

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov**

IN RE:

Chapter 11 Cases

RED LOBSTER MANAGEMENT LLC,¹

Case No. 6:24-bk-02486-GER

RED LOBSTER RESTAURANTS LLC,
RLSV, INC.,
RED LOBSTER CANADA, INC.,
RED LOBSTER HOSPITALITY LLC,
RL KANSAS LLC,
RED LOBSTER SOURCING LLC,
RED LOBSTER SUPPLY LLC,
RL COLUMBIA LLC,
RL OF FREDERICK, INC.,
RED LOBSTER OF TEXAS, INC.,
RL MARYLAND, INC.,
RED LOBSTER OF BEL AIR, INC.,
RL SALISBURY, LLC,
RED LOBSTER INTERNATIONAL HOLDINGS LLC,

Jointly Administered with
Case No. 6:24-bk-02487-GER
Case No. 6:24-bk-02488-GER
Case No. 6:24-bk-02489-GER
Case No. 6:24-bk-02490-GER
Case No. 6:24-bk-02491-GER
Case No. 6:24-bk-02492-GER
Case No. 6:24-bk-02493-GER
Case No. 6:24-bk-02494-GER
Case No. 6:24-bk-02495-GER
Case No. 6:24-bk-02496-GER
Case No. 6:24-bk-02497-GER
Case No. 6:24-bk-02498-GER
Case No. 6:24-bk-02499-GER
Case No. 6:24-bk-02500-GER

Debtors.

**OBJECTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS TO CORRECTED
EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS
(I) APPROVING POSTPETITION FINANCING, (II) AUTHORIZING THE
USE OF CASH COLLATERAL, (III) GRANTING LIENS AND PROVIDING
SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (IV) GRANTING
ADEQUATE PROTECTION, (V) MODIFYING THE AUTOMATIC STAY,
(VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are Red Lobster Management LLC (6889); Red Lobster Sourcing LLC (3075); Red Lobster Supply LLC (9187); RL Kansas LLC (2396); Red Lobster Hospitality LLC (5297); Red Lobster Restaurants LLC (4308); RL Columbia LLC (7825); RL of Frederick, Inc. (9184); RL Salisbury, LLC (7836); RL Maryland, Inc. (7185); Red Lobster of Texas, Inc. (1424); Red Lobster of Bel Air, Inc. (2240); RLSV, Inc. (6180); Red Lobster Canada, Inc. (4569); and Red Lobster International Holdings LLC (4661). The Debtors' principal offices are located at 450 S. Orange Avenue, Suite 800, Orlando, FL 32801.

The Official Committee of Unsecured Creditors (the “Committee”) of Red Lobster Management LLC and its affiliated debtors and debtors in possession (the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) hereby files this objection (this “Objection”) to the Debtors’ *Corrected Emergency Motion for Interim and Final Orders (I) Approving Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Providing Super Priority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief*, dated May 20, 2024 [ECF No. 79] (the “DIP Motion”).² In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT³

1. The DIP Facility is fundamentally flawed and should be denied in its present form. Pursuant to the DIP Facility, the Prepetition Term Loan Secured Parties⁴ seek to effectuate a massive and inappropriate “land grab” at the expense of unsecured creditors. The Prepetition Term Loan Lenders want to roll-up (i.e., cross-collateralize) \$175 million of their prepetition debt, some of which is presumably underwater, and secure it with new liens on extremely valuable, previously unencumbered assets of the Debtors (the “Unencumbered Assets”), including, but not limited to,

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Motion, the Interim DIP Order, or the DIP Credit Agreement (each as defined below), as applicable.

³ Capitalized terms used but not otherwise defined in this section shall have the meanings ascribed to such terms elsewhere in this Objection.

⁴ *Financing Agreement*, dated as of January 22, 2021 (as amended by that certain Amendment No. 1 to Financing Agreement, dated as of September 22, 2022, as further amended by that certain Amendment No. 2 to Financing Agreement, dated as of February 29, 2024, as further amended by that certain Amendment No. 3 to Financing Agreement, dated as of March 29, 2024, and as further restated, amended and restated, supplemented or otherwise modified from time to time, the “Prepetition Term Loan Financing Agreement”; the loan provided thereunder, the “Prepetition Term Loan”; the credit facility contemplated thereby, the “Prepetition Term Loan Facility”; and the obligations arising under the Prepetition Term Loan Facility, the “Prepetition Term Loan Obligations”), by and among Debtor Red Lobster Management LLC, Fortress Credit Corp. (the “Prepetition Term Loan Agent”), certain lenders thereto (the “Prepetition Term Loan Lenders” and together with the Prepetition Term Loan Agent, the “Prepetition Term Loan Secured Parties”), and the other co-Debtors, in their capacities as guarantors.

the proceeds of avoidance actions, cash on hand in store locations, liquor licenses, and critical leases and real estate utilized in the Debtors' ongoing operations (the "Unencumbered Real Estate").

2. By all accounts, the Prepetition Term Loan Secured Parties were undersecured as of the Petition Date and there is no evidence in the record to the contrary. The DIP Facility proposes to substantially improve the collateral position of the Prepetition Term Loan Secured Parties, while prejudicing unsecured creditors, through the roll up of \$175 million of the Prepetition Term Loan Obligations and the grant of new liens against the DIP Collateral, which would now include the Unencumbered Assets and Unencumbered Real Estate, to secure such rolled-up debt. This is blatant cross-collateralization of apparently undersecured prepetition debt in direct violation of the Eleventh Circuit's decision in *In re Saybrook Mfg. Co.*⁵

3. In *Saybrook*, when faced with an undersecured prepetition creditor attempting to glom onto new collateral to secure its prepetition debt (in consideration for a separate new money loan by such creditor), the Eleventh Circuit put it bluntly:

We conclude that cross-collateralization is inconsistent with bankruptcy law for two reasons. First, cross-collateralization is not authorized as a method of post-petition financing under section 364. Second, cross-collateralization is beyond the scope of the bankruptcy court's inherent equitable power because it is directly contrary to the fundamental priority scheme of the Bankruptcy Code.^[6]

4. The Eleventh Circuit went on to state that: "By their express terms, sections 364(c) & (d) apply only to future—i.e., post-petition—extensions of credit. They do not authorize the granting of liens to secure prepetition loans."⁷ And further, quoting the Ninth Circuit: "there is

⁵ *In re Saybrook Mfg. Co.*, 963 F.2d 1490 (11th Cir. 1992).

⁶ *Id.* at 1495.

⁷ *Id.*

no . . . applicable provision in the Bankruptcy Code authorizing the debtor to pay certain pre-petition unsecured claims in full while others remain unpaid. To do so would impermissibly violate the priority scheme of the Bankruptcy Code.”⁸

5. This is precisely what is happening here. During oral argument at the first day hearing in these Chapter 11 Cases (the “First Day Hearing”), counsel for the DIP Agent and the Prepetition Term Loan Agent explained:

A lot of talk about the creeping roll-up. And I think Your Honor’s colleague had it right, that this is not what Saybrook was talking about. This is really refinancing prepetition debt, as if we walked in with that amount of new money.^[9]

Whether characterized as a “refinancing” (which it is not) or otherwise, the fact remains that the Prepetition Term Loan Parties simply did **not** “walk[] in with that amount of a new money.”¹⁰ It is, in essence, a **fiction**. The Prepetition Term Loan Obligations (to the extent valid) already existed as of the Petition Date and the economic reality is that such prepetition indebtedness is proposed to be cross-collateralized with new DIP Collateral, including Unencumbered Assets and Unencumbered Real Estate that would otherwise form the sole basis of recovery for general unsecured creditors. The Debtors are also seeking to pay some unsecured claims (i.e., the undersecured deficiency claims of the Prepetition Term Loan Secured Parties) ahead of other unsecured claims. *Saybrook* expressly prohibits that, as quoted above.

6. In addition to constituting an impermissible cross-collateralization, the \$175 million Roll-Up amounts to a massive transfer of value to the Prepetition Term Loan Secured Parties. The economic reality is that the granting of liens on Unencumbered Assets, including

⁸ *Id.* at 1496 (quoting *Transamerica Commercial Finance Corp. v. Citibank (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089, 1094 (9th Cir.1991)).

⁹ May 21, 2024 Hr’g Tr. 138:4–8.

¹⁰ *Id.*

Unencumbered Real Estate, to secure what was previously underwater prepetition debt with a stroke of a pen results in a massive windfall to the Prepetition Term Loan Secured Parties—perhaps in the tens of millions of dollars¹¹—on top of the already substantial commitment fees they are receiving for making loans under the DIP Facility. Indeed, the improvement in position—from prepetition undersecured to postpetition fully secured by new collateral—dwarfs the cash fees paid to the Prepetition Secured Parties and is, in a word, unconscionable. This extraordinary transfer of value to the Prepetition Term Loan Secured Parties comes at the direct expense of general unsecured creditors represented by the Committee who would otherwise have the ability to look to the Unencumbered Assets for a distribution. The Court should protect the Debtors and their estates from the lender overreach that is requiring the payment of such an enormous price for postpetition financing to bridge to a section 363 sale.

7. Another major goal of the Prepetition Term Loan Secured Parties in demanding the Roll-Up is to allow them to credit bid on assets against which they have no lien. The Debtors own and operate a restaurant business out of hundreds of locations. They cannot operate without the Unencumbered Real Estate, which is an integral part of the Debtors' estates and represents a substantial component of value that any buyer would be willing to pay for the Debtors' going concern assets. Yet, as of the Petition Date, the Prepetition Term Loan Secured Parties did not have a single mortgage or deed of trust filed against any leased or owned real estate of the Debtors. Stated another way, as of the Petition Date, the Prepetition Term Loan Secured Parties could not credit bid against the Unencumbered Real Estate and any proceeds therefrom would have to be

¹¹ For example, if the total Prepetition Term Loan Obligations is \$265 million and the collateral securing it is worth only \$125 million, by effectuating the \$175 million Roll-Up and fully securing it with DIP Liens on valuable Unencumbered Assets, at least \$50 million of the Prepetition Term Loan Obligations goes from out of the money to fully secured and good money.

shared with general unsecured creditors, whose claims could total hundreds of millions of dollars in these Chapter 11 Cases.

8. The Prepetition Term Loan Secured Parties also seek to extract every ounce of value from the Debtors' estate through other means, including in the form of Replacement Liens on Unencumbered Assets, unnecessary fees (in addition to the Roll-Up), expense reimbursements, and peculiar provisions designed to require the payment of a "make whole" if the DIP Obligations are paid prior to maturity. Further, there should be no waiver of marshaling rights under the DIP Facility, otherwise the DIP Lenders could simply choose to apply all of the new money portion of the DIP Facility against the Unencumbered Assets first, leaving the Prepetition Term Loan Obligations and any rolled-up debt to be credit bid against the remaining previously encumbered assets of these estates (such as inventory, equipment, accounts receivable, and intellectual property).

9. To further disenfranchise general unsecured creditors, the DIP Facility hamstringing the Committee in the performance of its statutory function through limitations on its ability to sufficiently investigate and, if necessary, commence a Challenge with respect to the Prepetition Term Loan Facility and related transactions. The Committee is granted a paltry investigation budget of only \$50,000 and a Post-Carve Out Trigger Notice Cap that is a small fraction of the Debtors' professionals (\$150,000 versus \$750,000).

10. While the Committee has no objection in principle to securing additional funding necessary to fund the Debtors' operational and administrative needs in these Chapter 11 Cases, the DIP Facility in its current form is simply not the answer and should not be sustained. Unless and until the \$175 million Roll-Up is dropped as contrary to Eleventh Circuit law and other significant revisions are made as requested herein, the DIP Motion should be denied.

BACKGROUND

I. General Background

11. On May 19, 2024 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Middle District of Florida (the “Court”), thereby commencing these chapter 11 cases (the “Chapter 11 Cases”). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ Chapter 11 Cases are being jointly administered for procedural purposes only.¹² No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases.

12. On the Petition Date, among other things, the Debtors filed the *Declaration of Jonathan Tibus in Support of Debtors’ Chapter 11 Petitions and First Day Relief* [ECF No. 6] (the “Tibus Declaration”). Prior to the Petition Date, on May 9, 2024, the Debtors, the Prepetition Term Loan Agent, and certain Prepetition Term Loan Lenders entered into that certain *Restructuring Support Agreement* [ECF No. 6, Exh. B] (the “Restructuring Support Agreement” or the “RSA”), which is annexed as Exhibit B to the Tibus Declaration. Among other things, the Restructuring Support Agreement contains (i) a *DIP Term Sheet*, annexed thereto as Exhibit A, which set forth the economic terms upon which the Prepetition Term Loan Lenders agreed to provide the Debtors with debtor-in-possession financing and (ii) a *Stalking Horse Term Sheet*, annexed thereto as Exhibit B, which sets forth the principal terms upon which the Prepetition Term Loan Lenders, through a newly-formed entity, RL Purchaser, LLC (the “Stalking Horse Bidder”),

¹² See ECF No. 62.

agreed serve as a stalking horse bidder in the contemplated sale and marketing process for substantially all of the Debtors' assets.¹³

13. On May 20, 2024, the Debtors filed the DIP Motion.¹⁴ In support of the DIP Motion, the Debtors filed: (a) the *Declaration of Nicholas Haughey in Support of Debtors' Emergency Motion for Interim and Final Orders (I) Approving Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief*, dated May 19, 2024 (the "Haughey Declaration") and (b) the *Declaration of Teri Stratton in Support of Debtors' Emergency Motion for Interim and Final Orders (I) Approving Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief*, dated May 19, 2024 (the "Stratton Declaration").¹⁵ That same day, Mary Ida Townson, United States Trustee for Region 21 (the "U.S. Trustee"), filed the Limited Objection, which objected to certain of the relief sought in the DIP Motion.¹⁶

14. Also on May 20, 2024, the Debtors filed the Sale Motion.¹⁷ Pursuant to the Sale Motion, the Debtors seek to implement the sale process (the "Sale Process") for the sale of

¹³ See RSA at Exhs. A, B.

¹⁴ See ECF No. 79.

¹⁵ The Haughey Declaration and the Stratton Declaration are annexed to the DIP Motion as Exhibit E and Exhibit F, respectively.

¹⁶ *Limited Objection to Debtors' Emergency Motion for Interim and Final Orders (I) Approving Postpetition Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief*, dated May 19, 2024 [ECF No. 90] (the "Limited Objection").

¹⁷ *Motion of the Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Substantially All of the Debtors' Assets, (B) Authorizing the Debtors to Enter Into Stalking Horse Agreement and to Provide Bidding Protections Thereunder, (C) Scheduling an Auction and Approving the Form and Manner of Notice Thereof*,

substantially all of the Debtors' assets (a "Sale"), as contemplated by the Restructuring Support Agreement. A proposed order establishing, among other things, sale procedures in connection with the Sale Process is attached to the Sale Motion as Exhibit A (the "Proposed Sale Procedures Order"). In addition, among other things, that certain *Asset Purchase Agreement*, dated as of May 19, 2024 (the "Stalking Horse Agreement"), by and among Red Lobster Management LLC and certain of subsidiaries named therein, as sellers, and the Stalking Horse Bidder, as purchaser, is attached as Exhibit 2 to the Proposed Sale Procedures Order. The Stalking Horse Agreement contemplates a credit bid of approximately \$275 million on account of the DIP Facility (\$100 million in new money advances and \$175 million of rolled-up prepetition debt) for substantially all of the Debtors' operating assets, including the Unencumbered Real Estate and various causes of action.

15. On May 21, 2024, the Court entered the *Interim Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral on a Limited Basis, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [ECF No. 127] (the "Interim DIP Order"). Also on May 21, 2024, certain of the Debtors entered into that certain *Secured Superpriority Debtor-In-Possession Financing Agreement*, an unexecuted copy of which is annexed to the DIP Order as Exhibit A (the "DIP Credit Agreement"), with Fortress Credit Corp., as Administrative Agent and Collateral Agent (in such capacity, the "DIP Agent") for and on behalf of the lenders

(D) Approving Assumption and Assignment Procedures, and (E) Scheduling a Sale Hearing and Approving the Form and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [ECF No. 49] (the "Sale Motion").

party thereto (collectively, the “DIP Lenders” and together with the DIP Agent, the “DIP Secured Parties”).

16. On May 31, 2024, pursuant to section 1102(a) of the Bankruptcy Code, the U.S. Trustee appointed the Committee.¹⁸ The Committee is comprised of the following nine members: (i) Warner Bros. Discovery, Inc. on behalf of itself and its subsidiaries; (ii) Realty Income Corporation; (iii) Gordon Food Service Canada Ltd.; (iv) Kenneth O. Lester Company, Inc. d/b/a Performance Food Group; (v) PepsiCo Sales, Inc.; (vi) Credera Enterprises Company, LLC; (vii) Rubin Postaer and Associates; (viii) Provender Hall I, LLC and Provender Hall IV, LLC; and (ix) George Parker. Following their appointment, the Committee selected (a) Pachulski Stang Ziehl & Jones LLP as counsel, (b) Pack Law, P.A. as local counsel, and (c) Genesis Credit Partners as financial advisor.

II. Prepetition Funded Debt

17. The DIP Lenders are also the Debtors’ Prepetition Term Loan Lenders and Stalking Horse Bidder (through their newly formed entity).¹⁹ The Debtors’ prepetition capital structure is described in Paragraphs 10 through 19 of the DIP Motion and Paragraphs 27 through 30 of the Tibus Declaration.²⁰ According to the Debtors, as of the Petition Date, they have over \$293 million of secured funded indebtedness, a summary of which is set forth below:²¹

¹⁸ *United States Trustee’s Appointment and Notice of Appointment of Official Committee of Creditors Holding Unsecured Claims*, dated May 31, 2024 [ECF No. 250].

¹⁹ *See, e.g.*, Tibus Decl. at ¶¶ 52–55; Haughey Decl. at ¶ 17; *see generally* RSA.

²⁰ *See* DIP Mot. at ¶¶ 10–19; Tibus Decl. at 27–30.

²¹ Source: DIP Mot. at ¶¶ 10–19; Tibus Decl. at 27–30. The following table is for summary purposes only and is solely based on the Debtors’ public representations to day. For the avoidance of doubt, nothing herein shall constitute an admission as to or an agreement concerning any of the items listed in the table below, including, but not limited to, with respect to the validity, amount, extent, priority, or secured status of the Prepetition Term Loan Facility and/or the ABL Facility and any indebtedness related thereto. The Committee expressly reserves all rights to contest, among other things, the foregoing, as well as any other matter related to the Prepetition Term Loan Facility, the ABL Facility, and any transaction, event, occurrence, or circumstance related thereto.

<u>Facility</u>	<u>Approx. Principal Amount Outstanding</u>
Prepetition Term Loan	\$264,720,000
Outstanding Letters of Credit (ABL Facility)	\$29,276,399
<i>Total</i>	\$293,996,399

However, notwithstanding the Debtors' description of the Prepetition Secured Parties collateral,²² as of the Petition Date, neither the Prepetition Term Loan Facility nor the ABL Facility encumber any of the Debtors' real estate. *As of the Petition Date, there are no mortgages and the all leases and fixtures are unencumbered.*

III. The Proposed DIP Facility

A. Facility Size and Key Terms

18. Pursuant to the DIP Motion, the Debtors seek authority to enter into a senior secured postpetition financing facility on a superpriority basis (the "DIP Facility") in accordance with the terms of the DIP Credit Agreement.²³ The DIP Facility proposes to provide extensions of credit not to exceed the principal amount of \$275 million, which amount is comprised of the sum of:

- A. a \$100 million new money multi-draw term loan (the "DIP Term Loan Commitments" and the loans pursuant thereto, the "DIP Delayed Draw Term Loans") comprised of (i) a \$40 million single-draw interim debtor-in-possession term loan (the "Interim DIP Term Loan") made available upon entry of the Interim DIP Order (the "Interim Amount") and (ii) a \$60 million final debtor-in-possession term loan (the "Final DIP Term Loan") made available in up to two additional draws (the "Final Amount" and, together with the Interim Amount, the "New Money Amount") upon entry of a final order approving the DIP Facility on a final basis (the "Final DIP Order");²⁴ and
- B. a roll-up of \$175 million in outstanding Prepetition Term Loan Obligations on a cashless dollar-for-dollar basis into DIP Delayed Draw Term Loans at a ratio of 1.75:1 (the "Roll-Up" and such rolled-up Prepetition Term Loan Obligations, the "Roll-Up Term Loans"), resulting in (i) a \$70 million roll-up upon entry of the Interim DIP Order (the "Interim Roll-Up Amount") and (ii) an up to \$105 million roll-up (assuming the Final DIP Term Loan is fully funded) upon entry of the Final

²² See Tibus Decl. at ¶ 30.

²³ DIP Mot. at ¶ 1(a).

²⁴ See DIP Credit Agreement at § 2.01.

DIP Order (the “Final Roll-Up Amount” and, together with the Interim Roll-Up Amount, the “Roll-Up Amount”), but subject to the “Challenge” rights set forth in Paragraph 46 of the Interim DIP Order.²⁵

19. The key terms of the DIP Facility are as follows:²⁶

Key Terms of Proposed DIP Facility	
DIP Lenders/Agent	• <u>DIP Lenders</u>: The Prepetition Term Loan Lenders party to the DIP Credit Agreement from time to time • <u>DIP Agent</u>: Fortress Credit Corp.
DIP Loan Parties	• <u>Administrative Borrower</u>: Red Lobster Management LLC • <u>Subsidiary Borrowers</u>: Each Debtor subsidiary of the Administrative Borrower identified in the DIP Credit Agreement • <u>Guarantors</u>: Each Debtor subsidiary of the Administrative Borrower identified in the DIP Credit Agreement [payable from all assets of the Debtors’ estates]
Maturity Date	• The earliest of: • (a) June 20, 2024 (if the Final DIP has not been entered); • (b) September 16, 2024; • (c) the effective date of any plan of reorganization; • (d) the closing date on which a § 363 sale for substantially all of the Debtors’ assets is consummated; and • (e) the occurrence of an event of default
New Money Commitment	• \$100 million, comprised of (i) \$40 million in Interim DIP Term Loans and (ii) \$60 million in Final DIP Term Loans
Roll-Up	• \$175 million in outstanding Prepetition Term Loan Obligations on a cashless dollar-for-dollar basis at a ratio of 1.75:1, comprised of: (i) a \$70 million Interim Roll-Up Amount and (ii) a \$105 million Final Roll-Up Amount • Subject to “Challenge” rights set forth in Paragraph 46 of Interim DIP Order
ABL Facility Pay-Off	• From the Interim Amount, Debtors to deposit with the ABL Agent: • (a) \$14,133,599.18 to cash collateralize Letters of Credit Obligations at 103% of their face value; • (b) \$1.1 million as collateral with respect to Bank Products; • (c) \$250,000.00 for the Expense Reserve; and • (d) \$102,688.70 in respect of accrued unpaid interest and Letters of Credit and unused line fees for the month of April • Monthly payments of the ABL Agent’s reasonable and documented out-of-pocket fees and expenses, including attorneys’ fees
Interest	• At Administrative Borrower’s option:

²⁵ See DIP Credit Agreement at § 2.01; Interim DIP Order at ¶ 46.

²⁶ See DIP Credit Agreement at Preamble, §§ 1.01, 2.01, 2.04, 2.05, 2.06, 2.08, 12.04; Interim DIP Order ¶¶ 5, 6, 8, 14, 15, 38, 43, 46.

Key Terms of Proposed DIP Facility	
	• (a) Reference Rate + 9.50%; or • (b) Adjusted Term SOFR + 10.50% • Interest on new money DIP Delayed Draw Term Loans payable in cash • Interest on Roll-Up Term Loans paid-in-kind
Prepayment/Funding	• Any prepayment, whether optional or mandatory, must be accompanied by: • (a) accrued interest on the principal amount being prepaid to the date of prepayment; and • (b) any “Funding Losses” • The term “Funding Losses” is defined as compensation for “any loss, cost and expense” and includes “any loss, cost or expense arising from the liquidation or redeployment of funds or from any fees payable”
Fees and Expenses	• <u>DIP Upfront Fee</u>: One percent (1.00%) of the aggregate principal amount of the DIP Term Loan Commitments (i.e., \$1 million), deducted from the Interim Amount • <u>DIP Exit Fee</u>: Three percent (3.00%) of the aggregate principal amount of the DIP Term Loan Commitments (i.e., \$3 million), payable in cash when the DIP Delayed Draw Term Loans either are paid in full, mature, or upon an Event of Default • <u>DIP Agent Fee</u>: \$100,000.00, deducted from the Interim Amount • <u>Expenses/Attorneys’ Fees</u>: Borrowers to pay on demand all reasonable and documented costs and expenses of the DIP Agent and the DIP Lenders in a broad range of circumstances, including, without limitation, in connection with defending any claim or action asserted against the DIP Agent or DIP Lenders that arises from or relates to the DIP Credit Agreement, any other Loan Document, the DIP Agent’s or the DIP Lenders’ claims against any DIP Loan Party, or any and all matters in connection therewith
Carve-Out	• All statutory fees required to be paid to the Clerk of Court and to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a) • \$50,000.00 for fees and expenses of a chapter 7 trustee under section 726(b) of the Bankruptcy Code • Allowed Professional Fees incurred before delivery of a Carve-Out Trigger Notice, but with respect to the Committee Professionals, only amounts contained in the DIP Budget • Post-Carve Out Trigger Notice Cap of \$750,000.00 for the Debtors’ professionals, but with respect to the Committee, only \$150,000.00
DIP Collateral	• <u>DIP Liens</u>: First priority DIP Liens on substantially all of the Debtors’ assets and the proceeds thereof, including all previously unencumbered assets of the Debtors’ estates (including, but not limited to, the proceeds of avoidance actions and unencumbered real property) • <u>DIP Superpriority Claims</u>: Allowed superpriority administrative expense claims for all DIP Obligations
Adequate Protection	• Prepetition Term Loan Agent to receive Replacement Liens on all DIP Collateral junior only to the DIP Liens

Key Terms of Proposed DIP Facility	
	• Prepetition Term Loan Agent to receive superpriority administrative expense claims in each of the Chapter 11 Cases, subject only to Carve-Out and the DIP Obligations • Payment of reasonable and documented out-of-pocket expenses, including the Prepetition Term Loan Agent's professional fees • Monthly payment-in-kind of interest to the Prepetition Term Loan Lenders at the default rate of interest • Prepetition Term Loan Lenders entitled to credit bid in connection with any sale of Prepetition Collateral
Credit Bidding	• DIP Agent and Prepetition Term Loan Agent authorized to credit bid any or all of the respective DIP Obligation and the Prepetition Obligations on a dollar-for-dollar basis in connection with any sale or other disposition of DIP Collateral or Prepetition Collateral
Challenge	• <u>Challenge Period</u>: 60 days from the Petition Date (i.e., July 18, 2024) • <u>Investigation Budget</u>: \$50,000.00

B. DIP Budget

20. The Debtors attached the initial DIP Budget as Exhibit B to the Interim DIP Order. According to the DIP Budget, the Debtors commenced these Chapter 11 Cases with approximately \$13.1 million in cash-on-hand. However, the DIP Budget is silent as to, among other things, the payment of claims arising under (i) section 503(b)(9) of the Bankruptcy Code (“Section 503(b)(9) Claims”), (ii) the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a *et seq.* (“PACA Claims”), and (iii) the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.* (“PASA Claims”). The DIP Budget is also silent as to the payment of “stub rent,” although the Debtors assert that none is payable. The foregoing items, to the extent due and owing, should be budgeted for prompt payment.

C. *Milestones*

21. There are several sets of milestones pursuant to which the Debtors intend to govern these Chapter 11 Cases, which arise under: (i) the DIP Credit Agreement (the “DIP Milestones”),²⁷ (ii) the Restructuring Support Agreement (the “RSA Milestones”);²⁸ (iii) if approved, the Stalking Horse Agreement (the “SHA Milestones”);²⁹ and (iv) if approved, the Proposed Sale Procedures Order (the “Sale Milestones”)³⁰ and, collectively with the DIP Milestones, the RSA Milestones, and the SHA Milestones, the “Milestones”). A summary of these at times conflicting sets of Milestones is as follows:³¹

Deadline	Event	Basis for Deadline
Petition Date + 30 (June 18, 2024)	Entry of Final DIP Order Entry of Sale Procedures Order	DIP Milestone RSA Milestone SHA Milestone
June 20, 2024	DIP Facility Maturity Date (if no Final DIP Order)	DIP Milestone
UNKNOWN	Service of Assumption and Assignment Notice	Sale Milestone
UNKNOWN + 14	Contract Objection Deadline	Sale Milestone
July 12, 2024	Sale Objection Deadline	Sale Milestone
Petition Date + 60 (July 18, 2024)	Qualified Bid Deadline	RSA Milestone Sale Milestone
July 22, 2024	Notify Bidders of Status as Qualified Bidders	Sale Milestone
Petition Date + 65 (July 23, 2024)	Auction (if any)	DIP Milestone RSA Milestone SHA Milestone Sale Milestone
July 25, 2024	Filing and Service of Notice of Auction Results	Sale Milestone
July 26, 2024	Post-Auction Objection Deadline	Sale Milestone
Petition Date + 70 (July 28, 2024)	Entry of Sale Order	DIP Milestone RSA Milestone SHA Milestone

²⁷ See Annex D to the DIP Credit Agreement; *see also* DIP Credit Agreement at § 1.01.

²⁸ See Exhibit E to the RSA.

²⁹ See Stalking Horse Agreement §§ 7.5(b)–(c), 10.1(c).

³⁰ See Proposed Sale Procedures Order; *see also* Exhibit 1 to Proposed Sale Procedures Order.

³¹ The below table summarizes only the go-forward milestones. Capitalized terms used in this table but not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Credit Agreement, the RSA, the Stalking Horse Agreement, and the Proposed Sale Procedures Order, as applicable.

Deadline	Event	Basis for Deadline
July 29, 2024	Sale Hearing	Sale Milestone
July 30, 2024	Entry of Sale Order	Sale Milestone
Petition Date + 75 (August 2, 2024)	Sale Closing Date (without automatic extension)	DIP Milestone RSA Milestone
August 3, 2024	Sale Closing Date	Sale Milestone
Petition Date + 90 (August 17, 2024)	Sale Closing Date (if automatically extended) ³²	DIP Milestone RSA Milestone
August 18, 2024	End Date (i.e., Outside Sale Closing Date)	SHA Milestone
September 16, 2024	Furthest outside Maturity Date of DIP Facility	DIP Milestone

As set forth in the table above, the Debtors' various set of Milestones conflict. For example, the Sale Motion proposes to hold a hearing on the Sale on July 29, 2024, which is one day *after* the DIP Milestone, RSA Milestone, and the SHA Milestone for the same event. Not only are the Debtors' various sets of Milestones confusing, but they are also problematic because compliance with the DIP Milestones is both an affirmative covenant of the DIP Loan Parties and an Event of Default if not satisfied, in each case under the DIP Credit Agreement.³³

D. Full Release of All Claims

22. The Debtors propose to fully validate the liens and claims of the Prepetition Term Loan Secured Parties and release any claims against them, unless the Committee conducts an investigation (with a limited budget of \$50,000.00), obtains standing, and asserts claims and causes of action against such lenders by July 18, 2024.³⁴

³² If the Sale Order is entered within 70 days of the Petition Date, then the deadline to consummate the Sale shall be extended to 90 days following the Petition Date, but solely for the purpose of obtaining necessary regulatory approvals. See RSA, Exh. E.

³³ DIP Credit Agreement at §§ 7.01(x), 9.01(u)(i).

³⁴ Interim DIP Order ¶¶ G, H, 46.

OBJECTION

23. A court should only approve a proposed debtor-in-possession financing if a debtor meets its burden to prove that such financing “is in the best interest of the general creditor body.”³⁵ Moreover, the proposed financing must be “fair, reasonable, and adequate.”³⁶ Postpetition financing should not be authorized if its primary purpose is to benefit or improve the position of a particular secured lender.³⁷ Indeed, the law has long acknowledged the unequal bargaining power inherent in negotiations leading to proposed postpetition financing, as well as the very significant harm that can befall creditors if the proposed financier is permitted to exploit its leverage position.³⁸ The DIP Facility should not simply become a tool of the Prepetition Term Loan Secured Parties to roll-up \$175 million of Prepetition Term Loan Obligations, collateralize prepetition indebtedness with Unencumbered Assets, including the Unencumbered Real Estate, and expeditiously credit bid such amounts as the Stalking Horse Bidder to extract every ounce of value from the Debtors’ estates, all at the expense of the Debtors’ general unsecured creditors. Not only is this inappropriate, but it is also inconsistent with Eleventh Circuit precedent.

24. As discussed herein, the proposed DIP Facility contains numerous objectionable terms. Indeed, if approved in its current form, the proposed DIP Facility “would disarm the

³⁵ *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing *In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983); see also *In re Tenney Village Co., Inc.*, 104 B.R. 562, 569 (Bankr. D.N.H. 1989) (“The debtor’s prevailing obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries”).

³⁶ *In re Crouse Group, Inc.*, 71 B.R. 544, 546 (Bankr. E.D. Pa. 1987).

³⁷ See, e.g., *In re Aqua Assocs.*, 123 B.R. 192, 195-98 (Bankr. E.D. Pa. 1991) (“[C]redit should not be approved when it is sought for the primary benefit of a party other than the debtor.”); *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990) (“[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate.”); *Tenney Village*, 104 B.R. at 568 (debtor in possession financing terms must not “pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the secured creditor”).

³⁸ See, e.g., *In re FCX, Inc.*, 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985) (“[T]he court should not ignore the basic injustice of an agreement in which the debtor, acting out of desperation, has compromised the rights of unsecured creditors.”).

Debtor[s] of all weapons usable against” the Prepetition Term Loan Secured Parties “for the bankruptcy estate[s’] benefit, place the Debtor[s] in bondage working for the” Prepetition Term Loan Secured Parties, “seize control of the reins of reorganization, and steal a march on other creditors in numerous ways.”³⁹ This Court should not countenance such machinations.

25. For the reasons set forth herein, the Committee submits that the DIP Facility should be denied in its present form.

I. The Roll-Up is Inappropriate and Impermissible

A. *The Roll-Up is a Form of Cross-Collateralization Forbidden Under Binding Eleventh Circuit Precedent*

26. The Eleventh Circuit has recognized that “[c]ross collateralization is an extremely controversial form of Chapter 11 financing.”⁴⁰ Cross-collateralization exists “when the lender attempts to take a security interest in previously unencumbered property of the estate to secure not only the postpetition extension of credit . . . but also the lender’s prepetition claims against the debtor, which might be unsecured, usually because of a deficiency of prepetition collateral to secure a portion of the lender’s claim.”⁴¹ As set forth in *Saybrook*, cross-collateralization is forbidden within the Eleventh Circuit.⁴²

27. Section 364 of the Bankruptcy Code provides, in pertinent part, that:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court,

³⁹ *Tenney Village*, 104 B.R. at 568.

⁴⁰ *Saybrook*, 963 F.2d at 1494.

⁴¹ 3 Collier on Bankruptcy P 364.06 (16th 2024); *see also Saybrook*, 963 F.2d at 1491–92 (“In return for making new loans to a debtor in possession under Chapter XI, a financing institution obtains a security interest on all assets of the debtor, both those existing at the date of the order and those created in the course of the Chapter XI proceeding, not only for the new loans, the propriety of which is not contested, but [also] for existing indebtedness to it.”) (quoting *In re Texlon Corp.*, 596 F.2d 1092, 1094 (2d Cir. 1979)) (alterations in original).

⁴² *Saybrook*, 963 F.2d 1495–96.

after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)

(1) ***The court***, after notice and a hearing, ***may authorize the obtaining of credit or the incurring of debt*** secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.^[43]

In *Saybrook*, the Eleventh Circuit reasoned that “[b]y their express terms, sections 364(c) & (d) apply only to future—i.e., post-petition—extensions of credit[,]” and “do not authorize the granting of liens to secure pre-petition loans.”⁴⁴ Recognizing that a bankruptcy court’s inherent equitable powers are not “unlimited[,]” the Eleventh Circuit in *Saybrook* concluded that “[c]ross-collateralization is directly inconsistent with the priority scheme of the Bankruptcy Code[,]” and thus “the practice may not be approved by the bankruptcy court under its equitable

⁴³ 11 U.S.C. §§ 364(c)–(d) (emphasis supplied).

⁴⁴ *Saybrook*, 963 F.2d at 1495; *id.* (“The terms of § 364(c) appear to limit the extent of priority or lien to the amount of the credit obtained or debt incurred *after* court approval.”) (quoting *In re Monach Circuit Indus., Inc.*, 41 B.R. 859, 862 (Bankr. E.D. Pa. 1984) (emphasis in original)).

authority.”⁴⁵ Based on its interpretation of section 364 of the Bankruptcy Code and its analysis of a bankruptcy court’s inherent equitable powers, the Eleventh Circuit expressly held in *Saybrook* that “cross-collateralization is inconsistent with the bankruptcy law” and is neither “authorized by section 364” of the Bankruptcy Code nor permissible on equitable grounds.⁴⁶

28. Here, the Roll-Up contemplated by the DIP Facility is an impermissible form of cross-collateralization. The DIP Facility provides for a \$175 million Roll-Up of Prepetition Term Loan Obligations on a cashless dollar-for-dollar basis into DIP Delayed Draw Term Loans at a ratio of 1.75:1. As of the Petition Date, the Prepetition Term Loan Obligations were not secured by the Unencumbered Real Estate—which is a huge hole in the prepetition collateral position of the Prepetition Term Loan Secured Parties. The Unencumbered Real Estate is critical to the Debtors’ ongoing restaurant operations. There is no Red Lobster without the Unencumbered Real Estate. As a result, the Prepetition Term Loan Obligations appear to be vastly undersecured and there is no evidence to the contrary.

29. Under the DIP Facility, the Prepetition Term Loan Agent is receiving, among other things, new liens in the DIP Collateral to secure \$175 million of rolled-up debt, which encompasses the key missing piece of the Prepetition Term Loan Secured Parties’ prepetition collateral position—the Unencumbered Real Estate. The DIP Lenders then propose to use such \$175 million Roll-Up, along with \$100 million of new money, to credit bid for all of the Debtors’ principal assets, including the Unencumbered Real Estate. Although this may be a brilliant strategy for the Prepetition Term Loan Secured Parties, it is in substance a cross-collateralization forbidden by binding Eleventh Circuit precedent.

⁴⁵ *Id.* at 1496.

⁴⁶ *Id.* at 1495–96.

30. The Prepetition Term Loan Secured Parties and the DIP Secured Parties contend that the \$175 million Roll-Up is in fact a “refinancing” transaction, explaining that it is “as if we walked in with that amount of new money.”⁴⁷ But they did not. The economic reality of the \$175 million Roll-Up is both simple and instructive: the Prepetition Term Loan Secured Parties walked in with \$100 million in new money and are walking out with DIP Collateral, which includes the Unencumbered Assets and Unencumbered Real Estate, securing both such \$100 million in new money *and* the \$175 million Roll-Up. There is plainly no need to undertake the mental gymnastics required to rationalize the legal fiction that is construing the \$175 million Roll-Up as a refinancing. The \$175 million Roll-Up is, in substance, inescapably an attempt to take a security interest in previously unencumbered property of these estates to secure prepetition indebtedness, including Unencumbered Real Estate that are not encumbered by mortgages or deeds of trust as of the Petition Date, which are critical to the Debtors’ business operations. As stated by Saybrook: “there is no . . . applicable provision in the Bankruptcy Code authorizing the debtor to pay certain pre-petition unsecured claims in full while others remain unpaid. To do so would impermissibly violate the priority scheme of the Bankruptcy Code.”⁴⁸ Under the DIP Motion, the Debtors propose to pay off \$175 million of undersecured term debt, while other unsecured creditors are left holding the bag.

31. The Debtors cite in *Vital Pharmaceuticals*,⁴⁹ which is non-binding and is outside this district, as a case within the Eleventh Circuit permitting a roll-up.⁵⁰ The roll-up approved in *Vital Pharmaceuticals* was heavily contested and approved only after a settlement was achieved

⁴⁷ See, e.g., May 21, 2024 Hr’g Tr. 138:4–8; *Id.* at

⁴⁸ Saybrook, 963 F.2d at 1496 (quoting *Transamerica Commercial Finance Corp. v. Citibank (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089, 1094 (9th Cir.1991)).

⁴⁹ *In re Vital Pharm., Inc.*, No. 22-17842 (PDR) (Bankr. S.D. Fla. Jan. 12, 2023).

⁵⁰ DIP Mot. at ¶ 48 n. 9.

between the debtors, the unsecured creditors committee, and other key stakeholders, aside from the U.S. Trustee.⁵¹ These settlements included signification concessions from the DIP Lenders and the Debtors, including, but not limited to, that the rolled-up amount would not have any recourse against the proceeds of avoidance actions and commercial tort claims that were not already collateral of the prepetition lenders.⁵² While the *Vital Pharmaceuticals* court heard argument on the roll-up issue and, on a different set of facts, ultimately approved it over the objection of the U.S. Trustee, the case did not involve a restaurant business with a critical set of leases that were unencumbered. Additionally, in *Vital Pharmaceuticals*, the key assets that were not encumbered as of the Petition Date, including avoidance actions and commercial torts, remained unencumbered with respect to the roll-up.⁵³ *Vital Pharmaceuticals*, therefore, is distinguishable.

32. At the First Day Hearing, in arguing in support of the roll-up, counsel for the Debtors noted that the Roll-Up is subject to the Challenge rights contained in the Interim DIP Order.⁵⁴ That does not change the fundamental nature of the Roll-Up as a prohibited form of cross-collateralization and also provides no basis for the Committee to challenge the Roll-Up on

⁵¹ See, e.g., *Vital Pharm.*, No. 22-17842 (PDR) (Bankr. S.D. Fla. Feb. 10, 2023) [ECF No. 781], Jan. 10, 2023 Hr'g Tr. 10:7–24 (debtors' counsel announcing that settlements were reached with major stakeholders other than the U.S. Trustee).

⁵² *Id.* at 15:19–24 (“Through the negotiation the parties agreed to limit the DIP liens and the superpriority claims recourse to those claims. For one thing, and I think this is very important, the obligations in respect of the rollup DIP loans will not have any recourse to the proceeds of avoidance actions, or any commercial tort claims that weren't already their prepetition collateral. So the lenders wouldn't be getting, through the rollup, access to any litigation proceeds that they wouldn't have been entitled to on account of their prepetition debt.”); see also *Vital Pharm.*, No. 22-17842 (PDR) (Bankr. S.D. Fla. Jan. 9, 2023) [ECF No. 627] (committee's statement in support outlining the terms of their agreement with the debtors).

⁵³ *Vital Pharm.*, No. 22-17842 (PDR) (Bankr. S.D. Fla. Feb. 10, 2023) [ECF No. 781], Jan. 10, 2023 Hr'g Tr. 15:19–24.

⁵⁴ May 21, 2024 Hr'g Tr. 122:4–11 (“I do think it is very important to note that the roll-up is subject to challenge. In Paragraph 46, it says specifically, notwithstanding anything to the contrary herein, challenges may be brought against the roll-up obligations prior to the challenge period termination date and the Court may order appropriate relief in the event of any successful challenge to the roll-up obligations.”).

the basis that it should not extend to the Unencumbered Assets and Unencumbered Real Estate. In other words, even if the Prepetition Term Loan Secured Parties were to stipulate that their prepetition liens did not extend to the Unencumbered Real Estate, that is not a basis to Challenge the Roll-Up, which already would have been approved by then. The point here is that the Roll-Up should not be a means to grant new liens on the DIP Collateral in favor of the Prepetition Term Secured Parties on account of the Prepetition Term Loan Obligations.

33. For these reasons, the Roll-Up should be denied in its entirety, including the Interim Roll-Up Amount authorized pursuant to the Interim DIP Order, as an impermissible form of cross-collateralization prohibited by the Eleventh Circuit in *Saybrook*.

B. Alternatively, the Roll-Up Should Be Denied on Other Grounds

34. Roll-ups are “generally viewed as a more controversial form of adequate protection that courts will approve sparingly.”⁵⁵ They are generally disfavored because they provide no benefit to the estate while favoring certain prepetition creditors over others.⁵⁶ Roll-ups, like the Roll-Up in the DIP Facility at issue, generally harm unsecured creditors in at least two ways. **First**, as addressed above, they enhance the lenders’ collateral package by providing liens over unencumbered assets—assets that would otherwise be available to unsecured creditors and not available for credit bidding. **Second**, the Bankruptcy Code requires this “rolled-up” debt to be repaid in full and in cash in order for a debtor to successfully emerge from chapter 11, thereby precluding the debtor from treating the prepetition rolled-up debt in accordance with section

⁵⁵ 1 COLLIER LENDING INSTITUTIONS & THE BANKRUPTCY CODE ¶ 5.03[2][b] (citing cases).

⁵⁶ *In re Verasun*, No. 08-12606 (BLS) (Bankr. D. Del. Dec. 3, 2008) [ECF No. 316] (J. Shannon noting that Bankruptcy Courts in the District of Delaware, the Southern District of New York, and elsewhere have found that “rollups are not favored. They are strongly discouraged on day one, and the bottom line is that for approval a substantial showing [of need for the financing] has to be made.”). *See also In re Bruin E&P Partners, LLC*, Tr. of Hr’g at 67:9–10, Case No. 20-33605 (Bankr. S.D. Tex Jul. 17, 2020) (finding that roll-ups are “heavily disfavored under the Bankruptcy Code”); *see also Reynolds v. Servisfirst Bank (In re Stanford)*, 17 F.4th 116, 128 (11th Cir. 2021) (Jordan, J., concurring).

1129(b)(2)(A) of the Bankruptcy Code.⁵⁷ Courts often refuse to grant a roll-up of prepetition debt that is potentially unsecured because it has the effect of elevating an unsecured claim to a secured claim.⁵⁸

35. Here, as described above, the \$175 million Roll-Up is problematic for litany of reasons, including, significantly, collateralizing Prepetition Term Loan Obligations with Unencumbered Assets of the Debtors' estates (including Unencumbered Real Estate that is central to the Debtors' business), which may be the only source of recovery for general unsecured creditors. The \$175 million Roll-Up represents a blatant attempt by the Prepetition Term Loan Secured Parties to improve their position relative to the Debtors' other creditors constituencies, at great cost to the Debtors' estates and, in particular, general unsecured creditors.

36. Critically, the \$175 million Roll-Up constitutes a disproportionate, unjustifiable, and enormous fee. The \$175 million Roll-Up is "creeping," so that a fee in the form of rolled-up Prepetition Term Loan Obligations is exacted every time the Debtors draw on the DIP Facility. In no uncertain terms, at a 1.75:1 ratio, there is a \$1.75 for every \$1.00 drawn under the DIP Facility. This extraordinary fee, however, is not exacted on the Debtors, but rather general unsecured creditors due to the fact that the Roll-Up Term Loans are proposed to be secured by DIP Collateral, which includes the Unencumbered Assets. The DIP Upfront Fee of one percent (1.00%) and the DIP Exit Fee of three percent (3.00%), though problematic in their own right, pale in comparison to the 175% fee exacted by the \$175 million Roll-Up. This is inappropriate, and the Court should not permit the Prepetition Term Loan Secured Parties to further deplete Unencumbered Assets that

⁵⁷ See, e.g., 3 COLLIER ON BANKRUPTCY ¶ 364.06[2] (16th ed.).

⁵⁸ See, e.g., *Saybrook*, 963 F.2d at 1495 (holding postpetition financing arrangement *per se* impermissible where undersecured prepetition lender provided postpetition financing in exchange for a security interest in debtor's postpetition property to secure its prepetition debt); *In re FCX, Inc.*, 54 B.R. 833, 840 (Bankr. E.D.N.C. 1985) ("[I]f an undersecured creditor can obtain unencumbered assets as security for all of its prepetition claims, that creditor is being preferred to the detriment of other unsecured claimants.").

would otherwise be available for the benefit of general unsecured creditors over the course of these Chapter 11 Cases.

37. At the First Day Hearing, counsel for the DIP Agent and Prepetition Term Loan Agent argued that the \$175 million Roll-Up will actually save the Debtors money because the Roll-Up accrues interest on PIK basis and the Prepetition Term Loan Secured Parties would seek cash pay interest in the amount of approximately \$7 million per quarter as a form of adequate protection.⁵⁹ This logic is flawed. While the Roll-Up indeed accrues interest on a PIK-basis rather than a cash-basis, there has been no showing that there is any diminution in value of the Prepetition Term Loan Secured Parties' prepetition collateral entitling such parties to adequate protection in the form of ongoing cash payment of interest (as discussed below) and, in any event, the Debtors are required under the Bankruptcy Code to repay in full the \$175 million in Roll-Up Term Loans, plus interest, in cash in order to emerge from chapter 11. Moreover, as a result of the \$175 million Roll-Up, the Debtors are necessarily forfeiting their optionality and ability to subject the Prepetition Term Loan Secured Parties to a "cram up" chapter 11 plan.

38. The Roll-Up is also troublesome because it forms part of the basis for a stalking horse credit bid for substantially all of the Debtor's assets. The Roll-Up, therefore, may have the effect of chilling bidding by increasing the floor price in the Sale Process, while simultaneously better positioning the Prepetition Term Loan Secured Parties to bid on the Unencumbered Real Estate and thereby succeed in their stalking horse bid. Further, at this juncture, it appears that the Prepetition Term Loan Obligations are undersecured. As a result, the \$175 million Roll-Up has the effect of elevating the claims of the Prepetition Secured Parties at the expense of general unsecured creditors—a major "land grab" by the Prepetition Term Loan Secured Parties.

⁵⁹ See May 21, 2024 Hr'g Tr. 138:9–17.

39. Accordingly, no further Roll-Up should be approved and the Interim Roll-Up Amount should be disavowed. The Court should outright deny the Roll-Up even if it determines that the Roll-Up is not a form of cross-collateralization.

II. There Should Be No Pledge of Unencumbered Assets or Unencumbered Real Estate

40. The Debtors propose to encumber all Unencumbered Assets and Unencumbered Real Estate (or the proceeds thereof) that would otherwise be available to unsecured creditors in favor of the DIP Lenders and, to the extent of any diminution in value, the Prepetition Term Loan Secured Parties.⁶⁰ The assets that the Committee believes were unencumbered as of the Petition Date that must be preserved for the benefit of unsecured creditors include, among others, commercial tort claims, the proceeds of Avoidance Actions, real property, leases, fixtures, and cash-on-hand in local depository accounts (which are not subject to deposit account control agreements in favor of the Prepetition Secured Parties). The DIP Lenders and the Prepetition Term Loan Secured Parties now seek to prematurely scoop up the Unencumbered Assets through the DIP Facility, Roll-Up, and the Final DIP Order.

41. The only way to preserve and protect the interests of unsecured creditors under such circumstances is to treat the Unencumbered Assets as sacrosanct and free and clear of any liens or superpriority claims. As proposed, the DIP Facility would encumber all such previously Unencumbered Assets in favor of the DIP Lenders and Prepetition Term Loan Secured Parties, without any prospect of a recovery by the unsecured creditors in these Chapter 11 Cases, including certain cash held in local depository accounts on the Petition Date, which was not properly perfected.

⁶⁰ See Interim DIP Order at ¶¶ 5–6, 14.

42. Avoidance actions (and the proceeds thereof), in particular, are uniquely for the benefit of general creditors of the estate, not secured creditors, and should not be encumbered in favor of secured lenders.⁶¹ Avoidance actions are statutory rights designed to ensure equitable distributions of a debtor's estate. Indeed, avoidance powers are intended to allow a debtor in possession or other party with standing to gain recoveries for the benefit of all unsecured creditors. Accordingly, bankruptcy courts often restrict a debtor's ability to pledge avoidance actions and their proceeds as collateral.

43. Here, there is no basis for the DIP Lenders and Prepetition Term Loan Secured Parties to take liens and superpriority claims on the Unencumbered Assets when the Debtors have offered nothing to unsecured creditors, other than the estates retaining ten percent (10%) of the net proceeds of the "Equity Holder Actions" under the Stalking Horse Agreement.⁶² But even this "offer" is illusory and the DIP Lenders' and Prepetition Term Loan Secured Parties' strategy is clear: obtain DIP Liens and Replacement Liens on avoidance actions, commercial tort claims, Unencumbered Real Estate, and other Unencumbered Assets, and then credit bid (utilizing the Roll-Up) to buy them, leaving behind merely ten percent (10%) of the net proceeds of the "Equity Holder Actions." This is loan-to-own at its finest. Therefore, any further interim or final order therefore should make plain that no DIP Liens or Replacement Liens shall attach to any

⁶¹ See *Official Comm. of Unsecured Creditors v. Goold Electronics Corp. (In re Goold Electronics Corp.)*, No. 93-4196, 1993 U.S. Dist. LEXIS 14318, at *12 (N.D. Ill., Sept. 20, 1993) (vacating bankruptcy court order approving post-petition financing "to the extent that the order assigns to the bank a security interest in the debtor's preference actions."). This is because avoidance actions are not property of a debtor's estate, but rather a construct of bankruptcy law for the benefit of unsecured creditors. See 5 COLLIER ON BANKRUPTCY ¶ 541.14 at n.1 ("The avoiding powers of a debtor in possession granted in chapter 5 of the [Bankruptcy] Code are not property of the estate but statutorily created powers to recover property."); see also *Frank v. Mich. State Unemployment Agency (In re Thompson Boat Co.)*, 252 F.3d 852, 854 (6th Cir. 2001) (affirming lower courts' determination that "the bankruptcy Code allows only a trustee, not debtors, to initiate a preference action to avoid certain transfers, so proceeds recovered are property of the bankruptcy estate, not the debtor.").

⁶² See Stalking Horse Agreement § 2.2(k).

Unencumbered Assets and any associated superpriority claims shall not be payable from the proceeds thereof. Absent such protections, general unsecured creditors likely will be wholly disenfranchised and left with no recovery in these Chapter 11 Cases.

III. The Full Range of Adequate Protection Proposed for the Prepetition Term Loan Secured Parties is Excessive Under the Circumstances

44. The Bankruptcy Code only requires debtors to provide a secured creditor with adequate protection to the extent that the automatic stay, the debtors' use of property, or a priming lien "results in a decrease in the value of such entity's interest in such property." 11 U.S.C. § 361(1). The purpose is to protect a secured creditor from diminution in the value of its collateral during the use period.⁶³ "[T]he initial burden of showing the need for adequate protection [is] upon the creditor having an interest in the property being used by the debtor. In order to meet this burden, the secured creditor must demonstrate that such relief is required by showing a likelihood that the collateral will decrease in value or establishing some other basis for the relief. The burden then shifts to the debtor to show that adequate protection is not needed or can be provided in a different manner."⁶⁴ Here, there has been no showing that adequate protection in favor of the Prepetition Secured Parties is needed to the extent proposed in the Motion.

45. Absent diminution, no adequate protection is needed. So, where the lenders' collateral is not diminishing as a result of its use, nothing further is required for adequate

⁶³ See *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 368 (1988); *In re 495 Central Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (goal is to "safeguard the secured creditor from diminution in the value of its interest"); *Lincoln Nat'l Life Ins. v. Craddock-Terry Shoe Corp.* (*In re Craddock-Terry Shoe Corp.*), 98 B.R. 250, 255 (Bankr. W.D. Va. 1988) (finding that what needs to be adequately protected is the decrease in value attributable to the stay arising on the petition date).

⁶⁴ *Zink v. Vanmiddlesworth*, 300 B.R. 394, 402-03 (N.D.N.Y. 2003) (citations omitted). See also *In re Gunnison Ctr. Apartments*, 320 B.R. 391, 396 (Bankr. D. Colo. 2005) ("The secured creditor 'must, therefore, prove this decline in value—or the threat of a decline—in order to establish a *prima facie* case.'") (quoting *In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994)); *In re Continental Airlines, Inc.*, 146 B.R. 536, 539 (Bankr. D. Del. 1992) ("Post-Timbers courts have uniformly required a movant seeking adequate protection to show a decline in value of its collateral.").

protection.⁶⁵ And, diminution is not equivalent to cash collateral use. A prepetition lender is “not entitled to an adequate protection claim on a dollar-for-dollar basis for cash collateral used during the case.”⁶⁶

46. The Debtors propose to grant the Prepetition Term Loan Secured Parties excessive adequate protection in the form of:

- A. The Roll-Up of \$175 million of Prepetition Term Loan Obligations;
- B. Replacement Liens, to the extent of any diminution, on the DIP Collateral, including Unencumbered Assets;
- C. Superpriority claims to the extent of any diminution payable from the DIP Collateral, including Unencumbered Assets;
- D. Validations of liens and claims of the Prepetition Term Loan Secured Parties and ABL Agent and broad releases, subject to an abbreviated Challenge Period and a small investigation budget of only \$50,000.00;
- E. Payment of interest (at the contract **default rate** as to interest accrued prepetition) on the Prepetition Term Loan Obligations, plus reimbursement of professional fees;
- F. Section 506(c) surcharge, marshaling, and equities-of-the-case waivers in favor of the Prepetition Term Loan Secured Parties for the duration of these Chapter 11 Cases; and
- G. Imposition of a truncated Sale Process, plagued by unclear and at times conflicting Milestones that may very well result in a foot-fault Event of Default under the DIP Credit Agreement if such Milestones are not rationalized.

For all the reasons noted above, the Prepetition Term Loan Secured Parties should not receive the benefit of any Roll-Up or any liens and superpriority claims payable from Unencumbered Assets or Unencumbered Real Estate.

⁶⁵ *Save Power Ltd. v. Pursuit Athletic Footwear (In re Pursuit Athletic Footwear)*, 193 B.R. 713, 716 (Bankr. D. Del. 1996).

⁶⁶ *Official Comm. v. UMB Bank, NA (In re Residential Cap.)*, 501 B.R. 549, 596-97 (Bankr. S.D.N.Y. 2013).

IV. Section 506(c), Marshaling, and Section 552(b) Waivers are Inappropriate

47. The Debtors intend to grant broad waivers of Bankruptcy Code section 506(c) surcharge, marshaling, and “equities of the case” rights as to the DIP Lenders and the Prepetition Term Loan Secured Parties.⁶⁷ The Committee objects to each of these provisions.

48. Specifically, the waiver of rights under section 506(c) of the Bankruptcy Code is inappropriate and must be denied. Section 506(c) of the Bankruptcy Code allows a debtor to charge the costs of preserving or disposing of a secured lender’s collateral to the collateral itself.⁶⁸ This provision ensures that the cost of liquidating a secured lender’s collateral is not paid from unsecured creditor recoveries.⁶⁹ Courts have widely recognized that section 506(c) waivers are not to be granted lightly.⁷⁰ Indeed, courts have explicitly provided that the waiver is not permitted without the consent of the committee⁷¹ or unless modified to provide for timely payment of administrative claims.⁷²

⁶⁷ Interim DIP Order at ¶¶ 49–51.

⁶⁸ See 11 U.S.C. § 506(c).

⁶⁹ See, e.g., *Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) (“section 506(c) is designed to prevent a windfall to the secured creditor”); *Kivitz v. CIT Group/Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md. 2000) (“the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs”).

⁷⁰ See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000) (finding that section 506(c) is a rule of fundamental fairness for all parties in interest and authorizing the surcharge of a secured lender’s collateral where reasonable and appropriate).

⁷¹ See *In re Mortgage Lenders Network, USA, Inc.*, Case No. 07-10146 (PJW), Hr’g Tr. (Docket No. 346) at 21 (Bankr. D. Del. March 20, 2007) (noting that without the committee’s prior approval, the section 506(c) waiver may not be approved).

⁷² See *In re NEC Holdings Corp.*, No. 10-11890 (Bankr. D. Del. July, 13, 2010), ECF No. 233, and Hearing Tr. at 108:1-5, ECF No. 224 (“I need some evidence that there’s a probability that admin claims are going to be paid in full, including 503(b)(9) claims or I won’t approve the financing.”); *Hartford Fire Ins. v. Northwest Bank Minn. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (BAP 8th Cir. 1998) (holding that provision in financing order purporting to immunize the postpetition lender from section 506(c) surcharge was unenforceable); *In re Colad Grp.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (refusing to approve postpetition financing agreement to the extent that the agreement purported to modify statutory rights and obligations created by the Bankruptcy Code by prohibiting any surcharge of collateral under section 506(c)).

49. Through the proposed section 506(c) waiver, the Debtors would irrevocably waive the estates' rights to charge certain costs or expenses incurred in the administration of these Chapter 11 Cases. This provision should be stricken from any Final Order because all such rights should be expressly preserved.

50. The DIP Lenders and Prepetition Term Loan Secured Parties also seek to restrict this Court's ability to implement equitable marshaling. The waiver of any marshaling requirements is prejudicial because the DIP Lenders and the Prepetition Term Loan Secured Parties, to the extent that either is granted any interest in the Unencumbered Assets, will enable the DIP Secured Parties to credit bit the \$100 million in new money against the all of the Unencumbered Assets and Unencumbered Real Estate first. They should be required to exhaust remedies from other DIP Collateral before turning to the Unencumbered Assets, especially in these Chapter 11 Cases where there may be no value for unsecured creditors from any other sources aside from the Unencumbered Assets. Marshaling may be a key remedy in ensuring that unsecured creditors do not bear the brunt of the expense of this case while having no prospect of any other distributions.⁷³

51. Finally, the Debtors propose that the "equities of the case" exception under Bankruptcy Code section 552(b) not apply to the DIP Lenders and the Prepetition Term Loan Secured Parties. The "equities of the case" exception in section 552(b) of the Bankruptcy Code allows a debtor, committee, or other party in interest to exclude postpetition proceeds from prepetition collateral on equitable grounds, including to avoid using unencumbered assets to fund the cost of a secured lender's foreclosure.⁷⁴ "The purpose of the equity exception is to prevent a

⁷³ See *Official Comm. v. Hudson United Bank (In re America's Hobby Center)*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998); *Ramette v. United States (In re Bame)*, 279 B.R. 833 (BAP 8th Cir. 2002) (marshaling doctrine invoked against taxing authorities to benefit estate's unsecured creditors).

⁷⁴ See 11 U.S.C. § 552(b).

secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which normally would go to general creditors) to cause the appreciated value.”⁷⁵ There should be no waiver of any equitable rights of the Debtors' estates.

52. In sum, the waiver of section 506(c), marshaling, and “equities of the case” rights are inappropriate for the reasons set forth herein and should be excised from the Final DIP Order.

V. The Proposed Carve-Out and Challenge Provisions Are Discriminatory and Objectionable

53. Through the DIP Facility, the Debtors propose to circumscribe the Committee's ability to properly exercise its statutory duties.

54. The Carve-Out in the Interim DIP Order includes discriminatory treatment of the Committee's professional as compared to the Debtors' professionals (\$750,000.00) by providing the Committee's professionals with only \$150,000.00 for the Post-Carve Out Trigger Notice Cap.⁷⁶

55. The Challenge Period Termination Date should be subject to further extension with consent of the applicable Prepetition Term Loan Secured Parties or by the Court for cause. The Committee also should be granted more than \$50,000.00 to conduct a full investigation of the Prepetition Term Loan Secured Parties' asserted liens and claims.⁷⁷ At a minimum, the Committee's investigation budget should be increased to \$200,000.00. The Committee should also be granted immediate standing to pursue any available Challenge. The Debtors have already

⁷⁵ *In re Muma Servs.*, 322 B.R. 541, 558-559 (Bankr. D. Del. 2005) (quoting *Delbridge*, 104 B.R. at 826). There is no reason to waive such rights here. See, e.g., *In re Metaldyne Corp.*, 2009 Bankr LEXIS 1533, at *19 (Bankr. S.D.N.Y. June 23, 2009) (“[T]he Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make. If, in the event, the Committee or any other party [in] interest argues that the equities of the case exception should apply to curtail a particular lender's rights, the Court will consider it.”); *Sprint Nextel Corp. v. U.S. Bank Nat'l Ass'n (In re TerreStar Networks)*, 457 B.R. 254, 272-73 (Bankr. S.D.N.Y. 2011) (request for section 552(b) waiver was premature because factual record not fully developed).

⁷⁶ Interim DIP Order at ¶ 38.

⁷⁷ *Id.* at ¶ 46.

stipulated and released any viable claims or objections relating to the Prepetition Term Loan Secured Parties. Further, certain of the Debtors are limited liability companies, which could create standing issues for creditors under some courts' interpretations of applicable state law. The Committee therefore either should be granted standing now to pursue any Challenge on behalf of the estates or, alternatively, the stipulations and releases in favor of the Prepetition Secured Parties should be stricken.

VI. Other Committee Issues With the DIP Facility and Final DIP Order

56. The Committee has various additional objections to any proposed further interim or final order:

- A. ***Credit Bidding.*** Any credit bidding of the Prepetition Term Loan Obligations must be expressly subject to the Committee's Challenge rights and the provisions of section 363(k) of the Bankruptcy Code.
- B. ***Budgets, Amendments, and Committee Reporting Rights.*** The Committee must be granted notice of any new budgets or amendments to the DIP Credit Agreement, whether material or nonmaterial, and provided concurrently with all financial reporting delivered to the DIP Secured Parties and the Prepetition Term Loan Secured Parties.
- C. ***Prepayment Penalty.*** The requirement contained in Sections 2.05(e) and 2.08 of the DIP Credit Agreement that the Debtors pay to the DIP Secured Parties accrued interest on the principal amount being prepaid to the date of prepayment and any "Funding Losses" is a make-whole in disguise. It should be stricken entirely from the DIP Credit Agreement.
- D. ***DIP Milestones.*** The DIP Milestones should be extended to provide the Debtors with sufficient time to properly conduct the Sale Process. The DIP Milestones should be modified such that there is no risk of a foot-fault Event of Default under any of the other Milestones that the Debtors are seeking to impose in these Chapter 11 Cases.

- E. ***Certain Claims.*** The DIP Budget should be modified to ensure that Section 503(b)(9) Claims, PACA Claims, PASA Claims, claims arising under the WARN Act, and “stub rent” (if any) are promptly paid and adequately budgeted for, including in the event of a winddown.

RESERVATION OF RIGHTS

57. The Committee hereby reserves its rights to supplement this Objection and/or to further object to the DIP Motion.

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WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that this Court: (i) sustain this Objection and (ii) grant the Committee such other and further relief as this Court deems just and proper.

Dated: June 12, 2024
Orlando, Florida

Respectfully submitted,

/s/ Joseph A. Pack

Joseph A. Pack, Esq. (Florida Bar No. 117882)

Jessey J. Krehl, Esq. (Florida Bar No. 1025848)

PACK LAW

51 Northeast 24th Street, Suite 108

Miami, Florida 33137

Telephone (305) 916-4500

Email: joe@packlaw.com

jessey@packlaw.com

-and-

PACHULSKI STANG ZIEHL & JONES LLP

Bradford J. Sandler, Esq. (admitted *pro hac vice*)

Robert J. Feinstein, Esq. (admitted *pro hac vice*)

Maxim B. Litvak, Esq. (admitted *pro hac vice*)

Paul J. Labov, Esq. (admitted *pro hac vice*)

Cia H. Mackle, Esq. (Florida Bar No. 26471)

Theodore S. Heckel, Esq. (admitted *pro hac vice*)

780 Third Avenue, 34th Floor

New York, New York 10017

Telephone: (212) 561-7700

Facsimile: (212) 561-7777

Email: bsandler@pszjlaw.com

rfeinstein@pszjlaw.com

mlitvak@pszjlaw.com

plabov@pszjlaw.com

cmackle@pszjlaw.com

theckel@pszjlaw.com

*Proposed Counsel to the Official
Committee of Unsecured Creditors*