period and on the date such Eurodollar Rate Advance shall be Converted or paid in full.

(b) Term Loan. Each Borrower shall pay interest on the unpaid principal amount of the Term Loan made to it and owing to each Term Lender from the Effective Date until such principal amount shall be paid in full, at the following rates per annum:

(i) Base Rate Advances. During such periods as any outstanding portion of the Term Loan is a Base Rate Advance, each such Term Loan Borrowing shall earn interest at a rate per annum equal at all times to the sum of (x) the Base Rate in effect from time to time plus (y) the Term Loan Margin for Base Rate Advances, payable in arrears monthly on the 5th day subsequent to the last day of each month during such periods and on the date such Base Rate Advance shall be Converted or paid in full.

(ii) Eurodollar Rate Advances. During such periods as any outstanding portion of the Term Loan is a Eurodollar Rate Advance, each such Term Loan Borrowing shall earn interest at a rate per annum equal at all times during each Interest Period for such Eurodollar Rate Advance to the greater of (A) 1.00% or (B) the Eurodollar Rate for such Interest Period for such outstanding portion of the Term Loan plus, in either case, the Term Loan Margin for Eurodollar Rate Advances, payable in arrears on the last day of such Interest Period and, if such Interest Period has a duration of more than three months, on each day that occurs during such Interest Period every three months from the first day of such Interest Period and on the date such Eurodollar Rate Advance shall be Converted or paid in full.

(c) Default Interest. Upon the occurrence and during the continuance of an Event of Default, and notwithstanding the Automatic Stay, the Borrowers shall pay interest on the unpaid principal amount of each Revolving Advance and Reimbursement Obligation owing to each Revolving Lender, and on the principal amount of the Term Loan, payable in arrears on the dates referred to in Section 2.08(a) or Section 2.08(b) above, as applicable (or, if earlier, at the time payment thereof is demanded by the Agent), at a rate per annum equal to 2% per annum above the rate per annum required to be paid on such Advance or Reimbursement Obligation pursuant to Section 2.08(a)(i) or Section 2.08(b)(i) above, as applicable. Further, the Borrowers shall pay interest, to the fullest extent permitted by law, on the amount of any interest, fee or other amount (other than principal) payable hereunder that is not paid when due, from the date such amount shall be due until such amount shall be paid in full, payable in arrears on the date

such amount shall be paid in full and on demand, at a rate per annum equal to 2% per annum above the rate per annum required to be paid on Base Rate Advances pursuant to Section 2.08(a)(i) or Section 2.08(b)(i) above, as applicable.

(d) Regulation D Compensation. Each Lender that is subject to reserve requirements of the Board of Governors may require the Borrowers to pay, contemporaneously with each payment of interest on the Eurodollar Rate Advances, additional interest on the related Eurodollar Rate Advances of such Lender at the rate per annum equal to the excess of (i) (A) the applicable Eurodollar Rate divided by (B) one minus the Eurodollar Rate Reserve Percentage over (ii) the applicable Eurodollar Rate. Any Lender wishing to require payment of such additional interest (x) shall so notify the Agent and the Borrowers, in which case such additional interest on the Eurodollar Rate Advances of such Lender shall be payable to such Lender at the place indicated in such notice with respect to each Interest Period commencing at least five Business Days after the giving of such notice and (y) shall notify the Agent and the Borrowers at least five Business Days prior to each date on which interest is payable on the amount then due it under this Section. Each such notification shall be accompanied by such information as the Borrowers may reasonably request.

Section 2.09 Interest Rate Determination. (a) [Reserved].

(b) If, with respect to any Eurodollar Rate Advances,

(i) the Agent determines (which determination shall be conclusive and binding absent manifest error) that adequate and reasonable means do not exist for ascertaining the Eurodollar Rate for such proposed Eurodollar Rate Advance for the applicable Interest Period; or

(ii) the Required Lenders notify the Agent prior to the commencement of any Interest Period for a proposed Eurodollar Rate Advance that the Eurodollar Rate for any Interest Period for such Eurodollar Rate Advances will not adequately reflect the cost to such Required Lenders of making, funding or maintaining their respective Eurodollar Rate Advances for such Interest Period, then

the Agent shall forthwith so notify the Borrowers and the Lenders, whereupon (x) each Eurodollar Rate Advance will automatically, on the last day of the then existing Interest Period therefor, Convert into a Base Rate Advance, and (y') the obligation of the Lenders to make, or to Convert Advances into, Eurodollar Rate Advances shall be suspended until the Agent shall notify the Borrowers and the Lenders that the circumstances causing such suspension no longer exist.

(c) If any Borrower shall fail to select the duration of any Interest Period for any Eurodollar Rate Advances in accordance with the provisions contained in the definition of "Interest Period" in Section 1.01, such Eurodollar Rate Advances will automatically, on the last day of the then existing Interest Period therefor, Convert into Base Rate Advances.

(d) On the date on which the aggregate unpaid principal amount of Eurodollar Rate Advances comprising any Borrowing shall be reduced, by payment or prepayment or otherwise, to less than \$5,000,000, such Eurodollar Rate Advances shall automatically Convert into Base Rate Advances.

(e) Upon the occurrence and during the continuance of any Event of Default, (i) each Eurodollar Rate Advance will automatically, on the last day of the then existing Interest Period therefor, Convert into a Base Rate Advance and (ii) the obligation of the Lenders to make, or to Convert Revolving Advances or any outstanding portion of the Term Loan, into, Eurodollar Rate Advances shall be suspended.

Section 2.10 Optional Conversion of Revolving Advances, Term Loan Borrowings. The Borrowers may on any Business Day, upon notice given to the Agent not later than 12:00 noon on the third Business Day prior to the date of the proposed Conversion and subject to the provisions of Sections 2.09 and 2.13, Convert all Revolving Advances of one Type comprising the same Borrowing into Revolving Advances of the other Type; and/or Convert any Term Loan Borrowing, of one Type into a Term Loan Borrowing, of the other Type; provided, however, that any Conversion of Eurodollar Rate Advances into Base Rate Advances shall be made only on the last day of an Interest Period for such Eurodollar Rate Advances, any Conversion of Base Rate Advances into Eurodollar Rate Advances shall be in an amount not less than the minimum amount specified in Section 2.02(b) and no Conversion of any Revolving Advances or Term Loan Borrowings shall result in more separate Borrowings than permitted under Section 2.02(b). Each such notice of a Conversion shall, within the restrictions specified above, specify (i) the date of such Conversion, (ii) the Revolving Advances or Term Loan Borrowings to be Converted, and (iii) if such Conversion is into Eurodollar Rate Advances, the duration of the initial Interest Period for each such Revolving Advance or Term Loan Borrowing. Each notice of Conversion shall be irrevocable and binding on the applicable Borrower.

Section 2.11 Optional and Mandatory Prepayments of Revolving Advances and Term Loan; Mandatory Reduction of the Revolving Commitments.

(a) (i) Any Borrower may, without penalty or premium and upon notice given not later than 12:00 noon three Business Days prior to the date of such prepayment (or, in the case of a Base Rate Advance, one Business Day prior to the date of such prepayment) to the Agent stating the proposed date and aggregate principal amount of the prepayment, and if such notice is given such Borrower shall, prepay the outstanding principal amount of the Advances comprising part of the same Borrowing in whole or ratably in part, together with accrued interest to the date of such prepayment on the principal amount prepaid; provided, however, that (x) each partial prepayment shall be in an aggregate principal amount of \$5,000,000 or an integral multiple of \$1,000,000 in excess thereof (or, in the case of partial prepayments of Swingline Advances, \$100,000 or a whole multiple thereof) and (y) in the event of any such prepayment of a Eurodollar Rate Advance, the applicable Borrower shall be obligated to reimburse the Lenders in respect thereof pursuant to Section 9.04(c).

(ii) Any Borrower may, subject to the terms of this Section 2.11(a)(ii) and upon notice given not later than 12:00 noon three Business

Days prior to the date of such prepayment (or, in the case of a Base Rate Advance, one Business Day prior to the date of such prepayment) to the Agent stating the proposed date and aggregate principal amount of the prepayment, and if such notice is given such Borrower shall, prepay the outstanding principal amount of the Term Loan in whole or ratably in part, together with accrued interest to the date of such prepayment on the principal amount prepaid; provided, however, that (w) each partial prepayment shall be in an aggregate principal amount of \$5,000,000 or an integral multiple of \$1,000,000 in excess thereof, (x) in connection with any such prepayment of the Term Loan, the Aggregate Revolving Commitments shall be reduced on a Pro Rata Basis (and make any necessary prepayment of Advances so that the reduction in Aggregate Revolving Commitments does not result in an Overadvance), and (y) in the event of any prepayment of a Eurodollar Rate Advance, the applicable Borrower shall be obligated to reimburse the Lenders in respect thereof pursuant to Section 9.04(c).

(b) If the Total Extensions of Credit exceed the Line Cap, the Borrowers shall prepay Advances in an amount equal to such excess, at the earlier of: (x) the demand by the Agent and (y) the next Business Day after either Borrower obtaining knowledge thereof; provided that if the aggregate principal amount of Advances then outstanding is less than the amount of such excess, the Borrowers shall, to the extent of such excess, Cash Collateralize outstanding L/C Obligations; provided further that if, after the prepayment of any Advances and the Cash Collateralization of L/C Obligations under this clause (b), the Total Extensions of Credit exceed the Line Cap, the Borrowers shall prepay the Term Loan in an amount equal to such excess (with a Pro Rata reduction in the Revolving Commitments). This Section shall be subject to the right of the Agent to make Permitted Overadvances in its discretion pursuant to Section 2.18.

(c) Subject to the Financing Orders, (i) the Borrowers shall repay the Advances (without a requirement to reduce the Revolving Commitments) in an amount equal to any Net Proceeds (other than Net Proceeds of the sale of Prepetition Unencumbered Assets and other than Net Proceeds received upon the consummation of a Go Forward Stores Qualified Bid), provided that if the aggregate principal amount of Advances then outstanding is less than the amount of such Net Proceeds, the Borrowers shall, to the extent of such excess, Cash Collateralize L/C Obligations; provided further that if the aggregate principal amount of Advances then outstanding plus the amount of outstanding and non-Cash Collateralized L/C Obligations is less than the amount of such Net Proceeds, the Borrowers shall, to the extent of such excess, deposit such Net Proceeds into the Term Loan Proceeds Account; provided further that if, after the prepayment of any Revolving Advances and any Cash Collateralization of L/C Obligations as set forth above under this clause (c)(i), an Event of Default shall have occurred and be continuing, the Borrowers shall prepay the Term Loan to the extent of such excess and (y) so long as no Event of Default shall have occurred and be continuing, the Borrowers may use the Net Proceeds deposited in the Term Loan Proceeds Account in accordance with the Approved Budget and (ii) in the case of Net Proceeds received upon the consummation of a Go Forward Stores Qualified Bid, the Borrowers shall repay the Obligations in full in cash.

(d) The Borrowers shall prepay the Advances in accordance with the provisions of Section 6.01(m) hereof, and upon the occurrence and during the continuance of an

Event of Default, the Borrowers shall Cash Collateralize outstanding L/C Obligations; provided that if, after the prepayment of any Revolving Advances and any Cash Collateralization of L/C Obligations as set forth above under this clause (d), an Event of Default exists, the Borrowers shall prepay the Term Loan; provided further that upon acceleration of the Obligations or the commencement of a Liquidation, all proceeds of Collateral shall be applied to the Obligations in accordance with Section 7.03.

(e) If on any day the Borrowers are not in compliance with the LTV Provisions, then, until the Borrowers are in compliance therewith, the Borrowers shall prepay Advances in an amount required to comply with such provisions, provided that if the aggregate principal amount of Advances then outstanding is less than the amount required, the Borrowers shall, to the extent of the balance, Cash Collateralize L/C Obligations; provided further that if, after the prepayment of any Advances and the Cash Collateralization of L/C Obligations under this clause (e), the Borrowers are not in compliance therewith, the Borrowers shall prepay the Term Loan in an amount equal to the amount required to cause compliance therewith (with a Pro Rata reduction in the Revolving Commitments).

(f) On each Rebalancing Date, (i) the Aggregate Revolving Commitments shall be automatically reduced, if necessary, to an amount equal to the Adjusted Revolving Exposure as of such Rebalancing Date (with the Revolving Commitment of each Revolving Lender being reduced by such Revolving Lender's Revolving Commitment Percentage of such reduction amount), and (ii) Borrowers shall prepay the Term Loan in an amount necessary to cause the ratio of the Adjusted Revolving Exposure as of such Rebalancing Date to the Term Loan outstanding on such Rebalancing Date to equal the Target Sharing Ratio. Notwithstanding anything in this Agreement to the contrary, if the Borrowers fail to make such prepayment of the Term Loan on any Rebalancing Date, whether or not any Borrower submits a Notice of Borrowing in order to fund such prepayment, Borrowers shall be deemed to have requested a Borrowing of Base Rate Advances in an amount necessary to pay all amounts due pursuant to this Section 2.11(f) on any Rebalancing Date, and each Lender shall fund its pro rata share of such Borrowing whether or not the Commitments have terminated, an Overadvance exists or is created thereby, or the conditions in Article IV are satisfied. Any such Borrowing shall be an Obligation and be secured by the Collateral.

(g) The Borrowers shall deliver to the Administrative Agent, in connection with each prepayment required under Section 2.11(c), a certificate signed by an Authorized Officer of the Borrowers setting forth in reasonable detail the calculation of the amount of such prepayment.

(h) Any prepayment of Revolving Advances pursuant to this Section 2.11 shall be applied, first, to any Base Rate Advances then outstanding and the balance of such prepayment, if any, to the Eurodollar Rate Advances then outstanding.

Section 2.12 Increased Costs. (a) If, due to a Change in Law, there shall be any increase in the cost to any Lender of agreeing to make or making, funding or maintaining Eurodollar Rate Advances or issuing or participating in Letters of Credit (excluding for purposes of this Section 2.12 any such increased costs resulting from (i) Taxes or Other Taxes (as to which Section 2.15 shall govern) and (ii) changes in the basis of taxation of overall net income or

overall gross income by the United States or by the foreign jurisdiction or state under the laws of which such Lender is organized or has its Applicable Lending Office or any political subdivision thereof), then the Borrowers shall from time to time, upon demand by such Lender (with a copy of such demand to the Agent), pay to the Agent for the account of such Lender additional amounts sufficient to compensate such Lender for such increased cost; provided that a Lender claiming additional amounts under this Section 2.12(a) agrees to use reasonable efforts (consistent with its internal policy and legal and regulatory restrictions) to designate a different Applicable Lending Office and/or take other commercially reasonable action if the making of such a designation or the taking of such actions would avoid the need for, or reduce the amount of, such increased cost that may thereafter accrue and would not, in the reasonable judgment of such Lender, be otherwise disadvantageous to such Lender. A certificate as to the amount of such increased cost, submitted to the Borrowers and the Agent by such Lender, shall be conclusive and binding for all purposes, absent manifest error. If any Borrower so notifies the Agent after any Lender notifies the Borrowers of any increased cost pursuant to the foregoing provisions of this Section 2.12(a), such Borrower may, upon payment of such increased cost to such Lender, replace such Lender with a Person that is an Eligible Assignee in accordance with the terms of Section 9.07 (and the Lender being so replaced shall take all action as may be necessary to assign its rights and obligations under this Agreement to such Eligible Assignee).

(b) If any Lender determines that any Change in Law affects or would affect the amount of capital or liquidity required or expected to be maintained by such Lender or any entity controlling such Lender and that the amount of such capital or liquidity is increased by or based upon the existence of such Lender's commitment to lend hereunder and other commitments of this type, then, upon demand by such Lender (with a copy of such demand to the Agent), the Borrowers shall pay to the Agent for the account of such Lender, from time to time as specified by such Lender, additional amounts sufficient to compensate such Lender or such entity in the light of such circumstances, to the extent that such Lender reasonably determines such increase in capital or liquidity to be allocable to the existence of such Lender's commitment to lend hereunder. A certificate as to such amounts submitted to the Borrowers and the Agent by such Lender shall be conclusive and binding for all purposes, absent manifest error.

(c) The Borrowers shall not be required to compensate a Lender pursuant to this Section for any increased costs or capital, liquidity or reserve requirement or pursuant to Section 2.15 for any Taxes incurred more than nine months prior to the date that such Lender notifies the Borrowers of the change or issuance giving rise to such increased costs or capital, liquidity or reserve requirement or Tax and of such Lender's intention to claim compensation therefor; provided that if the change or issuance giving rise to such increased costs or capital, liquidity or reserve requirement or Tax is retroactive, then the nine-month period referred to above shall be extended to include the period of retroactive effect thereof.

Section 2.13 Illegality. Notwithstanding any other provision of this Agreement, if any Lender shall notify the Agent that any Change in Law has made it unlawful for any Lender or its Eurodollar Lending Office to perform its obligations hereunder to make Eurodollar Rate Advances or to fund or maintain Eurodollar Rate Advances hereunder, (a) each Eurodollar Rate Advance will automatically, upon such demand, Convert into a Base Rate Advance or an Advance that bears interest at the rate set forth in Sections 2.08(a)(i) or 2.08(b)(i), as the case may be and (b) the obligation of the Lenders to make Eurodollar Rate Advances or to Convert

Advances or Term Loan Borrowings into Eurodollar Rate Advances shall be suspended until the Agent shall notify the Borrowers and the Lenders that the circumstances causing such suspension no longer exist.

Section 2.14 Payments and Computations. (a) The Borrowers shall make each payment hereunder and under the other Loan Documents, without any right of counterclaim or set-off, not later than 1:00 p.m. on the day when due in U.S. dollars to the Agent at the Agent's Account in same day funds. The Agent will promptly thereafter cause to be distributed like funds relating to the payment of principal or interest or commitment fees ratably (other than amounts payable pursuant to Section 2.12, 2.15 or 9.04(c)) to the Lenders for the account of their respective Applicable Lending Offices, and like funds relating to the payment of any other amount payable to any Lender to such Lender for the account of its Applicable Lending Office, in each case to be applied in accordance with the terms of this Agreement. Upon its acceptance of an Assignment and Acceptance and recording of the information contained therein in the Register pursuant to Section 9.07(e), from and after the effective date specified in such Assignment and Acceptance, the Agent shall make all payments hereunder and under the other Loan Documents in respect of the interest assigned thereby to the Lender assignee thereunder, and the parties to such Assignment and Acceptance shall make all appropriate adjustments in such payments for periods prior to such effective date directly between themselves.

(b) Unless payment is otherwise made by Borrowers, the becoming due of any Obligation (whether principal, interest, fees or other charges, including Extraordinary Expenses, L/C Obligations, Cash Collateral or Obligations relating to Bank Products and Cash Management Services) shall be deemed to be a request for a Base Rate Advance on the due date in the amount due and the proceeds of such Advance shall be disbursed as direct payment of such Obligation, without further application to or order of the Bankruptcy Court and notwithstanding that an Overadvance may result thereby. In addition, Agent may, at its option, charge such amount against any operating, investment or other account of a Borrower maintained with Agent or any of its Affiliates, without further application to or order of the Bankruptcy Court and notwithstanding that an Overadvance may result thereby.

(c) All computations of interest based on the Base Rate shall be made by the Agent on the basis of a year of 365 or 366 days, as the case may be, and all computations of interest based on the Eurodollar Rate or the Federal Funds Rate and of letter of credit fees, commitment fees and other fees shall be made by the Agent on the basis of a year of 360 days, in each case for the actual number of days (including the first day but excluding the last day) occurring in the period for which such interest or commitment fees are payable. Each determination by the Agent of an interest rate hereunder shall be conclusive and binding for all purposes, absent manifest error.

(d) Whenever any payment hereunder or under the other Loan Documents shall be stated to be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall in such case be included in the computation of payment of interest or commitment fee, as the case may be; provided, however, that, if such extension would cause payment of interest on or principal of Eurodollar Rate Advances to be made in the next following calendar month, such payment shall be made on the next preceding Business Day.

(e) Unless the Agent shall have received notice from any Borrower prior to the date on which any payment is due by it to the Lenders hereunder that such Borrower will not make such payment in full, the Agent may assume that the applicable Borrower has made such payment in full to the Agent on such date and the Agent may, in reliance upon such assumption, cause to be distributed to each Lender on such due date an amount equal to the amount then due such Lender. If and to the extent such Borrower shall not have so made such payment in full to the Agent, each Lender shall repay to the Agent forthwith on demand such amount distributed to such Lender together with interest thereon, for each day from the date such amount is distributed to such Lender until the date such Lender repays such amount to the Agent, at the Federal Funds Rate.

Section 2.15 Taxes. (a) Any and all payments by the Borrowers to or for the account of any Lender, the Agent or any Co-Collateral Agent hereunder or under the other Loan Documents or any other documents to be delivered hereunder shall be made, in accordance with Section 2.14 or the applicable provisions of such other documents, free and clear of and without deduction for any and all present or future Taxes (excluding any Excluded Taxes). If the Borrowers shall be required by law to deduct any Taxes from or in respect of any sum payable hereunder or under any other Loan Document or any other documents to be delivered hereunder to any Lender, the Agent or any Co-Collateral Agent, (i) to the extent that the withholding or deduction is made on account of Indemnified Taxes, the sum payable shall be increased as may be necessary so that after making all required deductions for Indemnified Taxes (including deductions for Indemnified Taxes applicable to additional sums payable under this Section 2.15) such Lender, the Agent and the Co-Collateral Agents (as the case may be) receive an amount equal to the sum each would have received had no such deductions of Indemnified Taxes been made, (ii) the Borrowers shall make such deductions as are determined by such Borrowers to be required based upon the information and documentation it has received pursuant to Sections 2.15(e) and (f)(i) and (iii) the Borrowers shall pay the full amount deducted to the relevant taxation authority or other authority in accordance with applicable law.

(b) In addition, the Borrowers shall pay any present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies that arise from any payment made hereunder or under the other Loan Documents or from the execution, delivery or registration of, performing under, or otherwise with respect to, this Agreement or the other Loan Documents or any other documents to be delivered hereunder, but excluding (i) any such taxes that are Other Connection Taxes imposed with respect to an assignment (other than an assignment made pursuant to Section 9.16), and (ii) all other United States federal taxes other than withholding Taxes (hereinafter referred to as “**Other Taxes**”). Other Taxes shall not include any Taxes imposed on, or measured by reference to, gross income, net income or gain.

(c) Without duplication of any additional amounts paid pursuant to Section 2.15(a), the Borrowers shall indemnify each Lender, the Agent and each Co-Collateral Agent for and hold it harmless against the full amount of Indemnified Taxes or Other Taxes (including Indemnified Taxes or Other Taxes imposed or asserted by any jurisdiction on amounts payable under this Section 2.15) imposed on or paid by such Lender, the Agent or any Co-Collateral Agent (as the case may be) and any liability (including penalties, interest and reasonable expenses) arising therefrom or with respect thereto. This indemnification shall be

made within 10 days from the date such Lender, the Agent or any Co-Collateral Agent (as the case may be) makes written demand therefor.

(d) As soon as practicable after the date of any payment of Indemnified Taxes, the Borrowers shall furnish to the Agent, at its address referred to in Section 9.02, the original or a certified copy of a receipt evidencing such payment to the extent such a receipt is issued therefor, or other written proof of payment thereof that is reasonably satisfactory to the Agent.

(e) Any Lender that is entitled to an exemption from or reduction of withholding Tax with respect to payments made under any Loan Document shall deliver to the Borrowers and the Agent, at the time or times reasonably requested by the Borrowers or the Agent, such properly completed and executed documentation reasonably requested by the Borrowers or the Agent as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, any Lender, if reasonably requested by the Borrowers or the Agent, shall deliver such other documentation prescribed by applicable law or reasonably requested by the Borrowers or the Agent as will enable the Borrowers or the Agent to determine whether or not such Lender is subject to backup withholding or information reporting requirements.

(f) Without limiting the generality of the foregoing:

(i) Each Lender that is a United States person, on or prior to the date of its execution and delivery of this Agreement in the case of each Lender and on the date of the Assignment and Acceptance pursuant to which it becomes a Lender in the case of each other Lender, and from time to time thereafter as reasonably requested in writing by the Borrowers or the Agent, shall provide each of the Agent and the Borrowers with two executed originals of Internal Revenue Service Form W-9 certifying that such Lender is exempt from U.S. federal backup withholding Tax on payments pursuant to this Agreement or the other Loan Documents; and

(ii) Each Lender organized under the laws of a jurisdiction outside the United States, and each other Lender that is not a domestic corporation within the meaning of Section 7701(a)(30) of the Internal Revenue Code:

(1) represents that all payments to be made to it under this Agreement or any other Loan Document are exempt from United States withholding Tax (including backup withholding Tax) under an applicable statute or tax treaty;

(2) on or prior to the date of its execution and delivery of this Agreement in the case of each Lender and on the date of the Assignment and Acceptance pursuant to which it becomes a Lender in the case of each other Lender, and from time to time thereafter as reasonably requested in writing by the Borrowers (but only so long as such Lender remains lawfully able

to do so), shall provide each of the Agent and the Borrowers with two executed originals of Internal Revenue Service Forms W-8BEN, W-8BEN-E or W-8ECI, as appropriate, or any successor or other form prescribed by the Internal Revenue Service, certifying that such Lender is exempt from or entitled to a reduced rate of United States withholding Tax on payments pursuant to this Agreement or the other Loan Documents; and

(3) on or prior to the date of its execution and delivery of this Agreement in the case of each Lender and on the date of the Assignment and Acceptance pursuant to which it becomes a Lender in the case of each other Lender, and from time to time thereafter as reasonably requested in writing by the Borrowers (but only so long as such Lender remains lawfully able to do so), shall provide each of the Agent and the Borrowers with executed originals of any other form prescribed by applicable law as a basis for claiming exemption from or a reduction in U.S. federal withholding Tax, duly completed, together with supplementary documentation as may be prescribed by applicable law to permit the Borrowers or the Agent to determine the withholding or deduction required to be made.

If the form provided by a Lender at the time such Lender first becomes a party to this Agreement indicates a United States interest withholding Tax rate in excess of zero, withholding Tax at such rate shall be considered excluded from Indemnified Taxes unless and until such Lender provides the appropriate forms certifying that a lesser rate applies, whereupon withholding Tax at such lesser rate only shall be considered excluded from Indemnified Taxes for periods governed by such form; provided, however, that, if at the date of the Assignment and Acceptance pursuant to which a Lender assignee becomes a party to this Agreement, the Lender assignor was entitled to payments under subsection (a) in respect of United States withholding Tax with respect to interest paid at such date, then, to such extent, the term Indemnified Taxes shall include (in addition to withholding Taxes that may be imposed in the future or other amounts otherwise includable in Indemnified Taxes) United States withholding Tax, if any, applicable with respect to the Lender assignee on such date. If any form or document referred to in this subsection (f) requires the disclosure of information, other than information necessary to compute the Tax payable and information required on the date hereof by Internal Revenue Service Form W-8BEN, W-8BEN-E, or W-8ECI, that the Lender reasonably considers to be confidential, the Lender shall give notice thereof to the Borrowers and shall not be obligated to include in such form or document such confidential information. For purposes of this subsection (f), the terms “**United States**” and “**United States person**” shall have the meanings specified in Section 7701 of the Internal Revenue Code.

(g) For any period with respect to which a Lender has failed to provide the Borrowers with the appropriate form, certificate or other document described in Section 2.15(e) (other than if such failure is due to a change in law, or in the interpretation or application thereof, occurring subsequent to the date on which a form, certificate or other document originally was required to be provided, or if such form, certificate or other document otherwise is not required under subsection (e) above), such Lender shall not be entitled to indemnification under Section 2.15(a) or (c) with respect to Indemnified Taxes imposed by the United States by

reason of such failure; provided, however, that should a Lender become subject to Indemnified Taxes because of its failure to deliver a form, certificate or other document required hereunder, the Borrowers shall take such steps as the Lender shall reasonably request to assist the Lender to recover such Indemnified Taxes. Further, if a payment made to the Agent or any Lender under any Loan Document would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Internal Revenue Code, as applicable), the Agent or such Lender, as applicable, shall deliver to the Borrowers and the Agent at the time or times prescribed by law and at such time or times reasonably requested by the Borrowers or the Agent such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Internal Revenue Code) and such additional documentation reasonably requested by the Borrowers or the Agent as may be necessary for the Borrowers and the Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this paragraph (g), "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

(h) Each Lender agrees that if any form or certification it previously delivered pursuant to this Section 2.15 expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify the Borrowers and the Agent in writing of its legal inability to do so.

(i) Any Lender claiming any additional amounts payable pursuant to this Section 2.15 agrees to use reasonable efforts (consistent with its internal policy and legal and regulatory restrictions) to change the jurisdiction of its Eurodollar Lending Office if the making of such a change would avoid the need for, or reduce the amount of, any such additional amounts that may thereafter accrue and would not, in the reasonable judgment of such Lender, be otherwise disadvantageous to such Lender.

(j) If any Lender determines, in its sole discretion exercised in good faith, that it has actually and finally realized, by reason of a refund, deduction or credit of any Indemnified Taxes paid or reimbursed by the Borrowers pursuant to subsection (a) or (c) above in respect of payments under this Agreement or the other Loan Documents, a current monetary benefit that it would otherwise not have obtained, and that would result in the total payments under this Section 2.15 exceeding the amount needed to make such Lender whole, such Lender shall pay to the Borrowers, with reasonable promptness following the date on which it actually realizes such benefit, an amount equal to the amount of such excess, net of all out-of-pocket expenses incurred by such Lender reasonably allocable in securing such refund, deduction or credit, provided that the Borrowers, upon the request of such Lender, agree to repay the amount paid over to the Borrowers to such Lender in the event such Lender is required to repay such refund to such jurisdiction. Nothing in this subsection (j) shall be construed to require any Lender to make available to the Borrowers or any other Person its tax returns or any confidential tax information.

(k) If the Agent, any Co-Collateral Agent or any Lender, as the case may be, shall become aware that it is entitled to claim a refund from a Governmental Authority in respect of Indemnified Taxes or Other Taxes paid by Borrower pursuant to this Section 2.15,

including Indemnified Taxes or Other Taxes as to which it has been indemnified by Borrower, or with respect to which Borrower or a Group Member that is a signatory hereto has paid additional amounts pursuant to this Section 2.15, it shall notify Borrower of the availability of such refund claim and, if the Agent, any Co-Collateral Agent or any Lender, as the case may be, determines in good faith that making a claim for refund will not have any adverse consequence to its Taxes or business operations, shall, after receipt of a request by Borrower, make a claim to such Governmental Authority for such refund at Borrower's expense.

Section 2.16 Sharing of Payments, Etc. If any Lender shall obtain any payment from any Group Member (whether voluntary, involuntary, through the exercise of any right of set-off, or otherwise) on account of the Advances, or the Term Loan or other amounts owing to it (other than pursuant to Section 2.12, 2.15 or 9.04(c)) in excess of its ratable share, such Lender shall forthwith purchase from the other Lenders such participations in the Advances, the Term Loan or other amounts owing to them as shall be necessary to cause such purchasing Lender to share the excess payment ratably with each of them; provided, however, that if all or any portion of such excess payment is thereafter recovered from such purchasing Lender, such purchase from each Lender shall be rescinded and such Lender shall repay to the purchasing Lender the purchase price to the extent of such recovery together with an amount equal to such Lender's ratable share (according to the proportion of (i) the amount of such Lender's required repayment to (ii) the total amount so recovered from the purchasing Lender) of any interest or other amount paid or payable by the purchasing Lender in respect of the total amount so recovered. The Borrowers agree that any Lender so purchasing a participation from another Lender pursuant to this Section 2.16 may, to the fullest extent permitted by law, exercise all its rights of payment (including the right of set-off) with respect to such participation as fully as if such Lender were the direct creditor of the Borrowers in the amount of such participation.

Section 2.17 Use of Proceeds of Advances and Term Loan. The proceeds of the Advances and the Term Loan shall be available (and each Borrower agrees that it shall use such proceeds) for operating, working capital and general corporate purposes of the Loan Parties, in each case consistent with, subject to and within the limitations contained in, the Approved Budget, including to refinance the Incremental DIP Term Loans outstanding on the Effective Date (in the case of the Term Loan), fund the Carve-Out Reserve and to pay other fees, costs and expenses incurred in connection with the transactions contemplated hereby and other administration costs incurred in connection with the Chapter 11 Cases; provided, however, that no proceeds of the Advances or the Term Loans or cash collateral shall be used to, among other things, (x) object, contest or raise any defense to the validity, perfection, priority, extent or enforceability of any amount due under or the liens and security interests granted under the Loan Documents or in connection with the Prepetition First Lien ABL Credit Agreement and any Debt thereunder or (y) investigate, initiate or prosecute any claims and defenses or commence causes of action against any Credit Party under or relating to the Loan Documents or any Prepetition Credit Parties under the Prepetition First Lien ABL Credit Agreement; and provided further, that the official creditors' committee or its counsel may use up to \$100,000 to investigate, for a sixty (60) day period from the date of entry of the Final Financing Order, the validity, perfection, priority, extent or enforceability of the liens securing the obligations under the Prepetition First Lien ABL Credit Agreement (but not to litigate any of the foregoing).

Section 2.18 Permitted Overadvances. The Agent may, in its discretion, make Permitted Overadvances without the consent of the Lenders, the Swingline Lender and the Issuing Lenders, and each Lender shall be bound thereby. Any Permitted Overadvance may constitute a Swingline Advance. A Permitted Overadvance is for the account of the Borrowers and shall constitute a Base Rate Advance and an Obligation secured by the Collateral, shall be treated for all purposes an Extraordinary Expense, and shall be repaid by the Borrowers in accordance with the provisions of Section 2.03(b) or 2.11(c)(i), as applicable. The making of any such Permitted Overadvance on any one occasion shall not obligate the Agent or any Lender to make or permit any Permitted Overadvance on any other occasion or to permit such Permitted Overadvances to remain outstanding. The making by the Agent of a Permitted Overadvance shall not modify or abrogate any of the provisions of Article III regarding the Lenders' obligations to purchase participations with respect to Letters of Credit or of Section 2.04 regarding the Lenders' obligations to purchase participations with respect to Swingline Advances. The Agent shall have no liability for, and no Loan Party or Credit Party shall have the right to, or shall, bring any claim of any kind whatsoever against the Agent with respect to "**inadvertent Overadvances**" (i.e. where an Overadvance results from changed circumstances beyond the control of the Agent (such as a reduction in the collateral value)) regardless of the amount of any such Overadvance(s).

Section 2.19 Superpriority Claims; Security and Priority of Liens. The Obligations, including all obligations of Holdings and each Subsidiary Guarantor in respect of its guarantee of the Obligations, shall, subject to the Carve-Out, at all times:

(a) pursuant to Sections 364(c)(1), 503(b), and 507(a)(2) of the Bankruptcy Code, be entitled to joint and several superpriority administrative expense claim status in the Chapter 11 Case of each Loan Party, with priority over all other allowed chapter 11 and chapter 7 administrative expense claims now existing or hereinafter arising, of any kind whatsoever, including expenses of a chapter 11 and chapter 7 trustee (the "**DIP Superpriority Claims**");

(b) pursuant to Section 364(c)(2) of the Bankruptcy Code, be secured by an automatically perfected security interest and lien on all assets of the Loan Parties that were not subject to a valid and perfected lien on the Petition Date (the "**Prepetition Unencumbered Assets**") and, upon entry of the Final Financing Order, the Avoidance Action Proceeds (as defined in the Final Financing Order) with lien priorities set forth in the Final Financing Order and the DIP Intercreditor Agreement;

(c) pursuant to Section 364(c)(3) of the Bankruptcy Code, be secured by an automatically perfected junior security interest and lien on all assets of each Loan Party (other than Prepetition ABL Collateral) that is subject to valid and perfected security interests in favor of third parties as of the Petition Date and any Senior Permitted Liens; and

(d) pursuant to Section 364(d)(1) of the Bankruptcy Code, be secured by a perfected first priority priming security interest and lien on the Prepetition ABL Collateral of each Loan Party on which the Prepetition ABL Lenders held a first priority security interest and lien and the Prepetition Second Lien Secured Parties held a second priority security interest and lien (such liens and security interests, the "**Priming Liens**"), in each case to the extent that

such Prepetition ABL Collateral is subject to existing liens that secure the obligations of the applicable Loan Party, including under the Prepetition First Lien ABL Credit Agreement and the Prepetition Second Lien Facilities (collectively, the “**Primed Liens**”) and such Priming Liens (x) shall be senior in all respects to the interests in such property of the Prepetition ABL Lenders under the Prepetition First Lien ABL Credit Agreement and the other “secured parties” referred to therein (collectively, the “**Prepetition First Lien ABL Credit Agreement Primed Parties**”), and of the Prepetition Second Lien Secured Parties under the Prepetition Second Lien Facilities (collectively, the “**Prepetition Second Lien Primed Parties**”), (y) shall also be senior to any liens granted to provide adequate protection in respect of any of the Primed Liens, and (z) shall be subject to Senior Permitted Liens.

Section 2.20 MIRE Event. Notwithstanding anything to the contrary herein, the making, increasing, extension or renewal of any Advances pursuant to this Agreement (excluding any continuation or conversion of Borrowings) after the Effective Date shall be subject to flood insurance due diligence in accordance with Section 6.01(i)(v)(1) and flood insurance compliance in accordance with Section 6.01(c) hereto.

ARTICLE III

AMOUNT AND TERMS OF THE LETTERS OF CREDIT

Section 3.01 L/C Commitment.

(a) Subject to the terms and conditions hereof, each Issuing Lender, in reliance on the agreements of the other Revolving Lenders set forth in Section 3.04(a), agrees to issue Letters of Credit for the account of any Borrower (on behalf of such Borrower or on behalf of any other Group Member) on any Business Day during the period from the Effective Date until the Termination Date in such form as may be approved from time to time by such Issuing Lender; provided that no Issuing Lender shall have any obligation to issue any Letter of Credit if (i) after giving effect to such issuance, the L/C Obligations would exceed the L/C Commitment or (ii) the face amount of the requested Letter of Credit, when aggregated with all other then outstanding Extensions of Credit, shall exceed the Line Cap at such time; provided further that each Issuing Lender may, but shall not be required to, issue Letters of Credit such that the aggregate L/C Obligations attributable to all such outstanding Letters of Credit issued by such Issuing Lender exceed \$85,102,988.50. Each Letter of Credit shall (i) be denominated in Dollars and (ii) expire no later than the earlier of (x) the first anniversary of its date of issuance, or (y) subject to the provisions of Section 6.01(p), the date that is thirty (30) day prior to the Scheduled Termination Date. Each Application and each Letter of Credit shall be subject to the International Standby Practices (ISP 98) of the International Chamber of Commerce (in the case of Standby L/Cs) or the Uniform Customs and Practice for Documentary Credits as most recently published by the International Chamber of Commerce (in the case of Commercial L/Cs) and, to the extent not inconsistent therewith, the laws of the State of New York.

(b) No Issuing Lender shall at any time be obligated to issue any Letter of Credit if (i) such issuance would conflict with, or cause such Issuing Lender or any Revolving Lender to exceed any limits imposed by, any applicable Requirement of Law, (ii) any order, judgment or decree of any Governmental Authority or arbitrator shall by its terms purport to

enjoin or restrain such Issuing Lender from issuing such Letter of Credit, or any law applicable to such Issuing Lender or any request or directive (whether or not having the force of law) from any Governmental Authority with jurisdiction over such Issuing Lender shall prohibit, or request that such Issuing Lender refrain from, the issuance of letters of credit generally or such Letter of Credit in particular or shall impose upon such Issuing Lender with respect to such Letter of Credit any restriction, reserve or capital requirement (for which such Issuing Lender is not otherwise compensated hereunder) not in effect on the Effective Date, or shall impose upon such Issuing Lender any unreimbursed loss, cost or expense which was not applicable on the Effective Date and which such Issuing Lender in good faith deems material to it; (iii) such issuance would violate one or more policies of such Issuing Lender applicable to letters of credit generally, or (iv) any Revolving Lender is at such time a Defaulting Lender hereunder, unless such Issuing Lender has entered into arrangements, including the delivery of cash collateral, satisfactory to such Issuing Lender (in its sole discretion) with the Borrowers or such Defaulting Lender to eliminate such Issuing Lender's actual or potential Fronting Exposure (after giving effect to Section 8.12(a)(iv)) with respect to the Defaulting Lender arising from either (x) the Letter of Credit then proposed to be issued or (y) that Letter of Credit and all other L/C Obligations as to which such Issuing Lender has actual or potential Fronting Exposure, as it may elect in its sole discretion.

Section 3.02 Procedure for Issuance of Letter of Credit. Any Borrower may from time to time request that an Issuing Lender issue a Commercial L/C or Standby L/C for its account (on behalf of such Borrower or on behalf of any other Group Member) by delivering to such Issuing Lender at its address for notices specified herein an Application therefor, completed to the satisfaction of such Issuing Lender, and such other certificates, documents and other papers and information as such Issuing Lender may reasonably request. Upon receipt of any Application, such Issuing Lender will process such Application and the certificates, documents and other papers and information delivered to it in connection therewith in accordance with its customary procedures and shall promptly issue the Letter of Credit requested thereby (but in no event shall such Issuing Lender be required to issue any Letter of Credit earlier than three Business Days after its receipt of the Application therefor and all such other certificates, documents and other papers and information relating thereto) by issuing the original of such Letter of Credit to the beneficiary thereof or as otherwise may be agreed to by such Issuing Lender and the applicable Borrower. Such Issuing Lender shall furnish a copy of such Letter of Credit to the applicable Borrower promptly following the issuance thereof. Such Issuing Lender shall promptly notify the Agent of the issuance, extension or amendment of Letters of Credit and any drawings or other payments under Letters of Credit.

Section 3.03 Fees and Other Charges. (a) The Borrowers will pay a fee on the face amount of all outstanding Letters of Credit (provided, however, that with respect to any Letter of Credit that, by its terms provides for one or more automatic increases in the amount thereof, the amount of such Letter of Credit shall be deemed to be the maximum amount of such Letter of Credit after giving effect to all such increases, whether or not such maximum amount is in effect at such time) at a per annum rate equal to (i) in the case of each Standby L/C and Banker's Acceptance, the Applicable Margin with respect to Eurodollar Rate Advances and (ii) in the case of each Commercial L/C, 50% of the Applicable Margin with respect to Eurodollar Rate Advances, in each case payable monthly in arrears on the 5th day subsequent to the last day of each month after the issuance date. In addition, the Borrowers shall pay to each applicable

Issuing Lender for its own account a fronting fee of 0.125% per annum on the undrawn and unexpired amount of each Letter of Credit, payable monthly in arrears on the 5th day subsequent to the last day of each month after the issuance date.

(b) In addition to the foregoing fees, the Borrowers shall pay or reimburse each Issuing Lender for such normal and customary costs and expenses as are incurred or charged by such Issuing Lender in issuing, negotiating, effecting payment under, amending or otherwise administering any Letter of Credit, unless otherwise agreed.

Section 3.04 Letter of Credit Participations. (a) Each Issuing Lender irrevocably agrees to grant and hereby grants to each Revolving Lender, and, to induce each Issuing Lender to issue Letters of Credit, each Revolving Lender irrevocably agrees to accept and purchase and hereby accepts and purchases from each Issuing Lender, on the terms and conditions set forth below, for such Revolving Lender's own account and risk an undivided interest equal to such Revolving Lender's Revolving Commitment Percentage in such Issuing Lender's obligations and rights under and in respect of each Letter of Credit and the amount of each draft paid by such Issuing Lender thereunder. Each Revolving Lender agrees with each Issuing Lender that, if a draft is paid under any Letter of Credit for which such Issuing Lender is not reimbursed in full by the Borrowers in accordance with the terms of this Agreement, such Revolving Lender shall pay to such Issuing Lender upon demand at such Issuing Lender's address for notices specified herein an amount equal to such Revolving Lender's Revolving Commitment Percentage of the amount of such draft, or any part thereof, that is not so reimbursed. Each Revolving Lender's obligation to pay such amount shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any set-off, counterclaim, recoupment, defense or other right that such Revolving Lender may have against such Issuing Lender, the Borrowers or any other Person for any reason whatsoever, (ii) the occurrence or continuance of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Article IV, (iii) any adverse change in the condition (financial or otherwise) of the Borrowers or any other Loan Party, (iv) any breach of this Agreement or any other Loan Document by the Borrowers, any other Loan Party or any other Revolving Lender or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

(b) If any amount required to be paid by any Revolving Lender to any Issuing Lender pursuant to Section 3.04(a) in respect of any unreimbursed portion of any payment made by such Issuing Lender under any Letter of Credit is paid to such Issuing Lender within three Business Days after the date such payment is due, such Revolving Lender shall pay to such Issuing Lender on demand an amount equal to the product of (i) such amount, times (ii) the daily average Federal Funds Rate during the period from and including the date such payment is required to the date on which such payment is immediately available to such Issuing Lender, times (iii) a fraction the numerator of which is the number of days that elapse during such period and the denominator of which is 360. If any such amount required to be paid by any Revolving Lender pursuant to Section 3.04(a) is not made available to such Issuing Lender by such Revolving Lender within three Business Days after the date such payment is due, such Issuing Lender shall be entitled to recover from such Revolving Lender, on demand, such amount with interest thereon calculated from such due date at the rate per annum set forth in Section 2.08(a)(i) applicable to Base Rate Advances. A certificate of such Issuing Lender

submitted to any Revolving Lender with respect to any amounts owing under this Section shall be conclusive in the absence of manifest error.

(c) Whenever, at any time after any Issuing Lender has made payment under any Letter of Credit and has received from any Revolving Lender its pro rata share of such payment in accordance with Section 3.04(a), such Issuing Lender receives any payment related to such Letter of Credit (whether directly from the applicable Borrower or otherwise, including proceeds of collateral applied thereto by such Issuing Lender), or any payment of interest on account thereof, such Issuing Lender will distribute to such Revolving Lender its pro rata share thereof; provided, however, that in the event that any such payment received by such Issuing Lender shall be required to be returned by such Issuing Lender, such Revolving Lender shall return to such Issuing Lender the portion thereof previously distributed by such Issuing Lender to it.

Section 3.05 Reimbursement Obligation of the Borrowers. If any draft is paid under any Letter of Credit, the Borrowers shall reimburse the applicable Issuing Lender for the amount of (a) the draft so paid and (b) any Taxes, fees, charges or other costs or expenses incurred by such Issuing Lender in connection with such payment (i) not later than 12:00 Noon on the Business Day that the applicable Borrower receives notice of such draft, if such notice is received on such day prior to 10:00 A.M. or (ii) if clause (i) above does not apply, the Business Day immediately following the day that the applicable Borrower receives such notice (such date, the “**Reimbursement Date**”). To the extent that the applicable Borrower fails to so reimburse the applicable Issuing Bank, whether or not any Borrower submits a Notice of Borrowing, Borrowers shall be deemed to have requested a Borrowing of Base Rate Advances in an amount necessary to pay all amounts due Issuing Bank on any Reimbursement Date and each Lender shall fund its pro rata share of such Borrowing whether or not the Commitments have terminated, an Overadvance exists or is created thereby, or the conditions in Article IV are satisfied.

Section 3.06 Obligations Absolute. Each Borrower’s obligations under this Article III shall be absolute and unconditional under any and all circumstances and irrespective of any set-off, counterclaim or defense to payment that any Borrower may have or have had against any Issuing Lender, any beneficiary of a Letter of Credit or any other Person. Each Borrower also agrees with each Issuing Lender that such Issuing Lender shall not be responsible for, and such Borrower’s Reimbursement Obligations under Section 3.05 shall not be affected by, among other things, the validity or genuineness of documents or of any endorsements thereon, even though such documents shall in fact prove to be invalid, fraudulent or forged, or any dispute between or among such Borrower and any beneficiary of any Letter of Credit or any other party to which such Letter of Credit may be transferred or any claims whatsoever of such Borrower against any beneficiary of such Letter of Credit or any such transferee. No Issuing Lender shall be liable for any error, omission, interruption or delay in transmission, dispatch or delivery of any message or advice, however transmitted, in connection with any Letter of Credit, except for errors or omissions found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of such Issuing Lender. Each Borrower agrees that any action taken or omitted by any Issuing Lender under or in connection with any Letter of Credit or the related drafts or documents, if done in the absence of gross negligence or willful misconduct, shall be binding on such Borrower and shall not result in any liability of such Issuing Lender to such Borrower.

Section 3.07 Letter of Credit Payments. If any draft shall be presented for payment under any Letter of Credit, the applicable Issuing Lender shall promptly notify the applicable Borrower of the date and amount thereof. The responsibility of such Issuing Lender to the Borrowers in connection with any draft presented for payment under any Letter of Credit shall, in addition to any payment obligation expressly provided for in such Letter of Credit, be limited to determining that the documents (including each draft) delivered under such Letter of Credit in connection with such presentment are substantially in conformity with such Letter of Credit.

Section 3.08 Applications. To the extent that any provision of any Application related to any Letter of Credit is inconsistent with the provisions of this Article III, the provisions of this Article III shall apply.

Section 3.09 Use of Letters of Credit. The Letters of Credit shall be available (and each Borrower agrees that it shall use such Letters of Credit) for general corporate purposes of Holdings and its Subsidiaries.

ARTICLE IV

CONDITIONS TO EFFECTIVENESS

Section 4.01 Conditions Precedent to Effectiveness. The effectiveness of this Agreement and the obligation of the Lenders to extend credit hereunder is conditioned upon satisfaction (or waiver) of each of the following conditions precedent:

(a) The Agent shall have received each of the following, each of which shall be originals or telecopies or other electronically transmitted copies (followed promptly by originals) unless otherwise specified, each properly executed by an Authorized Officer of the signing Loan Party and each in form and substance satisfactory to the Agent and the Co-Collateral Agents:

(i) this Agreement duly executed by each of Holdings, the Borrowers, the Agent, the Co-Collateral Agents, and the Lenders;

(ii) the Guarantee and Collateral Agreement duly executed by the applicable Loan Parties;

(iii) each other Loan Document set forth on Schedule 4.01, each duly executed by the applicable Loan Parties;

(iv) such certificates of resolutions or other action, incumbency certificates and/or other certificates of Authorized Officers of each Loan Party as the Agent may reasonably require evidencing (A) the authority of each Loan Party to enter into this Agreement and the other Loan Documents to which such Loan Party is a party or is to be a party and (B) the identity, authority and capacity of each Authorized Officer thereof authorized to act as an Authorized Officer in connection with this Agreement and the other Loan Documents to which such Loan Party is a party or is to be a party;

(v) copies of each Loan Party's organization or other governing documents and such other documents and certifications as the Agent may reasonably require to evidence that each Loan Party is duly organized or formed, and that each Loan Party is validly existing, in good standing and qualified to engage in business in each jurisdiction where failure to so qualify could reasonably be expected to have a Material Adverse Effect;

(vi) an opinion of in-house counsel to Holdings and of one or more special or local counsel to Holdings, the Borrowers and the other Loan Parties, addressed to the Agent, the Co-Collateral Agents and each Lender as to such matters as the Agent and Co-Collateral Agents may reasonably request;

(vii) a certificate signed by an Authorized Officer of Holdings and the Borrowers certifying (A) that the conditions specified in Section 4.02 have been satisfied and (B) that the Perfection Certificate is true and correct in all material respects;

(viii) evidence that all insurance (including endorsements except as set forth on Schedule 6.01(q)) required to be maintained pursuant to Section 6.01(c) has been obtained and is in effect, including all flood hazard insurance policies and related endorsements for each Real Property that is located in a Special Flood Hazard Area;

(ix) a Borrowing Base Certificate, duly completed and executed by an Authorized Officer of Holdings, together with supporting information satisfactory to the Co-Collateral Agents in their Permitted Discretion for the most recent prior week ended at least three Business Days before the Effective Date;

(x) results of searches or other evidence reasonably satisfactory to the Co-Collateral Agents (in each case dated as of a date reasonably satisfactory to the Co-Collateral Agents) indicating the absence of Liens on the assets of the Loan Parties, except for Permitted Liens;

(xi) the DIP Intercreditor Agreement duly executed by the Junior DIP Term Loan Agent, the Agent, the Co-Collateral Agents and the Loan Parties;

(xii) [reserved]; and

(xiii) such other customary certificates, documents or consents as the Agent and the Co-Collateral Agents reasonably may require.

(b) All actions required by law or reasonably requested by the Co-Collateral Agents to be undertaken, and all documents and instruments, including Uniform Commercial Code financing statements, required by law or reasonably requested by the Co-Collateral Agents to be filed, registered, or recorded to create or perfect the Liens intended to be

created under the Loan Documents and all such documents and instruments shall have been so filed, registered or recorded to the satisfaction of the Co-Collateral Agents.

(c) The conditions set forth in Section 4.02 shall be satisfied after giving effect to the transactions to occur on the Effective Date.

(d) There shall have been no event or circumstance since the Petition Date, that has had or could reasonably be expected to have, either individually or in the aggregate, a Material Adverse Effect (other than as customarily occurs as a result of events leading up to and following the commencement of a proceeding under chapter 11 of the Bankruptcy Code).

(e) All fees required to be paid (to the extent invoiced) to the Agent, the Co-Collateral Agents, the Joint Lead Arrangers or the Lenders on or before the Effective Date shall have been paid in full.

(f) The Borrowers shall have paid all costs and expenses of the Agent and the Co-Collateral Agents (to the extent set forth in Section 9.04(a) and invoiced) incurred in connection with or relating to this Agreement and the other Loan Documents, including reasonable fees, charges and disbursements of counsel to the Agent and each Co-Collateral Agent (provided that such payment shall not thereafter preclude a final settling of accounts between the Borrowers and the Agent and the Co-Collateral Agents).

(g) (i) Each Loan Party shall have provided the documentation and other information requested by the Lenders at least three (3) Business Days prior to the Effective Date that is required by authorities under applicable “know your customer” and anti-money laundering rules and regulations, including without limitation, the PATRIOT Act, and (ii) to the extent the Borrower qualifies as a “legal entity customer” under the Beneficial Ownership Regulation, the Borrower shall have provided a Beneficial Ownership Certification in relation to the Borrower at least two (2) Business Days prior to the Effective Date.

(h) The Borrowers shall have paid (i) all accrued and unpaid interest, commitment fees, letter of credit fees and other fees to the Initial Lenders under the Interim DIP Facility and (ii) all accrued and unpaid interest, commitment fees, letter of credit fees and other fees owed to Participating Prepetition Lenders under the Prepetition Credit Agreement, in each case accrued to (but not including) the Effective Date.

(i) The Agent shall have received a signed copy of the Final Financing Order, which Final Financing Order shall not have been vacated, reversed, modified, amended or stayed in any respect.

(j) The Agent shall have received signed copies of all orders granting the relief requested in the Loan Parties “first day motions” on a final basis, including (i) authorizing the Loan Parties to continue the use of their cash management system on a final basis, and (ii) authorizing the Loan Parties to reimburse certain employee expenses on a final basis, which orders shall be in form and substance acceptable to the Agent in its sole and absolute discretion.

(k) No trustee, responsible officer or examiner having powers related to the operation of the business (beyond those set forth under Sections 1106(a)(3) and (4) of the Bankruptcy Code) under Bankruptcy Code section 1104 (other than a fee examiner) shall have been appointed or elected with respect to the Loan Parties, any of their subsidiaries, or any of their respective properties, or any Loan Party or its subsidiaries shall have applied for, consented to, or acquiesced in, any such appointment, with respect to the Loan Parties, any of their subsidiaries or their respective properties.

(l) The Joint Lead Arrangers shall have received and be satisfied, in their sole and absolute discretion, with the Approved Budget and the Store Footprint Plan, in each case at least 1 (one) Business Day prior to the Effective Date.

(m) There shall exist no unstayed action, suit, investigation, litigation or proceeding pending or (to the knowledge of the Loan Parties) threatened in any court or before any arbitrator or governmental instrumentality (other than the Chapter 11 Cases) that could reasonably be expected to have a Material Adverse Effect.

(n) Upon entry of the Final Financing Order, the entry into this Agreement shall not violate any requirement of law and shall not be enjoined, temporarily, preliminarily, or permanently.

(o) [Reserved].

(p) [Reserved].

(q) The Junior DIP Term Loan Agreement shall have been executed and delivered by all parties thereto (the execution and delivery of which by the Debtors shall have been authorized by the Bankruptcy Court in the Junior DIP Interim Financing Order), all Junior DIP Term Loan Documents shall be in form and substance satisfactory to the Agent in its sole and absolute discretion, and the Debtors shall have deposited the net proceeds of the initial drawing of the Junior DIP Term Loans in an aggregate initial principal amount of \$75,000,000 into the Term Loan Proceeds Account.

(r) All other conditions precedent in this Section 4.01 shall have been satisfied or waived on or before November 30, 2018.

Section 4.02 Conditions Precedent to Each Extension of Credit. The obligation of each Lender to make an Extension of Credit on any date shall be subject to the conditions precedent that the effectiveness of this Agreement shall have occurred and on the date of such Extension of Credit the following statements shall be true (and each of the giving of the applicable Notice of Borrowing or Application for a Letter of Credit, as the case may be, and the acceptance by the applicable Borrower of the proceeds of such Borrowing or the issuance of such Letter of Credit, as applicable, shall constitute a representation and warranty by the applicable Borrower that on the date of such Borrowing or Letter of Credit issuance such statements are true):

(i) the representations and warranties made by each Loan Party in or pursuant to the Loan Documents are true and correct on and as of such

date in all material respects, before and after giving effect to such Extension of Credit and to the application of the proceeds therefrom, as though made on and as of such date, except to the extent that (A) such representations or warranties are qualified by a materiality standard, in which case they shall be true and correct in all respects, and (B) such representations or warranties expressly relate to an earlier date (in which case such representations and warranties shall be true and correct in all material respects as of such earlier date);

(ii) no event has occurred and is continuing, or would result from such Extension of Credit or from the application of the proceeds therefrom, that constitutes a Default or an Event of Default;

(iii) after giving effect to such Extension of Credit, the Total Extensions of Credit will not exceed the Line Cap;

(iv) after giving effect to such Extension of Credit, the Borrowers will be in compliance with the LTV Provisions;

(v) such Extension of Credit shall not violate any Requirement of Law and shall not be enjoined, temporarily, preliminarily or permanently;

(vi) such Extension of Credit shall not result in the Total Extensions of Credit exceeding the amount authorized for the DIP ABL Facility by the Final Financing Order;

(vii) (i) the Final Financing Order shall be in full force and effect and shall not have been vacated, reversed, stayed, amended or modified in any respect, (ii) no motion for reconsideration of the Final Financing Order shall have been timely filed by any of the Debtors or their Subsidiaries, and (iii) no appeal of the Final Financing Order shall have been timely filed; and

(viii) in the case of a Revolving Advance or Swingline Advance, the date of such Advance is a Revolving Availability Date.

The conditions set forth in this Section 4.02 are for the sole benefit of the Credit Parties but until the Required Lenders otherwise direct the Agent to cease making Extensions of Credit, the Revolving Lenders will fund their Revolving Commitment Percentage of all Advances and participate in all Swingline Advances and Letters of Credit whenever made or issued, which are requested by a Borrower or are otherwise Permitted Overadvances and which, notwithstanding the failure of the Loan Parties to comply with the provisions of this Article IV, are agreed to by the Agent acting in the interests of the Credit Parties, provided, however, that the making of any such Extensions of Credit shall not be deemed a modification or waiver by any Credit Party of the provisions of this Article IV on any future occasion or a waiver of any rights or the Credit Parties as a result of any such failure to comply.

ARTICLE V

REPRESENTATIONS AND WARRANTIES

Section 5.01 Representations and Warranties of Holdings and the Borrowers.

Holdings and the Borrowers hereby jointly and severally represent and warrant as follows:

(a) Organization; Power and Authority; EEA Financial Institution; EEA Financing Institutions. Each Loan Party (i) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization and (ii) is in compliance with all Requirements of Law except to the extent that the failure to comply therewith could not, in the aggregate, reasonably be expected to have a Material Adverse Effect. No Loan Party is an EEA Financial Institution.

(b) Due Authorization; No Conflict. Upon entry of the Final Financing Order, the execution, delivery and performance by each Loan Party of the Loan Documents to which it is a party, and the consummation of the transactions contemplated hereby or thereby, are within such Loan Party's powers, have been duly authorized by all necessary organizational action, and do not contravene (i) the charter or by-laws or other organizational or governing documents of such Loan Party or (ii) law or any contractual restriction binding on or affecting any Loan Party.

(c) Government Approvals; Consents. Upon entry of the Final Financing Order, no authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body or any other third party is required for the due execution, delivery and performance by any Loan Party of any Loan Document to which it is a party that has not already been obtained.

(d) Due Execution. Each Loan Document has been duly executed and delivered by each Loan Party party thereto. Upon entry of the Final Financing Order, this Agreement constitutes, and each other Loan Document will constitute upon execution, the legal, valid and binding obligation of each Loan Party party thereto enforceable against such Loan Party in accordance with its respective terms and the Final Financing Order, subject to the effect of any applicable bankruptcy, insolvency, reorganization or moratorium or similar laws affecting the rights of creditors generally and subject to general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

(e) Financial Statements. The consolidated and consolidating balance sheets of Holdings and its Subsidiaries and the related consolidated statements of income and cash flows and shareholders' equity of Holdings and its Subsidiaries, that have been and are hereafter delivered to Agent and Lenders fairly present the consolidated financial condition and results of operations of Holdings and its Subsidiaries as at the dates and for the periods indicated, all in accordance with GAAP consistently applied.

(f) Absence of Material Adverse Effect. Since the Petition Date, there has been no event or circumstance, either individually or in the aggregate, that has had or would reasonably be expected to have a Material Adverse Effect.

(g) Litigation. Other than the Chapter 11 Cases, there are no material unstayed Adverse Proceedings now pending or threatened or affecting Holdings, the Borrowers or any of their respective Subsidiaries before any court, Governmental Authority or arbitrator.

(h) Margin Stock. Following application of the proceeds of each Advance and the Term Loan and the issuance of each Letter of Credit, not more than five (5%) percent of the value of the assets of the Borrowers and their respective Subsidiaries on a consolidated basis will be "Margin Stock" (within the meaning of Regulation U issued by the Board of Governors. No proceeds of any Extension of Credit or Letters of Credit will be used by Borrowers to purchase or carry, or to reduce or refinance any Debt incurred to purchase or carry, any Margin Stock or for any related purpose governed by Regulations T, U or X of the Board of Governors.

(i) Investment Company Act. No Loan Party is an "investment company", or a company "controlled" by an "investment company", within the meaning of the Investment Company Act of 1940, as amended.

(j) Taxes. All United States Federal income tax returns and all other material tax returns which are required to be filed have been filed by or on behalf of Holdings, the Borrowers and their respective Subsidiaries, and all Taxes due with respect to Holdings, the Borrowers and their respective Subsidiaries pursuant to such returns or pursuant to any assessment received by Holdings, the Borrowers or any Subsidiary have been paid except to the extent permitted in Section 6.01(b). The charges, accruals and reserves on the books of Holdings, the Borrowers and their Subsidiaries in respect of Taxes or other governmental charges have been made in accordance with, and to the extent required by, GAAP.

(k) Information; Accuracy. All written information (including the Approved Budget and each Rolling Budget) heretofore furnished by Holdings, the Borrowers or their Subsidiaries to the Agent, any Co-Collateral Agent or any Lender (including the Perfection Certificate) for purposes of or in connection with this Agreement or any other Loan Document, taken as a whole, was true and correct in all material respects on the date as of which such information was stated or certified, provided that with respect to projected financial information, the Loan Parties represent only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time. As of the Effective Date, the information included in the Beneficial Ownership Certification, if applicable, is true and correct in all respects.

(l) Collateral. No Collateral is subject to any Lien except the Permitted Liens existing on the Effective Date. Each Loan Party and Subsidiary has good and marketable title to (or valid leasehold interests in) all of its Real Property, and good title to all of its personal property, including all property reflected in any financial statements delivered to the Agent or the Lenders, in each case free of Liens except Permitted Liens. Each Loan Party and Subsidiary has paid and discharged all lawful claims that, if unpaid, could become a Lien on its properties, other than Permitted Liens. All Liens of the Agent in the Collateral are duly perfected Liens with lien priorities set forth in the Final Financing Order and the DIP Intercreditor Agreement and subject to Permitted Liens entitled to priority under applicable law. Schedule 5.01(l)(A) sets forth the address (including street address, county and state) of all previously unencumbered Real

Property that is owned or ground leased by the Loan Parties as of the Effective Date (specifying whether each parcel of Real Property is either owned or ground leased). Schedule 5.01(l)(B) sets forth the address (including street address, county and state) of all previously unencumbered Real Property that is leased by the Loan Parties as of the Effective Date, together with the name of each lessor and such lessor's contact information. Each Lease of Real Property by the Loan Parties is enforceable (except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting creditors' rights generally and by general principles of equity) against the lessor thereof in accordance with its terms and is in full force and effect and, other than for defaults arising solely as a result of the commencement of the Chapter 11 Cases, the Loan Parties are not in default of the terms of any such Lease; provided that the representation set forth in this sentence shall not apply to any Lease for a Store location that is subject to the Specified Store Closing Sales if the failure of such representation to be true and correct would not impair the applicable Loan Party's ability to continue to occupy such Store location. The Agent has received the Flood Documentation with respect to all Real Property.

(m) Intellectual Property. Except as, in the aggregate, would not reasonably be expected to have a Material Adverse Effect: (i) each Loan Party owns, or is licensed to use, all Intellectual Property necessary for the conduct of its business as currently conducted; (ii) no material claim has been asserted and is pending by any Person challenging the use of any Intellectual Property or the validity or effectiveness of any such Intellectual Property or alleging that the conduct of the business of any Loan Party infringes, misappropriates, or otherwise violates in any material respect any Intellectual Property of any Person, nor do Holdings or the Borrowers know of any valid basis for any such claim; and (iii) to the best knowledge of Holdings and the Borrowers, neither the use of Intellectual Property by each Group Member nor the operation of their respective businesses infringes, misappropriates or otherwise violates the rights of any Person in any material respect.

(n) ERISA.

(i) Except as set forth on Schedule 5.01(n) or as would not reasonably be expected to result in a Material Adverse Effect, (a) neither a Reportable Event nor a failure to meet minimum required contributions (in accordance with Section 430 or any prior applicable section of the Internal Revenue Code or Section 302 of ERISA) has occurred during the five year period prior to the date on which this representation is made or deemed made with respect to any Plan, (b) each Plan is in compliance with the applicable provisions of ERISA, the Internal Revenue Code and other applicable federal or state laws, and (c) no termination of a Single Employer Plan has occurred. Except as set forth on Schedule 5.01(n), no Lien imposed under the Internal Revenue Code or ERISA exists on account of any Plan, and no Lien in favor of the PBGC or a Plan has arisen, during such five-year period. Each Single Employer Plan that is intended to qualify under Section 401(a) of the Internal Revenue Code has received a favorable determination letter from the United States Internal Revenue Service (the "IRS") and, to the best knowledge of Holdings and the Borrowers, nothing has occurred which would cause the loss of, such qualification. Except as set forth on Schedule 5.01(n) or as would not reasonably be expected to result in a Material Adverse Effect, the Loan Parties and each ERISA Affiliate have made

all required contributions to each Plan subject to Section 430 of the Internal Revenue Code, and no application for a funding waiver or an extension of any amortization period pursuant to Section 430 of the Internal Revenue Code has been made with respect to any Plan.

(ii) There are no pending or, to the best knowledge of Holdings and the Borrowers, threatened claims, actions or lawsuits, or action by any Governmental Authority, with respect to any Plan that would reasonably be expected to have a Material Adverse Effect. There has been no prohibited transaction or violation of the fiduciary duty rules with respect to any Plan that has resulted or could reasonably be expected to result in a Material Adverse Effect. No ERISA Event has occurred or is reasonably expected to occur, in each case that would reasonably be expected to result in a Material Adverse Effect. Neither any Loan Party nor any ERISA Affiliate has incurred, or would reasonably be expected to incur, any liability under Title IV of ERISA with respect to any Pension Plan, other than premiums due and not delinquent under Section 4007 of ERISA or as would not reasonably be expected to have a Material Adverse Effect; neither any Loan Party nor any ERISA Affiliate has incurred, or reasonably expects to incur, any liability (and, to the knowledge of the Borrowers, no event has occurred which, with the giving of notice under Section 4219 of ERISA, would result in such liability) under Sections 4201 or 4243 of ERISA with respect to a Multiemployer Plan except as would not reasonably be expected to have a Material Adverse Effect; and neither any Loan Party nor any ERISA Affiliate has engaged in a transaction that would reasonably be expected to be subject to Sections 4069 or 4212(c) of ERISA. Except as would not reasonably be expected to have a Material Adverse Effect, neither Holdings, the Borrowers nor any Commonly Controlled Entity has had a complete or partial withdrawal (as such terms are defined in Sections 4203 and 4205 of ERISA, respectively) from any Multiemployer Plan that has resulted or would reasonably be expected to result in a liability under ERISA. No such Multiemployer Plan is Insolvent except as would not reasonably be expected to result in aggregate liability to Holdings and its Subsidiaries of \$100,000,000 or more.

(iii) Each Loan Party represents and warrants that it is not and will not be using “plan assets” (within the meaning of 29 CFR § 2510.3-101, as modified by Section 3(42) of ERISA) of one or more Benefit Plans in connection with the Advances, the Letters of Credit or the Revolving Commitments;

(o) Environmental Matters. Except as, individually or in the aggregate, would not reasonably be expected to result in a Material Adverse Effect, no Group Member (i) has failed to comply with any Environmental Law or to obtain, maintain or comply with any permit, license or other approval required under any Environmental Law, (ii) has any Environmental Liabilities, (iii) has received notice of any claim with respect to any Environmental Liability or (iv) knows of any basis for any Environmental Liability.

(p) Security Interest. (i) The Guarantee and Collateral Agreement is effective to create in favor of the Control Co-Collateral Agent, for the benefit of the Credit Parties, a legal, valid and enforceable security interest in the Collateral described therein and proceeds thereof.

(ii) When financing statements and other filings specified on Schedule 5.01(p) in appropriate form are filed in the offices specified on Schedule 5.01(p), the Guarantee and Collateral Agreement shall, to the extent a security interest therein can be perfected by filing a UCC financing statement, constitute a fully perfected Lien on, and security interest in, all right, title and interest of the Loan Parties in such Collateral and the proceeds thereof, as security for the Obligations, in each case prior and superior in right to the Lien or claim of any other Person (except for Senior Permitted Liens).

(iii) The Mortgages shall be effective to create in favor of the Control Co-Collateral Agent (for the benefit of the Credit Parties) or, if so contemplated by the respective Mortgage, the Control Co-Collateral Agent and the other Credit Parties, legal, valid and enforceable Liens on all of the Loan Parties' rights, titles and interests in and to the Mortgaged Property thereunder and the proceeds thereof, and when such Mortgages are validly filed, registered or recorded in the proper real estate filing, registration or recording offices, and all required mortgage Taxes and recording and registration charges are duly paid, the Control Co-Collateral Agent (for the benefit of the Credit Parties) shall have valid Liens with record or registered notice to third parties on all rights, titles and interests of the Loan Parties in such Mortgaged Property.

(q) Payables Practices. Except for managing payments of certain payables to conserve cash in the period immediately preceding the commencement of the Chapter 11 Cases, each Loan Party has not made any material change in the historical accounts payable practices from those in effect immediately prior to the date hereof.

(r) Insurance Matters. The properties of the Loan Parties are insured as required pursuant to Section 6.01(c) hereof. Each insurance policy required to be maintained by the Loan Parties pursuant to Section 6.01(c) is in full force and effect and all premiums in respect thereof that are due and payable have been paid.

(s) Equity Interests. Each Loan Party has good title to the Equity Interests in its Subsidiaries and all such Equity Interests are duly issued, fully paid and non-assessable. There are no outstanding options to purchase, warrants, subscription rights, agreements to issue or sell, convertible interests, phantom rights or powers of attorney relating to any capital stock of any Loan Party (other than Holdings) or Subsidiary, except as set forth on Schedule 5.01(s). The copies of the organization and governing documents of each Loan Party provided pursuant to Section 4.01 are true and correct copies of each such document, each of which is valid and in full force and effect.

(t) Labor Matters; Certain Employment Matters. As of the date of this Agreement, except as would not reasonably be expected to have individually or in the aggregate,

a Material Adverse Effect, (a) there are no strikes, lockouts, slowdowns or other material labor disputes against any Loan Party or any Subsidiary thereof pending or, to the knowledge of Holdings or any Borrower, threatened, (b) the hours worked by and payments made to employees of the Loan Parties comply with the Fair Labor Standards Act and any other applicable federal, state, local or foreign law dealing with such matters, (c) all payments due from any Loan Party and its Subsidiaries, or for which any claim may be made against any Loan Party, on account of wages and employee health and welfare insurance and other benefits, have been paid or properly accrued in accordance with GAAP as a liability on the books of such Loan Party. Except as set forth on Schedule 5.01(t) (as updated by the Borrowers from time to time) (i) no Loan Party or any Subsidiary is a party to or bound by any collective bargaining agreement, management agreement or any material bonus, restricted stock, stock option, or stock appreciation plan or agreement or any similar plan, agreement or arrangement (excluding in each case individual employment agreements) and (ii) no employee of a Loan Party is also an employee of any Permitted Holder. There are no representation proceedings pending or, to the knowledge of Holdings or any Borrower, threatened to be filed with the National Labor Relations Board, and no labor organization or group of employees of any Loan Party or any Subsidiary has made a pending demand for recognition, in each case which would individually or in the aggregate reasonably be expected to result in a Material Adverse Effect. There are no complaints, unfair labor practice charges, grievances, arbitrations, unfair employment practices charges or any other claims or complaints against any Loan Party or any Subsidiary pending or, to the knowledge of Holdings or any Borrower, threatened to be filed with any Governmental Authority or arbitrator based on, arising out of, in connection with, or otherwise relating to the employment or termination of employment of any employee of any Loan Party or any of its Subsidiaries which would, individually or in the aggregate, be reasonably expected to result in a Material Adverse Effect. The consummation of the transactions contemplated by the Loan Documents will not give rise to any right of termination or right of renegotiation on the part of any union under any collective bargaining agreement to which any Loan Party or any of its Subsidiaries is bound, except as would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

(u) WARN Act. No Loan Party has incurred any liability or obligation under the Worker Adjustment and Retraining Notification Act or any similar federal or state law that remains unpaid or unsatisfied and is in excess of \$100,000 individually or \$750,000 in the aggregate for all such liabilities.

(v) Brokerage Fees. No broker or finder brought about the obtaining, making or closing of the Advances or the Term Loan or transactions contemplated by the Loan Documents, and, other than amounts payable pursuant to the Fee Letter, no Loan Party or Affiliate thereof has any obligation to any Person in respect of any finder's or brokerage fees in connection therewith.

(w) Limitation on Certain Transactions. No Loan Party has any obligation to any Permitted Holder with respect to any consulting, management or similar fee; provided, that, for the avoidance of doubt, the foregoing shall not apply to (i) any arrangement disclosed in Holdings' annual report on form 10-K for the fiscal year ended February 3, 2018; (ii) any employment arrangement between any Loan Party and an individual Person who is also an employee of a Permitted Holder, so long as such employment arrangements are (x) on terms

that are fair and reasonable and comparable to terms provided to employees in comparable positions for companies of a comparable size and no less favorable to such Loan Party than it would obtain in a comparable arm's length transaction with a Person that is not an employee of a Permitted Holder and (y) in the case of any officer (as defined in Rule 16a-1 under the Securities Exchange Act of 1934) or director of Holdings, any beneficial owner (as defined in Rule 13d-3 under the Securities Exchange Act of 1934) of more than 10.0% of Holdings' Equity Interests or any Person that ranks in the top five in compensation among all employees of the Loan Parties, approved by a majority of disinterested members of the board of directors of Holdings in good faith; or (iii) any obligation arising from any financial advisory, financing or underwriting services or other investment banking activities provided by a Permitted Holder so long as (x) such services directly relate to and are provided in conjunction with an acquisition or divestiture or other specific transaction conducted outside the ordinary course of business, (y) such services are on terms that are fair and reasonable and comparable to terms provided by independent financial advisory, financing or underwriting service provider or other investment banking service providers and (z) compensation for such services are approved by a majority of disinterested members of the board of directors of Holdings in good faith.

(x) PATRIOT Act; Anti-Corruption. To the extent applicable, each Loan Party is in compliance, in all material respects, with (i) AML Laws, (ii) the PATRIOT Act, (iii) the United States Foreign Corrupt Practices Act of 1977 (the "FCPA"), and (iv) the Corruption of Foreign Public Officials Act, as amended. No part of the proceeds of any credit extensions will be used, directly or, to the Loan Parties' knowledge, indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the FCPA.

(y) Pension Plan Matters. None of Holdings, the Borrowers, any of their respective Subsidiaries, nor any Permitted Holder or Significant Holder is an Affiliate of the Sears Holdings Pension Plan. The Sears Holdings Pension Plan qualifies as an Eligible Assignee pursuant to the definition thereof.

(z) Sanctions; OFAC. No Group Member, nor any of their respective directors, officers, employees, agents or Affiliates, is a Sanctioned Person. Each Group Member has implemented and maintains in effect policies and procedures designed to ensure compliance by each Group Member and their respective directors, officers, employees, agents, and Affiliates, with applicable Sanctions. Each Group Member and their respective directors, officers, and employees to the extent of their activities in those capacities, and, to the knowledge of each Group Member, their respective agents and Affiliates, to the extent of their activities in those capacities, is in compliance with applicable Sanctions. No Group Member will, directly or, to their knowledge, indirectly, use the proceeds of any credit extensions, or lend, contribute or otherwise make available such proceeds to any Person in any manner that would directly or indirectly result in a violation of applicable Sanctions by any Person.

(aa) Final Financing Order.

(i) The Final Financing Order is in full force and effect, and has not been vacated, reversed, terminated, stayed, modified or amended in

any manner without the written consent of the Agent and the Co-Collateral Agents.

(ii) Upon the occurrence of the Termination Date (whether by acceleration or otherwise), the Agent shall, subject to Article VII and the applicable provisions of the Final Financing Order, be entitled to immediate payment of the Obligations and to enforce the remedies provided for under this Agreement and the other Loan Documents in accordance with the terms hereof, thereof and the Final Financing Order, in each case without further application to or order by the Bankruptcy Court.

(iii) If the Final Financing Order is the subject of a pending appeal in any respect, none of the Final Financing Order, the extension of credit or the performance by any Loan Party of any of its obligations under this Agreement or any of the other Loan Documents shall be the subject of a presently effective stay pending appeal. The Debtors, the Agent, the Co-Collateral Agents and the Lenders shall be entitled to rely in good faith upon the Final Financing Order, notwithstanding objection thereto or appeal therefrom by any interested party. The Debtors, the Agent, the Co-Collateral Agents and the Lenders shall be permitted and required to perform their respective obligations in compliance with the Loan Documents notwithstanding any such objection or appeal, unless the Final Financing Order has been stayed by a court of competent jurisdiction.

(bb) Security Interest. Upon entry of each of the Interim Financing Order and the Final Financing Order, each such Financing Order was or shall be effective to create in favor of the Co-Collateral Agents, for the benefit of the Lenders, a legal, valid enforceable and perfected security interest in the Collateral and proceeds thereof, as and to the extent contemplated by each such Financing Order, as described in this Agreement and the other Loan Documents.

(cc) Appointment of Trustee or Examiner; Liquidation. No order has been entered in any of the Chapter 11 Cases (a) for the appointment of a Chapter 11 trustee, (b) for the appointment of a responsible officer or examiner (other than a fee examiner) having expanded powers (beyond those set forth under Sections 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1104 of the Bankruptcy Code or (c) to convert any of the Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code or to dismiss any of the Chapter 11 Cases.

(dd) No Other Insolvency Proceeding. None of the Loan Parties is a debtor in any Insolvency Proceeding.

(ee) Superpriority Claims; Liens. Upon the entry of each of the Interim Financing Order and the Final Financing Order, each such Financing Order and the Loan Documents are sufficient to provide the superpriority claims and security interests and Liens on Collateral of the Loan Parties described in, and with the priority provided in, the Interim DIP Term Sheet and the Loan Documents, as applicable.

(ff) Non-Subsidiary Guarantor Entities. Since August 4, 2018, no Loan Party has transferred any assets to any Specified Subsidiary other than as reported in filings with the SEC made prior to the Petition Date.

(gg) Approved Budget. The Borrowers have heretofore furnished to the Agent the Approved Budget and such Approved Budget was prepared in good faith upon assumptions that the Borrowers believed to be reasonable assumptions on the date of delivery of the then-applicable Approved Budget. To the knowledge of the Borrowers, no facts exist that (individually or in the aggregate) would result in any material change in the Approved Budget.

(hh) Reorganization Matters.

(i) The Chapter 11 Cases were commenced on the Petition Date in accordance with applicable law and proper notice thereof was given for (i) the motion seeking approval of the Loan Documents and the Interim Financing Order and Final Financing Order, (ii) the hearing for the entry of the Interim Financing Order, and (iii) the hearing for the entry of the Final Financing Order. The Debtors have given, on a timely basis as specified in the Interim Financing Order, all notices required to be given to all parties specified in the Interim Financing Order.

(ii) After the entry of the Interim Financing Order, and pursuant to and to the extent permitted in the Interim Financing Order and the Final Financing Order, the Obligations will constitute allowed administrative expense claims in the Chapter 11 Cases having priority over all administrative expense claims and unsecured claims against the Loan Parties now existing or hereafter arising, of any kind whatsoever, including all administrative expense claims specified in any provision of the Bankruptcy Code or otherwise, as provided under Section 364(c)(1) of the Bankruptcy Code, subject to the Carve-Out and the priorities set forth in the Interim Financing Order or Final Financing Order, as applicable.

(iii) After the entry of the Interim Financing Order and pursuant to and to the extent provided in the Interim Financing Order and the Final Financing Order, the Obligations will be secured by a valid and perfected Lien on all of the Collateral subject, as to priority, only to the Carve-Out to the extent set forth in the Interim Financing Order and the Final Financing Order and with the lien priority set forth in the Final Financing Order and the DIP Intercreditor Agreement.

(iv) Notwithstanding the provisions of Section 362 of the Bankruptcy Code, and subject to the applicable provisions of the Interim Financing Order or the Final Financing Order, as the case may be, upon the maturity (whether by acceleration or otherwise) of any of the Obligations, the Agent and Lenders shall be entitled to immediate payment of such Obligations and to enforce the remedies provided for hereunder or under applicable law,

without further notice, motion or application to, hearing before, or order from, the Bankruptcy Court.

ARTICLE VI

COVENANTS

Section 6.01 Affirmative Covenants. So long as any Advance or other Obligation (other than contingent indemnification obligations for which no claim shall have then been asserted) shall remain unpaid, any Letter of Credit shall remain outstanding (unless the same has been Cash Collateralized or back-to-back letters of credit from an issuer and on terms acceptable to the Issuing Lenders have been provided in respect of such Letters of Credit) or any Lender shall have any Commitment hereunder, each of Holdings and the Borrowers will, and will cause each of their Subsidiaries to:

(a) Compliance with Laws, Etc. (i) Comply in all respects with all applicable Requirements of Law, such compliance to include compliance with ERISA and Environmental Laws (which compliance includes taking any required actions with respect to the release or threatened release of Hazardous Materials), except for such non-compliance as would not reasonably be expected to have a Material Adverse Effect, and (ii) comply in all material respects with the Bankruptcy Code and any order of the Bankruptcy Court.

(b) Payment of Taxes, Etc. Pay and discharge before the same shall become delinquent, (i) all Taxes, assessments and governmental charges or levies imposed upon it or upon its property (ii) all payments required to be made to any Pension Plan, and (iii) all lawful claims that, if unpaid, might by law become a Lien upon its property; provided that neither Holdings, the Borrowers nor any of their Subsidiaries shall be required to pay or discharge any such Tax, assessment, charge or claim (x) that is being contested in good faith and by proper proceedings and as to which appropriate reserves are being maintained, unless and until any Lien resulting therefrom attaches to its property and becomes enforceable against its other creditors, (y) if such non-payments, either individually or in the aggregate, would not be reasonably expected to have a Material Adverse Effect or (z) for which payment is excused under the Bankruptcy Code.

(c) Maintenance of Insurance. (i) Maintain insurance with responsible and reputable insurance companies or associations in such amounts and covering such risks as is consistent with prudent business practice; provided that Holdings, the Borrowers and their Subsidiaries may self-insure to the extent consistent with prudent business practice; provided further that policies maintained with respect to any Collateral located at a warehouse or DC shall provide coverage for Inventory at (x) the retail selling price of such Inventory less any permanent markdowns, consistent with the Loan Parties' past practices, or (y) another selling price permitted by the Co-Collateral Agents in their Permitted Discretion.

(ii) None of the Credit Parties shall be a co-insurer with any Loan Party or any other Person with respect to any fire and extended coverage policies maintained with respect to any Collateral without the prior written consent of the Co-Collateral Agents. Fire and extended coverage policies

maintained with respect to any Collateral shall be endorsed or otherwise amended to include a non-contributing lenders' loss payable clause, in form and substance reasonably satisfactory to the Co-Collateral Agents, which endorsements or amendments shall provide that the insurer shall pay all proceeds otherwise payable to the Loan Parties under the policies directly to the Control Co-Collateral Agent, as its interests may appear.

(iii) Within thirty (30) days following delivery of written notice from the Agent to Holdings, Holdings shall notify the insurers and use commercially reasonable efforts to have such policies amended to include such other provisions as the Co-Collateral Agents may reasonably require from time to time to protect the interests of the Credit Parties. Commercial general liability policies shall be endorsed to name the Co-Collateral Agents as additional insureds, as their interests may appear. Each certificate delivered by the Loan Parties' insurance broker with respect to each property and liability insurance policy referred to in this Section 6.01(c) shall also provide that such policy shall not be canceled, modified or not renewed other than upon not less than ten (10) days' prior written notice thereof by the insurance broker to the Co-Collateral Agents.

(iv) The Borrowers shall deliver to the Co-Collateral Agents, prior to the cancellation, modification or non-renewal of any such policy of insurance, evidence of renewal or replacement of a policy previously delivered to the Co-Collateral Agents, including an insurance binder therefor, together with evidence satisfactory to the Co-Collateral Agents of payment of the premium therefor and, upon request of the Agent, a copy of such renewal or replacement policy. In the event that the Borrowers fail to maintain any such insurance as required pursuant to this Section 6.01(c), the Agent may obtain such insurance on behalf of the Borrowers and the Loan Parties shall reimburse the Agent as provided herein for all costs and expenses in connection therewith; the Agent's obtaining of such insurance shall not be deemed a cure or waiver of any Default or Event of Default arising from the Loan Parties' failure to comply with the provisions of this Section 6.01(c).

(v) The Borrowers shall cause each property insurance policy with respect to any Real Property to be endorsed or otherwise amended to include a "standard" lender's loss payable endorsement, in form and substance reasonably satisfactory to the Co-Collateral Agents; deliver a certificate of insurance with respect to such Real Property to the Co-Collateral Agent; and deliver to the Co-Collateral Agents, prior to or concurrently with the cancellation or nonrenewal of any such policy of insurance covered by this clause (v), a copy of a renewal or replacement (or other evidence of renewal of a policy previously delivered to the Agent) insurance certificate with respect thereto.

(vi) If any building or mobile home on any improved Real Property is at any time located in an area identified by the Federal Emergency Management Agency (or any successor agency) as a special flood hazard area

(each a “**Special Flood Hazard Area**”) with respect to which flood insurance has been made available under the Flood Insurance Laws, (i) maintain, or cause to be maintained, with a financially sound and reputable insurer, flood insurance in an amount and otherwise sufficient to comply with all applicable rules and regulations promulgated pursuant to the Flood Insurance Laws and (ii) deliver to the Agent evidence of such compliance in form and substance reasonably acceptable to the Agent.

(d) Preservation of Corporate Existence, Etc. Preserve and maintain its corporate existence, material rights (charter and statutory) and franchises unless otherwise consented to by the Agent and the Co-Collateral Agents in their sole and absolute discretion.

(e) Inspection Rights. In addition to the Agent’s and the Co-Collateral Agents’ rights under Section 6.01(k) and Section 8.02(b) hereof, subject to reasonable confidentiality limitations, at any reasonable time and from time to time but not more frequently than once per month (or at any time if an Event of Default has occurred and is continuing), permit the Agent, the Co-Collateral Agents or any Agent Professionals, at the Loan Parties’ expense, to (i) visit, enter onto, and inspect any of the Real Property (subject to the rights of tenants under their leases and provided that, except after the occurrence of an Event of Default, such visits and inspections shall not include any intrusive or invasive environmental sampling, testing or investigation); provided such Persons shall use good faith efforts to coordinate such visits and inspections so as to minimize the interference with and disruption to the normal business operations of tenants under their lease, and (ii) examine and make copies of and abstracts from the records and books of account of, and visit the properties of, Holdings, the Borrowers and any of their Subsidiaries, and to discuss the affairs, finances and accounts of Holdings, the Borrowers and any of their Subsidiaries, as the case may be, with any of their officers or directors and with their independent certified public accountants.

(f) Keeping of Books. Keep proper books of record and account, in which full and correct entries shall be made of all financial transactions and the assets and business of Holdings, the Borrowers and each Subsidiary in accordance with GAAP in effect from time to time, and each Loan Party shall promptly furnish to the Agent or any Co-Collateral Agent, such copies of such books and records or extracts therefrom as the Agent or such Co-Collateral Agent, as applicable, may reasonably request, and the Agent, any Co-Collateral Agent or any Agent Professional may use any of such Loan Party’s personnel, equipment, supplies and premises as may be reasonably necessary for the foregoing, during normal business hours and, if an Event of Default exists or has occurred and is continuing, for the collection of Credit Card Accounts Receivable, Pharmacy Receivables and realization of other Collateral.

(g) Maintenance of Properties, Etc. Except as otherwise permitted pursuant to Section 6.02(b), or where the failure to do so, either individually or in the aggregate, would not be reasonably expected to have a Material Adverse Effect, maintain and preserve all of its properties that are used or useful in the conduct of its business in good working order and condition, ordinary wear and tear excepted.

(h) Transactions with Affiliates. Conduct all transactions otherwise permitted under this Agreement with any of their Affiliates on terms that are fair and reasonable

and no less favorable to Holdings, the applicable Borrower or their respective Subsidiaries than it would obtain in a comparable arm's-length transaction with a Person not an Affiliate other than transactions solely between or among the Loan Parties; provided, that the foregoing shall not prohibit (i) any Loan Party or any Subsidiary thereof from entering into employment arrangements with its officers and retention and other agreements with officers and directors pursuant to the reasonable requirements of its business or (ii) any transactions set forth on Schedule 6.01(h) hereto.

(i) Further Assurances.

(i) With respect to any Inventory, Credit Card Accounts Receivable, Pharmacy Receivables and other Collateral acquired after the Effective Date by any Group Member that is or is required to become a Loan Party hereunder, promptly (i) execute and deliver to the Co-Collateral Agents such amendments to the Guarantee and Collateral Agreement or such other documents as the Co-Collateral Agents may reasonably request in order to grant to the Co-Collateral Agents, for the benefit of the Credit Parties, a security interest in such property and (ii) take all actions as the Co-Collateral Agents may reasonably request to grant to the Co-Collateral Agents, for the benefit of the Credit Parties, a perfected security interest in such property with the priority required herein, including the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be requested by the Co-Collateral Agents and the delivery of Blocked Account and other control agreements as may be reasonably requested by the Co-Collateral Agents.

(ii) With respect to any new Domestic Subsidiary which is created or acquired after the Effective Date by any Group Member and which owns any Inventory, Credit Card Accounts Receivable, Pharmacy Receivables and other Collateral, promptly (and in any event within 10 Business Days of the date such Person becomes a Subsidiary) cause such new Domestic Subsidiary to (i) become a party to the Guarantee and Collateral Agreement, (ii) take such actions as the Co-Collateral Agents may reasonably request to grant to the Co-Collateral Agents for the benefit of the Credit Parties a security interest, with the priority and perfection required herein, in the Collateral described in the Guarantee and Collateral Agreement held by such new Domestic Subsidiary, including, to the extent applicable, the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be reasonably requested by the Co-Collateral Agents and the delivery of Blocked Account and other control agreements, (iii) if requested by the Co-Collateral Agents, deliver to the Co-Collateral Agents an officer's certificate with respect to such Domestic Subsidiary in form and substance reasonably satisfactory to the Co-Collateral Agents, and (iv) if requested by Co-Collateral Agents, deliver to the Co-Collateral Agents legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Co-Collateral Agents.

(iii) The Borrowers shall notify the Co-Collateral Agents ten (10) Business Days prior to the opening of any new deposit account in which funds of any of the Loan Parties are concentrated, or the commencement of concentrating funds in an existing deposit account that is not subject to a Blocked Account Agreement, and, if requested by the Co-Collateral Agents, the Borrowers shall deliver or cause to be delivered a Blocked Account Agreement reasonably satisfactory in form and substance to the Co-Collateral Agents upon the opening of, or commencement of concentrating funds in, such account (unless such account is a Utility Deposit Adequate Assurance Account).

(iv) [Reserved].

(v) With respect to any Real Property upon which the Co-Collateral Agents request a Mortgage (which requests shall be limited such that there will be no more than twenty (20) Mortgages in effect at any time, unless an Event of Default has occurred and is continuing, in which case there shall be no such limit on such requests by the Co-Collateral Agents) within ninety (90) days after such request (but in no event prior to the Borrower receiving confirmation from the Agent that flood insurance due diligence and compliance in accordance with Section 6.01(i)(v)(1) has been completed) or such longer period as may be agreed by the Co-Collateral Agents in their sole and absolute discretion, the Borrower shall, or shall cause the applicable Loan Party to, grant to the Control Co-Collateral Agent a Mortgage on such Real Property, subject to no Liens except Permitted Liens, and record such Mortgage in the land records of the county in which such Real Property is located, and cause each such Loan Party to pay, in full, all mortgage recording taxes, fees and other charges required to be paid in connection with such recording, registration or filing of the Mortgage. Unless otherwise waived by the Co-Collateral Agents or the applicable Lender (solely with respect to clause (i)(v)(2) below), with respect to each such Mortgaged Property, the Borrowers shall cause the following requirements to be satisfied with respect to the applicable Mortgaged Property:

(1) the Co-Collateral Agents shall have received, with respect to each Mortgaged Property, the Flood Documentation;

(2) the Co-Collateral Agents shall have received:

(A) counterparts of each Mortgage to be entered into with respect to each such Mortgaged Property duly executed and delivered by the record owner of such Mortgaged Property and suitable for recording, registering or filing (together with any other forms or undertakings that are required or customary to effect such recording, registration or filing) in the land records of the county in which such Mortgaged Property is located; and

(B) with respect to the Mortgage encumbering each such Mortgaged Property, opinions of local counsel regarding the enforceability of such Mortgage and such other matters customarily covered in real estate mortgage counsel opinions as the Agent may reasonably request, if and to the extent, and in such form, as local counsel customarily provides such opinions as to such other matters; and

(3) the Agent shall have received:

(A) a policy or policies or marked up unconditional binder of title insurance (“**Title Policy**”), in the amount of the fair market value of the respective Mortgaged Property, issued by a nationally recognized title insurance company (“**Title Insurer**”) insuring the Lien of each Mortgage as a valid Lien on the Mortgaged Property described therein, free of any other Liens except Permitted Liens, and with lien priority as set forth in the Final Financing Order and the DIP Intercreditor Agreement together with such customary endorsements, coinsurance and reinsurance as the Agent may reasonably request and which are available at commercially reasonable rates in the jurisdiction where the applicable Mortgaged Property is located, and

(B) a survey of each Mortgaged Property (including all improvements, easements and other customary matters thereon reasonably required by the Agent), as applicable, for which all necessary fees (where applicable) have been paid, which (A) complies in all material respects with the minimum detail requirements of the American Land Title Association and American Congress of Surveying and Mapping as such requirements are in effect on the date of preparation of such survey and (B) is sufficient for such Title Insurer to remove all standard survey exceptions from the title insurance policy relating to such Mortgaged Property or otherwise reasonably acceptable to the Agent; provided, however, that so long as the Title Insurer shall accept the same to eliminate the standard survey exceptions from such policy or policies, in lieu of a new or revised survey Borrowers may provide a “no material change” affidavit with respect to any prior survey for the respective Mortgaged Property (which prior survey otherwise substantially complies with the foregoing survey requirements) (a “**Survey**”).

(j) Reporting Requirements. Furnish to the Agent, for delivery to the Lenders:

(i) as soon as available and in any event within 30 days (or, in the case of a fiscal month that ends on the same day as the end of a fiscal quarter, 45 days) after the end of each fiscal month of each fiscal year of Holdings, (a) the consolidated balance sheet of Holdings and its Subsidiaries and the consolidated balance sheet of Holdings and its domestic Subsidiaries as of the end of such month and consolidated statements of income and cash flows of Holdings and its Subsidiaries and the consolidated statements of income and cash flows of Holdings and its domestic Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such month, duly certified (subject to year-end audit adjustments) by an Authorized Officer of Holdings as having been prepared in accordance with GAAP and (b) a certificate of an Authorized Officer of Holdings as to compliance with the terms of this Agreement and the other Loan Documents in the form of Exhibit I;

(ii) as soon as available and in any event within 45 days after the end of each of the first three fiscal quarters of each fiscal year of Holdings, (a) the consolidated balance sheet of Holdings and its Subsidiaries and the consolidated balance sheet of Holdings and its domestic Subsidiaries as of the end of such quarter and consolidated statements of income and cash flows of Holdings and its Subsidiaries and the consolidated statements of income and cash flows of Holdings and its domestic Subsidiaries for the period commencing at the end of the previous fiscal year and ending with the end of such quarter, duly certified (subject to year-end audit adjustments) by an Authorized Officer of Holdings as having been prepared in accordance with GAAP and (b) a certificate of an Authorized Officer of Holdings as to compliance with the terms of this Agreement and the other Loan Documents in the form of Exhibit I (the Borrowers being permitted to satisfy the requirements of clause (ii)(a) by delivery, in the manner provided in Section 9.02(b), of its quarterly report on form 10-Q (or any successor form), as filed with the SEC so long as the financial statements contained therein satisfy the requirement of this clause (ii));

(iii) as soon as available and in any event within 90 days after the end of each fiscal year of Holdings, (a) a copy of the annual audit report for such year for Holdings and its Subsidiaries, containing the consolidated balance sheet of Holdings and its Subsidiaries as of the end of such fiscal year and consolidated statements of income and cash flows of Holdings and its Subsidiaries for such fiscal year, in each case reported on without a “going concern” or like qualification or exception (other than a “going concern” qualification, exception or paragraph of emphasis solely as a result of the Chapter 11 Cases and Debt maturing thereafter), or qualification arising out of the scope of the audit, by its Board-appointed auditor of national standing, (b) a consolidated balance sheet of Holdings and its domestic Subsidiaries as of the end of such fiscal year and consolidated statements of income and cash flows of Holdings and its domestic Subsidiaries for such fiscal year duly certified by an Authorized Officer of Holdings as having been prepared in accordance with GAAP, and (c) a certificate of an Authorized Officer of Holdings as to compliance with the terms of this Agreement and the other Loan Documents in

the form of Exhibit I (the Borrowers being permitted to satisfy the requirements of clause (iii)(a) by delivery, in the manner provided in Section 9.02(b), of its annual report on form 10-K (or any successor form), as filed with the SEC, so long as the financial statements contained therein satisfy the requirement of this clause (iii));

(iv) as soon as available and in any event by 5:00 p.m. Central Time Thursday of each week (or, if Thursday is not a Business Day, on the next succeeding Business Day), and with a draft being delivered by 5:00 p.m. Central Time on Wednesday of each week, a Borrowing Base Certificate as of the close of business on the immediately preceding Saturday and supporting information satisfactory to the Agent and the Co-Collateral Agents in their Permitted Discretion (including (i) a list of accounts payable to vendors of consigned inventory and of Inventory consisting of Lands' End merchandise and merchandise in other leased departments, (ii) calculations of Inventory itemizing separately consigned inventory by vendor, in-transit Inventory, Inventory located at Stores to be closed pursuant to Specified Store Closing Sales, Inventory located at non-closing Stores, and Inventory located in warehouse locations, together with back-up information for each in-transit Inventory category and (iii) a breakdown of Stores being closed or proposed to be closed, which information with respect to such Stores shall be limited to pro rata collections of such Stores collected from the point of sale systems during the relevant period which correspond to cash collections described in, and determined in a manner consistent with, the Approved Budget), certified to be complete and correct in all material respects by an Authorized Officer of Holdings;

(v) not later than the 10th day of every month (or such later day as the Co-Collateral Agents may agree in their Permitted Discretion), an updated inventory appraisal;

(vi) promptly and in any event within five days after any Authorized Officer of Holdings or any Borrower has knowledge of the occurrence and continuance of a Default or Event of Default, a statement of an Authorized Officer of Holdings or such Borrower setting forth details of such Default or Event of Default and the action that Holdings or such Borrower has taken and proposes to take with respect thereto;

(vii) promptly after the sending or filing thereof, copies of all quarterly and annual reports and proxy solicitations that Holdings sends to its public security holders generally, and copies of all reports on form 8-K (or its equivalent) and registration statements for the public offering (other than pursuant to employee Plans) of securities that Holdings or any of its Subsidiaries files with the SEC or any national securities exchange;

(viii) promptly after the commencement thereof, notice of all actions and proceedings before any court, governmental agency or arbitrator

affecting Holdings, the Borrowers or any of their Subsidiaries of the type described in Section 5.01(g);

(ix) as soon as available, but in any event no later than 60 days after the end of each fiscal year of Holdings, forecasts prepared by management of Holdings for Holdings and its domestic Subsidiaries in form satisfactory to the Agent and containing information reasonably required by the Agent;

(x) (A) contemporaneously with the delivery of the reports required pursuant to clauses (ii) and (iii) above, a report (which may take the form of a footnote to Holdings' quarterly and annual reports filed with the SEC and delivered to the Agent) setting forth the estimated Unfunded Pension Liability of Holdings and its Subsidiaries, and (B) promptly after receipt thereof by the Loan Parties, a copy of the funded status report received from the Loan Parties' actuaries with respect to amounts to be funded under the Loan Parties' Pension Plan;

(xi) promptly, notice of any event that the Loan Parties reasonably believes has resulted in or could reasonably be expected to result in a Material Adverse Effect;

(xii) [reserved];

(xiii) [reserved];

(xiv) promptly following any request therefor, information and documentation reasonably requested by the Agent or any Lender for purposes of compliance with applicable "know your customer" and anti-money-laundering rules and regulations, including, without limitation, the PATRIOT Act and the Beneficial Ownership Regulation;

(xv) promptly, notice of (i) the filing or commencement of, or any written threat or notice of intention of any Person to file or commence, any Adverse Proceeding not previously disclosed in writing by a Borrower to the Agent, or (ii) any material development in any Adverse Proceeding that would reasonably be expected to have a Material Adverse Effect, or that seeks to enjoin or otherwise prevent the consummation of, or to recover any damages or obtain relief as a result of, the transactions contemplated hereby;

(xvi) concurrently with the delivery to the Junior DIP Term Loan Agent or the lenders under the Junior DIP Term Loan Agreement, copies of any report or other information required to be delivered thereto pursuant to the terms of the Junior DIP Term Loan Agreement to the extent such report or information is not otherwise required to be delivered to the Agent or Lenders hereunder;

(xvii) promptly, but in any event no later than five (5) Business Days of such change, notice of any change in the board of directors (or similar governing body) of Holdings, the Borrowers or Sears;

(xviii) as soon as practicable and, in any event, at least three (3) Business Days or such shorter period as agreed to by the Agent and the Co-Collateral Agents in their sole and absolute discretion in advance of filing with the Bankruptcy Court or delivering to any official committee appointed in any of the Chapter 11 Cases (or the professionals to such committee) or to the U.S. Trustee, as the case may be, copies of all Material Documents, and engage in good faith consultation with the Agent, the Co-Collateral Agents and their respective advisors prior to filing such documents to the extent reasonably possible under the circumstances;

(xix) as soon as available, copies of all formal proposals, letters of interest, letters of intent, bids, agreements and any final proposed definitive documentation for the sale of any or all of the Loan Parties' assets (other than sales of inventory in the ordinary course of business) or for any investment pursuant to which additional capital is to be received by the Loan Parties;

(xx) promptly upon request by any Co-Collateral Agent, a status report and updated information relating to any sale permitted under the Loan Documents, in form and substance acceptable to the Co-Collateral Agents in their reasonable discretion;

(xxi) at least one (1) Business Day prior to the consummation by any Loan Party or any of its Subsidiaries of any Disposition or series of related Dispositions of any Collateral of a type that is included in the Borrowing Base with a value in excess of \$7,500,000 in the aggregate (other than inventory in the ordinary course of business and intercompany transfers among Loan Parties), whether pursuant to section 363 of the Bankruptcy Code or otherwise, a roll forward of the Borrowing Base Loan Parties' Eligible Inventory together with an updated Borrowing Base Certificate, in each case giving pro forma effect to such Disposition;

(xxii) on each Business Day, a certificate of the Borrowers demonstrating compliance with the LTV Provisions; and

(xxiii) such other information respecting Holdings, the Borrowers or any of their Subsidiaries, or the Borrowing Base, as the Agent, the Co-Collateral or any Lender through the Agent may from time to time request.

Reports and financial statements required to be delivered by the Borrowers pursuant to clauses (ii)(a), (iii)(a) and (vii) of this subsection (j) shall be deemed to have been delivered on the date on which Holdings causes such reports, or reports containing such financial statements,

to be posted on the Internet at www.sec.gov or at such other website identified by the Borrowers in a notice to the Agent and the Lenders and that is accessible by the Lenders without charge.

(k) Collateral Monitoring and Review. Upon the request of the Agent, any Co-Collateral Agent, or the Required Lenders, after reasonable notice and during normal business hours, permit the Agent, the Co-Collateral Agents or any Agent Professionals to conduct appraisals, commercial finance examinations and other evaluations, including, without limitation, of (i) Holdings' and the Borrowers' practices in the computation of the Borrowing Base and (ii) the assets included in the Borrowing Base and financial information such as, but not limited to, sales, gross margins, payables, accruals and reserves, related to the calculation of the Borrowing Base and (iii) an Real Estate included in the Collateral. The Borrowers shall pay the reasonable out-of-pocket fees and expenses of the Agent, the Co-Collateral Agents and any Agent Professionals in connection with monthly inventory appraisals, discretionary real estate appraisals, and three commercial finance examinations each fiscal year (which the Agent and Co-Collateral Agents shall be obligated to undertake for the benefit of the Credit Parties). Notwithstanding the foregoing, the Agent and the Co-Collateral Agents may cause (i) additional appraisals and commercial finance examinations to be undertaken (A) as each in its Permitted Discretion deems necessary or appropriate, at its own expense, and (B) if required by applicable law or if a Default or an Event of Default has occurred and is continuing, in each case, at the expense of the Borrowers. In connection with any inventory appraisal and commercial finance examination relating to the computation of the Borrowing Base, Holdings shall make such adjustments to the calculation of the Borrowing Base as the Agent shall reasonably require in its Permitted Discretion based upon the terms of this Agreement and the results of such inventory appraisal and commercial finance examination. Any inventory appraisal or commercial finance examination requested by the Agent or any Co-Collateral Agent shall be scheduled at such time as the Co-Collateral Agents, in consultation with the Borrowers, may agree in order to minimize any disruption to the conduct of the Borrowers' business.

(l) Landlord Waivers, Access Agreements and Customs Broker Agreements. Upon the request of the Agent or any Co-Collateral Agent, (i) obtain from each lessor that is a Group Member, and use commercially reasonable efforts to obtain from each lessor that is not a Group Member, leasing a DC at which Collateral is located to a Loan Party, consents, approvals, Lien waivers and rights to access and occupy each such DC (including, without limitation, to take possession and dispose of any Collateral from each such DC upon the occurrence and during the continuance of an Event of Default) reasonably satisfactory to the Co-Collateral Agents; (ii) obtain from each Subsidiary of Holdings owning a DC at which Collateral is located, consents, approvals, Lien waivers and rights to access and occupy each such DC (including, without limitation, to take possession and dispose of the Collateral from each such DC upon the occurrence and during the continuance of an Event of Default) reasonably satisfactory to the Co-Collateral Agents; (iii) use commercially reasonable efforts to cause each Loan Party's customs brokers to deliver an agreement (including, without limitation, a Customs Broker Agreement) to the Co-Collateral Agents covering such matters and in such form as the Co-Collateral Agents may reasonably require; and (iv) with respect to any property or assets subject to the Lien of a third party use commercially reasonable efforts to cause the holder of such Lien to enter into an agreement reasonably satisfactory to the Agent, permitting the Co-Collateral Agents to use such property and assets, at no cost or expense to the Co-Collateral

Agents, in connection with the disposition of any of the Collateral by the Co-Collateral Agents during the continuance of an Event of Default.

(m) Cash Management.

(i) Upon the request of the Agent, the Loan Parties shall enter into a Blocked Account Agreement reasonably satisfactory in form and substance to the Co-Collateral Agents with each Blocked Account Bank covering such deposit accounts as the Agent may request (other than Excluded Accounts, the Carve-Out Account, the Luxottica Reserve Account, the Winddown Account and the Utility Deposit Adequate Assurance Accounts).

(ii) The Loan Parties shall ACH or wire transfer daily (or with respect to DDAs that have historically not been swept daily (and other DDAs with the consent of the Co-Collateral Agents, not to be unreasonably withheld), periodically, consistent with past practices) (and whether or not there are then any outstanding Obligations) to a Blocked Account all amounts on deposit in each DDA of such Loan Party, other than Excluded Accounts, the Carve-Out Account, the Luxottica Reserve Account, the Winddown Account, the Utility Deposit Adequate Assurance Accounts, and the Term Loan Proceeds Account; provided that such covenant shall not apply to any minimum balance as may be required to be kept in the subject DDA by the depository institution at which such DDA is maintained. The Loan Parties shall ACH or wire transfer daily to a Blocked Account all payments due from Credit Card Processors and other proceeds of any of the Collateral except as provided in Section 6.01(n). All swept funds shall be conclusively presumed to be Collateral and proceeds of Collateral and the Agent, Co-Collateral Agents and the Lenders shall have no duty to inquire as to the source of the amounts on deposit in any DDA or Blocked Account.

(iii) Upon the request of the Agent, deliver to the Agent copies of credit card notifications (each, a “**Credit Card Notification**”) substantially in the form attached hereto as Exhibit E and Third Party Payor Notifications (each, a “**Third Party Payor Notification**”) substantially in the form attached hereto as Exhibit H, in each case executed on behalf of such Loan Party and addressed to such Loan Party’s Credit Card Processors and Third Party Payors, as applicable, listed in the Perfection Certificate. To the extent that any Loan Party hereafter engages a Credit Card Processor other than the Credit Card Processors listed in the Perfection Certificate, or a Third Party Payor other than the Third Party Payors listed in the Perfection Certificate, such Loan Party shall promptly furnish written notice thereof to the Agent and, upon the request of the Agent, shall deliver to the Agent an executed Credit Card Notification or Third Party Payor Notification, as applicable, with respect to such Credit Card Processor or Third Party Payor. The Agent may deliver such Credit Card Notifications and Third Party Payor Notifications to the applicable Credit Card Processors and Third Party Payors at any time.

(iv) Each Blocked Account Agreement shall require the ACH or wire transfer no less frequently than daily (and whether or not there are then any outstanding Obligations) to the Agent's Account, of all cash receipts and collections held in each applicable Blocked Account (net of any minimum balance, not to exceed \$25,000 (or such greater amount with the consent of the Co-Collateral Agents, not to be unreasonably withheld), as may be required to be kept in the subject Blocked Account by the Blocked Account Bank), including, without limitation, the following:

(A) all available cash receipts from the sale of Inventory and other Collateral other than as set forth in Section 6.01(n);

(B) all proceeds of collections of Pharmacy Receivables and Credit Card Accounts Receivable;

(C) all proceeds from any casualty or other insured damage to, or any taking under power of eminent domain or by condemnation or similar proceeding of any Collateral other than as set forth in Section 6.01(n); and

(D) all Net Proceeds from any equity issuance by or capital contribution to any Loan Party or its Subsidiaries.

The Borrowers shall be deemed to have complied with the provisions of this clause (iv) if they cause the ACH or wire transfer daily of all funds which an Authorized Representative of the Borrowers in good faith believes to be the amount deposited in the Blocked Accounts in excess of \$25,000 (or such greater amount as permitted above in this clause (iv)).

(v) The Agent's Account shall at all times be under the sole dominion and control of the Co-Collateral Agents. The Loan Parties hereby acknowledge and agree that (i) the Loan Parties have no right of withdrawal from the Agent's Account, (ii) the funds on deposit in the Agent's Account shall at all times be collateral security for all of the Obligations, and (iii) the funds on deposit in the Agent's Account shall be applied as provided in this Agreement. In the event that, notwithstanding the provisions of this Section 6.01(m), any Loan Party receives or otherwise has dominion and control of any such proceeds or collections, such proceeds and collections shall be held in trust by such Loan Party for the Co-Collateral Agents, shall not be commingled with any of such Loan Party's other funds or deposited in any account of such Loan Party and shall, not later than the Business Day after receipt thereof, be deposited into the Agent's Account or dealt with in such other fashion as such Loan Party may be instructed by the Co-Collateral Agents. The amounts deposited into the Agent's Account shall be applied to the prepayment of the Advances and other Obligations then outstanding; provided that upon payment in full of such outstanding Advances or Obligations, as applicable, any remaining amounts will

be released and transferred to a deposit account of the Loan Parties as the Borrowers shall direct.

(vi) The Prepetition Unencumbered Assets Proceeds Account shall at all times be under the sole dominion and control of the Control Co-Collateral Agent. The Loan Parties hereby acknowledge and agree that (i) the Loan Parties have no right of withdrawal from the Prepetition Unencumbered Assets Proceeds Account, (ii) the funds on deposit in the Prepetition Unencumbered Assets Proceeds Account shall at all times be collateral security for all of the Obligations, and (iii) so long as the Junior DIP Term Loan Facility is outstanding, the funds on deposit in the Prepetition Unencumbered Assets Proceeds Account shall be applied to the Obligations only in accordance with the DIP Intercreditor Agreement and paragraph 13 of the Final Financing Order. In the event that, notwithstanding the provisions of Section 6.01(m), any Loan Party receives or otherwise has dominion and control of any proceeds of Prepetition Unencumbered Assets (other than proceeds contained in the Winddown Account), such proceeds and collections shall be held in trust by such Loan Party for the Co-Collateral Agents, shall not be commingled with any of such Loan Party's other funds or deposited in any account of such Loan Party and shall, not later than the Business Day after receipt thereof, be deposited into the Prepetition Unencumbered Assets Proceeds Account or dealt with in such other fashion as such Loan Party may be instructed by the Co-Collateral Agents.

(vii) Upon the request of the Agent, the Loan Parties shall cause bank statements and/or other reports to be delivered to the Agent not less often than monthly, accurately setting forth all amounts deposited in each Blocked Account to ensure the proper transfer of funds as set forth above.

(n) Disposition of Prepetition Unencumbered Assets. (i) Subject to the Financing Orders and the DIP Intercreditor Agreement, the Borrowers shall apply any Net Proceeds of the sale of Prepetition Unencumbered Assets to fund the Winddown Account, provided that after the Winddown Account has been funded in an amount equal to \$240,000,000, the Borrowers shall, to the extent of such excess, deposit such Net Proceeds into the Prepetition Unencumbered Assets Proceeds Account; provided, further that the Loan Parties waive their right to seek to use the funds in the Prepetition Unencumbered Assets Proceeds Account as "cash collateral" as defined in Section 363 of the Bankruptcy Code or otherwise.

(o) Physical Inventories. Cause physical inventories and periodic cycle counts to be undertaken, at the expense of the Loan Parties, conducted by such inventory takers and following such methodology as may be satisfactory to the Co-Collateral Agents in their Permitted Discretion. The Co-Collateral Agents (or their designated Agent Professionals), at the expense of the Loan Parties, may participate in and/or observe each scheduled physical count of Inventory which is undertaken on behalf of any Loan Party. The Loan Parties, within five (5) days following the completion of any such inventory, shall provide the Co-Collateral Agents with a reconciliation of the results of such inventory (as well as of any other physical inventory or cycle counts undertaken by a Loan Party) and shall post such results to the Loan Parties' stock ledgers and general ledgers, as applicable.

(p) Letters of Credit. In the event that the Loan Parties request that any Letter of Credit have an expiry after the Termination Date and the Issuing Lenders, in their discretion, issue such Letter of Credit, the Borrowers shall on or before the date that is thirty (30) days prior to the Scheduled Termination Date, Cash Collateralize the L/C Obligations with respect to any such Letter of Credit.

(q) Post-Effective Date Requirements. The Borrowers shall, and shall cause each of the applicable Loan Parties to, satisfy the requirements set forth on Schedule 6.01(q) on or before the date specified in such schedule for such requirement or, in each case, on such later date agreed by Agent in its sole and absolute discretion.

(r) Case Milestones; Go Forward Plan. Holdings and the Borrowers shall:

(i) comply with each of the covenants set forth on Schedule 6.01(r)(i) (the “**Case Milestones**”) upon the terms and at the times set forth therein; and

(ii) (A) comply with the Borrowers’ Go Forward Plan attached hereto as Schedule 6.01(r)(ii), including the material terms of any binding agreement for a Specified Sale Transaction or Specified Store Closing Sales or any of the documents or agreements executed in connection therewith in all material respects and (B) consummate each Specified Sale Transaction and or the Specified Store Closing Sale strictly in accordance with the material terms of the documents or agreements executed in connection therewith; in each case in accordance with the applicable timing referred to thereon (or such later dates as approved in writing by the Agent and the Co-Collateral Agents) and subject to documentation (including, without limitation, motions and orders) in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion (without any waiver or amendment to such documents or agreements unless consented to in writing by the Agent), in each case, other than as a result of a consummation of a higher or better transaction as contemplated by the applicable bid procedures.

(s) Debtor Advisors; Cooperation; Status Calls. (i) The Debtors shall continuously retain during the term of this Agreement (A) a chief restructuring officer (the “**Chief Restructuring Officer**”), (B) a restructuring advisor (the “**Restructuring Advisor**”), and (C) a financial advisor (the “**Financial Advisor**”). The retention of the Financial Advisor, the Restructuring Advisor and the Chief Restructuring Officer shall be on terms and conditions (including as to scope of engagement) satisfactory to the Agent and each Co-Collateral Agent in their sole and absolute discretion. The Agent and each Co-Collateral Agent hereby confirm that (1) Mohsin Y. Meghji is an acceptable Chief Restructuring Officer, (2) M-III Partners, LP is an acceptable Restructuring Advisor, (3) Lazard Freres & Co. LLC is an acceptable Financial Advisor and (4) the terms of each of their engagements as filed with the Bankruptcy Court prior to the date hereof are acceptable. In addition, in connection with the closure of any additional Stores referred to in clause (c) of the definition of “Specified Store Closing Sale” the Debtors shall retain, on a competitive basis, subject to their fiduciary duty to the bankruptcy estate to

maximize value, an independent, nationally recognized, professional retail inventory liquidation firm that provides full liquidation services acceptable to the Agent and the Co-Collateral Agents in their Permitted Discretion (the “**Liquidation Agent**”; the Liquidation Agent, together with the Financial Advisor, the Restructuring Advisor and the Chief Restructuring Officer, each a “**Debtor Advisor**” and collectively, the “**Debtor Advisors**”). If any Debtor Advisor in any of the above roles ceases to be retained, the Debtors will retain a new Debtor Advisor in such role, which new Debtor Advisor (other than the Liquidation Agent) shall be satisfactory to the Co-Collateral Agents in their sole and absolute discretion and, in the case of the Liquidation Agent, satisfactory to the Co-Collateral Agents in their Permitted Discretion, within 5 Business Days (which period may be extended with the approval of the Agent and the Co-Collateral Agents in their sole and absolute discretion) of such cessation. The Debtors shall provide the Agent and the Co-Collateral Agents and their respective advisors with reasonable access to the Debtor Advisors.

(ii) The Loan Parties shall fully cooperate with the Debtor Advisors, including, without limitation, in connection with the preparation of the Approved Budget and other reporting or information required to be delivered pursuant to this Agreement, and shall grant them full and complete access to the books and records of the Loan Parties. The Loan Parties hereby (i) authorize the Agent and each Co-Collateral Agent (or their respective agents or advisors, including any Agent Professionals) to communicate directly with the Debtor Advisors regarding any and all matters related to the Debtors and their Affiliates, including all financial reports and projections developed, reviewed or verified by any Debtor Advisor, Store closing information and all additional information, reports and statements reasonably requested by the Agent or any Co-Collateral Agent, and (ii) authorize and direct each Debtor Advisor to provide the Agent and each Co-Collateral Agent (or their respective agents or advisors, including any Agent Professionals) with copies of reports and other information or materials prepared or reviewed by such Debtor Advisor as the Agent or any Co-Collateral Agent may reasonably request.

(iii) The Borrowers shall arrange for weekly (unless waived by the Co-Collateral Agents in their sole and absolute discretion) status calls with the Agent, each Co-Collateral Agent and any Agent Professionals, and shall cause the Debtor Advisors (or other appropriate agents or advisors to the Loan Parties) to participate, together with financial officers of the Loan Parties, to discuss (A) the Approved Budget or the Budget Variance Reports and/or any other reports or information delivered pursuant to clause (j) above or Section 6.03 hereof or otherwise, (B) the financial operations and performance of the Loan Parties’ business, (C) the status of landlord negotiations, (D) the status of any Specified Store Closing Sales, (E) the status of the Chapter 11 Cases generally, (F) progress in achieving compliance with the Case Milestones and the Go Forward Plan or (G) such other matters relating to the Debtors as the Agent or any Co-Collateral Agent (or their respective agents or advisors, including any Agent Professionals) shall reasonably request.

(t) Leases.

(i) Make all payments and otherwise perform all obligations, in all material respects, other than to the extent permitted by the Bankruptcy Code, in respect of all Leases to which any Loan Party or any of its Subsidiaries is a party and otherwise in accordance with the Approved Budget, (ii) keep all Leases in full force and effect and not allow such Leases to lapse or be terminated or any rights to renew such Leases to be forfeited or cancelled, and (iii) promptly notify the Co-Collateral Agents of any material default by any party with respect to any Leases and cooperate with the Co-Collateral Agent in all respects to cure any such default, except, in each case, with respect to Leases relating to Store locations subject to Specified Store Closing Sales after the date of the effectiveness of the rejection of the applicable Leases.

(ii) Other than with respect to Leases relating to any Specified Store Closing Sale, consult with the Agent and Co-Collateral Agents regarding any plans to assume or reject Leases.

(u) Certain Other Bankruptcy Matters.

(i) Holdings, the Borrowers and their Subsidiaries shall comply (i) in all respects, after entry thereof, with all of the requirements and obligations set forth in the Financing Orders, the Cash Management Order and the Employee Wage Order, and each order of the Bankruptcy Court, as each such order may be amended with the consent of the Agent and the Co-Collateral Agents, and (ii) all other obligations and responsibilities as debtors-in-possession under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

(ii) Holdings and the Borrowers shall provide as soon as reasonably practicable but in any event no later than three (3) Business Days' (or such shorter notice acceptable to the Agent and the Co-Collateral Agents in their sole and absolute discretion) prior written notice to the Agent and its advisors prior to filing any motion or notice to assume or reject any of Holdings', any Borrower's or any Subsidiary's material contracts or material non-residential real property leases pursuant to Section 365 of the Bankruptcy Code, and no such contract or lease shall be assumed or rejected, if such assumption or rejection adversely impacts the Collateral, any Liens thereon or any DIP Superpriority Claims payable therefrom (including, without limitation, any sale or other disposition of Collateral or the priority of any such Liens or DIP Superpriority Claims) if the Agent informs Holdings and the Borrowers in writing within two (2) Business Days of receipt of the notice from Holdings and the Borrowers referenced above that it objects to such assumption or rejection, as applicable.

(iii) Holdings, the Borrowers and each of the Subsidiaries hereby irrevocably waive any right, pursuant to section 364(c) or 364(d) of the Bankruptcy Code or otherwise, to grant any Lien of equal or greater priority than the Liens securing the Obligations, or to approve a claim of equal or greater priority than the DIP Superpriority Claims, other than as expressly set forth in a Financing Order.

(iv) Each Loan Party shall promptly and diligently oppose all motions filed by Persons in the Bankruptcy Court to lift the automatic stay on Collateral with a fair market value in excess of \$1,000,000 (other than motions filed by the Agent relating to the DIP ABL Facility or by the Prepetition ABL Agent relating to the Prepetition First Lien ABL Credit Agreement or by the Junior DIP Term Loan Agent relating to the Junior DIP Term Loan), all motions filed by Persons in the Bankruptcy Court to terminate the exclusive ability of the Debtors to file a chapter 11 plan, and all other motions filed by Persons in the Bankruptcy Court that, if granted, could reasonably be expected to have a material adverse effect on the Agent or any Lender or any Collateral.

(v) Any and all Material Documents filed by the Debtors in the Chapter 11 Cases shall be in form and substance satisfactory to the Agent.

(v) Certain Sanctions and AML Matters.

(i) Each Group Member will use the proceeds of the Advances and Term Loan only for the purposes described in Section 2.17, and ensure that no proceeds of the Advances and Term Loan will be advanced or otherwise made available, directly or indirectly, by any Group Member (i) for the purposes of funding any activity, business, or transaction with a Sanctioned Person or in a Sanctioned Country, except as authorized by applicable Sanctions, or (ii) that would result in the violation of applicable Sanctions or AML Laws.

(ii) Each Group Member will (a) maintain in effect and enforce policies and procedures reasonably designed to ensure compliance by each Group Member and each of their respective directors, officers, employees, and agents with applicable Sanctions and AML Laws, and (b) conducts the business of such Group Member in compliance with applicable Sanctions and AML Laws.

Section 6.02 Negative Covenants. So long as any Advance or other Obligation (other than contingent indemnification obligations for which no claim shall have then been asserted) shall remain unpaid, any Letter of Credit shall remain outstanding (unless the same has been Cash Collateralized or back-to-back letters of credit from an issuer and on terms acceptable to the Issuing Lender have been provided in respect of such Letters of Credit) or any Lender shall have any Commitment hereunder, each of Holdings and the Borrowers will not, and will not permit any of their Subsidiaries to:

(a) Liens, Etc. Create or suffer to exist any Lien upon property of Holdings, the Borrowers or any Domestic Subsidiary other than Permitted Liens.

(b) Fundamental Changes. Merge into or consolidate with any other Person, or permit any other Person to merge into or consolidate with it, or sell, transfer, lease or otherwise dispose of (in one transaction or in a series of transactions) all or substantially all of its assets (in each case, whether now owned or hereafter acquired), or liquidate or dissolve, except that any Subsidiary of Holdings may sell, transfer, lease or otherwise dispose of its assets

pursuant to a Specified Store Closing Sale or a Specified Sale Transaction; provided that at least three (3) Business Days prior to the occurrence thereof, the Borrowers shall furnish to the Co-Collateral Agents an updated Borrowing Base Certificate to the extent required pursuant to Section 6.01(j)(xxi).

(c) Acquisitions. Make any Acquisition.

(d) Restricted Payments. Declare or make, or agree to pay or make, directly or indirectly, any Restricted Payment, except that, if at the time thereof no Event of Default shall exist and be continuing, Subsidiaries of Holdings may declare and pay dividends to Holdings, the Borrowers or any Subsidiary Guarantor.

(e) Negative Pledge Clauses. Enter into or suffer to exist or become effective any agreement that prohibits or limits the ability of Holdings or any Subsidiary of Holdings to create, incur, assume or suffer to exist any Lien in favor of the Co-Collateral Agents upon the Collateral (as defined in the Guarantee and Collateral Agreement and other Security Documents in effect from time to time, and including assets which become Collateral pursuant to Section 6.01(n)), whether now owned or hereafter acquired.

(f) Clauses Restricting Subsidiary Distributions. Enter into or suffer to exist or become effective any consensual encumbrance or restriction on the ability of any Subsidiary of Holdings to (a) make Restricted Payments in respect of any Equity Interests of such Subsidiary held by, or pay any Debt owed to, Holdings or any other Subsidiary of Holdings, (b) make loans or advances to, or other investments in, Holdings or any other Subsidiary of Holdings, (c) transfer any of its assets to Holdings or any other Subsidiary of Holdings or (d) grant Liens upon any of its properties or assets, whether now owned or hereafter acquired, and allow for the pledge of its capital stock to secure the Obligations; except for such encumbrances or restrictions existing under or by reason of (i) any restrictions existing under this Agreement and the other Loan Documents; (ii) any restrictions with respect to a Subsidiary imposed pursuant to an agreement that has been entered into in connection with the disposition of all or any portion of the Equity Interests or assets of such Subsidiary; (iii) the provisions contained in any agreement governing Postpetition Debt existing as of the date of this Agreement; (iv) customary provisions restricting subletting or assignment of any lease governing a leasehold interest of any Borrower or a Subsidiary of any Borrower entered into in the ordinary course of business, (v) customary restrictions and conditions contained in the documents relating to any Lien, so long as such Lien is not prohibited hereunder and such restrictions or conditions relate only to the specific asset subject to such Lien; (vi) customary provisions restricting assignment of any contract entered into by any Borrower or any Subsidiary of any Borrower in the ordinary course of business, (vii) customary provisions restricting the assignment of licensing agreements, management agreements or franchise agreements entered into by any Borrower or any of its Subsidiaries in the ordinary course of business; (viii) restrictions on the transfer of assets securing purchase money obligations and capitalized lease obligations; (ix) customary net worth provisions contained in real property leases entered into by Subsidiaries of any Borrower, so long as the applicable Borrower has determined in good faith that such net worth provisions could not reasonably be expected to impair the ability of the Borrowers and their Subsidiaries to meet their ongoing obligations, (x) restrictions in respect of the Intellectual Property held by

KCD IP, LLC and any proceeds of the foregoing, and (xi) such other restrictions as the Co-Collateral Agents may agree in their sole and absolute discretion.

(g) Accounting Changes. Make or permit any change in accounting policies or reporting practices, except as required by GAAP.

(h) [Reserved].

(i) Dispositions.

(i) Make any Disposition except Permitted Dispositions.

(ii) Make any Permitted Dispositions pursuant to the De Minimis Asset Sale Order which result in aggregate sale proceeds in excess of \$5,000,000 without the prior written consent of the Co-Collateral Agents in their sole and absolute discretion (it being understood that this clause (ii) shall not have the effect of waiving any condition, restriction or qualification to the ability of Holdings, the Borrowers or any of their Subsidiaries to make any Disposition set forth in the definition of "Permitted Dispositions" or the defined terms used therein).

(j) Debt; Prepayment of Debt.

(i) Create, incur, assume, suffer to exist or otherwise become or remain liable with respect to any Debt, except Permitted Debt.

(ii) Purchase, redeem, defease or prepay any principal of, premium, if any, interest or other amount payable in respect of any Debt (other than any prepayment of the Obligations, which prepayment shall be governed by Section 2.11, and other than any prepayment by any Specified Subsidiary or any Subsidiary that is not a Domestic Subsidiary of any Debt of a Specified Subsidiary or any Subsidiary that is not a Domestic Subsidiary; provided that such prepayment is not made with the proceeds of any Investments made by any Loan Party in such Specified Subsidiary or such Subsidiary that is not a Domestic Subsidiary) prior to its scheduled maturity.

(k) Investments. Make any Investments, except Permitted Investments.

(l) [Reserved].

(m) Amendments to Certain Documents. (a) Amend or modify, or grant any waiver or release under or terminate in any manner, the articles or certificate of incorporation or formation, by laws, limited liability company operating agreement, partnership agreement or other organizational documents of such Loan Party or Subsidiary (other than any Specified Subsidiary, so long as the Loan Parties provide prior written notice of such amendment, modification, waiver, release or termination with respect to any organizational document of any Specified Subsidiary); (b) amend or modify, or permit the amendment or modification of, any provision of the Prepetition First Lien ABL Credit Agreement, the

Prepetition Second Lien Facilities or any agreement, document or instrument evidencing or relating thereto, except to the extent expressly permitted by any Financing Order then in effect or (c) amend, modify or waive any provision of the Junior DIP Term Loan Documents unless as agreed by the Required Lenders.

(n) LTV Provisions.

(i) Maximum Loan to Value Ratio (Prepetition ABL Term/Revolver). Permit at any time (v) the Prepetition Revolver/Term Exposure plus (w) Total Extensions of Credit plus (x) the Availability Reserves plus (y) the Borrowing Base Carve-Out Reserve plus (z) the Prepetition FILO Reserve, in each case at such time, to exceed 87.5% of the LTV Formula Amount at such time.

(ii) Maximum Loan to Value Ratio (Total Prepetition ABL) Ratio. Permit at any time (v) the Prepetition Total Extensions of Credit plus (w) Total Extensions of Credit plus (x) the Availability Reserves plus (y) the Borrowing Base Carve-Out Reserve plus (z) the Prepetition FILO Reserve, in each case at such time, to exceed 97.5% of the LTV Formula Amount at such time.

(o) Financing Orders. Notwithstanding anything to the contrary herein, use any portion or proceeds of the Extensions of Credit or the Collateral, or disbursements set forth in the Approved Budget, for payments or purposes that would violate the terms of paragraph 39 (*Prohibited Use of DIP ABL Facility, DIP ABL Collateral, Cash Collateral, Carve-Out, etc.*) of the Interim Financing Order or paragraph 40 (*Prohibited Use of DIP ABL Facility, DIP ABL Collateral, Cash Collateral, Carve-Out, etc.*) of the Final Financing Order.

(p) Reclamation Claims. Enter into any agreement to return any of its Inventory to any of its creditors for application against any Prepetition Debt, Prepetition trade payables or other Prepetition claims under Section 546(c) of the Bankruptcy Code or allow any creditor to take any setoff or recoupment against any of its Prepetition Debt, Prepetition trade payables or other Prepetition claims based upon any such return pursuant to Section 553(b)(1) of the Bankruptcy Code or otherwise if, after giving effect to any such agreement, setoff or recoupment, the aggregate amount applied to Prepetition Debt, Prepetition trade payables and other Prepetition claims subject to all such agreements, setoffs and recoupments since the Petition Date would exceed \$7,500,000.

(q) Insolvency Proceeding Claims. Incur, create, assume, suffer to exist or permit any other superpriority administrative claim which is pari passu with or senior to the claim of the Agent or the Lenders against the Debtors, except as set forth in the applicable Financing Order.

(r) Bankruptcy Actions. Seek, consent to, or permit to exist, without the prior written consent of the Agent and the Co-Collateral Agents, any order granting authority to take any action that is prohibited by the terms of this Agreement, the Financing Orders or the

other Loan Documents or refrain from taking any action that is required to be taken by the terms of this Agreement, the Financing Orders or any of the other Loan Documents.

(s) Sanctions-Compliant Repayment of Obligations. Use, directly or, to Borrowers' knowledge, indirectly, any funds or assets derived from or used in any activity, business, or transaction with a Sanctioned Person, in a Sanctioned Country, except as authorized by applicable Sanctions, or that otherwise violates applicable Sanctions, to repay or discharge any obligated under this Agreement.

Section 6.03 Approved Budget.

(a) The use of Extensions of Credit by the Loan Parties under this Agreement and the other Loan Documents and the use of cash collateral shall be limited in accordance with the Approved Budget (subject to the Permitted Variance) and Section 2.17. The Approved Budget shall depict, on a weekly and line item basis, (i) (A) projected cash receipts (including from asset sales), (B) projected disbursements (including ordinary course operating expenses, bankruptcy-related expenses (including professional fees of the Debtor's professionals and advisors), and any other fees and expenses relating to the Loan Documents), (C) projected Net Cash Flow, (D) projected inventory receipts and levels, and (E) the projected Borrowing Base and Excess Availability, (ii) a report listing the Stores subject to Specified Store Closing Sales and the other remaining Stores, and (iii) such other information requested by the Agent or any Co-Collateral Agent for the first thirteen (13) week period from the Effective Date, and such Approved Budget shall be approved by, and in form and substance satisfactory to, the Agent and the Co-Collateral Agents in their sole discretion (it being acknowledged and agreed that the Approved Budget attached hereto as Exhibit J is approved by and satisfactory to the Agent and each Co-Collateral Agent). The Approved Budget shall be updated, modified or supplemented by the Borrowers (x) with the written consent of the Agent and each Co-Collateral Agent in their sole and absolute discretion and (y) upon the request of Agent or any Co-Collateral Agent from time to time (which request may, without limitation, be made in connection with any Specified Transaction or the commencement, or during the continuation, of the Specified Stores Closing Sales); provided, however, that in the event the Agent, the Co-Collateral Agents and the Loan Parties cannot agree as to an updated, modified or supplemented budget, the then-current Approved Budget shall continue in effect, with weekly details for any periods after the 13-week period covered by the then-current Approved Budget to be derived in a manner satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion based on the then-current Approved Budget (each such period so approved, an "Extended Budget Period"), and such disagreement shall give rise to an Event of Default upon the later of (x) the end of the period covered by the then-current Approved Budget and (y) the end of the then-current Extended Budget Period. Each Approved Budget delivered to the Agent and the Co-Collateral Agents shall be accompanied by such supporting documentation as reasonably requested by the Agent or any Co-Collateral Agent. Each Approved Budget shall be prepared in good faith, with due care and based upon assumptions which the Loan Parties believe to be reasonable.

(b) The Borrowers shall comply with the Approved Budget (subject to the Permitted Variance), which compliance shall be tested on the Saturday of every second week (each, a "**Budget Testing Date**") commencing on November 24, 2018 for the Cumulative Four-

Week Period then ending pursuant to the Budget Variance Report delivered by the Borrowers to the Administrative Agents and the Co-Collateral Agents.

(c) The Borrowers shall deliver to the Agent and the Co-Collateral Agents, not later than 5:00 p.m. on the Wednesday of each week (commencing with the first Wednesday following the Effective Date) a Budget Certificate, and such Budget Certificate shall include such detail as is reasonably satisfactory to the Agent and the Co-Collateral Agents, signed by an Authorized Officer of the Holdings and, in the case of certificates delivered on a Wednesday following a Budget Testing Date, certifying that the Loan Parties are in compliance with the covenant contained in Section 6.03(b), together with (A) a Rolling Budget, (B) a Weekly Flash Reporting Package and (C) a Budget Variance Report, each of which shall be prepared by the Borrower through the last day of the Prior Week and the Cumulative Four Week Period.

(d) The Agent, the Co-Collateral Agents and the Lenders (i) may assume that the Loan Parties will comply with the Approved Budget, (ii) shall have no duty to monitor such compliance and (iii) shall not be obligated to pay (directly or indirectly from the Collateral) any unpaid expenses incurred or authorized to be incurred pursuant to any Approved Budget. The line items in the Approved Budget for payment of interest, expenses and other amounts to the Agent, the Co-Collateral Agents and the Lenders are estimates only, and the Loan Parties remain obligated to pay any and all Obligations in accordance with the terms of the Loan Documents and the applicable Financing Order regardless of whether such amounts exceed such estimates. Nothing in any Approved Budget (including any estimates of a loan balance in excess of borrowing base restrictions) shall constitute an amendment or other modification of any Loan Document or any of the borrowing base restrictions or other lending limits set forth therein.

ARTICLE VII

EVENTS OF DEFAULT

Section 7.01 Events of Default. If any of the following events (“**Events of Default**”) shall occur and be continuing:

(a) Any Borrower shall fail to pay (i) any principal of any Advance, Term Loan or Reimbursement Obligation when the same becomes due and payable, or (ii) any interest on any Advance, Term Loan or Reimbursement Obligation or any fees, or (iii) any other amounts payable under this Agreement or any other Loan Document, in each case under this clause (iii), within three (3) days after the same becomes due and payable; or

(b) Any representation or warranty made by any Loan Party herein or in any other Loan Document or in any other written statement furnished in connection with to this Agreement or any other Loan Document or the transactions contemplated thereby shall prove to have been incorrect in any material respect when made or deemed made; or

(c) (i) Any Loan Party shall fail to perform or observe any term, covenant or agreement contained in Section 6.01(c), (d), (e), (h), (j), (k), (m), (p), (r), (s) or (u),

6.02, or 6.03 of this Agreement, (ii) any Loan Party shall fail to perform or observe any term, covenant or agreement contained in Section 6.01(n) and such failure continues for more than one Business Day or (iii) any Loan Party shall fail to perform or observe any other term, covenant or agreement contained in this Agreement or any other Loan Document, if such failure shall remain unremedied for thirty (30) days; or

(d) Any Loan Party shall fail to pay any principal amount on any postpetition or unstayed Debt in an aggregate principal amount in excess of \$25,000,000 that is outstanding (but excluding Debt outstanding hereunder) when the same becomes due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), and such failure shall continue after the applicable grace period, if any, specified in the agreement or instrument relating to such Debt; or any other event shall occur or condition shall exist under any agreement or instrument relating to such postpetition or unstayed Debt and shall continue after the applicable grace period, if any, specified in such agreement or instrument, if the effect of such event or condition is to accelerate, or permit the “agent,” “trustee” or other representative or required percentage of holders thereof to accelerate, the maturity of such Debt; or any such Debt shall be declared to be due and payable, or required to be prepaid or redeemed, purchased or defeased, or an offer to prepay, redeem, purchase or defease such Debt shall be required to be made and is accepted (in each case other than (i) a scheduled prepayment, redemption or purchase, or (ii) a mandatory prepayment, redemption or purchase, or a required offer to prepay, redeem or purchase, that results from the voluntary sale or transfer of property or assets, unless such prepayment, redemption or purchase is not made on the date such prepayment, redemption or purchase is due), in each case prior to the stated maturity thereof; or there occurs under any Swap Contract an Early Termination Date (as defined in such Swap Contract) resulting from any event of default under such Swap Contract as to which any Loan Party is the Defaulting Party (as defined in such Swap Contract) and the Swap Termination Value owed by such Loan Party as a result thereof is greater than \$25,000,000; or

(e) A judgment or order for the payment of money (excluding any “first day” or “second day” orders or any order fixing the amount of any claim in the Chapter 11 Cases, in each case to the extent such orders are in form and substance acceptable to the Agent in its sole and absolute discretion) in excess of \$25,000,000 (net of any portion of such judgment to be paid by a third-party insurer as to which coverage has not been disputed) shall be rendered after the Petition Date against any Group Member, which order or judgment is not automatically stayed or stayed pursuant to an order of the Bankruptcy Court, and either (i) enforcement proceedings shall have been commenced by any creditor upon such judgment or order or (ii) there shall be any period of 10 consecutive days during which a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect; or

(f) (i) Any “person” or “group” (as such terms are used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, but excluding any employee benefit plan of such person or its Subsidiaries, and any Person or entity acting in its capacity as trustee, agent or other fiduciary or administrator of any such plan) other than a Permitted Holder becomes the “beneficial owner” (as defined in Rules 13d-3 and 13d-5 under the Securities Exchange Act of 1934, except that a person or group shall be deemed to have “beneficial ownership” of all securities that such person or group has the right to acquire (such right, an “**option right**”), whether such right is exercisable immediately or only after the passage of time),

directly or indirectly, of 35% or more of the equity securities of Holdings entitled to vote for members of the Board of Directors of Holdings on a fully-diluted basis (and taking into account all such securities that such person or group has the right to acquire pursuant to any option right) and such "person" or "group" shall beneficially own (as such term is used herein) a greater percentage of the equity Securities of Holdings entitled to vote for members of the Board of Directors than the Permitted Holders shall, collectively, beneficially own; or (ii) during any period of 12 consecutive months, a majority of the members of the Board of Directors or other equivalent governing body of Holdings cease to be composed of individuals (x) who were members of that board or equivalent governing body on the first day of such period, (y) whose election or nomination to that board or equivalent governing body was approved by individuals referred to in clause (x) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (z) whose election or nomination to that board or other equivalent governing body was approved by individuals referred to in clauses (x) and (y) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body; or (iii) Holdings shall cease for any reason to own, directly or indirectly, 100% of the Voting Stock of Sears and Kmart; or

(g) (i) Any Borrower or any of its ERISA Affiliates shall incur, or shall be reasonably likely to incur administrative expense claims in excess of \$25,000,000 in the aggregate (subject to Section 7.01(p)) as a result of one or more of the following: (a) the occurrence of any ERISA Event; (b) the partial or complete withdrawal of such Borrower or any of its ERISA Affiliates from a Multiemployer Plan; or (c) the termination of a Multiemployer Plan; or (ii) the PBGC shall have obtained a valid and perfected Lien on assets of any of the Loan Parties; or

(h) Any of the Loan Documents or Prepetition Loan Documents shall cease, for any reason, to be in full force and effect, or any Loan Party or any Affiliate thereof shall so state in writing, or any Lien created by any of the Security Documents or Prepetition Loan Documents shall cease to be enforceable and of the same effect and priority purported to be created thereby, including as a result of the failure to comply with Section 5.4 of the Guarantee and Collateral Agreement or Section 5.4 of the Prepetition Guarantee and Collateral Agreement; or

(i) The guarantee contained in Section 2 of the Guarantee and Collateral Agreement shall cease, for any reason, to be in full force and effect or any Loan Party shall so state in writing; or

(j) The entry of an order dismissing any of the Chapter 11 Cases of any Loan Party or converting any of the Chapter 11 Cases of any Loan Party to a case under chapter 7 of the Bankruptcy Code, or any filing by a Loan Party or an affiliate thereof of a motion or other pleading seeking entry of such an order; or

(k) A trustee, responsible officer or an examiner having powers related to the operation of the business (beyond those set forth under Sections 1106(a)(3) and (4) of the Bankruptcy Code) under Bankruptcy Code section 1104 (other than a fee examiner) is appointed or elected in the Chapter 11 Cases, a Debtor applies for, consents to, or acquiesces in, any such appointment, or the Bankruptcy Court shall have entered an order providing for such

appointment, in each case without the prior written consent of the Administrative Agent and the Co-Collateral Agents in their sole and absolute discretion; or

(l) The entry of an order (I) staying, reversing or vacating (a) the Interim Financing Order, (b) the Final Financing Order, (c) the Cash Management Order, (d) the Employee Expense Order or (e) the Junior DIP Financing Orders, (II) modifying or amending (a) – (c) or (e) other than in form and substance satisfactory to the Administrative Agent and the Co-Collateral Agents in their sole and absolute discretion, or (III) modifying or amending (d) in a manner adverse to the Administrative Agent, the Co-Collateral Agents or the other Credit Parties; or the filing by a Debtor of an application, motion or other pleading seeking entry of any order of the types described in clauses (I)-(III) without the prior written consent of the Administrative Agent and the Co-Collateral Agents in their sole and absolute discretion; or

(m) The entry of an order in any of the Chapter 11 Cases denying or terminating use of cash collateral by the Loan Parties; or

(n) The entry of an order in any of the Chapter 11 Cases granting relief from any stay or proceeding (including, without limitation, the Automatic Stay) so as to allow a third party to proceed with foreclosure against any assets of the Loan Parties in excess of \$25,000,000; or

(o) The entry of an order in the Chapter 11 Cases charging any of the Collateral or Prepetition ABL Collateral under Section 506(c) of the Bankruptcy Code against the Credit Parties or the Prepetition Credit Parties or the commencement of other actions by any Loan Party or any affiliate thereof that challenges the rights and remedies of any of the Credit Parties hereunder or under any of the other Loan Documents or any of the Prepetition Credit Parties under the Prepetition First Lien ABL Credit Agreement or any of the Loan Documents (as defined in the Prepetition First Lien ABL Credit Agreement) in any of the Chapter 11 Cases or in a manner inconsistent with the Loan Documents; or

(p) Without the prior written consent of the Agent and other than in respect of the DIP ABL Facility and the Carve-Out or as permitted pursuant to the Loan Documents, the bringing of any motion or taking of any action seeking entry of an order, or the entry of an order by the Bankruptcy Court, in any of the Chapter 11 Cases (v) granting superpriority administrative expense status to any claim *pari passu* with or senior to the claims of the Credit Parties hereunder and under the other Loan Documents, (w) permitting the Debtors to obtain financing under Section 364 of the Bankruptcy Code, (x) permitting the Debtors to grant security interests or liens under Section 364 of the Bankruptcy Code, (y) permitting the Debtors to use cash collateral under Section 364 of the Bankruptcy Code, or (z) authorizing the Debtors to take other actions adverse to any Credit Party or any Prepetition Credit Party or their rights and remedies under the Loan Documents, the Prepetition First Lien ABL Credit Agreement or their interest in Prepetition ABL Collateral or the Collateral under Section 364 of the Bankruptcy Code; or

(q) The entry of any order terminating any Debtor's exclusive right to file a plan of reorganization or the expiration of any Debtor's exclusive right to file a plan of

reorganization without the prior written consent of the Administrative Agent and Co-Collateral Agents in their sole and absolute discretion; or

(r) There shall arise any superpriority claim in the Chapter 11 Case which is pari passu with or senior to the priority of the DIP Superpriority Claims, except with respect to the Carve-Out and as set forth in the Financing Orders; or

(s) The entry of any order in the Chapter 11 Cases which provides adequate protection, or the granting by any Loan Party of similar relief in favor of any one or more of a Loan Party's prepetition creditors, contrary to the terms and conditions of any Financing Order or the Loan Documents; or

(t) The making of any payments in respect of prepetition obligations other than (i) as permitted by the Interim Financing Order and the Final Financing Order, (ii) as permitted by the Cash Management Order or any other substantive order entered by the Bankruptcy Court, all of which shall be in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion, (iii) as permitted by any administrative "first day order," "second day order" or other administrative order entered by the Bankruptcy Court, all of which shall be in form and substance satisfactory to the Administrative Agent and Co-Collateral Agents in their sole and absolute discretion, or (iv) as otherwise agreed to in writing by the Administrative Agent and Co-Collateral Agents; or

(u) Other than with respect to the Carve-Out, the Liens securing the DIP ABL Facility and other than as provided in the Financing Orders, the Loan Parties shall create or incur, or the Bankruptcy Court enters an order granting, any claim or lien which is pari passu with or senior to any Liens securing the "Obligations" under the Prepetition First Lien ABL Credit Agreement, or the Adequate Protection Liens and adequate protection obligations granted under the Financing Orders; or

(v) Noncompliance by any Loan Party or any of its affiliates with the terms of the Interim Financing Order, the Final Financing Order, the Cash Management Order or the Employee Wage Order in any material respect or in a manner adverse to the Credit Parties; or

(w) The Loan Parties or any of their subsidiaries (or any direct or indirect parent of any Loan Party), or any person claiming by or through any of the foregoing, shall obtain court authorization to commence, or shall commence, join in, assist, acquiesce to, or otherwise participate as an adverse party in any suit or other proceeding against the Agent, any Co-Collateral Agent or any of the Lenders regarding the DIP ABL Facility or the Prepetition Credit Parties regarding the Prepetition Facilities; or

(x) The Debtors, any of the Loan Parties or any of their subsidiaries (or any of their direct or indirect parents) shall file, propose, support, or fail to contest in good faith the filing or confirmation of a chapter 11 plan that is not an Acceptable Plan of Reorganization or the entry of a confirmation order approving such plan; or

(y) Any order shall be entered which dismisses any of the Chapter 11 Cases and which order (i) does not provide for termination of the unused commitments under the DIP ABL Facility and payment in full in cash of the Loan Parties' obligations under the DIP

ABL Facility, (ii) does not provide for release and exculpatory provisions relating to the Agent, the Co-Collateral Agents, the Joint Lead Arrangers and the Lenders that are satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion and (iii) is not otherwise satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion, or any of the Loan Parties or any of their subsidiaries (or any of their direct or indirect parents), shall file, propose, support, or fail to contest in good faith the filing of a motion or other pleading seeking to dismiss any of the Chapter 11 Cases not in accordance with this provision (y); or

(z) The Bankruptcy Court shall enter an order authorizing the sale of all or substantially all of the assets of the Debtors or its subsidiaries, other than pursuant to any Specified Sale Transaction or the Specified Store Closing Sales, unless such order contemplates repayment in full in cash of the DIP ABL Facility and the Prepetition Facilities upon consummation of the sale; or

(aa) The entry of an order in the Chapter 11 Cases avoiding or permitting recovery of any portion of the payments made on account of the obligations under the DIP ABL Facility, the Loan Documents, any Prepetition Facility or the Prepetition First Lien ABL Credit Agreement or related documents, or the taking of any action by any Loan Party to challenge, support or encourage a challenge of any such payments; or

(bb) The Final Financing Order and the terms thereof shall cease to create a valid and perfected security interest and lien on the Collateral; or

(cc) If the Final Financing Order does not include a waiver, in form and substance satisfactory to the Agent and the Co-Collateral Agents in their sole and absolute discretion, of (A) the right to surcharge the Prepetition ABL Collateral and/or the Collateral under Section 506(c) of the Bankruptcy Code, (B) any ability to limit the extension under Section 552(b) of the Bankruptcy Code of the liens of the Prepetition ABL Agent on the Prepetition ABL Collateral to any proceeds, products, offspring, or profits of the Prepetition ABL Collateral acquired by any Loan Party after the Petition Date and (C) the doctrine of marshaling; or

(dd) An order in the Chapter 11 Cases shall be entered (i) charging any of the Collateral or Prepetition ABL Collateral under Section 506(c) of the Bankruptcy Code against the Agent, the Credit Parties, the Prepetition ABL Agent or the Prepetition Credit Parties, or (ii) limiting the extension under Section 552(b) of the Bankruptcy Code of the Liens of the Prepetition ABL Agent on the Prepetition ABL Collateral to any proceeds, products, offspring, or profits of the Prepetition ABL Collateral acquired by any Loan Party after the Petition Date; or

(ee) The commencement by any Debtor or any Loan Party of other actions that are materially adverse to Agent, the Credit Parties or their respective rights and remedies under the Loan Documents in any of the Chapter 11 Cases or inconsistent with any of the Loan Documents; or

(ff) The filing or support of any pleading by any Loan Party (or any affiliate thereof) seeking, or otherwise consenting to, any relief the granting of which could reasonably be expected to result in the occurrence of an Event of Default.

Section 7.02 Remedies. Upon the occurrence of any Event of Default, in each case without further order or application of the Bankruptcy Court, the Agent may, on behalf of the Lenders, or, at the direction of the Required Lenders shall, take any or all of the following actions:

(a) declare the Revolving Commitment of each Revolving Lender to be terminated, whereupon the same shall forthwith terminate provided that upon the occurrence of any Event of Default described in clauses (j) – (ff) of Section 7.01, the Revolving Commitments shall automatically terminate; provided that such termination shall be deemed rescinded to the extent it is determined by the Bankruptcy Court during the Remedies Notice Period that no Event of Default has occurred and is continuing;

(b) declare the Advances, the Term Loan, all interest thereon and all other amounts payable under this Agreement and the other Loan Documents (including all amounts of the L/C Obligations, whether or not the beneficiaries of the then outstanding Letters of Credit shall have presented the documents required thereunder) to be forthwith due and payable, whereupon the Advances, the Term Loan, all such interest and all such amounts shall become and be forthwith due and payable, without presentment, demand, protest or further notice of any kind, all of which are hereby expressly waived by the Borrowers; provided that upon the occurrence of any Event of Default described in clauses (j) – (ff) of Section 7.01, all such amounts and interest shall automatically become due and payable, without presentment, demand protest or any notice of any kind, all of which are hereby expressly waived by the Borrowers. With respect to all Letters of Credit with respect to which presentment for honor shall not have occurred at the time of an acceleration pursuant to this paragraph or for which the outstanding amount of any drawing under any Letters of Credit (including any Taxes, fees, charges and other costs and expenses incurred by the Issuing Lender in connection therewith) have not then been fully reimbursed or discharged, the Borrowers shall Cash Collateralize such Letters of Credit and all other Reimbursement Obligations;

(c) declare interest on the Obligations to accrue at the default rate set forth herein, whereupon the interest on the Obligations shall automatically accrue at the default rate;

(d) subject to the Remedies Notice Period, (i) enter upon any premises on or in which any of the Collateral may be located and take possession of the Collateral or complete processing, manufacturing and repair of all or any portion of the Collateral, (ii) collect, foreclose, receive, appropriate, setoff and realize upon any and all Collateral, (iii) remove any Collateral from any premises on or in which the same may be located for the purpose of effecting the sale, foreclosure or other disposition thereof or for any other purpose, (iv) exercise its unqualified right to credit bid up to the full amount of the outstanding Obligations (including any accrued interest) in any sale of the Collateral (or any part thereof), which credit bid may incorporate a credit bid of the Prepetition ABL Facilities (including any accrued interest), without the need for further Court order authorizing the same, and whether such sale is

effectuated through section 363 or 1129 of the Bankruptcy Code, by a chapter 7 trustee under Section 725 of the Bankruptcy Code, or otherwise;

(e) take whatever other commercially reasonable action the Agent or the Required Lenders may deem necessary or desirable for the protection of the interests of the Credit Parties (including, subject to the Remedies Notice Period, in respect of the Collateral);

(f) exercise all rights and remedies available to it (whether as a secured creditor or otherwise) under the DIP ABL Facility, this Agreement, the other Loan Documents, the Financing Orders or applicable law (including, subject to the Remedies Notice Period, in respect of the Collateral);

(g) declare the termination of the Loan Documents as to any future liability or obligation of the Agent, the Co-Collateral Agents, the Issuing Lenders and the Lenders, but without affecting any of the Collateral or the liabilities or obligations of any Loan Party;

(h) declare a termination, reduction or restriction on the ability of the Loan Parties to use any cash collateral; and/or

(i) subject to the Remedies Notice Period, with respect to any Event of Default arising out of the failure of the Loan Parties to complete any material step in the Go Forward Stores Sale Process, direct any or all of the Loan Parties to sell or otherwise dispose of any or all of the Collateral on terms and conditions acceptable to the Agent pursuant to Section 363, Section 365 and other applicable provisions of the Bankruptcy Code (and, without limiting the foregoing, direct any Loan Party to assume and assign any lease or executory contract included in the Collateral to the Agent's designees in accordance with and subject to Section 365 of the Bankruptcy Code).

All rights, remedies and powers granted to the Agent or Co-Collateral Agents hereunder and under the Loan Documents or Financing Orders, as applicable, are cumulative, not exclusive and enforceable, in the Agent's or such Co-Collateral Agent's discretion, alternatively, successively, or concurrently.

Section 7.03 Application of Proceeds.

If an Event of Default shall have occurred and be continuing and the Obligations shall have been accelerated or a Liquidation shall have been commenced, except as otherwise agreed by all Lenders, the Agent shall apply, subject to the DIP Intercreditor Agreement, all or any part of Proceeds constituting Collateral, whether or not held in the Agent's Account, and any proceeds of the guarantee set forth in Guarantee and Collateral Agreement, in payment of the Obligations in the following order:

First, to pay all incurred and unpaid fees, expenses, including Extraordinary Expenses, indemnities, and other amounts (including and fees, charges and disbursements of counsel to the Agent and the Co-Collateral Agents) payable to the Agent and the Co-Collateral Agents (each in its capacity as such) under the Loan Documents, pro rata among such Persons according to the amounts of such Obligations then due and owing and remaining unpaid to each;

Second, to pay all incurred and unpaid expenses, indemnities, and other amounts (other than principal, interest and fees, and Obligations relating to Cash Management Services and Bank Products) payable to the Lenders, the Swingline Lender and the Issuing Lenders (including fees, charges and disbursements of counsel to the respective Lenders, the Swingline Lender and the Issuing Lenders), under the Loan Documents, pro rata among such Persons according to the amounts of such Obligations then due and owing and remaining unpaid to each;

Third, to pay all accrued and unpaid interest on all Permitted Overadvances, to the Agent or pro rata among the Lenders, as applicable, according to the amounts of such Obligations then due and owing and remaining unpaid to each;

Fourth, to pay all the unpaid principal on all Permitted Overadvances, to the Agent or pro rata among the Lenders, as applicable, according to the amounts of such Obligations then due and owing and remaining unpaid to each;

Fifth, to pay all accrued and unpaid interest on the Swingline Advances (to the extent that Swingline Advances have not been refinanced by a Revolving Advance);

Sixth, to pay all the unpaid principal of the Swingline Advances (to the extent that Swingline Advances have not been refinanced by a Revolving Advance);

Seventh, to pay all accrued and unpaid interest on all Advances, Reimbursement Obligations and the Term Loan, and fees, payable to the Lenders and the Issuing Lenders under the Loan Documents, pro rata among such Persons according to the amounts of such Obligations then due and owing and remaining unpaid to each;

Eighth, to pay all the unpaid principal on all Advances and the Term Loan and to pay Reimbursement Obligations and to Cash Collateralize all other L/C Obligations, pro rata among the Lenders according to the amounts of such Obligations then due and owing and remaining unpaid to the Lenders;

Ninth, to pay all other amounts then due and owing and remaining unpaid in respect of the Obligations (other than Obligations relating to Cash Management Services and Bank Products), pro rata among the Lenders according to the amounts of the Obligations (other than Obligations relating to Cash Management Services and Bank Products) then due and owing and remaining unpaid to the Lenders;

Tenth, to the applicable Lenders or Affiliates thereof towards the payment of amounts then due and owing and remaining unpaid in respect of Cash Management Services and the prepayment, settlement and termination of Cash Management Services, pro rata among the applicable Lenders and Affiliates thereof according to the amounts then due and owing and remaining unpaid in respect of Cash Management Services;

Eleventh, to the applicable Lenders or Affiliates thereof towards the payment of amounts then due and owing and remaining unpaid in respect of Bank Products, pro rata among the applicable Lenders and Affiliates thereof according to the amounts that would become due and owing upon the prepayment, settlement and termination of such Bank Products;

Twelfth, any balance remaining after the Obligations shall have been paid in full, no Letters of Credit shall be outstanding (unless the same has been Cash Collateralized or back-to-back letters of credit from an issuer and on terms acceptable to the Issuing Lender have been provided in respect of such Letters of Credit) and the Commitments shall have terminated, shall be paid over to the Borrowers or to whomsoever may be lawfully entitled to receive the same.

Section 7.04 Lift of Automatic Stay. Subject to the Order and the terms thereof, if any Event of Default then exists, the Automatic Stay shall be modified or vacated to permit the Agent and the Lenders to exercise all rights and remedies under this Agreement, the other Loan Documents or applicable law, without notice, application or motion, hearing before, or order of the Bankruptcy Court.

Section 7.05 License; Cooperation. The Agent and the Co-Collateral Agents are hereby granted an irrevocable, non-exclusive license or other right to use, license or sub-license (without payment of royalty or other compensation to any Person) any or all Intellectual Property, computer hardware and software, trade secrets, brochures, customer lists, promotional and advertising materials, labels, packaging materials and other Property owned by any Loan Party, in advertising for sale, marketing, selling, collecting, completing manufacture of, or otherwise exercising any rights or remedies with respect to, any Collateral in each case after the occurrence, and solely during the continuance, of an Event of Default. To the extent the Loan Parties may lawfully do so, the Agent and the Co-Collateral Agents (together with their respective agents, representatives and designees) are hereby granted a non-exclusive right to have access to, and a rent-free right to use, any and all owned or leased locations (including, without limitation, warehouse locations, distribution centers and Store locations) for the purpose of arranging for and effecting the sale or disposition of Collateral, including the production, completion, packaging and other preparation of such Collateral for sale or disposition (it being understood and agreed that the Agent and its representatives (and persons employed on their behalf), may continue to operate, service, maintain, process and sell the Collateral, as well as to engage in bulk sales of Collateral). Upon the occurrence and the continuance of an Event of Default and the exercise by the Agent, either Co-Collateral Agent or Lenders of their rights and remedies under this Agreement and the other Loan Documents, the Loan Parties shall assist the Agent, the Co-Collateral Agents and Lenders in effecting a sale or other disposition of the Collateral upon such terms as are reasonably acceptable to the Agent.

ARTICLE VIII

THE AGENT AND CO-COLLATERAL AGENTS

Section 8.01 Appointment. Each Lender hereby irrevocably designates and appoints (i) Bank of America as Agent, and (ii) Bank of America and Wells Fargo Bank, National Association as Co-Collateral Agents, under this Agreement, the DIP Intercreditor Agreement and the other Loan Documents and the Financing Orders, and each such Lender irrevocably authorizes the Agent and the Co-Collateral Agents, in such capacity, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Agent and the Co-Collateral Agents, as applicable, by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto. For clarity,

and notwithstanding anything to the contrary contained in this Agreement and the other Loan Documents, no consent of the Lenders shall be required to amend this Agreement or the Loan Documents to (i) cause additional assets to become Collateral or to add additional Subsidiaries as guarantors of the Obligations, or (ii) implement the provisions of Section 8.12, and the Agent and the Loan Parties shall be entitled to execute any and all amendments necessary or desirable to accomplish any of the foregoing and such amendments shall be binding on the other parties hereto. Notwithstanding any provision to the contrary elsewhere in this Agreement, neither the Agent nor the Co-Collateral Agents shall have any duties or responsibilities, except those expressly set forth in this Agreement and the other Loan Documents to which it is a party, or any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against the Agent or the Co-Collateral Agents.

Section 8.02 Delegation of Duties; Agent Advisors. (a) Each of the Agent and the Co-Collateral Agents may execute any of its duties under this Agreement and the other Loan Documents by or through agents (including through the other Agents) or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. Neither the Agent nor the Co-Collateral Agents shall be responsible for the negligence or misconduct of any agents or attorneys-in-fact selected by it with reasonable care.

(b) Each of the Agent and the Co-Collateral Agents, on behalf of each of them and the Lenders, shall be entitled to retain (either directly or through counsel) any financial advisor, auditor or any other consultant the Agent and the Co-Collateral Agents may deem necessary (collectively, the “**Agent Advisors**”) to provide advice, analysis and reporting for the benefit of the Agent, the Co-Collateral Agents and the Lenders. The Loan Parties and their advisors shall grant access to, and cooperate in all respects with, the Agent, the Co-Collateral Agents, the Lenders, the Agent Advisors and any other representatives of the foregoing and provide all information that such parties may reasonably request in a timely manner. The Borrowers shall promptly pay upon demand all fees and expenses of each Agent Advisor, and all such fees and expenses shall constitute Obligations and be secured by the Collateral.

Section 8.03 Exculpatory Provisions. No Agent (for purposes of this Article VIII, “**Agent**” and “**Agents**” shall mean the collective reference to the Agent, the Co-Collateral Agents and any other Lender designated as an “Agent” for purposes of this Agreement, including the Joint Lead Arrangers, the Syndication Agent and the Documentation Agent) nor any of their respective Related Parties shall be (i) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Agreement or any other Loan Document (except to the extent that any of the foregoing are found by a final and non-appealable decision of a court of competent jurisdiction to have resulted from its or such Person’s own gross negligence or willful misconduct) or (ii) responsible in any manner to any of the Lenders for any recitals, statements, representations or warranties made by any Loan Party or any officer thereof contained in this Agreement or any other Loan Document or in any certificate, report, statement or other document referred to or provided for in, or received by the Agents under or in connection with, this Agreement or any other Loan Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document or for any failure of any Loan Party that is a party thereto to perform its obligations

hereunder or thereunder. The Agents shall not be under any obligation to any Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Loan Document, or to inspect the properties, books or records of any Loan Party.

Section 8.04 Reliance by Agents. The Agent and Co-Collateral Agents shall be entitled to rely, and shall be fully protected in relying, upon any instrument, writing, resolution, notice, consent, certificate, affidavit, letter, telecopy, telex or teletype message, statement, order or other document or conversation believed by them to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including counsel to Holdings or the Borrowers), independent accountants and other experts selected by the Agent. The Agent may deem and treat the payee of any Note as the owner thereof for all purposes unless a written notice of assignment, negotiation or transfer thereof shall have been filed with the Agent. The Agent and Co-Collateral Agents shall be fully justified in failing or refusing to take any action under this Agreement or any other Loan Document unless they shall first receive such advice or concurrence of the Required Lenders (or, if so specified by this Agreement, the Supermajority Lenders or all Lenders) as they deem appropriate or they shall first be indemnified to its satisfaction by the Lenders against any and all liability and expense that may be incurred by them by reason of taking or continuing to take any such action. The Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Loan Documents in accordance with a request of the Required Lenders (or, if so specified by this Agreement, the Supermajority Lenders, affected Lenders or all Lenders), and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Lenders and all future holders of the Advances and the Term Loan.

Section 8.05 Notice of Default. The Agent and the Co-Collateral Agents shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default unless the Agent or the applicable Co-Collateral Agent has received notice from a Lender, Holdings or a Borrower referring to this Agreement, describing such Default or Event of Default and stating that such notice is a "notice of default". In the event that the Agent receives such a notice, the Agent shall give notice thereof to the Lenders. The Agent and the Co-Collateral Agents shall take such action with respect to such Default or Event of Default as shall be reasonably directed by the Required Lenders (or, if so specified by this Agreement, the Supermajority Lenders, affected Lenders or all Lenders); provided that unless and until the Agent or the Co-Collateral Agents shall have received such directions, the Agent, in consultation with the Co-Collateral Agents, may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

Section 8.06 Non-Reliance on Agents and Other Lenders. Each Lender expressly acknowledges that neither the Agent, the Co-Collateral Agents nor any of their respective Related Parties have made any representations or warranties to it and that no act by the Agent or any Co-Collateral Agent hereafter taken, including any review of the affairs of a Loan Party or any affiliate of a Loan Party, shall be deemed to constitute any representation or warranty by the Agent or any Co-Collateral Agent to any Lender. Each Lender represents to the Agent and the Co-Collateral Agents that it has, independently and without reliance upon the Agent, any Co-Collateral Agent or any other Lender, and based on such documents and

information as it has deemed appropriate, made its own appraisal of, and investigation into, the business, operations, property, financial and other condition and creditworthiness of the Loan Parties and their Affiliates and made its own decision to make its Advances and the Term Loan hereunder and enter into this Agreement. Each Lender also represents that it will, independently and without reliance upon the Agent, any Co-Collateral Agent or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Loan Documents, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of the Loan Parties and their Affiliates. Except for notices, reports and other documents expressly required to be furnished to the Lenders by the Agent or the Co-Collateral Agents hereunder, the Agent and the Co-Collateral Agents shall not have any duty or responsibility to provide any Lender with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of any Loan Party or any Affiliate of a Loan Party that may come into the possession of the Agent or any Co-Collateral Agent or any of their respective Related Parties.

Section 8.07 Reports and Financial Statements. By signing this Agreement, each Lender:

(a) agrees to furnish the Agent, with such frequency as the Agent may reasonably request, a summary of all Bank Products and Cash Management Services provided by, and amounts due or to become due on account thereof to, such Lender. In connection with any distributions to be made hereunder, the Agent shall be entitled to assume that no amounts are due to any Lender on account of any such Bank Products or Cash Management Services unless the Agent has received written notice thereof from such Lender;

(b) is deemed to have requested that the Agent furnish such Lender, promptly after they become available, copies of all financial statements and reports required to be delivered by the Loan Parties hereunder and all commercial finance examinations and appraisals of the Collateral received by the Co-Collateral Agents (collectively, the “**Reports**”) (which the Agent and the Co-Collateral Agents agree to so deliver);

(c) expressly agrees and acknowledges that the Agent and the Co-Collateral Agents make no representation or warranty as to the accuracy of the Reports, and shall not be liable for any information contained in any Report;

(d) expressly agrees and acknowledges that the Reports are not comprehensive audits or examinations, that the Agent, the Co-Collateral Agents or any other party performing any audit or examination will inspect only specific information regarding the Loan Parties and will rely significantly upon the Loan Parties’ books and records, as well as on representations of the Loan Parties’ personnel;

(e) agrees to keep all Reports confidential in accordance with the provisions of this Agreement;

(f) without limiting the generality of any other indemnification provision contained in this Agreement, agrees: (i) to hold the Agent, the Co-Collateral Agents, the Agent Professionals and any such other Lender or Person preparing a Report harmless from any action the indemnifying Lender may take or conclusion the indemnifying Lender may reach or draw from any Report in connection with any credit extensions that the indemnifying Lender has made or may make to the Borrowers, or the indemnifying Lender's participation in any Letter of Credit or Swingline Advance, or the indemnifying Lender's purchase of, a Loan or Loans; and (ii) to pay and protect, and indemnify, defend, and hold the Agent, the Co-Collateral Agents, the Agent Professionals and any such other Lender or Person preparing a Report harmless from and against, the claims, actions, proceedings, damages, costs, expenses, and other amounts (including reasonable attorney costs) incurred by the Agent, Co-Collateral Agents and any such other Lender or Person preparing a Report as the direct or indirect result of any third parties who might obtain all or part of any Report through the indemnifying Lender; and

(g) agrees that it shall not take or institute any actions or proceedings, judicial or otherwise, for any right or remedy against any Loan Party under this Agreement or any other Loan Documents or the Financing Orders, as applicable (including the exercise of any right of setoff, rights on account of any banker's lien or similar claim or other rights of self-help), or institute any actions or proceedings, or otherwise commence any remedial procedures, with respect to the guaranties or any Collateral or any other property of any such Loan Party, without the prior written consent of the Agent. The provisions of this paragraph are for the sole benefit of the Lenders and the Agent and shall not afford any right to, or constitute a defense available to, any Loan Party.

Section 8.08 Indemnification of Agent Indemnitees.

(a) Indemnification. The Lenders agree to indemnify Agent Indemnitees (to the extent not reimbursed by Holdings or the Borrowers and without limiting the obligation of Holdings or the Borrowers to do so), ratably according to their respective Pro Rata Shares in effect on the date on which indemnification is sought under this Section (or, if indemnification is sought after the date upon which the Revolving Commitments of any Lender shall have terminated and the Advances and the Term Loan shall have been paid in full, in accordance with such Pro Rata Shares immediately prior to such date), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever that may at any time (whether before or after the payment of the Advances and the Term Loan) be imposed on, incurred by or asserted against any Agent Indemnitee in any way relating to or arising out of, the Commitments, this Agreement, any of the other Loan Documents or any documents contemplated by or referred to herein or therein or the transactions contemplated hereby or thereby or any action taken or omitted by such Agent Indemnitee under or in connection with any of the foregoing; provided that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements to an Agent Indemnitee that are found by a final and non-appealable decision of a court of competent jurisdiction to have resulted from the such Agent Indemnitee's gross negligence or willful misconduct. The agreements in this Section shall survive the payment of the Advances, the Term Loan and all other amounts payable hereunder. If any Agent Indemnitee is sued by any receiver, trustee in bankruptcy, debtor-in-possession, the official committee of unsecured creditors, or other Person for any alleged

preference from a Loan Party or fraudulent transfer, then any monies paid by such Agent Indemnitee in settlement or satisfaction of such proceeding, together with all interest, costs and expenses (including attorneys' fees) incurred in the defense of same, shall be promptly reimbursed to such Agent Indemnitee by Lenders to the extent of each Lender's Pro Rata share.

(b) Proceedings. Without limiting the generality of the foregoing, if at any time (whether prior to or after the Termination Date) any proceeding is brought against any Agent Indemnitees by a Loan Party, or any Person claiming through a Loan Party, to recover damages for any act taken or omitted by Agent in connection with any Obligations, Collateral, Loan Documents or matters relating thereto, or otherwise to obtain any other relief of any kind on account of any transaction relating to any Loan Documents, each Lender agrees to indemnify and hold harmless the Agent Indemnitees with respect thereto and to pay to the Agent Indemnitees such Lender's Pro Rata share of any amount that any Agent Indemnitee is required to pay under any judgment or other order entered in such proceeding or by reason of any settlement, including all interest, costs and expenses (including attorneys' fees) incurred in defending same; provided that no Lender shall be liable for payment of any such amount to the extent that it is determined in a final, non-appealable judgment by a court of competent jurisdiction that such judgment, order or settlement resulted from such Agent Indemnitees' gross negligence or willful misconduct. In Agent's discretion, Agent may reserve for any such proceeding, and may satisfy any judgment, order or settlement, from proceeds of Collateral prior to making any distributions of Collateral proceeds to Lenders provided that it has not been determined in a final, non-appealable judgment by a court of competent jurisdiction that such judgment, order or settlement resulted from any Agent Indemnitees' gross negligence or willful misconduct.

Section 8.09 Agent in Its Individual Capacity. Each Agent and its Affiliates may make loans to, accept deposits from and generally engage in any kind of business with any Loan Party as though such Agent were not an Agent. With respect to its Advances made or renewed by it and with respect to any Letter of Credit issued or participated in by it, each Agent shall have the same rights and powers under this Agreement and the other Loan Documents as any Lender and may exercise the same as though it were not an Agent, and the terms "**Lender**" and "**Lenders**" shall include each Agent in its individual capacity.

Section 8.10 Successor Agent.

(a) The Agent may resign as Agent upon 30 days' notice to the Lenders and the Borrowers. If the Agent shall resign as Agent under this Agreement and the other Loan Documents, then the Required Lenders shall appoint from among the Lenders a successor agent for the Lenders, whereupon such successor agent shall succeed to the rights, powers and duties of the Agent, and the term "**Agent**" shall mean such successor agent effective upon such appointment, and the former Agent's rights, powers and duties as Agent shall be terminated, without any other or further act or deed on the part of such former Agent or any of the parties to this Agreement or any holders of the Advances or the Term Loan. If no successor agent has accepted appointment as Agent by the date that is 30 days following a retiring Agent's notice of resignation, the retiring Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Agent hereunder, until such time, if any, as the Required Lenders appoint a successor agent as provided for above. After any retiring

Agent's resignation as Agent, the provisions of this Article VIII shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement and the other Loan Documents.

(b) Any Co-Collateral Agent may resign as Co-Collateral Agent upon 30 days' notice to the Lenders and the Borrowers. The rights, duties and responsibilities of the Co-Collateral Agents hereunder are specific to each of Bank of America, N.A. and Wells Fargo Bank, National Association, and upon (i) the resignation of any such Person as a Co-Collateral Agent hereunder, or (ii) except as otherwise agreed by the Borrowers and the Agent (whose agreement shall not be unreasonably withheld), the assignment of all of the rights, duties and obligations under this Agreement in respect of its Revolving Commitment, the Advances, the Term Loan and other amounts owing to it and any Note or Notes held by it by any such Person, then such rights, duties and responsibilities of such Person as a Co-Collateral Agent shall automatically terminate and be of no further force and effect; provided that the provisions of this Article VIII shall inure to such Person's benefit as to any actions taken or omitted to be taken by it while it was Co-Collateral Agent under this Agreement and the other Loan Documents. Without limiting the foregoing, no additional Co-Collateral Agents shall be appointed hereunder without the prior written consent of the Agent and the Borrowers.

Section 8.11 Documentation Agent and Syndication Agent; Bank Product and Cash Management Services Providers. (a) Neither the Documentation Agent, the Syndication Agent nor any other Lender designated as an "**Agent**" for purposes of this Agreement (other than Bank of America in its capacity as Agent and Co-Collateral Agent, and Wells Fargo Bank, National Association in its capacity as Co-Collateral Agent) shall have any duties or responsibilities hereunder in its capacity as such.

(b) Notwithstanding anything to the contrary in this Agreement or any other Loan Document, no provider or holder of any Bank Products or Cash Management Services shall have any voting or approval rights hereunder (or be deemed a Lender) solely by virtue of its status as the provider or holder of such agreements or products or the Obligations owing thereunder, nor shall the consent of any such provider or holder be required (other than in their capacities as Lenders, to the extent applicable) for any matter hereunder or under any of the other Loan Documents, including as to any matter relating to the Collateral or the release of Collateral or any Loan Party.

Section 8.12 Defaulting Lenders.

(a) Adjustments. Notwithstanding anything to the contrary contained in this Agreement, if any Lender becomes a Defaulting Lender, then, until such time as that Lender is no longer a Defaulting Lender, to the extent permitted by applicable law:

(i) Waivers and Amendments. Such Defaulting Lender's right to approve or disapprove any amendment, waiver or consent with respect to this Agreement shall be restricted as set forth in the definition of "Required Lenders", "Supermajority Lenders" and this Section 8.12.

(ii) Defaulting Lender Waterfall. Any payment of principal, interest, fees or other amounts received by the Agent for the account of such Defaulting Lender (whether voluntary or mandatory, at maturity, pursuant to Article VII or otherwise) or received by the Agent from a Defaulting Lender pursuant to Section 9.05 shall be applied at such time or times as may be determined by the Agent as follows: first, to the payment of any amounts owing by such Defaulting Lender to the Agent hereunder; second, to the payment on a pro rata basis of any amounts owing by such Defaulting Lender to the Issuing Lenders or Swingline Lender hereunder; third, to Cash Collateralize the Issuing Lenders' Fronting Exposure with respect to such Defaulting Lender; fourth, as the Borrowers may request (so long as no Default or Event of Default exists), to the funding of any Extension of Credit in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Agent; fifth, if so determined by the Agent and the Borrowers, to be held in a deposit account and released pro rata in order to (x) satisfy such Defaulting Lender's potential future funding obligations with respect to Extensions of Credit under this Agreement and (y) Cash Collateralize the Issuing Lenders' future Fronting Exposure with respect to such Defaulting Lender with respect to future Letters of Credit issued under this Agreement; sixth, to the payment of any amounts owing to the Non-Defaulting Lenders, the Issuing Lenders or Swingline Lender as a result of any judgment of a court of competent jurisdiction obtained by any Lender, the Issuing Lenders or the Swingline Lender against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; seventh, so long as no Default or Event of Default exists, to the payment of any amounts owing to the Borrowers as a result of any judgment of a court of competent jurisdiction obtained by the Borrowers against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; and eighth, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if (x) such payment is a payment of the principal amount of any Extension of Credit in respect of which such Defaulting Lender has not fully funded its appropriate share, and (y) such Advances or Term Loans were made or the related Letters of Credit were issued at a time when the conditions set forth in Section 4.02 were satisfied or waived, such payment shall be applied solely to pay the Extensions of Credit owed to all Non-Defaulting Lenders on a pro rata basis prior to being applied to the payment of any Obligations owed to, such Defaulting Lender until such time as all Advances, Term Loans and funded and unfunded participations in Letters of Credit and Swingline Advances are held by the Lenders pro rata in accordance with the Commitments hereunder without giving effect to Section 2.16. Any payments, prepayments or other amounts paid or payable to a Defaulting Lender that are applied (or held) to pay amounts owed by a Defaulting Lender or to post Cash Collateral pursuant to this Section 8.12 shall be deemed paid to and redirected by such Defaulting Lender, and each Lender irrevocably consents hereto.

(iii) Certain Fees.

(A) No Defaulting Lender shall be entitled to receive any fee payable under Section 2.05 for any period during which that Lender is a Defaulting Lender (and, except as provided in clause (iii)(C) below, the Borrowers shall not be required to pay any such fee that otherwise would have been required to have been paid to that Defaulting Lender).

(B) Each Defaulting Lender shall be entitled to receive Letter of Credit fees pursuant to Section 3.03 for any period during which that Lender is a Defaulting Lender only to the extent allocable to its Revolving Commitment Percentage of the stated amount of Letters of Credit for which it has provided Cash Collateral.

(C) With respect to any fee payable under Section 2.05 or any Letter of Credit Fee not required to be paid to any Defaulting Lender pursuant to clause (A) or (B) above, the Borrowers shall (x) pay to each Non-Defaulting Lender that portion of any such fee otherwise payable to such Defaulting Lender with respect to such Defaulting Lender's participation in Letters of Credit or Swingline Advances that has been reallocated to such Non-Defaulting Lender pursuant to clause (iv) below, (y) pay to the Issuing Lenders and Swingline Lender, as applicable, the amount of any such fee otherwise payable to such Defaulting Lender to the extent allocable to such Issuing Lender's or Swingline Lender's Fronting Exposure to such Defaulting Lender, and (z) not be required to pay the remaining amount of any such fee.

(iv) Reallocation of Applicable Percentages to Reduce Fronting Exposure. All or any part of such Defaulting Lender's participation in Letters of Credit and Swingline Advances shall be reallocated among the Non-Defaulting Lenders in accordance with their respective Revolving Commitment Percentages (calculated without regard to such Defaulting Lender's Revolving Commitment) but only to the extent that (x) the conditions set forth in Section 4.02 are satisfied at the time of such reallocation (and, unless the Borrowers shall have otherwise notified the Agent at such time, the Borrowers shall be deemed to have represented and warranted that such conditions are satisfied at such time), and (y) such reallocation does not cause the aggregate outstanding amount of Obligations of any Non-Defaulting Lender to exceed such Non-Defaulting Lender's Revolving Commitment. No reallocation hereunder shall constitute a waiver or release of any claim of any party hereunder against a Defaulting Lender arising from that Lender having become a Defaulting Lender, including any claim of a Non-Defaulting Lender as a result of such Non-Defaulting Lender's increased exposure following such reallocation.

(v) Cash Collateral, Repayment of Swingline Advances.

If the reallocation described in clause (a)(iv) above cannot, or can only partially, be effected, the Borrowers shall, without prejudice to any right or remedy available to them hereunder or under applicable law, (x) first, prepay Swingline Advances in an amount equal to the Swingline Lenders' Fronting Exposure and (y) second, Cash Collateralize the Issuing Lenders' Fronting Exposure in accordance with the procedures set forth in Section 3.01(b).

(b) Consents. If a Lender becomes a Defaulting Lender, then, in addition to the rights and remedies that may be available to the other Credit Parties, the Loan Parties or any other party at law or in equity, and not in limitation thereof, except as set forth in the last sentence hereof, such Defaulting Lender's right to participate in decision-making rights related to the Obligations in respect of Required Lender and Supermajority Lender votes, this Agreement or the other Loan Documents shall be suspended during the pendency of such failure or refusal. Notwithstanding anything else provided herein, any amendment, waiver determination, consent or notification under Section 9.01 that would (i) increase or extend the term of the Revolving Commitment of a Defaulting Lender, (ii) reduce the principal amount of the Advances or the Term Loan made by such Defaulting Lender, (iii) alter the terms and conditions of this sentence or (iv) otherwise disproportionately affect a Defaulting Lender, will require the consent of such Defaulting Lender.

(c) Defaulting Lender Cure. If the Borrowers, the Agent, the Swingline Lender and the Issuing Lenders agree in writing that a Lender is no longer a Defaulting Lender, the Agent will so notify the parties hereto, whereupon as of the effective date specified in such notice and subject to any conditions set forth therein (which may include arrangements with respect to any Cash Collateral), that Lender will, to the extent applicable, purchase at par that portion of outstanding Advances of the other Lenders or take such other actions as the Agent may determine to be necessary to cause the Advances and funded and unfunded participations in Letters of Credit and Swingline Advances to be held on a pro rata basis by the Revolving Lenders in accordance with their Revolving Commitment Percentages (without giving effect to Section 2.16), whereupon such Lender will cease to be a Defaulting Lender; provided that no adjustments will be made retroactively with respect to fees accrued or payments made by or on behalf of the Borrowers while that Lender was a Defaulting Lender; and provided, further, that except to the extent otherwise expressly agreed by the affected parties, no change hereunder from Defaulting Lender to Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender.

Section 8.13 Certain ERISA Matters.

(a) Each Lender (x) represents and warrants, as of the date such Person became a Lender party hereto, to, and (y) covenants, from the date such Person became a Lender party hereto to the date such Person ceases being a Lender party hereto, for the benefit of, each Agent (as defined in Section 8.03) and their respective Affiliates, and not, for the avoidance of doubt, to or for the benefit of the Borrower or any other Loan Party, that at least one of the following is and will be true:

(i) such Lender is not using “plan assets” (within the meaning of Section 3(42) of ERISA or otherwise) of one or more Benefit Plans in connection with the Extensions of Credit, the Letters of Credit or the Commitments,

(ii) the transaction exemption set forth in one or more PTEs, such as PTE 84-14 (a class exemption for certain transactions determined by independent qualified professional asset managers), PTE 95-60 (a class exemption for certain transactions involving insurance company general accounts), PTE 90-1 (a class exemption for certain transactions involving insurance company pooled separate accounts), PTE 91-38 (a class exemption for certain transactions involving bank collective investment funds) or PTE 96-23 (a class exemption for certain transactions determined by in-house asset managers), is applicable with respect to such Lender’s entrance into, participation in, administration of and performance of the Extensions of Credit, the Letters of Credit, the Commitments and this Agreement,

(iii) or (A) such Lender is an investment fund managed by a “Qualified Professional Asset Manager” (within the meaning of Part VI of PTE 84-14), (B) such Qualified Professional Asset Manager made the investment decision on behalf of such Lender to enter into, participate in, administer and perform the Extensions of Credit, the Letters of Credit, the Commitments and this Agreement, (C) the entrance into, participation in, administration of and performance of the Extensions of Credit, the Letters of Credit, the Commitments and this Agreement satisfies the requirements of sub-sections (b) through (g) of Part I of PTE 84-14 and (D) to the best knowledge of such Lender, the requirements of subsection (a) of Part I of PTE 84-14 are satisfied with respect to such Lender’s entrance into, participation in, administration of and performance of the Extensions of Credit, the Letters of Credit, the Commitments and this Agreement.

(b) In addition, unless sub-clause (i) in the immediately preceding clause (a) is true with respect to a Lender, such Lender further (x) represents and warrants, as of the date such Person became a Lender party hereto, to, and (y) covenants, from the date such Person became a Lender party hereto to the date such Person ceases being a Lender party hereto, for the benefit of, the Agents and their respective Affiliates, and not, for the avoidance of doubt, to or for the benefit of the Borrower or any other Loan Party, that none of the Agents or any of their respective Affiliates is a fiduciary with respect to the assets of such Lender involved in the Extensions of Credit, the Letters of Credit, the Commitments and this Agreement (including in connection with the reservation or exercise of any rights by the Agent under this Agreement, any Loan Document or any documents related to hereto or thereto).

Section 8.14 Credit Bidding. The Credit Parties hereby irrevocably authorize the Agent, at the direction of the Required Lenders, to credit bid all or any portion of the Obligations (including accepting some or all of the Collateral in satisfaction of some or all of the Obligations pursuant to a deed in lieu of foreclosure or otherwise) and in such manner purchase (either directly or through one or more acquisition vehicles) all or any portion of the Collateral

(a) at any sale thereof conducted under the provisions of the Bankruptcy Code of the United States, including under Sections 363, 1123 or 1129 of the Bankruptcy Code of the United States, or any similar laws in any other jurisdictions to which a Loan Party is subject, or (b) at any other sale or foreclosure or acceptance of collateral in lieu of debt conducted by (or with the consent or at the direction of) the Agent (whether by judicial action or otherwise) in accordance with any applicable law. In connection with any such credit bid and purchase, the Obligations owed to the Credit Parties shall be entitled to be, and shall be, credit bid on a ratable basis (with Obligations with respect to contingent or unliquidated claims receiving contingent interests in the acquired assets on a ratable basis that would vest upon the liquidation of such claims in an amount proportional to the liquidated portion of the contingent claim amount used in allocating the contingent interests) in the asset or assets so purchased (or in the Equity Interests or debt instruments of the acquisition vehicle or vehicles that are used to consummate such purchase); provided, however, that none of the Credit Parties shall be allowed to credit bid any of the Obligations independently and all such credit bids shall have to be submitted through, and administered by, the Agent, as set forth herein. In connection with any such bid (i) the Agent shall be authorized to form one or more acquisition vehicles to make a bid, (ii) to adopt documents providing for the governance of the acquisition vehicle or vehicles (provided that any actions by the Agent with respect to such acquisition vehicle or vehicles, including any disposition of the assets or Equity Interests thereof, shall be governed, directly or indirectly, by the vote of the Required Lenders, irrespective of the termination of this Agreement and without giving effect to the limitations on actions by the Required Lenders contained in Section 9.01 of this Agreement), and (iii) to the extent that Obligations that are assigned to an acquisition vehicle are not used to acquire Collateral for any reason (as a result of another bid being higher or better, because the amount of Obligations assigned to the acquisition vehicle exceeds the amount of debt credit bid by the acquisition vehicle or otherwise), such Obligations shall automatically be reassigned to the Lenders pro rata and the Equity Interests and/or debt instruments issued by any acquisition vehicle on account of the Obligations that had been assigned to the acquisition vehicle shall automatically be cancelled, without the need for any Credit Party or any acquisition vehicle to take any further action.

ARTICLE IX

MISCELLANEOUS

Section 9.01 Amendments, Etc. No amendment or waiver of any provision of this Agreement or any other Loan Document (other than the Fee Letter, which may be amended by the parties thereto (or in the case of fees payable solely to the Agent, by the Borrowers and the Agent)), nor consent to any departure by any Borrower or any Loan Party therefrom, shall in any event be effective unless the same shall be in writing and signed by the Required Lenders or by the Agent at the direction of the Required Lenders, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that no amendment, waiver or consent shall:

(a) unless in writing and also signed by each Lender directly affected thereby, do any of the following: (i) increase the amount or extend the expiration date of any Lender's Commitment, (ii) subject to clause (h) below, reduce the principal of, or interest on, the Advances, the Term Loan or any fees or other amounts payable hereunder; provided, however,

that only the consent of the Required Lenders shall be necessary to waive any obligation of the Borrowers to pay interest, fees or other amounts at the default rate; or (iii) postpone any date fixed for any payment of principal of, or interest on, the Advances, the Term Loan or any fees or other amounts payable hereunder (it being understood that the waiver of (or amendment to the terms of) any mandatory prepayment shall not constitute a postponement of any date scheduled for the payment of principal or interest);

(b) unless in writing and signed by all of the Lenders, do any of the following: (i) change the percentage of the Commitments or of the aggregate unpaid principal amount of the Advances, the Term Loan or the number of Lenders, that shall be required for the Lenders or any of them to take any action hereunder, (ii) other than in accordance with Section 9.13, release all or substantially all of the Collateral or release all or substantially all of the guarantors from their obligations under the Guarantee and Collateral Agreement, (iii) except as expressly permitted herein or in any other Loan Document, subordinate the Liens granted hereunder or under the other Loan Documents, to any other Lien, (iv) amend this Section 9.01, (v) amend the definitions of “Required Lenders” or “Supermajority Lenders,” (vi) release either Borrower from all of its obligations hereunder or amend Section 9.07(j), (vii) increase the advance rates constituting part of the Borrowing Base or (viii) amend Section 7.03;

(c) unless in writing and signed by the Supermajority Lenders, (i) amend Section 6.02(n) (or the defined terms used in such section or any component thereof) the definition of “LTV Provisions”, the definitions “Line Cap”, “Borrowing Base” and the other defined terms used in such definitions or any component thereof (other than the advance rates)) in a manner that would result in more credit being made available to the Borrowers and (ii) increase the Swingline Commitment;

(d) unless in writing and signed by the Agent and the Co-Collateral Agents (in addition to the Lenders required above to take such action), as applicable, amend, modify or waive any provision of Article VIII or affect the rights or duties of the Agent and the Co-Collateral Agents, as applicable, under this Agreement or any other Loan Document;

(e) unless in writing and signed by the Swingline Lender (in addition to the Lenders required above to take such action), amend, modify or waive any provision of Section 2.03 or 2.04;

(f) unless in writing and signed by each Issuing Lender (in addition to the Lenders required above to take such action), amend, modify or waive any provision of Article III;

(g) unless in writing and signed by each affected member of any Class, have a materially disproportionate adverse effect on such Class; or

(h) unless in writing and signed by (i) the holders of more than 50% of the sum of the Aggregate Revolving Commitments then in effect or, if the Aggregate Revolving Commitments have been terminated, the holders of more than 50% of the Total Revolving Extensions of Credit then outstanding (other than Extensions of Credit held by Permitted Holder Lenders) and (ii) holders of more than 50% of the principal amount of the Term Loans then

outstanding (other than the portion of the Term Loan held by any Permitted Holder Lenders), (x) waive any payment otherwise required under Section 2.11(b)-(f) or (y) amend Section 2.11(f) (or the defined terms used in such section or any components thereof).

Section 9.02 Notices, Etc.

(a) All notices and other communications provided for hereunder shall be in writing (including telecopier communication) and mailed, telecopied or delivered, (i) if to Holdings, any Borrower or any Subsidiary Guarantor, at its address at 3333 Beverly Road, Hoffman Estates, Illinois 60179, Attention: General Counsel, with a copy to Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153, Attention: Douglas Urquhart, Esq.; (ii) if to any Lender, at its address set forth in its completed administrative questionnaire delivered to the Agent; (iii) if to Bank of America, (x) in its capacity as Agent, a Co-Collateral Agent, the Swingline Lender or an Issuing Lender, at its address at 100 Federal Street, 9th Floor, Boston, Massachusetts 02110, Attention: Stephen J. Garvin and Brian P. Lindblom, and (y) in its capacity as Agent with respect to financial and other reporting sent pursuant to Section 6.01(j) hereof, at its address set forth in clause (x) above and also at 1455 Market Street, San Francisco, CA 94103, Attention: Aamir Saleem, in each case with a copy to Skadden, Arps, Slate, Meagher & Flom LLP, 155 N. Wacker Drive, Suite 3400, Chicago, Illinois 60527, Attention: Seth E. Jacobson, Esq.; (iv) if to Wells Fargo Bank, National Association or its Affiliates, in its capacity as a Co-Collateral Agent or as an Issuing Lender, at its address at One Boston Place, 19th Floor, Boston, Massachusetts 02108, Attention: Joseph Burt, with a copy to Choate, Hall & Stewart LLP, Two International Place, Boston, Massachusetts 02110, Attention: Kevin J. Simard, Esq., or (v), if to any other Issuing Lender, at such address as shall be designated by such party in a written notice to the other parties and, as to each other party, at such other address as shall be designated by such party in a written notice to the Borrowers and the Agent; provided that notices required to be delivered pursuant to Section 6.01(j)(i), (iii), (iv), and (vii) shall be delivered to the Agent and the Lenders as specified in Section 9.02(b). All such notices and communications shall, when mailed, telecopied, telegraphed or emailed, be effective when deposited in the mails, telecopied, delivered to the telegraph company or confirmed by email, respectively, except that notices and communications to the Agent pursuant to Article II, III or VIII shall not be effective until received by the Agent. Delivery by telecopier of an executed counterpart of any amendment or waiver of any provision of this Agreement or any Loan Document or of any exhibit hereto or thereto to be executed and delivered hereunder shall be effective as delivery of a manually executed counterpart thereof.

(b) Holdings and the Borrowers agree that materials required to be delivered pursuant to Sections 6.01(j)(ii), 6.01(j)(i), (iii) and (vii), shall be deemed delivered to the Agent on the date on which Holdings causes such reports, or reports containing such financial statements, to be posted on the Internet at www.sec.gov or at such other website identified by the Borrowers in a written notice to the Agent and the Lenders and that is accessible by the Lenders without charge or if not so posted, may be delivered to the Agent in an electronic medium in a format acceptable to the Agent by email to brian.p.lindblom@baml.com and to aamir.saleem@baml.com. Holdings and the Borrowers agree that the Agent may make such materials, as well as any other written information, documents, instruments and other material relating to Holdings, the Borrowers, any of their Subsidiaries or any other materials or matters relating to this Agreement, the Loan Documents or any of the transactions contemplated hereby

(collectively, the “**Communications**”) available to the Lenders by posting such notices on Intralinks or a substantially similar electronic system (the “**Platform**”). Holdings and the Borrowers acknowledge that (i) the distribution of material through an electronic medium is not necessarily secure and that there are confidentiality and other risks associated with such distribution, (ii) the Platform is provided “as is” and “as available” and (iii) neither the Agent nor any of its Affiliates warrants the accuracy, adequacy or completeness of the Communications or the Platform and each expressly disclaims liability for errors or omissions in the Communications or the Platform. No warranty of any kind, express, implied or statutory, including any warranty of merchantability, fitness for a particular purpose, non-infringement of third party rights or freedom from viruses or other code defects, is made by the Agent or any of its Affiliates in connection with the Platform. No Agent Indemnitee shall have any liability to Borrowers, Credit Parties or any other Person for losses, claims, damages, liabilities or expenses of any kind (whether in tort, contract or otherwise) relating to use by any Person of the Platform, including any unintended recipient, nor for delivery of Communications and other information via the Platform, internet, e-mail, or any other electronic platform or messaging system.

(c) Each Lender agrees that notice to it (as provided in the next sentence) (a “**Notice**”) specifying that any Communications have been posted to the Platform shall constitute effective delivery of such information, documents or other materials to such Lender for purposes of this Agreement; provided that if requested by any Lender the Agent shall deliver a copy of the Communications to such Lender by email or telecopier. Each Lender agrees (i) to notify the Agent in writing of such Lender’s e-mail address to which a Notice may be sent by electronic transmission (including by electronic communication) on or before the date such Lender becomes a party to this Agreement (and from time to time thereafter to ensure that the Agent has on record an effective e-mail address for such Lender) and (ii) that any Notice may be sent to such e-mail address.

(d) The Loan Parties hereby acknowledge that certain of the Lenders (each, a “**Public Lender**”) may have personnel who do not wish to receive material non-public information with respect to the Loan Parties or their Affiliates, or the respective securities of any of the foregoing, and who may be engaged in investment and other market-related activities with respect to such Persons’ securities. The Loan Parties hereby agree that they will use commercially reasonable efforts to identify that portion of the Communications provided by or on behalf of any Loan Party hereunder (collectively, “**Borrower Materials**”) that may be distributed to the Public Lenders and that (w) all such Borrower Materials shall be clearly and conspicuously marked “PUBLIC” which, at a minimum, shall mean that the word “PUBLIC” shall appear prominently on the first page thereof; (x) by marking Borrower Materials “PUBLIC,” the Loan Parties shall be deemed to have authorized the Credit Parties to treat such Borrower Materials as not containing any material non-public information (although it may be sensitive and proprietary) with respect to any Loan Party or its securities for purposes of United States Federal and state securities laws; (y) all Borrower Materials marked “PUBLIC” are permitted to be made available through a portion of the Platform designated “Public Side Information”; and (z) the Agents and the Joint Lead Arrangers shall be entitled to treat any Borrower Materials that are not marked “PUBLIC” as being suitable only for posting on a portion of the Platform not designated “Public Side Information.” The Loan Parties and the Credit Parties acknowledge that, notwithstanding the foregoing, “public” information may not be segregated from material non-public information on the Platform. The Credit Parties

acknowledge that Communications may include Loan Parties' material non-public information, and should not be made available to personnel who do not wish to receive such information or may be engaged in investment or other market-related activities with respect to a Loan Party's securities. Furthermore, each Public Lender agrees to cause at least one individual at or on behalf of such Public Lender to at all times have selected the "Private Side Information" or similar designation on the content declaration screen of the Platform in order to enable such Public Lender or its delegate, in accordance with such Public Lender's compliance procedures and applicable law, including United States Federal and state securities laws, to make reference to Borrower Materials that are not made available through the "Public Side Information" portion of the Platform and that may contain material non-public information with respect to any Loan Party or its securities for purposes of United States Federal or state securities laws.

Section 9.03 No Waiver; Remedies. No failure on the part of any Lender or the Agent to exercise, and no delay in exercising, any right hereunder or under any other Loan Document shall operate as a waiver thereof; nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

Section 9.04 Costs and Expenses. (a) The Loan Parties shall reimburse the Agent and each Co-Collateral Agent for all Extraordinary Expenses. The Loan Parties jointly and severally agree to pay promptly all reasonable costs and expenses of the Agent, the Co-Collateral Agent, and the Joint Lead Arrangers including the reasonable fees and expenses of Skadden, Arps, Slate, Meagher & Flom LLP, Choate Hall & Stewart LLP, BRG and the other Agent Professionals, (i) in connection with the preparation, execution, delivery, distribution (including via the internet or through a service such as Intralinks), administration, modification and amendment of this Agreement, the other Loan Documents and the other documents to be delivered hereunder (including the preparation, negotiation and execution of any amendments, consents, waivers, assignments, restatements or supplements hereto or thereto); (ii) all due diligence, syndication (including printing, distribution and bank meetings), transportation, computer, duplication, appraisal, consultant, and audit expenses; (iii) the syndication and funding of the Extensions of Credit and any issuance of Letters of Credit; (iv) the creation, perfection or protection of the liens under the Loan Documents (including all search, filing and recording fees); (v) subject to Section 6.01(k), all expenses incurred in connection with inspections, verifications, examinations and appraisals relating to the Borrowing Base and the Collateral, and (vi) the fees and expenses set forth in the Fee Letter. The Loan Parties further jointly and severally agree to pay on demand all costs and expenses of the Agent, the Co-Collateral Agents and the Lenders, if any (including reasonable counsel fees and expenses of counsel to the Agent, counsel to the Co-Collateral Agents and counsel to the Lenders (in the case of the Lenders, limited to one counsel for the Lenders in connection with the enforcement of or protection of its rights hereunder)), in connection with (i) the enforcement of the Loan Documents, the Financing Orders and the Cash Management Order; (ii) any refinancing or restructuring of the DIP ABL Facility in the nature of a "work-out"; and (iii) any legal proceeding relating to or arising out of the DIP ABL Facility or the other transactions contemplated by the Loan Documents, the Financing Orders or the Cash Management Order. The Loan Parties acknowledge that counsel to the Agent or any Co-Collateral Agent may provide the Agent or such Co-Collateral Agent, as applicable, a benefit (such as a discount, credit or accommodation for other matters) based on

counsel's overall relationship with the Agent or such Co-Collateral Agent, as applicable, including fees paid hereunder.

(b) Holdings and the Borrowers jointly and severally agree to indemnify and hold harmless the Agent, each Co-Collateral Agent, each Issuing Lender, each Lender, the Agent Advisors and each of their Related Parties (each, an "**Indemnified Party**") from and against any and all claims, damages, losses, liabilities and expenses (including reasonable fees and expenses of counsel) incurred by or asserted or awarded against any Indemnified Party, in each case arising out of or in connection with or by reason of (including in connection with any investigation, litigation or proceeding or preparation of a defense in connection therewith) (i) this Agreement, the Prepetition First Lien ABL Credit Agreement, the other Loan Documents, any of the transactions contemplated herein or therein or the actual or proposed use of the Letters of Credit or the proceeds of the Advances, and (ii) the actual or alleged presence of Hazardous Materials on, under, at or from any property of Holdings, the Borrowers or any of their Subsidiaries or any Environmental Liability or Environmental Action relating in any way to Holdings, the Borrowers or any of their Subsidiaries, except to the extent such claim, damage, loss, liability or expense is found in a final, non-appealable judgment by a court of competent jurisdiction to have resulted from such Indemnified Party's gross negligence or willful misconduct. In the case of an investigation, litigation or other proceeding to which the indemnity in this Section 9.04(b) applies, such indemnity shall be effective whether or not such investigation, litigation or proceeding is brought by Holdings, any Borrower, its directors, equityholders or creditors or an Indemnified Party or any other Person, whether or not any Indemnified Party is otherwise a party thereto and whether or not the transactions contemplated hereby are consummated. Holdings and the Borrowers also agree not to, and not to permit any of the their Subsidiaries to, assert any claim for special, indirect, consequential or punitive damages against the Agent, any Co-Collateral Agent, any Lender, any of their Affiliates, or any of their respective Related Parties, on any theory of liability, arising out of or otherwise relating to this Agreement, the other Loan Documents, any of the transactions contemplated herein or the actual or proposed use of the Letters of Credit or the proceeds of the Advances or the Term Loan.

(c) If (i) any payment of principal of, or Conversion of, any Eurodollar Rate Advance is made by any Borrower to or for the account of a Lender other than on the last day of the Interest Period for such Advance, as a result of a payment or Conversion pursuant to Section 2.09(d) or (e), 2.11 or 2.13, acceleration of the maturity of the Advances pursuant to Section 7.02 or for any other reason, or by an Eligible Assignee to a Lender other than on the last day of the Interest Period for such Advance upon an assignment of rights and obligations under this Agreement pursuant to Section 9.07 as a result of a demand by any Borrower pursuant to Section 9.07(a), or (ii) any Borrower fails to prepay, borrow, continue or convert any Eurodollar Rate Advance on the date or in the amount notified by any Borrower; the applicable Borrower shall, promptly after notice by such Lender setting forth in reasonable detail the calculations used to quantify such amount (with a copy of such notice to the Agent), pay to the Agent for the account of such Lender any amounts required to compensate such Lender for any additional losses, costs or expenses that it may reasonably incur as a result of such payment or Conversion, including any loss (including loss of anticipated profits), cost or expense incurred by reason of the liquidation or reemployment of deposits or other funds acquired by any Lender to fund or maintain such Advance. For purposes of calculating amounts payable by the Borrowers to the

Lenders under this Section 9.04(c), each Lender shall be deemed to have funded each Eurodollar Rate Advance made by it at the Eurodollar Rate for such Advance by a matching deposit or other borrowing in the London interbank market for a comparable amount and for a comparable period, whether or not such Eurodollar Rate Advance was in fact so funded.

(d) Without prejudice to the survival of any other agreement of Holdings or any Borrower hereunder, the agreements and obligations of Holdings and the Borrowers contained in Sections 2.12, 2.15 and 9.04 shall survive the payment in full of principal, interest and all other amounts payable hereunder and under the other Loan Documents.

Section 9.05 Right of Set-off. Subject to the Financing Orders and Section 7.02, upon (i) the occurrence and during the continuance of any Event of Default and (ii) the making of the request or the granting of the consent specified by Section 7.02 to authorize the Agent to declare the Extensions of Credit due and payable pursuant to the provisions of Section 7.02, each Lender and each of its Affiliates is hereby authorized at any time and from time to time (notwithstanding the provisions of the Bankruptcy Code and without notice, application or motion, hearing before, or order of the Bankruptcy Court), to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by such Lender or such Affiliate to or for the credit or the account of Holdings or any Loan Party against any and all of the obligations of Holdings and the Loan Parties now or hereafter existing under this Agreement, the other Loan Documents and the Extensions of Credit of such Lender, whether or not such Lender shall have made any demand under this Agreement or the other Loan Documents. Each Lender agrees promptly to notify Holdings or the applicable Loan Party (with a copy to the Agent) after any such set-off and application, provided that the failure to give such notice shall not affect the validity of such set-off and application. The rights of each Lender and its Affiliate under this Section are in addition to other rights and remedies (including other rights of set-off) that such Lender and its Affiliate may have.

Section 9.06 Binding Effect; Effectiveness. When this Agreement has been executed by Holdings, the Borrowers, the Agent and the Co-Collateral Agents, and the Lenders, this Agreement shall thereafter be binding upon and inure to the benefit of Holdings, the Borrowers, the Agent, the Co-Collateral Agents, each Issuing Lender, each Lender and their respective successors and assigns.

Section 9.07 Assignments and Participations. (a) Each Lender may, upon notice to the Borrowers and the Agent and with the consent, not to be unreasonably withheld or delayed, of the Agent, assign to one or more Persons all or a portion of its rights and obligations under this Agreement (including all or a portion of its Revolving Commitment, the Advances, the Term Loan and other amounts owing to it and any Note or Notes held by it); provided, however, that (i) [Reserved]; (ii) [Reserved], (iii) each such assignment with respect to any Class of rights and obligations shall be of a constant, and not a varying, percentage of all rights and obligations under this Agreement with respect to such Class, (iv) except in the case of an assignment to a Person that, immediately prior to such assignment, was a Lender, an Affiliate of a Lender or an Approved Fund or an assignment of all of a Lender's rights and obligations under this Agreement, (x) the amount of the Revolving Commitment of the assigning Revolving Lender being assigned pursuant to each such assignment (determined as of the date of the

Assignment and Acceptance with respect to such assignment) shall in no event be less than \$10,000,000 (unless an Event of Default has occurred and is continuing, in which case not less than \$5,000,000) or an integral multiple of \$1,000,000 in excess thereof unless the Borrowers and the Agent otherwise agree and (y) the amount of the Term Loan of the assigning Term Lender being assigned pursuant to each such assignment (determined as of the date of the Assignment and Acceptance with respect to such assignment) shall in no event be less than \$5,000,000 or an integral multiple of \$1,000,000 in excess thereof (or, if less, the entire outstanding amount of the Term Loan held by such Term Lender) unless the Agent otherwise agrees, (v) each such assignment shall be to an Eligible Assignee, (vi) the parties to each such assignment shall execute and deliver to the Agent, for its acceptance and recording in the Register, an Assignment and Acceptance, and the parties to such assignment (other than the Agent) shall deliver together therewith any Note subject to such assignment and a processing and recordation fee of \$3,500 (except no such fee shall be payable for assignments to a Lender, an Affiliate of a Lender or an Approved Fund), and (vii) any Lender may, without the approval of the Borrowers, but with notice to the Borrowers, assign all or a portion of its rights and obligations to any of its Affiliates or to another Lender (provided no assignment of Revolving Commitments or any Revolving Advances or other Revolving Extensions of Credit may be made by a Revolving Lender to a Term Lender pursuant to this clause unless such Term Lender is already also a Revolving Lender hereunder). Upon such execution, delivery, acceptance and recording, from and after the effective date specified in each Assignment and Acceptance, (x) the assignee thereunder shall be a party hereto and, to the extent that rights and obligations hereunder have been assigned to it pursuant to such Assignment and Acceptance, have the rights and obligations of a Lender hereunder and (y) the Lender assignor thereunder shall, to the extent that rights and obligations hereunder have been assigned by it pursuant to such Assignment and Acceptance, relinquish its rights (other than its rights under Section 2.12, 2.15 and 9.04 to the extent any claim thereunder relates to an event arising prior such assignment) and be released from its obligations under this Agreement (and, in the case of an Assignment and Acceptance covering all or the remaining portion of an assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto).

(b) In connection with any assignment of rights and obligations of any Defaulting Lender hereunder, no such assignment shall be effective unless and until, in addition to the other conditions thereto set forth herein, the parties to the assignment shall make such additional payments to the Agent in an aggregate amount sufficient, upon distribution thereof as appropriate (which may be outright payment, purchases by the assignee of participations or sub-participations, or other compensating actions, including funding, with the consent of the Agent, the applicable pro rata share of Loans previously requested but not funded by the Defaulting Lender, to each of which the applicable assignee and assignor hereby irrevocably consent), to (x) pay and satisfy in full all payment liabilities then owed by such Defaulting Lender to the Agent, the Issuing Lender or any Lender hereunder (and interest accrued thereon) and (y) acquire (and fund as appropriate) its full pro rata share of all Loans and participations in Letters of Credit and Swingline Advances in accordance with its Revolving Commitment Percentage. Notwithstanding the foregoing, in the event that any assignment of rights and obligations of any Defaulting Lender hereunder shall become effective under applicable law without compliance with the provisions of this paragraph, then the assignee of such interest shall be deemed to be a Defaulting Lender for all purposes of this Agreement until such compliance occurs.

(c) By executing and delivering an Assignment and Acceptance, the Lender assignor thereunder and the assignee thereunder confirm to and agree with each other and the other parties hereto as follows: (i) other than as provided in such Assignment and Acceptance, such assigning Lender makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with this Agreement or the other Loan Documents or the execution, legality, validity, enforceability, genuineness, sufficiency or value of this Agreement or the other Loan Documents or any other instrument or document furnished pursuant hereto or thereto; (ii) such assigning Lender makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Loan Parties or the performance or observance by the Borrowers of any of their obligations under this Agreement or any other instrument or document furnished pursuant hereto; (iii) such assignee confirms that it has received a copy of this Agreement, together with copies of the financial statements referred to in Section 5.01(e) and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into such Assignment and Acceptance; (iv) such assignee will, independently and without reliance upon the Agent, such assigning Lender or any other Lender and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement and the other Loan Documents; (v) such assignee confirms that it is an Eligible Assignee; (vi) such assignee appoints and authorizes the Agent to take such action as agent on its behalf and to exercise such powers and discretion under this Agreement and the other Loan Documents as are delegated to the Agent by the terms hereof and thereof, together with such powers and discretion as are reasonably incidental thereto; and (vii) such assignee agrees that it will perform in accordance with their terms all of the obligations that by the terms of this Agreement are required to be performed by it as a Lender.

(d) Upon its receipt of an Assignment and Acceptance executed by an assigning Lender and an assignee representing that it is an Eligible Assignee, together with any Note or Notes subject to such assignment, the Agent shall, if such Assignment and Acceptance has been completed and is in substantially the form of Exhibit B hereto, (i) accept such Assignment and Acceptance, (ii) record the information contained therein in the Register and (iii) give prompt notice thereof to the Borrowers.

(e) The Agent shall maintain at its address referred to in Section 9.02 a copy of each Assignment and Acceptance delivered to and accepted by it and a register for the recordation of the names and addresses of the Lenders and the Revolving Commitment of, and principal amount (and stated interest) of the Advances and L/C Obligations owing to, each Revolving Lender from time to time, the principal amount (and stated interest) of the Term Loan owing to each Term Lender from time to time, (the “**Register**”). The entries in the Register shall be conclusive and binding for all purposes, absent manifest error, and the Borrowers, the Agent and the Lenders shall treat each Person whose name is recorded in the Register as a Lender hereunder for all purposes of this Agreement. The Register shall be available for inspection by the Borrowers or any Lender at any reasonable time and from time to time upon reasonable prior notice.

(f) Each Lender may, without the consent of the Agent or any Loan Party, sell participations to one or more banks or other entities (other than the Borrowers or any

of their Affiliates) in or to all or a portion of its rights and obligations under this Agreement (including all or a portion of its Revolving Commitment, the Advances owing to it, the portion of the Term Loan owing to it, and any Note or Notes held by it); provided, however, that (i) such Lender's obligations under this Agreement (including its Revolving Commitment to the Borrowers and its obligations to the Swingline Lender and the Issuing Lender hereunder) shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (iii) such Lender shall remain the holder of any such Note for all purposes of this Agreement, (iv) the Borrowers, the Agent, the Co-Collateral Agents and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement and (v) no participant under any such participation shall have any right to approve any amendment or waiver of any provision of this Agreement or any Loan Document, or consent to any departure by any Borrower therefrom, except to the extent that such amendment, waiver or consent would require the affirmative vote of the Lender from which it purchased its participation pursuant to Section 9.01(a). Each Lender that sells a participation shall, acting solely for this purpose as a non-fiduciary agent of the Borrower, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Extensions of Credit or other obligations under the Loan Documents (the "**Participant Register**"); provided that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information related to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Loan Document) to any Person except to the extent that such disclosure is necessary to establish that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the United States Treasury Regulations. The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary.

(g) Any Lender may, in connection with any assignment or participation or proposed assignment or participation pursuant to this Section 9.07, disclose to the assignee or participant or proposed assignee or participant, any information relating to Holdings, the Borrowers or their Subsidiaries furnished to such Lender by or on behalf of the Borrowers; provided that, prior to any such disclosure, the assignee or participant or proposed assignee or participant shall agree to preserve the confidentiality of any Borrower Information relating to Holdings, the Borrowers or their Subsidiaries received by it from such Lender in accordance with Section 9.08.

(h) Notwithstanding any other provision set forth in this Agreement, any Lender may at any time (i) create a security interest in all or any portion of its rights under this Agreement (including the Advances owing to it, the portion of the Term Loan owing to it and any Notes held by it), including, without limitation, in favor of any Federal Reserve Bank in accordance with Regulation A of the Board of Governors and (ii) assign to one or more special purpose funding vehicles (each, an "**SPV**") all or any portion of its funded Advances (without the corresponding Revolving Commitment), without the consent of any Person or the payment of a fee, by execution of a written assignment agreement in a form agreed to by such Lender and such SPV, and may grant any such SPV the option, in such SPV's sole discretion, to provide the Borrowers all or any part of any Advances that such Lender would otherwise be obligated to

make pursuant to this Agreement. Such SPVs shall have all the rights which a Revolving Lender making or holding such Advances would have under this Agreement, but no obligations; provided, that no SPV shall be entitled to compensation pursuant to Section 2.12 or 2.15 in excess of that to which the applicable Revolving Lender would otherwise have been entitled. The Lender shall remain liable for all its original obligations under this Agreement, including its Revolving Commitment (although the unused portion thereof shall be reduced by the principal amount of any Advances held by an SPV). Notwithstanding such assignment, the Agent and Borrowers may deliver notices to the Lender (as agent for the SPV) and not separately to the SPV unless the Agent and Borrowers are requested in writing by the SPV (or its agent) to deliver such notices separately to it. The Borrowers shall, at the request of any Revolving Lender, execute and deliver to such Person as such Revolving Lender may designate, a Note in the amount of such Lender's Revolving Commitment to evidence the Advances of such Revolving Lender and related SPV.

(i) The Borrowers, upon receipt of written notice from the relevant Lender, agree to issue Notes to any Lender to facilitate transactions of the type described in paragraph (h) above.

(j) Neither Holdings nor any Borrower shall have the right to assign its rights hereunder or any interest herein without the prior written consent of each of the Lenders.

Section 9.08 Confidentiality. Neither the Agent, any Co-Collateral Agent, any Issuing Lender, nor any Lender may disclose to any Person any confidential, proprietary or non-public information of Holdings or the Borrowers furnished to the Agent or the Lenders by Holdings or the Borrowers (such information being referred to collectively herein as the "**Borrower Information**"), except that each of the Agent, each of the Co-Collateral Agents, each of the Issuing Lenders and each of the Lenders may disclose Borrower Information (i) to its and its Related Parties to whom disclosure is required to enable the Agent, the Co-Collateral Agents, the Issuing Lenders or such Lender to perform its obligations under this Agreement and the other Loan Documents or in connection with the administration or monitoring of this Agreement and the other Loan Documents by the Agent, the Co-Collateral Agents, Issuing Lenders, or such Lender (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Borrower Information and instructed to keep such Borrower Information confidential on substantially the same terms as provided herein), (ii) to the extent requested by any regulatory authority, (iii) to the extent required by applicable laws or regulations or by any subpoena or similar legal process (including in connection with the Chapter 11 Cases), (iv) to any other party to this Agreement and the other Loan Documents, (v) in connection with the exercise of any remedies hereunder or any suit, action or proceeding relating to this Agreement and the other Loan Documents or the enforcement of rights hereunder or thereunder, (vi) subject to an agreement containing provisions substantially the same as those of this Section 9.08, to any assignee or participant, or any prospective assignee or participant, (vii) to the extent such Borrower Information (A) is or becomes generally available to the public on a non-confidential basis other than as a result of a breach of this Section 9.08 by the Agent, any Co-Collateral Agent or such Lender, as the case may be, or (B) is or becomes available to the Agent, any Co-Collateral Agent or such Lender on a non-confidential basis from a source other than Holdings, the Borrowers or any of their Subsidiaries and (viii) with the consent of the Borrowers.

Section 9.09 Governing Law. This Agreement and the Notes shall be governed by, and construed in accordance with, the laws of the State of New York without regard to conflicts of laws principles thereof but including Section 5-1401 and 5-1402 of the New York General Obligations Law and, to the extent applicable, the Bankruptcy Code.

Section 9.10 Execution in Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by telecopier shall be effective as delivery of a manually executed counterpart of this Agreement.

Section 9.11 Jurisdiction, Etc. Each of the parties hereto hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of the Bankruptcy Court or, if the Bankruptcy Court does not have or abstains from jurisdiction, to the exclusive jurisdiction of any New York State court or federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or the other Loan Documents, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding shall be heard and determined in any such New York State court or, to the extent permitted by law, in such federal court. Holdings and each of the Borrowers hereby irrevocably consents to the service of process in any action or proceeding in such courts by the mailing thereof by any parties hereto by registered or certified mail, postage prepaid, to Holdings or such Borrower at its address specified pursuant to Section 9.02. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement shall affect any right that any party may otherwise have to bring any action or proceeding relating to this Agreement or the other Loan Documents in the courts of any jurisdiction. Each of the parties hereto irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or the other Loan Documents in any New York State or federal court. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

Section 9.12 WAIVER OF JURY TRIAL. EACH OF HOLDINGS, THE BORROWERS, THE AGENT, THE CO-COLLATERAL AGENTS, THE ISSUING LENDERS AND THE LENDERS HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE OTHER LOAN DOCUMENTS OR THE ACTIONS OF THE AGENT, THE CO-COLLATERAL AGENTS, THE ISSUING LENDERS OR ANY LENDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT THEREOF.

Section 9.13 Release of Collateral or Guarantee Obligation.

(a) Notwithstanding anything to the contrary contained herein or in any other Loan Document, the Co-Collateral Agents are hereby irrevocably authorized by each Lender (without requirement of consent of or notice to any Lender) to take, and hereby agree to take, any action requested by the Borrowers having the effect of releasing any Collateral or guarantee obligations (i) to the extent necessary to permit consummation of any Permitted Disposition; provided that the guarantee obligations of Sears may not be released without the consent of the Required Lenders, or (ii) under the circumstances described in paragraph (b) below.

(b) At such time as the Advances, the Term Loan, the Reimbursement Obligations and all other Obligations shall have been paid in full in cash, the Commitments have been terminated and no Letters of Credit shall be outstanding (or any outstanding L/C Obligations shall have been Cash Collateralized or back-to-back letters of credit from an issuer and on terms acceptable to the Issuing Lenders have been provided in respect of such Letters of Credit), the Collateral shall be released from the Liens created by the Security Documents, and the Security Documents and all obligations (other than those expressly stated to survive such termination) of the Co-Collateral Agents and each Loan Party under the Security Documents shall terminate, all without delivery of any instrument or performance of any act by any Person.

Section 9.14 PATRIOT Act Notice. Each Lender that is subject to the PATRIOT Act and the Agent (for itself and not on behalf of any Lender) hereby notifies each Borrower that pursuant to the requirements of the PATRIOT Act, it is required to obtain, verify and record information that identifies each Borrower, which information includes the name and address of such Borrower and other information that will allow such Lender or the Agent, as applicable, to identify such Borrower in accordance with the PATRIOT Act. Each Borrower hereby agrees to provide such information promptly upon the request of any Lender or the Agent.

Section 9.15 Integration. This Agreement and the other Loan Documents represent the agreement of Holdings, the Borrowers, the Agent, the Co-Collateral Agents and the Lenders with respect to the subject matter hereof and thereof, and there are no promises, undertakings, representations or warranties by the Agent, any Co-Collateral Agent or any Lender relative to subject matter hereof and thereof not expressly set forth or referred to herein or in the other Loan Documents.

Section 9.16 Replacement of Lenders. If any Lender requests compensation under Section 2.12 or if the Borrowers are required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 2.15, if any Lender does not consent (a “**Non-Consenting Lender**”) to a proposed amendment, waiver, consent or release with respect to any Loan Document that requires the consent of each Lender and that has been approved by the Required Lenders or any Lender is a Defaulting Lender, then the Borrowers may, at their sole expense and effort, upon notice to such Lender and the Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section 9.07), all of its interests, rights and obligations under this Agreement and the related Loan Documents to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment), provided that:

(a) the Borrowers shall have paid to the Agent the assignment fee specified in Section 9.07;

(b) such Lender shall have received payment of an amount equal to the outstanding principal of its Advances, its ratable share of the Term Loan, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrowers (in the case of all other amounts);

(c) in the case of any such assignment resulting from a claim for compensation under Section 2.12 or payments required to be made pursuant to Section 2.15, such assignment will result in a reduction in such compensation or payments thereafter;

(d) with respect to the replacement of any Non-Consenting Lender, such amendment, waiver or consent can be effected as a result of such assignment (together with all other assignments required by the Agent to be made pursuant to this paragraph); and

(e) such assignment does not conflict with applicable laws.

A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrowers to require such assignment and delegation cease to apply.

Section 9.17 No Advisory or Fiduciary Capacity. In connection with all aspects of each transaction contemplated hereby, the Loan Parties each acknowledge and agree that: (i) the credit facility provided for hereunder and any related arranging or other services in connection therewith (including in connection with any amendment, waiver or other modification hereof or of any other Loan Document) are an arm's-length commercial transaction between the Loan Parties, on the one hand, and the Credit Parties, on the other hand, and each of the Loan Parties is capable of evaluating and understanding and understands and accepts the terms, risks and conditions of the transactions contemplated hereby and by the other Loan Documents (including any amendment, waiver or other modification hereof or thereof); (ii) in connection with the process leading to such transaction, each Credit Party is and has been acting solely as a principal and is not the financial advisor, agent or fiduciary, for the Loan Parties or any of their respective Affiliates, stockholders, creditors or employees or any other Person; (iii) none of the Credit Parties has assumed or will assume an advisory, agency or fiduciary responsibility in favor of the Loan Parties with respect to any of the transactions contemplated hereby or the process leading thereto, including with respect to any amendment, waiver or other modification hereof or of any other Loan Document (irrespective of whether any of the Credit Parties has advised or is currently advising any Loan Party or any of its Affiliates on other matters) and none of the Credit Parties has any obligation to any Loan Party or any of its Affiliates with respect to the transactions contemplated hereby except those obligations expressly set forth herein and in the other Loan Documents; (iv) the Credit Parties and their respective Affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Loan Parties and their respective Affiliates, and none of the Credit Parties has any obligation to disclose any of such interests by virtue of any advisory, agency or fiduciary relationship; and (v) the Credit Parties have not provided and will not provide any legal,

accounting, regulatory or tax advice with respect to any of the transactions contemplated hereby (including any amendment, waiver or other modification hereof or of any other Loan Document) and each of the Loan Parties has consulted its own legal, accounting, regulatory and tax advisors to the extent it has deemed appropriate. Each of the Loan Parties hereby waives and releases, to the fullest extent permitted by law, any claims that it may have against each of the Credit Parties with respect to any breach or alleged breach of agency or fiduciary duty.

Section 9.18 Acknowledgement and Consent to Bail-In of EEA Financial Institutions. Notwithstanding anything to the contrary in any Loan Document or in any other agreement, arrangement or understanding among the parties, each party hereto (including each Credit Party) acknowledges that any liability arising under a Loan Document of any Credit Party that is an EEA Financial Institution, to the extent such liability is unsecured, may be subject to the write-down and conversion powers of an EEA Resolution Authority, and agrees and consents to, and acknowledges and agrees to be bound by, (a) the application of any Write-Down and Conversion Powers by an EEA Resolution Authority to any such liabilities arising under any Loan Documents which may be payable to it by any Credit Party that is an EEA Financial Institution; and (b) the effects of any Bail-in Action on any such liability, including (i) a reduction in full or in part or cancellation of any such liability; (ii) a conversion of all, or a portion of, such liability into shares or other instruments of ownership in such EEA Financial Institution, its parent undertaking, or a bridge institution that may be issued to it or otherwise conferred on it, and that such shares or other instruments of ownership will be accepted by it in lieu of any rights with respect to any such liability under any Loan Document; or (iii) the variation of the terms of such liability in connection with the exercise of the write-down and conversion powers of any EEA Resolution Authority.

Section 9.19 Interim DIP Term Sheet Amended and Restated. Upon satisfaction of the conditions precedent to the effectiveness of this Agreement, (a) this Agreement shall amend and restate the Interim DIP Term Sheet in its entirety, (b) the rights and obligations of the parties under the Interim DIP Term Sheet shall be subsumed within and be governed by this Agreement; provided, that Holdings and the Borrowers hereby agree that all obligations and other liabilities of the Loan Parties under the Interim Term Sheet shall remain outstanding, shall constitute continuing Obligations secured by the Collateral, and this Agreement shall not be deemed to evidence or result in a novation or repayment and reborrowing of such obligations and other liabilities.

Section 9.20 Keepwell. Each Loan Party that is a Qualified ECP Guarantor at the time the Guarantee and Collateral Agreement or the grant of a security interest under the Loan Documents, in each case, by any Specified Loan Party becomes effective with respect to any Swap Obligation, hereby jointly and severally, absolutely, unconditionally and irrevocably undertakes to provide such funds or other support to each Specified Loan Party with respect to such Swap Obligation as may be needed by such Specified Loan Party from time to time to honor all of its obligations under the Loan Documents in respect of such Swap Obligation (but, in each case, only up to the maximum amount of such liability that can be hereby incurred without rendering such Qualified ECP Guarantor's obligations and undertakings under the Guarantee and Collateral Agreement voidable under applicable law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount). The obligations and undertakings of each Qualified ECP Guarantor under this Section shall remain in full force and

effect until the Obligations have been paid and performed in full. Each Loan Party intends this Section to constitute, and this Section shall be deemed to constitute, a guarantee of the obligations of, and a “keepwell, support, or other agreement” for the benefit of, each Specified Loan Party for all purposes of the Commodity Exchange Act.

Section 9.21 DIP Intercreditor Agreement; Financing Orders. This Agreement is subject to the terms and provisions of the DIP Intercreditor Agreement and the Final Financing Order. In the event of a conflict between the terms hereof and the terms of the DIP Intercreditor Agreement or the Final Financing Order, the terms of the DIP Intercreditor Agreement or the Final Financing Order, as applicable, shall govern and control.

[Remainder of page intentionally left blank]

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 159 of 161

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed
by their respective officers thereunto duly authorized, as of the date first above written.

SEARS HOLDINGS CORPORATION

By: _____
Name: _____
Title: _____

SEARS ROEBUCK ACCEPTANCE
CORP.

By: _____
Name: _____

KMART CORPORATION

By: _____
Name: _____
Title: _____

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 160 of 161

BANK OF AMERICA, N.A.,
as Agent, a Co-Collateral Agent, a Lender,
Swingline Lender and an Issuing Lender

By: _____
Name: _____
Title: _____

WELLS FARGO BANK, NATIONAL
ASSOCIATION,
as a Co-Collateral Agent, an Issuing Lender
and a Lender

By: _____
Name: _____
Title: _____

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-1 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit A
Pg 161 of 161

[Other Lenders]

By: _____
Name: _____
Title: _____

MEMORANDUM

November 15, 2018

Re: Sears Holdings Corporation:
Superpriority Senior Secured Debtor-In-Possession Asset-Based Credit Agreement

We have posted for review by the syndicate the Superpriority Senior Secured Debtor-In-Possession Asset-Based Credit Agreement (the “DIP Credit Agreement”), to be among Sears Holdings Corporation, a Delaware corporation (“Holdings”), Sears Roebuck Acceptance Corp., a Delaware corporation (“SRAC”), Kmart Corporation, a Michigan corporation (collectively with SRAC, the “Borrowers”), the lenders party thereto, Bank of America, N.A., as administrative agent (the “Agent”) and as co-collateral agent, Wells Fargo Bank, National Association, as co-collateral agent (collectively with Bank of America, N.A. in its capacity as such, the “Co-Collateral Agents”) and the other agents named therein. All capitalized terms not otherwise defined herein shall have the same meaning as in the DIP Credit Agreement.

Reference is hereby made to that certain Third Amended and Restated Credit Agreement, dated as of July 21, 2015 (as amended, restated, supplemented or otherwise modified from time to time prior to the date hereof, the “Prepetition Credit Agreement”), among Holdings, the Borrowers, the lenders party thereto, Bank of America, N.A., as administrative agent and as co-collateral agent, Wells Fargo Bank, National Association, as co-collateral agent and the other agents named therein.

All legal questions should be directed in writing to Tabitha Humphries at tabitha.humphries@skadden.com and Seth Jacobson at seth.jacobson@skadden.com. All business questions should be directed in writing to Brian Lindblom at brian.p.lindblom@baml.com.

Revolving Lenders:

If you are a Revolving Lender under the Prepetition Credit Agreement, you are hereby offered the opportunity to participate in the Incremental DIP Revolving Commitments under the DIP Credit Agreement on a pro rata basis based on your Prepetition Revolving Advances.

If you choose to participate, subject to bankruptcy court approval, your Prepetition Revolving Advances will be rolled up into Revolving Extensions of Credit under the DIP Credit Agreement and your Prepetition L/C Obligations will be rolled up into L/C Obligations under the DIP Credit Agreement (including all Existing Letters of Credit issued under the Prepetition Credit Agreement being deemed issued under the DIP Credit Agreement on the Effective Date).

If you (A) hereby commit to your pro rata share of Incremental DIP Revolving Commitments, (B) elect to roll up your Prepetition Revolving Advances and your Prepetition L/C Obligations and (C) consent to, and direct the Co-Collateral Agent to consent to, the priming of the Liens granted under the Prepetition Loan Documents by the Liens on Prepetition ABL Collateral granted under the Loan Documents (to the extent set forth in the Loan Documents and the Financing Orders), *please (i) communicate your intention to Brian Lindblom, (ii) execute the signature page attached herewith and (iii) submit the signature page via the instructions below.*

Any Revolving Lender submitting a signature page shall be deemed to have consented to clauses (A) – (C) above and all other terms and provisions of the DIP Credit Agreement.

If you elect not to participate, you do ***not*** need to submit a signature page. Please be advised that the liens granted under the Prepetition Credit Agreement will be primed as set forth in clause (C) above. If you elect not to participate, no other action is being requested of you in connection with the DIP Credit Agreement.

Term Lenders:

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

18-23538-rdd Doc 955-2 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit B

Pg 2 of 2

If you are a 2016 Term Lender under the Prepetition Credit Agreement, you are hereby offered the opportunity to participate in the Initial Term Loan under the DIP Credit Agreement on a pro rata basis based on the aggregate outstanding principal amount of the Prepetition 2016 Term Loan you hold.

If you choose to participate, subject to bankruptcy court approval, the aggregate outstanding principal amount of the Prepetition 2016 Term Loan you hold will be rolled up into the Term Loan under the DIP Credit Agreement.

If you (A) hereby commit to your pro rata share of the Initial Term Loan, (B) elect to roll up your portion of the Prepetition 2016 Term Loan and (C) consent to, and direct the Co-Collateral Agent to consent to, the priming of the Liens granted under the Loan Documents (as defined in the Prepetition Credit Agreement) by the Liens on Prepetition ABL Collateral granted under the Loan Documents (to the extent set forth in the Loan Documents and the Financing Orders), ***please (i) communicate your intention to Brian Lindblom, (ii) execute the signature page attached herewith and (iii) submit the signature page via the instructions below.***

Any Term Lender submitting a signature page shall be deemed to have consented to clauses (A) – (C) above and all other terms and provisions of the DIP Credit Agreement.

If you elect not to participate, you do ***not*** need to submit a signature page. Please be advised that the Liens granted under the Prepetition Credit Agreement will be primed as set forth in clause (C) above. If you elect not to participate, no other action is being requested of you in connection with the DIP Credit Agreement.

As of November 26th, all of the Revolving Lenders and all Term Loan Lenders (other than the Sears Holdings Pension Fund) have submitted signature pages, will participate in the incremental revolving commitments and term loans, as applicable, and will have their prepetition loans and letter of credit obligations rolled up. In addition, the Debtors will be seeking court approval to roll up the Term Loans held by the Sears Holdings Pension Fund. Upon entry of the Final Order and closing under the credit facility, the Joint Lead Arrangers (or their affiliates) will fund their pro rata share of the incremental commitments associated with the roll-up of the Term Loan held by the Sears Holdings Pension Fund.

AMERICAN BANKRUPTCY INSTITUTE

18-23538-rdd Doc 955-3 Filed 11/30/18 Entered 11/30/18 13:13:14 Exhibit C
Pg 1 of 1

In re Sears Holdings Corp.
Week Cash Flow Forecast - Revised 13 Week DIP Model
(\$ in Millions)

FISCAL MONTH Forecast / Actual Week Ending Fiscal Week	FY18 P10		FY18 P11					FY18 P12				FY19 P1		Total 13 Weeks Through 2/16/19
	Forecast 11/24/18 Week 42	Forecast 12/1/18 Week 43	Forecast 12/8/18 Week 44	Forecast 12/15/18 Week 45	Forecast 12/22/18 Week 46	Forecast 12/29/18 Week 47	Forecast 1/5/19 Week 48	Forecast 1/12/19 Week 49	Forecast 1/19/19 Week 50	Forecast 1/26/19 Week 51	Forecast 2/2/19 Week 52	Forecast 2/9/19 Week 01	Forecast 2/16/19 Week 02	
	Week 42	Week 43	Week 44	Week 45	Week 46	Week 47	Week 48	Week 49	Week 50	Week 51	Week 52	Week 01	Week 02	
Post-Petition Week	Week 6	Week 7	Week 8	Week 9	Week 10	Week 11	Week 12	Week 13	Week 14	Week 15	Week 16	Week 17	Week 18	
Forecast Week	Week 42	Week 43	Week 44	Week 45	Week 46	Week 47	Week 48	Week 49	Week 50	Week 51	Week 52	Week 01	Week 02	Total
I. OPERATING CASH FLOW														
Total Operating Receipts	\$180	\$286	\$184	\$200	\$193	\$215	\$259	\$171	\$135	\$121	\$118	\$106	\$105	\$2,273
Operating Disbursements														
Merchandise Vendors	(119)	(91)	(85)	(95)	(85)	(51)	(53)	(62)	(58)	(56)	(57)	(61)	(62)	(935)
Payroll, Taxes, and Benefits	(30)	(68)	(38)	(60)	(32)	(58)	(31)	(40)	(27)	(25)	(41)	(29)	(36)	(514)
Occupancy ¹	(1)	(1)	(27)	(10)	(1)	(1)	(1)	(30)	(1)	(1)	(1)	(18)	(16)	(111)
Other Operating Disbursements	(65)	(53)	(87)	(64)	(75)	(76)	(72)	(74)	(60)	(71)	(55)	(60)	(50)	(893)
Total Operating Disbursements	(215)	(243)	(237)	(228)	(194)	(185)	(157)	(206)	(146)	(153)	(155)	(168)	(164)	(2,453)
Total Operating Cash Flow	(\$35)	\$42	(\$53)	(\$29)	(\$1)	\$29	\$102	(\$34)	(\$11)	(\$32)	(\$36)	(\$62)	(\$59)	(\$180)
II. NON-OPERATING CASH FLOWS														
Non-Operating Disbursements														
Capex	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(13)
Interest and Financing Fees ²	(4)	(8)	(7)	(7)	(7)	(4)	(5)	(9)	(5)	(5)	(5)	(5)	(5)	(76)
Total Non-Operating Disbursements	(5)	(9)	(8)	(8)	(8)	(5)	(6)	(10)	(6)	(6)	(6)	(6)	(6)	(89)
Total Business Cash Flow	(\$40)	\$33	(\$61)	(\$37)	(\$9)	\$24	\$96	(\$44)	(\$17)	(\$38)	(\$42)	(\$68)	(\$65)	(\$269)
Total Other Non-Operating Disbursements	(22)	(21)	(31)	(13)	(16)	(13)	(19)	(5)	(7)	(0)	(19)	0	0	(166)
Net Cash Flow Before Financing	(\$62)	\$12	(\$92)	(\$50)	(\$25)	\$11	\$78	(\$49)	(\$24)	(\$38)	(\$62)	(\$68)	(\$65)	(\$434)
III. LIQUIDITY														
Beginning Cash Balance	\$224	\$161	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$224
Net Cash Flows Before Financing	(62)	12	(92)	(50)	(25)	11	78	(49)	(24)	(38)	(62)	(68)	(65)	(434)
Financing Cash Flow	0	(173)	92	50	25	(11)	(78)	49	24	38	62	68	65	211
Ending Cash Balance	\$161	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Outstanding 1L - Beginning ³	1,543	1,543	1,295	1,311	1,261	1,187	1,176	1,098	1,147	1,144	1,128	1,151	1,166	\$1,543
Financing Cash Flow	0	(173)	92	50	25	(11)	(78)	49	24	38	62	68	65	211
Jr. DIP (Draws)	0	(75)	(75)	(100)	(100)	0	0	0	0	0	0	0	0	(350)
Buyer Financing (Draws) ⁴	0	0	0	0	0	0	0	0	(27)	(54)	(39)	(52)	(67)	(239)
Total Outstanding 1L - Ending ⁵	\$1,543	\$1,295	\$1,311	\$1,261	\$1,187	\$1,176	\$1,098	\$1,147	\$1,144	\$1,128	\$1,151	\$1,166	\$1,165	\$1,165
Junior DIP Balance	\$0	\$75	\$150	\$250	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	\$350	
Buyer Financing Balance	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$27	\$81	\$120	\$172	\$239	
Total Outstanding 1L - Ending ⁵	\$1,543	\$1,295	\$1,311	\$1,261	\$1,187	\$1,176	\$1,098	\$1,147	\$1,144	\$1,128	\$1,151	\$1,166	\$1,165	
Line Cap ⁵	\$1,577	\$1,471	\$1,429	\$1,384	\$1,350	\$1,328	\$1,277	\$1,157	\$1,144	\$1,128	\$1,151	\$1,166	\$1,165	
Ending Cash Balance	\$161	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	
Net Availability	34	176	118	123	163	152	180	10	0	0	0	0	0	
Total Liquidity (Cash plus Availability)	\$195	\$176	\$118	\$123	\$163	\$152	\$180	\$10	\$0	\$0	\$0	\$0	\$0	

Footnotes

- Excludes rent on rejected leases
- Includes Interest on 1L and Cascade Loans and Financing Fees on Senior and Junior DIP facilities
- Includes Sr. DIP Term Loan, Sr. DIP Revolver, Term Loan, Revolving Credit Facility, and Normal Course LC. All pre-petition 1L balances will be repaid with available cash immediately following the final order on 11/27.
- Assumed loan that bridges the Company's net availability needs through the close of going concern sale
- Adjusted Borrowing Base calculated using Revised Formula

86 Notre Dame L. Rev. 469

Notre Dame Law Review
March, 2011

Article

[Michelle M. Harner](#)^{al}

Copyright (c) 2011 the Notre Dame Law Review; Michelle M. Harner

THE SEARCH FOR AN UNBIASED FIDUCIARY IN CORPORATE REORGANIZATIONS

President Rejects GM, Chrysler Rescue Plans: Obama Warns Cash Infusion Could Be Last. ¹

When a company experiences financial distress, a control contest often follows. Management fights to remain in control of the company, and shareholders, creditors and others try to influence management's exercise of that control--or wrest it away. This is not a new phenomenon. The degree of influence now exerted by corporate stakeholders in the distressed context, however, is strikingly different than in the past.

*Headlines like the one above highlight that stakeholder control issues are at the forefront of financially distressed situations large and small. The U.S. government, as creditor, dictated the terms of Chrysler's and General Motors' bankruptcies. It also demanded and received preferred stock from several troubled *470 financial institutions, giving those institutions little time or flexibility to consider or reject the terms of the government's offer. And the U.S. government is not alone in using high-pressure tactics with distressed companies; stakeholders--particularly lenders and other significant creditors-- employ such tactics consistently and routinely.*

This Article analyzes the intensified contest for control in corporate reorganizations and whether, as a result, existing bankruptcy laws adequately protect the interests of all of a debtor's stakeholders. Efforts by a stakeholder to influence control often lead to conflicts of interests and multiple, competing demands on bankruptcy fiduciaries, i.e. debtors in possession and statutory committees. In theory, these fiduciaries should shun their personal interests and any undue influence by particular stakeholders. In practice, however, debtors and committees frequently are unable or unwilling to do so, and bankruptcy courts often do not learn of conflicts, if at all, until it is too late. Accordingly, this Article suggests the use of a third-party neutral to correct information asymmetry and promote objectivity and fairness in the bankruptcy process.

	Introduction	471
I.	The Nature and Scope of the Problem	476
II.	The Development of U.S. Corporate Reorganization Laws	479
	A. Equity Receiverships and Protective Committees	479
	B. Federal Corporate Reorganization Law	481
	1. The Chandler Act	482
	2. Chapter 11 of the Bankruptcy Code	484
	3. Bankruptcy Fiduciaries	485
III.	Conflict and Control Contests in Chapter 11	491
	A. Creditor Conflict	493
	B. Debtor-Committee Conflict	496

	C. Weaknesses in Existing Chapter 11 Process	498
IV.	Alternatives to Chapter 11	499
	A. The Canadian Monitor	500
	B. The French Judicial Administrator	503
	C. The U.K. Administrator	505
	D. Observations Regarding Chapter 11 Alternatives	507
V.	The Case Facilitator Proposal	508
	A. The Basic Elements of the Proposal	510
	1. The Case Facilitator's Primary Objectives	511
	2. The Case Facilitator's Role	512
	3. The Case Facilitator's Compensation	514
	B. The Third-Party Neutral Panel	514
	C. Case Facilitator and Prepackaged Bankruptcies	516
	D. Value of the Case Facilitator Proposal	517
	1. Using Mediation to Control Costs	518
	2. Response to Potential Increased Costs	519
	E. The Case Facilitator Versus the Chapter 11 Trustee/Examiner	519
	F. Fostering the Dual Goals of Chapter 11	521
	Conclusion	522

*471 Introduction

The Washington Post reported: “President Obama's harsh attack on hedge funds [that] he blamed for forcing Chrysler into bankruptcy yesterday sparked cries of protest from the secretive financial firms that hold about \$1 billion of the automaker's debt.”² The article was discussing the status of restructuring negotiations among the U.S. government, banks holding seventy percent of the secured debt, hedge funds holding a minority of the secured debt and Chrysler itself. The automaker filed for bankruptcy and ultimately sold most of its assets to the Italian automaker Fiat on terms negotiated by the U.S. and Canadian governments, the United Auto Workers, certain lenders and, to some extent, the company.³

The parties around the negotiating table in the corporate reorganization context certainly have changed. Traditionally, the distressed corporation, as a debtor in possession, sat at the head of the table and controlled the tenor and much of the substance of the negotiations.⁴ The other parties included the corporation's senior lenders *472 and representatives of its unsecured creditors. These parties typically were financial institutions and trade creditors who had an existing business relationship with the corporation and a vested interest in the continuation of the corporation as a going-concern.

Although the distressed corporation remains at the table, it no longer automatically assumes the lead role in the negotiations, and it frequently deals with strangers rather than familiar business partners.⁵ Financial institutions and trade creditors are increasingly quick to sell their troubled credits.⁶ They often exit the credit before a corporation can design and implement a restructuring plan. The buyers of this distressed debt include hedge funds, private equity firms, and claims traders.⁷ These institutions focus on profit generation, whether through the reorganization or liquidation of the corporation's business, and generally achieve their goals by seizing control of restructuring negotiations.⁸

*473 The goals of the corporation and its new set of creditors can and often do conflict. In addition, intercreditor conflict can develop as creditors compete for control of the corporation's restructuring.⁹ Consequently, the corporation's Chapter 11 bankruptcy case can become a battleground for resolving conflict rather than a neutral site for building consensus. This conflict can impair corporate value and potentially derail a corporation's restructuring efforts.

This Article analyzes the increasing conflict in corporate reorganizations and whether the fiduciaries designated by the U.S. Bankruptcy Code--i.e., the debtor itself, referred to as a debtor in possession (DIP), and statutory stakeholder committees--are equipped to protect the corporation and its stakeholders generally. A DIP assumes the role of a trustee under the Bankruptcy Code and is charged with acting in the interests of the bankruptcy estate.¹⁰ Similarly, the DIP's board of directors owes its

fiduciary duties to the corporate entity.¹¹ A statutory committee, on the other hand, owes fiduciary duties to the particular class of creditors or shareholders represented by the committee. Statutory committees of unsecured creditors are common in Chapter 11 cases, and these committees owe their fiduciary duties to the corporation's general unsecured creditors.¹²

*474 DIPs and creditors' committees are subject to self-interest and influence by outside pressures. Board members and corporate management may aggressively pursue a reorganization of the business to, among other things, preserve their jobs or attempt to salvage value for shareholders.¹³ They may in turn cede to the demands of private funds to obtain postpetition or exit financing for the corporation.¹⁴ Creditors' committees may support a plan that allows one or more of its members to obtain control of the reorganized corporation. Committee members also have access to and may use the corporation's confidential information to advance their own business agendas.¹⁵

The potential vulnerability of DIPs and creditors' committees raises the question of who is or should be protecting the bankruptcy estate. The estate is formed upon the corporation's Chapter 11 filing and includes, among other things, all of the corporation's legal and *475 equitable interests in property.¹⁶ The estate represents the primary source of recovery for the debtor's stakeholders. Although the bankruptcy court and the U.S. trustee oversee Chapter 11 cases, they often do not possess the information necessary to help the parties reach a consensual or value-maximizing resolution to the case.

This Article suggests an alternative approach for preserving estate value in the Chapter 11 context: a third-party neutral appointed by the court to participate in the process. The Article refers to this neutral as a "case facilitator."¹⁷ The case facilitator would introduce an objective party into the restructuring process to facilitate (i) the flow of information among all parties and (ii) the ultimate resolution of the Chapter 11 case. This dual charge and the facilitative nature of the role distinguish the case facilitator from a traditional Chapter 11 trustee or examiner.

The case facilitator would, among other things, work with the DIP to gather information and explore restructuring alternatives; provide information to the debtor's stakeholders; act as a facilitator for negotiations among the debtor and its stakeholders; and report all relevant information to the bankruptcy court and U.S. trustee. The role of the case facilitator is crafted from elements of existing U.S. bankruptcy laws, as well as concepts incorporated into Canadian, French and U.K. insolvency laws.¹⁸ It also draws on basic principles of mediation and other alternative dispute resolution techniques.¹⁹ The primary goals of the case facilitator proposal are to correct information asymmetry and reduce conflict (and related costs) in Chapter 11 cases, thereby protecting and enhancing value for the benefit of all stakeholders.

Part I of this Article summarizes the nature and scope of the problems associated with creditor control, conflicts and self-dealing in *476 Chapter 11. Part II places the problem in historical context by reviewing the development of U.S. bankruptcy laws and the traditional roles of the DIP and statutory committee. Part III then analyzes the increasing conflict and stakeholder control in Chapter 11 cases. This analysis leads to a discussion of the role of DIPs and statutory committees in Chapter 11 and the tools available to them and others to combat potential abuses of the process. Part IV explores alternatives to a U.S.-style corporate reorganization, focusing on Canadian, French, and U.K. insolvency laws. This comparative discussion lays the foundation for the case facilitator proposal.

Part V sets forth the basic elements of the case facilitator proposal. This Part explains the duties of the case facilitator, the mediation components of the proposal and how the concept could be integrated into existing U.S. bankruptcy laws. It also addresses potential concerns with the proposal and suggests ways the case facilitator could streamline the process and reduce administrative costs. This Article concludes by encouraging policymakers to adopt the case facilitator proposal as a way to level the playing field in Chapter 11 and provide the often under-represented bankruptcy estate and stakeholders a voice in the Chapter 11 process.

I. The Nature and Scope of the Problem

The primary goals of Chapter 11 are to rehabilitate corporate debtors and maximize recoveries to creditors.²⁰ The Bankruptcy Code also generally seeks to level the playing field among a debtor's stakeholders, thereby providing a more equitable distribution.²¹ Achieving one or more of the Bankruptcy Code's objectives is difficult in any individual or business bankruptcy case. That task is even more *477 onerous in a Chapter 11 case because the corporate debtor and its various stakeholders often have their own, competing agendas.²²

Creditors are not benevolent by nature. Rather, they endeavor to maximize their individual returns.²³ If other creditors also benefit, that result typically is inadvertent and of secondary concern. Accordingly, as in *In re Foamex International, Inc.*²⁴ case, a creditor may seek appointment to a statutory committee and then resign upon having its contract assumed and performed by the debtor.²⁵ Likewise, as in the *In re Galey & Lord*²⁶ case, a creditor may use confidential information obtained by serving on a statutory committee to enhance its own trading in the debtor's securities;²⁷ or as in the *In re Kmart Corp.*²⁸ case, a creditor may use its position on a committee to gain ownership control of the reorganized company.²⁹ Counsel to the statutory committee may either ignore or facilitate a member's self-interested conduct *478 because of loyalty to the member who secured or supported counsel's retention.³⁰

Moreover, the activity of hedge funds and private equity firms in distressed debt complicates the problem. Similar to Goldman Sachs' investment strategy with AIG, these creditors can use derivatives, short-selling, empty voting and similar investment strategies to mitigate their economic exposure while making a control play for the debtor.³¹ As observed in the WorldCom³² case:

Because the long position in one proprietary account was offset by a short position in another proprietary account, Blue River had only a \$6.5 million face value claim against WorldCom. Had the U.S. Trustee known that Blue River's claim was \$6.5 million and not \$400 million, it is unlikely that Blue River would have been appointed to WorldCom's creditors' committee.³³

Finally, management bias and alliance with friendly creditors can disadvantage others in the process.³⁴

Self-dealing and control contests in corporate restructurings are becoming commonplace.³⁵ As a result, conflicts and costly disputes are on the rise, and the problems associated with information asymmetry are intensifying.³⁶ The current Chapter 11 process does not facilitate adequate monitoring of these disputes or provide a resolution mechanism, short of litigation before the bankruptcy court or *479 displacement of the corporate debtor, to solve them.³⁷ The case facilitator proposal seeks to strengthen these aspects of the Chapter 11 process and promote greater efficiency in corporate restructurings.

II. The Development of U.S. Corporate Reorganization Laws

Early U.S. bankruptcy law did not address corporate reorganization.³⁸ The laws primarily focused on merchants and "straight" bankruptcy (i.e., liquidation). Troubled corporations thus were left to their own devices, negotiating workouts with their major creditors in a largely unsupervised forum. The Great Depression of the 1930s produced the first federal bankruptcy laws covering corporate reorganizations, and aspects of those laws continue under the U.S. Bankruptcy Code. An understanding of the law's development is helpful in analyzing control contests and conflicts in bankruptcy and the role that DIPs and statutory committees do or should play.³⁹

A. Equity Receiverships and Protective Committees

In the late nineteenth century, creative lawyers and federal judges crafted a procedure to fill a void in U.S. bankruptcy laws and address the financial distress of the country's railroads. The procedure, commonly referred to as an equity receivership, allowed a troubled railroad--with the assistance of its major creditors--to invoke the jurisdiction of the federal courts to achieve a restructuring of its debt.⁴⁰ Technically, the railroad's creditors would petition the court *480 to appoint a receiver and the receiver would take title to the railroad's assets.⁴¹ The receiver's primary task was to find a buyer for the assets and to continue the railroad's operations until the time of the sale.

Although the basic description of an equity receivership leaves the impression that the railroad, its management and its creditors turned over control of the restructuring to a receiver, that result did not occur in most cases. Rather, management typically encouraged friendly creditors to petition for the appointment of a receiver, and then management and those creditors would negotiate a restructuring plan.⁴² Those creditors were sometimes referred to as a protective committee or a reorganization committee. Those creditors also were frequently the only (and therefore successful) bidders at the sale of the railroad's assets.⁴³ Consequently, in most cases, the receiver played an insignificant role.

Other troubled corporations soon adopted equity receivership procedures similar to those invoked by the railroads.⁴⁴ The process not only provided a structured forum in which corporations could reorganize, but it also facilitated a quick restructuring with little interference from outsiders, such as the court, the receiver, and the Securities and Exchange Commission (SEC).⁴⁵ Corporate management thus frequently favored the process.

The insular nature of equity receiverships, however, lent the process to abuse and generated substantial criticism. The most notable critic was William O. Douglas. As discussed below, Justice Douglas launched his campaign against equity receiverships after the process *481 was codified by Congress in 1934.⁴⁶ He asserted that management and those creditors aligned with management controlled most aspects of the equity receivership process, providing no representation for, and frequently small returns to, other creditors.⁴⁷ In fact, creditors not participating in the reorganization committee's plan could be cashed out for a fraction of their debt holdings.⁴⁸

Justice Douglas also lamented the role of protective committees in the process. He complained that the committees often were self-selected and influenced, if not controlled, by management and the corporation's investment bankers.⁴⁹ Although he acknowledged the useful role that committees could play in reorganizations, he cited conflicts and other circumstances that, in his opinion, caused committee members to breach their fiduciary duties. He stated, "In the welter of conflicting interests, ulterior objectives and self-serving actions which flow from investment banker-management dominance over committees, these committees have frequently lost sight of their essential functions which they can perform to advance the interests of investors."⁵⁰ As discussed in Part III, several of Justice Douglas' criticisms might apply to the existing Chapter 11 process.

B. Federal Corporate Reorganization Law

Equity receivership was the preferred means of corporate reorganization well into the 1930s. Congress even adopted key features of equity receiverships in the first U.S. corporate reorganization laws, *482 enacted in 1934 as section 77B of the 1898 Bankruptcy Act.⁵¹ Congress enacted section 77B in response to the Great Depression.⁵²

Under section 77B, management and a protective committee could still formulate the plan of reorganization and force dissenting creditors to accept the plan. They no longer had to implement the plan, however, under the guise of a receiver sale. Section

77B required only that the court determine that the plan “‘was fair and equitable,’ did not ‘discriminate unfairly,’ and ‘was feasible.’”⁵³ Consequently, the process remained subject to abuse and manipulation by management and key creditors.

The codification of equity receiverships generated substantial criticism from the SEC and others.⁵⁴ The result was a substantial overhaul of corporate reorganization laws, culminating in the Chandler Act of 1938.⁵⁵ What equity receiverships and section 77B gave management and key creditors' groups, the Chandler Act essentially took away, at least with respect to public corporations.

1. The Chandler Act

The Chandler Act of 1938⁵⁶ established two business reorganization options--Chapter X for public companies and Chapter XI for ***483** small businesses.⁵⁷ Chapter X stood in stark contrast to equity receiverships and section 77B. For example, it mandated the appointment of an independent bankruptcy trustee, SEC involvement in the plan process and significantly increased court involvement in the solicitation of votes on, and approval of, the plan of reorganization.⁵⁸ Chapter XI, on the other hand, left most of the plan process to the discretion of the debtor and its unsecured creditors, with little involvement from the court and no requirement for trustee or SEC participation.⁵⁹

Both Chapters X and XI contemplated creditors' committees, but they prescribed very different roles for those committees. Under Chapter X, creditors could still form protective committees.⁶⁰ These committees were limited, however, to providing information to the represented creditors and had no official standing in the bankruptcy case. Creditors' committees in Chapter XI did have standing and were elected at a meeting of creditors early in the case.⁶¹ In fact, the Chapter XI creditors' committee was the primary party overseeing the debtor's conduct and negotiation of the plan.

Not surprisingly, public corporations resisted filings under Chapter X. Managers and large creditors disliked the loss of control and corresponding uncertainty.⁶² Consequently, many corporations first tried to qualify for Chapter XI or negotiate a restructuring outside of the formal process.⁶³ They viewed Chapter X as a last resort. Nevertheless, it remained the primary reorganization option for public corporations for the next thirty years.

***484** 2. Chapter 11 of the Bankruptcy Code

A sharp rise in consumer bankruptcy in the 1960s energized bankruptcy reform efforts that produced the Bankruptcy Code of 1978.⁶⁴ Corporate reorganization received substantial attention in the reform process as well. The Bankruptcy Code consolidated the business reorganization chapters into one chapter (i.e., Chapter 11) and eliminated what corporations found most offensive about Chapter X: the mandatory trustee and SEC participation.⁶⁵

Notably, the two key proposals set forth during the bankruptcy reform process did not directly recommend the elimination of trustees and the SEC's involvement in the plan process.⁶⁶ For example, the proposal by the National Bankruptcy Review Commission contemplated a presumption in favor of a trustee in large cases and the appointment of a bankruptcy administrator to perform the tasks assigned to the SEC under Chapter X.⁶⁷ Similarly, the proposal by the National Conference of Bankruptcy Judges maintained the role of the trustee and SEC in public corporation cases.⁶⁸ The bankruptcy bar was, however, a strong proponent of a presumption that a trustee would not be appointed, leaving a corporation's restructuring in management's hands.⁶⁹

Chapter 11 of the Bankruptcy Code adopted much of the flexibility built into Chapter XI.⁷⁰ Debtors (as DIPs) remain in possession of their assets and can operate their businesses and pursue their restructurings with oversight primarily from a

creditors' committee. The Bankruptcy Code also created the U.S. trustee program, which serves some of the administrative functions assigned to the SEC under Chapter *485 X. ⁷¹ The U.S. trustee oversees both individual and business bankruptcies and rarely plays a substantive oversight role in any particular case. In addition, Chapter 11 permits the appointment of a trustee or examiner under certain circumstances.

Overall, the Bankruptcy Code was largely viewed as prodebtor legislation at the time of its enactment. In early Chapter 11 cases, courts granted the debtor's management lengthy periods of exclusivity in which only the debtor could propose a plan of reorganization; allowed the debtor to defer decisions on the treatment of most all contracts and leases until plan confirmation; and enjoined most all actions against the debtor and sometimes its directors, officers and nondebtor affiliates. ⁷² The debtor's control of the process has weakened, however, as creditors have become more sophisticated, lobbied for favorable legislative amendments and created control opportunities. ⁷³

3. Bankruptcy Fiduciaries

As discussed above, Chapter 11 allows a DIP and its management to lead the debtor's restructuring efforts and contemplates the appointment of a statutory committee to oversee those efforts. Sections *486 1101 and [1107 of the Bankruptcy Code](#) facilitate the DIP's role by recognizing the existence of a DIP and granting it "all the rights . . . and powers, and [authority to perform] all the functions and duties . . . of a trustee serving in a case under" Chapter 11. ⁷⁴ Section 1102 in turn provides that, in all but a few excluded cases, "the United States trustee shall appoint a committee of creditors or . . . of equity security holders as the United States trustee deems appropriate." ⁷⁵ The committee's duties are listed in § 1103 and include consulting with the DIP; investigating the DIP's prepetition and postpetition conduct and affairs; and participating in the plan process. ⁷⁶

The Bankruptcy Code itself does not use the term "fiduciary" or expressly designate either the DIP or the committee as a fiduciary. ⁷⁷ Nevertheless, case law recognizes the fiduciary nature of both statutory representatives. Specifically, courts treat the DIP as a fiduciary for the bankruptcy estate, and the committee as a fiduciary for those it represents. ⁷⁸ Courts also have suggested in certain circumstances *487 that the committee's efforts must generally benefit the bankruptcy estate. ⁷⁹

A fiduciary relationship traditionally exists where "one party to a fiduciary relation (the entrustor) is dependent on the other (the fiduciary)." ⁸⁰ The role envisioned for the DIP and the committee under the Bankruptcy Code certainly satisfies this basic definition. The debtor's stakeholders--i.e., parties with economic interests in the bankruptcy estate--rely on the DIP to propose and confirm a plan that maximizes *488 the estate's value. Likewise, creditors or equity holders represented by a committee expect the committee to act in their best interests. ⁸¹

A fiduciary owes certain duties to its beneficiaries, including the utmost duty of good faith and loyalty. ⁸² In the bankruptcy context, these duties generally require the DIP's management and the committee's members to put aside their self-interest and make decisions based on the collective best interests of their beneficiaries. ⁸³ Identifying the restructuring course that best serves a particular beneficiary class can be challenging in and of itself. The DIP's and committee's task is even more onerous when the individual interests of management, committee members or outside parties infiltrate the decision-making process. ⁸⁴

*489 Self-interest and conflict are potential hazards in any fiduciary relationship. The multiple interests, flexibility in valuation, and overall exigency of the situation intensify these hazards in the bankruptcy context. ⁸⁵ As in other fiduciary relationships, identifying these *490 hazards is challenging. ⁸⁶ The fiduciaries largely control the conduct and information evidencing the self-interest and conflict; the beneficiaries, the bankruptcy court, and the U.S. trustee may not be aware of the issue or only learn about it after the fact.

This dependency of beneficiaries, the bankruptcy court and the U.S. trustee on the DIP and the committee for information may, in part, explain why parties rarely seek or obtain the appointment of a Chapter 11 trustee.⁸⁷ Although use of a DIP is the default rule in Chapter 11, § 1104 does contemplate the appointment of a disinterested trustee under certain circumstances.⁸⁸ For example, the court may appoint a Chapter 11 trustee “for cause” or “if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate.”⁸⁹ Parties simply may not have the information they need to request a trustee. Parties also may use the information they do have to extract concessions from the DIP that benefit them personally, but not the bankruptcy estate generally.⁹⁰

A Chapter 11 trustee, if appointed, serves the same type of role as a trustee under Chapter 7 of the Bankruptcy Code. The trustee displaces the debtor's management and controls most decisions relating to the business and the bankruptcy.⁹¹ The primary difference is that the Chapter 11 trustee must decide whether to pursue a plan of reorganization *491 or convert or dismiss the case.⁹² The Chapter 11 trustee also generally has more flexibility to continue to operate the business for a longer period of time.⁹³

Although the DIP, the committee, and the trustee serve most fiduciary functions in Chapter 11, the Bankruptcy Code also permits the appointment of an examiner and subjects most meaningful transactions to bankruptcy court approval.⁹⁴ These provisions are important tools in protecting stakeholders' interests, but again their usefulness is limited by information asymmetry in most Chapter 11 cases. “[T]he bankruptcy judge can only act on information and transactions that are presented to her.”⁹⁵

The remainder of this article analyzes the roles of DIPs and committees in practice and alternatives to relying primarily on these two fiduciaries to protect stakeholders' interests. Not every Chapter 11 case is crippled by conflict and self-interest, but anecdotal evidence suggests that the problem is prevalent, costly and warrants fresh examination.

III. Conflict and Control Contests in Chapter 11

Conflicts and self-interest are common in Chapter 11 cases.⁹⁶ For example, the debtor's management may try to compensate for prepetition decisions leading to the bankruptcy or salvage value for shareholders when those options in fact only delay the case and dissipate *492 value.⁹⁷ If the debtor has new management put in place by or at the request of prepetition creditors, management may pursue options in the interests of only those creditors. Likewise, creditors, competitors and potential purchasers may try to influence the debtor, the committee and the overall process in a manner favorable to their interests, regardless of the impact on the bankruptcy estate generally.⁹⁸

Moreover, conflicts and self-interest are occurring more frequently as debtors' key creditor relationships shift from traditional commercial banks to hedge funds, private equity firms and other nontraditional lenders. The problem relates in part to a break in “relationship *493 lending” and in part to the motives and objectives of this new creditor body.⁹⁹ These creditors are increasingly using Chapter 11 to facilitate above-market returns on distressed investments, to influence governance or operational decisions, or to obtain ownership control of the debtor.¹⁰⁰

A. Creditor Conflict

Bankruptcy generally is viewed as a zero-sum game.¹⁰¹ The debtor has a limited pool of assets, and creditors want to maximize their percentage share of those assets. Consequently, a larger percentage recovery to one creditor or class of creditors means a smaller share for others. Although the distribution order in bankruptcy technically is predetermined by the absolute priority rule, creditors frequently negotiate around this rule.¹⁰² As a result, creditors use *494 prepetition contract terms, postpetition financing and litigation threats, among other things, to negotiate for better treatment in the bankruptcy distribution.

In addition, certain investors target the debt of distressed corporations as a means to obtain control of the corporation or its assets.¹⁰³ These investors purchase debt at various levels of the debtor's capital structure and then use the terms of that debt instrument and their voting rights under the Bankruptcy Code to influence the debtor's restructuring.¹⁰⁴ Distressed debt investors successfully used this strategy in, among others, the Chapter 11 cases of *In re Allied Holdings, Inc.*,¹⁰⁵ *In re Granite Broadcasting, Inc.*,¹⁰⁶ *In re Kmart Corp.*,¹⁰⁷ *In re Radnor Holdings Corp.*,¹⁰⁸ and *In re Werner Holding Co.*¹⁰⁹

Whether a creditor is seeking a larger return or control of the corporation, it tries to influence or control the restructuring process to achieve its objectives. The creditor's objective and pursuit of control in turn might conflict with the debtor's restructuring plan or the efforts of other creditors or shareholders to influence the process.¹¹⁰ This conflict and self-interested conduct often lead to delay, additional costs and diminished returns to stakeholders.

For example, in the *Adelphia Communications Corp.*, Chapter 11 cases, conflict developed among the creditors of the debtor parent *495 corporation and a debtor affiliate corporation regarding the sale of the debtors' assets and the allocation of the proceeds under a plan.¹¹¹ This conflict also involved the debtors, the official creditors' committee, and the official equity holders' committee and generated multiple, complex disputes that consumed and paralyzed the debtors' reorganization for almost five years.¹¹² The debtors ultimately consummated the sale of their assets and confirmed a distribution plan, but only after years of conflict and cost that depleted the estate value that otherwise would have been available to pay stakeholders.¹¹³

Similar intercreditor conflict arose in the Chapter 11 cases of *In re American Remanufacturers, Inc.*¹¹⁴ and *Fibermark, Inc.*¹¹⁵ In the *American Remanufacturers* case, a control contest between the senior secured lenders and two junior debtholders forced the debtor to convert its case to a Chapter 7 case.¹¹⁶ A member of the senior lending group bought the debtor's assets in Chapter 7 for approximately \$7.7 million--substantially less than the value contemplated by the debtor's proposed restructuring strategy in Chapter 11.¹¹⁷ The *Fibermark* intercreditor *496 dispute cost the estate approximately \$60 million.¹¹⁸ Other examples of control contests and intercreditor disputes include *In re Pliant Corp.*¹¹⁹ and *In re eToys Direct 1, LLC.*¹²⁰

B. Debtor-Committee Conflict

Conflicting interests can place the debtor and the statutory committee at odds.¹²¹ Although a committee's challenge to debtor conduct *497 is often appropriate and value generating, it also can be the result of individual preferences of committee members.¹²² Likewise, when a committee rightfully objects to debtor conduct, it may be conduct motivated by management self-interest or outside influences over management.¹²³ And frequently, instability in committee membership (e.g., a member resigning from the committee once the debtor assumes its contract or pays its debt) can prevent the committee itself from being a meaningful check on conflicts and self-interest. Whether the case deals with management or committee member self-interest, the resulting conflict can impair value and confidence in the statutory representatives and the overall process.

Debtor and committee member conflict, particularly conflict accompanied by undue influence, is challenging for stakeholders both to detect and resolve. A large part of a Chapter 11 case is negotiated *498 behind the scenes--disputes typically reach the court's docket only if there is a complete impasse, which may not occur if one party caves to the other's demands.¹²⁴ Moreover, even once a dispute is before the court, the only public information about the conflict is that divulged by the debtor and the committee. The court and stakeholders not allowed in the negotiating room may never know the true nature or economic consequences of the dispute.

C. Weaknesses in Existing Chapter 11 Process

A negotiated, consensual resolution generally is the desired result in a Chapter 11 case. That resolution should, however, strive to achieve the dual goals of the Chapter 11 process: rehabilitating the debtor and maximizing creditors' returns. A so-called consensual resolution might not serve those goals if, for example, a group of creditors strong-arms the debtor into selling its assets or if management (perhaps together with a new equity sponsor) implements an over leveraged plan of reorganization.

The Bankruptcy Code seeks to protect against such abuses of the Chapter 11 process by imposing certain duties on the DIP and the committee; providing the bankruptcy court with substantial case oversight authority; requiring plans to be feasible and in the best interests of creditors; and facilitating the appointment of a trustee or examiner in extreme cases.¹²⁵ Yet, abuses of the process continue, and some commentators suggest that a complete overhaul or elimination of the existing structure is warranted.¹²⁶ The case facilitator proposal discussed here recognizes the substantial value in the existing structure and seeks to address its weaknesses.

Many Chapter 11 abuses occur because the key players in the case have a vested interest in the restructuring. Even the professionals retained by the debtors and the committee are not completely free of ^{*499} conflict and loyalty issues, depending on both professional and personal ties that exist prior to the case or are anticipated to develop after.¹²⁷ But each of these players, including the professionals, can add substantial value to the process. For example, the DIP and its management have the historical knowledge, business expertise and industry relationships that often are essential to a successful restructuring. Likewise, key creditors and shareholders have the ability to compromise claims and perhaps invest new capital.

Any workable solution should not exclude these key players or limit their roles. Rather, the solution lies in facilitating more meaningful, objective and efficient dialogue among the parties. To develop this solution, this Article draws on elements of existing U.S. bankruptcy law, as well as foreign insolvency law and alternative dispute resolution techniques.

IV. Alternatives to Chapter 11

As explained above, the general rule in U.S. corporate reorganizations is that the corporate debtor stays in possession of its property and in control of its restructuring efforts with relatively little interference from the bankruptcy court or the U.S. trustee. This approach is commonly referred to as a U.S.-style or Chapter 11-style reorganization. Although some countries like Belgium, Canada, China, France, Germany, Italy, and the United Kingdom have adopted aspects of a Chapter 11-style reorganization, most countries balance the control retained by the corporate debtor with more intrusive governmental or judicial oversight.¹²⁸ Moreover, many countries mandate the appointment of an administrator, receiver or other trustee upon the commencement of any corporate bankruptcy.¹²⁹

^{*500} This Part briefly explores alternatives to the DIP structure used in the United States. The Article does not endorse replacing the DIP. Nevertheless, analyzing alternative approaches can identify tools to enhance the DIP's restructuring efforts.

A. The Canadian Monitor

The development of Canadian corporate insolvency law follows a pattern similar to the U.S. experience. Canadian insolvency law is federal law, and the Canadian Parliament enacted its primary corporate reorganization law--the Companies' Creditors Arrangement Act (CCAA)--during the Great Depression.¹³⁰ Corporations also can ^{*501} elect to liquidate their assets in a process akin to Chapter 7 under the Canadian Bankruptcy and Insolvency Act.¹³¹

Similarities exist between the CCAA and Chapter 11, and corporations in cross-border insolvency cases often pursue reorganizations under both statutes.¹³² A corporate debtor under the CCAA can obtain a stay of proceedings, debtor in possession financing and certain other protections afforded debtors under Chapter 11. Those protections largely are crafted by

the court and parties, however, under the general guidelines of the CCAA and are not necessarily imposed *502 by federal statute as under Chapter 11. ¹³³ Moreover, the CCAA mandates the appointment of a monitor in every case. ¹³⁴

The Canadian monitor is an officer of the court and typically a licensed bankruptcy trustee associated with a major accounting firm. ¹³⁵ The monitor's duties include “monitoring the company's business and financial affairs . . . [and examining] the company's property, including the premises, books, records [and] data”; filing a report with the court “on the state of the company's business and financial affairs”; and communicating with the company's creditors. ¹³⁶ As at least one court and commentator have explained:

[The monitor] is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors. ¹³⁷

The monitor does not displace the debtor or its management team. In fact, the role of the monitor was developed by the Canadian Parliament as an alternative to the creditors' committees appointed in the Chapter 11 process. ¹³⁸ Although some commentators question *503 whether a monitor is really neutral in performing its duties, most courts and commentators believe the process works. ¹³⁹ Commentators often cite the CCAA proceedings of Air Canada-- a complex restructuring accomplished in eighteen months--to bolster their support for the process. ¹⁴⁰

B. The French Judicial Administrator

A distressed corporation generally has three formal insolvency options under French law--a safeguard proceeding, a judicial reorganization or a judicial liquidation. ¹⁴¹ The corporation cannot be technically insolvent under French law to invoke the safeguard proceeding; in fact, French law requires corporations to commence a judicial reorganization or liquidation within forty-five days of becoming insolvent. ¹⁴² Rather, the safeguard proceeding is designed to help corporations anticipate and avoid technical insolvency, thereby preserving the value of the corporation's business for all stakeholders. ¹⁴³

*504 The safeguard proceeding “was inspired in part by U.S. chapter 11” and, accordingly, permits the debtor and its management to remain in place during the proceeding. ¹⁴⁴ The debtor's management may continue to operate the business, negotiate with creditors and employees and maintain its positions in the reorganized corporation. ¹⁴⁵ The debtor is not the only party, however, with a key role in the reorganization process. The safeguard procedure contemplates significant participation by the court, a court nominee, controllers (who represent creditors), certain committees and a judicial administrator. ¹⁴⁶

The judicial administrator does not displace the debtor, but it “supervise[s] the debtor's management operations . . . [or assists] the debtor in all or some of the management.” ¹⁴⁷ The judicial administrator also has ongoing reporting obligations to the court and the court nominee and is charged with developing the debtor's plan of reorganization. ¹⁴⁸ Similar to the Canadian monitor, the judicial administrator *505 is appointed by the court and mandated in every safeguard proceeding. ¹⁴⁹

Eurotunnel was among the first distressed corporations to test the safeguard procedures. In 2007, Eurotunnel implemented its reorganization plan and, shortly thereafter, posted a small profit and issued dividends to shareholders. ¹⁵⁰ Autodis, a French auto parts maker, also invoked the safeguard proceeding in 2009 to restructure its debt obligations through, among other things, a debt-for-equity exchange with its major lenders. ¹⁵¹ The Autodis safeguard procedure was completed in six weeks.

C. The U.K. Administrator

Unlike Canada and France, the United Kingdom does not offer a formal corporate insolvency procedure that recognizes an official role for the corporate debtor in the restructuring process.¹⁵² Rather, an administrator is appointed to assume the role and responsibilities of the debtor's management in every corporate reorganization case, ^{*506} called an administration proceeding.¹⁵³ The administrator oversees virtually every aspect of the debtor's restructuring, including the development of a restructuring plan and the presentation of that plan to creditors.¹⁵⁴

Nevertheless, the corporation, its directors or its secured creditors may appoint the administrator, which allows the corporate debtor to play at least an indirect role in the restructuring process.¹⁵⁵ Notably, most corporations entering administration elect this option and frequently appoint bankruptcy professionals associated with one of the large accounting firms.¹⁵⁶ An administrator also has the authority to, and in most cases does, retain existing management to help the administrator develop and implement a restructuring plan.¹⁵⁷

An administrator is an officer of the court, and its general duties are detailed in the U.K.'s Insolvency Act.¹⁵⁸ The court generally has little involvement in the administration proceeding, giving the administrator significant discretion to achieve its statutory objectives. Administrators may pursue a going-concern or piecemeal sale of the ^{*507} debtor or a stand-alone reorganization.¹⁵⁹ The latter typically is accomplished with the cooperation of management. Distressed corporations and their creditors may even work with an administrator prior to commencing an administration proceeding to facilitate a quick restructuring, similar to the prepackaged Chapter 11 cases used in the United States.¹⁶⁰

D. Observations Regarding Chapter 11 Alternatives

The Canadian, French, and U.K. insolvency schemes discussed here each acknowledge limitations on the court's role in any given restructuring and the need for a meaningful check on the corporate debtor. Even under schemes like French insolvency laws that generally encourage significant involvement by the court, courts cannot participate in the negotiations and day-to-day affairs of the debtor for practical and other reasons.¹⁶¹ Courts in turn must rely on third parties for accurate and timely information regarding the restructuring. Most countries, like Canada, France, and the United Kingdom, rely on a party other than the debtor to fulfill that role.¹⁶²

The Canadian monitor, the French judicial administrator, and the U.K. administrator each have reporting obligations to the court and, to varying degrees, creditors, but there are notable differences among the three structures. For example, the Canadian monitor does not necessarily intervene in the restructuring negotiations and is not responsible for proposing the debtor's reorganization plan.¹⁶³ In contrast, the U.K. administrator is directly responsible for the reorganization plan, but the common practice of the administrator being appointed by or relying on management in that process suggests value to retaining the debtor's involvement at some level.

The French judicial administrator's primary charge is assisting the debtor, and it must coordinate negotiation activities with the court ^{*508} nominee and controllers.¹⁶⁴ Consequently, the judicial administrator's role provides a check on the debtor's conduct, but does not streamline the process itself. Moreover, the Canadian monitor and the U.K. administrator may not be truly independent or disinterested parties; for example, the monitor may be the debtor's auditor.¹⁶⁵ This lack of independence may create biases and increase rather than resolve conflicts in the restructuring.

These three insolvency schemes underscore the utility of objective oversight of the debtor and others involved in the restructuring; meaningful reporting to the court and stakeholders; and a facilitator to bring the parties together to negotiate

and agree upon a restructuring plan. The noted differences suggest opportunities for improvement through the case facilitator proposal. Overall, this analysis supports viewing corporate restructuring more as alternative dispute resolution and less as traditional litigation. ¹⁶⁶

V. The Case Facilitator Proposal

Chapter 11 and the DIP model can add value to a corporation's restructuring efforts. A debtor's existing management and employees have the knowledge, expertise and relationships necessary to any corporation's successful reorganization. ¹⁶⁷ They also often know best the corporation's weaknesses and what contributed to its financial distress. These individuals are vested, however, in the corporation, and they may lack the ability to assess objectively the corporation's financial options.

The case facilitator proposal recognizes the potential weaknesses in the DIP model and seeks to strengthen the model without discouraging its use. As discussed below, the case facilitator would not displace the debtor's management or receive any direct authority to act ^{*509} on behalf of the debtor. ¹⁶⁸ Rather, the case facilitator would serve as the “eyes and ears” of the bankruptcy court and act as a third-party neutral and plan facilitator for the debtor and all of its stakeholders. ¹⁶⁹

The case facilitator proposal also introduces much-needed neutrality into the Chapter 11 process. ¹⁷⁰ Neutrality in this context implies a participant without a vested interest in the prepetition relationships among the parties or the ultimate outcome of the case. ¹⁷¹ As Professor Westbrook explains: “If a bankruptcy involves competing ^{*510} interests, then control may be exercised either impartially or with partiality to one interest or another. If the policymaker recognizes both interests as worthy of protection, then its policy requires neutrality in the default manager.” ¹⁷² Although the case facilitator would not assume control of a Chapter 11 case, she would provide a neutral perspective to the parties that is absent in the existing process. Moreover, as discussed below, the case facilitator's ability to convey information to the court, including information concerning obstructionist or self-dealing behavior, would help her play a meaningful role in case resolution. ¹⁷³

A. The Basic Elements of the Proposal

The appointment of a case facilitator would be mandatory in every Chapter 11 case, unless the court for cause waived the requirement. ¹⁷⁴ The court would make the appointment from a panel of qualified third-party neutrals as soon as possible after the filing of the Chapter 11 petition. The debtor and other parties in interest could request a particular third-party neutral from the panel, but the ultimate decision would rest with the court. ¹⁷⁵ The qualifications for the third-party neutral panel are discussed below. ¹⁷⁶

^{*511} 1. The Case Facilitator's Primary Objectives

Upon her appointment, the case facilitator's primary objectives would be to facilitate (i) the collection and sharing of information among the bankruptcy court, the debtor and the stakeholders; and (ii) negotiations among the parties regarding the debtor's reorganization or other appropriate resolution to the case. Accordingly, the case facilitator's first task would be reviewing the debtor's books and records, the events leading to the Chapter 11 case and the debtor's overall financial position. ¹⁷⁷ The case facilitator would submit a factual accounting to the court and stakeholders based on this review, ¹⁷⁸ and she would be obligated to update this report on a periodic basis, providing the court with information regarding the debtor's progress, potential issues and reorganization timeline. ¹⁷⁹

In addition to submitting factual reports, the case facilitator would be required to communicate with the key parties in the Chapter 11 case. The case facilitator should be in constant dialogue with the debtor and establish appropriate contact with

representatives of the debtor's major stakeholder groups. The latter would include any official committee, as well as any ad hoc committees that are active in the case.¹⁸⁰ In fact, the case facilitator model may reduce litigation regarding official committee composition and requests for the *512 appointment of additional official committees.¹⁸¹ The case facilitator would be a contact point for all stakeholders.

2. The Case Facilitator's Role

The case facilitator would use her meetings with the debtor and stakeholders to gather and share information and assist the parties in assessing the strengths and weaknesses of their respective positions, the potential risks and costs associated with those positions, and other factors influencing the debtor's case. The debtor still would be the primary party responsible for developing and proposing a plan of reorganization.¹⁸² The case facilitator would act primarily in its named role: reviewing the proposed plan options and working with the parties to help them identify the best option.¹⁸³

Notably, the case facilitator would not independently assess or make recommendations to the bankruptcy court regarding the parties' positions or the debtor's reorganization options. This distinction is important to preserve the case facilitator's independence and avoid *513 conflicts that might arise if she is asked to perform both judgmental and facilitative functions.¹⁸⁴ Although this type of hybrid role may be desirable in some cases, it would be the exception rather than the rule. As discussed below, this distinction also places the role of the case facilitator outside of that traditionally reserved for a trustee or examiner.

The limited role of the case facilitator in evaluating and recommending courses of action would not restrict the case facilitator's ability to signal information to the bankruptcy court and stakeholders. The case facilitator would necessarily evaluate the facts of the case in drafting her written reports for the court. The case facilitator's ability to send a negative signal to the court regarding a particular party or the process generally would encourage parties to cooperate more fully with the case facilitator.

The case facilitator would have the discretion to pursue her facilitator role in an informal or more formal mediation setting.¹⁸⁵ For example, if the parties are not cooperating as fully or timely as necessary, the case facilitator may elect to treat the matter as a formal mediation, requiring the affected parties to submit position statements.¹⁸⁶ These statements would identify the particular party's position, support for that position, suggestions for additional discovery, and the party's representative with authority to act on the party's *514 behalf.¹⁸⁷ The parties' representatives then would be required to attend one or more mediation conferences.¹⁸⁸ A failed mediation may require the court's intervention either to resolve the matter or, perhaps, to entertain motions to convert or dismiss the case or appoint a Chapter 11 trustee.

3. The Case Facilitator's Compensation

The case facilitator would be paid for her services from the bankruptcy estate and should be permitted to retain professionals to assist in performing her duties.¹⁸⁹ The terms governing case facilitator compensation and professional retention could be similar to those applicable to panel bankruptcy trustees.¹⁹⁰ For example, the compensation paid to the case facilitator could be tied to the value of the debtor's assets, and her ability to retain professionals and incur other expenses could be limited by the court based on the size and complexity of the case.¹⁹¹ This type of scaled, flat-rate compensation scheme would help control costs. And like panel trustees, a case facilitator should be subject to removal for cause upon the request of the debtor or a party in interest or sua sponte by the court.¹⁹²

B. The Third-Party Neutral Panel

The case facilitator proposal requires effective third-party neutrals. Effective third-party neutrals in turn need to be qualified and free from conflicts of interest. Accordingly, uniform standards should *515 govern the third-party neutral panels established in each jurisdiction.¹⁹³

The standards could follow those applicable to mediator panels under alternative dispute resolution programs. For example, licensed attorneys who practice in the bankruptcy field could apply to serve as a case facilitator. The applicant would be required to, among other things, certify that she is in good standing with the bar, has completed appropriate mediation training, and is willing to serve as a court-appointed case facilitator in at least one Chapter 11 case per year.¹⁹⁴ The third-party neutral panel could be an extension of the jurisdiction's existing panel of bankruptcy trustees.

Panel applicants also should understand that, when serving as case facilitators, they are an officer of the court, but they are not an advocate for any particular party in the Chapter 11 case. Panel applicants could be required to take an oath to that effect or certify their *516 commitment to that charge on a periodic basis.¹⁹⁵ Any panel applicant who deviates from this basic principle should be removed from the panel and subjected to appropriate sanctions by the presiding court.

Once placed on the third-party neutral panel, panelists should be required to submit periodic disclosures to the court or the U.S. trustee regarding their active bankruptcy representations.¹⁹⁶ This disclosure will assist the court and the U.S. trustee in monitoring potential conflicts of interests. Moreover, if a panelist is approached to act as the case facilitator in a Chapter 11 case, she should be required to disclose immediately any actual or potential conflicts or relationships in the case. The case facilitator must be completely disinterested and free from conflict in any assigned case.

C. Case Facilitator and Prepackaged Bankruptcies

The Bankruptcy Code permits debtors to solicit acceptances of a plan of reorganization prior to filing a Chapter 11 case.¹⁹⁷ This process commonly is called a prepackaged Chapter 11 case, and it typically results in a quick reorganization. Prepackaged Chapter 11 cases can be completed in as few as sixty days, provided there are no complications in the confirmation process.¹⁹⁸

The case facilitator proposal does not undercut the value of prepackaged Chapter 11 cases. In fact, it may enhance that process and make it a more viable option for distressed companies. For example, the court could waive the case facilitator requirement in a prepackaged case. Alternatively, the debtor and its stakeholders could approach a member of its jurisdiction's third-party neutral panel prior to filing any case and seek her assistance in negotiating the prepackaged plan.¹⁹⁹ Debtors in the United Kingdom have invoked this type *517 of pre-filing involvement by a third party (i.e., the administrator) with some success.²⁰⁰ A third-party neutral may even help the parties reach an out-of-court workout and avoid a Chapter 11 filing altogether. A third-party neutral would need to conduct any prepetition activities carefully and mindful of her duties as a potential case facilitator in the matter.

D. Value of the Case Facilitator Proposal

As a descriptive matter, the case facilitator proposal adds significant value to the Chapter 11 process. It provides the court with objective and timely status reports, which will help courts make more informed decisions. It provides an automatic investigation mechanism to uncover wrongful or illegal conduct that might have contributed to the debtor's financial distress. It allows more stakeholders to have a seat at the negotiating table by identifying a neutral court official to seek out, hear, and consider stakeholder concerns regarding the case. Finally, it enhances the alternative dispute resolution aspects of bankruptcy by introducing a trained mediator into the plan negotiating process.

As a practical matter, parties and critics likely will highlight the additional administrative layer added to the Chapter 11 process by the case facilitator proposal.²⁰¹ The proposal does add another party to the Chapter 11 process and imposes additional fees and expenses on the bankruptcy estate. The primary objectives of the proposal are, however, to streamline the process and improve communication, thereby fostering quicker reorganizations and less litigation. These objectives have the potential to reduce the overall cost of Chapter 11 cases and add value that offsets any expenses associated with the case facilitator's appointment.²⁰²

***518 1. Using Mediation to Control Costs**

Although not specifically contemplated by the Bankruptcy Code, courts have used techniques similar to mediation and plan facilitators in Chapter 11 cases.²⁰³ Courts typically make these appointments pursuant to their inherent authority to manage their dockets, their limited equitable powers under [§ 105 of the Bankruptcy Code](#), and various rules encouraging alternative dispute resolution in the federal courts.²⁰⁴ Some courts also allow the parties in bankruptcy cases to request mediation through their local bankruptcy rules.²⁰⁵

Courts typically invoke a mediation technique, either sua sponte or at the request of a party in interest, in cases where the parties have reached an impasse. For example, in the Chapter 11 cases of *In re R.H. Macy & Co.*,²⁰⁶ the court appointed a third-party mediator after the debtor failed to propose a confirmable plan during the first two years of the case.²⁰⁷ The court apparently was concerned that ongoing plan negotiations among the parties, without the intervention of an objective third party, would result in litigation and additional delay and expense.²⁰⁸ Notably, the parties reached consensus on a plan of reorganization “[w]ithin approximately five months of the appointment of the mediator.”²⁰⁹

Courts also have used mediation techniques to resolve claims against the debtor, including in the *In re Lehman Brothers Holdings Inc.*²¹⁰ Chapter 11 case and in the asbestos context.²¹¹ These claims resolution facilities generally have enabled the bankruptcy estate to resolve a large number of claims on an expedited basis and at a cost-savings to the estate.²¹² Although mediators do not always produce consensual or estate-maximizing resolutions, anecdotal evidence suggests that the potential benefits outweigh any potential burdens imposed by the additional administrative procedures.

2. Response to Potential Increased Costs

The case facilitator proposal seeks to draw on prior uses of mediation in bankruptcy and integrate mediation techniques into Chapter 11. The proposal would introduce mediation at the commencement of the case, and parties would expect and understand this element of the process. Consequently, Chapter 11 cases would not linger uncertainly for years before the court or an interested party introduced mediation concepts.

Overall, the case facilitator proposal has the potential to reduce rather than increase costs. The integration of mediation early in the Chapter 11 process could have substantial operational and cost-saving benefits for the debtor and the bankruptcy estate. In addition, as discussed in Part V.A.3, linking the case facilitator's compensation to asset value and limiting her expenditures would help ensure that costs correspond to the size and complexity of the Chapter 11 case.

E. The Case Facilitator Versus the Chapter 11 Trustee/Examiner

Another potential critique of the case facilitator proposal is that the Bankruptcy Code already contemplates the appointment of a trustee if the parties act in bad faith or, in extreme circumstances, cannot ***520** reach a consensus on a reorganization plan.²¹³ Alternatively, parties can request the appointment of an examiner to investigate the debtor's or other parties' conduct. In theory, courts simply could invoke these remedies more frequently. In practice, this expanded use of existing remedies--

particularly Chapter 11 trustees--would meet intense resistance and would not enhance the communication and negotiation that are necessary to resolve Chapter 11 cases in an expeditious and cost-effective manner.

A Chapter 11 trustee, even when appointed with limited powers, is viewed as stripping the debtor of any meaningful say in the reorganization process and almost ensuring a sale or liquidation of the debtor's business.²¹⁴ Whether or not this perception is accurate, it permeates corporate America and much of the bankruptcy bar. This perception may relate to the history of Chapter 11, specifically Chapter X of the Bankruptcy Act.²¹⁵ Even if the role of the Chapter 11 trustee were changed substantively under the Bankruptcy Code, psychological barriers likely would prevent its successful implementation.²¹⁶

More importantly, the case facilitator is significantly different in scope and purpose than a traditional bankruptcy trustee or examiner.²¹⁷ The appointment of a trustee or examiner involves finger-pointing and suggestions of misconduct; the appointment of a case *521 facilitator would not.²¹⁸ The case facilitator would not have authority to take control of the debtor's business or the Chapter 11 case. She likewise would not have authority to extinguish creditors' claims, convert the case to a liquidation or recommend a course of action to the court. Rather, her primary focus would be facilitating communication and negotiation among the parties. Consequently, the case facilitator should not be viewed as a threat to the autonomy of the DIP or any other party in the Chapter 11 case.

In addition, cases still may warrant the appointment of a traditional Chapter 11 trustee.²¹⁹ The case facilitator's reports may reveal facts supporting the appointment of a trustee or the pursuit of claims against certain parties. The case facilitator would not recommend or pursue those actions, but she may provide relevant information to the court and stakeholders. In that respect, the case facilitator may provide sufficient information to the parties that may eliminate the need for any examiner.²²⁰

F. Fostering the Dual Goals of Chapter 11

The goals of Chapter 11 generally are defined as rehabilitating the debtor and maximizing returns to creditors.²²¹ The case facilitator proposal would help courts and debtors achieve these dual goals. As discussed above, it would introduce an objective third party into the process at an early stage, providing all parties with more information and in turn a greater ability to assess the debtor's restructuring options.²²² This attribute alone may help avoid prolonged disputes about the basic question of whether the debtor should reorganize or liquidate.

*522 Moreover, the proposal's focus on conflict resolution may preserve value for the estate. Conflicts and competing restructuring plans among the debtor and the stakeholders can cost the estate millions; money otherwise available for investment in the debtor's operations or payments to creditors.²²³ Either use would better serve the underlying goals of Chapter 11. In sum, the case facilitator proposal seeks to provide the court, the debtor, and the stakeholders with much-needed information and a dispute resolution framework to foster the parties' opportunities for success.

Conclusion

Chapter 11 and the U.S. DIP model are important tools for distressed corporations. They offer a debtor the ability to reassess its operational structure and financial obligations in a relatively safe and stable environment, at least at the outset of the case. This environment can change quickly on a debtor, however, under internal pressures from the board or management or, more likely, external pressures from key stakeholders. The Chapter 11 process and debtors could benefit from an objective reporting and mediation tool--i.e., a case facilitator.

The case facilitator proposal is based on a third-party neutral platform and would not displace the traditional role of DIPs or stifle the voice of stakeholders in the process.²²⁴ Rather, it would place an objective party at the negotiation table to enhance

communication among the parties themselves and the court, and it would integrate mediation techniques into the process to facilitate quicker and less litigious resolutions.²²⁵ The case facilitator proposal would not eliminate all conflict in Chapter 11 cases. It would, however, better balance and mitigate competing interests in the case and better equip the court to evaluate any unresolved conflict.

Accordingly, as courts and policymakers consider the utility of Chapter 11, they should consider implementing the case facilitator proposal. Courts arguably could invoke this technique on a case-by-case basis under existing provisions of the Bankruptcy Code, but it would be a more effective mechanism if adopted on a uniform basis as part of the Bankruptcy Code itself.²²⁶ The early intervention of a third-party neutral into the reorganization process could save critical time and money and, consequently, the debtors themselves.

Footnotes

© 2011 University of Notre Dame. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format, at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the Notre Dame Law Review, and includes this provision and copyright notice.

^{a1} Associate Professor of Law, University of Maryland School of Law. I would like to thank Juliet Moringiello, Nancy Rapoport, Robert Rhee, Jana Singer, and Fred Tung for their comments on earlier drafts of this article. I also benefited from discussions with Daniel Keating, Charles Tabb, Ray Warner, Alan White, and the other participants in the 2010 Association of American Law Schools Annual Meeting, Debtor and Creditor Section; the 2009 Association of American Law Schools Mid-Year Meeting, Transaction Law Section; the 2009 Law and Society Annual Meeting; and faculty colloquia at Widener University School of Law and the University of Maryland School of Law. In addition, I appreciate the assistance of my very talented research assistant, John Lentz. Nevertheless, all opinions, errors and omissions in this Article are my own. Finally, I thank the University of Maryland School of Law and the University of Nebraska-Lincoln College of Law for financial support.

¹ Associated Press, President Rejects GM, Chrysler Rescue Plans: Obama Warns Cash Infusion Could Be Last, *Bos. Globe*, Mar. 31, 2009.

² Steven Mufson & Tomoe Murakami Tse, In Chrysler Saga, Hedge Funds Cast as Prime Villain: Firms Say They Were Right to Hold Out, *Wash. Post*, May 1, 2009, at A14.

³ See, e.g., Michael J. de la Merced, Chrysler Appears Set to Leave Bankruptcy, *N.Y. Times*, June 10, 2009, at B1 (explaining litigation regarding and final approval of Chrysler-Fiat transaction); Tomoe Murakami Tse, Chrysler Deal with Fiat Hits Legal Road Bump, *Wash. Post*, June 4, 2009, at A17 (explaining terms of Chrysler-Fiat transaction); see also Affidavit of Ronald E. Kolka in Support of First Day Pleadings at 26-38, *In re Chrysler LLC*, No. 09-50002-ajg (Bankr. S.D.N.Y. Apr. 30, 2009) (explaining restructuring negotiations leading to Chrysler-Fiat transaction).

⁴ See, e.g., Douglas G. Baird & Robert K. Rasmussen, [Chapter 11 at Twilight](#), 56 *Stan. L. Rev.* 673, 675 (2003) ("Even in the cases most resembling the traditional reorganization, creditor control is the dominant theme. Indeed, if the experience of large businesses leaving Chapter 11 in 2002 is any guide, those at the helm do the bidding of the creditors throughout the case."); see also M. Todd Henderson, [Paying CEOs in Bankruptcy: Executive Compensation When Agency Costs Are Low](#), 101 *Nw. U. L. Rev.* 1543, 1558-64 (2007) (explaining creditor control opportunities in Chapter 11 and how that control affects the debtor's conduct); George W. Kuney, [Hijacking Chapter 11](#), 21 *Emory Bankr. Dev. J.* 19, 24-25 (2004) (explaining the shift in control of restructurings to secured creditors and exploring the effects of that shift); Harvey R. Miller, [Chapter 11 in Transition--From Boom to Bust and into the Future](#), 81 *Am. Bankr. L.J.* 375, 387 (2007) (explaining the gradual marginalization of the debtor's role in Chapter 11 and noting that "[i]n 1978 Congress intended that the debtor-in-possession would be the driving force of a chapter 11 reorganization"); James H.M. Sprayregen et al., Chapter 11: Not Perfect, but Better Than the Alternatives, 14 *J. Bankr. L. & Prac.*, No. 6, 2005 at 3-5 (explaining perceived changes in Chapter 11 process and theories supporting those changes). For a thoughtful analysis of the development of, and changes in, secured creditor rights in the insolvency context, see Thomas E. Plank, [The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy](#), 59 *Md. L. Rev.* 253 (2000).

- ⁵ See, e.g., Miller, *supra* note 4, at 385 (“The chapter 11 process, as contemplated in 1978, has been overwhelmed by marginalization of the debtor-in-possession, expansion of creditor (particularly secured creditor) control, the increasing imposition of creditor designated chief restructuring officers (‘CROs’), claims trading, more complex debt and organizational structures, short-term profit motivation and, of course, greed gratified by claims trading, acquisitions and litigation.”).
- ⁶ See Robert K. Rasmussen, Where Are [All the Transnational Bankruptcies? The Puzzling Case for Universalism](#), 32 *Brook. J. Int’l L.* 983, 1001 (2007) (observing that “[t]hose creditors who want no part of bankruptcy have an exit option: they can sell out to the various hedge funds that take a stake in many cases” and explaining debt strategies of hedge funds and similar investors).
- ⁷ See Douglas G. Baird & Robert K. Rasmussen, The [Prime Directive](#), 75 *U. Cin. L. Rev.* 921, 939 n.43 (2007) (“For those who fret that bankers have a culture that makes them overly cautious, one need only remember that many of today’s lenders are not traditional banks. Private hedge funds are on the prowl for investments that promise above market returns.”).
- ⁸ See, e.g., Douglas G. Baird, Acceptance Remarks: [Bankruptcy’s Undiscovered Country](#), 25 *Emory Bankr. Dev. J.* 1, 7 (2008) (“The [new Chapter 11] process itself resembles the takeover battles we see outside of bankruptcy. Corporate raiders square off against each other in a bidding war, just as they would in a hostile takeover.”); Douglas G. Baird & Robert K. Rasmussen, [Private Debt and the Missing Lever of Corporate Governance](#), 154 *U. Pa. L. Rev.* 1209, 1226-28 (2006) (explaining the shift in control to creditors and illustrating effects of this shift through a case study of the Warnaco Chapter 11 case); David A. Skeel, Jr., [Creditors’ Ball: The “New” New Corporate Governance in Chapter 11](#), 152 *U. Pa. L. Rev.* 917, 931-33 (2003) (explaining ways that creditors seek to assert control over Chapter 11 debtors).
- ⁹ See discussion *infra* Part III; see also Stephen J. Lubben, [Credit Derivatives and the Future of Chapter 11](#), 81 *Am. Bankr. L.J.* 405, 427-29 (2007) (discussing creditor conflicts created by hedging debt positions and other credit derivative practices, including empty plan voting).
- ¹⁰ See [11 U.S.C. § 1107\(a\)](#) (2006) (providing that “a debtor in possession shall have all the rights ... and powers, and shall perform all the functions and duties ... of a trustee serving in a case under” Chapter 11); see also [In re Cenargo Int’l. PLC](#), 294 B.R. 571, 599 n.32 (Bankr. S.D.N.Y. 2003) (“There is no question that a debtor in possession is a fiduciary, like a chapter 11 trustee, for the estate, creditors and shareholders.” (citing [CFTC v. Weintraub](#), 471 U.S. 343 (1985); [In re Bidermann Indus., U.S.A., Inc.](#), 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997))).
- ¹¹ See Rutheford B. Campbell, Jr. & Christopher W. Frost, [Managers’ Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware \(and Elsewhere\)](#), 32 *J. Corp. L.* 491, 493, 509 nn.83-86 (2007) (“[W]hen the company enters bankruptcy and is operating under Chapter 11, the cases hold or suggest that the obligation [of the debtor’s management] is to maximize the total interests of creditors and shareholders as a whole.”); A. Mechele Dickerson, [Privatizing Ethics in Corporate Reorganizations](#), 93 *Minn. L. Rev.* 875, 878-86 (2009) (explaining the fiduciary duties of directors and officers in and outside of insolvency); see also [In re Count Liberty, LLC](#), 370 B.R. 259, 276 (Bankr. C.D. Cal. 2007) (“When the debtor is a corporation, the debtor in possession’s fiduciary obligations to the corporation, its creditors and shareholders, fall upon the officers and directors.”).
- ¹² See, e.g., [In re Fas Mart Convenience Stores](#), 265 B.R. 427, 432 (Bankr. E.D. Va. 2001) (“Members of the committee also have another duty—a fiduciary duty to all creditors represented by the committee.” (citing [In re Pierce](#), 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999); [In re First Republic Bank Corp.](#), 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988)); [In re Firstplus Fin.](#), 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000) (“In a Chapter 11 case, an Unsecured Creditors’ Committee is appointed by the Office of the United States Trustee and owes a fiduciary duty to act on behalf of all unsecured creditors.”)).
- ¹³ See, e.g., Christopher W. Frost, The [Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations](#), 72 *Am. Bankr. L.J.* 103, 103 (1998) (“Protected from the normal contractual and market forces that restrain the behavior of managers of healthy companies, managers of firms in bankruptcy, the harshest critics charge, use delay and other strategies to enrich themselves and the shareholders at the expense of the firm’s creditors.”).
- ¹⁴ See Harvey R. Miller & Shai Y. Waisman, Is [Chapter 11 Bankrupt?](#), 47 *B.C. L. Rev.* 129, 170 (2005) (“Excessive creditor control remains undesirable because such influence may cause the debtor’s operations to be managed solely in the interests of the particular controlling creditor group, thereby foreclosing the debtor’s restructuring options.”).
- ¹⁵ See, e.g., Carl A. Eklund & Lynn W. Roberts, The [Problem with Creditors’ Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function](#), 5 *Am. Bankr. Inst. L. Rev.* 129, 129 (1997) (noting that a creditor’s “acceptance of an active

participatory role in a bankruptcy proceeding through service on a committee is most likely motivated by each committee member's interest in obtaining the maximum possible return on its claim"); Mark J. Krudys, [Insider Trading by Members of Creditors' Committee--Actionable!](#), 44 DePaul L. Rev. 99, 124-27 (1994) (explaining conflict and self-interest issues posed by committee members continuing to trade in the debtor's equity or debt); see also Kurt F. Gwynne, [Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code](#), 14 Am. Bankr. Inst. L. Rev. 109, 120-26 (2006) (explaining potential conflicts for committee members, including competing fiduciary duties).

¹⁶ See 11 U.S.C. § 541(a)(1) (2006) (explaining that the filing of a bankruptcy petition creates an estate comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case").

¹⁷ The case facilitator would not displace the DIP and would not have standing to file formal motions or litigation in the Chapter 11 case. See *infra* Part V (describing the case facilitator proposal). Rather, the case facilitator would perform the functions of a third-party neutral and serve primarily the court while assisting the debtor and its stakeholders. For a general discussion of the need for neutrality in bankruptcy, see Jay Lawrence Westbrook, [The Control of Wealth in Bankruptcy](#), 82 Tex. L. Rev. 795, 825-27 (2004). See also Michelle M. Harner, [Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives](#), 16 Am. Bankr. Inst. L. Rev. 69, 74 n.23, 106-07 (2008) (discussing a concept similar to the case facilitator in context of empirical study regarding distressed debt investors and referencing the "neutral manager" posited by Professor Westbrook (citing Westbrook, *supra*, at 825-27)).

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part V.

²⁰ See, e.g., [Toibb v. Radloff](#), 501 U.S. 157, 163-64 (1991) (discussing two traditional goals of Chapter 11); [In re Aurora Cord & Cable Co.](#), 2 B.R. 342, 346 (Bankr. N.D. Ill. 1980) ("The essence of Chapter 11, however, is to prevent the unnecessary dismemberment of viable corporations and to provide a maximum distribution to creditors who would be likely to receive nothing in the event of liquidation."); [H.R. Rep. No. 95-595](#), at 220 (1978); [S. Rep. No. 95-989](#), at 10 (1978); see also [United States v. Whiting Pools, Inc.](#), 462 U.S. 198, 203 (1983) ("By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" (citation omitted)); Elizabeth Warren, [Bankruptcy Policymaking in an Imperfect World](#), 92 Mich. L. Rev. 336, 419 (1993) (discussing traditional goals of Chapter 11).

²¹ For example, the Bankruptcy Code authorizes the DIP to challenge and avoid certain pre-petition transfers to creditors made within the ninety days before the filing of the Chapter 11 case (or one year for transfers to insiders) or made with actual or constructive intent to defraud creditors. See 11 U.S.C. §§ 547, 548.

²² See *infra* Part III.

²³ See, e.g., Jonathan C. Lipson, [The Shadow Bankruptcy System](#), 89 B.U. L. Rev. 1609, 1662 (2009) ("In the old days, people wanted to see two things: to get paid and to see the company survive. Today, people only want one thing: to get paid." (quoting Interview by Jonathan C. Lipson with Private Investigator No. 3 (July 14, 2009))); Westbrook, *supra* note 17, at 844 (describing incentive problems inherent in creditor control: "creditor control risks realization of substantially less than the full value of the asset being sold"); see also Jamie Mason, [Every Man for Himself, Deal](#), Mar. 20, 2009, <http://www.thedeal.com/newsweekly/features/every-man-for-himself.php> ("Bankruptcies are negotiating bazaars. There are many constituencies--the debtor, lenders, creditors of all kinds, potential acquirers.... It's often a scrum, with every man and woman for themselves.").

²⁴ [368 B.R. 383 \(Bankr. D. Del. 2007\)](#).

²⁵ In Foamex International, Shell Chemical resigned from the creditors' committee after the debtor assumed its executory contract. See Order Pursuant to [Section 365\(a\) of the Bankruptcy Code](#) Authorizing Foamex L.P. to Assume an Executory Contract, as Amended, with Shell Chemical LP, [In re Foamex Int'l, Inc.](#), 368 B.R. 383 (No. 05-12685-PJW); Amended Notice of Appointment of Committee of Unsecured Creditors, [In re Foamex Int'l, Inc.](#), 368 B.R. 383 (No. 05-12685-PJW) (noting that it was "[a]mended to reflect resignation of Shell Chemical from the Committee as of December 1, 2006").

²⁶ Ch. 7 Case No. 04-43098 (Bankr. N.D. Ga. Aug. 19, 2004).

- ²⁷ David Wighton, \$10.9m Settles Insider Trading Case, *Fin. Times*, May 31, 2007, at 24 (describing the allegations against Barclays Capital regarding trading in Galey & Lord securities based on inside information).
- ²⁸ No. 02-02474 (Bankr. N.D. Ill. Feb. 26, 2003).
- ²⁹ Disclosure Statement with Respect to First Amended Joint Plan of Reorganization of Kmart Corp. & Its Affiliated Debtors & Debtors-in-Possession at 74, *In re Kmart*, No. 02-02474; see also Michelle M. Harner, The [Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing](#), 77 *Fordham L. Rev.* 703, 725-27 (2008) (discussing ESL Investment's use of committee position to propose plan under which it acquired control of reorganized company).
- ³⁰ See, e.g., Peter Lattman, Bankrupt, *Forbes* (Oct. 31, 2005), <http://www.forbes.com/forbes/2005/1031/060.html> (describing Chapter 11 examiner's criticism of committee counsel's role in creditors' disputes in the FiberMark case).
- ³¹ See Daniel Gross, The Rise of the 'Empty Creditor', *Slate* (Apr. 21, 2009, 3:01 PM), <http://www.slate.com/id/2216604> ("Goldman didn't care that it would wipe out its AIG arrangements, because it had already hedged its exposure to AIG--through contracts, credit-default swaps, or other derivatives."); see also Lipson, *supra* note 23, at 1648-49 (discussing emerging issues with empty voting and similar creditor strategies in Chapter 11).
- ³² [Van D. Greenfield, Exchange Act Release No. 52,744 \(Nov. 7, 2005\)](#) (remedial sanctions and cease-and-desist order), available at <http://www.sec.gov/litigation/admin/34-52744.pdf>.
- ³³ *Id.* at 8.
- ³⁴ See, e.g., [In re Exide Techs.](#), 303 B.R. 48, 60 (Bankr. D. Del. 2003) (endorsing, in a valuation dispute between debtor and committee, committee's assertion that "plans providing management and/or senior creditors with the majority of stock or options in the reorganized company (as in the Debtor's Plan) is a strong indicator that the company is being undervalued, resulting in a windfall for management and the senior creditors"); see also *infra* Part III.B (discussing debtor-committee conflict).
- ³⁵ See *infra* Part III.
- ³⁶ See also Lipson, *supra* note 23, at 1624 ("[T]here are important gaps between the informational architecture of the Bankruptcy Code and the federal securities laws. Shadow bankruptcy exploits these gaps.").
- ³⁷ See *infra* Parts II.B.3, III.C, V.E.
- ³⁸ The U.S. Constitution grants Congress the power to "pass uniform laws on the subject of bankruptcy." [U.S. Const. art. I, § 8, cl. 4](#). Congress made three early attempts at federal bankruptcy legislation before achieving long-term legislation under the 1898 Bankruptcy Act. These early attempts--the 1800 Act, the 1841 Act, and the 1867 Act--first targeted merchant involuntary bankruptcies, but then included voluntary and involuntary bankruptcies for all parties other than corporations. See Charles Jordan Tabb, The [History of the Bankruptcy Laws in the United States](#), 3 *Am. Bankr. Inst. L. Rev.* 5, 14-19 (1995). The 1867 Act eventually permitted corporations to act as debtors and introduced the concept of composition (i.e., debt repayment plans) as an alternative to liquidation. *Id.* at 19-20.
- ³⁹ The history of U.S. bankruptcy law has been explored in depth in several excellent sources. See, e.g., David A. Skeel, Jr., *Debt's Dominion* (2001); Charles Warren, *Bankruptcy in United States History* (1935); Tabb, *supra* note 38. Accordingly, this Article only highlights developments relevant to the balance of power between fiduciaries and beneficiaries in Chapter 11.
- ⁴⁰ See Skeel, *supra* note 39, at 56-60 (explaining development of equity receiverships); Tabb, *supra* note 38, at 21-23 (same); see also Donald R. Korobkin, [Rehabilitating Values: A Jurisprudence of Bankruptcy](#), 91 *Colum. L. Rev.* 717, 747-49 (1991) (describing development and use of equity receiverships); Bruce A. Markell, [Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations](#), 44 *Stan. L. Rev.* 69, 74-77 (1991) (describing the development of the absolute priority rule with respect to railroads).
- ⁴¹ See Daniel J. Bussel, [Coalition-Building Through Bankruptcy Creditors' Committees](#), 43 *UCLA L. Rev.* 1547, 1553-55 (1996) (explaining general process followed in equity receiverships).

- [42](#) See Tabb, *supra* note 38, at 22 (“In form, the receivership resulted in the sale of the debtor’s assets, with the proceeds distributed to creditors. In substance, however, the entire elaborate proceeding often resulted in old management retaining control of the enterprise, and dictating the terms of the sale.”).
- [43](#) See Skeel, *supra* note 39, at 59 (“Counsel who have acted frequently for reorganization committees have spent a great many anxious hours preparing for the unexpected bidder, but in my own experience he has never appeared Manifestly in most sales where the security holders ... have ... placed their interest in the hands of a committee there is not likely to be serious competition at the sale.” (quoting Paul Cravath, a lawyer who represented committees in equity receivership cases)).
- [44](#) See *id.* at 57-60 (explaining application of equity receiverships to general businesses); Tabb, *supra* note 38, at 21-23 (same).
- [45](#) See Tabb, *supra* note 38, at 22 (“In practice, the equity receivership came to be dominated by insiders, and was subject to much abuse.”).
- [46](#) See Bussel, *supra* note 41, at 1556-57 (explaining the abuse of equity receiverships and Justice Douglas’s criticism of the process).
- [47](#) Justice Douglas conducted a study of equity receiverships during his tenure with the SEC. See SEC, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937) [hereinafter SEC Report].
- [48](#) See Skeel, *supra* note 39, at 60 (noting that creditors who did not support the proposed reorganization plan were entitled to receive their pro rata share of the “upset price,” which typically was set at ten to eighty percent below the market value of the debt).
- [49](#) See SEC Report, *supra* note 47, at 315-16 (recommending that “measures be taken to free committees operating in that field from material conflicts of interest”).
- [50](#) To Amend the Securities Act of 1933: Hearing Before the H. Comm. on Interstate and Foreign Commerce, 75th Cong. 24 (1937) (statement of William O. Douglas, Comm’r, SEC).
- [51](#) See Bussel, *supra* note 41, at 1555-56 (noting that section 77B was “aptly described as the old equity receivership reorganization pressed upon a bankruptcy mold, with additions” (internal quotation marks omitted)).
- [52](#) See, e.g., [Barlow v. Budge](#), 127 F.2d 440, 443 (8th Cir. 1942) (“The unfavorable business conditions which prevailed during the 1930s are a matter of common knowledge. Businessmen were urged to continue operations in the face of adverse conditions, to prevent further unemployment and in the hope that their businesses might survive. Legislation, both state and national, was enacted to prevent individuals and corporations from going to the wall.”). Notably, Congress adopted similar reorganization provisions for railroads in 1933 under section 77 of the 1898 Bankruptcy Act. See Bankruptcy Act of 1898, ch. 541, § 77, 30 Stat. 544 (repealed 1978); Skeel, *supra* note 39, at 54, 106. For a judicial account of the development of the railroad provisions, see Cont’l [Ill. Nat’l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co.](#), 294 U.S. 648, 670-75 (1935).
- [53](#) See Bussel, *supra* note 41, at 1556 (describing key elements of section 77B).
- [54](#) See SEC Report, *supra* note 47, at 84 (“[77B] preserved and, in some cases, even accentuated certain defects in the earlier procedures.”); see also Skeel, *supra* note 39, at 101-13 (detailing Justice Douglas’ involvement in the campaign to reform section 77B and his role in the SEC Report); Tabb, *supra* note 38, at 28 (explaining the role of various bankruptcy studies and reports, in addition to the SEC Report, in the passage of the Chandler Act).
- [55](#) See Tabb, *supra* note 38, at 29.
- [56](#) Pub. L. No. 75-696, 52 Stat. 840 (repealed 1978).
- [57](#) For a judicial account of the development of the Chandler Act of 1938, see [SEC v. Am. Trailer Rentals Co.](#), 379 U.S. 594, 603-07 (1965).
- [58](#) See Bussel, *supra* note 41, at 1557-58 (explaining key elements of Chapter X).

- ⁵⁹ See *id.* (explaining key elements of Chapter XI); see also Dickerson, *supra* note 11, at 888-89 (describing treatment of debtors and their management under Chapter X versus Chapter XI).
- ⁶⁰ See Bussel, *supra* note 41, at 1558 (explaining roles of committees under Chapter X and Chapter XI).
- ⁶¹ See *id.*
- ⁶² See Skeel, *supra* note 39, at 123-27 (explaining the general negative corporate reaction to Chapter X and noting that “[t]he independent trustee requirement discouraged the managers of large firms from filing for bankruptcy if there was any way to avoid it”).
- ⁶³ Bankruptcy Reform Act of 1978, [Pub. L. No. 95-598, 92 Stat. 2549](#) (codified as amended at [11 U.S.C. §§ 101-1300](#) (2006)); see *id.* at 125-27; see also Dickerson, *supra* note 11, at 890 (“The harsh treatment managers received in Chapter X discouraged managers from using that Chapter and ultimately caused Chapter XI to become the dominant reorganization vehicle for even large, publicly-traded companies that ostensibly should have filed under the trustee-controlled Chapter X.”).
- ⁶⁴ See Skeel, *supra* note 39, at 136-41 (explaining events leading to enactment of the Bankruptcy Code); Tabb, *supra* note 38, at 31-37 (same).
- ⁶⁵ See Tabb, *supra* note 38, at 35 (“Another notable feature of the 1978 law was the merger of the reorganization chapters into a single chapter.”).
- ⁶⁶ See Skeel, *supra* note 39, at 176-77 (explaining general proposals of the National Bankruptcy Review Commission and the National Conference of Bankruptcy Judges and noting that “[c]riticism by the bankruptcy bar and bench was muted at times, and the early hearings even included a few notes of support for the existing regime”).
- ⁶⁷ See *id.* at 177 (“Similarly, there was broad support for the Bankruptcy Commission’s proposal to soften the requirement that trustees be appointed in large cases, by making the trustee presumptive, rather than mandatory.”).
- ⁶⁸ See *id.*
- ⁶⁹ See *id.*
- ⁷⁰ See Bussel, *supra* note 41, at 1559 (explaining key elements of Chapter 11).
- ⁷¹ See Tabb, *supra* note 38, at 35 (explaining that Congress rejected the Commission’s proposal for a “Bankruptcy Administrator,” but adopted “a pilot program utilizing ‘United States trustees’ as administrative officers”).
- ⁷² See, e.g., Miller, *supra* note 4, at 387 (noting that Congress enacted certain provisions of the Bankruptcy Code to induce reluctant debtors to file Chapter 11 cases, including: “administrative provisions that provided protections for the debtor, including the automatic stay; the ability to use, sell or lease property, including the cash collateral and other collateral security of a secured creditor; the ability to assume or reject executory contracts and unexpired leases of non-residential real property; and, importantly, the ability to obtain credit and offer to lenders material enhancements for lending to a debtor-in-possession”). For example, prior to the 2005 amendments to the Bankruptcy Code, courts generally were very liberal in granting extensions of the debtor’s exclusive period to file and solicit acceptances of a plan of reorganization. See, e.g., *In re Ionosphere Clubs, Inc.*, No. 89-10448 (Bankr. S.D.N.Y. May 12, 1999) (extending the debtor’s exclusive period for approximately six years). The 2005 amendments to the Bankruptcy Code place a firm expiration on the debtor’s exclusive periods-- i.e., eighteen months for its exclusive period to file a plan and twenty months for its exclusive period to solicit acceptance of the plan. See [11 U.S.C. § 1121\(d\)](#) (2006).
- ⁷³ See, e.g., Kuney, *supra* note 4, at 24-25 (explaining creditor influence over bankruptcy legislation); Miller, *supra* note 4, at 387 (“Using that piece of special interest legislation [referring to [section 1110 of the Bankruptcy Code](#)] as a foundation, other creditor groups pressed Congress for legislative containment of the bankruptcy court and the debtor-in-possession’s powers. Congress has been generous in responding to the ‘needs’ of these special interest groups.”).
- ⁷⁴ [11 U.S.C. § 1107\(a\)](#); see also *id.* § 1101(1) (defining “debtor in possession”).
- ⁷⁵ *Id.* § 1102(a)(1); see also *id.* § 1102(b)(1) (“[A creditors’ committee] shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee”).

- ⁷⁶ See id. § 1103 (describing duties of statutory committees); see also Greg M. Zipes & Lisa L. Lambert, [Creditors' Committee Formation Dynamics: Issues in the Real World](#), 77 Am. Bankr. L.J. 229, 231 (2003) ("Congress specifically allowed committees to 'consult with the trustee or debtor concerning the administration of the case,' to evaluate the debtor's financial dealings and current financial condition so the committee can evaluate the case's viability and the prospects for a plan, to negotiate plan terms, and to seek the appointment of a trustee or examiner." (quoting 11 U.S.C. § 1103(c)(1))).
- ⁷⁷ See, e.g., [In re PWS Holding Corp.](#), 228 F.3d 224, 246 (3d Cir. 2000) ("Section 1103(c) of the Bankruptcy Code, which grants to the Committee broad authority to formulate a plan and perform 'such other services as are in the interest of those represented,' has been interpreted to imply both a fiduciary duty to committee constituents and a limited grant of immunity to committee members." (quoting 11 U.S.C. 1103(c)); [In re Envirodyne Indus.](#), 174 B.R. 955, 964 (Bankr. N.D. Ill. 1994) ("Both trustees and official committees are the creation of the Code and their duties are governed under the Code. In addition, both trustees and members of official committees owe fiduciary duties to their respective constituencies." (citation omitted)).
- ⁷⁸ With respect to DIPs, see, for example, [Commodity Futures Trading Commission v. Weintraub](#), 471 U.S. 343, 355 (1985), which noted that "if a debtor remains in possession--that is, if a trustee is not appointed--the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession"; [Biltmore Associates, LLC v. Twin City Fire Insurance Co.](#), 572 F.3d 663 (9th Cir. 2009), which stated that "the debtor in possession of the bankruptcy estate [is] empowered to act as a trustee and required to act as a fiduciary for its creditors and shareholders"; [In re Insilco Technologies, Inc.](#), 480 F.3d 212, 215 n.3 (3d Cir. 2007), which noted that "[w]hen acting as debtor in possession, the debtor is bound by all of the fiduciary duties of a bankruptcy trustee"; [In re Cenargo International, PLC](#), 294 B.R. 571, 599 n.32 (Bankr. S.D.N.Y. 2003), which stated that "[t]here is no question that a debtor in possession is a fiduciary, like a chapter 11 trustee, for the estate, creditors and shareholders." With respect to committees, see, for example, [Jacobson v. AEG Capital Corp.](#), 50 F.3d 1493, 1500 (9th Cir. 1995), which stated that "[a] committee has a fiduciary responsibility to represent the best interests of their constituency"; [Westmoreland Human Opportunities, Inc. v. Walsh](#), 327 B.R. 561, 573 (Bankr. W.D. Pa. 2005), noting general fiduciary duty of creditors' committees and explaining "the existence of a fiduciary relationship among the committee members as they are serving each other as well as the unsecured creditors not selected as members of the committee"; [In re Fas Mart Convenience Stores, Inc.](#), 265 B.R. 427, 432 (Bankr. E.D. Va. 2001), which stated that "[m]embers of the committee also have another duty--a fiduciary duty to all creditors represented by the committee"; and [In re Firstplus Financial, Inc.](#), 254 B.R. 888, 894 (Bankr. N.D. Tex. 2000), which stated that "[i]n a Chapter 11 case, an Unsecured Creditors' Committee is appointed by the Office of the United States Trustee and owes a fiduciary duty to act on behalf of all unsecured creditors." See also C.R. Bowles, Jr. & Nancy B. Rapoport, [Has the DIP's Attorney Become the Ultimate Creditors' Lawyer in Bankruptcy Reorganization Cases?](#), 5 Am. Bankr. Inst. L. Rev. 47, 53-54 (1997) (explaining fiduciary duties of the DIP).
- ⁷⁹ Cases suggesting that a statutory committee has some duty to the bankruptcy estate generally arise in the context of court approval of the committee's professional's fees or professional compensation for other parties in interest. See, e.g., [Mfrs. Hanover Trust Co. v. Bartsh](#) ([In re Flight Transp. Corp. Secs. Litig.](#)), 874 F.2d 576, 581 (8th Cir. 1989) (ruling on a request for payment of an indenture trustee's professional fees and observing that "unlike the trustee, the debtor-in-possession and the official creditors' committee, which are entities with fiduciary obligations to the bankruptcy estate, an indenture trustee owes its fiduciary duty to the debenture holders, not the bankruptcy estate"). But see [Official, Unsecured Creditors' Comm. v. Stern](#) ([In re SPM Mfg. Corp.](#)), 984 F.2d 1305, 1315 (1st Cir. 1993) ("While a creditors' committee and its members must act in accordance with the provisions of the Bankruptcy Code and with proper regard for the bankruptcy court, the committee is a fiduciary for those whom it represents, not for the debtor or the estate generally.").
- ⁸⁰ Tamar Frankel, [Fiduciary Law](#), 71 Calif. L. Rev. 795, 800 (1983); see also Ernest Vinter, [A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts](#) 1 (3d ed. 1955) (explaining nature of fiduciary relationship); Robert Cooter & Bradley J. Freedman, [The Fiduciary Relationship: Its Economic Character and Legal Consequences](#), 66 N.Y.U. L. Rev. 1045, 1046 (1991) (noting different theories of fiduciary duties and observing that "[i]n any of these paradigmatic forms, a beneficiary entrusts a fiduciary with control and management of an asset").
- ⁸¹ Unlike the beneficiaries of traditional fiduciary relationships, these stakeholders are not solely dependent on the DIP and the committee. A debtor's creditors, equity holders and other parties in interest have standing to appear and be heard on most any issue raised in the Chapter 11 case. See 11 U.S.C. § 1109(b). Nevertheless, not every stakeholder gets a seat at the negotiating table, and thus their practical ability to protect their own interests is limited by the process itself.
- ⁸² See, e.g., [Lange v. Schropp](#) ([In re Brook Valley VII, Joint Venture](#)), 496 F.3d 892, 900 (8th Cir. 2009) (explaining that, in the bankruptcy context, "[t]he fiduciary obligation consists of two duties: the duty of care and the duty of loyalty"); [Ad Hoc Comm. of](#)

[Equity Holders of Tectonic Network, Inc. v. Wolford](#), 554 F. Supp. 2d 538, 558 n.135 (D. Del. 2008) (explaining the duty of good faith as a subset of the duty of loyalty in the bankruptcy context).

83

See, e.g., [In re Brook Valley](#), 496 F.3d at 900-01 (“The duty of loyalty comes into play when there appears to be a conflict between the interests of the fiduciary and the entity to which he owes loyalty. For a debtor in possession, this duty ‘includes an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety, to treat all parties to the case fairly and to maximize the value of the estate.’” (quoting 7 Collier on Bankruptcy § 1107.02(4) (Lawrence P. King ed., 15th rev. ed. 2006))); [Westmoreland Human Opportunities, Inc. v. Walsh](#), 246 F.3d 233, 256 (3d Cir. 2001) (“A committee member violates its fiduciary duty by pursuing a course of action that furthers its self-interest to the potential detriment of fellow committee members.”); [Official Comm. of Unsecured Creditors of Apex Global Info. Servs., Inc. v. Qwest Commc'ns Corp.](#), 405 B.R. 234, 252 (Bankr. E.D. Mich. 2009) (“[I]t is evident that participation on the unsecured committee is accompanied and undergirded with fiduciary responsibilities which obligate members to ‘act with undivided loyalty for the benefit of all of the unsecured creditors.’” (quoting [In re ABC Auto. Prods. Corp.](#), 210 B.R. 437, 441 (Bankr. E.D. Pa. 1997))); [In re First RepublicBank Corp.](#), 95 B.R. 58, 61 (Bankr. N.D. Tex. 1998) (“A conflict of interest that amounts to a breach of that fiduciary duty constitutes the type of conflict that would mandate removal of the creditor from the committee.”).

84

See, e.g., [In re Brook Valley](#), 496 F.3d 892 (affirming lower court's decision holding that debtor's partners breached fiduciary duty of loyalty by consenting to foreclosure sale of debtor's assets and then bidding on assets at sale); [Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims](#), 323 F.3d 228, 234-36 (3d Cir. 2003) (affirming lower court's decision subordinating claims of insider/director of debtor for breaching fiduciary duty by, among other things, purchasing claims against debtor at a discount price, withdrawing support for debtor's original bankruptcy plan and pursuing competing plan); [In re Nutritional Sourcing Corp.](#), 398 B.R. 816, 835 (Bankr. D. Del. 2008) (denying plan confirmation where creditors' committee negotiated and approved settlement detrimental to a certain class of unsecured creditors not specifically represented by a committee member); [Official Comm. of Equity Sec. Holders of Adelphia Commc'ns Corp. v. Adelphia Commc'ns Corp. \(In re Adelphia Commc'ns Corp.\)](#), 371 B.R. 660, 673 (Bankr. S.D.N.Y. 2007) (affirming lower court's withdrawal of equity committee's derivative standing because “the Equity Committee is so far out of the money, it would have an inherent conflict of interest in controlling any litigation against the banks”), [aff'd](#), 544 F.3d 420 (2d Cir. 2008); [In re Count Liberty, LLC](#), 370 B.R. 259, 277 (Bankr. C.D. Cal. 2007) (holding debtor, through the conduct of its president, in contempt of cash collateral order, as evidence showed misappropriation of estate funds); [In re Adelphia Commc'ns Corp.](#), 336 B.R. 610, 670-73 (Bankr. S.D.N.Y. 2006) (observing that “[d]ebtors also have the duty to avoid conflicts of interest and the appearance of impropriety, and to treat all parties to the case fairly” and, accordingly, granting ad hoc committee's motion to require recusal of debtors from litigation and negotiations among creditors regarding interdebtor disputes), [aff'd](#), 342 B.R. 122 (S.D.N.Y.); [In re Fibermark, Inc.](#), 330 B.R. 480 (Bankr. D. Vt. 2005) (describing dispute among creditors' committee members regarding alleged breaches of fiduciary duties and claims trading order); [In re Malkus, Inc., No. 03-07711](#), 2004 WL 3202212, at *3-4 (Bankr. M.D. Fla. Nov. 15, 2004) (denying plan confirmation where debtor, through principals, ignored court orders and failed to adhere to duties under Bankruptcy Code); [In re Venturelink Holdings, Inc.](#), 299 B.R. 420 (Bankr. N.D. Tex. 2003) (holding that creditors' committee member had a disqualifying conflict of interest where he received large sums of money prepetition while serving as the debtor's chairman of the board); [In re Coram Healthcare Corp.](#), 271 B.R. 228 (Bankr. D. Del. 2001) (denying plan confirmation where the debtor's CEO also had a consulting contract with one of the debtor's largest noteholders); [Locks v. U.S. Tr.](#), 157 B.R. 89, 91 (Bankr. W.D. Pa. 1993) (affirming lower court's holding that a creditors' committee member's “advocacy on behalf of [future asbestos claimants] violated his pre-existing fiduciary duty to prepetition claimants, posing a conflict of interest that required dismissal of his Motion”).

85

See, e.g., [Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02 Civ. 6274 \(GBD\)](#), 2003 U.S. Dist. LEXIS 18149, at *23 (S.D.N.Y. Oct. 9, 2003) (analyzing different interests represented by single creditors' committee and observing that “[s]uch conflicts are not unusual in reorganization” [and] [i]n indeed, ‘they are inherent in all bankruptcy cases,’ and ‘inevitable’ in complex cases, such as the jointly administered one at bar” (quoting [In re Altair Airlines, Inc.](#), 727 F.2d 88, 90 (3d Cir. 1984); [In re Sharon Steel Corp.](#), 100 B.R. 767, 770 (Bankr. W.D. Penn. 1989))); see also Harvey R. Miller, [Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations](#), 23 Seton Hall L. Rev. 1467, 1468 (1993) (“The directors of the debtor as DIP continue to owe the twin fiduciary duties of care and loyalty to both the creditors and stockholders of the debtor corporation. However, these beneficiaries often have conflicting interests as to the administration of a bankruptcy case, the development of a plan of reorganization, or any alternative. These conflicts become even more aggravated when the corporation is insolvent.”).

86

See Alison Grey Anderson, [Conflicts of Interest: Efficiency, Fairness and Corporate Structure](#), 25 UCLA L. Rev. 738, 760 (1978) (proposing special conflict of interest rules because “violations of fiduciary duty are frequently very difficult to detect”).

- 87 See Dickerson, *supra* note 11, at 888-900 (explaining the requirements for appointing a Chapter 11 trustee and observing that “[t]hough the Code provides that managers can be replaced or supervised by a public trustee, trustee appointments are, and always have been, rare”); see also Kelli A. Alces, [Enforcing Corporate Fiduciary Duties in Bankruptcy](#), 56 U. Kan. L. Rev. 83, 84-85 (2007) (noting the rarity of trustee appointments and arguing that Chapter 11 trustees, rather than derivative lawsuits, are a more effective means of disciplining management of a distressed company).
- 88 See 11 U.S.C. § 1104 (2006) (explaining grounds to support appointment of Chapter 11 trustee); see also *In re Sharon Steel Corp.*, 871 F.2d 1217, 1228 (3d Cir. 1989) (affirming lower court’s order appointing Chapter 11 trustee and explaining requirements of § 1104 of the Bankruptcy Code).
- 89 11 U.S.C. § 1104(a)(1), (2).
- 90 The stigma attaching to a bankruptcy trustee also may be to blame. This possibility and its relation to the case facilitator proposal is discussed *infra* Part V.E.
- 91 See 11 U.S.C. § 1106(a)(1) (defining a Chapter 11 trustee’s duties, in part, by reference to the duties of a trustee under Chapter 7 of the Bankruptcy Code).
- 92 See *id.* § 1106(a)(5) (requiring Chapter 11 trustee to “file a plan under [section 1121](#) of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case”).
- 93 Compare *id.* § 1106(a)(3) (giving Chapter 11 trustee discretion to continue to operate the debtor’s business with no explicit time restrictions), with *id.* § 721 (“The court may authorize the [Chapter 7] trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.”).
- 94 *Id.* § 1104(c) (providing that, under certain circumstances, “the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate”).
- 95 Frost, *supra* note 13, at 114; see also Harvey R. Miller & Shai Y. Waisman, [Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?](#), 78 Am. Bankr. L.J. 153, 189 (2004) (“Once the plan is presented, the bankruptcy court is without means to independently assess the plan’s feasibility and overcome the weight of the combined creditors and submerged debtors appearing before it urging confirmation.”).
- 96 See *supra* Part II.B.3; see also Eklund & Roberts, *supra* note 15, at 130 (“The problem is that although all creditors can understand and share the same basic goal of maximizing the estate and the return for their creditor class, there exists inherent conflicts between creditors.”).
- 97 See, e.g., A. Mechele Dickerson, [A Behavioral Approach to Analyzing Corporate Failures](#), 38 Wake Forest L. Rev. 1, 23 (2003) (“Moreover, even if market controls discourage directors from making decisions that cause the firm’s insolvency, the ‘final period’ problem will make managers indifferent to market controls once the firm becomes insolvent. The final period problem arises when a person fears that she is about to lose her job and senses that she will be unable to secure equal or better employment.”); Sean J. Griffith, [Deal Protection Provisions in the Last Period of Play](#), 71 Fordham L. Rev. 1899, 1947 (2003) (exploring how management self-interest biases affect decision making and stating that “[a]n analysis of management and director behavior reveals several cognitive biases that may contribute to sub-optimal decision-making in the last period of play”); Park McGinty, [The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism](#), 46 Emory L.J. 163, 208-09 (1997) (explaining structural bias and management bias toward either shareholders or creditors and how bias might impact corporate governance and insolvency); see also Stephen J. Lubben, [Some Realism About Reorganization: Explaining the Failure of Chapter 11 Theory](#), 106 Dick. L. Rev. 267, 292-93 (2001) (suggesting that management-shareholder bias is a myth, at least in the insolvency context where management likely will favor interests of creditors).
- 98 See, e.g., Martin J. Bienenstock, [Conflicts Between Management and the Debtor in Possession’s Fiduciary Duties](#), 61 U. Cin. L. Rev. 543, 546 (1992) (“Second, if two or more classes of creditors exist to negotiate with, management may be more partial to the class that wants to retain management on the best terms to operate the business of the reorganized debtor. In both situations, management has a fiduciary duty to do what is best for the estate and creditors, and has a potentially conflicting interest in doing what is best for management.”); Steve H. Nickles, [Behavioral Effect of New Bankruptcy Law on Management and Lawyers: Collage of Recent Statutes and Cases Discouraging Chapter 11 Bankruptcy](#), 59 Ark. L. Rev. 329, 379 (2006) (“Acrimony [and conflict between

debtors and creditors] seem[] likely to increase if, as this article suggests, the new bankruptcy law increases the risks of liability for management. Creditors will become more emboldened and aggressive against management, and management will become more defensive with respect to creditors.”); see also Eklund & Roberts, *supra* note 15, at 130 (“Creditors who serve on official committees, whose goal is to divvy an insufficient pie, are susceptible to the pressure of conflicts in their individual capacities.”); Carolyn Okomo, *ALF to Send Plan to Creditors*, Deal, Mar. 26, 2008 (noting that debtor was seeking to remove its former parent company from the creditors' committee for alleged breaches of fiduciary duty that included offering employment positions to the debtor's employees); cases cited *supra* note 84.

⁹⁹ See *supra* notes 5-8 and accompanying text.

¹⁰⁰ See, e.g., [Contrarian Funds, LLC v. Westpoint Stevens, Inc. \(In re Westpoint Stevens, Inc.\)](#), 333 B.R. 30, 34 (Bankr. S.D.N.Y. 2005) (describing costly control contest between one group of creditors led by investor Wilbur Ross and another group of creditors led by Carl Icahn); [In re A.V.B.I., Inc.](#), 143 B.R. 738, 738-39 (Bankr. C.D. Cal. 1992) (describing control contest between former management and shareholders that resulted in an unconfirmable plan proposing only a nominal distribution to unsecured creditors); see also H. Slayton Dabney, Jr. & Richelle Eisendrath, *When Hedge Funds Compete*, Am. Bankr. Inst. J., Dec. 2007/Jan. 2008, at 22 (describing control contests and related consequences in the Chapter 11 cases of *In re Delphi Corp.*, Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. Oct. 14, 2005), *In re Dana Corp.*, Ch. 11 Case No. 06-10354 (Bankr. S.D.N.Y. Mar. 13, 2006), and [In re Granite Broadcasting, Inc.](#), 369 B.R. 120 (Bankr. S.D.N.Y. 2007)); Edward B. Rock & Michael L. Wachter, *Corporate Control Transactions: Introduction*, 152 U. Pa. L. Rev. 463, 470 (2003) (noting prevalence of control contests in Chapter 11 cases).

¹⁰¹ A zero-sum game typically exists where a gain for one party necessarily results in a loss to another party. See, e.g., Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091, 1096 (“The contest between debtor and creditor is almost always zero-sum”); James J. White, [Failure and Forgiveness: A Review](#), 73 Am. Bankr. L.J. 435, 447 (1999) (“[B]ankruptcy is usually a zero sum game, where more for me is less for you”); see also David Gray Carlson, [Secured Lending as a Zero-Sum Game](#), 19 Cardozo L. Rev. 1635, 1637 (1998) (explaining general theory behind zero-sum principle and its application in secured lending context).

¹⁰² See Donald S. Bernstein, *A Reorganization Lawyer's Perspective on Professor Warren's Vanishing Trials: The New Age of American Law*, 79 Am. Bankr. L.J. 942, 946 (2005) (“Though legal scholars have from time to time raised questions about why a senior class would compromise its right to invoke the absolute priority rule, the cost of litigating the issue, the delay involved and the uncertainty involved in valuation litigation without a market test often can be sufficient incentives to motivate the senior class to settle.”). But see [Motorola, Inc. v. Official Comm. of Unsecured Credits & JPMorgan Chase Bank \(In re Iridium Operating LLC\)](#), 478 F.3d 452 (2d Cir. 2007) (revoking settlement between committee and senior lenders that allocated estate funds to a litigation vehicle in violation of the absolute priority rule). The absolute priority rule, codified in §§ 1129(b) and 726 of the *Bankruptcy Code*, requires that claims and interests be paid according to their seniority in the debtor's capital structure and that a senior class be paid in full before any distributions are made to junior classes.

¹⁰³ See Henderson, *supra* note 4, at 1568 & n.127 (“While the market for the debt and trade claims of distressed firms is growing, it remains a small component of traditional debt and equity markets, and is inhabited largely by firms that specialize in this type of investing.”); see also Marjorie L. Girth, [Rethinking Fairness in Bankruptcy Proceedings](#), 73 Am. Bankr. L.J. 449, 470-71 (1999) (“Another significant fairness concern arising in the context of claims trading is the buyer's potential to acquire enough claims to block the confirmation of any Chapter 11 plan that it deemed unsatisfactory.”).

¹⁰⁴ For a description of the strategies and objectives of distressed debt investors, see data and sources discussed in Harner, *supra* note 17.

¹⁰⁵ Ch. 11 No. 05-1251 (Bankr. N.D. Ga. May 2, 2006).

¹⁰⁶ [369 B.R. 120 \(Bankr. S.D.N.Y. 2007\)](#).

¹⁰⁷ Ch. 11 No. 02-02474 (Bankr. N.D. Ill. Feb. 26, 2003).

¹⁰⁸ [353 B.R. 820 \(Bankr. D. Del. 2006\)](#).

¹⁰⁹ Ch. 11 No. 06-10578(KJC) (Bankr. D. Del. June 12, 2006).

¹¹⁰ See, e.g., Cynthia A. Baker, [Other People's Money: The Problem of Professional Fees in Bankruptcy](#), 38 Ariz. L. Rev. 35, 52-53 (1996) (exploring committee member self-interest in the retention of committee counsel and noting that “[t]he personal interests of

committee members may also lead to decisions to purchase professional services, where the benefit received is not shared by the entire constituency”).

- ¹¹¹ See Debtors' Motion Pursuant to [Sections 105, 363, 365 and 1146\(c\) of the Bankruptcy Code](#) and [Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure](#) Seeking Approval of: (I) A Form of Notice Regarding Certain Hearing Dates & Objection Deadlines; (II) New Provisions for Termination and for the Payment or Crediting of the Breakup Fee; (III) The Sale of Substantially All Assets of Adelphia Communications Corp. & Its Affiliated Debtors to Time Warner NY Cable LLC & Certain Other Assets to Comcast Corp. Free & Clear of Liens, Claims, Encumbrances, & Interests & Exempt from Applicable Transfer Taxes; (IV) The Retention, Assumption &/or Assignment of Certain Agreements, Contracts & Leases; & (V) The Granting of Related Relief at 4-13, [In re Adelphia Commc'ns Corp., 336 B.R. 610 \(Bankr. S.D.N.Y. 2006\)](#) (No. 02-41729 (REG)).
- ¹¹² See id.; see also [In re Adelphia Commc'ns Corp., 359 B.R. 54, 58-59 \(Bankr. S.D.N.Y. 2006\)](#) (detailing certain aspects of the intercreditor disputes).
- ¹¹³ See [In re Adelphia Commc'ns Corp., 368 B.R. 140, 242 \(Bankr. S.D.N.Y. 2007\)](#) (holding that plan was fair and equitable in part because “[t]he expense and delay occasioned by the continued litigation ... would prejudice”).
- ¹¹⁴ Ch. 11 No. 05-20022 (PJW) (Bankr. D. Del. Nov. 7, 2007).
- ¹¹⁵ No. 04-10463 (Bankr. D. Vt. Aug. 16, 2005), available at http://online.wsj.com/public/resources/documents/WSJ-HarveMiller_report.pdf.
- ¹¹⁶ See Motion for an Order Pursuant to [Sections 361, 363 & 364 of the Bankruptcy Code \(1\)](#) Authorizing the Debtors to Obtain Postpetition Financing, (2) Authorizing the Use of Cash Collateral, (3) Authorizing Repayment of Certain Prepetition Secured Debt, (4) Granting Liens & Superpriority Administrative Expense Status, (5) Providing Adequate Protection & (6) Scheduling & Approving the Form & Method of Notice of Final Hearing at 7, In re Am. Remanufacturers, Ch. 11 No. 05-20022 (PJW); In re Am. Remanufacturers, Inc., Ch. 7 No. 05-20022 (PJW) (Bankr. D. Del. Nov. 17, 2007) (converting Chapter 11 cases to Chapter 7 cases).
- ¹¹⁷ See In re Am. Remanufacturers, Inc., No. 05-20022 (PJW) (Bankr. D. Del. Nov. 17, 2007) (converting Chapter 11 cases to Chapter 7 cases); see also Fitch Ratings, A Case Study Approach to U.S. Second-Lien Leveraged Loan Recovery Expectations 5 (2007) (“A member of the company's senior lender group subsequently purchased the company's inventory assets at a fire sale for \$ 7.7 million.”); David Peress & Thomas C. Prinzhorn, Nontraditional Lenders and the Impact of Loan-to-Own Strategies on the Restructuring Process, Am. Bankr. Inst. J., Apr. 2006, at 48, 57 (“After four days of confusing disputes about definitions of third parties, priming and subordination, the company lawyers informed the court that the company had run out of cash and converted to a chapter 7 liquidation.”). The sale proposed in the debtor's original Chapter 11 filing was valued at approximately \$32 million. See Motion for Order Authorizing & Approving (A) An Asset Purchase Agreement Subject to Higher & Better Offers, (B) Sale of Substantially All of the Debtors' Assets, Free & Clear of Liens, Claims, Encumbrances & Interests, (C) Assumption & Assignment of Certain Executory Contracts, (D) Assumption of Certain Liabilities, & (E) Granting Related Relief at 3, In re Am. Remanufacturers, Inc., No. 05-20022 (PJW) (Bankr. D. Del. Nov. 7, 2005) (describing original sale terms).
- ¹¹⁸ See Report of Harvey R. Miller, as Examiner at 12, In re FiberMark, No. 04-10463.
- ¹¹⁹ Ch. 11 No. 09-10443 (Bankr. D. Del.); see Bill Rochelle, Bashas', Flying J, Charter, Pliant, Touse: Bankruptcy (Update 1), Bloomberg (July 15, 2009), <http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=MSFT:US&sid=AssOhkekB0bI> (describing conflict between first-lienholders, second lienholders and unsecured creditors and competing plans).
- ¹²⁰ Ch. 11 No. 08-13412 (BLS) (Bankr. D. Del. Feb. 23, 2009); see, e.g., Debtors' Motion to Convert Cases from Chapter 11 to Chapter 7 of the Bankruptcy Code, In re eToys Direct 1, LLC, No. 08-13412 (BLS) (explaining dispute among debtors, pre-petition first lienholders, prepetition second lienholders, creditors' committee, and post-petition lenders and requesting conversion of Chapter 11 cases as a result of the parties' inability to resolve dispute). The parties in the eToys Chapter 11 cases ultimately settled their dispute, allowing the sale of the debtors' assets to proceed in Chapter 11. See Order Approving Settlement Agreement with Mutual Release Among the Debtors, the Committee, & the Lenders at Exhibit A, In re eToys Direct 1, LLC, No. 08-13412 (BLS) (Bankr. D. Del. Mar. 18, 2009) (approving settlement agreement).
- ¹²¹ See, e.g., Marie Beaudette, Calpine Urges Court to Keep Consulting Firm on Chapter 11 Case, Associated Press, Oct. 5, 2007 (shareholders' committee objected to debtor's retention of consulting firm because of alleged conflict of interest, which debtor and

creditors' committee claimed was resolved); Okomo, *supra* note 98 (committee seeking appointment of trustee and debtor seeking to remove its former parent company from the creditors' committee for alleged breaches of fiduciary duty that included offering employment positions to the debtor's employees); Viewpoint, *Montgomery Ward: Genuine Reorganization or GECC's Fig Leaf?*, 34 Bankr. Ct. Dec. (LRP) 1 (Apr. 27, 1999) (detailing dispute between the committee, on the one hand, and the debtor and GECC (the debtor's controlling shareholder, postpetition lender and creditor), on the other); Will Debtors Wielding Rule 2019 Prompt Hedge Fund Retreat, 47 Bankr. Ct. Dec. (LRP) 4 (Mar. 27, 2007) (explaining conflict between debtor and ad hoc committee of shareholders regarding committee's disclosure obligations and noting that committee had objected to the debtor's request to extend exclusivity and valuation and was requesting the appointment of an examiner); Liz McKenzie, *Creditors Win Bid to End Fremont Plan Exclusivity*, Law360 (July 15, 2009), <http://www.law360.com/articles/11532> (reporting that court granted creditors' committee's motion to terminate Fremont General Corporation's exclusive period to file a plan); Evan Weinberger, *Creditors Seek Block on Lyondell Exec Payouts*, Law360 (July 20, 2009), <http://www.law360.com/articles/112218> (explaining basis of creditors' committee's objection to Lyondell Chemical Company's employee retention plan). Disputes between a debtor and one or more of its committees also can lead to the appointment of a Chapter 11 trustee or examiner. See, e.g., [In re Sonicblue Inc., No. 03-51775, 2007 WL 926871 \(Bankr. N.D. Cal. Mar. 26, 2007\)](#) (order appointing Chapter 11 trustee where debtor's counsel issued a prepetition opinion letter to bondholders now controlling committee and whose claims were subject to challenge by the debtor and junior creditors); Shannon D. Murray, *Nellson to Seek End to Probe, Deal*, July 12, 2007 (reporting that debtor and ad hoc committee of first lienholders were asking court to revoke appointment of examiner, which was triggered by dispute with creditors' committee).

¹²² See generally Michael P. Richman & Jonathan E. Aberman, *Creditors' Committees Under the Microscope: Recent Developments Highlight Hazards of Self-Dealing*, Am. Bankr. Inst. J., Sept. 2007, at 22 (describing conflict between debtors and committees and among committee members and discussing cases in which committee member self-interest posed obstacles to the debtor's restructuring plan).

¹²³ For example, in support of its objection to Lyondell's executive retention plan, the creditors' committee alleged that the debtor's management breached its fiduciary duties and was liable for mismanagement with respect to the debtor's prepetition business affairs. See Weinberger, *supra* note 121. Likewise, a committee can scrutinize a debtor's prepetition transactions and determine whether they contributed in an illegal or inappropriate way to the debtor's financial demise. See, e.g., Jamie Mason, *Steve & Barry's Back in Chapter 11*, Deal, Nov. 21, 2008 (committee challenging prepetition transaction between debtor and private equity firm, in which the private equity firm acquired a fifty percent stake in the debtor).

¹²⁴ See Randall J. Newsome, [Vanishing Trials--What's the Fuss All About?](#), 79 Am. Bankr. L.J. 973, 973 (2005) (discussing decrease in bankruptcy litigation and the role of negotiation and compromise in that development); Judge Barr Praises Professionals in Centis Bankruptcy, 43 Bankr. Ct. Dec. (LRP) 5 (July 28, 2004) ("I appreciate all of the effort that went into the 'behind-the-scenes' process which is always necessary to the things the court doesn't see but we sense" (quoting Judge James N. Barr)).

¹²⁵ See discussion *supra* Part II.B.3.

¹²⁶ See Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751 (2002) (exploring the shift from corporate reorganizations to corporate liquidations and causes underlying that shift); Alan Schwartz, [A Contract Theory Approach to Business Bankruptcy](#), 107 Yale L.J. 1807, 1851 (1998) ("The Essay's central claim is captured in a variation on a trendy slogan: Privatize bankruptcy."); discussion *supra* Part II.B.3.

¹²⁷ A similar conflict issue exists for any professional manager retained by a company, commonly called a chief restructuring officer, at the behest of creditors. See Dickerson, *supra* note 11, at 918-27 (explaining use of chief restructuring officers, which Professor Dickerson characterizes as "private trustees" and potential issues with their retention).

¹²⁸ See *infra* note 129; see also Ziad Raymond Azar, [Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide](#), 16 Cardozo J. Int'l & Comp. L. 279, 283, 289-302 (2008) (noting the adoption of Chapter 11-style provisions by several countries and analyzing, among other things, whether countries displace management completely or partially under corporate insolvency laws); Jay Lawrence Westbrook, [A Global Solution to Multinational Default](#), 98 Mich. L. Rev. 2276 (2000) (reviewing global bankruptcy reform measures).

¹²⁹ For example, a trustee, receiver or other court-appointed official is mandated (either to displace or monitor the debtor) under the corporate reorganization laws of Belgium, Canada, China, France, Germany, Italy, Japan, Spain, and the United Kingdom. See, e.g., Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, § 11.7(1) (Can.); () [Law of Insolvency] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) arts. 22, 73 (Chin.), translated in Bankr. Law &

Restructuring Research Ctr., China Univ. of Politics & Law, Enterprise Insolvency Law of the People's Republic of China (2007), available at http://transnationallawblog.typepad.com/transnational_law_blog/files/ChinaBankoLaw2007.pdf; Insolvency Act, 1986, c. 45, §§ 1(2), 32, Sch. B1 (Eng.), available at Insolvency Act of 1986, Legislation.gov.uk, <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=2519933>; Code de commerce [C. com.] arts. L621-8, L631-9 (Fr.), available in English at http://195.83.177.9/upl/pdf/code_32.pdf; Insolvenzordnung [InsO] [Insolvency Act], Oct. 5, 1994, Bundesgesetzblatt [BGBL.] at 2866, §§ 56, 274 1994 I (Ger.); Vittorio Lupoli & Andrea De Tomas, Global Legal Grp., The International Comparative Legal Guide to Corporate Recovery and Insolvency: Italy 132 (2008), available at <http://www.iclg.co.uk/khadmin/Publications/pdf/2012.pdf> (explaining that in Italy, “[t]he Bankruptcy Court appoints the judge in charge of the procedure and the official receiver. The judge directs the whole procedure and authorises the extraordinary administration acts proposed by the official receiver”); Alberto Núñez-Lagos Burguera & Ángel Alonso Hernández, Global Legal Grp., The International Comparative Legal Guide to Corporate Recovery and Insolvency: Spain 215 (2008), available at <http://www.iclg.co.uk/khadmin/Publications/pdf/2024.pdf> (explaining that in Spain, “[d]uring the common phase, the Judge will appoint the members of the trustees panel, whose main function is to determine the debtor's estate and existing debts, and to control the management of the debtor's business”); European Judicial Network, Bankruptcy--Belgium, Eur. Commission (May 31, 2006), http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_bel_en.htm (last updated May 31, 2006) (stating that in Belgium, the Commercial Court designates at least one receiver pursuant to Judicial Administrative Act §15(1)(2) and the court designates at least one liquidator in the process of Bankruptcy pursuant to section 11(1) of the Bankruptcy Act of August 8, 1997, Belgisch Staatsblad [B.S.] [Official Gazette of Belgium], Oct. 28, 1997).

¹³⁰ See 2 Michael J. MacNaughton et al., *Doing Business in Canada* § 12.05 (2009) (“Originally enacted during the Depression and attaining new prominence in the 1980's, the CCAA currently is the primary restructuring statute used in Canada for large corporate enterprises.”). A corporation must be insolvent and have aggregate liabilities of at least \$5 million to commence a case under the CCAA. *Id.* The insolvency requirement is defined by reference to Canada's Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (Can.), and Winding-Up and Restructuring Act, R.S.C. 1985, c. W-11 (Can.), which generally incorporate both the balance sheet and cash flow insolvency tests. In addition, “a debtor may be considered insolvent if the debtor faces a ‘looming liquidity crisis’ or is in the ‘proximity’ of insolvency even if it is making its obligations as they become due.” *Id.* “The principle purpose of the Companies' Creditors Arrangement Act is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.” *In re Federal Gypsum Co.*, [2007] N.S.J. 558 (Can. N.S.S.C.), 2007 NS.C. LEXIS 635, at *7 (citation omitted) (quoting *In re Juniper Lumber Co.*, [2000] N.B.J. 144 (Can. N.B.C.A.)). Certain amendments to the CCAA went into effect on September 18, 2009. The amendments generally seek “[t]o encourage restructuring of viable businesses as an alternative to bankruptcy [and to] provide increased predictability and consistency while preserving its flexibility.” Summary of Legislative Changes, Office of the Superintendent of Bankr. Can., <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html> (last updated Jan. 19, 2010).

¹³¹ See MacNaughton et al., *supra* note 130, § 12.02 (discussing the Bankruptcy and Insolvency Act). A corporation also may reorganize its business under the Bankruptcy and Insolvency Act, but its structure is more suitable for smaller companies and less complex reorganizations. *Id.* § 12.05.

¹³² For example, Quebecor World Inc. and its affiliated debtors simultaneously received orders sanctioning their Second Amended and Restated Plan of Reorganization and Compromise (in Canada) and confirming their Third Amended Joint Plan of Reorganization (in the United States). See, e.g., Press Release, Quebecor World's U.S. and Canadian Plans of Reorganization Approved by U.S. Bankruptcy Court and Quebec Superior Court (July 2, 2009), available at <http://www.reuters.com/article/pressRelease/idUS208777+02-Jul-2009+MW20090702>.

¹³³ See MacNaughton et al., *supra* note 130, § 12.05 (explaining how many critical components of a debtor's restructuring are left largely to the discretion of the court, with only vague, if any, statutory guidance). In general, a corporate debtor uses a CCAA proceeding to negotiate a plan of arrangement with its creditors that restructures its debt obligations. The plan must be approved by “[a] majority in number representing two thirds in value of the creditors, or class of creditors ... present and voting either in person or by proxy” and sanctioned by the court. R.S.C. 1985, c. C-36, § 6 (Can.).

¹³⁴ See R.S.C. 1985, c. C-36, § 11.7(1) (Can.) (“When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company.”).

¹³⁵ See Philip R. Wood, *Principles of International Insolvency* § 10-022 (2007) (“The monitor is usually an accounting firm.”). The CCAA requires that the monitor be a licensed “trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.” R.S.C. 1985, c. C-36, § 11.7(1) (Can.).

- ¹³⁶ See R.S.C. 1985, c. C-36, § 11.7 (Can.) (setting forth the role and duties of a monitor).
- ¹³⁷ In re Pine Valley Mining Corp., [2008] B.C.J. 637 (Can. B.C.S.C.), 2008 BC.C. LEXIS 702, at *14 (quoting Kevin P. McElcheran, Commercial Insolvency in Canada 236 (2005)).
- ¹³⁸ See Janis Sarra, Ethics and Conflicts, the Role of Insolvency Professionals in the Integrity of the Canadian Bankruptcy and Insolvency System, 13 Int'l Insolvency Rev. 167, 175 (2004) ("The introduction of the monitor in CCAA proceedings was in part a Canadian response to the US practice of having creditors' committees in Chapter 11 workouts"); see also Evan D. Flaschen, Suggestions for the National Bankruptcy Review Commission and Congress: [Independent Monitors in Chapter 11, 4 Am. Bankr. Inst. L. Rev. 514 \(1996\)](#) (suggesting the appointment of a monitor with powers similar to a Chapter 11 examiner in Chapter 11 cases); Yaad Rotem, [Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada, 3 Va. L. & Bus. Rev. 125, 150 \(2008\)](#) (proposing the Canadian monitor as an effective example of hybrid (i.e., some combination of the roles of a DIP and bankruptcy trustee) governance in insolvency proceedings).
- ¹³⁹ Rotem, *supra* note 138, at 147-50.
- ¹⁴⁰ For a discussion of the results of Air Canada's restructuring, see Press Release, Air Canada Expects to Record an Estimated \$235 Million of Operating Income Before Reorganization and Restructuring Items for the Third Quarter 2004 (Oct. 27, 2004), available at <http://www.aircanada.jp/news/jpen-20041027.pdf>.
- ¹⁴¹ See Mark Broude et al., An Overview of Global Insolvency Regimes, in *The Guide to Distressed Debt and Turnaround Investing* 31, 43-44 (2006) (explaining these three formal insolvency proceedings). French law also provides two additional pre-insolvency options, the mandataire ad hoc and the conciliation. See C. com. arts. L611-3, L611-4 (Fr.). A conciliation also is commonly called a composition, as the Commercial Code only refers to a "composition procedure" and "conciliators." See Clifford Chance LLP, European Insolvency Procedures 14 (2010), available at <http://www.cliffordchance.com/showimage/showimage.aspx?LangID=de&binaryname=/handout%20euro%C20insolvency%00procedures2.pdf> ("The Conciliation (Proce' dure de Conciliation) ... was introduced in 1984 and is governed by articles L.611-4 et seq. of the French Commercial Code.").
- ¹⁴² See C. com. art. L631-4 (Fr.) ("The commencement of these proceedings must be requested by the debtor at the latest within the forty-five days following the cessation of payments if the debtor has not, within this time limit, requested the commencement of conciliation proceedings.").
- ¹⁴³ See Chance, *supra* note 141, at 14; Broude et al., *supra* note 141, at 43-44 (explaining objectives of the safeguard). Safeguard Proceedings are "aimed at recovery if the debtor establishes that, although not insolvent, he is facing difficulties which he is unable to overcome on his own").
- ¹⁴⁴ Allen & Overy Bulleting, Road Testing the New French Safeguard Procedure (2006). Under a safeguard proceeding, the debtor works under the supervision of the court and the court-appointed officials to negotiate a restructuring plan. See C. com. art. L621-4 (Fr.) (explaining court appointments in proceeding). The plan must be approved by the court, after it has been submitted to the court nominee, controllers and certain other parties and the necessary assents are obtained. Id. art. L626-2 (listing plan requirements); id. arts. L626-9 to L626-11 (plan confirmation process).
- ¹⁴⁵ Id. art. L622-1 ("The management of the business shall be carried out by its manager."); id. art. L622-3 ("The debtor shall continue to carry out acts of disposal and management over his personal estate as well as to exercise rights and actions not included within the administrator's duties.").
- ¹⁴⁶ See id. art. L622-1 ("Where the Court, in accordance with the provisions of Article L621-4, appoints one or more administrators, it will assign them to jointly or individually supervise the debtor's management operations or to assist the debtor in all or some of the management."); id. art. L622-20 ("Only the court nominee appointed by the Court may act on behalf and in the general interest of the creditors."). The court nominee is essentially a representative for the creditors and serves as a liaison between the controllers (i.e., creditors appointed by the court to serve in an official capacity) and the court. Id.; see also id. art. L621-10 (discussing appointment of controllers).
- ¹⁴⁷ Id. art. L622-1. The provisions governing safeguard proceedings were amended in 2009 to, among other things, allow the debtor company to propose to the court the name of an individual to serve as the administrator. See, e.g., Freshfields Burckhaus Deringer LLP, Briefing: French Insolvency Law (2009), available at www.freshfields.de/publications/pdfs/2009/feb09/25197.pdf.

- [148](#) Id. art. L623-1 (requiring the administrator to draft a report regarding the debtor's economic and employment situation); id. art. L623-3 (requiring the administrator to consult with the court nominee and the court).
- [149](#) Id. art. L621-4, at 204 (“[T]he Court shall appoint two court nominees, that is, a court nominee and an administrator”).
- [150](#) Letter from Jacques Gounon, Chairman & Chief Exec., Group Eurotunnel, to Shareholders (Mar. 2009), available at <http://www.eurotunnel.com/NR/rdonlyres/C042C4A0-E42F-4040-AB6C-EDA5E1C1FA55/0/090310ETOnTrackMarch.pdf>.
- [151](#) See Laurent Assaya et al., *Autodis: A Surgical Restructuring à la Française*, Jones Day Comment., July 2009, at 1, 1-3, available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6484 (explaining the Autodis restructuring). The provisions governing safeguard proceedings were amended in 2010 to, among other things, permit an accelerated or “pre-pack” filing, similar to that accomplished in the Autodis safeguard proceeding. See, e.g., Benoît Fleury, *The French Accelerated Financial Safeguard (the French “Prepack”)*, Gibson Dunn (Oct. 14, 2010), <http://www.gibsondunn.com/publications/pages/FrenchAcceleratedFinancialSafeguard-FrenchPrepack.aspx>.
- [152](#) The United Kingdom's insolvency laws provide both rehabilitation and liquidation alternatives for insolvent corporations. The primary rehabilitation provision is administration, but corporations also may pursue rehabilitations using a composition (called a company voluntary arrangement (CVA)) or a scheme of arrangement. A CVA requires the appointment of a trustee to supervise the restructuring, as it proceeds largely as an out-of-court workout. See Insolvency Act, 1986, c. 45, § 1(2) (“A proposal under this Part is one which provides for some person (‘the nominee’) to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation; and the nominee must be a person who is qualified to act as an insolvency practitioner [or authorised to act as nominee, in relation to the voluntary arrangement].”) A scheme of arrangement requires a separate judicial proceeding and, consequently, may be used by an administrator in an administration. Companies Act, 2006, c. 46, §§ 895-900 (Eng.); see also Highlands Ins. Co., *Proposal in Relation to a Scheme of Arrangement 14-16* (May 1, 2009) (Eng.), available at <http://www.ukhighlands.com/circulars/Scheme%20Document.pdf> (explaining administration proceedings).
- [153](#) See 1986, c. 45, sch. B1 (Eng.). “Administration replaces the existing management and has the effect of imposing a stay on the enforcement of security or any other legal proceeding against the debtor without the consent of the court or the administrator.” Audrey Whitfill et al., *Jurisdiction Matters for Secured Creditors in Insolvency*, Standard & Poor's (Apr. 13, 2006), <http://www2.standardandpoors.com/portal/site/sp/en/ap/page.article/2,1,1,0,1145997583489.html>.
- [154](#) See Broude et al., *supra* note 141, at 41 (“Once appointed, the administrator basically displaces the company's directors and assumes broad executive authority and powers.”).
- [155](#) See 1986, c. 45, sch. B1 P P 14, 22 (Eng.).
- [156](#) See, e.g., David Jetuah, *Deloitte Called in for Wedgewood UK Administration*, Acct. Age (Jan. 5, 2009), <http://www.accountancyage.com/accountancyage/news/2233270/wedgewood-goes-receivership> (Wedgewood UK selected four partners from Deloitte to serve as administrators); John Oates, *Nortel UK Goes into Administration to Save Itself*, Enterprise (Jan. 15, 2009), http://www.channelregister.co.uk/2009/01/15/nortel_europe_administration (Nortel appointed Ernst and Young as its administrators); Setanta UK Goes into Administration, *Irishtimes* (June 23, 2009), <http://www.irishtimes.com/newspaper/breaking/2009/0623/breaking63.html> (Setanta appointed Deloitte as its administrator).
- [157](#) See Broude et al., *supra* note 141, at 41 (“Under a court approved protocol, it is possible that the administrator may leave much of the day-to-day management decisions to existing management under the administrator's supervision”).
- [158](#) 1986, c. 45, sch. B1 (Eng.). For example, the Insolvency Act instructs the administrator to pursue a reorganization of the company first, followed by a going-concern and then piecemeal sale of the company's assets. Id. § 3(1). The statute further requires the administrator to pursue the objectives in the stated order and to forego a particular objective only if she believes “that it is not reasonably practicable to achieve [the other objectives and she] ... does not unnecessarily harm the interests of the creditors of the company as a whole.” Id. § 3(4).
- [159](#) See Broude et al., *supra* note 141, at 41 (explaining the broad discretion granted to an administrator in pursuing reorganization or sale of the debtor or its assets).

- [160](#) See sources and examples cited in Harner, *supra* note 29, at 748-49 (discussing the use of prepackaged plans under U.K. insolvency laws).
- [161](#) See Broude et al., *supra* note 141, at 44 (“[T]he presiding judge in a French bankruptcy has extremely broad powers, both judicially and in the administration of the debtor’s business, as compared to a bankruptcy judge in the United States”).
- [162](#) See *supra* note 130.
- [163](#) See MacNaughton et al., *supra* note 130, § 12.05[6] (“The debtor and its creditors usually expect the monitor to comment on the plan, although commenting is not a requirement.”). But see Sarra, *supra* note 138, at 178 (“In some cases, the monitor has developed the plan of arrangement.”).
- [164](#) See *supra* Part IV.B (discussing the French judicial administrator’s duties).
- [165](#) See, e.g., Sarra, *supra* note 138, at 176 (“In the past five years, roughly 33% of CCAA proceedings involved a monitor that had been the auditor of the debtor corporation”); see also *supra* Part IV.C (discussing the debtor’s ability to appoint the U.K. administrator). Notably, amendments to the CCAA, effective as of September 18, 2009, prohibit the debtor’s auditor from serving as monitor, absent court approval. See Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, § 11.7 (Can.).
- [166](#) See Newsome, *supra* note 124, at 973 (“Compromise is what makes reorganization possible.”).
- [167](#) See generally Miller & Waisman, *supra* note 14, at 169 (explaining the various virtues and value of the existing Chapter 11 process); see also Elizabeth Warren & Jay Lawrence Westbrook, [The Success of Chapter 11: A Challenge to the Critics](#), 107 Mich. L. Rev. 603, 634 (2009) (reporting empirical data showing strengths in the Chapter 11 process).
- [168](#) See *infra* Part V.A.
- [169](#) See *supra* Part IV (discussing the Canadian monitor, the French judicial administrator, and the U.K. administrator); see also Bussel, *supra* note 41, at 1618 (“A substantial literature now exists confirming that third-party neutrals (or ‘mediators’ or ‘facilitators’) can be effective in bringing parties to agreement by managing the negotiation process.”). In most Chapter 11 cases, this independent representative is absent. This void not only leads to the type of conflict discussed *supra* Parts I.B.3, II, but also frequently puts the DIP’s counsel in the uncomfortable position of having to monitor and investigate the conduct of its debtor client. See generally Bowles & Rapoport, *supra* note 78, at 68 (“[S]everal courts have begun to impose yet another fiduciary duty on Estate Counsel—that of actively overseeing or policing the conduct of the Debtor during the pendency of a chapter 11 case.”).
- [170](#) As discussed in Part II, the balance of power and control in corporate restructurings has shifted from the debtor, to creditors, to an independent trustee and then back again. See *supra* Part II. The case facilitator proposal and its focus on neutrality would help reach a better equilibrium in this balance of power.
- [171](#) The Article does not invoke the concept of neutrality to suggest a particular theoretical model of the corporation in bankruptcy. Rather, the terms neutrality and stakeholders are used here in the context of resolving competing claims and disputes that may impede progress in a Chapter 11 case. The dynamics of insolvent firm governance may in fact inform the utility of various models of the corporation, but that discussion is beyond the scope of this current Article. See, e.g., Theresa A. Gabaldon, [Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders](#), 65 Md. L. Rev. 538, 542 (2006) (explaining that, under options theory, “once a firm has issued debt, debtholders and holders of equity both share contingent control and bear residual risk”); Lynn A. Stout, [The Mythical Benefits of Shareholder Control](#), 93 Va. L. Rev. 789, 804-05 (2007) (discussing the team production model of corporate governance and noting that “while shareholders may share in the wealth when the corporation does well and suffer when the firm does poorly, so may employees, creditors, and other stakeholders”); see also Stephen M. Bainbridge, [Much Ado About Little? Directors’ Fiduciary Duties in the Vicinity of Insolvency](#), 1 J. Bus. & Tech. L. 336 (2007) (arguing that zone of insolvency only applies in cases where the business judgment rule does not apply, shareholder and creditor interests conflict, and recovery goes directly to those with standing); Henry T.C. Hu & Jay Lawrence Westbrook, [Abolition of the Corporate Duty to Creditors](#), 107 Colum. L. Rev. 1321 (2007) (arguing that the corporate duty to creditors doctrine should be abolished and imposing a duty arising only upon a formal bankruptcy proceeding); Frederick Tung, [The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors](#), 57 Emory L.J. 809 (2008) (proposing an approach called contract primacy as the default credit rule).

- ¹⁷² Westbrook, *supra* note 17, at 825. Professor Westbrook acknowledges that exceptions may exist to the need for neutrality in a particular case, such as where the senior secured lender is significantly undersecured. The case facilitator proposal accounts for these scenarios by giving the bankruptcy court discretion to waive the appointment of a case facilitator. See Thomas H. Jackson & Robert E. Scott, On the [Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain](#), 75 Va. L. Rev. 155, 159 (1989) (discussing tensions among claimants' interests in Chapter 11 and observing that "the objective of the collective is never entirely congruent with the objective of any of the constituent parts"); *infra* Part V.A. The case facilitator proposal also may ameliorate concerns regarding the redistributive effects of collectivism in certain circumstances, including redistributions motivated by "errors and misperceptions owing to imperfections in legal rules; ... strategic manipulation of the bankruptcy process; ... [and] contribution among creditors to reduce 'eve of bankruptcy' conflicts of interest." Jackson & Scott, [supra](#), at 163.
- ¹⁷³ See *infra* Part V.A.2.
- ¹⁷⁴ For example, the court's discretion in the appointment of a case facilitator would allow it to waive the appointment in small business cases, where the circumstances may not warrant an appointment.
- ¹⁷⁵ The proposal does not support the election of the case facilitator by creditors, as can be done in the Chapter 7 and Chapter 11 trustee context, because the case facilitator is intended to be an independent representative of the court. See 11 U.S.C. § 702 (2006) (election of Chapter 7 trustee); *id.* § 1104(b)(1) (election of Chapter 11 trustee).
- ¹⁷⁶ See *infra* Part V.B.
- ¹⁷⁷ The case facilitator's investigation powers would be similar to those of a Chapter 11 trustee or examiner. See 11 U.S.C. § 1104 (describing powers of trustee and examiner).
- ¹⁷⁸ For example, the case facilitator could be required to submit its preliminary report within sixty days of the commencement of the case. This general timeframe would allow the case facilitator sufficient time to perform discovery and review of the debtor's books and records, yet present the report early enough so that the court and the parties can start to develop a meaningful exit strategy for the debtor. In addition, this timeframe could be expedited in a prepackaged Chapter 11 case. See *infra* Part V.C.
- ¹⁷⁹ In general, quarterly reports likely would suffice, but this timeframe could be altered by the court on a case-by-case basis. In addition, the court could entertain requests to seal the reports, at least on a temporary basis, on a case-by-case basis to the extent that the reports contain sensitive, confidential or proprietary information. Although the Bankruptcy Code encourages full disclosure of all relevant information, the court may determine that information concerning potential claims, settlement negotiations and similar matters should be protected until an appropriate resolution of the matter is reached among the affected parties.
- ¹⁸⁰ See Bo J. Howell, [Hedge Funds: A New Dimension in Chapter 11 Proceedings](#), 7 DePaul Bus. & Com. L.J. 35, 46-51 (2008) (discussing participation of ad hoc committees in Chapter 11 cases).
- ¹⁸¹ See, e.g., Kenneth N. Klee & K. John Shaffer, [Creditors' Committee Under Chapter 11 of the Bankruptcy Code](#), 44 S.C.L. Rev. 995, 1024-25 (1993) ("On the other hand, multiple committees can complicate negotiations, delay the reorganization process, and create additional administrative expenses to the debtor's estate, particularly in terms of higher professional fees."); Charles J. Tabb, [The Future of Chapter 11](#), 44 S.C.L. Rev. 791, 840 (1993) ("Within the creditor ranks, courts also can resist the temptation to appoint multiple committees. The savings would be in fees and in reducing bargaining costs." (footnote omitted)); see also Gwynne, *supra* note 15, at 134 (explaining use of multiple committees and noting that "[o]ne of the main factors in decisions refusing to order the appointment of an additional committee is the expense associated with the additional committee, including the fees that would be incurred by the estate to pay for the committee's professionals").
- ¹⁸² The case facilitator proposal does not contemplate reducing the debtor's exclusive periods to file and solicit acceptances of a plan of reorganization. See 11 U.S.C. § 1121 (providing the debtor with an initial 120 days to file, and 180 days to solicit acceptances of, a plan of reorganization).
- ¹⁸³ A "plan facilitator" concept was included in the recommendations of the Select Advisory Committee on Business Reorganizations (SABRE). See Karen M. Gebbia-Pinetti, [First Report of the Select Advisory Committee on Business Reorganization](#), 57 Bus. Law. 163, 167 (2001) ("Proposal 2 is designed to employ a neutral facilitator to foster consensus and break through impasse if the parties are unable to agree on the essential structure of a plan within a reasonable period."). The case facilitator's role in the plan process would be similar to the plan facilitator contemplated by SABRE's proposal, including in its functions to bring the parties to the negotiating

table and make recommendations to the court regarding the debtor's restructuring options. See *id.* The case facilitator proposal would differ significantly, however, by introducing the neutral third party at the inception of the case and requiring that party to review and report on not only the circumstances surrounding the debtor's financial demise, but also the parties' disputes, progress, and related issues during the Chapter 11 case.

¹⁸⁴ See, e.g., Lela P. Love, The [Top Ten Reasons Why Mediators Should Not Evaluate](#), 24 Fla. St. U. L. Rev. 937, 941 (1997) (discussing potential issues with a mediator serving both an evaluative and a facilitative function). The Article uses the term “judgmental” in lieu of “evaluative” in discussing the potential conflicts for a mediator in the bankruptcy context because any successful mediation in Chapter 11 will require the neutral to evaluate the merits and use her evaluative skills in fostering a consensus. Nevertheless, the Article does not contemplate an advisory role for the case facilitator in order to encourage more disclosure by the parties and mitigate concerns about adverse consequences from those disclosures. As discussed in Part V.E, this aspect of the case facilitator role distinguishes it from a trustee and examiner.

¹⁸⁵ See discussion *infra* Part V.D; see also Robert E. Wells, Jr., [Alternative Dispute Resolution--What Is It? Where Is It Now?](#), 28 S. Ill. U. L.J. 651, 652 (2004) (exploring status of alternative dispute resolution and describing alternative dispute resolution as “a large umbrella that encompasses numerous alternatives to litigation and contains too many permeations to fully enumerate”). According to Wells:

A sterile definition of mediation would read as follows: Mediation is a non-adversarial, non-binding and cooperative process for privately resolving disputes with the assistance of a trained, neutral third-party whose role is to promote communication between the parties to the dispute and to assist in the negotiation of the terms of resolution of that dispute.

Id.

¹⁸⁶ See, e.g., Ariz. Local R. Bankr. P. 9072-8 (describing steps for formal mediation of dispute in bankruptcy case).

¹⁸⁷ See, e.g., *id.* R. 9072-8(c) (stating “[n]ot less than seven days before the ADR Conference, each party shall submit directly to the mediator, and shall serve on all counsel and pro se parties, an ADR statement” and setting forth requirements for such submission).

¹⁸⁸ See, e.g., *id.* R. 9072-8(d) (setting forth persons required to attend mediation conference).

¹⁸⁹ See 11 U.S.C. §§ 327-328, 330-331 (2006) (describing a bankruptcy trustee's ability to retain professionals and those professionals' ability to seek compensation).

¹⁹⁰ See *id.* § 326 (detailing compensation of bankruptcy trustees, which is tied in part to the amount of distributions to stakeholders); [id.](#) § 327 (authorizing bankruptcy trustees to retain professionals).

¹⁹¹ The Article suggests linking the case facilitator's compensation to the value of the debtor's assets (or alternatively the debtor's gross sales or revenues) rather than stakeholder distributions to avoid impairing the case facilitator's neutrality in the process. See *supra* Part V.

¹⁹² See 11 U.S.C. § 324 (providing for the removal of bankruptcy trustees); see also Ariz. Local R. Bankr. P. 9072-7(c) (setting forth circumstances that disqualify a mediator from service).

¹⁹³ For example, the Bankruptcy Code provides uniform standards that govern the eligibility of a person to serve as a bankruptcy trustee. See 11 U.S.C. §§ 321-322.

¹⁹⁴ For example, the alternative dispute resolution procedure adopted by the United States Bankruptcy Court for the District of Arizona sets the following criteria for mediators:

- (1) if the applicant is an attorney, be a member in good standing of the bar of any state or the District of Columbia, with at least five years of practice; or
- (2) if the applicant is an attorney, be a member in good standing of the bar of the Federal District Court of Arizona, with at least five years of practice; or
- (3) if the applicant is a panel trustee, be an active panel trustee in good standing with the office of the United States Trustee with at least five years of service as a panel trustee, or if retired, have been a panel trustee in good standing with the office of the United States Trustee with at least five years of service as a panel trustee;
- (4) not have been suspended, or have had a professional license or bond revoked, or have pending any proceeding to suspend or revoke such license or bond;

(5) not have resigned from a professional organization or panel while an investigation was pending into allegations of misconduct which would warrant suspension, disbarment or professional license or bond revocation;
 (6) not have been convicted of a felony;
 (7) have completed appropriate mediation training, or have sufficient experience, in the mediation process;
 (8) be determined by the court to be competent to perform the duties of a mediator; and
 (9) be willing to serve as mediator in at least one matter during each quarter of each year, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate.
 Ariz. Local R. Bankr. P. 9072-6.

[195](#) See id. R. 9072-6(e) (setting forth an oath for mediators).

[196](#) A case facilitator should be a “disinterested person,” as such term is defined under the Bankruptcy Code. See [11 U.S.C. § 101\(14\)](#) (defining “disinterested person” to mean, among other things, that the person “is not a creditor, an equity security holder, or an insider” of the debtor).

[197](#) See id. § 1126(b) (permitting prepetition solicitation of plan of reorganization under certain circumstances).

[198](#) See generally Conrad B. Duberstein, [Out-of-Court Workouts](#), 1 *Am. Bankr. Inst. L. Rev.* 347, 365 (1993) (“Since the prepackaged plan is negotiated before the Chapter 11 case starts, it can take advantage of all the benefits available under the Code without the detriments of a prolonged and expensive proceeding” (quoting Marc S. Kirschner et al., [Prepackaged Bankruptcy Plans: The Deleveraging Tool of the ‘90s in the Wake of OID and Tax Concerns](#), 21 *Seton Hall L. Rev.* 643, 663 (1991))).

[199](#) See supra Part V.B.

[200](#) See supra Part IV.C.

[201](#) Chapter 11 cases are already extremely expensive, and the bankruptcy estate bears the overwhelming burden of these administrative costs. See Stephen J. Lubben, *Am. Bankr. Inst.*, Chapter 11 Professional Fee Study (2007) (extensive study of professional fees in Chapter 11 cases); see also [11 U.S.C. § 328](#) (providing that professionals retained by debtors, trustees and committees may be compensated by the bankruptcy estate).

[202](#) See supra Part V.A.; see also Flaschen, supra note 138, at 515 (“[A]n effective monitor could well reduce expenses in a case by substantially reducing the parties’ resort to expensive and wasteful adversarial litigation to resolve matters that would be addressed on a constructive basis in consideration of the independent appointee’s recommendations.”).

[203](#) See Robert J. Niemic, *Fed. Judicial Ctr.*, *Mediation in Bankruptcy* (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bankrmed.pdf/\\$file/bankrmed.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bankrmed.pdf/$file/bankrmed.pdf) (reporting results of survey regarding mediation practices in bankruptcy); Newsome, supra note 124, at 977-79 (discussing the increasing use of “case management and alternative dispute resolution ... in the bankruptcy courts”); see also J. Thomas Corbett, [Mediation, Bankruptcy and the Bankruptcy Administrator](#), 65 *Ala. Law.* 410, 413 (2004) (describing use of mediation in bankruptcy cases); Gebbia-Pinetti, supra note 183, at 188-91 nn.41-47 (explaining use of mediation and alternative dispute resolution procedures in bankruptcy).

[204](#) See Corbett, supra note 203, at 411-13.

[205](#) Ariz. Local R. Bankr. P. 9072-1 (setting forth bankruptcy alternative dispute resolution program).

[206](#) Ch. 11 No. 93 Civ. 4414, [1994 WL 482948](#) (Bankr. N.D.N.Y. Feb. 13, 1994).

[207](#) Id.; see also [In re Eagle Picher Indus., Inc.](#), 172 F.3d 48, [1998 WL 939869](#), at *2 (6th Cir. Dec. 21, 1998) (unpublished table decision) (using mediator to facilitate plan negotiations).

[208](#) See Harvey R. Miller, [The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play](#), 69 *Am. Bankr. L.J.* 431, 437 (1995); Cassandra G. Mott, [Macy’s Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case](#), 14 *Ohio St. J. on Disp. Resol.* 193, 207-10 (1998).

[209](#) Corbett, supra note 203, at 412.

- [210](#) Ch. 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y.).
- [211](#) See Corbett, *supra* note 203, at 412 (explaining use of mediation to resolve claims disputes); Erin Marie Daly, Mediation Ordered in Lehman Derivatives Feud, Law360 (Aug. 26, 2009), http://www.law360.com/print_article/118654 (last visited Nov. 12, 2010) (“Judge James Peck of the U.S. Bankruptcy Court for the Southern District of New York agreed with Lehman Wednesday that compulsory mediation would reduce the number of disputes over the contracts”); see also [A.H. Robins Co. v. Dalkon Shield Claimants Trust](#), 164 F.3d 623, 1998 WL 726754, at *1 (4th Cir. Oct. 16, 1998) (unpublished table decision) (explaining alternative dispute resolution procedures used to address products liability claims).
- [212](#) See Corbett, *supra* note 203, at 412 (“The claims resolution facility established in the Greyhound case resulted in 95 percent of more than 3,200 pre-petition tort claims being resolved through ADR.”).
- [213](#) See [11 U.S.C. § 1104 \(2006\)](#) (grounds for appointing Chapter 11 trustee); Alces, *supra* note 87, at 136-37 (“The trustee remedy is specifically provided by the Code when the bankruptcy court or party in interest believes that the debtor’s management has engaged in ‘fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor.’” (quoting [11 U.S.C. § 1104\(a\)](#))); see also discussion *supra* Part II.B.3.
- [214](#) See, e.g., Clifford J. White III & Walter W. Theus, Jr., [Chapter 11 Trustees and Examiners After BAPCPA](#), 80 *Am. Bankr. L.J.* 289, 316 (2006) (explaining history to, and current status of, Chapter 11 trustees and observing that “[t]he distaste for chapter 11 trustee appointments shown by many bankruptcy courts early in the development of the case law under the Code was perhaps to be expected, given their experience in presiding over chapter XI cases under the Bankruptcy Act”); see also Alces, *supra* note 87, at 137 (discussing the flexibility in trustee appointments and the use of trustees with limited powers).
- [215](#) See Warren, *supra* note 20, at 371-73 (explaining the importance of perception in the utility of bankruptcy laws and noting that “[o]ne of the key reasons for the adoption of the 1978 Code was the widespread perception that the old Code was unworkable”).
- [216](#) See discussion *supra* Part II.B; see also Warren, *supra* note 20, at 371 (“In order to stimulate the debtor to initiate bankruptcy proceedings at an appropriate point when the business risks economic failure, there must be some incentive to attract the business into the bankruptcy process.”).
- [217](#) See *supra* Part V.A.2.
- [218](#) See *supra* note 174 and accompanying text.
- [219](#) The case facilitator’s meaningful service to the court will turn, in part, on her receiving accurate and complete information from all parties. That type of full disclosure likely will not occur if information provided to the case facilitator might be used against the party by the case facilitator in a subsequent trustee role. See discussion *supra* Part V.A; see also [11 U.S.C. § 321\(b\)](#) (2006) (“A person that has served as an examiner in the case may not serve as trustee in the case.”).
- [220](#) Although the case facilitator would not judge the parties’ conduct as often done by an examiner, other parties in the Chapter 11 case could perform that function with the information provided by the case facilitator. Consequently, the case facilitator proposal could eliminate the additional cost associated with a separate examiner but continue the benefits realized in cases from the appointment of examiners. See, e.g., [In re Adelphia Commc’ns Corp.](#), 336 B.R. 610 (Bankr. S.D.N.Y. 2006) (reviewing the use of examiners in several large, complex Chapter 11 cases).
- [221](#) See *supra* Part I.
- [222](#) See *supra* Part V.A.
- [223](#) See *supra* Part III.
- [224](#) See *supra* Part V.
- [225](#) See *supra* Part V.
- [226](#) See *supra* Part V.D.

THE SEARCH FOR AN UNBIASED FIDUCIARY IN..., 86 Notre Dame L....

86 NTDLR 469

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
HDR Holding, Inc., <i>et al.</i> , ¹	Case No. 19-11396 (MFW)
Debtors.	(Jointly Administered)
	Ref. Docket Nos. 12, 38

**FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364 AND 507,
BANKRUPTCY RULES 2002, 4001, 6004 AND 9014 AND LOCAL BANKRUPTCY
RULE 4001-2 (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION
SENIOR SECURED SUPERPRIORITY FINANCING, (II) AUTHORIZING THE
DEBTORS' LIMITED USE OF CASH COLLATERAL, (III) GRANTING
ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES,
AND (IV) GRANTING RELATED RELIEF**

Upon the motion (the "Motion") of the above referenced debtors and debtors in possession (collectively, the "Debtors") in the above-referenced chapter 11 cases (the "Chapter 11 Cases"), for entry of an interim order (the "Interim Order") and a final order (this "Final Order"), pursuant to sections 105, 361, 362, 363, 364 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (as amended, the "Bankruptcy Code"), Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (as amended, the "Bankruptcy Rules"), and Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), seeking, *inter alia*:

- (i) authorization for (a) the Debtors, including Schramm, Inc., a Pennsylvania corporation (the "Borrower"), to obtain up to \$6,000,000.00 in principal amount of postpetition financing (the "DIP Facility"), and to access up to \$3,000,000.00 in the interim and pending a final hearing all on the terms and conditions set forth in the Interim Order, this Final Order and that certain Debtor-in-Possession Delayed Draw Term Loan Promissory Note (the "DIP

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: HDR Holding, Inc. (2015) and Schramm, Inc. (0480). The Debtors' mailing address is 800 E. Virginia Ave., West Chester, PA 19380.

Note,” substantially in the form attached hereto as Exhibit A and together with the Interim Order and this Final Order, and all appendices, exhibits or schedules to the Interim Order and to the DIP Note, including, without limitation, the DIP Budget (as defined below) as the same may be amended, restated, or supplemented from time to time in accordance with the terms hereof and thereof, collectively, the “DIP Loan Documents”),² among the Borrower, HDR Holding, Inc., a Delaware corporation (the “Guarantor”) and Schramm II Inc., a Delaware corporation (with its successors and assigns, collectively, the “DIP Lender”), and (b) the Guarantor to guaranty the Borrower’s obligations in respect of the DIP Loans and all other obligations and indebtedness of the Borrower under or arising in connection with the DIP Loan Documents;

- (ii) authorization for the Debtors to, subject to the Carve-Out (defined below) and Permitted Prior Senior Liens, grant security interests, liens, and superpriority claims (including a superpriority administrative claim pursuant to sections 364(c)(1), 503(b) and 507(b) of the Bankruptcy Code, liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code) to the DIP Lender to secure all obligations of the Debtors under and with respect to the DIP Facility (collectively, the “DIP Obligations”);
- (iii) authorization for the Debtors, pursuant to sections 105, 361, 362, 363, and 507 of the Bankruptcy Code to use cash collateral, as such term is defined in section 363(a) of the Bankruptcy Code (“Cash Collateral”, which shall not include loan proceeds of the DIP Facility), and all other Prepetition Collateral (defined below), in accordance with the terms of the Interim Order, this Final Order and the DIP Budget, as provided herein;
- (iv) to, subject to the Carve-Out and any Permitted Prior Senior Liens, provide Adequate Protection of the liens and security interests (such liens and security interests, the “Prepetition Liens”) of the prepetition lenders (such financial institutions, including Hark (as defined below) and GenNx360 Capital Partners, L.P. (“GenNx360”), in such capacity, the “Prepetition Lenders”) under that certain Amended and Restated Credit Agreement, dated as of March 23, 2016 (as amended, restated, supplemented or otherwise modified from time to time, the “Credit Agreement”, and together with any other agreements, instruments, notes, guaranties, and other documents related thereto, collectively, the “Prepetition Financing Documents”)), among the Borrower, the Guarantor, the various institutions from time to time party thereto as Prepetition Lenders, and Hark Capital I, LP (f/k/a Enhanced Credit Supported Loan Fund, LP, “Hark”), as Agent (in such capacity, the “Agent”, and together with the Prepetition Lenders, collectively, the “Prepetition Secured Parties”), which Prepetition Liens are being consensually primed by

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to those terms in the DIP Loan Documents.

the DIP Facility, as more fully set forth in the Interim Order and this Final Order;

- (v) modification of the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the Interim Order and this Final Order;
- (vi) that this Court hold an interim hearing (the “Interim Hearing”) to consider the relief sought in the Motion and entry of the proposed Interim Order;
- (vii) that this Court schedule a final hearing (the “Final Hearing”) to consider entry of this Final Order granting the relief requested in the Motion on a final basis; and
- (viii) waiver of any applicable stay with respect to the effectiveness and enforceability of this Final Order (including a waiver pursuant to Bankruptcy Rule 6004(h));

and the Interim Hearing having been held by this Court on June 25, 2019 and the notice of the Motion and the relief sought at the Interim Hearing complying with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and any other applicable law; this Court having considered the Motion and all pleadings related thereto, including the record made by the Debtors at the Interim Hearing, and having entered the Interim Order (*i.e.*, that certain *Interim Order Pursuant to 11 U.S.C. 105, 361, 362, 363, 364 and 507, Bankruptcy Rules 2002, 4001, 6004 and 9014 and Local Bankruptcy Rule 4001-2 (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties and (IV) Granting Related Relief* [Docket No. 38]) on June 25, 2019; and the Final Hearing having been held by this Court on August 2, 2019; and pursuant to Bankruptcy Rule 4001 and Local Rule 4001-2, due and sufficient notice of the Motion and the relief sought at the Final Hearing having been given under the particular circumstances by the Debtors; this Court having considered the Motion and all pleadings related thereto, including the record made at the Interim Hearing and the Final Hearing, and the objections thereto raised by, among others,

the Committee (as defined below) and DNOW L.P. (“DNOW”) (including Docket Nos. 129 and 132); and after due deliberation and consideration, and good and sufficient cause appearing therefor:

THE COURT HEREBY FINDS AS FOLLOWS:

A. On June 24, 2019 (the “Petition Date”), each Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are continuing to operate their respective businesses and manage their respective properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

B. The Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and the *Order Directing Joint Administration of the Debtors’ Chapter 11 Cases* [Docket No. 29] entered by this Court on June 25, 2019.

C. On July 9, 2019 an official committee of unsecured creditors (the “Committee”), as provided for under section 1102 of the Bankruptcy Code, was appointed in the Chapter 11 Cases.

D. Subject to Paragraph 16 below, and without prejudice to the rights, if any, of any other party, the Debtors admit, stipulate, and agree that:

(a) as of the Petition Date, the Debtors were indebted and liable, without defense, counterclaim, or offset of any kind to the Prepetition Secured Parties under the Prepetition Financing Documents including under (i) the Term Loan A (as defined in the Prepetition Financing Documents) in the amount not less than \$5,347,722.47 plus any other accrued and accruing unpaid Obligations thereunder, including interest, fees and expenses (including legal fees and expenses), (ii) the Term Loan B (as defined in the Prepetition Financing Documents) in the amount not less than \$6,500,000.00 plus any other accrued and accruing unpaid Obligations thereunder, including interest, fees and expenses (including legal fees and expenses), and (ii) the Term Loan C (as defined in the Prepetition Financing Documents) in the amount not less than \$6,000,000.00 plus any other accrued and accruing unpaid Obligations thereunder, including interest, fees and expenses (including legal fees and expenses). All obligations of the Debtors arising under the Credit Agreement or any other Prepetition Financing Documents, including all loans, advances, debts, liabilities, principal, interest, fees, charges, expenses, and

obligations for the performance of covenants, tasks, or duties or for the payment of monetary amounts owing to the Prepetition Secured Parties by the Debtors, of any kind or nature, whether or not evidenced by any note, agreement, or other instrument, shall be referred to herein collectively as the “Prepetition Secured Obligations”; and

(b) as of the Petition Date, the Prepetition Secured Obligations are secured by the security interests granted in those certain Security Documents (as defined in the Credit Agreement, as amended, restated, supplemented, or otherwise modified from time to time), pursuant to which each Debtor granted to the Agent, for the benefit of the Prepetition Secured Parties, to secure such Debtor’s Prepetition Secured Obligations, a first priority security interest in the Collateral (as defined in the Credit Agreement and referred to in this Final Order as the “Prepetition Collateral”), including (i) all Accounts; (ii) all cash and Cash Equivalents; (iii) all Chattel Paper (including Electronic Chattel Paper); (iv) all Commercial Tort Claims as set forth on Schedule 3.16(d) to the Credit Agreement (as updated from time to time in accordance with the Credit Agreement); (v) all Copyright Licenses; (vi) all Copyrights; (vii) all Deposit Accounts; (viii) all Documents; (ix) all Equipment; (x) all Fixtures; (xi) all General Intangibles; (xii) all Goods; (xiii) all Instruments; (xiv) all Inventory; (xv) all Investment Property; (xvi) all Letter-of-Credit Rights; (xvii) all Material Contracts and all such other agreements, contracts, leases, licenses, tax sharing agreements, or hedging arrangements now or hereafter entered into by an Obligor (as defined in the Credit Agreement), as such agreements may be amended or otherwise modified from time to time (collectively, the “Assigned Agreements”), including without limitation, (A) all rights of an Obligor to receive moneys due and to become due under or pursuant to the Assigned Agreements, (B) all rights of an Obligor to receive proceeds of any insurance, indemnity, warranty, or guaranty with respect to the Assigned Agreements, (C) claims of an Obligor for damages arising out of or for breach of or default under the Assigned Agreements, and (D) the right of an Obligor to terminate the Assigned Agreements, to perform thereunder, and to compel performance and otherwise exercise all remedies thereunder; (xviii) all Patent Licenses; (xix) all Patents; (xx) all Payment Intangibles; (xxi) all Securities Accounts; (xxii) all Software; (xxiii) all Supporting Obligations; (xxiv) all Trademark Licenses; (xxv) all Trademarks; (xxvi) all books, records, ledger cards, files, correspondence, computer programs, tapes, disks, and related data processing software (owned by such Obligor or in which it has an interest) that at any time evidence or contain information relating to any Collateral or are otherwise necessary or helpful in the collection thereof or realization thereupon; (xxvii) all other personal property of any kind or type whatsoever owned by such Obligor; and (xxviii) to the extent not otherwise included, all Accessions, Proceeds and products of any and all of the foregoing.

E. The Debtors have an immediate and critical need to obtain postpetition financing under the DIP Facility and to use Cash Collateral, among other things, to fund working capital requirements, costs, and expenses of administration of the Chapter 11 Cases and fees and expenses relating to the DIP Facility during the pendency of the Chapter 11 Cases. Without

access to the DIP Facility and the continued use of Cash Collateral to the extent authorized pursuant to the Interim Order and this Final Order, the Debtors and their estates would suffer immediate and irreparable harm. The Debtors do not have sufficient available sources of working capital and financing to operate their businesses or maintain their properties in the ordinary course of business without access to the DIP Facility and the authorized use of Cash Collateral.

F. In light of the Debtors' circumstances, the Debtors are unable to obtain (i) adequate unsecured credit allowable either (a) under sections 364(b) and 503(b)(1) of the Bankruptcy Code, or (b) under section 364(c)(1) of the Bankruptcy Code, (ii) adequate credit secured by (x) a senior lien on unencumbered assets of their estates under section 364(c)(2) of the Bankruptcy Code, and (y) a junior lien on encumbered assets under section 364(c)(3) of the Bankruptcy Code, or (iii) secured credit under section 364(d)(1) of the Bankruptcy Code from sources other than the DIP Lender on terms more favorable than the terms of the DIP Facility. The only source of secured credit available to the Debtors, other than the use of Cash Collateral, is the DIP Facility. The Debtors require both additional financing under the DIP Facility and the continued use of Cash Collateral under the terms of this Final Order to satisfy their postpetition liquidity needs.

G. The DIP Lender has indicated a willingness to provide the Debtors with certain financing commitments, but solely on the terms and conditions set forth in the Interim Order, this Final Order and in the DIP Loan Documents. Accordingly, after considering all of their practical alternatives, the Debtors have concluded, in an exercise of their sound business judgment, that the financing to be provided by the DIP Lender pursuant to the terms of the Interim Order, this

Final Order and the DIP Loan Documents represents the best financing currently available to the Debtors.

H. The consent of the Prepetition Secured Parties to the priming of their liens by the DIP Liens, the Carve-Out, and use of the Prepetition Collateral, including Cash Collateral, by the Debtors, is limited to the Interim Order, this Final Order and the DIP Facility presently before this Court and shall not extend to any other postpetition financing or to any modified version of this DIP Facility with any party other than the DIP Lender. Furthermore, the consent of the Prepetition Secured Parties to the priming of their liens by the DIP Liens, the Carve-Out, and use of the Prepetition Collateral, including Cash Collateral, by the Debtors does not constitute, and shall not be construed as constituting, an acknowledgment or stipulation by the Prepetition Secured Parties that their interests in the Prepetition Collateral are adequately protected pursuant to this Final Order or otherwise, provided, however, the Prepetition Secured Parties agree that the Adequate Protection granted to the Prepetition Secured Parties in the Interim Order and this Final Order is reasonable and calculated to protect the interests of the Prepetition Secured Parties, subject to the rights of the Prepetition Secured Parties to seek a modification of such Adequate Protection, as set forth below.

I. In light of the Debtors' circumstances, the security interests and liens granted pursuant to the Interim Order and this Final Order to the DIP Lender are appropriate under section 364(d) of the Bankruptcy Code because, among other things, (i) such security interests and liens do not impair the interests of any holder of a valid, perfected, prepetition security interest or lien in the property of the Debtors' estates, (ii) the holders of such valid, perfected, prepetition security interests and liens have consented to the security interests and priming liens granted pursuant to the Interim Order and this Final Order to the DIP Lender or (iii) the interests

of any holder of a valid, perfected, prepetition security interest or lien are otherwise adequately protected.

J. In light of the Debtors' circumstances, good cause has been shown for entry of this Final Order pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2) and Local Rule 4001-2(c). In particular, the authorization granted in the Interim Order and this Final Order (to the extent not previously executed) for the Debtors to execute the DIP Loan Documents, to continue using the Prepetition Collateral, including Cash Collateral, and to obtain financing, including on a priming lien basis, is necessary to avoid immediate and irreparable harm to the Debtors and their estates. Entry of this Final Order is in the best interest of the Debtors, their estates and creditors. The terms of the DIP Loan Documents (including the Debtors' continued use of the Prepetition Collateral, including Cash Collateral) are fair and reasonable under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration for the Prepetition Secured Parties' consent thereto.

K. The Debtors, the DIP Lender, and the Agent have negotiated the terms and conditions of the DIP Loan Documents (including the Debtors' continued use of the Prepetition Collateral, including Cash Collateral) the Interim Order and this Final Order in good faith and at arm's length. Any credit extended and loans made to the Debtors pursuant to the Interim Order and this Final Order shall be, and hereby are, deemed to have been extended, issued, or made, as the case may be, in "good faith" within the meaning of section 364(e) of the Bankruptcy Code. The Prepetition Secured Parties are entitled to receive Adequate Protection as set forth herein pursuant to sections 361, 362, 363, and 364 of the Bankruptcy Code for any diminution in the value of their respective interests in the Prepetition Collateral, including Cash Collateral,

resulting from the automatic stay or the Debtors' use, sale, or lease of the Prepetition Collateral, including Cash Collateral, during the Chapter 11 Cases.

L. The Debtors acknowledge, represent, stipulate, and agree, that, (i) subject to the entry of this Final Order, the Debtors have obtained all known authorizations, consents, and approvals necessary from, and have made all known filings with and given all known notices to, all federal, state, and local governmental agencies, authorities, and instrumentalities required to be obtained, made, or given by the Debtors in connection with the execution, delivery, performance, validity, and enforceability of the DIP Loan Documents; and (ii) due to the commencement of these Chapter 11 Cases, the Debtors are in default with respect to their Prepetition Secured Obligations and an Event of Default has occurred under the Prepetition Financing Documents.

M. Based on the foregoing, and upon the record made before this Court at the Interim Hearing and the Final Hearing, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:³

1. Jurisdiction and Venue. Consideration of the Motion constitutes a "core-proceeding" as defined in 28 U.S.C. § 157(b)(2). This Court has jurisdiction over this proceeding and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157 and 1334. Venue for the Chapter 11 Cases and the proceedings on the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. Notice. On the Petition Date, the Debtors filed the Motion with this Court and pursuant to Bankruptcy Rules 2002, 4001, and 9014, and the Local Bankruptcy Rules of this

³ Pursuant to Bankruptcy Rule 7052, findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact.

Court, the Debtors provided notice of the Motion, the Interim Hearing and the Final Hearing by electronic mail, facsimile, hand delivery, or overnight delivery to the following parties or to their counsel as indicated below: (i) the Office of the United States Trustee for this District (the “U.S. Trustee”); (ii) the Debtors’ thirty (30) largest unsecured creditors on a consolidated basis and, once appointed, counsel for the Committee; (iii) counsel to the DIP Lender and the Agent; (iv) all other known parties with liens of record on assets of the Debtors as of the Petition Date; (v) the local office for the Internal Revenue Service; and (vi) any party having filed requests for notice in the Chapter 11 Cases (collectively, (i)-(vi), the “Notice Parties”). Given the nature of the relief sought in the Motion, this Court concludes that the form, scope, and timing of the foregoing notice complies with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable law.

3. The DIP Budget.

(a) Subject to and in accordance with the terms of the DIP Note, the Borrower shall from time to time as set forth below prepare and provide to the DIP Lender and counsel to the Committee a rolling 13-week cash flow forecast setting forth on a line item basis the Debtors’ projected cash receipts and cash disbursements on a weekly basis, substantially in the form of the initial budget annexed hereto as Exhibit B (the initial budget and each subsequent budget, a “DIP Budget”). The Borrower may use the proceeds of the DIP Facility and Cash Collateral, for the purposes and up to the amounts set forth in the DIP Budget, together with Permitted Variances (defined in the DIP Note) subject to the terms and conditions set forth in the DIP Note and this Final Order. No later than 5:00 p.m. (New York time) on Tuesday of each calendar week, commencing on July 2, 2019, the Debtors shall provide the DIP Lender and the Agent, with a copy to counsel to the Committee, with a report (the “DIP Budget Variance

Report”) of the aggregate variance between actual disbursements and projected disbursements as set forth in the DIP Budget for the most recently ended Applicable Period. Subject to a Permitted Variance, the Debtors’ actual disbursements during an Applicable Period shall not exceed those projected in the DIP Budget for such Applicable Period. Except with respect to fees and expenses of Retained Professionals (as hereinafter defined), subject to Paragraph 30 below, the amount of the DIP Facility and Cash Collateral authorized to be used hereby shall not exceed the amounts reflected in the DIP Budget (together with Permitted Variances), which shall be in form and substance satisfactory to the DIP Lender for the time period set forth therein, but in no event beyond the Maturity Date. Except as expressly provided for herein, this Order does not create any rights for the benefit of any third party, whether as direct, indirect, or incidental beneficiary.

(b) The DIP Budget may be amended, supplemented, extended, or otherwise modified from time to time in any manner as to which Debtors and the DIP Lender mutually agree in writing without further order of this Court; provided that notice of any amendments shall be given to the U.S. Trustee and counsel to the Committee.

4. Reports. The Debtors shall promptly provide to the U.S. Trustee and counsel to the Committee any DIP Budget Variance Report, any modified DIP Budget, and any other reports required under the DIP Loan Documents; provided, however, the Debtors may take appropriate actions with respect to confidentiality of any portion of the DIP Budget and DIP Budget Variance Report.

5. Use of Prepetition Collateral (including Cash Collateral). Immediately upon entry of this Final Order, the Debtors are authorized to use Cash Collateral, subject to and as set forth in the DIP Budget, this Final Order and the DIP Loan Documents. The Debtors are further

authorized to use the Prepetition Collateral (including Cash Collateral) during the period from the Petition Date through and including the Maturity Date in accordance with the terms and conditions of this Final Order; provided, that the Prepetition Secured Parties are granted Adequate Protection as set forth in this Final Order.

6. Borrowing Authorization.

(a) The DIP Facility. The Debtors are authorized to enter into and perform the transactions contemplated in this Final Order, and the DIP Loan Documents and such additional documents, instruments, and agreements as may be reasonably required by the DIP Lender to implement the terms or effectuate the purposes of this Final Order, and to receive financial accommodations and borrow under the DIP Facility up to \$6,000,000.00 subject to the terms set forth in the DIP Note. The DIP Note and the other DIP Loan Documents shall constitute and are hereby deemed to be the legal, valid, and binding obligations of the Debtors and each of their respective estates, enforceable in accordance with the terms hereof and the DIP Loan Documents against each such Debtor, its respective estate, and any successor of each such Debtor or any representative of the estates (including a trustee, responsible person, or examiner with expanded powers). The Debtors are authorized to obtain financial accommodations pursuant to the terms of the DIP Budget, this Final Order, the DIP Note, and the other DIP Loan Documents and the Guarantor is hereby authorized to guaranty such financial accommodations and borrowings in accordance with the terms of this Final Order, the DIP Note, and the other DIP Loan Documents.

(b) Use of Proceeds. The Debtors are authorized to utilize the proceeds of Loans to fund working capital requirements, costs and expenses of administration of the Chapter 11 Cases, and fees and expenses relating to the DIP Facility during the pendency of the Chapter

11 Cases.

7. Due Authorization. The Debtors acknowledge, represent, stipulate, and agree, and this Court hereby finds and orders, that:

(a) in entering into the DIP Loan Documents and obtaining the use of Cash Collateral, and as consideration therefor and for the other accommodations and agreements of the DIP Lender reflected herein and in the DIP Loan Documents, the Debtors hereby agree that until such time as all of the DIP Obligations are indefeasibly paid in full in cash and the DIP Note and DIP Loan Documents are terminated in accordance with the terms thereof, the DIP Obligations, the DIP Liens, or the DIP Superpriority Claims provided to the DIP Lender under this Final Order shall not be primed by a subsequent lender or a party in interest through the granting of a superior or *pari passu* lien or administrative expense pursuant to sections 105(a), 326, 328, 330, 331, 364(c), 364(d), 503, 506, 507, 546(c), 552(b), 726 (other than expenses of a trustee under section 726(b)) or 1114 of the Bankruptcy Code) or otherwise, except as expressly authorized in the DIP Note (provided, that the DIP Liens, the DIP Superpriority Claims, the liens of the Prepetition Secured Parties, the Adequate Protection Liens (defined below), and the Section 507(b) Claims (defined below) of the Prepetition Secured Parties, shall be subordinate and subject to the Carve-Out (defined below));

(b) the Guarantor is liable for, and hereby absolutely and unconditionally guarantees to the DIP Lender and its successors and assigns, the full and prompt payment when due (whether at maturity or earlier, by reason of acceleration or otherwise, and at all times thereafter) and performance of, all DIP Obligations owed or hereafter owing to the DIP Lender by the Borrower. The Guarantor agrees that (i) its guarantee obligation hereunder shall be, and is, absolute and unconditional for all purposes in these Chapter 11 Cases and is a present and

continuing guaranty of payment and performance and not of collection, and (ii) its obligations under this Final Order and any DIP Loan Document shall not be discharged until the indefeasible payment and performance, in full in cash of the DIP Obligations, and the termination of the lending commitments under the DIP Loan Documents; and

(c) in no event shall the DIP Lender by entering into the DIP Loan Documents be deemed to be in control of the operations of the Debtors or to be acting as a “responsible person” or “owner or operator” with respect to the operation or management of the Debtors, so long as the actions of the DIP Lender do not constitute, within the meaning of 42 U.S.C. § 9601(20)(F), actual participation in the management or operational affairs by the lender of a vessel or facility owned or operated by a debtor, or otherwise cause liability to arise to the federal or state government, or the status of responsible person or managing agent to exist under applicable law (as such terms, or any similar terms, are used in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, as amended, or any similar federal or state statute).

8. DIP Interest and Payment of Expenses.

(a) The DIP Obligations shall bear interest at the applicable rate (including any applicable default rate after the occurrence of an Event of Default) set forth in the DIP Loan Documents, and be due and payable in accordance with this Final Order and the DIP Loan Documents, in each case without further notice, motion or application to, order of, or hearing before this Court.

(b) The Debtors shall pay the reasonable and documented prepetition and postpetition fees and expenses of the attorneys and advisors (each, a “DIP Lender Advisor”) for the DIP Lender as provided under the DIP Loan Documents. No DIP Lender Advisor shall be

required to file an application seeking compensation for services or reimbursement of expenses with this Court. Each DIP Lender Advisor seeking compensation for services or reimbursement of expenses under the DIP Loan Documents, the Interim Order, or this Final Order shall transmit a reasonably detailed invoice to counsel to the Debtors, the U.S. Trustee, and the Committee, provided that any such invoice may be reasonably redacted by each DIP Lender Advisor to protect from disclosure any confidential information or information otherwise subject to a protective privilege such as attorney-client privilege or attorney work-product privilege. The Debtors, the U.S. Trustee, and the Committee, shall have ten (10) Business Days in which to raise an objection to the payment of any fees and expenses of such DIP Lender Advisor. Upon the expiration of such ten (10) Business Day period, the Debtors shall promptly pay any portion of such fees and expenses to which no objection has been interposed. To the extent any objection has been interposed and cannot be consensually resolved, the dispute will be scheduled for adjudication at the next regularly-scheduled omnibus hearing in the Chapter 11 Cases.⁴

9. Amendments. Each of the Debtors, after consultation with the Committee, is expressly authorized and empowered to enter into amendments, supplements, extensions, or other modifications from time to time in any manner as to which Debtors and the DIP Lender mutually agree in writing without further order of this Court; provided, that any material modification or amendment shall be subject to Court approval following notice of any such material modification or amendment by the Debtors to the Agent, the U.S. Trustee, counsel to the Committee and the Rule 2002 service list, which parties may object to such modification or amendment, in writing, within five (5) Business Days from the date of the transmittal of such notice (which, to the extent such contact information for such parties is known to the Debtors,

⁴ Subject to the priorities set forth herein, nothing in the Interim Order or this Final Order affects the Agent's or the Prepetition Secured Parties' rights to seek prepetition and postpetition professional fees and other expenses arising under the Prepetition Financing Document as part of any allowed claim in the Chapter 11 Cases.

shall be transmitted by fax or e-mail, and, if not known, by overnight mail); provided, further, that if such objection is timely provided, then such modification or amendment shall be permitted only pursuant to an order of this Court, the entry of which may be sought on an expedited basis.

10. Superpriority Claims and DIP Liens. In respect of the DIP Obligations under the DIP Note, the other DIP Loan Documents and this Final Order the DIP Lender is granted the following with respect to the Debtors, their estates and all DIP Collateral:

(a) a superpriority administrative expense claim pursuant to section 364(c)(1) of the Bankruptcy Code with priority over all other administrative expenses pursuant to the Bankruptcy Code (including the kinds specified in or arising or ordered pursuant to sections 105(a), 326, 328, 330, 331, 503(b), 506(c), 507, 546(c), 552(b), 726 (other than expenses of a trustee under section 726(b)), and 1114 of the Bankruptcy Code or otherwise), which superpriority expenses of the DIP Lender shall be subordinate to the DIP Liens (defined below) and the Carve-Out (the “DIP Superpriority Claims”); provided that pursuant to applicable bankruptcy law, the granting of such DIP Superpriority Claims does not affect the status and superior priority of any liens, including the liens of the DIP Lender, the Prepetition Secured Parties and the holder of any Permitted Prior Senior Lien (defined below).

(b) a first priority, priming security interest in and lien pursuant to section 364(d)(1) of the Bankruptcy Code on all encumbered property of the Debtors and their estates (the “Section 364(d)(1) Liens”), which Section 364(d)(1) Liens shall be senior to any existing liens or claims, including the Prepetition Liens of the Prepetition Secured Parties, subject only to (i) the Carve-Out and (ii) liens on property of the Debtors (including the proceeds of such property) that are in existence on the Petition Date other than the Prepetition Liens of the

Prepetition Secured Parties, but only, if applicable, (A) to the extent such lien on any property is valid, perfected, and not avoidable, (B) such lien on such property (or the proceeds of such property, as applicable) on the Petition Date is a valid, perfected, and non-avoidable Permitted Lien (as defined in the Credit Agreement) senior in priority to the prepetition liens on such property, or (C) to the extent such lien could be on unencumbered property under (A) above or, other than not being perfected as of the Petition Date, would otherwise qualify as a senior permitted lien under (B) above, a valid, non-avoidable lien that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code (the foregoing clause (ii) being referred to collectively as the “Permitted Prior Senior Liens”);

(c) a first priority security interest and lien pursuant to section 364(c)(2) of the Bankruptcy Code on all unencumbered property of the Debtors, and any and all products, rents, offspring, profits, and proceeds of any of the foregoing (the “Section 364(c)(2) Liens”). The Section 364(c)(2) Liens shall not include, extend to, or apply to, any claims and causes of action relating to or arising under Chapter 5 of the Bankruptcy Code, including sections 544, 545, 547, 548 and 550 or any other similar state or federal law and any and all products, rents, offspring, profits, and proceeds of same (the “Avoidance Actions”). The Section 364(c)(2) Liens shall be subject to the Carve-Out; and

(d) a junior security interest and lien pursuant to section 364(c)(3) of the Bankruptcy Code on all property of the Debtors and their estates that is subject to a Permitted Prior Senior Lien (collectively, the “Section 364(c)(3) Liens”), which Section 364(c)(3) Liens are also subject to the Carve-Out. The Section 364(d)(1) Liens, Section 364(c)(2) Liens, and Section 364(c)(3) Liens shall be collectively referred to as the “DIP Liens.”

11. DIP Collateral. The DIP Liens of the DIP Lender under the DIP Loan Documents and as approved and perfected by this Final Order include, inter alia, liens upon and security interests in (i) all of those items and types of collateral in which security interests may be created under Article 9 of the Uniform Commercial Code, (ii) to the extent not expressly prohibited by law or contract, all of those items and types of collateral not governed by Article 9 of the Uniform Commercial Code, including, without limitation, licenses issued by any federal or state regulatory authority, any leasehold or other real property interests, and commercial tort claims of the Debtors, (iii) any and all other collateral of any nature or form, and (iv) the products, rents, offspring, profits, and proceeds of any of the foregoing (collectively, (i)-(iv), the “DIP Collateral”). None of the DIP Obligations, DIP Liens, or DIP Superpriority Claims shall (a) be subject to or *pari passu* with any lien or security interest that is avoided and preserved for the benefit of the Debtors’ estates under section 551 of the Bankruptcy Code, (b) be subject to or *pari passu* with any inter-company claim, whether secured or unsecured, of any Debtor or any domestic or foreign subsidiary or affiliate of any Debtor, (c) be subject to sections 510, 549, or 550 of the Bankruptcy Code, or (d) hereafter be subordinated to or made *pari passu* with any other lien or security interest under sections 361, 363, or 364 of the Bankruptcy Code or otherwise, except as expressly provided in this Final Order.

12. Carve-Out.

(a) Generally. The DIP Liens, the DIP Superpriority Claims, the liens of the Prepetition Secured Parties, the Adequate Protection Liens, and the Section 507(b) Claims (defined below) of the Prepetition Secured Parties, shall be subject to the payment, without duplication, of the following fees and expenses (the amounts set forth below, together with the limitations set forth therein, collectively, the “Carve-Out”) from, at the Debtors’ discretion, any

loan proceeds of the DIP Facility, Cash Collateral, or proceeds resulting from liquidation of DIP Collateral or Prepetition Collateral (and not from either cash collateral or proceeds resulting from the liquidation of any collateral of any holder of a Permitted Prior Senior Lien):

(i) Subject to the allocations under the Budget, the reasonable fee and expense claims of the respective retained professionals of the Debtors and the Committee, that have been approved by this Court at any time during the Chapter 11 Cases pursuant to sections 330 and 331 of the Bankruptcy Code including any interim approval as set forth in any procedures approved by the Court relating to the interim approval of fees and expenses of the Retained Professionals (the Court approved professionals of the Debtors and the Committee are collectively referred to as the “Retained Professionals”), the reasonable expenses of members of the Committee (“Committee Member Expenses”, which shall not include legal fees and expenses of Committee members) which were incurred (A) on and after the Petition Date and before the Carve-Out Trigger Date (defined below), and (B) on and after the Carve-Out Trigger Date in an aggregate amount not exceeding \$50,000 for all Retained Professionals and Committee Member Expenses; provided that, in each case, such fees and expenses of the Retained Professionals and Committee Member Expenses are ultimately allowed on a final basis by this Court pursuant to sections 330 and 331 of the Bankruptcy Code or otherwise and are not excluded from the Carve-Out under Paragraph 17 of this Final Order (nothing herein shall waive the right of any party to object to the allowance of any such fees and expenses); provided further that any Court-approved bonus, transaction, success fees, completion fees, substantial contribution fees, or any other fees of similar import of any person or entity referenced in this paragraph shall be paid solely from the net proceeds of the Court approved transaction giving rise to such award;

(ii) Subject to the “Health Insurance Claims/Premiums” line item in the Budget, up to \$70,000 for self-insured administrative expense claims; and

(iii) the unpaid fees payable to the U.S. Trustee and Clerk of the Bankruptcy Court pursuant to section 1930 of Title 28 of the United States Code plus statutory interest, if any, imposed under 31 U.S.C. § 3717. There is no limitation on the obligations of the Debtors and their estates with respect to unpaid fees payable to the U.S. Trustee and Clerk of the Bankruptcy Court pursuant to section 1930 of Title 28 of the United States Code.

(b) Carve-Out Trigger Date. As used herein, the term “Carve-Out Trigger Date” means the date on which the DIP Lender provides written notice to the Debtors, the U.S. Trustee, and counsel to the Committee that the Carve-Out is invoked, which notice may be delivered only on or after the occurrence of an Event of Default under the DIP Loan Documents or upon the Maturity Date.

(c) Reduction of Amounts. The fixed dollar amount available to be paid under the Carve-Out following the Carve-Out Trigger Date on account of allowed fees and expenses incurred on and after the Carve-Out Trigger Date shall be reduced, dollar-for-dollar, by the aggregate amount of payments made on and after the Carve-Out Trigger Date on account of fees and expenses incurred on and after the Carve-Out Trigger Date to Retained Professionals and with respect to Committee Member Expenses (whether from Cash Collateral, any proceeds of the DIP Financing, or otherwise).

(d) Reservation of Rights. The DIP Lender reserves its rights to object to the allowance of any fees and expenses, including any fees and expenses sought that are not provided for in the DIP Budget. The payment of any fees or expenses of the Retained Professionals and Committee Member Expenses pursuant to the Carve-Out shall not, and shall

not be deemed to (i) reduce any Debtor's obligations owed to any of the DIP Lender, Prepetition Secured Parties, or to any holder of a Permitted Prior Senior Lien, or (ii) modify, alter, or otherwise affect any of the liens and security interests of such parties in the DIP Collateral or Prepetition Collateral (or their respective claims against the Debtors). The DIP Lender and Prepetition Secured Parties shall not be responsible for the direct payment or reimbursement of any fees or disbursements of any Retained Professionals, Committee Member Expenses, the U.S. Trustee or Clerk of the Bankruptcy Court (or of any other entity) incurred in connection with the Chapter 11 Cases or any successor case, and nothing in the Interim Order, this Final Order or otherwise shall be construed to obligate such parties in any way to pay such compensation to or to reimburse such expenses.

13. Waiver of Right to Surcharge. In light of (i) the consent of the DIP Lender to the current payment of administrative expenses of the Debtors' estates in accordance with the DIP Budget, (ii) the agreement of the DIP Lender to subordinate its Superpriority Claims to the Carve-Out, and (iii) the agreement of the DIP Lender to subordinate its DIP Liens to the Carve-Out and Permitted Prior Senior Liens, the DIP Lender and Prepetition Secured Parties (other than GenNx360 and Hark in their capacities as Prepetition Lenders) are each entitled to a waiver of (a) the provisions of section 506(c) of the Bankruptcy Code and (b) any "equities of the case" claims or other claims under sections 105(a) or 552(b) of the Bankruptcy Code. No costs or expenses of administration or other charge, lien, assessment, or claim incurred at any time (including, without limitation, any expenses set forth in the DIP Budget) by any Debtor or any other person or entity shall be imposed or charged against any or all of the DIP Collateral, the DIP Lender, the Prepetition Collateral (other than the Prepetition Collateral of GenNx360 and Hark in their capacities as Prepetition Lenders), and the Prepetition Secured Parties (other than

GenNx360 and Hark in their capacities as Prepetition Lenders), or their respective claims or recoveries under the Bankruptcy Code, including sections 105(a), 506(c), 552(b) thereof, or otherwise, and the Debtors, on behalf of their estates, waive any such rights. It is expressly understood by all parties that in making all such undertakings and proceeding in compliance with the DIP Budget, the Interim Order, this Final Order and the DIP Loan Documents, the DIP Lender and Prepetition Secured Parties (other than GenNx360 and Hark in their capacities as Prepetition Lenders) have each relied on the foregoing provisions of this Paragraph. Notwithstanding any approval of or consent to the DIP Budget, nothing in the Interim Order or this Final Order shall constitute or be deemed to constitute the consent by any of the DIP Lender and the Prepetition Secured Parties to the imposition of any costs or expense of administration or other charge, lien, assessment, or claim (including, without limitation, any amounts set forth in the DIP Budget) against such party, its claims, or its collateral under sections 105(a), 506(c), or 552(b) of the Bankruptcy Code or otherwise and no such consent shall be implied from any other action or inaction by such parties.

14. Automatic Perfection.

(a) The (i) DIP Liens granted to the DIP Lender pursuant to the Interim Order and this Final Order and the DIP Loan Documents and (ii) Adequate Protection Liens granted to the Prepetition Secured Parties pursuant to the Interim Order and this Final Order shall be valid, enforceable, and perfected by operation of law upon entry of this Final Order by this Court without any further action by any party. Neither the DIP Lender in respect of the DIP Liens, nor the Prepetition Secured Parties in respect of the Adequate Protection Liens, shall be required to enter into or to obtain any control agreements, landlord waivers (unless required by law or contract), mortgagee waivers, bailee waivers, or warehouseman waivers or to give, file, or record

any UCC-1 financing statements, mortgages, deeds of trust, leasehold mortgages, notices to account debtors or other third parties, notices of lien, or similar instruments in any jurisdiction (including filings with the United States Patent and Trademark Office, the United States Copyright Office, or any similar agency in respect of trademarks, copyrights, trade names, or patents with respect to intellectual property) (collectively, the “Perfection Documents”), or obtain consents from any licensor or similarly situated party in interest, or take any other action to validate, record, or perfect the DIP Liens granted under the DIP Loan Documents, the Interim Order, and this Final Order and the Adequate Protection Liens granted under the Interim Order and this Final Order and approved hereby, all of which are automatically and immediately perfected by the entry of this Final Order. If the DIP Lender or Prepetition Secured Parties, independently or collectively, in each of their respective sole discretion, choose to obtain, enter into, give, record, or file any Perfection Documents, (x) all such Perfection Documents shall be deemed to have been obtained, entered into, given, recorded, or filed, as the case may be, as of the Petition Date, (y) no defect in any such act shall affect or impair the validity, perfection, priority, or enforceability of the DIP Liens and Adequate Protection Liens, and (z) such liens shall have the relative priority set forth herein notwithstanding the timing of filing of any such Perfection Documents. In lieu of optional recording or filing any Perfection Documents, the DIP Lender and the Agent may, in each of their sole discretion, choose to record or file a true and complete copy of this Final Order in any place that any Perfection Document would or could be recorded or filed (which may include a description of the collateral appropriate to be indicated in a recording or filing at such place of recording or filing), and such recording or filing by the DIP Lender and the Agent shall have the same effect as if such Perfection Document had been filed or recorded as of the Petition Date. In addition, the DIP Lender may, in its reasonable discretion,

require the Debtors to file or record any Perfection Document. The Debtors are authorized to execute and deliver promptly upon demand to the DIP Lender all Perfection Documents as the DIP Lender may reasonably request.

(b) Until the indefeasible payment in full in cash of the DIP Obligations, DIP Collateral and Perfection Documents evidencing liens subordinate to the DIP Liens in the possession, custody, or control of the Agent (or in the possession, custody, or control of agents or bailees of the Agent) shall be deemed to be sufficient for the purposes of perfecting the security interests granted in such DIP Collateral and Agent (or their agents or bailees, as applicable) shall, to the extent applicable, be an agent or bailee, as the case may be, on behalf of and for the benefit of the DIP Lender for the purposes of perfecting the security interests granted in such DIP Collateral. Upon an Event of Default and the request of the DIP Lender or the Agent (or their agents or bailees, as applicable) shall transfer, assign, and otherwise convey, as applicable, any DIP Collateral and Perfection Documents in its possession, custody, or control to the DIP Lender for the enforcement of rights and remedies under the DIP Loan Documents, and, upon the indefeasible payment in full in cash of all DIP Obligations, the DIP Lender (or its agents or bailees, as applicable) shall transfer, assign, and otherwise convey any Prepetition Collateral and Perfection Documents to the Agent. The authorization, grant, perfection, scope, and vesting of the DIP Liens, the DIP Superpriority Claims, and the DIP Obligations are fully effectuated by this Final Order and any security agreements, collateral agreements, or other Perfection Documents executed as part of the DIP Loan Documents shall supplement the authorization, grant, perfection, scope, and vesting set forth herein as well as the powers and protections accorded to the DIP Lender, but in no event shall any such security agreement, collateral

agreement, or other Perfection Document be interpreted as a limitation of such provisions of this Final Order.

15. Stipulations and Waivers: Subject to and without prejudice to the rights of the Committee and any other party with standing as set forth in Paragraph 16 below, the Debtors admit, stipulate, and agree to the following, and make the releases and waivers set forth below, on and as of the Petition Date:

(a) All Prepetition Financing Documents are valid and enforceable by the Prepetition Secured Parties against each of the Debtors in accordance with their respective priorities. With respect to the Prepetition Collateral, the Prepetition Secured Parties have valid, duly-authorized, perfected, enforceable, non-voidable, and binding security interests in, and liens on, substantially all of the Prepetition Collateral as of the Petition Date (with the Prepetition Secured Parties holding junior liens on all Collateral), including the Cash Collateral. The Debtors further admit, acknowledge, and agree that (i) the Prepetition Secured Obligations constitute legal, valid, and binding obligations of each of the Debtors, (ii) no offsets, defenses, or counterclaims to the Prepetition Secured Obligations exist, and (iii) no portion of the Prepetition Secured Obligations is subject to avoidance, disallowance, reduction, or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law.

(b) The Debtors have no valid claims (as such term is defined in section 101(5) of the Bankruptcy Code) or causes of action against the Prepetition Secured Parties with respect to the Prepetition Financing Documents, whether arising at law, in contract, or at equity, including any recharacterization, subordination, avoidance, or other claims arising under or pursuant to sections 105, 510, or 542 through 553, inclusive, of the Bankruptcy Code or applicable non-bankruptcy law.

(c) As of the Petition Date, the Prepetition Secured Obligations for which the Debtors, without defense, counterclaim, or offset of any kind, were truly and justly indebted to the Prepetition Secured Parties, not less than the amount set forth in Paragraph D of this Final Order plus, in each case, all accrued or hereafter accruing and unpaid interest thereon and any additional amounts, charges, fees, and expenses (including any attorneys', accountants', appraisers', and financial advisors' fees and expenses that are chargeable or reimbursable under the Prepetition Financing Documents) now or hereafter due under the Prepetition Financing Documents.

(d) The Debtors do not have, and hereby forever release and waive, any claims, objections, challenges, counterclaims, causes of action, defenses, setoff rights, obligations, rights to subordination, or any other liabilities, whether arising under the Bankruptcy Code or applicable non-bankruptcy law, against the Prepetition Secured Parties, or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors, and employees from the beginning of time through the Petition Date; provided that the Debtors do not waive any rights set forth in Paragraph 22.

16. Effect of Stipulations on Third Parties.

(a) Generally. The admissions, stipulations, agreements, releases, and waivers set forth in the immediately preceding Paragraph 15 and Paragraph D above of this Final Order (collectively, the "Prepetition Lien and Claim Matters") are and shall be binding on the Debtors, any subsequent trustee (including any Chapter 7 trustee), responsible person, examiner with expanded powers, any other estate representative, and all parties-in-interest and all of their successors-in-interest and assigns, including, without limitation, the Committee unless, and solely to the extent that, subject to Paragraph 32 below, a party-in-interest with standing and

requisite authority: (i) has timely filed the appropriate pleadings, and timely commenced the appropriate proceeding required under the Bankruptcy Code and Bankruptcy Rules, including, without limitation, as required pursuant to Part VII of the Bankruptcy Rules (in each case subject to the limitations set forth in Paragraph 17 of the Interim Order and this Final Order) challenging the Prepetition Lien and Claim Matters (each such proceeding or appropriate pleading commencing a proceeding or other contested matter, a “Challenge”) by September 11, 2019 (the “Challenge Deadline”), as such applicable date may be extended in writing from time to time in the sole discretion of the Agent (with respect to the Prepetition Collateral) or by this Court for good cause shown pursuant to an application filed by a party in interest prior to the expiration of the Challenge Deadline, or (z) with respect to the Committee, the Committee has filed the appropriate pleadings commencing a Challenge by the Challenge Deadline, as such applicable date may be extended in writing from time to time in the sole discretion of the Agent (with respect to the Prepetition Collateral) or by this Court for good cause shown pursuant to an application filed by the Committee prior to the expiration of the Challenge Deadline (the hearing on any such application shall be scheduled for the first available omnibus hearing scheduled in the Chapter 11 Cases following the filing of such application); and (ii) this Court enters judgment in favor of the plaintiff or movant in any such timely and properly commenced Challenge proceeding and any such judgment has become a final judgment that is not subject to any further review or appeal; provided, however, if the Chapter 11 Cases convert to Chapter 7 prior to the Challenge Deadline, the Challenge Deadline shall be extended for the Chapter 7 trustee to 10 days after the appointment or election of such trustee. For the avoidance of doubt, subject to the provisions hereof, the Committee is granted standing to commence a Challenge by the Challenge Deadline and any trustee appointed or elected in these Chapter 11 Cases shall,

until the expiration of the period provided herein for asserting Challenges, and thereafter for the duration of any adversary proceeding or contested matter commenced pursuant to this Paragraph (whether commenced by such trustee, the Committee or commenced by any other party in interest on behalf of the Debtors' estates), be deemed to be a party other than the Debtors and shall not, for purposes of such adversary proceeding or contested matter, be bound by the acknowledgments, admissions, confirmations, and stipulations of the Debtors in the Interim Order and this Final Order.

(b) Binding Effect. To the extent any Prepetition Lien and Claim Matters are not subject to a Challenge timely and properly commenced by the Challenge Deadline, or to the extent any Challenge does not result in a final and non-appealable judgment or order of this Court that is inconsistent with the Prepetition Lien and Claim Matters, then, without further notice, motion, or application to, order of, or hearing before, this Court and without the need or requirement to file any proof of claim, the Prepetition Lien and Claim Matters shall pursuant to this Final Order become binding, conclusive, and final on any person, entity or party-in-interest in the Chapter 11 Cases, and their successors and assigns, and in any successor case for all purposes and shall not be subject to challenge or objection by any party-in-interest, including, without limitation, a trustee, responsible individual, examiner with expanded powers, or other representative of the Debtors' estates. Notwithstanding anything to the contrary herein, if any such proceeding is properly and timely commenced, the Prepetition Lien and Claim Matters shall nonetheless remain binding unless such Challenge is successful pursuant to an order or judgment that is final and no longer subject to appeal or further review. To the extent any such Challenge proceeding is timely and properly commenced, the Prepetition Secured Parties shall be entitled to include the related costs and expenses, including but not limited to reasonable attorneys' fees,

incurred in defending themselves in any such proceeding, pursuant to the Prepetition Financing Documents.

17. Limitation on Use of Proceeds. Notwithstanding anything in the Interim Order or this Final Order to the contrary, no portion or proceeds of the DIP Facility, the DIP Collateral, the Prepetition Collateral, the Cash Collateral, or the Carve-Out, and no disbursements set forth in the DIP Budget shall be used for the payment of professional fees, disbursements, costs, or expenses incurred in connection with: (a) objecting, contesting, or raising any defense to the validity, perfection, priority, or enforceability of, or any amount due under, the DIP Loan Documents or the Prepetition Financing Documents or any security interests, liens, or claims granted under the Interim Order, this Final Order, the DIP Loan Documents, or the Prepetition Financing Documents to secure such amounts; (b) asserting any Challenges, claims, actions, or causes of action against any of the DIP Lender, the Prepetition Secured Parties, or any of their respective agents, affiliates, subsidiaries, directors, officers, representatives, attorneys, or advisors; or (c) contesting the Prepetition Lien and Claim Matters; provided that no more than \$50,000 in the aggregate of the proceeds of the DIP Facility, the DIP Collateral, the Prepetition Collateral, the Cash Collateral, and the Carve-Out may be used by the Committee to investigate (but not prosecute or Challenge) Prepetition Lien and Claim Matters (of which the Committee stipulates that \$20,000 has been incurred as of August 2, 2019).

18. No Lien on Avoidance Actions or Their Proceeds. For the avoidance of doubt, the DIP Collateral, DIP Liens, DIP Superpriority Claims shall not include, nor extend to, any Avoidance Actions or to any and all products, rents, offspring, profits, and proceeds of any Avoidance Actions. Furthermore, the Adequate Protection Liens and Section 507(b) Claims of GenNx360 and Hark in their capacities as Prepetition Lenders shall not include, nor extend to,

any Avoidance Actions or to any and all products, rents, offspring, profits, and proceeds of any Avoidance Actions.

19. Adequate Protection. The Prepetition Secured Parties agree, and this Court finds, that the adequate protection provided in this Final Order (the “Adequate Protection”), including, without limitation, in this Paragraph, is reasonable and calculated to protect the interests of the Prepetition Secured Parties. Notwithstanding any other provision hereof, the grant of Adequate Protection to the Prepetition Secured Parties pursuant hereto is without prejudice to the right of the Prepetition Secured Parties to seek adequate protection or to seek modification of a grant of Adequate Protection provided in the Interim Order and this Final Order so as to provide different or additional adequate protection, and without prejudice to the right of the Debtors or any other party in interest to contest any such request.

(a) Adequate Protection Liens. As adequate protection, the Agent, in accordance with sections 361, 363(e), and 364(d) of the Bankruptcy Code, is hereby granted, for the benefit of the Prepetition Secured Parties, valid, binding, enforceable, and perfected junior security interests and replacement liens (the “Adequate Protection Liens”) upon all property of the Debtors whether arising prepetition or postpetition of any nature whatsoever, wherever located, in each case to secure the Prepetition Secured Obligations against, without duplication, the aggregate diminution, if any, subsequent to the Petition Date, in the value of the Prepetition Collateral by: (i) the reduction in Prepetition Collateral available to satisfy Prepetition Secured Obligations as a consequence of the priming of the Prepetition Secured Obligations by the DIP Obligations; (ii) depreciation, use, sale, loss, decline in market price, or otherwise of the Prepetition Collateral as a consequence of the use, sale, or lease of the Prepetition Collateral by the Debtors or as a result of the imposition of the automatic stay; and (iii) the sum of the

aggregate amount of all Cash Collateral and the aggregate value of all non-cash Prepetition Collateral that is applied in payment of the DIP Obligations or any other obligations or expenses of the Debtors other than Prepetition Secured Obligations, but only to the extent of any decrease in the value of the Prepetition Collateral on account of subsections (i), (ii), and (iii) above, all to the extent authorized by the Bankruptcy Code. The Adequate Protection Liens are subject and subordinate to (A) the Carve-Out, (B) the DIP Obligations, the DIP Liens, and the DIP Superpriority Claims, and (C) the Permitted Prior Senior Liens. The Adequate Protection Liens shall not (x) be subject to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code, (y) subject to any inter-company claim, whether secured or unsecured, of any Debtor or any domestic or foreign subsidiary or affiliate of any Debtor, or (z) hereafter be subordinated to or made *pari passu* with any other lien or security interest under sections 361, 363, or 364 of the Bankruptcy Code or otherwise except as expressly provided in this Final Order and the DIP Loan Documents, including, without limitation, with respect to the Carve-Out, Permitted Prior Senior Liens, DIP Obligations, DIP Liens, and DIP Superpriority Claims.

(b) Section 507(b) Claims. To the extent that the Agent shall hold claims allowable under sections 503(b) and 507(a)(2) of the Bankruptcy Code, notwithstanding the provision of Adequate Protection hereunder, the Agent for the benefit of the Prepetition Secured Parties is hereby each granted an administrative expense claim pursuant to section 507(b) of the Bankruptcy Code (each, a "Section 507(b) Claim") with priority over all other administrative expenses, but in all cases subject and subordinate to the Carve-Out, the Permitted Prior Senior Liens, DIP Obligations, DIP Liens, and DIP Superpriority Claims.

20. Milestones. As a condition to the DIP Facility and the use of Cash Collateral, the Debtors shall comply with the milestones attached hereto as Exhibit C (as have been amended, supplemented or otherwise modified from time to time, the “Milestones”). For the avoidance of doubt, the failure of the Debtors to comply with any of the Milestones (a) shall constitute an Event of Default under the DIP Facility, the Interim Order and this Final Order, (b) subject to the expiration of the Remedies Notice Period (defined below), result in the automatic termination of the Debtors’ authority to use Cash Collateral under the Interim Order and this Final Order, and (c) permit the DIP Lender, subject to Paragraph 22, to exercise the rights and remedies provided for in this Final Order and the DIP Facility.

21. Indemnification. The Debtors shall indemnify the DIP Lender and its successors and assigns and each of their officers, directors, employees, agents, advisors, and controlling persons (each, an “Indemnified Person”) and hold each of them harmless from and against all costs, expenses (including reasonable fees, disbursements, and other charges of counsel), and liabilities of such Indemnified Person arising out of or relating to any claim or any litigation or other proceeding (regardless of whether such Indemnified Person is a party thereto and regardless of whether such matter is initiated by a third party or by the Debtors or any of their affiliates or shareholders) that relates to the DIP Facility, the Interim Order or this Final Order, including the financing contemplated hereby, the Chapter 11 Cases, or any transactions in connection therewith; provided that no Indemnified Person will be indemnified for any cost, expense, or liability to the extent determined in a final, non-appealable judgment of a court of competent jurisdiction to have resulted from such Person’s gross negligence, willful misconduct, fraud, or violations of this Order. Other than with respect to the proviso at the end of the immediately preceding sentence, nothing herein is meant to limit the scope of any indemnity

provided for the benefit of the DIP Lender in the DIP Loan Documents. For the avoidance of doubt, to the extent there is any inconsistency between the indemnification provisions in the DIP Note and this Final Order, this Final Order shall govern.

22. Remedies. Upon the occurrence of an Event of Default under the DIP Loan Documents or upon the Maturity Date, and in each case without further notice, motion or application to, order of, or hearing before, this Court (other than such notice required by this Paragraph), subject to the full funding of the Carve-Out, the DIP Lender is granted leave to cease making financial accommodations to the Debtors, accelerate any or all of the DIP Obligations, and declare such DIP Obligations to be immediately due and payable in full, in cash. Upon the Maturity Date, and after providing five (5) Business Days' prior written notice to this Court (the "Remedies Notice Period"), the Agent, the U.S. Trustee, and counsel to the Committee, the DIP Lender shall be entitled to exercise all of its rights and remedies under this Final Order and the DIP Loan Documents, including, without limitation, foreclose upon the DIP Collateral or otherwise enforce the DIP Obligations, the DIP Liens, and the DIP Superpriority Claims on any or all of the DIP Collateral and to exercise any other default-related remedies under the DIP Loan Documents, this Final Order or applicable law in seeking to recover payment of the DIP Obligations. With respect to Permitted Prior Senior Liens, any exercise of such rights and remedies shall be in accordance with applicable non-bankruptcy law. During the Remedies Notice Period, any party in interest may seek an order of the Court staying the DIP Lender's exercise of such remedies against the DIP Collateral and, if no such stay is obtained, then the DIP Lender may exercise any and all such rights and remedies and the Debtors' authority to use Cash Collateral under the Interim Order and this Final Order shall terminate, in each case, without further order of the Court or notice to any party.

23. Access to DIP Collateral. Notwithstanding anything contained herein to the contrary and without limiting any other rights or remedies of the DIP Lender contained in the Interim Order, this Final Order or the DIP Loan Documents, or otherwise available at law or in equity, and subject to the terms of the DIP Loan Documents, upon written notice to the landlord of any leased premises that an Event of Default or the Maturity Date has occurred and is continuing under the DIP Loan Documents, the DIP Lender may, subject to the applicable notice provisions, if any, in the Interim Order, this Final Order and any separate agreement by and between such landlord and the DIP Lender, enter upon any leased premises of the Debtors or any other party for the purpose of exercising any remedy with respect to DIP Collateral located thereon and shall be entitled to all of the Debtors' rights and privileges as lessee under such lease without interference from the landlords thereunder. Nothing herein shall require the DIP Lender to assume any lease as a condition to the rights afforded to the DIP Lender in this Paragraph.

24. Insurance Policies. The Debtors consent to, and the DIP Lender and the Prepetition Secured Parties shall be, and shall be deemed to be, without any further action or notice, named as additional insureds and loss payees on each insurance policy maintained by the Debtors that in any way relates to DIP Collateral or Prepetition Collateral, as applicable.

25. Successors and Assigns. This Final Order, the DIP Note, and the other DIP Loan Documents shall be binding upon all parties in interest in these Chapter 11 Cases and their successors and assigns, including any subsequently appointed trustee, responsible individual, examiner with expanded powers, or other estate representative.

26. Survival. The provisions of this Final Order and any actions taken pursuant hereto shall survive the entry of any subsequent order, and the rights, remedies, powers, privileges, liens, and priorities of the DIP Lender and the Prepetition Secured Parties provided

for in this Final Order, in any DIP Loan Document and any Prepetition Financing Document shall not be modified, altered, or impaired in any manner without their consent (which consent shall not be unreasonably withheld) by any order, including any order (i) confirming any plan of reorganization or liquidation in any of the Chapter 11 Cases (and, to the extent not indefeasibly paid in full in cash, the DIP Obligations shall not be discharged by the entry of any such order, each of the Debtors having hereby waived such discharge pursuant to section 1141(d)(4) of the Bankruptcy Code), (ii) converting any of the Chapter 11 Cases to a Chapter 7 case, (iii) dismissing any of the Chapter 11 Cases, or (iv) any superseding cases under the Bankruptcy Code. The terms and provisions of this Final Order as well as the DIP Obligations, the DIP Liens, the DIP Superpriority Claim, the DIP Loan Documents, and the Adequate Protection Liens shall continue in full force and effect notwithstanding the entry of any such order, and such rights, claims, and liens shall maintain their priority as provided by this Final Order and the DIP Loan Documents to the maximum extent permitted by law until all of the DIP Obligations are indefeasibly paid in full, in cash.

27. Good Faith. The DIP Facility, the use of Cash Collateral, and the other provisions of this Final Order, the DIP Note, and the other DIP Loan Documents have been negotiated in good faith and at arm's length among the Debtors, the DIP Lender, and the Agent, and the extension of the financial accommodations to the Debtors by the DIP Lender and Prepetition Secured Parties pursuant to this Final Order and the DIP Loan Documents have been and are deemed to be extended in good faith, as that term is used in section 364(e) of the Bankruptcy Code. The DIP Lender and the Prepetition Secured Parties are entitled to, and are hereby granted, the full protections of section 364(e) of the Bankruptcy Code.

28. Subsequent Reversal or Modification. Subject to Paragraphs 26 and 27, if any or all of the provisions of this Final Order are hereafter reversed, modified, vacated, or stayed, that action will not affect (i) the validity of any obligation, indebtedness or liability under this Final Order and the DIP Loan Documents by the Debtors prior to the date of receipt of written notice to the DIP Lender and Agent of the effective date of such action or (ii) the validity and enforceability of any lien, administrative expense, right, or priority authorized or created hereby or pursuant to this Final Order and the DIP Loan Documents, including, without limitation, the DIP Obligations, the DIP Liens, the DIP Superpriority Claims, the Prepetition Secured Obligations, the Adequate Protection Liens, and the Section 507(b) Claims.

29. No Waiver. This Final Order shall not be construed in any way as a waiver or relinquishment of any rights that the DIP Lender and Prepetition Secured Parties may have to bring or be heard on any matter brought before this Court. Any consent, modification, declaration of default, exercise of remedies, or non-exercise of remedies under or in connection with this Final Order or the DIP Loan Documents shall require the approval of the DIP Lender and shall not be deemed a waiver or relinquishment of any of the rights of the DIP Lender. Except as expressly set forth herein, nothing contained in this Final Order (including without limitation, the authorization to use any Cash Collateral) shall impair, prejudice, or modify any rights, claims, or defenses available in law or equity to the DIP Lender or the Prepetition Secured Parties, including, without limitation, the right (a) to request conversion of any of the Debtors' Chapter 11 Cases to Chapter 7, (b) to seek to terminate the exclusive rights of the Debtors to file, and solicit acceptances of, a plan of reorganization under section 1121 of the Bankruptcy Code or propose, subject to the provisions of section 1121 of the Bankruptcy Code, a chapter 11 plan or plans, (c) to object to the fees and expenses of any Retained Professionals, and (d) to seek

relief from the automatic stay. All such rights, claims, and defenses, and the rights, objections, and defenses of all parties in connection therewith, are hereby reserved.

30. Additional Defaults. In addition, and without limitation of the Events of Default set forth in and defined in the DIP Loan Documents, the Interim Order, or this Final Order, it shall be a default hereunder (and constitute an “Event of Default” under the DIP Loan Documents) if an order is entered dismissing or converting any of the Chapter 11 Cases under section 1112 of the Bankruptcy Code or appointing a Chapter 11 trustee or an examiner or other estate representative with expanded powers. Any order for dismissal or conversion shall be automatically deemed to preserve the rights of the DIP Lender and the Prepetition Secured Parties under the Interim Order and this Final Order and shall preserve the Carve-Out. It shall be an Event of Default for the sale of substantially all of the assets of the Debtors, unless, upon the closing of such transaction, all liens securing the DIP Obligations and the Prepetition Secured Obligations (in their respective priority) are transferred to the proceeds of such sale. If an order dismissing any of these Chapter 11 Cases under section 305 or 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall be deemed to provide that (a) the DIP Liens and the DIP Superpriority Claims granted to the DIP Lender hereunder and in the DIP Loan Documents, as the case may be, and the Carve-Out shall continue in full force and effect, shall remain binding on all parties in interest and shall maintain their priorities as provided in the Interim Order and this Final Order until all DIP Obligations and indebtedness owing to the DIP Lender under the DIP Loan Documents shall have been indefeasibly paid in full in cash and the DIP Lender’s obligations and commitments under the DIP Loan Documents shall have been terminated, and this Court shall retain jurisdiction, notwithstanding such dismissal, for purposes of enforcing the DIP Obligations, DIP Liens, DIP Superpriority Claims, Adequate Protection

Liens, Section 507(b) Claims, and the Carve-Out. It shall be an Event of Default if, without the consent of the DIP Lender, the Debtors' actual disbursements for the payment of the fees and expenses of Retained Professionals and reimbursement of Committee Expenses exceed, on a line item basis for each Retained Professional or group of Retained Professionals, as the case may be, the total amounts reflected in the "Non-Recurring Disbursements" section of the DIP Budget.

31. Order Governs. In the event of any conflict between or among, as applicable, the provisions of the Interim Order, this Final Order and the DIP Loan Documents, the Motion, or any supporting documents, the provisions of this Final Order shall control and govern to the extent of such conflicts.

32. Right to Credit Bid/Assume Debt. Notwithstanding anything herein to the contrary, including Paragraph 16 above, pursuant to, among other things, section 363(k) of the Bankruptcy Code, (i) the DIP Lender in its capacity as Stalking Horse Bidder (as defined on Exhibit C) shall have the exclusive right to use the DIP Obligations, DIP Liens, and DIP Superpriority Claim to credit bid at the Auction, (ii) the DIP Lender in its capacity as Stalking Horse Bidder shall have the right to include as part of its Stalking Horse Bid an assumption of the Obligations under Term Loan A in the amount not less than \$5,347,722.47 plus any other accrued and accruing unpaid Obligations thereunder, including interest, fees and expenses (including legal fees and expenses), as part of its Stalking Horse Bid and (iii) the DIP Lender in its capacity as Stalking Horse Bidder shall have the right to include as part of its Stalking Horse Bid the assumption of the Obligations under Term Loan B (subject to satisfaction of the Obligations under Term Loan A) at the Auction. Notwithstanding anything herein to the contrary, including the foregoing and Paragraph 16 above, (i) to the extent that the DIP Lender in its capacity as Stalking Horse Bidder seeks to make subsequent overbids at the Auction (as

defined on Exhibit C) that include a crediting of its assumption of any portion of Term Loan B, in order for the crediting of such overbids to be considered higher and better for purposes of the Auction, the Stalking Horse Bidder shall be required to provide cash collateralization (which may be in the form of a letter of credit) of such overbid to the extent of the amount of the Term Loan B portion that it seeks to have credited for purposes of the overbid at the Auction and (ii) to the extent that the Stalking Horse Bidder is the successful purchaser of the Debtors' assets, the Committee and DNOW agree, that upon a successful Challenge, if any, to the nature, extent, validity or priority of the Term Loan A, Term Loan B, Term Loan C loans or the 2016 Amended and Restated Credit Agreement, they shall not seek to recover any portion of the Term Loan A Obligations from the DIP Lender, the Stalking Horse Bidder, GenNx360, Hark or the Agent. Nothing in this paragraph shall prejudice or otherwise impact any Challenge to the nature, extent, validity or priority of the rights, claims, causes of action, or other available relief arising out of, or otherwise relating to, the 2016 Amended and Restated Credit Agreement, the Term Loan A, Term Loan B or Term Loan C obligations. Such amounts of cash collateralization may be increased each round by the minimum overbid amount. If the DIP Lender in its capacity as Stalking Horse Bidder is the prevailing bidder, such collateralized amount shall be held in escrow subject to further determination by the Court. Subject to the cash collateralization provisions of this paragraph, nothing herein shall preclude the DIP Lender in its capacity as Stalking Horse Bidder and GenNx 360 from asserting in connection with the Sale Hearing (as defined in Exhibit C) that the credit bid or assumption of any or all Term Loan B shall be valued in a different manner than as valued by the Debtors, in consultation with the Committee, at the Auction, and the rights of all parties, including the Debtors and Committee, to object thereto are reserved.

33. No Marshaling. Except for the Prepetition Collateral of GenNx360 and Hark in their capacities as Prepetition Lenders, none of the DIP Collateral, or Prepetition Collateral shall be subject to the doctrine of marshaling or any similar doctrine or law of any jurisdiction requiring the recovery upon or application to any indebtedness of any collateral or proceeds in any particular order or action; provided, that notwithstanding the foregoing and anything to the contrary in the DIP Note, the DIP Lender and the Prepetition Secured Parties shall first use all DIP Collateral or Prepetition Collateral (respectively) that is encumbered property of the Debtors as of the Petition Date prior to using any other DIP Collateral or Prepetition Collateral (respectively) to finally and indefeasibly repay the DIP Obligations or Prepetition Secured Obligations (respectively) in full in cash. For the avoidance of doubt, there shall be no marshalling of the Prepetition Collateral securing the Term Loan C obligations.

34. Waiver of Requirement to File Proofs of Claim.

(a) The DIP Lender shall not be required to file proofs of claim in the Chapter 11 Cases or any successor Chapter 7 cases, in order to maintain its claims for payment of the DIP Obligations under the applicable DIP Loan Documents. The statements of claim in respect of the DIP Obligations set forth in the Interim Order and this Final Order, together with the evidence accompanying the Motion and presented at the Interim Hearing and the Final Hearing are deemed sufficient to and do constitute proofs of claim in respect of such obligations and such secured status.

(b) The Prepetition Secured Parties shall not be required to file proofs of claim in the Chapter 11 Cases or any successor Chapter 7 cases, in order to maintain their respective claims for payment of the Prepetition Secured Obligations under the applicable Prepetition Financing Documents or for performance of the Adequate Protection. The

statements of claim in respect of the Prepetition Secured Obligations and the Adequate Protection set forth in the Interim Order and this Final Order, together with the evidence accompanying the Motion and presented at the Interim Hearing and the Final Hearing are deemed sufficient to and do constitute proofs of claim in respect of such obligations and such secured status.

(c) Master Proof of Claim. Notwithstanding any order to the contrary entered by this Court in relation to the establishment of a bar date in the Chapter 11 Cases or any successor Chapter 7 cases, the Agent on behalf of itself and the Prepetition Secured Parties shall be authorized (but not required) in its sole discretion to file a master proof of claim against the Debtors (each a “Master Proof of Claim”) on account of their prepetition claims arising under the Prepetition Financing Documents, as applicable. Upon the filing of a Master Proof of Claim against the Debtors, the applicable Prepetition Secured Party and each of its respective successors and assigns, shall be deemed to have filed a proof of claim in the amount set forth opposite its name therein in respect of its claims against the Debtors arising under the Prepetition Financing Documents, and the claims of the Prepetition Secured Party (and its respective successors and assigns) named in the Master Proof of Claim shall be allowed or disallowed as if such entity had filed a separate proof of claim in each Chapter 11 Case or any successor cases in the amount set forth opposite each name listed in the Master Proof of Claim. The Agent shall further be authorized to amend its respective Master Proof of Claim from time to time to, among other things, reflect a change in the holders of the claims set forth therein, or a reallocation among such holders of the claims asserted therein resulting from any transfer of such claims. The provisions set forth in this Paragraph and any Master Proof of Claim filed pursuant to the terms hereof are intended solely for the purpose of administrative convenience and shall not

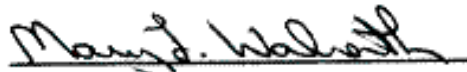
affect the substantive rights of any party in interest or their respective successors in interest, including, without limitation, the rights of each Prepetition Secured Party as the holder of a claim against the Debtors under applicable law, and the numerosity requirements set forth in section 1126 of the Bankruptcy Code.

35. Headings. The headings in this Final Order are for reference purposes only and will not in any way affect the meaning and interpretation of the terms of this Final Order.

36. Immediate Effect of Order. This Final Order shall take effect immediately upon execution hereof, and, notwithstanding anything to the contrary contained in Bankruptcy Rules, including Bankruptcy Rule 4001(a)(3), there shall be no stay of execution of effectiveness of this Order. All objections to the entry of this Final Order have been withdrawn or overruled and the Motion is approved on a final basis on the terms and conditions set forth herein. The Debtors shall promptly mail copies of this Final Order to the Notice Parties and to counsel to the Committee

37. Jurisdiction. The Bankruptcy Court shall have exclusive jurisdiction with respect to any and all disputes or matters under, or arising out of or in connection with, either the DIP Facility or the DIP Loan Documents.

Dated: August 7th, 2019
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

Case 19-11396-MFW Doc 164-1 Filed 08/07/19 Page 1 of 37

Exhibit A

DIP Note

**DEBTOR-IN-POSSESSION
DELAYED DRAW TERM LOAN PROMISSORY NOTE**

\$6,000,000

New York, New York
Dated as of June [], 2019

FOR VALUE RECEIVED, and subject to the terms and conditions set forth herein, Schramm, Inc., a Pennsylvania corporation (the "Borrower"),¹ as borrower, HDR Holding, Inc., a Delaware corporation, as a guarantor (the "Guarantor", and together with the Borrower, each a "Debtor" and, collectively, the "Debtors"), hereby unconditionally promise to pay to the order of Schramm II Inc., a Delaware corporation (together with its successors and assigns, collectively, the "Lender"), the aggregate of any and all amounts the Lender has disbursed to the Borrower pursuant to this Debtor-in-Possession Delayed Draw Term Loan Promissory Note (as the same may be amended, modified, renewed, restated, or supplemented from time to time, this "Note"), not to exceed the aggregate principal amount at any time outstanding of six million dollars (\$6,000,000), together with all accrued and unpaid interest (including all interest added to the outstanding principal amount hereof pursuant to Section 4(a) below) and fees thereon, as provided in this Note. On June 23, 2019 (the "Petition Date"), the Debtors filed voluntary petitions for reorganization ("Chapter 11 Cases") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended (the "Bankruptcy Code"). The Chapter 11 Cases are being jointly administered. The Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Borrower has requested that the Lender make loans from time to time on the terms, and subject to the conditions set forth, in this Note and the Interim Order or Final Order (as applicable), which are incorporated herein upon entry by the Bankruptcy Court. The Borrower intends to utilize such loans to fund working capital requirements, costs, and expenses of administration of the Chapter 11 Cases, and fees and expenses relating to the DIP Facility during the pendency of the Chapter 11 Cases.

1. Loans.

(a) Subject to the terms and conditions hereof, the Lender shall make available to the Borrower, from time to time until the Maturity Date, loans (each, a "Loan") in an aggregate principal amount not to exceed the Commitment. The aggregate principal amount of all Loans made hereunder shall not exceed at any time the amount of the Commitment, plus all interest added to the outstanding principal amount hereof pursuant to Section 4(a) below (the "Maximum Amount"). Until the Maturity Date, the Borrower may, subject to the satisfaction of the conditions as set forth in Section 2 herein, from time to time borrow Loans under this Section 1, provided that (i) the aggregate principal amount of Loans made hereunder shall not exceed the Commitment, (ii) each disbursement of Loans shall be in a minimum amount of

¹ Capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed thereto in Section 20 of this Note, in the DIP Motion or in the Interim Order.

\$1,000,000, (iii) the initial disbursement of Loans shall be made no sooner than one (1) Business Day after entry of the Interim Order and shall not exceed \$2,000,000, unless otherwise agreed by Lender in its sole discretion, (iv) the second disbursement of Loans shall be made no sooner than July 11, 2019, and shall not exceed \$1,000,000, unless otherwise agreed by Lender in its sole discretion, (v) the third disbursement of Loans shall be made no sooner than August 8, 2019, and shall not exceed \$1,000,000, unless otherwise agreed by Lender in its sole discretion, and (vi) the fourth disbursement of Loans shall be made no sooner than September 26, 2019, and shall not exceed \$2,000,000, unless otherwise agreed by Lender in its sole discretion. Each Loan shall be made on notice by the Borrower to the Lender at the address specified in Section 22(a) hereof. Any such notice must be given no later than 12:00 p.m. (New York time) on the date that is at least two (2) Business Days prior to the date of the proposed Loan; provided that the initial Loan may be made within one (1) Business Day after entry of the Interim Order. Each such notice (a “Notice of Loan”) shall be given in writing (by electronic transmission or overnight courier) specifying (i) the amount of such Loan requested, (ii) the proposed date of such Loan, which must be a Business Day, and (iii) such other information as may be reasonably required by the Lender. Upon receipt of a Notice of Loan, subject to the satisfaction of the conditions set forth in this Note, the Lender shall make the proceeds of such Loan available to the Borrower on the applicable date of funding of such Loan by transferring immediately available funds equal to such proceeds to Borrower’s Designated Account. Any amounts of principal repaid or prepaid hereunder may not be reborrowed. The entire unpaid balance of the Loans and all other Obligations shall be immediately due and payable in full in immediately available funds on the Maturity Date.

(b) The Lender shall be entitled to rely upon, and shall be fully protected in relying upon, any Notice of Loan or similar notice believed by it to be genuine. The Lender may assume that each Person executing and delivering any such notice was duly authorized, unless the responsible individual acting thereon has actual knowledge to the contrary.

(c) The Borrower shall utilize the proceeds of Loans to fund working capital requirements, costs and expenses of administration of the Chapter 11 Cases, and fees and expenses relating to the DIP Facility during the pendency of the Chapter 11 Cases, in each case, in accordance with the Approved Budget, subject to Permitted Variances.

2. Certain Conditions to Each Loan. The Lender shall not be obligated to fund any Loan, if, as of the date thereof:

(a) the Borrower or Guarantor has not paid any amount then payable hereunder or under any other Loan Document or shall not have performed any of their respective obligations hereunder or under any other Loan Document;

(b) the Borrower or Guarantor has not duly executed and delivered this Note;

(c) the Borrower or Guarantor has not delivered corporate resolutions, incumbency certificates, and similar documents, in form and substance satisfactory to Lender in its reasonable discretion, with respect to this Note and the other Loan Documents and the transactions contemplated hereby and thereby;

(d) the Borrower and Guarantor have not (i) duly paid any and all fees, costs, and expenses then payable hereunder or under any other Loan Documents (including, without limitation, the reasonable and documented fees, costs, and expenses of counsel to the Lender) and (ii) fully performed all of their respective obligations hereunder or under any other Loan Documents;

(e) (i) the Bankruptcy Court has not entered the Interim Order within three (3) days of the Petition Date, or (ii) the Interim Order has been stayed, vacated, reversed, modified, or amended without the Lender's consent in its sole discretion;

(f) on any such date that is on or after the date that is thirty (30) calendar days after the Petition Date, (i) the Bankruptcy Court has not entered the Final Order, or (ii) the Final Order has been stayed, vacated, reversed, modified, or amended without the Lender's consent in its sole discretion;

(g) the Borrower has not delivered to the Lender the Approved Budget that is in form and substance satisfactory in the Lender's sole discretion, or shall not have updated the Approved Budget in accordance with this Note;

(h) a Bankruptcy Court order has been entered (i) authorizing the Borrower or the Guarantor to obtain financing or credit pursuant to section 364 of the Bankruptcy Code from any Person other than the Lender; or (ii) providing adequate protection to any Person under sections 361 through 364 of the Bankruptcy Code other than as authorized pursuant to the Interim Order or with the consent and approval of the Lender;

(i) any representation or warranty by the Borrower or the Guarantor contained herein or in any other Loan Documents shall be untrue or incorrect as of such date in any material respect;

(j) (i) any Event of Default shall have occurred and be continuing or would result after giving effect to any requested Loan; or (ii) any Default shall have occurred and be continuing or would result after giving effect to any requested Loan, and the Lender in its sole discretion shall have determined not to make any Loan so long as such Default is continuing;

(k) except as occasioned by the commencement of the Chapter 11 Cases and the actions, proceedings, investigations, and other matters related thereto, any event or circumstance having a Material Adverse Effect shall have occurred since the date hereof and the Lender shall have determined not to make any Loan so long as such Material Adverse Effect is continuing;

(l) the Debtors shall not have filed the Sale Motion in form and substance acceptable to the Lender;

(m) the Sale Motion has been withdrawn or an order approving the Sale Motion (which order must be in form and substance acceptable to the Lender) has not been entered by the date set forth in the Interim Order;

(n) on any date after the Sale Order has been entered, the Sale Order is stayed, vacated, reversed, modified (without Lender's consent), or on appeal; or

(o) after giving effect to any Loan, the outstanding principal amount of all Loans would exceed the lesser of (i) the Maximum Amount, (ii) the amount then authorized by the Interim Order, and (iii) the amount permitted to be borrowed for the applicable period as set forth in the Approved Budget, subject to Permitted Variances.

The request and acceptance by the Borrower of the proceeds of any Loan shall be deemed to constitute, as of the date of such request, acceptance or incurrence, (i) a representation and warranty by the Borrower and Guarantor that the conditions in this Section 2 have been satisfied and (ii) a reaffirmation by the Borrower and Guarantor of the granting and continuance of the Lender's Liens, pursuant to the Collateral Documents.

3. Payment of Principal. FOR VALUE RECEIVED, Borrower promises to pay to the Lender, in the manner and at the place hereinafter provided, the unpaid principal amount of all Loans made by the Lender pursuant to this Note to the Borrower on the Maturity Date.

4. Payment of Interest.

(a) The unpaid principal amount of Loans shall bear interest from the date when made until paid in full at a rate equal to twelve percent (12%) per annum, payable on each applicable Interest Payment Date. All payments of interest hereunder shall be made by adding the amount of interest payable on any Interest Payment Date to the outstanding principal amount of Loans, and such amount shall thereafter constitute principal amount of Loans bearing interest in accordance herewith.

(b) If any payment of any of the Obligations becomes due and payable on a day other than a Business Day, the time for payment thereof will be extended to the next succeeding Business Day and, with respect to payments of principal, interest thereon shall be payable at the then applicable rate during such extension.

(c) All computations of fees and interest shall be made by the Lender on the basis of a 360-day year, in each case for the actual number of days occurring in the period for which such fees or interest are payable. Each determination by the Lender of an interest rate hereunder shall be final, binding, and conclusive on the Borrower (absent manifest error).

(d) So long as an Event of Default shall have occurred and be continuing, and at the election of the Lender confirmed by written notice from the Lender to the Borrower, the interest rate applicable to the Obligations shall be increased by two percentage points (2.00%); per annum above the rate of interest otherwise applicable hereunder (the "Default Rate"), and all outstanding Obligations shall bear interest at the Default Rate applicable to such Obligations. Interest at the Default Rate shall accrue from the date of such Event of Default until such Event of Default is cured or waived and shall be payable upon demand.

(e) Notwithstanding anything to the contrary set forth in this Section 4, if a court of competent jurisdiction determines in a final order that the rate of interest payable hereunder exceeds the highest rate of interest permissible under law (the "Maximum Lawful

Rate”), then so long as the Maximum Lawful Rate would be so exceeded, the rate of interest payable hereunder shall be equal to the Maximum Lawful Rate; provided that if at any time thereafter the rate of interest payable hereunder is less than the Maximum Lawful Rate, Borrower shall continue to pay interest hereunder at the Maximum Lawful Rate until such time as the total interest received by the Lender is equal to the total interest that would have been received had the interest rate payable hereunder been (but for the operation of this paragraph) the interest rate payable since the closing date as otherwise provided in this Note. Thereafter, interest hereunder shall be paid at the rate(s) of interest and in the manner provided in Sections 4(a) through (d), unless and until the rate of interest again exceeds the Maximum Lawful Rate, and at that time this paragraph shall again apply. If the Maximum Lawful Rate is calculated pursuant to this paragraph, such interest shall be calculated at a daily rate equal to the Maximum Lawful Rate divided by the number of days in the year in which such calculation is made. If, notwithstanding the provisions of this Section 4(e), a court of competent jurisdiction shall finally determine that the Lender have received interest hereunder in excess of the Maximum Lawful Rate, the Lender shall, to the extent permitted by applicable law, promptly apply such excess to the payment of other outstanding Obligations and thereafter shall refund any excess to Borrower or as a court of competent jurisdiction may otherwise order.

5. Payments. Except as expressly provided in Section 4(a), all payments of principal and interest in respect of this Note shall be made in Dollars in same day funds to the Lender to such account or accounts as shall be designated in a written notice delivered by the Lender to the Borrower. Each payment made hereunder shall be credited first, to fees and reimbursable expenses of the Lender then due and payable pursuant to any of the Loan Documents; second, to interest then due and payable on the Loans; third, to the principal balance of the Loans until the same has been paid in full; and fourth, to all other Obligations. Any amounts of principal repaid or prepaid hereunder may not be reborrowed.

The Borrower hereby authorizes the Lender to, and the Lender may, from time to time, upon prior notice to the Borrower, charge the Loan Account of the Borrower with any amount due and payable by the Borrower under any Loan Documents. The Borrower agrees that the Lender shall have the right to make such charges whether or not any Default or Event of Default shall have occurred and be continuing. Any amount charged to the Loan Account of the Borrower shall be deemed a Loan hereunder made by the Lender to the Borrower. The Borrower confirms that any charges that the Lender may so make to the Loan Account of the Borrower as herein provided will be made as an accommodation to Borrower and solely at the Lender’s discretion.

6. Optional Prepayments. The Borrower shall have the right at any time and from time to time to prepay the principal of the Loans in whole or in part without penalty or premium. Any prepayment or repayment hereunder shall be accompanied by accrued interest on the principal amount of the Loans being prepaid or repaid to the date of prepayment or repayment.

7. Mandatory Prepayments.

(a) [Reserved].

(b) Immediately upon receipt by the Borrower or the Guarantor (as applicable) of cash proceeds of any asset disposition, unless the Lender agrees otherwise, the Borrower or Guarantor (as applicable) shall prepay the Loans, together with accrued interest thereon, in an amount equal to 100% of such proceeds, net of (A) reasonable commissions and other reasonable and customary transaction costs, fees, and expenses properly attributable to such transaction and payable by the Borrower or Guarantor (as applicable) in connection therewith as approved by the Bankruptcy Court (in each case, paid to non-affiliates), (B) transfer or sales taxes, and (C) amounts required to be applied to the repayment of debt secured by such assets sold, to the extent such debt or such liens are senior in priority to the payment of the Obligations or the Lender's Liens securing the Obligations. Any such prepayment shall be applied in accordance with Section 5.

(c) Upon the receipt by the Borrower or the Guarantor of any Extraordinary Receipts, the Borrower or Guarantor (as applicable) shall prepay the outstanding principal of the Loans in an amount equal to 100% of such Extraordinary Receipts, net of any reasonable expenses incurred in collecting such Extraordinary Receipts. Any such prepayment shall be applied in accordance with Section 5.

(d) Borrower shall prepay the Loans to the extent the Borrower or the Guarantor has excess cash above amounts reasonably necessary or anticipated to pay all expenses and other obligations (including any mandatory prepayments under this Section 7) then due and payable and taking into account the prospective funding needs in the Approved Budget, with any such prepayment to be in an amount equal to such excess cash amount and to be payable within two (2) business days after any such excess cash amount is obtained by the Borrower or the Guarantor. Any such prepayment shall be applied in accordance with Section 5.

(e) No Implied Consent. Nothing in this Section 7 shall be construed to constitute the Lender's consent to any transaction that is not permitted by other provisions of this Note or the other Loan Documents. For the avoidance of doubt, no reinvestment of the proceeds of any Extraordinary Receipts, asset sales or other proceeds of Collateral shall be permitted without the prior written consent of the Lender in its sole and absolute discretion.

8. Expense Reimbursement.

(a) [Reserved].

(b) [Reserved].

(c) Lender's Out-of-Pocket Expenses. The Borrower and Guarantor shall reimburse the Lender for all reasonable and documented out-of-pocket expenses incurred in connection with the negotiation and preparation of the Loan Documents and the obtaining of approval of the Loan Documents by the Bankruptcy Court (including the reasonable and documented fees and expenses of Winston & Strawn LLP ("W&S") and Robinson & Cole LLP ("R&C"), counsel for the Lender, all of the Lender's special counsel, advisors, consultants, and auditors retained in connection with the preparation and negotiation of the Loan Documents and advice in connection therewith). In addition, the Borrower and Guarantor shall reimburse the Lender for all reasonable fees, costs, and expenses, including the reasonable fees, costs, and

expenses of counsel (including W&S and R&C) or other advisors for advice, assistance, or other representation in connection with:

(1) any amendment, modification or waiver of, consent with respect to, or termination or enforcement of, any of the Loan Documents or advice in connection with the administration of the Loans made pursuant hereto or Lender's rights hereunder or thereunder;

(2) the review of pleadings and documents related to the Chapter 11 Cases and any subsequent Chapter 7 cases, attendance at meetings or hearings related to the Chapter 11 Cases and any subsequent Chapter 7 cases, and general monitoring of the Chapter 11 Cases and any subsequent Chapter 7 cases;

(3) any litigation, contest, dispute, suit, proceeding, or action (whether instituted by the Lender, the Borrower, a Guarantor, or any other Person, and whether as a party, witness, or otherwise) in any way relating to the Collateral, any of the Loan Documents, or any other agreement to be executed or delivered in connection herewith or therewith, including any litigation, contest, dispute, suit, case, proceeding, or action, and any appeal or review thereof, in connection with a case commenced by or against the Borrower, a Guarantor or any other Person that may be obligated to the Lender by virtue of the Loan Documents, including any such litigation, contest, dispute, suit, proceeding, or action arising in connection with any work-out or restructuring of the Loans during the pendency of one or more Events of Default;

(4) any attempt to enforce any remedies of the Lender against the Borrower, a Guarantor, or any other Person that may be obligated to the Lender by virtue of any of the Loan Documents, including any such attempt to enforce any such remedies in the course of any work-out or restructuring of the Loans during the pendency of one or more Events of Default;

(5) any work-out or restructuring of the Loans during the pendency of one or more Events of Default; and

(6) any efforts to (i) monitor the Loans or any of the other Obligations, (ii) evaluate, observe or assess the Borrower, Guarantor, or their respective affairs, and (iii) verify, protect, evaluate, assess, appraise, collect, sell, liquidate, or otherwise dispose of any of the Collateral;

including, as to each of clauses (1) through (6) above, all documented and reasonable attorneys' and other professional and service providers' fees arising from such services, including those in connection with any appellate proceedings, and all expenses, costs, charges, and other fees incurred by such counsel and others in connection with or relating to any of the events or actions described in this Section 8(c), all of which shall be payable, on demand, by the Borrower and Guarantor to the Lender. Without limiting the generality of the foregoing, such documented and reasonable expenses, costs, charges, and fees may include: fees, costs and expenses of accountants, appraisers, investment bankers, management, and other consultants and paralegals; court costs and expenses; photocopying and duplication expenses; court reporter fees, costs, and

expenses; long distance telephone charges; air express charges; facsimile charges; secretarial overtime charges; and expenses for travel, lodging, and food paid or incurred in connection with the performance of such legal or other advisory services. For the avoidance of doubt, all of the foregoing fees, costs, and expenses shall be Obligations under the Note.

9. Indemnity. The Borrower and Guarantor shall indemnify and hold harmless the Lender and its respective affiliates, members, officers, directors, employees, attorneys, agents, and representatives (each, an “Indemnified Person”), from and against any and all suits, actions, proceedings, claims, damages, losses, liabilities, and expenses (including reasonable attorneys’ fees and disbursements and other costs of investigation or defense, including those incurred upon any appeal) that may be instituted or asserted against or incurred by any such Indemnified Person as the result of credit having been extended, suspended, or terminated under this Note and the other Loan Documents and the administration of such credit, and in connection with or arising out of the transactions contemplated hereunder and thereunder and any actions or failures to act in connection therewith, and legal costs and expenses arising out of or incurred in connection with disputes between or among any parties to any of the Loan Documents (collectively, “Indemnified Liabilities”); provided that, neither the Borrower nor the Guarantor shall be liable for any indemnification to an Indemnified Person to the extent that any such suit, action, proceeding, claim, damage, loss, liability, or expense results solely from that Indemnified Person’s gross negligence or willful misconduct as finally determined by a court of competent jurisdiction. **NO INDEMNIFIED PERSON SHALL BE RESPONSIBLE OR LIABLE TO ANY OTHER PARTY, ANY SUCCESSOR, ASSIGNEE, OR THIRD PARTY BENEFICIARY OF SUCH PERSON OR ANY OTHER PERSON ASSERTING CLAIMS DERIVATIVELY THROUGH SUCH PARTY, FOR INDIRECT, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES THAT MAY BE ALLEGED AS A RESULT OF CREDIT HAVING BEEN EXTENDED, SUSPENDED, OR TERMINATED UNDER ANY LOAN DOCUMENT OR AS A RESULT OF ANY OTHER TRANSACTION CONTEMPLATED HEREUNDER OR THEREUNDER.** For the avoidance of doubt, the Borrower’s and Guarantor’s obligations under this paragraph shall be an Obligation under this Note.

10. Adjustments for Withholding, Capital Adequacy. Notwithstanding anything to the contrary contained herein, all payments to the Lender by the Borrower and Guarantor under this Note shall be made free and clear of and without deduction or withholding for any and all taxes, duties, levies, imposts, deductions, charges, or withholdings and all related liabilities (all such taxes, duties, levies, imposts, deductions, charges, withholdings, and liabilities being referred to as “Taxes”) imposed by the United States of America or any other nation or jurisdiction (or any political subdivision or taxing authority of either), unless such Taxes are required by applicable law to be deducted or withheld and excluding taxes imposed on Lender’s overall net income by the jurisdiction under the laws of which it is organized or any political subdivision thereof. If the Borrower or Guarantor shall be required by applicable law to deduct or withhold any such Taxes from or in respect of any amount payable under this Note, then (i) the amount payable shall be increased (and for greater certainty, in the case of interest, the amount of interest shall be increased) as may be necessary so that after making all required deductions or withholdings, (including deductions or withholdings applicable to any additional amounts paid under this Note) the Lender receives an amount equal to the amount it would have received if no such deduction or withholding had been made, (ii) the Borrower or Guarantor shall

make such deductions or withholdings, and (iii) the Borrower or Guarantor shall immediately pay the full amount deducted or withheld to the relevant governmental entity in accordance with applicable law.

If the effect of the adoption, effectiveness, phase-in, or applicability after the date hereof of any law, rule or regulation (including without limitation any tax, duty, charge, or withholding on or from payments due from the Borrower or Guarantor (but excluding taxation on the overall net income of the Lender)), or any change therein or in the interpretation or administration thereof by any governmental authority, central bank, or comparable agency charged with the interpretation or administration thereof, is to reduce the rate of return on the capital of the Lender with respect to this Note or to increase the cost to the Lender of making or maintaining amounts available under this Note, the Borrower and Guarantor agree to pay the Lender such additional amount or amounts as will compensate the Lender on an after-tax basis for such reduction or increase.

The Borrower and Guarantor agree to immediately pay any present or future stamp or documentary taxes or any other excise or property taxes, charges, financial institutions duties, debits taxes, or similar levies (all such taxes, charges, duties, and levies being referred to as “Other Taxes”) which arise from any payment made by the Borrower or Guarantor under this Note or from the execution, delivery or registration of, or otherwise with respect to, this Note.

The Borrower and Guarantor shall indemnify the Lender for the full amount of Taxes or Other Taxes (including, without limitation, any Taxes or Other Taxes imposed by any jurisdiction on amounts payable by the Borrower hereunder) paid by the Lender and any liability (including penalties, interest, and expenses) arising from or with respect to such Taxes or Other Taxes, whether or not they were correctly or legally asserted, excluding taxes imposed on the Lender’s overall net income. Payment under this indemnification shall be made upon demand. A certificate as to the amount of such Taxes or Other Taxes submitted to the Borrower or Guarantor by the Lender shall be conclusive evidence, absent manifest error, of the amount due from the Borrower to the Lender.

The Borrower and Guarantor shall furnish to the Lender the original or a certified copy of a receipt evidencing payment of Taxes or Other Taxes made by the Borrower within thirty (30) days after the date of any payment of Taxes or Other Taxes.

11. [Reserved].

12. Priority of Obligations and the Lender’s Liens. The priority of the Lender’s Liens on the Collateral and of the Obligations, including adequate protection liens and superpriority claims granted to the Lender under the Interim Order and the Final Order shall be as set forth in the Interim Order or Final Order (as applicable). As more fully described in the Interim Order or Final Order (as applicable), to the fullest extent allowed pursuant to the Bankruptcy Code and subject to any limitations set forth in the Interim Order or the Final Order (as applicable), the Lender’s Liens on the Collateral and the Obligations shall be senior to all other liens, claims, interests, and other obligations of the Borrower and Guarantor, including but not limited to all Liens provided to the Prepetition Secured Parties pursuant to the Prepetition Financing Documents.

13. Further Assurances. The Borrower and Guarantor represent that no other Indebtedness of the Borrower or Guarantor exists other than this Note and the Permitted Indebtedness. The Borrower and Guarantor agree that they shall, at the Borrower's and Guarantor's expense and upon request of the Lender, duly execute and deliver or cause to be duly executed and delivered, to the Lender such further instruments and do and cause to be done such further acts as may be necessary or proper in the opinion of the Lender to carry out more effectively the provisions and purposes of this Note or any other Loan Documents, including, upon the Lender's written request and in form and substance satisfactory to the Lender, security agreements, UCC-1 financing statements and other Collateral Documents granting to the Lender, first priority Liens in the Collateral to secure the Obligations.

14. Reports and Notices.

(a) On or before Wednesday of each calendar week commencing on the first full week after the Petition Date, the Borrower hereby agrees to deliver to the Lender (i) a report of operating disbursements, non-recurring disbursements, cash receipts and West Chester New Rig Deposits (each, on a line-item basis corresponding to the applicable line items in the Approved Budget) and (ii) a statement setting forth in reasonable detail the cash balance for each deposit account of the Debtors as of the previous Friday.

(b) The Borrower and Guarantor will provide the Lender with the following by no later than 5:00 p.m. (New York time) on Tuesday of each calendar week, commencing on July 2, 2019: a comparison of actual total operating disbursements, total non-recurring disbursements, total cash receipts and total West Chester New Rig Deposits for the most recently ended Applicable Period to the Approved Budget for such Applicable Period and an explanation in reasonable detail of the variances between actual results and the Approved Budget for such Applicable Period and verifying whether or not such variances constitute Permitted Variances.

(c) [Reserved].

(d) The Borrower and Guarantor hereby agree to deliver, or cause to be delivered to the Lender, each of the following, which shall be in form and detail acceptable to the Lender in its sole discretion:

(1) promptly (and in any event within twenty-four (24) hours) after any officer of the Borrower or the Guarantor (as applicable) obtains knowledge of the occurrence of any Default or Event of Default under any Loan Document, notice of such occurrence, together with a detailed statement by a responsible officer of the Borrower or Guarantor (as applicable) of the steps being taken by the Borrower or Guarantor (as applicable) to cure the effect of such Default or Event of Default;

(2) promptly (and in any event within twenty-four (24) hours) upon any officer of the Borrower or the Guarantor (as applicable) obtaining knowledge thereof, notice of any material loss of or damage to any Collateral or of any material adverse change in any Collateral or the prospect of payment thereof, or of the occurrence or existence of any other event or circumstance which has had or could reasonably be expected to have a Material Adverse Effect;

(3) with respect to any filings by the Borrower or Guarantors in the Chapter 11 Cases, as soon as reasonably practicable and in any event at least two (2) calendar days prior to filing, copies of any motion, pleading, or other filing by or on behalf of any Debtor that would materially and negatively impact the Collateral or, if granted, would constitute a Material Adverse Effect;

(4) (A) promptly (and in any event within twenty-four (24) hours) after submission to any governmental authority, (I) all documents and information furnished to such governmental authority in connection with any investigation of the Borrower or the Guarantor (as applicable), other than routine inquiries by such governmental authority, and (II) copies of any periodic or special reports filed by the Borrower or the Guarantor (as applicable) with any governmental authority, other than routine reports filed in the ordinary course of business, and (B) as soon as available and in any event within three (3) days of the execution, receipt or delivery thereof, copies of notices and other communications received from or sent to any governmental authority which specifically relate to the Borrower or the Guarantor other than routine communication with the Office of the United States Trustee;

(5) promptly (and in any event within twenty-four (24) hours) upon any officer of the Borrower or the Guarantor (as applicable) obtaining knowledge thereof, notice of the Borrower's or the Guarantor's (as applicable) violation of any law, rule or regulation which could reasonably be expected to have a Material Adverse Effect; and

(6) promptly upon request, such other information concerning the condition or operations, financial or otherwise, of the Borrower or the Guarantor as the Lender may reasonably request.

(e) The Borrower and Guarantor authorize the Lender to communicate directly with their independent certified public accountants, advisors, and chief restructuring officer (the "CRO"), if any, and authorizes and shall instruct those accountants, advisors, and CRO to reasonably disclose and make reasonably available to the Lender, as requested by the Lender, any and all financial statements and other supporting financial documents, schedules, and information relating to the Borrower and Guarantor or any of their respective subsidiaries (including copies of any issued management letters) with respect to the business, financial condition and other affairs of the Borrower and Guarantor or any of their respective subsidiaries.

15. Affirmative Covenants.

The Borrower and Guarantor agree that:

(a) The Borrower and Guarantor will keep accurate books of record and account pertaining to the Collateral and pertaining to the Borrower's and Guarantor's businesses and financial condition and such other matters as the Lender may from time to time request, in which true and complete entries will be made in accordance with GAAP and, upon request of the Lender, will permit any officer, employee, attorney, accountant, or agent of the Lender to audit, review, make extracts from, or copy, at the Borrower's and Guarantor's expense, any and all

corporate and financial and other books and records of the Borrower and Guarantor at all times during ordinary business hours, to send and discuss with account debtors and other obligors requests for verification of amounts owed to the Borrower and Guarantor, and to discuss the Borrower's and Guarantor's affairs with any of their directors, officers, employees, attorneys, accountants, or the CRO. The Borrower and Guarantor will permit the Lender, or any of its respective officers, employees, accountants, attorneys, or agents, to examine and inspect any Collateral or any other property of the Borrower and Guarantor at any time during ordinary business hours. The provisions of the forgoing Section 15(a) are subject, in all respects, to reasonable confidentiality restrictions the Borrower and Guarantor may deem appropriate under the circumstances and any applicable attorney-client, attorney work product, or similar privilege in favor of the Borrower or Guarantor.

(b) (i) The Borrower and Guarantor will (A) comply with all requirements of law, the non-compliance with which could reasonably be expected to have a Material Adverse Effect and (B) use and keep the Collateral, and require that others use and keep the Collateral, only for lawful purposes, without violation of any federal, state, or local law, statute, or ordinance, and (ii) the Borrower and Guarantor will obtain, maintain in effect and comply with all permits, licenses, and similar approvals necessary for the operation of their respective businesses as now or hereafter conducted.

(c) The Borrower and Guarantor will pay or discharge, when due (except for any pre-petition taxes), (i) all taxes, assessments, and governmental charges levied or imposed upon them or upon their income or profits, upon any properties of the Borrower or Guarantor (including, without limitation, the Collateral) or upon or against the creation, perfection or continuance of the security interest, prior to the date on which penalties attach thereto, (ii) all federal, state and local taxes required to be withheld by them, and (iii) all lawful claims for labor, materials and supplies which, if unpaid, might by law become a lien or charge upon any properties of the Borrower and Guarantor.

(d) (i) The Borrower and Guarantor will keep and maintain the Collateral and all of their other properties necessary or useful in their business in good condition, repair, and working order (normal wear and tear excepted) and will from time to time replace or repair any worn, defective, or broken parts, and (ii) the Borrower and Guarantor will defend the Collateral against all claims or demands of all Persons (other than the Lender and, if applicable and authorized by the Interim Order or Final Order, the Prepetition Secured Parties) claiming the Collateral or any interest therein.

(e) The Borrower and Guarantor will conduct their respective businesses and affairs without knowingly infringing upon or interfering with any intellectual property of any other Person in any respect and shall comply in all respects with the terms of the written agreements governing the Borrower's and Guarantor's use of any intellectual property licenses.

(f) The Borrower and Guarantor will keep all Collateral free and clear of all security interests, liens and encumbrances, except Permitted Encumbrances.

(g) The Borrower and Guarantor will obtain and at all times maintain insurance with responsible and reputable insurers, in such amounts and against such risks as may

from time to time be reasonably required by the Lender, but in all events in such amounts and against such risks as is usually carried by companies engaged in a similar business and owning similar properties in the same general areas in which the Borrower and Guarantor operate. Without limiting the generality of the foregoing, the Borrower and Guarantor will at all times keep all tangible Collateral insured against risks of fire (including so-called extended coverage), theft, collision (for Collateral consisting of motor vehicles), and such other risks and in such amounts as the Lender may reasonably request, with any loss payable to the Lender to the extent of its interest. As provided in the Interim Order or the Final Order (as applicable), the Lender shall be named as a loss payee or an additional insured, as applicable, on each insurance policy maintained by the Debtors that in any way relates to the Collateral. Upon request of Lender, Borrower and Guarantor shall cause all policies of insurance maintained by any Debtor to contain a loss payable endorsement or an additional insured endorsement, as applicable, in favor of the Lender, in form and substance acceptable to the Lender.

(h) The Borrower and Guarantor will preserve and maintain their existences and all of their rights, privileges, and franchises necessary or desirable in the normal conduct of their business and shall conduct their business in an orderly, efficient, and regular manner.

(i) The Borrower and Guarantor shall operate their business in a manner consistent with the Approved Budget subject only to Permitted Variances.

(j) The Borrower and Guarantor shall comply with all terms, conditions, requirements and obligations set forth in the Interim Order or the Final Order (as applicable).

(k) The Borrower and Guarantor shall maintain their cash management systems in accordance with the cash management order authorizing the Debtors' use of the cash management system entered in the Chapter 11 Cases, which order shall be in form and substance reasonably satisfactory to the Lender.

16. Negative Covenants.

The Borrower and Guarantor agree that, without the prior written consent of the Lender in its sole discretion:

(a) The Borrower and Guarantor shall not directly or indirectly merge or consolidate with, acquire all or substantially all of the assets or capital Stock of, or otherwise combine with, any Person.

(b) The Borrower and Guarantor shall not create, incur, assume, or permit to exist any Indebtedness, except (without duplication), to the extent not prohibited by the Bankruptcy Code, Permitted Indebtedness.

(c) The Borrower and Guarantor shall not make any changes in their capital structures or amend their organizational documents in a manner that would adversely affect the Lender.

(d) The Borrower and Guarantor shall not create, incur, assume, or permit to exist any Lien on or with respect to any of their properties or assets (whether now owned or

hereafter acquired) except for Permitted Encumbrances. In addition, Borrower and Guarantor shall not become a party to any agreement, note, indenture, or instrument or take any other action that would prohibit the creation of a Lien on any of their properties or other assets in favor of the Lender, as collateral for the Obligations.

(e) The Borrower and Guarantor shall not enter into any material contractual agreement or any amendment thereto after the Petition Date, other than the Loan Documents, unless approved by the Lender.

(f) The Borrower and Guarantor shall not maintain any deposit account or securities account that is not subject to a first priority security interest in favor of the Lender pursuant to the Interim Order and the Final Order.

(g) The Borrower and Guarantor shall not consent to any amendment, supplement or other modification of any of the terms or provisions contained in, or applicable to, the Interim Order or the Final Order.

(h) [Reserved].

(i) [Reserved].

(j) The Borrower and Guarantor shall not make any changes in any of their business objectives, purposes, or operations that could materially adversely affect the repayment of the Loans or any of the other Obligations or could reasonably be expected to have or result in a Material Adverse Effect. The Borrower and Guarantor shall not engage in any business other than the businesses currently engaged in by them or businesses reasonably related thereto.

(k) The Borrower and Guarantor will not assume, guarantee, endorse, or otherwise become directly or contingently liable in connection with any obligations of any other Person, except the endorsement of negotiable instruments by the Borrower and Guarantor for the deposit or collection or similar transactions in the ordinary course of business.

(l) Except for Stock in any subsidiary of Borrower or Guarantor held on the date hereof, the Borrower and Guarantor will not purchase or hold beneficially any Stock or other securities or evidences of indebtedness of, make or permit to exist any Loans or advances to, or make any investment or acquire any interest whatsoever in, any other Person, including specifically, but without limitation, any partnership or joint venture.

(m) The Borrower and Guarantor will not permit any breach, default, or event of default to occur under any note, loan agreement, indenture, mortgage, or other security agreement binding upon the Borrower or the Guarantor, except for breaches, defaults or events of default existing on the date of commencement of the Chapter 11 Cases or resulting therefrom.

(n) The Borrower and Guarantor will not pay salaries, bonuses, commissions, consultant fees, or other compensation, other than as provided in the Approved Budget; or increase the salary, bonus, commissions, consultant fees, or other compensation of any directors, shareholders, or consultant, or any member of their respective families, other than as may be provided in the Approved Budget.

(o) The Borrower and Guarantor will not convey, sell, lease, assign, transfer, or otherwise dispose of any of their property, business, or assets, whether now owned or hereinafter acquired other than in the ordinary of course of business or pursuant to the terms of the Stalking Horse APA.

(p) The Borrower and Guarantor shall not cancel any claim or debt owing to them, except for reasonable consideration negotiated on an arm's-length basis and in the ordinary course of their business consistent with past practices.

17. Events of Default; Rights and Remedies. Notwithstanding the provisions of section 362 of the Bankruptcy Code and without application or motion to the Bankruptcy Court, but subject to the provisions of the Interim Order or the Final Order (as applicable), the occurrence of any one or more of the following events (regardless of the reason therefor) shall constitute an "Event of Default" hereunder:

(a) The Borrower or the Guarantor (i) shall fail to make any payment of principal or interest on, or fees owing in respect of the Loans or any of the other Obligations when due and payable, or (ii) shall fail to pay or reimburse the Lender for any expense reimbursable hereunder or under any other Loan Document in accordance with the Interim Order or Final Order (as applicable).

(b) Any representation or warranty herein or in any other Loan Document or in any written statement, report, financial statement, or certificate made or delivered to the Lender by the Borrower or the Guarantor is untrue or incorrect in any material respect as of the date when made or deemed made.

(c) Any provision of any Loan Document shall for any reason cease to be valid, binding, and enforceable in accordance with its terms (or the Borrower or the Guarantor shall challenge the enforceability of any Loan Document or shall assert in writing, or engage in any action or inaction based on any such assertion, that any provision of any Loan Document has ceased to be or otherwise is not valid, binding and enforceable in accordance with its terms), or any Lien created under any Loan Document shall cease to be a valid and perfected first priority Lien (except as otherwise permitted herein or therein) in any of the Collateral purported to be covered thereby.

(d) There shall be a change in the business, assets, operations, or financial condition of the Borrower or the Guarantor that results in a Material Adverse Effect, other than those customarily caused by commencing a case under chapter 11 of the Bankruptcy Code and other than a sale pursuant to the terms of the Stalking Horse APA which results in the indefeasible payment in full in cash of the Obligations.

(e) A deviation during any Applicable Period in actual total operating disbursements, total non-recurring disbursements, total cash receipts or total West Chester New Rig Deposits from the Approved Budget in excess of any such item's Permitted Variance shall occur.

(f) Any event constituting an event of default or termination event as set forth in the Interim Order or Final Order (as applicable) (each, a "Termination Event") shall occur.

(g) Any of the following shall occur:

(1) Any milestone set forth on Exhibit C to the Interim Order or Exhibit C to the Final Order, as applicable, shall not have been satisfied.

(2) The Stalking Horse APA is terminated.

(3) A motion or other pleading is filed in any of the Chapter 11 Cases to dismiss or convert such Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code, which motion or pleading is not withdrawn within five (5) calendar days, or otherwise overruled or dismissed by the Bankruptcy Court within fourteen (14) calendar days.

(4) A motion or other pleading is filed in any of the Chapter 11 Cases for entry of an order authorizing the appointment of an interim or permanent trustee in such Chapter 11 Case or the appointment of an examiner (other than a fee examiner) in such Chapter 11 Case, which motion or pleading is not withdrawn within five (5) calendar days, or otherwise overruled or dismissed by the Bankruptcy Court within fourteen (14) calendar days.

(5) The Borrower or Guarantor moves in the Chapter 11 Cases (or fails to contest in good faith a motion brought by any other Person) to approve a sale or other disposition of substantially all of the Debtors' assets that does not provide for the termination of Lender's Commitment to make Loans and the indefeasible payment in full in cash of all Obligations and all indebtedness and obligations owing to the Lender or its Affiliates under the Prepetition Financing Documents, in each case, upon the consummation of such sale.

(6) The Borrower or the Guarantor moves for (or fails to contest in good faith a motion brought by any other Person), or the Bankruptcy Court enters, an order confirming a chapter 11 plan, which plan is not in form and substance acceptable to the Lender in its sole discretion, unless such plan provides for the termination of Lender's Commitment to make Loans and the indefeasible payment in full in cash of all Obligations and all indebtedness and obligations owing to the Lender or its Affiliates under the Prepetition Financing Documents, in each case, on or prior to the effective date of such plan.

(7) The Borrower or the Guarantor moves in the Chapter 11 Cases (or fails to contest in good faith a motion brought by any other Person or such motion succeeds): (i) to obtain financing from any Person other than the Lender or one of its wholly-owned subsidiaries under sections 364(c) or 364(d) of the Bankruptcy Code (other than any such financing that provides for the termination of Lender's Commitment to make Loans and the indefeasible payment in full in cash of all Obligations and all indebtedness and obligations owing to the Lender or its Affiliates under the Prepetition Financing Documents, in each case, on the effective date of such financing); (ii) to grant any Lien other than Permitted Encumbrances upon or affecting any Collateral (other than any such Lien securing financing that provides for the termination of Lender's

Commitment to make Loans and the indefeasible payment in full in cash of all Obligations and all indebtedness and obligations owing to the Lender or its Affiliates under the Prepetition Financing Documents, in each case, on the effective date of such financing); (iii) to recover from any portion of the Collateral any costs or expenses of preserving or disposing of such Collateral under section 506(c) of the Bankruptcy Code; or (iv) to authorize any other action or actions adverse to the Lender, or its rights and remedies hereunder or its interests in the Collateral, that would, individually or in the aggregate, have a Material Adverse Effect.

(8) The allowance of any claim or claims under section 506(c) of the Bankruptcy Code against or with respect to any Collateral.

(9) The Interim or Final Order is reversed, vacated, revoked, stayed, amended, supplemented, or otherwise modified in any manner without the prior written consent of the Lender in its sole discretion.

(10) The occurrence of any post-petition judgments, liabilities or events that, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect.

(11) The entry by the Bankruptcy Court of an order authorizing the appointment of an interim or permanent trustee in the Chapter 11 Cases or the appointment of an examiner (other than a fee examiner) in the Chapter 11 Cases.

(12) The Chapter 11 Cases, or any of them, shall be dismissed or converted from cases under Chapter 11 to cases under Chapter 7 of the Bankruptcy Code without the consent of the Lender.

(13) The entry of an order in the Chapter 11 Cases avoiding or requiring repayment of any portion of the payments made to the Lender on account of the Obligations owing under this Note or the other Loan Documents.

(14) The entry of an order in the Chapter 11 Cases granting any other superpriority administrative claim or Lien equal to or superior to that granted to the Lender, unless consented to by the Lender in its sole discretion.

(15) The entry of an order by the Bankruptcy Court granting relief from or modifying the automatic stay of section 362 of the Bankruptcy Code (i) to allow any creditor (other than the Lender) to execute upon or enforce a Lien on any Collateral, or (ii) with respect to any Lien of or the granting of any Lien on any Collateral to any state or local environmental or regulatory agency or authority that could reasonably be expected to have a Material Adverse Effect.

(16) There shall commence any suit or action against the Lender by or on behalf of (i) the Borrower or Guarantor or (ii) the Committee, in each case, that constitutes a challenge or that asserts a claim or seeks a legal or equitable remedy that would have the effect of subordinating the claim or Lien of the Lender and, if such suit or action is commenced by any Person other than Borrower or the Guarantor, such suit or

action shall not have been dismissed or stayed within ten (10) calendar days after service thereof on the Lender, and, if stayed, such stay shall have been lifted.

(h) The Borrower or the Guarantor shall fail or neglect to perform, keep or observe any of the provisions of this Note that is not the subject of any other clause of this Section 17, and such failure remains uncured for five (5) Business Days after notice.

If any Event of Default shall have occurred and be continuing, then the Lender may, upon written notice (the "Termination Notice") to the Borrower and Guarantor subject to the terms of the Interim Order or Final Order (as applicable): (i) terminate this Note and the DIP Facility contemplated hereby with respect to further Loans; (ii) declare all or any portion of the Obligations, including all or any portion of any Loan, to be forthwith due and payable; (iii) revoke the Borrower's and the Guarantor's rights to use cash collateral in which Lender has an interest; and (iv) exercise any rights and remedies under the Loan Documents, the Interim Order or the Final Order (as applicable), or at law or in equity.

Except as otherwise provided for in this Note or by applicable law, the Borrower and Guarantor waive: (a) presentment, demand, protest, and notice of presentment, dishonor, notice of intent to accelerate, notice of acceleration, protest, default, nonpayment, maturity, release, compromise, settlement, extension or renewal of any or all commercial paper, accounts, contract rights, documents, instruments, chattel paper and guaranties at any time held by the Lender on which the Borrower or Guarantor may in any way be liable, and hereby ratifies and confirms whatever the Lender may do in this regard; (b) all rights to notice and a hearing prior to the Lender's taking possession or control of, or the Lender's replevy, attachment or levy upon, the Collateral or any bond or security that might be required by any court prior to allowing the Lender to exercise any of its remedies; and (c) the benefit of all valuation, appraisal, marshaling and exemption laws.

Subject to the terms of the Interim Order and Final Order (as applicable), in addition to any rights now or hereafter granted under applicable law and not by way of limitation of any such rights, upon the occurrence and during the continuance of any Event of Default, the Lender is hereby authorized at any time or from time to time, without notice to the Borrower or to any other Person, any such notice being hereby expressly waived, to offset and to appropriate and to apply any and all balances held by it at any of its offices for the account of the Borrower or the Guarantor (regardless of whether such balances are then due to the Borrower or the Guarantor) and any other properties or assets at any time held or owing by the Lender to or for the credit or for the account of the Borrower or the Guarantor against and on account of any of the Obligations that are not paid when due.

To the extent permitted by law and subject in all respects to the terms of the Interim Order or the Final Order (as applicable), the Lender's sole duty with respect to the custody, safekeeping, and physical preservation of the Collateral in its possession shall be to deal with it in the same manner as the Lender deals with similar securities and property as a secured lender in other transactions. The Lender's duty of care with respect to Collateral in the custody or possession of a bailee or other third person shall be deemed fulfilled if it exercises reasonable care in the selection of the bailee or other third person, and the Lender need not otherwise

preserve, protect, insure or care for any Collateral, and the Lender shall not be obligated to preserve any rights the Borrower may have against prior parties.

18. Reference Agreements. This Note evidences the Loans that may be made to the Borrower from time to time in the aggregate principal amount at any time outstanding of up to the Maximum Amount and is issued pursuant to and entitled to the benefits of the Interim Order and Final Order (as applicable) to which reference is hereby made for a more complete statement of the terms and conditions under which the Loans evidenced by this Note are made and are to be repaid.

19. The Guarantee.

(a) To induce the Lender to execute this Note and advance the Loans described herein and in consideration of benefits expected to accrue to the Borrower by reason of the Loans and for other good and valuable consideration, receipt of which is hereby acknowledged, the Guarantor hereby unconditionally and irrevocably guarantees jointly and severally to the Lender, the due and punctual payment of all present and future Obligations of the Borrower to the Lender, including, but not limited to, the due and punctual payment of principal of and interest on the Loans and the due and punctual payment of all other Obligations now or hereafter owed by the Borrower under the Loan Documents, in each case as and when the same shall become due and payable, whether at stated maturity, by acceleration, or otherwise, according to the terms hereof and thereof (including all interest, costs, fees, and charges). In case of failure by the Borrower to punctually pay any Obligations owed to the Lender guaranteed hereby, the Guarantor hereby unconditionally agrees to make such payment or to cause such payment to be made punctually as and when the same shall become due and payable, whether at stated maturity, by acceleration, or otherwise, and as if such payment were made by the Borrower.

(b) The obligations of the Guarantor shall be unconditional and absolute and, without limiting the generality of the foregoing, shall not be released, discharged, or otherwise affected by:

(1) any extension, renewal, settlement, compromise, waiver, or release in respect of any obligation of the Borrower or the Guarantor under this Note or any other Loan Document or by operation of law or otherwise;

(2) any modification or amendment of or supplement to this Note or any other Loan Document;

(3) any change in the corporate existence, structure, or ownership of the Borrower or the Guarantor, or any of their respective assets, or any resulting release or discharge of any obligation of the Borrower or of the Guarantor contained in any Loan Document;

(4) the existence of any claim, set-off, or other rights which the Borrower or the Guarantor may have at any time against the Lender or any other Person, whether or not arising in connection herewith;

(5) any failure to assert, or any assertion of, any claim or demand or any exercise of, or failure to exercise, any rights or remedies against the Borrower, the Guarantor or any other Person or property;

(6) any application of any sums by whomsoever paid or howsoever realized to any obligation of the Borrower or the Guarantor, regardless of what obligations of the Borrower or the Guarantor remain unpaid (other than any payment of the Obligations);

(7) any invalidity or unenforceability relating to or against the Borrower or the Guarantor for any reason of this Note or of any other Loan Document or any provision of applicable law or regulation purporting to prohibit the payment by the Borrower or the Guarantor of the principal of or interest on any Loan or any other amount payable under the Loan Documents (in each case, other than in connection with the payment in full of the Obligations); or

(8) any other act or omission to act or delay of any kind by the Lender or any other Person or any other circumstance whatsoever that might, but for the provisions of this paragraph, constitute a legal or equitable discharge of the obligations of the Guarantor under this paragraph.

(c) The Guarantor's obligations under this Note shall remain in full force and effect until the Commitments are terminated and the Obligations payable by the Borrower and the Guarantor under this Agreement and all other Loan Documents shall have been paid in full. If at any time any payment of the Obligations by the Borrower or the Guarantor under the Loan Documents is rescinded or must be otherwise restored or returned, the Guarantor's obligations under this Note with respect to such payment shall be reinstated at such time as though such payment had become due but had not been made at such time.

(d) The Guarantor agrees it will not exercise any rights which it may acquire by way of subrogation by any payment made hereunder, or otherwise, until all the Obligations shall have been paid in full subsequent to or concurrently with the termination of all the Commitments. If any amount shall be paid to a Guarantor on account of such subrogation rights at any time prior to the later of (i) the payment in full of the Obligations payable by the Borrower hereunder and the other Loan Documents and (ii) the termination of the Commitments, such amount shall be held in trust for the benefit of the Lender and shall forthwith be paid to the Lender.

(e) Subject to the terms of the Interim Order and Final Order (as applicable), to the fullest extent permitted by law, the Guarantor irrevocably waives acceptance hereof, presentment, demand, protest, and any notice not provided for herein, as well as any requirement that at any time any action be taken by the Lender or any other Person against the Borrower, another Guarantor, or any other Person.

(f) Subject to the terms of the Interim Order and Final Order (as applicable), if acceleration of the time for payment of any Obligation payable by the Borrower, all such amounts otherwise subject to acceleration under the terms of this Note or the other Loan

Documents shall nonetheless be payable by the Guarantor hereunder forthwith on demand by the Lender.

(g) Subject to the terms of the Interim Order and Final Order (as applicable), the Borrower and the Guarantor are engaged in related businesses and integrated to such an extent that the financial strength and flexibility of the Borrower has a direct impact on the success of the Guarantor. The Guarantor will derive substantial direct and indirect benefit from the extensions of credit hereunder.

(h) The Guarantor shall take such action as the Borrower is required by this Agreement to cause such Guarantor to take, and shall refrain from taking such action as the Borrower is required by this Agreement to prohibit such Guarantor from taking.

20. Definitions. The following terms used in this Note shall have the following meaning (and any of such terms may, unless the context otherwise requires, be used in the singular or the plural depending on the reference):

“Applicable Period” means each of the First Applicable Period, the Second Applicable Period, the Third Applicable Period and each Rolling Applicable Period, as applicable.

“Approved Budget” means a detailed budget which sets forth projected cash receipts (including a line item for projected West Chester New Rig Deposits) and cash disbursements on a weekly basis by line item for the time period from and including the Petition Date through the conclusion of the initial Approved Budget period set forth therein, in form and substance acceptable to the Lender in its sole discretion prior to the hearing to consider the authorization of the Borrower’s and Guarantor’s entry into this Note, a copy of which is attached hereto as Exhibit A, as the same may be updated, modified or supplemented from time to time with the written consent of the Lender in its sole discretion.

“Bankruptcy Code” shall have the meaning given such term in the recital to this Note.

“Bankruptcy Court” shall have the meaning given such term in the recital to this Note.

“Borrower” shall have the meaning given such term in the recital to this Note.

“Business Day” means any day other than a Saturday, Sunday or legal holiday under the laws of the State of New York or any other day on which banking institutions located in the State of New York are authorized or required by law or other governmental action to close.

“Chapter 11 Cases” shall have the meaning given such term in the recital to this Note.

“Collateral” shall mean the assets and property covered by the Interim Order and Final Order (as applicable) and the other Collateral Documents and any other assets and property, real or personal, tangible or intangible, now existing or hereafter acquired, that may at

any time be or become subject to a security interest or Lien in favor of the Lender, to secure the Obligations. Without limiting the foregoing, the Collateral shall include all proceeds of any of the foregoing and all present and future assets and property of the estates of the Borrower and Guarantor under section 541(a) of the Bankruptcy Code (including, without limitation, the proceeds of claims and causes of action under chapter 5 of the Bankruptcy Code).

“Collateral Documents” shall mean any agreement entered into pursuant to Section 13 hereof and all similar agreements entered into guaranteeing payment of, or granting a Lien upon property as security for payment of, the Obligations, including the Interim Order or the Final Order (as applicable).

“Committee” shall mean any official committee of unsecured creditors appointed in the Chapter 11 Cases.

“Commitment” means the commitment of the Lender to make the Loans to the Borrower in the aggregate principal amount not to exceed \$6,000,000, as the same may be terminated or reduced from time to time in accordance with the terms of this Note.

“Contingent Obligation” means, with respect to any Person, any obligation of such Person guaranteeing or intended to guarantee any Indebtedness, leases, dividends or other obligations (“primary obligations”) of any other Person (the “primary obligor”) in any manner, whether directly or indirectly, including, without limitation, (i) the direct or indirect guaranty, endorsement (other than for collection or deposit in the ordinary course of business), co-making, discounting with recourse or sale with recourse by such Person of the obligation of a primary obligor, (ii) the obligation to make take-or-pay or similar payments, if required, regardless of nonperformance by any other party or parties to an agreement, (iii) any obligation of such Person, whether or not contingent, (A) to purchase any such primary obligation or any property constituting direct or indirect security therefor, (B) to advance or supply funds (1) for the purchase or payment of any such primary obligation or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (C) to purchase property, assets, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation, or (D) otherwise to assure or hold harmless the holder of such primary obligation against loss in respect thereof; provided, however, that the term “Contingent Obligation” shall not include any product warranties extended in the ordinary course of business. The amount of any Contingent Obligation shall be deemed to be an amount equal to the stated or determinable amount of the primary obligation with respect to which such Contingent Obligation is made (or, if less, the maximum amount of such primary obligation for which such Person may be liable pursuant to the terms of the instrument evidencing such Contingent Obligation) or, if not stated or determinable, the maximum reasonably anticipated liability with respect thereto (assuming such Person is required to perform thereunder), as determined by such Person in good faith.

“CRO” shall have the meaning given such term in Section 14(e) of this Note.

“Debtor” and “Debtors” shall have the meaning given such terms in the recital to this Note.

“Default” means an event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default.

“Default Rate” shall have the meaning given such term in Section 4(d) of this Note.

“Designated Account” shall mean account number [____], ABA routing number [____-7021] maintained by the Borrower with [____] in [____], [____] or such other deposit account of the Borrower (located in the United States) that has been designated as such in writing by the Borrower to the Lender.

“DIP Facility” shall mean this Agreement and the extensions of credit made hereunder.

“DIP Motion” shall mean the Debtors’ Motion for Entry of Interim and Final Orders, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, and 507, Bankruptcy Rules 2002, 4001, 6004, and 914, and Local Rule 4001-2: (I) Authorizing the Debtors to Obtain Postpetition Senior Secured Superpriority Financing, (II) Authorizing the Debtors’ use of Cash Collateral, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief.

“Dollars” or “\$” shall mean lawful currency of the United States of America.

“Event of Default” shall have the meaning given such term in Section 17 of this Note.

“Extraordinary Receipts” means any cash received by the Borrower or a Guarantor not in the ordinary course of business (and not consisting of proceeds described Section 7(b) hereof), including, without limitation, (i) foreign, United States, state, or local tax refunds, (ii) pension plan reversions, (iii) proceeds of insurance, (iv) judgments, proceeds of settlements, or other consideration of any kind in connection with any cause of action, (v) condemnation awards (and payments in lieu thereof), (vi) indemnity payments, and (vii) any purchase price adjustment received in connection with any purchase agreement.

“Final Order” shall mean an order of the Bankruptcy Court entered in the Chapter 11 Cases after a final hearing pursuant to section 364 of the Bankruptcy Code and Bankruptcy Rule 4001, satisfactory in form and substance to the Lender in its sole discretion, together with all extensions, modifications, and amendments thereto, (i) authorizing the Borrower and Guarantor to obtain credit, incur Indebtedness, and grant Liens under this Note and the other Loan Documents, (ii) granting adequate protection, (iii) modifying the automatic stay, and (iv) granting related relief, all as set forth in such order.

“First Applicable Period” means the period from the Petition Date to the last day of the Fiscal Week that is two Fiscal Weeks after the Petition Date.

“Fiscal Week” means a calendar week commencing on Sunday and ending on the following Saturday.

“GAAP” shall mean generally accepted accounting principles in the United States of America.

“Guarantor” shall have the meaning given such term in the recital to this Note.

“Indebtedness” shall mean, without duplication, with respect to any Person, (i) all indebtedness of such Person for borrowed money; (ii) all obligations of such Person for the deferred purchase price of property or services (other than trade payables, payables to vendors or other account payables incurred in the ordinary course of such Person’s business and not past due for more than ninety (90) days after the date such payable was created); (iii) all obligations of such Person evidenced by bonds, debentures, notes, or other similar instruments or upon which interest payments are customarily made; (iv) all obligations and liabilities of such Person created or arising under any conditional sales or other title retention agreement with respect to property used or acquired by such Person, even though the rights and remedies of the lessor, seller, and the lender thereunder are limited to repossession or sale of such property; (v) all capitalized lease obligations of such Person; (vi) all obligations and liabilities, contingent or otherwise, of such Person, in respect of letters of credit, acceptances, and similar facilities; (vii) all obligations and liabilities, calculated on a basis reasonably satisfactory to the Lender and in accordance with accepted practice, of such Person under interest rate or currency swaps and other derivatives; (viii) all Contingent Obligations; (ix) all other items which, in accordance with GAAP, would be included as liabilities on the liability side of the balance sheet of such Person; and (x) all obligations referred to in clauses (i) through (ix) of this definition of another Person secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) a Lien upon property owned by such Person, even though such Person has not assumed or become liable for the payment of such Indebtedness. The Indebtedness of any Person shall include the Indebtedness of any partnership or joint venture in which such Person is a general partner or a joint venturer.

“Indemnified Person” shall have the meaning given such term in Section Error! Reference source not found. of this Note.

“Interest Payment Date” shall mean the first Business Day of each month to occur while any Loans are outstanding; provided that, in addition to the foregoing, each of (x) the date upon which all of the Loans have been paid in full and (y) the Maturity Date shall be deemed to be an “Interest Payment Date” with respect to any interest that has then accrued hereunder.

“Interim Order” shall mean an order of the Bankruptcy Court entered in the Chapter 11 Cases pursuant to section 364 of the Bankruptcy Code and Bankruptcy Rule 4001, satisfactory in form and substance to the Lender in its sole discretion, together with all extensions, modifications, and amendments thereto, (i) authorizing the Borrower and Guarantor, on an interim basis, to obtain credit, incur Indebtedness, and grant Liens under this Note and the other Loan Documents, (ii) granting adequate protection, (iii) modifying the automatic stay, (iv) setting a final hearing, and (v) granting related relief, all as set forth in such order. The Interim Order is attached hereto as Exhibit B.

“Lender” shall have the meaning given such term in the recital to this Note.

“Lien” shall mean any mortgage or deed of trust, pledge, hypothecation, assignment, deposit arrangement, lien, charge, claim, security interest, easement, encumbrance, or preference, priority, or other security agreement or preferential arrangement of any kind or nature whatsoever (including any lease or title retention agreement, any financing lease having substantially the same economic effect as any of the foregoing, and the filing of, or agreement to give, any financing statement perfecting a security interest under the Uniform Commercial Code or comparable law of any jurisdiction).

“Loan” shall have the meaning given such term in Section 1 of this Note.

“Loan Account” means an account maintained hereunder by the Lender on its books of account with respect to the Borrower, in which the Borrower will be charged with all Loans made to, and all other Obligations incurred by, the Borrower.

“Loan Documents” shall mean this Note, the Interim Order, the Final Order, the Collateral Documents, and all other agreements, instruments, documents, and certificates executed and delivered to, or in favor of, the Lender and including all other pledges, powers of attorney, consents, assignments, contracts, notices, and all other written matter whether heretofore, now or hereafter executed by or on behalf of the Borrower or the Guarantor, or any employee of the Borrower or the Guarantor, and delivered to the Lender in connection with this Note or the transactions contemplated thereby. Any reference in this Note or any other Loan Document to a Loan Document shall include all appendices, exhibits or schedules thereto, and all amendments, restatements, supplements, or other modifications thereto, and shall refer to such Loan Document as the same may be in effect at any and all times such reference becomes operative.

“Material Adverse Effect” means a material adverse effect on (i) the operations, business assets, or properties or condition (financial or otherwise) of the Borrower or a Guarantor (other than those resulting solely from the commencement of the Chapter 11 Cases), (ii) the ability of the Borrower or a Guarantor to perform any of its obligations under any Loan Document to which it is a party (other than those resulting solely from the commencement of the Chapter 11 Cases), (iii) the legality, validity, or enforceability of this Note or any other Loan Document, (iv) the rights and remedies of the Lender under any Loan Document, or (v) the validity, perfection, or priority of a Lien in favor of the Lender on any of the Collateral.

“Maturity Date” means the earliest of: (i) Stated Maturity Date; (ii) the date on which the Obligations are declared to be, or otherwise become, due and payable in full due to the occurrence of an Event of Default; and (iii) the date of delivery of a Termination Notice.

“Maximum Amount” shall have the meaning given such term in Section 1 of this Note.

“Maximum Lawful Rate” shall have the meaning given such term in Section 4(e) of this Note.

“Note” shall have the meaning given such term in the recitals of this Note.

“Notice of Loan” shall have the meaning given such term in Section 1 of this Note.

“Obligations” shall mean all loans, advances, debts, liabilities, and obligations for the performance of covenants, tasks, or duties or for payment of monetary amounts (whether or not such performance is then required or contingent, or such amounts are liquidated or determinable) owing by the Borrower and Guarantor to the Lender, and all covenants and duties regarding such amounts, of any kind or nature, present or future, whether or not evidenced by any note, agreement or other instrument, arising under this Note or any of the other Loan Documents. This term includes all principal, interest, fees, charges, expenses, attorneys’ fees and any other sum chargeable to the Borrower and Guarantor under this Note or any of the other Loan Documents.

“Other Taxes” shall have the meaning given such term in Section 10 of this Note.

“Permitted Encumbrances” shall mean any pre-existing liens and security interests as of the Petition Date on the Collateral, but solely to the extent that such liens and security interests were, as of the Petition Date, valid, enforceable, perfected, and non-avoidable liens, or were perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code.

“Permitted Indebtedness” shall mean: (a) current Indebtedness maturing in less than 90 days and incurred in the ordinary course of business for supplies, equipment, services, taxes or labor; (b) Indebtedness arising under this Note and the other Loan Documents; (c) Prepetition Indebtedness; (d) deferred taxes and other expenses incurred in the ordinary course of business; (e) other Indebtedness listed in the Approved Budget; and (f) administrative expenses of Borrower for which the Bankruptcy Court has not directed payment.

“Permitted Variances” shall mean, for any Applicable Period, any variance that does not result in (w) the actual total operating disbursements for any Applicable Period being greater than 110% of what is projected in the Approved Budget as “Total Operating Disbursements” for such period, (x) the actual total non-recurring disbursements for any Applicable Period being greater than 110% of what is projected in the Approved Budget as “Total Non-Recurring Disbursements” for such period, (y) the actual total cash receipts for any Applicable Period being more than 10% less than what is projected in the Approved Budget as “Total Cash Receipts” for such period or (z) the actual total amount of West Chester New Rig Deposits received for any Applicable Period being more than 10% less than what is projected in the Approved Budget as “Rig Sales” for such period. Actual total operating disbursements, total non-recurring disbursements and total cash receipts shall be determined in a manner consistent with the determination of “Total Operating Disbursements,” “Total Non-Recurring Disbursements” and “Total Cash Receipts”, respectively, in the Approved Budget.

“Person” shall mean any individual, sole proprietorship, partnership, joint venture, trust, unincorporated organization, association, corporation, limited liability company, institution, public benefit corporation, other entity or government (whether federal, state, county, city, municipal, local, foreign, or otherwise, including any instrumentality, division, agency, body, or department thereof).

“Petition Date” shall have the meaning given such term in the recitals of this Note.

“Prepetition Financing Documents” shall have the meaning given such term in the Interim Order or the Final Order, as applicable.

“Prepetition Indebtedness” shall mean all Indebtedness of the Borrower and Guarantor incurred or assumed prior to the Petition Date, which for the avoidance of doubt shall include the Prepetition Secured Obligations.

“Prepetition Secured Obligations” shall have the meaning given such term in the Interim Order or the Final Order, as applicable.

“Prepetition Secured Parties” shall have the meaning given such term in the Interim Order or the Final Order, as applicable.

“Rolling Applicable Period” means each period of four Fiscal Weeks, beginning with the period of four Fiscal Weeks ending on the last day of the Fiscal Week immediately following the Third Applicable Period and each Fiscal Week thereafter (which shall be reported on the last day of such week), in each case, on a rolling four week basis.

“Sale Motion” means the Debtors’ Motion For Entry of Orders (I)(A) Establishing Bidding Procedures Relating to the Sale of the Debtors’ Assets, (B) Establishing Procedures Relating to the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Including Notice of Proposed Cure Amounts, (C) Approving Form and Manner of Notice Relating Thereto, and (D) Scheduling a Hearing to Consider the Proposed Sale; (II)(A) Approving the Sale of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests, and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief.

“Sale Order” means the entry by the Bankruptcy Court of an order approving a sale as requested in the Sale Motion.

“Second Applicable Period” means the period from the Petition Date to the last day of the Fiscal Week that is three Fiscal Weeks after the Petition Date.

“Stalking Horse APA” means that certain Asset Purchase Agreement by and among the Debtors and Schramm II Inc., a Delaware corporation, executed on or about the Petition Date, and submitted as an exhibit to the Sale Motion.

“Stated Maturity Date” the first Business Day that is one-hundred and twenty (120) days after the Petition Date or such later date agreed to by the Lender in its sole discretion.

“Stock” shall mean all shares, options, warrants, general or limited partnership interests or other equivalents (regardless of how designated) of or in a corporation, partnership or equivalent entity whether voting or nonvoting, including common stock, preferred stock or any other “equity security” (as such term is defined in Rule 3a11-1 of the General Rules and

Regulations promulgated by the Securities and Exchange Commission under the Securities Exchange Act).

“Taxes” shall have the meaning given such term in Section 10 of this Note.

“Termination Event” shall have the meaning given such term in Section 17 of this Note.

“Termination Notice” shall have the meaning given such term in Section 17 of this Note.

“Third Applicable Period” means the period from the Petition Date to the last day of the Fiscal Week that is four Fiscal Weeks after the Petition Date.

“West Chester New Rig Deposits” shall mean deposits received from customers of the Borrower for new rig orders to be manufactured at the Borrower’s West Chester, Pennsylvania facility. West Chester New Rig Deposits are referenced on the Approved Budget as “Rig Sales”.

21. Representations and Warranties. The Borrower and Guarantor represent as follows:

(a) the Borrower and Guarantor are corporations duly organized, validly existing and in good standing under the laws of their respective jurisdictions of incorporation;

(b) subject to entry of the Interim Order, the execution and delivery of this Note and the other Loan Documents and the performance by the Borrower and Guarantor of the Borrower’s and Guarantor’s obligations hereunder and under the other Loan Documents are within their corporate powers, have been duly authorized by all necessary corporate or limited liability company action of the Borrower and Guarantor, have received all necessary bankruptcy, insolvency or governmental approvals, and do not and will not contravene or conflict with any provisions of applicable law or of the Borrower’s and Guarantor’s organizational documents or of any agreements binding upon or applicable to the Borrower and Guarantor or any of the Borrower’s and Guarantor’s properties;

(c) the Chapter 11 Cases have been duly authorized by all necessary corporate action by or on behalf of the Borrower and the Guarantor and have been duly and properly commenced;

(d) subject to entry of the Interim Order, this Note and each other Loan Document is a legal, valid, and binding obligation, enforceable against the Borrower and Guarantor in accordance with its terms except as limited by equitable principles relating to enforceability;

(e) the Borrower and Guarantor have good and marketable title to, or valid leasehold interests in, all of their respective properties and assets; none of the properties and assets of the Borrower and Guarantor are subject to any Liens other than Permitted Encumbrances, and (giving effect to the protections provided by the Chapter 11 Cases) there are

no facts, circumstances or conditions that may result in any Liens other than Permitted Encumbrances;

(f) no information contained in this Note, any of the other Loan Documents, any projections, financial statements or collateral reports or other reports from time to time delivered hereunder or any written statement furnished by or on behalf of the Borrower and Guarantor to the Lender pursuant to the terms of this Note, any Loan Document or otherwise contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statements contained herein or therein not misleading in light of the circumstances under which they were made. Subject to entry of the Interim Order and the Final Order (as applicable), the Liens granted to the Lender pursuant to the Collateral Documents will at all times be fully perfected first priority Liens in and to the Collateral described;

(g) except for proceedings in the Chapter 11 Cases, no action, claim, lawsuit, demand, investigation, or proceeding is now pending or, to the knowledge of the Borrower and the Guarantor, threatened against the Borrower or the Guarantor that (i) challenges the Borrower's or the Guarantor's right or power to enter into or perform any of their respective obligations under the Loan Documents to which each is a party, or the validity or enforceability of any Loan Document or any action taken thereunder, (ii) otherwise affects this Note or any other Loan Document, or (iii) (giving effect to the protections provided by the Chapter 11 Cases) has a reasonable risk of being determined adversely to the Borrower or the Guarantor and that, if so determined, could have a Material Adverse Effect;

(h) to the best of the Borrower's and the Guarantor's knowledge, each of their accounts, contracts, contract rights, tangible chattel paper, intangible or electronic chattel paper, documents, instruments, general intangibles, supporting obligations and other rights, remedies, obligations, or other intangibles of any kind (i) is and will be genuine, and in all respects what it purports to be, and is not and will not be evidenced by a judgment, an instrument or chattel paper (unless such judgment shall have been assigned to the Lender in such manner as the Lender shall deem necessary or appropriate to perfect and preserve its first priority security interest therein and unless, if so requested by the Lender, such instrument shall have been endorsed and delivered to or at the direction of the Lender and, in the case of tangible chattel paper, if so requested by the Lender, delivered to the Lender); (ii) represents and will represent a bona fide transaction completed or in progress in accordance with the terms and provisions contained in the invoices and purchase orders relating thereto, and the underlying transactions giving rise thereto do not and will not in any way violate any requirements of law; and (iii) is and will be in the amount shown on the Borrower's and Guarantor's records, which amount is and will be actually and absolutely owing to the Borrower and Guarantor and not contingent or subject to any rights of set-off or reduction for any reason other than regular discounts, credits or adjustments allowed by the Borrower and Guarantor in the ordinary course of their business; and

(i) the execution, delivery and performance of this Note and the other Loan Documents will not (immediately or with the giving of notice or passage of time, or both) (i) violate the organizational documents of the Borrower or the Guarantor, or violate any law or regulation; or (ii) result in the creation or imposition of any Lien upon any of the property of the Borrower or the Guarantor, except in favor of the Lender.

22. Miscellaneous.

(a) All notices and other communications provided for hereunder shall be in writing (including facsimile communication) and mailed, electronically mailed, or delivered as follows:

If to Borrower or Guarantor:

Schramm, Inc.
800 E. Virginia Avenue
West Chester, PA 19380
Attention: Craig Mayman, President
Email: CMayman@schramminc.com

With a copy (not constituting notice) to:

Young Conaway Stargatt & Taylor, LLP
1000 North King Street
Wilmington, DE 19801
Attention: Craig D. Gear
Email: ckgear@ycst.com

If to Lender:

Schramm II Inc.
c/o GenNx360 Capital Partners, L.P.
590 Madison Avenue, 27th Floor
New York, NY 10022
Attention: Glen Bushery
Email: gbushery@gennx360.biz

With a copy (not constituting notice) to:

Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
Attention: Carey D. Schreiber
Email: cschreiber@winston.com

All such notices and communications shall, when mailed or sent by overnight courier, be effective when deposited in the mails or delivered to the overnight courier, as the case may be, or when sent by facsimile or electronic mail be effective when confirmation is received.

(b) No failure or delay on the part of the Lender or any other holder of this Note (or any portion thereof) to exercise any right, power or privilege under this Note and no course of dealing between the Borrower, Guarantor, and the Lender shall impair such right, power or privilege or operate as a waiver of any default or an acquiescence therein, nor shall any

single or partial exercise of any such right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies expressly provided in this Note are cumulative to, and not exclusive of, any rights or remedies that the Lender would otherwise have. No notice to or demand on the Borrower or the Guarantor in any case shall entitle the Borrower or the Guarantor to any other or further notice or demand in similar or other circumstances or constitute a waiver of the right of the Lender to any other or further action in any circumstances without notice or demand.

(c) The Borrower, Guarantor, and any endorser of this Note hereby consent to renewals and extensions of time at or after the maturity hereof without notice, and hereby waive diligence, presentment, protest, demand and notice of every kind and, to the full extent permitted by law, the right to plead any statute of limitations as a defense to any demand hereunder.

(d) If any provision in or obligation under this Note shall be invalid, illegal, or unenforceable in any jurisdiction, the validity, legality, and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

(e) **THIS NOTE AND THE RIGHTS AND OBLIGATIONS OF BORROWER, GUARANTOR AND THE LENDER HEREUNDER SHALL BE GOVERNED BY, AND SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE INTERNAL LAWS OF THE STATE OF NEW YORK (INCLUDING WITHOUT LIMITATION SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK), WITHOUT REGARD TO CONFLICT OF LAWS PRINCIPLES.**

(f) **THE BORROWER, GUARANTOR, AND, BY THEIR ACCEPTANCE OF THIS NOTE, THE LENDER AND ANY SUBSEQUENT HOLDER OF THIS NOTE, HEREBY IRREVOCABLY AGREE TO WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS NOTE OR ANY DEALINGS BETWEEN THEM RELATING TO THE SUBJECT MATTER OF THIS NOTE AND THE LENDER/BORROWER RELATIONSHIP THAT IS BEING ESTABLISHED.** The scope of this waiver is intended to be all-encompassing of any and all disputes that may be filed in any court and that relate to the subject matter of this transaction, including without limitation contract claims, tort claims, breach of duty claims and all other common law and statutory claims. The Borrower, Guarantor, and, by their acceptance of this Note, the Lender and any subsequent holder of this Note, each (i) acknowledges that this waiver is a material inducement to enter into a business relationship, that each has already relied on this waiver in entering into this relationship, and that each will continue to rely on this waiver in their related future dealings and (ii) further warrants and represents that each has reviewed this waiver with its legal counsel and that each knowingly and voluntarily waives its jury trial rights following consultation with legal counsel. **THIS WAIVER IS IRREVOCABLE, MEANING THAT IT MAY NOT BE MODIFIED EITHER ORALLY OR IN WRITING, AND THIS WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS, OR MODIFICATIONS OF THIS NOTE.** In the event of litigation, this provision may be filed as a written consent a trial by the court. Each party hereto hereby submits to the exclusive

jurisdiction of the Bankruptcy Court for purposes of all legal proceedings arising out of or relating to this Note or the transactions contemplated hereby.

(g) The Borrower and Guarantor hereby waive the benefit of any statute or rule of law or judicial decision which would otherwise require that the provisions of this Note be construed or interpreted most strongly against the party responsible for the drafting thereof.

(h) The Borrower and Guarantor shall not have the right to assign their obligations or liabilities under this Note without the prior written consent of the Lender. The Lender may assign to one or more entities all or any part of, or may grant participation's to one or more entities in or to all or any part of, the amounts outstanding hereunder, and to the extent of any such assignment or participation (unless otherwise stated therein) the assignee or participant shall have the same rights and benefits hereunder as it would have it were a Lender hereunder. The Lender shall notify the Borrower and Guarantor of any such assignment which notice shall include a description of the assignment and include customary instructions from the Lender and its assignee with respect to the making of payments and other communications with the Lender and such assignee.

(i) No provision of this Note may be amended or waived unless such amendment or waiver is in writing and is signed by the Borrower, the Guarantor, and the Lender.

(j) If any provision of this Note is held invalid, illegal, or unenforceable, the parties shall negotiate in good faith so as to replace each invalid, illegal or unenforceable provision with a valid, legal, and enforceable provision which will, in effect, from an economic viewpoint, most nearly and fairly approach the effect of the invalid, illegal, or unenforceable provision and the intent of the parties in entering into this Note.

(k) This Note, the other Loan Documents, and all Liens created hereby or pursuant to the Collateral Documents or any other Loan Documents shall be binding upon the Borrower, the Guarantor, the estates of the Borrower and Guarantor, and any trustee or successor in interest of the Borrower and Guarantor in the Chapter 11 Cases or any subsequent case commenced under Chapter 7 of the Bankruptcy Code, and shall not be subject to section 365 of the Bankruptcy Code. This Note and the other Loan Documents shall be binding upon, and inure to the benefit of, the successors of the Lender and its respective assigns, transferees and endorsees. The Liens created by this Note, and the other Loan Documents shall be and remain valid and perfected in the event of the substantive consolidation or conversion of any of the Chapter 11 Cases or any other bankruptcy case of the Borrower or the Guarantor to a case under Chapter 7 of the Bankruptcy Code or in the event of dismissal of any of the Chapter 11 Cases or the release of any Collateral from the jurisdiction of the Bankruptcy Court for any reason, without the necessity that the Lender files financing statements or otherwise perfect its security interests or Liens under applicable law.

(l) In the event of any inconsistency between the provisions of the Interim Order or Final Order (as applicable) and this Note or any other Loan Document, the provisions of the Interim Order or Final Order (as applicable) shall govern.

(m) THIS WRITTEN PROMISSORY NOTE REPRESENTS THE FINAL AGREEMENT AMONG THE PARTIES, AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS AMONG THE PARTIES.

[Signature Pages Follow]

IN WITNESS WHEREOF, the Borrower, the Guarantor and Lender have caused this Note to be executed and delivered by their duly authorized officer as of the day and year and at the place first above written.

BORROWER:

SCHRAMM, INC.

By: _____
Name: _____
Title: _____

GUARANTOR:

HDR HOLDING, INC.

By: _____
Name: _____
Title: _____

LENDER:

Schramm II Inc.

By: _____

Name: _____

Title: _____

EXHIBIT A

Approved Budget

(attached)

Exhibit B

DIP Budget

2020 VIRTUAL WINTER LEADERSHIP CONFERENCE

Case 19-11396-MFW Doc 164-2 Filed 08/07/19 Page 2 of 2

(\$ 000's)	Bankruptcy Filing		Estimated Sale Date										Convert to Liquidating Ship 11	
	Actual Weekly		Budget Weekly										Budget Weekly	
	28-Jun	5-Jul	12-Jul	19-Jul	26-Jul	2-Aug	9-Aug	16-Aug	23-Aug	30-Aug	6-Sep	13-Sep	20-Sep	27-Sep
Cash Receipts														
Part Sales	39	32	100	135	135	135	135	135	135	135	135	135	135	135
Rig Sales														
Other														
Total Cash Receipts	39	32	100	135	135	135	135	380	135	135	135	135	135	135
Operating Disbursements														
Inventory Purchases and Vendors	(135)	(675)	(626)	(447)	(118)	(118)	(118)	(225)	(118)	(118)	(68)	(68)	(68)	(68)
Salaries, Wages, Commission and Taxes	(82)	(99)	(88)	(88)	(94)	(143)	(94)	(66)	(66)	(66)	(66)	(66)	(66)	(66)
Health Insurance Claims/Premiums	(12)	(31)	(10)	(10)	(10)	(25)	(25)	(5)	(5)	(5)	(5)	(5)	(5)	(5)
Rent		(71)				(71)					(71)			
Recurring CC Expense / Travel			(30)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)
Directors Fees	(4)													
Business Insurance Premium	(1)	(1)	(309)			(5)				(5)				(5)
Bank Fees	(2)					(3)				(3)				(3)
Sales Tax			(5)					(5)						
Interest Payment		(71)				(34)								
Regulatory Fees			(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Purchased Service & Pass-Thru Expense			(24)	(64)	(24)	(24)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(15)
Temporary Contractor	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Office expense			(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Utilities			(39)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(13)	(13)
Supplies			(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)
Total Operating Disbursements	(237)	(949)	(1,139)	(635)	(266)	(449)	(258)	(342)	(230)	(238)	(271)	(185)	(180)	(258)
Net Operating Cash Flow	(198)	(917)	(1,039)	(115)	(131)	(314)	(123)	38	(95)	(103)	(136)	(50)	(45)	(123)
Non-Recurring Disbursements														
YCST														
GenNx Counsel									(300)					(175)
FocalPoint														(425)
Claims Agent														(500)
Unsecured Creditors' Committee			(25)				(25)				(25)			(425)
Trustee Fees														(75)
Lender Counsel														
PR Firm	(40)		(16)				(17)					(17)		(25)
Designated Director														
Quarterly Director Fees			(32)											(307)
Cure Payments														(200)
Estate Wind-Down Expenses														
Total Non-Recurring Disbursements	(40)	-	(73)	(25)	(25)	-	(42)	(25)	(300)	-	(25)	(42)	-	(2,132)
Net Cash Flow	(238)	(917)	(1,112)	(140)	(156)	(314)	(165)	13	(395)	(103)	(161)	(92)	(45)	(2,255)
Ending Cash	253	2,015	1,098	986	846	690	377	1,212	1,225	831	728	568	476	432
Pre-Petition	15	1,098	(14)	846	690	377	212	1,225	831	728	568	476	432	(1,823)
Cash DIP Funding	2,000	1,098	986	846	690	377	1,212	1,225	831	728	568	476	432	2,000
Ending Cash after DIP Funding	2,015	1,098	986	846	690	377	1,212	1,225	831	728	568	476	432	106
DIP Funding Summary														
Beginning Cash DIP Balance	-	2,000	2,000	3,000	3,000	3,000	3,000	4,000	4,000	4,000	4,000	4,000	4,000	6,000
IBAGenNx Monthly DIP Deferral														
Additional Cash DIP Funding	2,000	-	1,000	-	-	-	1,000	-	-	-	-	-	-	2,000
Ending DIP Balance	2,000	2,000	3,000	3,000	3,000	3,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	6,000

Exhibit C

Milestones

(i) On the Petition Date, the Debtors shall have filed a motion seeking approval of the DIP Facility.

(ii) On or before June 27, 2019, the Debtors shall have filed a motion (the “**Bid Procedures Motion**”) with the Bankruptcy Court to approve bid procedures and establish the date of an auction to determine a winning bidder or bidders for the Debtors’ assets (the “**Auction**”). The Bid Procedures Motion will provide for the selection of a stalking horse bidder and entry into an asset purchase agreement with the stalking horse bidder (the “**Stalking Horse Bidder**”), subject to better and higher bids as set forth therein, acceptable to the DIP Lender in its sole and absolute discretion as confirmed in writing.

(iii) On or before June 27, 2019, the Interim Order authorizing and approving the DIP Facility and the transactions contemplated thereby on an interim basis, in form and substance satisfactory to the DIP Lender as confirmed in writing in its sole and absolute discretion, shall have been entered by the Bankruptcy Court.

(iv) On or before August 6, 2019, an order approving the Bid Procedures Motion (the “**Bid Procedures Order**”), in form and substance satisfactory to the DIP Lender as confirmed in writing in its sole and absolute discretion, shall have been entered by the Bankruptcy Court.

(v) On or before August 6, 2019, the Final Order authorizing and approving the DIP Facility and the transactions contemplated thereby on a final basis, in form and substance satisfactory to the DIP Lender as confirmed in writing in its sole and absolute discretion, shall have been entered by the Bankruptcy Court.

(vi) On or before September 16, 2019, the Bankruptcy Court shall have convened and concluded a hearing to consider approval of a sale (the “**Sale Hearing**”) to the Stalking Horse Bidder or to the Successful Bidder following an Auction and an order approving the sale (the “**Sale Order**”), in form and substance satisfactory to the DIP Lender as confirmed in writing in its sole and absolute discretion, which Sale Order shall approve a sale to the Successful Bidder at any Auction conducted under the Bid Procedures Order or to the Stalking Horse Bidder if there are no other qualified bidders, shall have been entered by the Bankruptcy Court (a “**Sale**”).

(vii) On or before September 30, 2019, or the first business day thereafter, the closing of the Sale shall have occurred.