IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
NANOSTRING TECHNOLOGIES, INC., *et al.,*[1]	Case No. 24-10160 (CTG)
Debtors.	(Jointly Administered)
	Re: D.I. 24 & 75
	Hearing Date: March 7, 2024 at 1:00 p.m. (ET) **Objection Deadline (Extended for Committee): February 29, 2024 at 4:00 p.m. (ET)**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING, GRANTING SENIOR POSTPETITION SECURITY INTERESTS AND ACCORDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS PURSUANT TO SECTIONS 364(C) AND 364(D) OF THE BANKRUPTCY CODE, (II) AUTHORIZING THE USE OF CASH COLLATERAL, (III) GRANTING ADEQUATE PROTECTION, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) GRANTING RELATED RELIEF

[1] The Debtors in these Chapter 11 Cases, along with the last four digits of their U.S. federal tax identification numbers, to the extent applicable, are NanoString Technologies, Inc. (4687), NanoString Technologies International, Inc. (2723), NanoString Technologies Netherlands B.V., and NanoString Technologies Germany GmbH. The Debtors' headquarters is located at 530 Fairview Avenue North, Suite 2000, Seattle, WA 98109.

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The Official Committee of Unsecured Creditors (the "Committee") of NanoString Technologies, Inc. ("NanoString") and its affiliated debtors and debtors in possession (collectively with NanoString, the "Debtors"), by and through its undersigned proposed counsel, hereby submits this objection (the "Objection") to the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing Granting Senior Postpetition Security Interests and According Superpriority Administrative Expense Status Pursuant to Sections 364(c) and 364(d) of the Bankruptcy Code, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 24] (the "DIP Motion").[2] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. By the DIP Motion, the Debtors seek approval of a DIP Facility designed to insulate the claims and liens of prepetition lenders who extracted collateral and guarantee obligations on the 90th day preceding the Petition Date from a company that was, at the time, insolvent. While the Committee understands and is fully supportive of the Debtors' need for liquidity to administer these Chapter 11 Cases, the Committee cannot support postpetition financing that purports to elevate claims that the Committee intends to prove are unsecured over the claims of similarly-situated general unsecured creditors while simultaneously foreclosing the Committee's ability to investigate and prosecute one or more challenges in respect of such claims. Accordingly, and by this Objection, the Committee objects to the approval of the DIP Facility which, among other things, seeks to (i) inappropriately and impermissibly elevate the prepetition claims of the holders

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in, as applicable, the Interim DIP Order (as defined herein) or the *Declaration of R. Bradley Gray in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 2] (the "First Day Declaration").

(the "Prepetition 2026 Notes Parties") of 6.95% Notes due 2026 issued by NanoString under the 2026 Indenture (the "Prepetition 2026 Notes") before resolution of the Committee's forthcoming challenges and (ii) restrict the exercise of the Committee's fiduciary duties in these cases.

2. The Prepetition 2026 Notes Parties entered these cases with the irrefutable knowledge that their claims and liens would be challenged—and likely challenged successfully—by the official committee of unsecured creditors that would be appointed in these Chapter 11 Cases. Although the Committee is in the early stages of its investigation and intends to move expeditiously to present this Court with a full recitation of the relevant facts, the public record reflects that the following events transpired. On November 6, 2023, exactly 90 days before the Petition Date, NanoString entered into an Exchange Agreement with certain holders of Prepetition unsecured 2.625% Convertible Senior Notes due 2025 issued by NanoString under the 2020 Indenture (the "Prepetition 2025 Notes") (*i.e.*, those holders who are now the Prepetition 2026 Notes Parties). By the Exchange Agreement, the holders exchanged their Prepetition 2025 Notes for a commensurate amount of Prepetition 2026 Notes, which new Prepetition 2026 Notes benefited from: (i) an interest rate that increased from 2.625% to 6.95%; (ii) the provision of a guarantee from Debtor NanoString Technologies International, Inc. ("International")—an entity that had *not* been an obligor with respect to the Prepetition 2025 Notes; and (iii) a first lien on substantially all of the assets of both NanoString and International. As "consideration" for the enhanced economics, additional obligor and new security interests, the holders purportedly agreed to a payment-in-kind interest feature (at a much higher interest rate) and additional runway in the form of an extended maturity date that the Company was unable to utilize. The grant of liens on NanoString's assets was a textbook preferential transfer and the facts will demonstrate that the

incurrence of guarantee obligations by International (and related grant of liens on its assets) was a fraudulent conveyance, rendering the entirety of the November Transactions[3] avoidable.

3. Just days after the November Transactions were consummated, a jury rendered a verdict against the Debtors in connection with litigation surrounding the Debtors' Identified GeoMx Products, which verdict awarded the plaintiffs approximately $31.6 million in damages. Faced with a substantial judgment and already limited liquidity, the Debtors found themselves in the unfortunate position of having to negotiate the terms of postpetition financing with their newly (and putatively) secured lenders, who made full use of their manufactured leverage to extract off-market, transparent and self-serving provisions explicitly designed to insulate their vulnerable prepetition claims and liens from challenge. These problematic provisions are summarized below and addressed in more detail herein.

4. ***First***, the DIP Facility contemplates that $95 million of the Debtors' putatively secured prepetition obligations under the Prepetition 2026 Notes will be "rolled up" into postpetition debt obligations in exchange for $47.5 million of new money DIP Loans without any provision for the Roll-Up Loans to be "unwound" in the event of a successful Committee challenge. The DIP Facility further provides that all $95 million in Roll-Up Loans will accrue interest during the Chapter 11 Cases at a higher interest rate than the Prepetition 2026 Notes and will be secured by substantially all of the assets of each Debtor, inclusive of the proceeds of Avoidance Actions. The purpose of the Roll-Up here is clear; both DIP Lenders negotiated this DIP Facility with the full knowledge that a committee, once formed, would immediately launch an investigation into the facts surrounding the November Transactions and commence a challenge

[3] The Committee currently is undertaking a full investigation of the facts and circumstances surrounding the transactions entered into in connection with the Exchange Agreement (the "November Transactions") and intends to pursue preference and fraudulent transfer claims in connection with these transactions, in addition to any other claims that the Committee may determine to pursue following its investigation.

in respect of the Prepetition 2026 Notes. In response to the inevitable challenge that the DIP Lenders will soon face in their capacity as Prepetition 2026 Notes Parties, the DIP Lenders demanded that the Debtors agree to roll up debt that is subject to colorable avoidance claims as a condition precedent to the funding of new money loans. Indeed, the DIP Lenders were so focused on extracting this "protection" for their vulnerable debt that they demanded the roll up of $25 million in prepetition indebtedness effective upon entry of the Interim DIP Order. The Committee objects to approval of the Roll-Up Loans in their entirety as the Committee intends to demonstrate that the Prepetition 2026 Notes are wholly unsecured debt obligations solely of NanoString (if not subject to avoidance in their entirety) and there is no legal basis to roll up unsecured claims.

5. ***Second***, the DIP Facility contains a highly unusual (yet transparent) waterfall mechanic governing application of the proceeds of a sale of the Debtors' assets or equity that has similarly been designed by the DIP Lenders to insulate their prepetition exposure at the expense of unsecured creditors. The DIP Credit Agreement provides that sale proceeds are to be applied *first* to pay down the Prepetition 2026 Notes, *second* to pay down the Roll-Up Loans and *finally* to pay down the New Money Loans. By this proposed mechanic, the DIP Lenders seek to accelerate the repayment of prepetition debt with an interest rate that is less than the rate under the DIP Credit Agreement outside of a plan, presumably to make it more difficult for this Court to fashion a remedy in the event of a successful challenge. Because the Committee believes that the Prepetition 2026 Notes Parties hold entirely unsecured claims solely at NanoString, the Committee objects to any provision that purports to authorize the payment of any amounts owing on account of the Prepetition 2026 Notes, regardless of whether such amounts constitute prepetition obligations or postpetition "rolled up" obligations, pending the Court's adjudication of the Committee's forthcoming challenges.

6. ***Third***, the DIP Facility purports to provide the Prepetition 2026 Notes Parties with adequate protection notwithstanding the fact that the Prepetition 2026 Notes are, again, likely to be rendered unsecured. The proposed forms of adequate protection include, among others: (i) payment of the fees and expenses of no less than five professional firms; (ii) the continued accrual and payment of interest (to be paid in kind, "unless otherwise required by the Prepetition First Lien Agent"); and (iii) replacement claims and liens against each Debtor and the assets of each Debtor, including the proceeds of Avoidance Actions. It is black letter law that a party must have a secured claim in order to be entitled to adequate protection. Accordingly, any adequate protection granted in favor of the Prepetition 2026 Notes Parties should only survive so long as such parties are deemed to hold secured debt and only should be provided by those Debtors (*if any*) against which it is determined that the Prepetition 2026 Notes Parties have an allowed secured claim. To that end, any cash payments made to the Prepetition 2026 Notes Parties on account of professional fee or interest obligations must be subject to recharacterization and disgorgement depending on the outcome of the Committee's forthcoming challenges and the Debtors' sale processes.

7. ***Fourth***, in light of the Committee's forthcoming challenges to the Prepetition 2026 Notes Parties' claims and liens, the Prepetition 2026 Notes Parties should not be permitted to benefit from the proceeds of Avoidance Actions in their capacity as holders of Roll-Up Loans (to the extent approved at all) or holders of putatively secured obligations under the Prepetition 2026 Notes. The Debtors have proposed granting liens on the proceeds of Avoidance Actions as security for the New Money Loans and the Roll-Up Loans and as part of the Prepetition 2026 Notes Parties' proposed adequate protection package. With respect to the DIP Liens provided on account of New Money Loans, the Committee does not object to the inclusion of Avoidance Action proceeds to support such New Money Loans. This Court, however, should not permit the Debtors to grant

liens on the proceeds of Avoidance Actions to satisfy any adequate protection claims that the Prepetition 2026 Notes Parties might attempt to assert or any claims arising under the Roll-Up Loans (if any). Avoidance Actions are by their nature designed to benefit, and ensure equality of distribution among, general unsecured creditors. Thus, the grant of liens on Avoidance Action proceeds is fundamentally at odds with the unique purposes served by Avoidance Actions. Granting liens on the proceeds of Avoidance Actions, except in the limited manner described above, would be particularly unjust under the facts and circumstances of these Chapter 11 Cases given that the parties demanding liens on the proceeds of Avoidance Actions are themselves parties against whom Avoidance Actions will be pursued.

8. ***Finally***, there are a number of other infirmities that must be remedied before any DIP Facility can be approved on a final basis. These infirmities include, among other things, the following:

(a) The Committee's Investigation Budget Is Too Restrictive. The Final DIP Order would unduly restrict the Committee's ability to challenge the Prepetition 2026 Notes Parties' claims and liens by limiting the funds available to the Committee to investigate the claims against the Prepetition 2026 Notes Parties to $50,000. Given the significant legal issues to review in these cases and colorable preference action and fraudulent conveyance claims discussed above, the Committee's investigation budget should be increased from $50,000 to $400,000, with amounts in excess thereof subject to allowance as administrative expenses.

(b) Proposed Bankruptcy Code Section 552(b) and 506(c) Waivers Are Inappropriate. The Interim DIP Order contemplates, upon entry of the Final DIP Order, waivers of (i) the "equities of the case" exception of Bankruptcy Code section 552(b) and (ii) the provisions of Bankruptcy Code section 506(c). Blanket waivers of these rights are particularly inappropriate here, where the Committee intends to challenge the Prepetition 2026 Notes Parties' purported liens on, and security interests in, the Prepetition Collateral.

(c) The Proposed Waiver of the Marshaling Doctrine Should Not Be Permitted. The Debtors also should not waive rights with respect to the marshaling doctrine as broadly as is proposed in the DIP Motion.

Marshaling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." Meyer v. United States, 375 U.S. 233, 237 (1963). There is no justification for the broad scope of the proposed marshaling waiver.

(d) Releases: To the extent any release in the Final DIP Order is approved for the benefit of the DIP Lenders and the Prepetition 2026 Notes Parties, such releases should include a carve out for fraud, gross negligence or willful misconduct.

(e) Indemnification. Indemnification provisions in the Final DIP Order, if permitted at all, must be narrowly tailored to ensure that the Prepetition 2026 Notes Parties are not able to seek indemnification from the Debtors of any costs incurred defending against a challenge pursued by the Committee or other party in interest or on account of any judgment with respect to a successful challenge.

(f) Credit Bid. The DIP Credit Agreement provides that the DIP Agent and Prepetition First Lien Agent shall each have the unqualified right to credit bid up to the full amount of their claims. Under no circumstances should the DIP Agent or Prepetition First Lien Agent be permitted to credit bid any of the claims underlying the Roll-Up Loans or Prepetition 2026 Notes pending final resolution of the Committee's forthcoming challenges.

(g) Events of Default. The DIP Credit Agreement contains numerous Events of Default that may be tripped by events outside the Debtors' control or by the Debtors' or the Committee's exercise of their fiduciary obligations. Each of the following problematic Events of Default under Section 8.01(n) (Events of Default – Chapter 11) of the DIP Credit Agreement must be stricken or modified to ensure that the Debtors are not held hostage by the DIP Lenders:

(i) Sections 8.01(n)(i), (ii), (xviii) and (xx) of the DIP Credit Agreement restrict the Debtors' exercise of their fiduciary obligations to seek alternative financing from third parties on better terms or file a plan of reorganization that treats the DIP Lenders'/Prepetition 2026 Notes Parties' claims in a manner that is not acceptable to such parties.

(ii) Section 8.01(n)(iii) of the DIP Credit Agreement prohibits confirmation of a plan of reorganization that does not provide for payment in full in cash of all the obligations under the DIP Credit Agreement (including Roll-Up Loans) and the Prepetition Obligations (*i.e.*, the full amount of the

Prepetition 2026 Notes that were not rolled up under the DIP Facility) on or before the effective date of such plan.

(iii) Section 8.01(n)(iv) provides that it would be an Event of Default if, among other things, this Court enters an order amending, supplementing, staying, vacating or otherwise modifying the DIP Credit Agreement or related order or "affecting in any material respect" the DIP Credit Agreement or related orders without the DIP Agent's consent.

(iv) Sections 8.01(n)(vi), (xiv) and (xxvi) each provide for Events of Default in connection with the application and/or waiver of Bankruptcy Code sections 506(c) and 552(b).

(v) Section 8.01(n)(xxi) provides for an Event of Default if any Debtor takes any action in support of any matter that constitutes an Event of Default set forth in Section 8.01(n) or any other Person shall do so (*i.e.*, the Committee) and such application is not contested in good faith by the Debtors and the relief requested is granted in an order that is not stayed pending appeal.

(vi) Section 8.01(n)(xxv) provides for an Event of Default if this Court does not approve the Roll-Up or approves any amendment, waiver or modification of the Roll-Up.

(h) Reporting and Notices. The Final DIP Order should provide that the Committee will receive the same reporting and notices, and at the same time, as the DIP Agent or DIP Lenders, as applicable.

(i) DIP Milestones. The DIP Facility includes various milestones that impose an accelerated timeframe on the Debtors' sale process. The Committee is still performing diligence to ensure that the milestones provide sufficient time to run a value-maximizing sale process. Accordingly, this Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights to supplement this Objection to request modifications to the milestones.

(j) Challenge Period. The Interim DIP Order and proposed Final DIP Order provide that the Challenge Period shall be tolled for a period not to exceed thirty (30) days upon the filing of a Challenge Standing Motion by the Committee, but that the granting of a Challenge Standing Motion shall not extend the Challenge Period beyond expiration of the Tolling Period. The filing of a Challenge Standing Motion should toll the Challenge Period at least until the entry of a final order on the Challenge Standing Motion, subject to

> the terms of any such final order governing the time period for the filing of any Challenge and, upon the granting of a Challenge Standing Motion, the Challenge Period should not lapse until entry of a final order on any applicable Challenges.

9. For these reasons and those set forth below, the Committee respectfully requests that the Court not approve the DIP Motion on a final basis absent modification to the terms of the DIP Facility and the relief granted as set forth in this Objection.

RELEVANT BACKGROUND

A. The Debtors' Prepetition Debt Structure

10. As described in greater detail in the First Day Declaration, as of the Petition Date, the Debtors have an aggregate amount of approximately $281 million in prepetition debt, consisting of approximately $231 million principal amount of outstanding funded debt obligations, comprising (i) $14,276,000 in Prepetition 2025 Notes and (ii) $217,300,000 in Prepetition 2026 Notes.[4] The Debtors also have stated that they have approximately $50,000,000 in additional unsecured obligations, including litigation claims and ordinary course trade claims, among others.[5]

11. On November 6, 2023, exactly 90 days before the Petition Date, NanoString entered into an Exchange Agreement with certain holders of Prepetition 2025 Notes (*i.e.*, those holders who are now the Prepetition 2026 Notes Parties).[6] As noted above, by the Exchange Agreement, the holders exchanged their unsecured Prepetition 2025 Notes for a commensurate amount of Prepetition 2026 Notes, which new Prepetition 2026 Notes benefited from: (i) an interest rate that increased from 2.625% to 6.95%; (ii) the provision of a guarantee from International—an entity

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[4] First Day Declaration ¶¶ 30-31.

[5] *Id*. ¶ 32.

[6] *Id*. ¶ 30.

that had *not* been an obligor with respect to the Prepetition 2025 Notes; and (iii) a first lien on substantially all of the assets of both NanoString and International.[7]

B. **The GeoMx Action and Jury Verdict**

12. On May 6, 2021, 10x Genomics, Inc. ("10x") and Prognosys Biosciences, Inc. ("Prognosys") filed a complaint against NanoString in the United States District Court for the District of Delaware (the "Delaware District Court") alleging that certain products, services and components sold by the Debtors for use in connection with GeoMx infringe seven patents that are owned by Prognosys.[8] From November 13 through November 17, 2023, the Delaware District Court held a jury trial on these issues. On November 17, 2023, the jury in that case rendered a verdict against NanoString, which verdict awarded the plaintiffs approximately $31.6 million in damages.[9]

C. **The Proposed DIP Facility and the Committee Formation**

13. On the February 5, 2024, the Debtors filed the DIP Motion.

14. On February 6, 2024, following a hearing (the "First Day Hearing"), the Court entered the *Interim Order (I) Authorizing the Debtors to Obtain Postpetition Financing, Granting Senior Postpetition Security Interests and According Superpriority Administrative Expense Status Pursuant to Sections 364(c) and 364(d) of the Bankruptcy Code, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [Docket No. 75] (the "Interim DIP Order"), approving the DIP Motion on

7 *Id*. ¶30.

8 *Id*. ¶ 36.

9 *Id*. ¶ 37.

an interim basis. Upon entry of the Interim DIP Order, the DIP Lenders funded $12.5 million under the DIP Facility and rolled up $25 million in Prepetition 2026 Notes.[10]

15. On February 15, 2024, pursuant to Bankruptcy Code section 1102, the United States Trustee for Region 3 appointed the Committee [Docket No. 104]. The Committee currently comprises (i) BMR-500 Fairview Avenue LLC, (ii) Delaware Trust Company, (iii) IDEX Health and Science, LLC, (iv) Seismic Software, Inc., and (v) Silverback Asset Management, LLC. On February 20, 2024, the Committee selected Akin Gump Strauss Hauer & Feld LLP as its primary counsel and thereafter selected Troutman Pepper Hamilton Sanders LLP as its Delaware co-counsel, and Piper Sandler & Co. as its investment banker, in each case subject to Court approval.

D. **The Proposed Roll-Up**

16. The DIP Facility contemplates the dollar-for-dollar conversion of $95 million of existing obligations under the Prepetition 2026 Notes into postpetition DIP Facility obligations (the "Roll-Up").[11] Upon entry of the Final DIP Order, $70 million of Prepetition 2026 Notes will be deemed to "roll up" into the DIP Facility and be treated as loans funded under the DIP Credit Agreement (the "Roll-Up Loans"), in addition to the initial $25 million of Prepetition 2026 Notes that were rolled up into Roll-Up Loans upon entry of the Interim DIP Order.[12] The Roll-Up Loans will accrue interest, payable in kind, at a rate of 8.95% per annum, and will become obligations of each Debtor (regardless of whether they were obligated on the Prepetition 2026 Notes or the Prepetition 2025 Notes) and be secured by liens on all of the Debtors' property, including property that was not previously encumbered by the Prepetition First Priority Liens.[13] As proposed,

[10] Interim DIP Order ¶ 3(b).

[11] DIP Credit Agreement § 2.01.

[12] *Id.*

[13] *Id.* § 1.01, 2.10.

pursuant to the Interim DIP Order and the proposed Final DIP Order, the Roll-Up Loans (as DIP Obligations) and the DIP Liens securing the Roll-Up Loans shall constitute valid, binding non-avoidable obligations of the Debtors, and no obligation, payment, transfer, or grant of security under the DIP Credit Agreement, the Interim DIP Order or the proposed Final DIP Order shall be stayed, restrained, voidable, avoidable, or recoverable under the Bankruptcy Code or under any applicable law (including under sections 502(d), 548, or 549 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, Uniform Voidable Transactions Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment, or counterclaim.[14]

E. **Application of Sale Proceeds**

17. The DIP Credit Agreement provides that, in the event that the Debtors consummate a sale of their equity interests or assets, the proceeds of such a sale shall be applied in the following order: *first*, to pay off the Prepetition 2026 Notes; *second*, to pay off the Roll-Up Loans; and *third*, to pay off the New Money Loans under the DIP Facility, in each case, including any associated fees and interest and subject to the Debtors' estates being administratively solvent.[15]

F. **The Proposed Adequate Protection to Prepetition 2026 Notes Parties**

18. As adequate protection, the Debtors propose that the Prepetition 2026 Notes Parties will receive, for any diminution in value of the Prepetition First Priority Liens on Prepetition Collateral (including Cash Collateral), (i) replacement liens and security interests in all DIP Collateral, subject and subordinate only to the Carve Out, Permitted Prior Liens and the DIP Liens, and (ii) superpriority administrative claims to the fullest extent provided by Bankruptcy Code

[14] Interim DIP Order ¶ 3(e).

[15] *Id.* § 2.09(c).

sections 503(b), 507(a) and 507(b), junior only to the Carve Out and the DIP Superpriority Claims.[16]

19. The Prepetition 2026 Notes Parties' proposed adequate protection package also contemplates that (i) the Prepetition 2026 Notes will accrue interest (to be paid in kind, "unless otherwise required by the Prepetition First Lien Agent") and (ii) the Debtors are authorized to pay the reasonable and documented fees and expenses of the Prepetition 2026 Notes Parties, including Gibson Dunn & Crutcher LLP, as counsel to certain Prepetition 2026 Notes Parties, Sullivan & Cromwell LLP, as counsel to certain Prepetition 2026 Notes Parties, Shipman & Goodwin LLP, as counsel to the Prepetition First Lien Agent, Richards, Layton & Finger (or any single replacement counsel thereto), Houlihan Lokey Capital, Inc. and any conflicts counsel or other legal counsels necessary to represent the interests of the Prepetition 2026 Notes Parties. Upon entry of the Final DIP Order, the Prepetition First Lien Adequate Protection Liens would be secured by, and the Prepetition First Lien Adequate Protection Claims would have recourse to, all assets of the Debtors' estates, including, without limitation, proceeds of Avoidance Actions.[17]

G. **The Debtors' Stipulations and Committee Rights**

20. The Debtors have stipulated to the validity of the aggregate amount of prepetition debt and the validity, enforceability and priority of the liens and security interests securing the obligations under the prepetition debt documents, including the debt documents entered into in connection with the Exchange Agreement.[18] The Interim DIP Order provides the Committee with a budget of only $50,000 solely to investigate, but not object to, challenge, prosecute, or litigate (including by way of formal discovery) the validity, enforceability, perfection and priority of the

[16] Interim DIP Order ¶ 9.

[17] *Id.*

[18] *Id.* ¶ F.

Prepetition First Priority Liens or any potential challenge against the Prepetition 2026 Notes Parties by the expiration of the Challenge Period, which is set for seventy-five (75) days following entry of the Interim DIP Order (*i.e.*, April 21, 2024).[19]

21. On February 24, 2024, the Committee served requests for production of documents and notices of depositions pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedures and Rule 7030 of the Federal Rules of Bankruptcy Procedure on the Debtors and the DIP Lenders in connection with the DIP Motion. Document production is not complete and depositions have yet to be taken.

OBJECTION

A. The DIP Facility Does Not Satisfy the Legal Standard for Approval of Postpetition Financing

22. The applicable standards for the Court to approve the DIP Facility have not been satisfied. A debtor seeking court approval of debtor in possession financing must demonstrate that (i) the financing arrangement is necessary to preserve assets of the estate and (ii) the arrangement is otherwise fair and reasonable. *In re L.A. Dodgers LLC*, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011) (citing *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987), *modified on other grounds*, 75 B.R. 553 (Bankr. E.D. Pa. 1987)); *In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (stating that requests for postpetition financing must show the funds are "necessary to preserve the assets of the estate"); *In re Republic Airways Holdings Inc.*, No. 16-10429 (SHL), 2016 WL 2616717, at *11 (Bankr. S.D.N.Y. May 4, 2016) (same). Courts recognize that "[d]ebtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a prepetition lien on cash collateral" and that "[a]s a result, lenders often exact favorable terms that harm the estate and creditors." *In re Defender Drug Stores, Inc.*,

[19] *Id.* ¶ 28.

145 B.R. 312, 317 (BAP 9th Cir. 1992) (citing *In re Ames Dep't Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990); *In re Tenney Vill. Co.*, 104 B.R. 562, 567–70 (Bankr. D.N.H. 1989)). Accordingly, courts are cautious not to approve financing terms that are considered harmful to an estate and its creditors. *See, e.g.*, *In re Laffite's Harbor Dev. I, LP*, No. 17-36191-H5-11, 2018 Bankr. LEXIS 2, *6 (Bankr. S.D. Tex. Jan. 2, 2018).

23. While certain unfavorable terms may be permitted as a reasonable exercise of a 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" or that "prejudice the powers and rights that the [Bankruptcy] Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest." *Defender Drug Stores*, 145 B.R. at 317; *see also In re Tenney Vill.*, 104 B.R. at 568 (denying approval of postpetition financing facility upon finding that it would "pervert the reorganizational process from one designed to accommodate all classes of creditors . . . to one specially crafted for the benefit of the [postpetition lender]"); *In re Ames Dep't Stores*, 115 B.R. at 39 ("Moreover, 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 . . . [C]ourts, correctly, examine all the facts and circumstances to determine if the estate is being benefitted rather than principally the pre-petition creditor.").

24. The terms of the DIP Facility violate applicable law in several respects. ***First***, the Roll-Up inappropriately and impermissibly converts claims that are likely to be unsecured into claims under the DIP Facility, without preserving the Court's ability to impose an appropriate remedy if the Committee successfully challenges the underlying debt, to the detriment of the

Debtors' estates and all unsecured creditors. ***Second***, the proposed DIP Credit Agreement requires the proceeds of any sale of the Debtors' assets or equity interests to be used, among other things, to repay the Prepetition 2026 Notes Parties' outstanding (unsecured) prepetition debt outside of a plan and potentially before resolution of the Committee's challenge. ***Third***, like the Roll-Up, the proposed adequate protection for the Prepetition 2026 Notes Parties inappropriately provides such lenders with adequate protection claims, adequate protection liens and adequate protection payments notwithstanding the fact that the claims and liens granted in connection with the November Transactions are likely to be avoided. ***Fourth***, the DIP Facility provides that the DIP Lenders and Prepetition 2026 Notes Parties are entitled to look to the proceeds of Avoidance Actions to satisfy their respective claims instead of preserving such proceeds for the benefit of those unsecured creditors who are not litigation targets. ***Fifth***, the proposed budget for the Committee's investigation of prepetition claims and liens is unduly restrictive. ***Sixth***, the proposed Bankruptcy Code section 552(b) and 506(c) waivers are inappropriate, and the proposed waiver of the marshaling doctrine should not be permitted. ***Finally***, there are a number of additional provisions of the DIP Facility that are inappropriate and must be stricken or modified as detailed herein.

B. The "Roll-Up" of the Prepetition 2026 Notes is Egregious and Violates Applicable Law

i. *The Prepetition 2026 Notes Parties Are Not Entitled to the Roll-Up*

25. Courts are hesitant to approve a roll up of prepetition debt where there is a material enhancement of the prepetition creditors' position at the expense of unsecured creditors. *In re Trico Marine*, Case No. 10-12653 (BLS) (Bankr. D. Del. 2010) Hr'g Tr. at 67:11–14 [Docket No. 206] (declining to grant the roll up of prepetition debt because the court lacked information to determine "whether or not [the court is] materially harming the position of the unsecured creditors

in this case or whether [the court is] materially enhancing the position of the putative secured creditor."). Roll ups generally are not favored because they provide no economic benefit to the debtor and solely benefit the prepetition lender by elevating prepetition claims and circumventing the Bankruptcy Code's priorities and distribution framework. *See, e.g., In re Saybrook Mfg. Co. Inc.*, 963 F.2d 1490 (11th Cir. 1992) (holding that a secured creditor's prepetition debt balance may not be paid off and/or "rolled into" a postpetition line of debtor in possession financing, with resultant enhancement of collateral position and administrative priority); *Official Comm. of Unsecured Creditors of New World Pasta Co. v. New World Pasta Co.*, 322 B.R. 560, 569 n.4 (M.D. Pa. 2005) (noting that roll up provisions "have the effect of improving the priority of a prepetition creditor"); *In re Tenney Vill. Co.*, 104 B.R. at 570 (holding that Bankruptcy Code section 364 does not authorize the granting of administrative expense priority for prepetition debt); *see also In re Verasun*, Case No. 08-12606 (BLS) (Bankr. D. Del. Dec. 3, 2008) Hr'g Tr. at 32:23-25 [Docket No. 316] (Judge Shannon noting that the Bankruptcy Court of the District of Delaware, the Southern District of New York, and other courts, have found that "roll-ups are not favored. They are strongly discouraged on day one, and the bottom line is that for approval a substantial showing has to be made . . . .").

26. While in certain limited situations, based on the facts and circumstances of a given case, *allowable* prepetition *secured* claims may be rolled-up or repaid outside a chapter 11 plan, there is no legal basis for doing so here. In the rare circumstances where a roll up is authorized, the debtor or the prepetition secured lender can typically prove that the lender is oversecured and that the liens securing such lender's claims are not subject to avoidance. In these Chapter 11 Cases, however, there is a significant likelihood that the security interests granted by NanoString in respect of the Prepetition 2026 Notes will be avoided as a preferential transfer and the guarantee

and related liens provided by International will be avoided as a fraudulent transfer, following which any remaining claims of the Prepetition 2026 Notes Parties will be *entirely unsecured* obligations of NanoString alone. The DIP Lenders' conduct in seeking to elevate what are likely to be general unsecured claims against a single Debtor above all other general unsecured creditors of all Debtors is the exact type of inequitable conduct that this Court should not condone when considering the propriety of the Roll-Up under applicable law.

27. Indeed, the undisputed facts already reflect that the Committee has *at least* a colorable basis to assert that the claims and liens granted in connection with the November Transactions are avoidable as a preference and/or fraudulent conveyance, as applicable.[20] As an initial matter, the grant of a security interest on substantially all assets of NanoString in favor of the Prepetition 2026 Notes Parties meets each element of a preferential transfer as set forth in Bankruptcy Code section 547(b).[21] ***First***, the security interests were provided to certain holders

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[20] In this Circuit, a creditors' committee may be granted standing to pursue actions on behalf of a debtor's estate upon a showing that: (1) there is a colorable claim or cause of action; (2) the debtor has unjustifiably refused a demand to pursue the claim; and (3) the committee has obtained permission of the bankruptcy court to initiate the action. *See Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery,* 330 F.3d 548, 566 (3d Cir. 2003); *Infinity Inv'rs Ltd. v. Kingsborough (In re Yes! Entm't Corp.),* 316 B.R. 141, 145 (D. Del. 2004); *In re Centaur, LLC,* No. 10-10799 (KJC), 2010 WL 4624910, at *4 (Bankr. D. Del. Nov. 5, 2010);. One measure of whether a claim is colorable is if it would survive a motion to dismiss. *See Claridge Assocs., LLC v. Schepis (In re Pursuit Capital Mgmt.),* 595 B.R. 631, 665 (Bankr. D. Del. 2018). Under the motion to dismiss standard, a proposed claim need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and include factual allegations that, if true, "state a claim to relief that is plausible on its face." See Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); In re Centaur, LLC, No. 10-10799 (KJC), 2010 WL 4624910, at *5 (Bankr. D. Del. Nov. 5, 2010).

[21] Bankruptcy Code section 547(b) provides for the avoidance of any transfer of an interest of a debtor in property:

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

of Prepetition 2025 Notes (*i.e.*, creditors) on account of the antecedent debt owed on such Notes by NanoString. ***Second***, the November Transactions took place exactly 90 days before the Petition Date, during which time NanoString was presumed to be insolvent.[22] ***Third***, the transfer enabled the holders of the new Prepetition 2026 Notes to receive more than they would have received on account of the Prepetition 2025 Notes in a chapter 7 proceeding had the transfer not been made given that the Prepetition 2026 Notes Parties (who previously had unsecured claims solely against NanoString) acquired the ability to look to substantially all of the assets of NanoString to satisfy their claims following the consummation of the November Transactions. As such, the grant of liens on the assets of NanoString in favor of the Prepetition 2026 Notes constitutes a *textbook* avoidable preferential transfer, for which the holders of the Prepetition 2026 Notes have no apparent defense.

28. Moreover, the incurrence of guarantee obligations by International (and the grant of security interests in connection therewith) satisfies each element of the Bankruptcy Code's requirements for a fraudulent transfer.[23] ***First***, upon information and belief, no value or benefit was provided to International in connection with the November Transactions, let alone reasonably equivalent value. International was not a guarantor of the Prepetition 2025 Notes and therefore had no obligation to the Prepetition 2026 Notes Parties prior to the November Transactions.

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent pro-vided by the provisions of this title.

[22] Pursuant to Bankruptcy Code section 547(f), for purposes of Bankruptcy Code section 547, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the petition date.

[23] Bankruptcy Code section 548(a)(1)(B) deems constructively fraudulent and avoidable any transfer of an interest of the debtor in property or any obligation incurred by the debtor that was made or incurred within two years before the petition date if, in pertinent part, (i) the debtor received "less than a reasonably equivalent value in exchange for such transfer or obligation" and (ii) the debtor was or became insolvent, was unreasonably undercapitalized or intended to incur debts beyond its ability to pay upon maturity. *See* 11 U.S.C. § 548(a)(1). Similarly, Bankruptcy Code section 548(a)(1)(A) provides for the avoidance of transfers made or obligations incurred with actual intent to hinder, delay or defraud any of a debtor's creditors, and Bankruptcy Code section 544 provides that fraudulent transfers can be avoided for the benefit of the estate under applicable state debtor-creditor laws.

International did not receive any actual benefit or indirect benefit from the November Transactions that would equate to reasonably equivalent value. ***Second***, International likely was insolvent, or otherwise rendered insolvent, at the time of, or as a result of, the November Transactions given its parent company's presumed insolvency. The Debtors' First Day Declaration supports this finding; as set forth in the First Day Declaration, (i) the Company experienced increasingly constrained liquidity throughout 2023, in response to which it sought (unsuccessfully) to raise new capital and implement cost-cutting measures and (ii) at the time of the November Transactions, the Company *had yet to turn a profit*. *See* First Day Declaration, ¶44. In light of the foregoing, the Roll-Up should not be approved insofar as it would effectuate the conversion of debt properly viewed as unsecured into postpetition loans under the DIP Facility, unfairly and impermissibly favoring the claims of a handful of unsecured creditors over all other creditors of these estates.

29. Further, no justification has been provided as to why the Roll-Up is appropriate or beneficial to the Debtors' estates, as is required under the Bankruptcy Code. *See, e.g., Official Comm. of Unsecured Creditors of New World Pasta Co.*, 322 B.R. at 569 n.4 (noting that roll-up provisions "have the effect of improving the priority of a prepetition creditor"); *In re Tenney Vill.*, 104 B.R. at 570 (holding that Bankruptcy Code section 364 does not authorize the granting of administrative expense priority for prepetition debt); *see also In re VeraSun*, Hr'g Tr. at 32:20–25 [Docket No. 316] (noting that the Bankruptcy Court for the District of Delaware has found that "roll ups are not favored . . . [and that] a substantial showing [of need for the financing] has to be made.").

30. Simply put, there is no justification for approval of the Roll-Up, aside from the clear inference that the Prepetition 2026 Notes Parties simply demanded it and the Debtors were not in a position to refuse. *See e.g.*, *In re RadioShack Corp.*, No. 15-10197 (BLS) (Bankr. D. Del.

Feb. 25, 2015), Hr'g Tr. at 208:19–22 [Docket No. 634] ("[T]he fact that a lender insists on [the roll up] is not a legitimate basis or predicate for approving relief and protection that this Court has consistently said should be strictly construed and, frankly, not encouraged."). Nor does there appear to be any economic benefit that would be obtained by these estates if the Court were to approve the Roll-Up; indeed, the interest rate on Roll-Up Loans is higher than the interest rate on the prepetition indebtedness. On this basis alone, the Court should find that the Debtors have not met their burden to prove that the unique facts of this case support the extraordinary relief embodied in the Roll-Up request, and the Roll-Up should be denied.

ii. ***The Roll-Up Must Be Subject to Automatic Unwinding in the Event of a Successful Challenge***

31. Notwithstanding the foregoing, if the Roll-Up is approved, the Roll-Up Loans must be, in all respects, automatically unwound if the claims and/or liens granted in respect of the Prepetition 2026 Notes are successfully challenged. The Final DIP Order should contain a self-effectuating mechanism to unwind the liens and other benefits granted through the Roll-Up and require disgorgement of any interest, fees or expenses paid as of the relevant date. Such a mechanism is required to ensure that the Prepetition 2026 Notes Parties' claims and/or liens, if successfully challenged, do not receive the benefit of superpriority administrative expense status and access to the DIP Collateral at the expense of unsecured creditors, and to avoid rendering the Committee's investigation and challenge rights illusory. These types of provisions are routinely included in DIP orders to prevent prejudice to the estates. *See, e.g.*, *In re TPC Group Inc.*, No. 22-10493 (CTG) (Bankr. D. Del. August 2, 2022) [Docket No. 566] (roll up subject to committee challenge); *In re Alamo Drafthouse Cinemas*, No. 21-10474 (MFW) (Bankr. D. Del. April 1, 2021) [Docket No. 249] (same); *In re GNC Holdings, Inc.*, No. 20-11662 (KBO) (Bankr. D. Del. July 21, 2020) [Docket No. 502] (same); *In re Libbey Glass, Inc.*, No. 20-11439 (LSS) (Bankr. D. Del.

July 2, 2020) [Docket No. 234] (same); *In re Haggen Holdings, LLC*, No. 15-11874 (KG) (Bankr. D. Del. Oct. 15, 2015) [Docket No. 449] (same); *In re Brookstone Holdings Corp.*, No. 14-10752 (BLS) (Bankr. D. Del. Apr. 25, 2014) [Docket No. 245] (same);

C. The DIP Credit Agreement's Provisions Regarding Application of Sale Proceeds Must Be Struck

32. Pursuant to the DIP Credit Agreement, the proceeds of any sale of the Debtors' assets or equity interests are to be used *first* to pay down the Prepetition 2026 Notes, *second* to pay down the Roll-Up Loans and *finally* to pay down the New Money Loans. The payment waterfall proposes to repay each category of debt in reverse order of seniority—a structure that appears to contravene logic but upon closer scrutiny has been designed, once again, to (i) impede the Committee's ability to unwind the November Transactions and (ii) facilitate the prompt payment of disputed debt.

33. For the reasons set forth at length in Section B above, the Committee believes that the Prepetition 2026 Notes are, at best, unsecured obligations solely of NanoString. Given this likely result, the Court should apply the same level of scrutiny to the DIP Credit Agreement's proposed waterfall mechanic that it would apply to any other request made by the Debtors to pay unsecured claims both in full and outside of a confirmed plan. Payments on prepetition claims generally are not permitted outside the context of a plan except under certain extenuating circumstances, as dictated by the "doctrine of necessity," which is the general rubric for the proposition that a court can authorize the payment of prepetition claims if such payment is essential to the continued operation of the debtor. *See Matter of Lehigh & N.E. Ry. Co.,* 657 F.2d 570, 581-82 (3d Cir. 1981) (setting out the necessity of payment doctrine); *In re Energy Future Holdings Corp., 561 B.R. 630, 642-43* (Bankr. D. Del. 2016) (explaining that the "necessity of payment" rule is intended to benefit all parties and is applicable when such payment is critical to the debtor's

reorganization); *In re Just For Feet, Inc.,* 242 B.R. 821, 824-25 (D. Del. 1999); *Matter of Columbia Gas Sys., Inc.,* 171 B.R. 189, 192 (Bankr. D. Del. 1994).

34. The Debtors have made no showing, nor is there any evidence in the record to support, that the payment—in full, in cash—of unsecured funded debt claims is somehow "essential" to the Debtors' operations or the administration of these cases. Indeed, there is no basis upon which this Court should find that holders who participated in presumptively avoidable transactions should be rewarded by receiving payment in full of their claims before (i) the resolution of the Committee's challenge on a final basis and (ii) the completion of all of the Debtors' pending sale processes, after which the Debtors and the Committee will have a better understanding of anticipated recoveries in these cases. The burden should not be shifted to the Committee—particularly under the facts before the Court—to seek to compel the Prepetition 2026 Notes Parties to disgorge any sale proceeds previously received upon the successful prosecution of the Committee's challenge. Accordingly, the Committee objects to the inclusion of any provision in the Final DIP Order or DIP Credit Agreement that authorizes the Debtors to make any payment on account of the Prepetition 2026 Notes.

D. The Proposed Adequate Protection Should Be Subject to Recharacterization or Disgorgement

35. As adequate protection of the Prepetition 2026 Notes Parties' purported interests in the Prepetition Collateral against the diminution in value resulting from the Debtors' use, sale or lease of such collateral, the Debtors seek authority to "pay" interest in kind on the Prepetition 2026 Notes and other fees and expenses of the Prepetition 2026 Notes Parties. The purpose of adequate protection is to ensure that prepetition lenders receive the security they bargained for prior to the petition date or, in other words, to preserve the secured creditor's position following the commencement of a bankruptcy case. *In re Residential Capital, LLC*, 501 B.R. 549, 594 (Bankr.

S.D.N.Y. 2013) (citations omitted); *In re Townley*, 256 B.R. 697, 700 (Bankr. D.N.J. 2000) ("The right of a secured creditor to the value of its collateral is a property right protected by the Fifth Amendment. Before the plan is confirmed, that property right is protected by the requirement of [Bankruptcy] Code section 361 for adequate protection."). If the Prepetition 2026 Notes Parties are determined to be unsecured, they are not entitled to payment of interest or other fees and expenses (or the Roll-Up). Accordingly, the Committee requests that such adequate protection be subject to recharacterization or automatic disgorgement, as applicable, once it is determined that the Prepetition 2026 Notes Parties are unsecured creditors.

E. **The DIP Collateral Should Not Include Liens on Avoidance Action Proceeds**

36. The grant of liens on Avoidance Action proceeds is fundamentally at odds with the unique purposes served by avoidance actions. Avoidance actions are distinct creatures of bankruptcy law designed to benefit, and ensure equality of distribution among, general unsecured creditors. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000), *rev'd en banc*, 330 F.3d 548 (3d Cir. 2003) (identifying underlying intent of avoidance powers to recover valuable assets for estate's benefit); *In re Tribune Co.*, 464 B.R. 126, 171 (Bankr. D. Del. 2011) (noting "that case law permits all unsecured creditors to benefit from avoidance action recoveries"); *In re Bethlehem Steel Corp.*, 390 B.R. 784, 786–87 (Bankr. S.D.N.Y. 2008) ("Avoidance actions . . . never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession . . . ."); *In re Sweetwater*, 55 B.R. 724, 731 (D. Utah 1985) ("The avoiding powers are not 'property' but a statutorily created power to recover property."), *rev'd on other grounds*, 884 F.2d 1323 (10th Cir. 1989); *In re Sapolin Paints, Inc.*, 11 B.R. 930, 937 (Bankr. E.D.N.Y. 1981)

(reciting "the well-settled principle that neither a trustee … nor a debtor-in-possession, can assign, sell *or otherwise transfer* the right to maintain a suit to avoid a preference" (emphasis added)).

37. Given their unique function, courts have recognized that the burden for granting liens on avoidance actions and their proceeds is high, particularly in light of an objection from a committee of unsecured creditors. *See In re RadioShack Corp.*, Hr'g Tr. at 210: 3–7 [Docket No. 634] ("… the lenders have a substantial burden in this case to convince [the court] that a lien on avoidance actions is necessary or appropriate … [The court] typically will not grant such a lien in the face of committee opposition."); *In re Ravn Air Group, Inc.*, No. 20-10755 (BLS) (Bankr. D. Del. April 29, 2020), Hr'g Tr. at 80:21–23 [Docket No. 159] ("I don't believe that I have ever approved a Section 506(c) waiver or a lien on avoidance actions or on proceeds of avoidance actions over a committee [objection].").

38. By the DIP Motion, the Debtors propose to grant liens on Avoidance Actions proceeds in connection with both the DIP Liens and the Prepetition First Lien Adequate Protection Liens. The Committee does not object to the grant of a lien on the proceeds of Avoidance Actions for the benefit of the New Money Loans (subject to the Committee's ability to argue that such proceeds should be looked to last to satisfy such Loans as addressed in more detail below). The Committee does, however, object to the grant of a lien on the proceeds of Avoidance Actions for the benefit of (i) the Prepetition 2026 Notes Parties through the Prepetition First Lien Adequate Protection Liens and (ii) Roll-Up Loans (which, for the reasons set forth above, are properly viewed as Prepetition 2025 Notes).

39. The Prepetition 2026 Notes Parties' desire for court-approved liens on as many of the Debtors' assets as possible (whether on account of their Roll-Up Loans or as adequate protection for their secured exposure, if any, under the Prepetition 2026 Notes) does not constitute

sufficient cause to deprive unsecured creditors of a potential recovery in these cases. Moreover, given that the fundamental purpose of avoidance actions is to recover valuable assets on behalf of the estate and its unsecured creditors—and not its putatively secured creditors who are the targets of the litigation at issue—such proceeds should similarly be excluded from property used to pay any superpriority claims arising under Bankruptcy Code section 507(b) on account of the Prepetition First Priority Adequate Protection Claims or any claims arising under the DIP Facility other than those arising under the New Money Loans.

F. **The Committee's Investigation Budget Is Too Restrictive**

40. The Debtors have stipulated as to the validity and priority of the Prepetition 2026 Notes Parties' claims and liens, which stipulations will become binding upon the Debtors' estates unless challenged by the Committee or another third party with standing.[24] The Final DIP Order, however, proposes to unduly restrict the Committee's ability to challenge the Prepetition 2026 Notes Parties' claims and liens by limiting the funds available to the Committee to investigate the claims against the Prepetition 2026 Notes Parties to just $50,000. The proposed terms of the Final DIP Order purport to prevent the Committee from using *any* funds—including those earmarked in the investigation budget—to object to, challenge, prosecute or litigate the validity, enforceability, perfection, priority or extent of the Prepetition First Priority Liens or any potential challenge against the Prepetition 2026 Notes Parties—inclusive, of course, of the challenge that the Committee intends to bring in the very near term. Given the unique facts and circumstances involving the November Transactions, the Committee requests that the prohibition on the use of cash collateral or DIP Facility proceeds to pay fees incurred in connection with a challenge to the Prepetition 2026 Notes Parties claims and liens be deleted in its entirety.

[24] Interim DIP Order ¶ F(i)-(iv).

41. Moreover, in light of the importance of the Committee's investigation and forthcoming challenges to the November Transactions, which are expected to provide a critical and meaningful recovery to unsecured creditors, the Committee must have an adequate budget, to investigate, among other things, the circumstances surrounding the November Transactions and any other claims that might be pursued against the Prepetition 2026 Notes Parties. To that end, the Committee respectfully submits that the Final DIP Order should be revised to increase the Committee's investigation budget from $50,000 to at least $400,000 and ensure any amounts in excess thereof are allowable against the estates as administrative expenses. The integrity of the bankruptcy process mandates that the Committee's professionals be permitted to advocate on behalf of unsecured creditors without being subject to the control of third parties whose interests are adverse to those of the Debtors' estates and against whom litigation will be commenced. *See, e.g.*, *In re Yellow Corporation*, No. 23-11069 (CTG) (Bankr. D. Del. Sept. 15, 2023) [Docket No. 571] ($350,000 budget); *In re McClatchy Co.*, No. 20-10418 (MEW) (Bankr. S.D.N.Y. Mar. 26, 2020) [Docket No. 233] ($750,000 budget); *In re Murray Energy Holdings Co.*, No. 19-56885 (JEH) (Bankr. W.D. Oh. Dec. 12, 2019) [Docket No. 431] ($250,000 budget); *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Apr. 12, 2018) [Docket No. 452] ($250,000 budget); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. July 5, 2016) [Docket No. 464] ($250,000 budget); *In re Molycorp, Inc.*, No. 15-11357 (CSS) (Bankr. D. Del. Jul. 24, 2015) [Docket No. 278] ($250,000 budget).

42. The Final DIP Order should also provide expressly that the Committee's professionals shall be entitled to seek allowance and payment of any amounts expended in excess of the investigation budget as administrative expenses, and that no party shall be permitted to object on the ground that such amounts exceeded the budget. *See, e.g.*, *In re Yellow Corporation*,

No. 23-11069 (CTG) (Bankr. D. Del. September 15, 2023) [Docket No. 571] (providing that committee's professionals shall be entitled to seek allowance of fees and expenses in excess of investigation budget); *In re TPC Group Inc.*, No. 22-10493 (CTG) (Bankr. D. Del. August 2, 2022) [Docket No. 566] (providing that amounts incurred by the committee's professionals in excess of the investigation budget constituted, subject to court approval, allowed administrative expenses); *In re McClatchy Co.*, No. 20-10418 (MEW) (Bankr. S.D.N.Y. Mar. 26, 2020) [Docket No. 233] (same); *In re Murray Energy Holdings Co.*, No. 19-56885 (JEH) (Bankr. W.D. Oh. Dec. 12, 2019) [Docket No. 431] (providing that the creditors' committee may seek payment of fees in excess of the investigation budget as an administrative expense as part of its professionals' fee applications); *In re Aegean Marine Petroleum Network Inc.*, No. 18-13374 (MEW) (Bankr. S.D.N.Y. Jan. 15, 2019) [Docket No. 290] (same); *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. June 7, 2018) [Docket No. 918] (same); *In re Molycorp, Inc.*, 562 B.R. 67 (Bankr. D. Del. 2017) (holding the carve-out agreed to by a secured creditor and debtor in possession in a cash collateral agreement could not be interpreted as a cap on fees that counsel to creditors' committee could obtain in event that counsel was successful in litigating certain claims to bring assets into the chapter 11 estate, and in event that chapter 11 plan was confirmed); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. July 5, 2016) [Docket No. 464] (same); *In re Breitburn Energy Partners LP*, No. 16-11390 (SMB) (Bankr. S.D.N.Y. Aug. 19, 2016) [Docket No. 431] (same); *In re Chemtura Corp.*, No. 09-11233 (REG) (Bankr. S.D.N.Y. Apr. 29, 2009) [Docket No. 281] (same); *In re Channel Master Holdings, Inc.*, 309 B.R. 855, 859-60 (Bankr. D. Del. 2004) (stating a cap on fees for committee's professionals in DIP financing order did not limit allowance or payment of these fees to those professionals).

G. **The Proposed Bankruptcy Code Section 552(b) and 506(c) Waivers Are Inappropriate**

43. The Interim DIP Order contemplates, upon entry of the Final DIP Order, waivers by the Debtors of (i) the "equities of the case" exception of Bankruptcy Code section 552(b) and (ii) the provisions of Bankruptcy Code section 506(c) that allow a debtor to seek to surcharge collateral. *See* Interim DIP Order ¶¶ I, 45. These blanket waivers are inappropriate and, indeed, inapplicable to the Prepetition 2026 Notes Parties to the extent it is determined that the Prepetition 2026 Notes are in fact unsecured.

44. A prospective finding at the outset of these Chapter 11 Cases that the section 552(b) "equities of the case" exception should be waived is particularly inappropriate under the facts and circumstances here. Bankruptcy Code section 552(b) allows the Debtors, the Committee or other parties in interest to assert that equitable considerations warrant the exclusion of postpetition proceeds from the collateral securing the Debtors' prepetition debt when unencumbered property was used to preserve the collateral of secured creditors. "The purpose of the equity exception is to prevent a 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." *In re Muma Servs. Inc.*, 322 B.R. 541, 558-559 (Bankr. D. Del. 2005) (quoting *Delbridge v. Prod. Credit Ass'n & Fed. Land Bank*, 104 B.R. 824, 826 (E.D. Mich. 1989)).

45. The Committee should be afforded every tool offered by the Bankruptcy Code to recognize a recovery for unsecured creditors. The "equities of the case" exception should not be waived at such an early stage in these cases, particularly given that the Committee intends to demonstrate that the Prepetition 2026 Notes Parties do not have a valid security interest in any of the Debtors' assets—let alone the postpetition proceeds of such assets. *See, e.g.*, *In re Metaldyne*

Corp., No. 09-13412 (MG), 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. Jun. 23, 2009) ("[T]he waiver of an equitable rule is not a finding of fact . . . and the 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 lenders' rights, the Court will consider it."); *In re iGPS Co. LLC*, No. 13-11459 (KG), 2013 WL 4777667, at *5 (Bankr. D. Del. July 1, 2013) (no waiver of the "equities of the case" exception with respect to creditors' committee); *In re Namco, LLC*, No. 13-10610 (PJW), 2013 WL 1332581 (Bankr. D. Del. Mar. 24, 2013) (same); *In re Chemtura Corp.*, No. 09-11233 (REG) (Bankr. S.D.N.Y. Apr. 29, 2009) [Docket No. 281] (no waiver of the "equities of the case" exception).

46. Further, the waiver of the provisions under Bankruptcy Code section 506(c) should be removed from the Final DIP Order. Bankruptcy Code section 506(c) is a rule of fundamental fairness, providing that secured creditors again share some of the burden of administrative expenses in a bankruptcy case where it is reasonable and appropriate for surcharges to be ordered. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12 (2000). This provision is designed to "prevent a windfall to the secured creditor" and "understandably shifts to the secured party … the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate." *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995). Here, and assuming *arguendo* that the Prepetition 2026 Notes Parties hold valid security interests in any of the Debtors' assets, a blanket 506(c) waiver by the Debtors would cause all parties in interest to lose this valuable protection that the Bankruptcy Code explicitly provides for the benefit of administrative creditors, unsecured creditors and other stakeholders. While the

Prepetition 2026 Notes Parties may argue that the waiver of Bankruptcy Code section 506(c) is consideration for the Carve Out, such agreement is not sufficient in a situation where, as here, it is apparent that the Prepetition 2026 Notes Parties are using the chapter 11 process for their sole benefit and their liens are subject to colorable claims.

H. **The Proposed Waiver of the Marshaling Doctrine Should Not Be Permitted**

47. The Debtors' estates also should not waive all rights with respect to the marshaling doctrine as proposed in the DIP Motion. Such rights should be preserved for the Committee. Marshaling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." *Meyer v. United States*, 375 U.S. 233, 237 (1963). There is no justification for the broad scope of the proposed marshaling waiver. At a minimum, the DIP Lenders and Prepetition 2026 Notes Parties (to the extent the Court determines that the Prepetition 2026 Notes Parties should be entitled to recover from Avoidance Action proceeds at all) should be required to exhaust all other DIP Collateral before seeking satisfaction from proceeds of Avoidance Actions—the value of which would otherwise be available for the benefit of unsecured creditors.

48. Relatedly, the proposed Final DIP Order includes a provision requiring that the DIP Obligations, at the option of the DIP Lenders in their "sole and absolute discretion," shall be repaid (a) first, from the DIP Collateral comprising Previously Unencumbered Property and (b) second, from all other DIP Collateral. This provision should be revised so that proceeds of Avoidance Actions will be looked to last to repay DIP Obligations, to preserve for unsecured creditors the benefit of any proceeds recovered through prosecution of Avoidance Actions.

I. Additional Modifications to the Proposed DIP Facility

49. The Committee also is troubled by certain other provisions of the proposed DIP Facility and requests that, as a condition to approval thereof, the following provisions (among others) be clarified or modified, as appropriate:

- Releases: To the extent any release in the Final DIP Order is approved for the benefit of the DIP Lenders and the Prepetition 2026 Notes Parties, such releases should include a carve out for fraud, gross negligence or willful misconduct.

- Indemnification. Indemnification provisions in the Final DIP Order, if permitted at all, must be narrowly tailored to ensure that the Prepetition 2026 Notes Parties are not able to seek indemnification from the Debtors of any costs incurred defending against a challenge pursued by the Committee or other party in interest or on account of any judgment with respect to a successful challenge.

- Credit Bid. The DIP Credit Agreement provides that the DIP Agent and Prepetition First Lien Agent shall each have the unqualified right to credit bid up to the full amount of their claims. Under no circumstances should the DIP Agent or Prepetition First Lien Agent be permitted to credit bid any of the claims underlying the Roll-Up Loans or Prepetition 2026 Notes pending resolution of the Committee's challenge.

- Events of Default. The DIP Credit Agreement contains numerous Events of Default that may be tripped by events outside the Debtors' control or by the Debtors or the Committee in the exercise of their fiduciary obligations. Each of the following problematic Events of Default under Section 8.01(n) (*Events of Default – Chapter 11*) of the DIP Credit Agreement must be stricken or modified to ensure that the Debtors are not held hostage by the DIP Lenders:

  (i) Sections 8.01(n)(i), (ii), (xviii) and (xx) of the DIP Credit Agreement restrict the Debtors' exercise of their fiduciary obligations to seek alternative financing from third parties on better terms or file a plan of reorganization that treats the DIP Lenders'/Prepetition 2026 Notes Parties' claims in a manner that is not acceptable to such parties.

  (ii) Section 8.01(n)(iii) of the DIP Credit Agreement prohibits confirmation of a plan of reorganization that does not provide for payment in full in cash of all the obligations under the DIP Credit Agreement (including Roll-Up Loans) ***and the Prepetition***

Obligations (*i.e.*, the full amount of the Prepetition 2026 Notes that were not rolled up under the DIP Facility) on or before the effective date of such plan.

(iii) Section 8.01(n)(iv) provides that it would be an Event of Default if, among other things, this Court enters an order amending, supplementing, staying, vacating or otherwise modifying the DIP Credit Agreement or related order or "affecting in any material respect" the DIP Credit Agreement or related orders without the DIP Agent's consent.

(iv) Sections 8.01(n)(vi), (xiv) and (xxvi) each provide for Events of Default in connection with the application and/or waiver of Bankruptcy Code sections 506(c) and 552(b).

(v) Section 8.01(n)(xxi) provides for an Event of Default if any Debtor takes any action in support of any matter that constitutes an Event of Default set forth in Section 8.01(n) *or any other Person shall do so* (*i.e.*, the Committee) and such application is not contested in good faith by the Debtors and the relief requested is granted in an order that is not stayed pending appeal.

(vi) Section 8.01(n)(xxv) provides for an Event of Default if this Court does not approve the Roll-Up or approves any amendment, waiver or modification of the Roll-Up.

- Reporting and Notices. The Final DIP Order should provide that the Committee will receive the same reporting and notices, and at the same time, as the DIP Agent or DIP Lenders, as applicable.

- DIP Milestones. The DIP Facility includes various milestones that impose an accelerated timeframe on the Debtors' sale process. The Committee is still performing diligence to ensure that the milestones provide sufficient time to run a value-maximizing sale process. Accordingly, this Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights to supplement this Objection to request modifications to the milestones.

- Challenge Period. The Interim DIP Order and proposed Final DIP Order provide that the Challenge Period shall be tolled for a period not to exceed thirty (30) days upon the filing of a Challenge Standing Motion by the Committee, but that the granting of a Challenge Standing Motion shall not extend the Challenge Period beyond expiration of the Tolling Period. The filing of a Challenge Standing Motion should toll the Challenge Period at least until the entry of a final order on the Challenge Standing Motion, subject to the terms of any such final order governing the time period for the filing of any Challenge and, upon the granting of a Challenge Standing

Motion, the Challenge Period should not lapse until entry of a final order on any applicable Challenges.

RESERVATION OF RIGHTS

50. As of the date of this Objection, the Committee is still performing diligence relevant to the proposed DIP Facility and taking discovery in connection therewith. Accordingly, this Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights, claims, defenses and remedies, including the right to amend, modify or supplement this Objection, to seek discovery, to raise additional objections and to introduce evidence at any hearing relating to this Objection and without in any way limiting any other rights of the Committee to further object to the DIP Motion, on any grounds, as may be appropriate.

CONCLUSION

WHEREFORE, the Committee requests that the Court (i) deny approval of the DIP Facility absent modifications to address the objections contained herein and (ii) provide the Committee such other and further relief as the Court may deem just, proper and equitable.

Dated: February 29, 2024

TROUTMAN PEPPER HAMILTON SANDERS LLP

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Proposed Counsel to the Official Committee of Unsecured Creditors of NanoString Technologies, Inc., et al.

CERTIFICATE OF SERVICE

I, Kenneth A. Listwak, hereby certify that on February 29, 2024, I caused copies of the foregoing *Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, Granting Senior Postpetition Security Interests and According Superpriority Administrative Expense Status Pursuant to Sections 364(c) and 364(d) of the Bankruptcy Code, (II) Authorizing the Use of Cash Collateral, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* to be served upon the parties set forth on the attached service list, in the manner indicated; and all ECF participants in these cases were served electronically through the Court's ECF noticing system, at their respective email addresses registered with the Court.

/s/ Kenneth A. Listwak
Kenneth A. Listwak (DE No. 6300)

In re: NanoString Technologies, Inc., *et al.*
Core/2002 Service List
Case No. 24-10160 (CTG)

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In re: NanoString Technologies, Inc., *et al.*
Core/2002 Service List
Case No. 24-10160 (CTG)

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