

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

JORDAN HEALTH PRODUCTS I, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 24-12271 (TMH)

(Jointly Administered)

Re: Docket Nos. 9 & 53

**OBJECTION OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO THE DIP MOTION**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the chapter 11 bankruptcy cases (the “Chapter 11 Cases”) of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) by and through its proposed counsel, files this objection (the “Objection”) to the *Debtors’ Emergency Motion for Entry of Interim and Final Orders Pursuant to §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection to Certain Prepetition Lenders; (III) Authorizing Use of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [Docket No. 9] (the “DIP Motion”).² In support of the Objection, the Committee respectfully states as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification numbers are: Jordan Health Products I, Inc. (9981); Global Medical Imaging, LLC (8828); D.R.E. Medical Group, Inc. (2356); Oncology Services International, Inc. (2514); Technical Options of Georgia, Inc. (5488); Jordan Health Products III, Inc. (9350); Transtate Equipment Company, Inc. (4201); Equipment Maintenance Solutions, Inc. (7216); Ultra Solutions Holdings, Inc. (2305); Ultra Solutions, LLC (3425); Pacific Medical Group, Inc. (4339); and Pacific Medical Holdings, Inc. (2135). The Debtors’ service address is 8700 W Bryn Mawr Ave., Suite 720S, Chicago, IL 60631. Debtor Jordan Health Products I, Inc. is doing business as Avante Health Solutions.

² Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the DIP Motion.

PRELIMINARY STATEMENT

1. By the DIP Motion, the Debtors seek various forms of relief that offer extraordinary protections and further the interests of AHS Acquisition Holdings, LLC (“AHS”), in its capacities as prepetition lender, postpetition lender, and stalking horse bidder, at the expense of the Debtors’ other creditors, particularly unsecured creditors. Shortly before the Petition Date (defined below), AHS stepped into the shoes of the Debtors’ prepetition secured lender and chose to become the Debtors’ prepetition and postpetition secured lender. This choice was a tactical one as part of its loan-to-own strategy to acquire the Debtors’ business. The Court should not reward this strategy—where AHS wears multiple hats—designed to benefit only AHS at the expense of the Debtors’ estates and their creditors.

2. The Committee’s concerns regarding the DIP Loan Facility are exacerbated by AHS’s desired grab of all value from previously Unencumbered Assets, including any property or assets consisting of “Excluded Assets”³ under any of the Prepetition Documents, for the repayment of the DIP Loan Facility and the recently acquired prepetition secured debt whether by DIP Liens and superpriority claims, as well as a significant adequate protection package, which includes Avoidance Proceeds, commercial tort claims and causes of action, and over \$3.2 million in cash in the Debtors’ deposit accounts as of the Petition Date. The Committee has not seen any deposit account control agreements with the Debtors or its depository banks in favor of the Prepetition Lender, which would leave the Debtors’ cash unencumbered as of the Petition Date.⁴

³ The definition of “Excluded Assets” in the Prepetition Collateral Documents includes, among other things, (i) leasehold interests in real property; (ii) fee owned real property with a fair market value less than \$2,500,000 individually; (iii) letter-of-credit rights valued at less than \$500,000 individually; and (iv) commercial tort claims valued at less than \$500,000 individually.

⁴ The Committee is in the early stages of its lien review and broader investigation given AHS’s multiple roles in the case and requires more time to determine the full extent of the additional collateral it appears that AHS is acquiring through the DIP Facility.

3. The proposed DIP Liens and Adequate Protection Liens should not encumber, and the superpriority claims should not have recourse to, the Avoidance Proceeds, Excluded Assets, and commercial tort claims and causes of action. These assets should be preserved for the benefit of all creditors of the estate. Further, the DIP Liens, Prepetition Secured Parties' Adequate Protection Liens, and DIP Superpriority Claims should not improve AHS's prepetition secured position by granting recourse to the Excluded Assets because AHS voluntarily granted priming liens to itself to protect its own interests, particularly when doing so strips unsecured creditors of all their remaining sources of recovery. Similarly, AHS should not receive DIP Liens and DIP Superpriority Claims on any pay-down of the Prepetition Obligations that already are entitled to adequate protection.

4. Further, the proposed DIP Loan Facility is insufficient in that it neither (i) provides adequate funding or time for a value-maximizing sale process, nor (ii) provides for payment of, among other things, all (a) administrative expenses—including, without limitation, approximately \$1.5 million in claims entitled to administrative priority status under section 503(b)(9) of the Bankruptcy Code and professional fees for the Committees' financial advisor, Genesis Credit Partners LLC. Here, AHS is not a "white knight" offering the Debtors needed liquidity to run a value-maximizing chapter 11. Rather, AHS is a recent acquirer of the Debtors' prepetition secured indebtedness less than a month before the Petition Date, presumably at a significant discount. While the potential of administrative insolvency looms large, neither the Debtors nor AHS seek to remedy it. Instead, AHS seeks to monopolize for itself any available cash in addition to the hefty interest, fees, and expenses associated with the DIP Loan Facility. If AHS intends to use the chapter 11 process to liquidate and obtain its collateral free and clear, it must fund a process that is fair and equitable to all parties in interest, including paying all costs of administration.

5. Moreover, the proposed budget for the Committee and restrictions on the use of DIP Loans, limits the Committee's ability to discharge its fiduciary duties and effectively advocate for unsecured creditors. These restrictions hinder the Committee from, among other things, (i) validating AHS's position, as the prepetition lender, that it has enforceable and valid liens on substantially all of the Debtors' assets, (ii) asserting any claims or causes of action against AHS, as both pre- and postpetition lender, and (iii) evaluating potential claims against current or former officers, employees, directors, agents, and a host of other related parties that relate to the Debtors' insolvency and the events leading to these Chapter 11 Cases.

6. On top of all of these protections in favor of AHS in its various and potentially conflicting capacities, AHS will also lock these Chapter 11 Cases into overly restrictive milestones and receive complete waivers of any claims for the surcharge of their collateral pursuant to section 506(c) of the Bankruptcy Code, the "equities of the case" exception under section 552(b) of the Bankruptcy Code, and the equitable doctrine of marshaling. These provisions are particularly inappropriate absent evidence that the DIP budget will be sufficient to cover all administrative claims in these Chapter 11 Cases.

7. The proposed DIP financing, particularly as it is linked to the truncated sale process, is a lopsided deal that would give AHS all of the Debtors' value, while severely limiting scrutiny of the actions of AHS and other parties. The result is an unfair process that prevents the Committee from properly exercising its fiduciary duties, hamstringing the Debtors' ability to maximize value for all stakeholders—not just the secured lenders—and places significant risk on unsecured creditors, who are thus deprived of a meaningful voice in the process.

8. In addition to the above, and as more fully set forth below, the Committee objects to the following terms and provisions of the DIP Loan Facility and/or Final DIP Order that are also improper or unfairly prejudice the rights of the Debtors' estates and unsecured creditors:

- Overbroad Adequate Protection: AHS is entitled to adequate protection only to the extent of the diminution in value of its interest in the Prepetition Collateral securing the Prepetition Obligations. Because it is priming its own liens, and the expedited sale process alone is sufficient to preserve and enhance the value of the Prepetition Collateral, AHS should not be granted adequate protection.⁵
- Credit Bidding: AHS should not be granted an unqualified right to credit bid under the provisions of the DIP Orders. See Interim DIP Order, ¶ 5.14. Such rights must remain subject to section 363(k) of the Bankruptcy Code, including subject to the Committee's rights to Challenge.
- Waiver of Meaningful Estate Rights and Powers: AHS seeks to strip unsecured creditors of valuable protections by demanding surcharge waivers under Bankruptcy Code section 506(c), "equities of the case exception" waivers under Bankruptcy Code section 552(b) and marshalling waivers. This is especially inappropriate where the DIP budget has not sufficiently provided for payment of all administrative expense claims, including, without limitation, claims entitled to administrative priority status under section 503(b)(9) of the Bankruptcy Code and there is a serious risk of administrative insolvency. There is no basis for waiving these important protections.
- Failure to Provide for Winddown and Administrative Expenses: The DIP Motion does not require there to be sufficient cash from a sale to ensure all administrative expense claims will be satisfied and funding in place to permit confirmation of a plan of liquidation and a distribution to unsecured creditors, thus further demonstrating that AHS, while taking full advantage of chapter 11, has failed to fund an adequate chapter 11 process. Moreover, the budget only covers the first six weeks of the case, and provides no funding for the "Transition Services Period" contemplated by the Stalking Horse Agreement (as defined in the Bid Procedures Order). See Docket No. 14-1, Stalking Horse Agreement, §§ 11.1(mmm), 2.3(c). While the Committee would expect that the services provided by the Debtors to the Purchaser during the Transition Services Period would be paid by the Purchaser, the general administrative burn associated with keeping the case open for another unspecified—but likely material—amount of time is not contemplated by the current DIP Budget.

⁵ At minimum, payment of Adequate Protection Professional Fees and Expenses should be made subject to the Committee's review of the invoices of the Adequate Protection Professionals. Authorizing Adequate Protection Professional Fees and Expenses (including pre-petition amounts) to be paid at Closing eliminates the ability of the Committee, U.S. Trustee, and other parties in interest to review the invoices for reasonableness and object because Closing must occur within 50 days. See Interim DIP Order 2.4(d).

- Certain DIP Termination Events are Inappropriate: The DIP Motion, DIP Loan Note, and the proposed final order (the “Final DIP Order”) include certain DIP Termination Events that are inappropriate and should be removed. More specifically, it shall be a DIP Termination Event if:
 - (i) a Challenge is filed and not overruled or dismissed within thirty (30) days. *See* Interim DIP Order, ¶¶ 3.1, 3.2. Consistent with the Court’s ruling with respect to the Interim DIP Order, if the Committee obtains standing and files a complaint (which presumably would already be colorable), it should be provided an opportunity to prosecute the claim without fear of the termination of funding.
 - (ii) the Debtors withdraw the Sale Motion and/or propose a New Approach of these Chapter 11 Cases other than a sale of substantially all assets pursuant to the Sale Motion that, in any case, does not provide for the repayment in full, in cash, of the DIP Obligations substantially contemporaneously with such withdrawal of the Sale Motion or proposal of such New Approach. *See* Interim DIP Order, ¶¶ 3.1, 3.2. Any DIP Termination Event triggered by the “New Approach” provision should contain a carve out to the extent consented to by AHS.
 - (iii) the Debtors propose or support any chapter 11 plan or the sale of all or substantially all of the Debtors’ assets (other than pursuant to the Sale Procedures Motion and the Sale Motion), or seek entry of an order confirming a chapter 11 plan or approving such non-conforming sale, that is not conditioned upon the payment of the DIP Obligations, ***the Prepetition Obligations*** and the Debtors’ obligations with respect to the Adequate Protection granted under the Final DIP Order, in full in cash. *See* Interim DIP Order, ¶¶ 3.1, 3.2. The Prepetition Obligations are undersecured as of the Petition Date. Requiring that they be paid in full as part of any alternate transaction would enhance the recovery to AHS at the expense of the Debtors’ other creditors and inappropriately limits the Debtors’ options under the Bankruptcy Code.
 - (iv) The Debtors obtain postpetition financing without repayment in full of the Prepetition Obligations. *See* Interim DIP Order, ¶¶ 3.1, 3.2. The relief granted in the DIP Orders does not grant the roll-up of Prepetition Obligations, and, therefore, only the DIP Obligations should be required to be paid as part of any refinancing of the DIP.
- Releases/Indemnification: The releases included in the Final DIP Order in favor of a litany of parties and entities are overly broad and should be limited to AHS, solely in its capacity as DIP Lender, and strictly related to the DIP Loan

Facility. *See* Interim DIP Order, § 5.17. In addition to gross negligence and willful misconduct, the indemnification provision in the Final Order and related provisions in the DIP Loan Note must exclude bad faith and fraud from the Debtors' indemnification obligations. *See* Interim DIP Order, § 1.5; DIP Loan Note, § 9. Moreover, the Debtors must not be obligated to indemnify any indemnified parties for any conduct arising from a successful Challenge.

- The Process Provides the Committee with Inadequate Funding to Exercise Its Fiduciary Duties: The total budgeted professional fees across all Debtors in these chapter 11 cases are heavily and unreasonably skewed in favor of the Debtors and the DIP Lender and against the Committee and unsecured creditors, particularly in the latest forecasts: (i) Debtors: \$2,218,600; (ii) DIP Lenders: \$820,000; and (iii) Committee (not including financial advisor): \$126,000. **The fees allocated to Committee professionals are 15% of the amount afforded AHS and less than 6% of the total amount for Debtor professionals.** Thus, the amount allocated to the Committee professionals is inappropriate and insufficient, and should be increased to at least \$1 million. Further, the post-default fee carve-out, including any retainer held by the Debtors' professionals, should be equally available to Debtor and Committee professionals and senior in priority to any Prepetition Liens or DIP Liens and Prepetition Secured Parties' Adequate Protection Liens
- AHS Seeks to Avoid Scrutiny of Prepetition and Postpetition Actions and Grant Inappropriate Releases: The Committee investigation budget for the DIP Loan Facility of only \$25,000 should be increased to \$100,000. Interim DIP Order, ¶ 5.4(b). Any final DIP order must also explicitly state that proceeds of any sale of the Debtors' assets shall not be paid to AHS on account of Prepetition Obligations or DIP Loans unless and until the Challenge Period has expired without a Challenge having been filed, or if a Challenge is filed, until such action is resolved by a final non-appealable order.
- Remedies Notice Period: Paragraph 3.3 of the Interim DIP Order should begin with "Unless otherwise ordered by the Court" to ensure that parties can stop the exercise of remedies at the conclusion of the Remedies Notice Period. The last sentence of that paragraph must permit the Committee and the U.S. Trustee to also seek an emergency hearing during such period.
- Excessive Interest and Fees: The proposed DIP Loan Facility includes an interest rate of 15%, a Facility Fee of 3%, an Exit Fee of 1%, and an annual Agent Fee of \$25,000.
- Reporting Rights. The Committee should receive the same reporting rights as the DIP Lender, including the weekly Proposed Budget. Interim DIP Order, § F(iv).

9. Unless the proposed Final DIP Order is modified to address the issues and objections raised herein, entry of the Final DIP Order may deprive priority and unsecured creditors of substantial value and effectively cede control of these Chapter 11 Cases to AHS less than one month after the Petition Date. Accordingly, for the reasons set forth herein, the Court should condition approval of the DIP Motion on a final basis upon the Debtors substantially revising the proposed Final DIP Order and the DIP Loan Documents to address the serious concerns discussed in this Objection.⁶

BACKGROUND

10. On October 8, 2024 (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) with this Court. The Office of the United States Trustee (the “U.S. Trustee”) appointed the Committee on October 17, 2024 [Docket No. 80]. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases.

11. On the Petition Date, the Debtors filed the DIP Motion. The DIP Loan Facility provides for, among other things, a senior secured super-priority term loan facility in an aggregate principal amount up to \$3,500,000.

12. On October 10, 2024, the Court entered the interim financing order approving the interim relief with respect to the DIP Loan Facility (the “Interim DIP Order”) [Docket No. 53].

⁶ At present, the Committee is in the process of seeking discovery relating to the DIP Loan Facility and the filing of these Chapter 11 Cases. Further, as of the filing of this Objection, the Committee has not received a copy of the proposed Final Order. Accordingly, the Committee reserves its rights to supplement this Objection, and urges that, at a minimum, final approval of the DIP Motion should be denied until the Debtors adequately comply with the Committee’s discovery requests and the Committee has had time to evaluate the discovery.

13. A hearing to consider, among other things, the DIP Motion on a final basis (the “Final Hearing”) is scheduled for November 4, 2024 at 1:00 p.m. (ET).

OBJECTIONS TO DIP MOTION

14. The proposed DIP Loan Facility impermissibly benefits AHS at the expense of unsecured creditors by (i) giving AHS a vice-like grip over the administration and ultimate outcome of the Debtors’ Chapter 11 Cases without paying for the benefits it is obtaining from Bankruptcy Code protection and (ii) granting AHS inappropriate and unnecessary protections and benefits over and above an already favorable financing package.

15. It is well settled that a court may not approve debtor-in-possession financing unless the debtor first establishes that it is otherwise unable to reasonably obtain unsecured credit and the credit is necessary for the debtor’s continued operation. 11 U.S.C. § 364(d)(1); *In re Barbara K. Enters.*, No. 08-11474 (MG), 2008 WL 2439649, at *23 (Bankr. S.D.N.Y. Jun. 16, 2008) (citing *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y.1990)); *In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991)). Once these two elements have been established, a court must consider whether the proposed financing is “fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender.” *In re L.A. Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (citations omitted).

16. Courts routinely recognize that “[d]ebtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a pre-petition lien on cash collateral.” *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (BAP 9th Cir. 1992). As a result, courts are cautious not to approve financing terms that are considered harmful to an estate and its creditors. *See, e.g., Ames Dep’t Stores, Inc.*, 115 B.R. at 37-38 (court must consider whether proposed financing “would tilt the conduct of the bankruptcy case; prejudice, at an early stage, the

powers and rights that the Bankruptcy Code confers for the benefit of all creditors; or leverage the Chapter 11 process by preventing motions by parties-in-interest from being decided on their merits”); *In re Laffite’s Harbor Dev. I, LP*, No. 17-36191, 2018 WL 272781, at *6 (Bankr. S.D. Tex. Jan. 2, 2018) (same). Thus, while certain favorable terms may be permitted as a reasonable exercise of a debtor’s business judgment, bankruptcy courts have declined to approve financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the sole (or primary) benefit of the lender. *Id.*; see also *Ames*, 115 B.R. at 38 (holding that the terms of a post-petition financing facility must not “pervert the reorganizational process from one designed to accommodate all classes of creditors . . . to one specially crafted for the benefit” of one creditor) (citing *In re Tenney Vill. Co.*, 104 B.R. 562, 567-570 (Bankr. D.N.H. 1989)).

17. The Committee does not dispute that the Debtors need post-petition financing to continue operations and get through a sale process. However, as far as the Committee can tell, the only party who demonstrably stands to benefit from the DIP Loan Facility is AHS. But courts should not approve proposed financing “where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate.” *Ames*, 115 B.R. at 39 (citing *In re Crouse Grp.*, 71 B.R. 544, 551 (Bankr. E.D. Pa. 1987)).

I. The DIP Loan Facility Stifles a Fair, Full, and Well-Developed Process.

18. The DIP Loan Facility stifles a fair, full, and well-developed process for maximizing the Debtors’ value by imposing artificial and aggressive milestones, forcing events of default if the Debtors fail to comply with the AHS’s self-serving process, failing to sufficiently fund all administrative claims and a winddown process, and failing to provide an adequate budget for the Committee.

19. The bankruptcy process should not be used solely to benefit secured lenders, and secured lenders should not be permitted to use the bankruptcy process for the limited purpose of foreclosing on their collateral for their benefit. See *In re Encore Healthcare Assoc.*, 312 B.R. 52,54, 56 (Bankr. E.D. Pa. 2004) (denying a bidding procedures motion where “the sole purpose of which was to liquidate assets for the benefit of the secured creditor” and noting that an “asset sale can easily be accomplished outside of bankruptcy either with the consent of the secured creditor or by abandoning the asset to the secured creditor to sell on its own”); *In re Nova Wildcat Shur-Line Holdings, Inc.*, No. 23-10114 (CTG) (Bankr. Del. 2023), Mar. 2, 2023 H’rg Tr. at 87:14-21 [Docket No. 212] (“[I]f you’re a secured creditor and want to invoke the bankruptcy process for the purpose of what will likely be maximizing the value of your collateral, you don’t get to impose the costs of that on other people . . . you’ve got to pay the freight associated with [that] process . . . includ[ing] paying the expected administrative expenses [of the case] includ[ing] reasonable committee fees.”). Here, the DIP Motion works closely with the Debtors’ Bid Procedures (which require consent of AHS for a sale of the assets that constitute its prepetition collateral and DIP Collateral) to set an expedited timetable to allow AHS to foreclose on its purported collateral with little time or scrutiny from third parties, particularly the Committee.

20. Moreover, AHS should not be permitted to declare defaults under the DIP Loan Facility based on milestones that are inconsistent with those ultimately approved by the Court, and any final DIP order should expressly acknowledge that the milestones set forth in the DIP Loan Facility do not supplant the Debtors’ fiduciary duty to pursue any value-maximizing transaction.

II. The DIP Loan Facility is a Value Grab of the Debtors' Assets.

21. AHS is inappropriately seeking to take all value for itself through expansive DIP Liens, DIP Superpriority Claims, and adequate protection liens on unencumbered assets, and waivers of key unsecured creditor protections.

A. The DIP Loan Facility Improperly Grants AHS Liens on Unencumbered Assets.

22. AHS seeks DIP Liens and adequate protection liens on the proceeds of avoidance actions brought under chapter 5 of the Bankruptcy Code and other similar provisions of applicable law. This is improper here because there is no other obvious source of recovery for unsecured creditors. Avoidance actions and their proceeds are intended to benefit unsecured creditors and therefore should not be encumbered for the benefit of secured creditors. *See Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics Corp.)*, 330 F.3d 548, 573 (3d Cir. 2000) (finding “avoidance actions are designed to protect” the interests of “unsecured creditors”). Accordingly, courts have restricted the pledge of avoidance actions and proceeds as collateral. The primary reason for such restriction, as recognized by the Fifth Circuit, is that avoidance actions and their proceeds are to be reserved for unsecured creditors. *See McFarland v. Leyh (In re Tex. Gen. Petrol. Corp.)*, 52 F.3d 1330, 1335–36 (5th Cir. 1995) (“[T]he proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits. . . . The proceeds recovered in avoidance actions should not benefit the reorganized debtor; rather, the proceeds should benefit the unsecured creditors.”); *see also Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm L.P. IV*, 229 F.3d 245, 250 (3d Cir. 2000) (“[A]ny recovery [under avoidance powers] is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer.”).

23. Here AHS's attempt to take Avoidance Proceeds and other forms of recovery is particularly egregious, as they do not even make an exception for proceeds from causes of action against themselves. It is inequitable to allow AHS to receive liens on and claims to what may be a source of recovery for unsecured creditors, particularly in light of adequate protection AHS stands to receive. Moreover, these provisions would render illusory the fundamental rights of the unsecured creditors otherwise acknowledged by all parties and enshrined in the Interim DIP Order to investigate and if appropriate avoid and/or recover in respect of prepetition debt.

24. Moreover, in the two weeks since its formation, the Committee has learned of potentially significant litigation claims against the Debtors' officers and directors and their sponsors related to unpaid sales taxes. The Committee believes that these claims constitute commercial tort claims that were not perfected by AHS or its predecessors because they were not described with specificity in their UCC filings, as required by section 9-108 of the Uniform Commercial Code. U.C.C. § 9-108. These claims, which may also be covered by the Debtors' insurance policies may have significant value and should not be encumbered by the DIP Liens or the Prepetition Secured Parties' Adequate Protection Liens. Like the avoidance actions discussed above, these potential claims represent unencumbered assets that could be used to generate a real recovery to unsecured creditors in this case. They should not be subject to new liens nor transferred to the Purchaser as part of a credit bid of the Prepetition Obligations where such claims were not part of the collateral package.

25. Further, the DIP Liens, Prepetition Secured Parties' Adequate Protection Liens, and DIP Superpriority Claims should not improve AHS's prepetition secured position by granting recourse to the Excluded Assets because AHS voluntarily granted priming liens to itself to protect

its own interests, particularly when doing so strips unsecured creditors of their remaining sources of recovery.

B. The Waivers in the DIP Loan Facility are Premature and Overbroad.

26. The DIP Motion seeks a waiver of (i) the “equities of the case” exception under section 552(b) of the Bankruptcy Code, (ii) surcharge of collateral under section 506(c) of the Bankruptcy Code and (iii) the equitable doctrine of marshalling. The section 552(b) and section 506(c) waivers are premature and overbroad, while the marshalling waiver should simply be denied.

i. Prospective Waiver of Section 552(b) Is Inappropriate.

27. Section 552(b) of the Bankruptcy Code provides that a secured lender’s lien will attach to the proceeds of its collateral “except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.” 11 U.S.C. § 552(b) (emphasis added). The DIP Motion seeks to waive this protection upon entry of a final order.

28. This waiver is wholly inappropriate at this point in these Chapter 11 Cases. The equities of the case exception is designed to “prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code.” *In re Patio & Porch Sys., Inc.*, 194 B.R. 569, 575 (Bankr. D. Md. 1996). The exception gives the court “considerable latitude in applying pre-petition security interests to post-petition proceeds.” *United Va. Bank v. Slab Fork Coal Co.*, 784 F.2d 1188, 1191 (4th Cir. 1986); *In re DiToro*, 22 B.R. 392, 393 n.5 (Bankr. E.D. Pa. 1982) (“[S]ection 552(b) grants the bankruptcy court discretion, on equitable grounds, to modify or alter the security interest.”); *In re Cybridge Corp.*, 304 B.R. 681, 690 (Bankr. D.N.J.), *aff’d*, 312 B.R. 262 (D.N.J. 2004). Here, it is far too early to understand or prejudge how the Debtors’ bankruptcy

cases will be resolved and whether an equities of the case argument would be appropriate against AHS.

29. Given the fact-intensive, equitable nature of the exception, courts have declined to make final rulings on its applicability on an incomplete factual record. *See, e.g., Slab Fork*, 784 F.2d at 1191 (remanding to supplement the record); *Sprint Nextel Corp. v. U.S. Bank Nat’l Ass’n (In re TerreStar Networks, Inc.)*, 457 B.R. 254, 272-73 (Bankr. S.D.N.Y. 2011) (declining to rule on basis of incomplete record). Moreover, even if a party could agree, in advance, not to assert the exception, the Court should not be bound to such a waiver. *In re Muma Servs., Inc.*, 322 B.R. 541, 558 (Bankr. D. Del. 2005) (engaging in section 552(b) equities of the case analysis).

30. Consistent with the foregoing, many courts will not grant prospective waivers of the equities of the case exception in the face of an objection from the creditors’ committee. *See, e.g., In re Metaldyne Corp.*, No. 09-13412 MG, 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) (“[T]he Court . . . declines to waive prospectively an argument that other parties in interest may make.”); *In re Caesars Entm’t Operating Co.*, No. 15-01145 (ABG) (Bankr. N.D. Ill. Mar. 25, 2015), § 19 [Docket No. 988] (final order excising 552(b) waiver for committee following objection); Hr’g Tr. at 110:14-17, *In re Trump Entm’t Resorts, Inc.*, No. 14-12103 (KG) (Bankr. D. Del. Oct 6, 2014) [Docket No. 246] (declining to approve final order with 552(b) waiver).

31. The Committee is not asking the Court to make any finding at this time regarding whether application of the “equities of the case” exception is appropriate. It is simply asking the Court to preserve the Committee’s ability to make these arguments in the future and the Court’s ability to grant such relief, if appropriate. While the Debtors may be free to waive their right to assert the “equities of the case” exception, neither the Court nor the Committee should be so limited.

ii. Prospective Waiver of Section 506(c) Is Inappropriate.

32. Section 506(c) of the Bankruptcy Code allows a debtor to recover from property securing a claim “the reasonable, necessary costs and expenses of preserving, or disposing of, such property.” 11 U.S.C. § 506(c). The DIP Motion seeks to waive this right.

33. Section 506(c) is a rule of fundamental fairness for all parties in interest, providing that secured creditors 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 (2000). This section is designed to “prevent a windfall to the secured creditor . . . [Section 506(c)] 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). In light of this, a number of courts have held that section 506(c) waivers are unenforceable. *See, e.g., Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868, 872 (8th Cir. 1998) (concluding section 506(c) waiver was “unenforceable”), vacated on other grounds, 177 F.3d 719 (8th Cir. 1999); *In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993) (noting section 506(c) waiver is “against public policy and unenforceable per se”); *McAlpine v. Comerica Bank- Detroit (In re Brown Bros. Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (finding section 506(c) waiver was “not enforceable”); *In re Colad Grp., Inc.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (finding no basis to “ignore” section 506(c)); *In re Mortg. Lenders Network USA, Inc.*, No. 07-10146 (PJW) (Bankr. D. Del.), Mar. 20, 2007 Hr’g Tr. at 21:7-13 [Docket No. 346] (the court noting: “If the Committee doesn’t agree with the waiver, it doesn’t happen.”); *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del), June 5, 2014, Hr’g Tr. at

212:8-22 [Docket No. 3927] (disapproving a waiver “based primarily . . . on the fact that it’s not fully consensual”); *In re Casa Sys. Inc.*, No. 24-10695 (Bankr. D. Del.) (KBO), May. 3, 2024 Hr’g Tr. at 36:6-10 [Docket No. 290] (refusing to grant waiver over committee objection in case where sale process was not adequately funded).

34. Neither the Committee nor this Court has any assurances that there will be sufficient proceeds to pay all administrative claims against the Debtors’ estates. In fact, the DIP budget attached to the Interim DIP Order does not include sufficient funds to pay section 503(b)(9) claims, professional fees, or for the Debtors to operate their businesses through the projected sale closings and the transition services period and subsequently wind down the estates. When coupled with the significant risk of administrative insolvency present here, a section 506(c) waiver is wholly inappropriate.

35. In addition, in *Hartford Underwriters*, the United States Supreme Court ruled that only the debtor is vested with standing to seek administrative surcharges under section 506(c). 530 U.S. at 12. Thus, if the Court were to approve the abrogation of the Debtors’ section 506(c) rights, all parties in interest could lose this valuable protections afforded by the Bankruptcy Code.

36. Accordingly, the Committee requests that the advance waiver of the Debtors’ section 506(c) rights be stricken. Alternatively, if the Court is unwilling to strike the Debtors’ waiver of their section 506(c) rights, the Committee should, in the final DIP order, be explicitly vested with standing to seek a surcharge against the DIP collateral if the facts ultimately prove that a surcharge is appropriate. Providing the Committee with standing to seek a section 506(c) surcharge, if appropriate, will preserve estate assets for the benefit of all unsecured creditors.

iii. The Marshalling Waiver Should be Denied.

37. “[Marshalling] requires the senior secured creditor to first collect its debt against the collateral other than that in which the junior secured creditor holds an interest, thereby leaving that collateral for the junior secured creditor’s benefit.” *In re Advanced Marketing Servs., Inc.*, 360 B.R. 421, 427 n.8 (Bankr. D. Del. 2007). Marshalling also “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). The DIP Motion seeks to waive this right.

38. Analogous to the equitable doctrine of marshalling, if the Court permits AHS to have liens on previously unencumbered collateral, AHS should be required to look to assets that were subject to its prepetition liens before seeking satisfaction of the applicable DIP Obligations from any previously unencumbered assets, the value of which would otherwise be available for the benefit of unsecured creditors. Here, where no other obvious source of recovery for unsecured creditors is apparent, satisfaction of claims and liens from unencumbered assets (particularly in respect of avoidance action proceeds, commercial tort claims and insurance proceeds arising from the same)—if such liens and claims are granted—should be the last available source of recovery under the DIP Loan Facility. Thus, the waiver of the right of marshalling should be denied.

C. The DIP Loan Facility Does Not Adequately Provide for Wind-Down of the Estates or Payment of All Administrative Expense Claims.

39. The currently filed DIP budget does not contemplate a budget for winding down the estates or paying all administrative claims, including approximately \$1.5 million in 503(b)(9) claims in full. Moreover, the budget only covers the first six weeks of the case, and provides no funding for the “Transition Services Period” contemplated by the Stalking Horse Agreement (as defined in the Bid Procedures Order).⁷ While the Committee would expect that the services

⁷ See Docket No. 14-1, Stalking Horse Agreement, §§ 11.1(mmm), 2.3(c).

provided by the Debtors to the Purchaser during the Transition Services Period would be paid by the Purchaser, the general administrative burn associated with keeping the Chapter 11 Cases open for another unspecified⁸—but likely material—amount of time is not contemplated by the current DIP Budget.

40. The insufficiencies in the filed DIP budget are particularly egregious in light of the Debtors’ waiver under the DIP Loan Facility of their section 506(c) surcharge rights, which could be a valuable source of funds to pay administrative expenses. Under the Bankruptcy Code, administrative insolvency constitutes “cause” to convert a case from chapter 11 to chapter 7. *See, e.g., In re Fleetstar LLC*, 614 B.R. 767, 781 (Bankr. E.D. La. 2020) (citing *In re BH S & B Holdings, LLC*, 439 B.R. 342, 349 (Bankr. S.D.N.Y. 2010) (“Although section 1112(b)(4) does not list administrative insolvency as a cause to convert or dismiss a chapter 11 case, a court may still consider this factor.”); *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 306 (Bankr. D. Del. 2011) (“Allowing such a case to remain in chapter 11 when it is administratively insolvent is not appropriate.”).

41. AHS has chosen to avail itself of the benefits of the chapter 11 process, and thus should provide a budget reasonably calculated to fund a solvent chapter 11 process. The Court should not approve financing and a sales process that does not ensure the estates remain administratively solvent.

⁸ Section 11.1(mmm) defines “Transition Services Period” as “**the period specified in the Transition Services Agreement** during which Sellers shall provide services to Purchaser. *See* Docket No. 14-1, Stalking Horse Agreement, §§ 11.1(mmm) (emphasis added). It is a condition precedent to Closing that the Sellers deliver to the Purchaser a “Transition Services Agreement, in form and substance reasonably acceptable to Purchaser and Sellers, that (among other things) requires any Seller designated by Purchaser to provide transition services to Purchaser with respect to information technology, human resources, accounting, finance and customer matters.” *Id.* at § 2.3(c).

III. AHS is Seeking to Avoid Scrutiny of its Prepetition and Postpetition Actions.

42. The Committee's fiduciary role is of paramount importance in the chapter 11 reorganization process, and it is essential that the Committee professionals are not artificially restrained from aiding the Committee in fulfilling that role. *See In re Channel Master Holdings, Inc.*, 309 B.R. 855 (Bankr. D. Del. 2004) (holding that a \$75,000 cap on committee's professional fees under a DIP Loan Facility was unreasonable compared to the larger budgets for other professionals in the case and determining that the cap on the committee's fees provided for inadequate compensation). This is so because courts recognize that the bankruptcy process works most effectively when it is an adversary process, with debtors and creditors both adequately represented. *See In re Ames Dep't Stores, Inc.*, 115 B.R. at 38 ("Absent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced.").

A. The Budgeted Amounts for Committee Professionals in These Cases Are Inadequate and Inappropriate.

43. The total budgeted professional fees across all Debtors in these chapter 11 cases are heavily and unreasonably skewed in favor of the Debtors and AHS and against the Committee and unsecured creditors, particularly in the latest forecasts: (i) Debtors: \$2,218,600; (ii) AHS: \$820,000; and (iii) Committee (not including financial advisor): \$126,000. The fees allocated to Committee professionals are 15% of the amount afforded AHS, less than 6% of the total amount for Debtor professionals, and under 4% of the total budget for all professionals. Similarly, the Committee's investigation budget is a mere \$25,000, even though AHS is serving as the prepetition lender, postpetition lender, and stalking horse bidder in these cases. The amounts allocated to the Committee professionals are inappropriate and insufficient. The Committee respectfully submits that \$1,000,000, which is approximately 45% of the Debtors' professional fees, would constitute a more reasonable and appropriate allocation to Committee professional fees given the

complexity of these chapter 11 cases and the need to investigate potential causes of actions related to the sales tax issues discussed above. *See, e.g., In re Eastern Outfitters, LLC*, No. 17-10243 (LSS) (Bankr. D. Del. Mar. 31, 2017) (Docket No. 260) (approving final DIP Financing order where the budget reflected committee professional fees being approximately 35% of the Debtors' professional fees); *In re Pacific Sunwear of California, Inc.*, No. 16-10882 (LSS) (Bankr. D. Del. Apr. 7, 2016) (approving fees and expenses of Committee professionals totaling approximately 35% of those incurred by the debtor's professionals).

B. The Carve-Outs Are Insufficient, Discriminatory and Should be Fully Funded Following a Sale.

44. The DIP Motion currently contemplates a \$100,000 (inclusive of any pre-petition retainer held by the applicable Professional Person to the extent not previously applied or returned) carve-out for payment of the fees of case professionals (both Debtor and Committee professionals) following an event of default. While the Committee and the Court have insufficient evidence to determine whether the proposed post-default carve-out amounts for professional fees will be adequate to respond to such events of default and/or wind down the estates' operations and conclude these cases following an event of default, these Carve-Outs appear to be patently insufficient for a case of this size and complexity. Accordingly, the Committee submits that the post-default carve-outs should be increased. Moreover, the post-default fee carve-out, including any retainer held by the Debtors' professionals, should be equally available to Debtor and Committee professionals and senior in priority to any Prepetition Liens or DIP Liens and Prepetition Secured Parties' Adequate Protection Liens.

C. The Committee's Investigation Budget Is Too Restrictive.

45. Through the DIP Motion, the Debtors (i) stipulate to the validity of the claims and liens of AHS and (ii) release AHS and certain related parties from all claims relating to the

Prepetition Obligations, and from a host of other conduct, inclusive of causes of action in respect of lender liability. Interim DIP Order § E(vii). These stipulations and waivers became effective as to the Debtors upon the entry of the Interim DIP Order, and will bind all other parties in interest unless they are challenged during the Challenge Period—that is, if by the Committee, within 75 days after entry of the Interim DIP Order.

46. In a transparent attempt by AHS to limit the Committee’s ability to investigate the validity and extent of AHS’s liens, the DIP Motion proposes to limit the funds available to the Committee to investigate such claims to \$25,000.

47. In light of the importance of the Committee’s investigation in these Chapter 11 Cases, which are premised upon a sale of substantially all of the Debtors’ assets most likely with AHS as the purchaser due to a \$72.5 million credit bid, the Committee needs ample time, and an adequate budget, to determine whether AHS’s claims and liens are valid and whether there exists any unencumbered assets that could provide for a recovery to unsecured creditors. The current investigation budget is inadequate, significantly lower than those typically allowed in similar chapter 11 cases of this size and complexity, and should be increased to \$100,000. *See, e.g., GNC Holdings, Inc.*, No. 20-11662 (KBO) (Bankr. D. Del. July 21, 2020) [Docket No. 502] (\$150,000 cap); *In re Newage, Inc.*, No. 22-10819 (LSS) (Bankr. D. Del., Sept. 30, 2022) [Docket No. 160] (\$200,000 cap); *In re Phoenix Services TopCo LLC*, No. 22-10906 (MFW) (Bankr. D. Del. Nov. 2, 2022) [Docket No. 237] (\$300,000 cap); *In re DCL Holdings, (USA), Inc.*, No. 22-11319 (JKS) (Bankr. D. Del., Feb. 23, 2023) Docket No. 267 (\$250,000 cap); *In re Debt Financing Guarantor, LLC*, No. 23-10025 (KBO) (Bankr. D. Del. Feb. 16, 2023) [Docket No. 303] (budget of \$200,000); *In re Virgin Orbit Holdings, Inc.*, No. 23-10405 (KBO) (Bankr. D. Del. May 1, 2023) [Docket No.

202] (\$125,000 cap); *In re Cano Health, Inc.*, No. 24-10164 (KBO) (Bankr. D. Del. Mar. 6, 2024) [Docket No. 271] (\$300,000 cap).

48. In addition, any final DIP order should expressly provide that, notwithstanding the investigation budget, the Committee’s professionals are permitted to seek allowance and payment, as administrative expenses, of any amounts expended in excess of the investigation budget. While AHS may want to impose limitations on the quantum of cash collateral and proceeds of the DIP Loan Facility that may be used to pay professional fees that may be incurred to its potential detriment, there is no basis to restrict the Committee’s ability to pursue its entitlement to an administrative expense claim for reasonable fees and expenses incurred by its professionals. *See, e.g., In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jun. 7, 2018) [Docket No. 918] (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 Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. Jul. 5, 2016) [Docket No. 464] (same); *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 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); *see also In re Beauty Brands, LLC*, No. 19-10031 (CSS) (Bankr. D. Del. Jan. 30, 2019) [Docket No. 219] (expressing Chief Judge Sontchi’s view on the record of the hearing that a judge has discretion with respect to how “pain [is] to be shared”).

a. The Challenge Period Should be Modified.

49. While the Committee recognizes that a 75-day challenge period from the date of entry of an interim DIP order is in line with the local rules, certain modifications to the challenge

period provisions are required. Any final order should provide for tolling of the Challenge Deadline to the extent there is noncompliance with the Committee's reasonable discovery requests. Any final order should also be revised to ensure sufficient standing of the Committee to challenge prepetition liens and claims. As such the Committee requests that any final order include the following language:

Nothing herein shall limit the Committee's ability to (x) file a motion in respect of any timely Challenge Proceeding for which it cannot obtain standing as a matter of law because the applicable Debtor is a limited liability company (an "LLC Challenge Motion"), and (y) seek pursuant to such LLC Challenge Motion a mechanism by which to prosecute such Challenge. If the Committee files an LLC Challenge Motion for which it cannot obtain standing, the expiration of the Challenge Period solely for the specific Challenge Proceeding set forth in the LLC Challenge Motion shall be tolled pending further order of the Court, and applicable parties shall meet and confer with respect to an appropriate process for the prosecution of any such Challenge Proceeding. If timely notified of a Challenge Proceeding for which the Committee cannot gain standing because the applicable Debtor is a limited liability company, the Debtors (or a designated representative) shall retain the authority to prosecute such Challenge Proceeding in the exercise of their business judgment and subject to any applicable further order of the Court.

Furthermore, to effectively preserve the Committee's challenge rights, any final order should specify that the proceeds of any sale of the Debtors' assets shall not be paid to AHS on account of Prepetition Obligations unless and until the lien challenge period has expired without a lien challenge having been filed, or if a lien challenge action is filed, until such action is resolved by a final non-appealable order.

RESERVATION OF RIGHTS

50. This Objection is without prejudice to, and the Committee hereby fully reserves, its right to further object, supplement and amend this Objection, including by filing a declaration in support thereof, and raise additional arguments in respect of the DIP Loan Facility, the DIP Motion, any final order approving the DIP Motion, and any stalking horse agreement or sales. The

Objection is also without prejudice to the Committee's right to seek other appropriate relief, including reconsideration of the relief granted in the Interim DIP Order.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court enter an order (i) denying the DIP Motion on a final basis or, alternatively, modifying the terms of the Debtors' DIP Loan Facility and Final DIP Order in a manner consistent with the relief requested herein, and (ii) granting such other and further relief as the Court deems just.

Dated: October 31, 2024
Wilmington, Delaware

Respectfully submitted,

/s/ Sameen Rizvi

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CERTIFICATE OF SERVICE

I, Sameen Rizvi, do hereby certify that on October 31, 2024, a copy of the foregoing **Objection of the Official Committee of Unsecured Creditors to the DIP Motion** was served on the parties listed on the attached service list in the manner indicated.

/s/ Sameen Rizvi

Sameen Rizvi (No. 6902)

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