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)
	:	**Ref. Docket Nos. 24, 75 & 80**

LIMITED OBJECTION OF 10X GENOMICS, INC. 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

10x Genomics, Inc. ("**10x**") hereby submits this limited objection (the "**Limited 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 Limited Objection, 10x respectfully states as follows:

[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.

[2] Capitalized terms not otherwise defined herein shall have their meaning as set forth in the DIP Motion.

INTRODUCTION

1. Through the DIP Motion, the Debtors seek the Court's approval of a $142.5 million senior secured, superpriority postpetition credit facility (the "**DIP Facility**") that will provide the Debtors with only about $47.5 million[3] in new money. The DIP Facility also provides for a 2x roll up of $95 million in prepetition secured obligations that are likely to be challenged as an avoidable preference[4] and/or a fraudulent conveyance and includes a number of other egregious provisions that are detrimental to the Debtors' estates and the Chapter 11 Cases.[5] The Debtors seek to address their precarious financial situation and operational challenges by pursuing "a value-maximizing sale transaction" in the Chapter 11 Cases on an expedited basis with an auction to take place, including potentially with respect to infringing product lines, within 90 days of the Petition Date (*i.e*. by May 4, 2024), a sale order to be entered within 100 days of the Petition Date, and a sale to be consummated within just 30 days thereafter.[6] While a motion seeking approval of bid procedures has not yet been filed, it appears that the Debtors will attempt to include both their GeoMx and CosMx product lines in the sale process.[7]

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[3] Pursuant to Section 2.04(iv) of the DIP Credit Agreement, up to $10,000,000 of this amount (or such greater amount as may be approved by the Required Lenders) may be used to fund (collectively with the proceeds of any Approved Sale or other cash on hand) IP and Non-Bankruptcy Litigation, which includes certain specified ongoing actions against 10x and other intellectual property and non-bankruptcy litigation. *See* DIP Credit Agreement §§ 1.01, 2.04(iv).

[4] Exactly 90 days prior to the Petition Date—within the preference period—the Debtors and holders of the majority of the Debtors' unsecured Prepetition 2025 Notes exchanged their Prepetition 2025 Notes for Prepetition 2026 Secured Notes and Warrants (each as defined and described in the *Declaration of R. Bradley Gray in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 26]).

[5] Such provisions include, among others, the aforementioned roll up, mutual releases for the Debtors and prepetition lenders, the ability to investigate and challenge prepetition liens, and the provision of liens on proceeds of avoidance actions. 10x expects that the Committee will more fully address these additional deficiencies.

[6] *See* DIP Credit Agreement § 6.24; *see also Declaration of R. Bradley Gray in Support of Chapter 11 Petitions and First Day Pleadings* [Docket. No. 26], at ¶ 43.

[7] *See February 6, 2024* Hr'g Tr., at 13:9-13:11 ("we're going to be here to facilitate a sale of the company, whether it be in whole or in parts.").

2. For the past three years, 10x and certain of the Debtors have been engaged in patent litigation in the United States and internationally that relates to the Debtors' GeoMx and CosMx products. 10x became the Debtors' largest unsecured creditor as the result of a November 2023 jury verdict finding that Debtor NanoString Technologies, Inc.'s GeoMx products infringe 10x's patents. 10x intends to seek relief from the automatic stay to continue certain patent litigation and administrative proceedings related to the Debtors' GeoMx product line (the "**Lift Stay Motion**"). The relief sought by 10x's Lift Stay Motion (and the Debtors' expected motion seeking to lift the stay with respect to the 261 Action[8]) will facilitate the Debtors' sale process and the efficient administration of the Debtors' estates by providing clarity for potential bidders with respect to whether two of the Debtors' three product lines are subject to valid patents or, instead, should be enjoined from further distribution.[9] But the DIP Facility appears to have been designed specifically to prevent such clarity and certainty.

3. ***First***, Section 8.01(n)(v)(B) of the DIP Credit Agreement provides that an Event of Default will occur upon "entry of an order (based on a motion filed by a creditor) granting relief from the Automatic Stay to permit any IP and Non-Bankruptcy Litigation to proceed during the Chapter 11 Cases." Additionally, Section 8.01(n)(v)(xxii) of the DIP Credit Agreement provides that an Event of Default will occur if "any Debtor shall be enjoined from conducting any material portion of its business . . ." Approving the DIP Facility with these Events of Default is a recipe

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[8] The Debtors have informed 10x that they intend to file a motion seeking to lift the automatic stay with respect to *10x Genomics, Inc. and President and Fellows of Harvard College v. NanoString Technologies, Inc.*, Case No. 22-cv-00261 (MFK) (D. Del. 2022) pending in the United States District Court for the District of Delaware pursuant to which 10x has asserted patent infringement claims against the Debtors with respect to one of their spatial business lines, the CosMx product line (the "**261 Action**"). The parties have been engaged in discovery on all claims and counterclaims in this case, and, prior to the imposition of the automatic stay, trial on these issues was scheduled to begin in September 2024. 10x does not oppose this relief.

[9] As the Debtors' counsel stated during the first day hearing, "critically, we believe that any potential buyer of our spatial business will want to see the matters that are in dispute resolved sooner, rather than later." *See February 6, 2024* Hr'g Tr., at 18:7-18:10.

for disaster early on in the Chapter 11 Cases since granting the Lift Stay Motion to facilitate the sale process will cause an immediate default under the DIP Facility shortly after its final approval.

4. ***Second***, the proposed Milestones and Maturity Date in the DIP Facility do not allow sufficient time for the Debtors to achieve full clarity in their sale process related to their spatial business (which includes the GeoMx and CosMx product lines) because the Debtors' litigation with 10x will not have a resolution before a sale is consummated under the current timeline. For example, the 261 Action that the Debtors seek to lift the stay to allow to proceed is not currently scheduled to begin trial until September 2024, **after** the applicable Milestone for the sale closing (June 13, 2024) and the Maturity Date (which contains an outside date of July 31, 2024). These DIP Facility provisions are antithetical to the Debtors' expressed need for clarity to ensure a value maximizing sale process.

5. While it would be one thing if the foregoing provisions, which seek to effectively use the bankruptcy process to deprive 10x of its ability to protect its valuable intellectual property rights under non-bankruptcy law, actually benefitted the Debtors' estates and parties in interest, they do not. Indeed, the failure by the Debtors to recognize that they are best positioned to maximize value during their sale process by lifting the stay with respect to both the CosMx and GeoMx litigation and crafting the case timeline around this litigation could prove extremely costly in short order. Absent revisions to the foregoing provisions in the DIP Credit Agreement, the Chapter 11 Cases will be irreparably harmed. For these and other reasons set forth herein, 10x respectfully submits that the Court should deny or otherwise modify the proposed DIP Facility as currently presented.

BACKGROUND

6. On February 4, 2024 (the "**Petition Date**"), each of the above-captioned debtors and debtors in possession (the "**Debtors**") filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the Court (the "**Chapter 11 Cases**"). The Debtors are authorized to operate their business and manage their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On February 15, 2024, the United States Trustee for the District of Delaware appointed an Official Committee of Unsecured Creditors (the "**Committee**") in the Chapter 11 Cases [Docket No. 104]. The Chapter 11 Cases are being jointly administered solely for procedural purposes pursuant to Bankruptcy Rule 1015(b) [Docket No. 63].

8. On the Petition Date, the Debtors filed the DIP Motion. On February 6, 2024, 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].

9. 10x is a life sciences technology company that was founded in 2012 in Pleasanton, California. 10x has invested hundreds of thousands of hours and at least $1.5 billion in research and development to invent, design, and develop its proprietary line of products for understanding biology at an unprecedented resolution and scale. 10x is a worldwide leader in genomics, the comprehensive study of biological systems at a molecular and cellular level. 10x launched its first commercial product in 2015, and over 7,000 scientific articles have been published based on data generated from 10x products. 10x's Visium and Xenium products have catalyzed the field of

spatial analysis by providing commercial offerings that enable true spatial discovery. Spatial analysis allows the large-scale interrogation of biological analytes in their spatial context, allowing researchers and clinicians to build a comprehensive map—a kind of Google Earth—of where each analyte is located, so that function can be tied to location.

10. Since May 2021, 10x has been actively engaged in litigation with the Debtors over various patent disputes, and, since May 2023, the Debtors have been found liable for infringing 10x's patents in three separate courts—the German Federal Patent Court in Munich, the United States District Court in Delaware, and the Unified Patent Court in the European Union have all found that the Debtors' products infringe more than ten 10x patents. The Debtors should not be permitted to use the bankruptcy process to skirt non-bankruptcy law in a prejudicial and inequitable effort to continue their infringing conduct without consequence. Additional details regarding litigation between 10x and the Debtors will be set forth in 10x's Lift Stay Motion, which will be filed in the coming days.

LIMITED OBJECTION

11. 10x objects to the approval of the DIP Facility on the terms presently proposed, as the terms and conditions thereof are not in the best interest of the Debtors' estates and their creditors in multiple respects. A court should approve a proposed debtor in possession financing only if such financing "is in the best interest of the general creditor body."[10] Moreover, the proposed financing must be "fair, reasonable, and adequate."[11] It is clear that certain provisions

[10] *In re Roblin Indus., Inc*., 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) *(citing In re Vanguard Diversified, Inc*., 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983)); *see also In re Chief Executive Officers Clubs*, 359 B.R. 527, 540 n.6 (Bankr. S.D.N.Y. 2007) (a debtor cannot excuse its fiduciary duties to its chapter 11 estate and its creditors for the sake of prompt DIP financing); *In re Tenney Village Co., Inc*., 104 B.R. 562, 569 (Bankr. D. N.H. 1989) ("The debtor's prevailing obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries").

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

of the proposed DIP Facility are not fair or reasonable and ultimately not in the best interests of the Debtors or creditors in these Chapter 11 Cases.

A. *The Debtors Seek to Hold 10x and Their Own Sale Process Hostage By Including Default Provisions that Deny 10x the Ability to Lift the Automatic Stay to Allow Crucial Litigation to Continue*

12. This Court should reject the DIP Facility as currently proposed because multiple default provisions are patently unfair and detrimental to the Debtors and the Chapter 11 Cases. The DIP Lenders have demanded default provisions that are inappropriate in that they subject stay relief to a heightened level of scrutiny by creating hurdles that would otherwise be of no legal significance to 10x's Lift Stay Motion or potential injunctive relief stemming therefrom. The inclusion of two Events of Default in Section 8.01(n) of the DIP Credit Agreement act to (i) set up the sale process to fail by preventing much-needed clarity and/or (ii) permit the Debtors to continue infringing upon 10x's patents without consequence.

13. *First*, Section 8.01(n)(v)(B) of the DIP Credit Agreement provides that an Event of Default will occur upon "entry of an order (***based on a motion filed by a creditor***) granting relief from the Automatic Stay to permit any IP and Non-Bankruptcy Litigation to proceed during the Chapter 11 Cases." (emphasis added). As noted above, 10x plans to soon move the Court for stay relief. By its motion, 10x will demonstrate that stay relief is warranted with respect to multiple pending actions against the Debtors.

14. *Second*, Section 8.01(n)(xxii) of the DIP Credit Agreement provides that an Event of Default will occur to the extent any Debtor is "enjoined from conducting any material portion of its business," which is a possible consequence of 10x's litigation related to the Debtors' ongoing patent infringement.

15. In tandem, these provisions are not only abnormal, but astounding in that they threaten the Debtors' ability to proceed in these Chapter 11 Cases mere days after the Debtors seek final DIP approval. Ultimately, if 10x is granted relief from stay (10x's Lift Stay Motion may be heard as soon as March 7, 2024) or receives an injunction (which is a possible outcome if 10x receives a final judgment in its favor in *10x Genomics, Inc. and Prognosys Biosciences, Inc. v. NanoString Technologies, Inc.*, Case No. 21-cv-653 (MFK) (D. Del. 2021)), it would allow the DIP Lenders to call an Event of Default and to thereafter pursue all rights and remedies they may have under the DIP Facility. In essence, the DIP Lenders have structured, and the Debtors have astonishingly accepted, default provisions that may place before the Court a choice between denying 10x relief that it is equitably entitled to and forcing the Debtors into a case-derailing Event of Default. Such provisions provide the DIP Lenders with significant leverage over the Debtors' estates very early in the cases and well beyond what a standard DIP lender should be entitled. When considering the fact that the DIP Lenders' prepetition secured notes may be subject to avoidance, these provisions are even more troubling. Such an inequitable outcome should not be allowed.

16. Moreover, in the DIP Motion, the Debtors constantly cite goals that do not align with one another. For example, the Debtors state that "[t]he DIP Facility and use of Cash Collateral are necessary to, among other things, (i) fund the Debtors' working capital and capital expenditure needs during the course of these Chapter 11 Cases and ensure payments to employees, third-party vendors, utilities, and taxing authorities, among others, all of which are critical to operate and maintain the Debtors' business; (ii) ensure the timely payment of administrative expenses; (iii) pursue the Sale Process; and (iv) provide a positive message to the market that these Chapter 11 Cases are sufficiently funded, which is critical to ensure that customers, employees and vendors

maintain confidence in the Debtors."[12] Yet the foregoing would be immediately compromised if the Debtors trigger an Event of Default under the proposed DIP Facility because the Court grants 10x's Lift Stay Motion, crippling the Debtors' ability to maximize the value of their estates.

17. The DIP Motion goes on to state that "[t]he relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and critical to the Debtors' efforts to maximize value for their stakeholders through their Sale Process."[13] If the Debtors' true motivation is to maximize the value of the sale process, then these default provisions make no sense. As the Debtors themselves have acknowledged and noted as a critical reason for their plan to move to lift the stay with respect to certain patent litigation, finality with respect to litigation regarding the Debtors' spatial business is critical to a successful sale.[14]

18. These default provisions are not only punitive and seek to preclude the Debtors' largest unsecured creditor from enforcing its patents in direct contradiction of non-bankruptcy law, but are themselves harmful to the Debtors and their ability to administer their estates.

B. *The DIP Milestones and Maturity Date Driving the Sale Timeline are Incompatible with the Debtors' Stated Litigation Goals*

19. Beyond the immediate cause for alarm resulting from the proposed Events of Default discussed above, the Chapter 11 Cases are doomed to fail if the DIP Facility is approved. Specifically, the proposed Milestones and Maturity Date (outside date of July 31, 2024) are too short to resolve the Debtors' patent disputes in such a way that the Debtors will be able to maximize value during the sale process. The Debtors plan to close a sale within 130 days of the Petition Date while also lifting the stay on litigation that they say is necessary to provide clarity to bidders.

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[12] *See* DIP Motion at ¶ 23.

[13] *Id*.

[14] *See February 6, 2024* Hr'g Tr., at 18:7-18:10.

But, the referenced litigation is not set for trial until well **after** the proposed sale is intended to close and the DIP Facility will mature (a chart of key dates is set forth on **Exhibit A** attached hereto). Indeed, given the import of 10x's claims on the Debtors' financial and operational status, any ambiguity will cloud the sale process and chill bidding. While the Debtors' general logic that they need clarity as to the litigation makes sense, it is not clear why the Debtors would set up a process that makes achieving that clarity impossible.

20. Under the Milestones established by the DIP Credit Agreement, the Debtors have only 73 days left (until May 4, 2024) to conduct an auction. Yet, as of the date hereof, the Debtors still have not filed their bid procedures motion nor has the litigation for which they will file a motion to lift the stay been permitted to proceed.

21. While the Debtors entered bankruptcy with a desire to pursue a sale process, the precious little time afforded by the Milestones for the Debtors to complete the sale process will likely prevent the possibility of a value-maximizing transaction to the detriment of all stakeholders.

RESERVATION OF RIGHTS

22. 10x expressly reserves all rights, claims, defenses, and remedies, including, without limitation, to supplement and amend this Limited Objection, to raise further and other objections to the DIP Motion and the proposed form of Final DIP Order, and to introduce evidence prior to or at any hearing regarding the DIP Motion in the event that 10x's objections are not resolved prior to such hearing.

CONCLUSION

23. For all of the foregoing reasons, 10x respectfully requests that the Court deny final approval of the DIP Facility in the form presented.

[*Remainder of page intentionally left blank.*]

Dated: February 21, 2024

Respectfully submitted,

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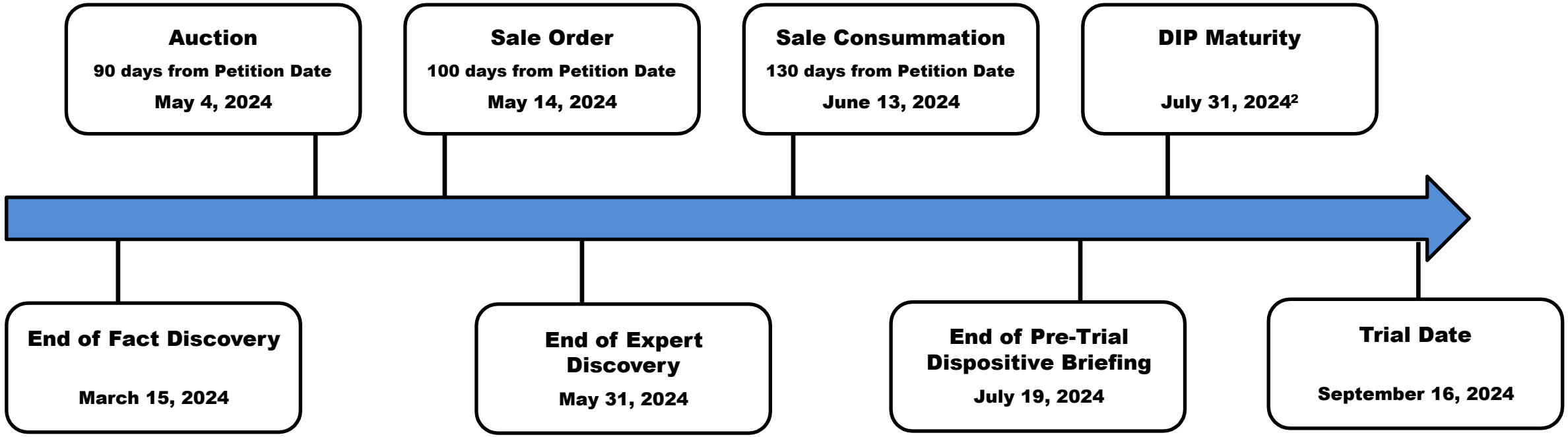
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Exhibit A

Key Dates

Select Proposed DIP Milestones[1] and Maturity



Current 261 Action Key Deadlines[3]

1 Proposed Milestones pursuant to Section 6.24 of the DIP Credit Agreement.

2 As defined in the DIP Credit Agreement, "Maturity Date" means the date that is the earliest of (i) July 31, 2024, (ii) the date on which the Obligations (as defined in the DIP Credit Agreement) become due and payable pursuant to the DIP Credit Agreement, whether by acceleration or otherwise and (iii) the effective date of a Chapter 11 Plan for the Debtors.

3 The dates set forth herein are pursuant to the *Stipulation and Order Amending Scheduling Order*, dated as of December 20, 2023, in the 261 Action [Docket No. 231]. The parties to the 261 Action are conferring to potentially extend certain of these deadlines.