IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FISKER INC., *et al.*,[1]	)	Case No. 24-11390 (TMH)
Debtors.	)	(Jointly Administered)
	)	**Re: D.I. 304, 320**

CVI INVESTMENTS, INC.'S STATEMENT IN SUPPORT OF CONSENSUAL USE OF CASH COLLATERAL AND OBJECTION TO ANY NONCONSENSUAL USE OF CASH COLLATERAL

CVI Investments, Inc. ("CVI"), by and through its undersigned counsel, hereby submits this (i) statement in support of consensual use of Cash Collateral on the terms set forth in the Proposed Consensual Cash Collateral Order (as defined below) and (ii) objection to any requests for continued use of Cash Collateral by the Debtors and their estates other than in accordance with CVI's consent (this "Objection").[2] In support of this Objection, CVI submits the *Declaration of Elizabeth Feld In Support of CVI Investments, Inc.'s Statement in Support of Consensual Use of Cash Collateral and Objection to Nonconsensual Use of Cash Collateral on Any Terms* (the "Feld Declaration") and respectfully states as follows:

[1] The debtors and debtors in possession in these Chapter 11 Cases (collectively, the "Debtors"), along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the Debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Fourth Interim Order (I) Authorizing the Debtors to Utilize Cash Collateral, (II) Granting Adequate Protection, (III) Modifying the Automatic Stay, (IV) Scheduling a Further Hearing On the Motion, and (V) Granting Related Relief* [D.I. 260] (the "Fourth Interim Cash Collateral Order," and together with the interim cash collateral orders entered at Docket Nos. 59, 98 and 184, the "Prior Interim Cash Collateral Orders").

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STATEMENT REGARDING AGREEMENT WITH THE DEBTORS ON CONSENSUAL USE OF CASH COLLATERAL PENDING CONVERSION TO CHAPTER 7

1. CVI has stated repeatedly from the outset of these Chapter 11 Cases that the administrative expenses that these cases are incurring would require conversion of these cases to chapter 7. CVI also feared that the proceeds of the Debtors' fleet sale would not be enough to sustain these cases in Chapter 11.

2. All of this has now come to pass. Estate professionals accrued approximately $2 million per week for the last two reported weeks, on cases that even by the Debtors' flawed and optimistic estimates will generate only $6.9 million in total proceeds after from the sale of the Debtors' vehicles after expenses are paid. These include millions in fees of the Official Committee of Unsecured Creditors (the "Committee"), which doubled the amount projected by the Debtors for such weeks notwithstanding that conversion of these cases was likely.[3] The result of the Committee's litigation strategy, if it continues, is that there will be nothing at all remaining for creditors.

3. The Debtors now agree that conversion of these Chapter 11 Cases is appropriate and has taken CVI up on its offer and assurance, made repeatedly for weeks both privately and on the record, to fund completion of the fleet sale and an orderly transition to chapter 7 by August 19, 2024. The consensual cash collateral order negotiated with the Debtors, *Proposed Fifth Interim Cash Collateral Order* [D.I. 320-1] (the "Proposed Consensual Cash Collateral Order") would allow the Debtors three weeks for completion of the fleet sale and provides for the payment of administrative expenses and additional amounts for a chapter 7 trustee to complete certain legacy

[3] *Proposed Consensual Cash Collateral Order*, Ex. A [D.I. 320-1] (the "Updated Cash Collateral Budget"); Fourth Interim Cash Collateral Order ¶ 11; *see also See* Hr'g Tr., Jul. 9, 2024, at 48:15-21 (The Court: "If the case gets converted to 7, the committee is disbanded and your work stops.").

tasks associated with existing and ongoing recalls and safety.

PRELIMINARY STATEMENT REGARDING OBJECTION TO ANY NON-CONSENSUAL USE OF CASH COLLATERAL

4. CVI and the Debtors spent considerable time and effort negotiating the careful compromise reflected in the Proposed Consensual Cash Collateral Order. To be clear, in the event there are any objections thereto, the Proposed Consensual Cash Collateral Order is the only way CVI will consent to use of cash collateral beyond July 29, 2024, the termination date under the existing cash collateral order. And there can be no further use of cash collateral without CVI's consent.

5. First, CVI has met its burden of showing that it is a secured creditor. Fisker Inc. is a public company with a board of directors, and the Debtors are and have been represented by sophisticated counsel. The Debtors executed loan and security documents with CVI and have stipulated to CVI's claims and liens in the Prior Interim Cash Collateral Orders. CVI agrees that parties in interest (other than the Debtors) may challenge its claims and liens, and CVI will respond robustly to any challenge that may be asserted. But, unless there is a judgment against it, CVI has interests in the collateral that as a matter of law must be adequately protected in the absence of its consent. And while the Committee's pleading is replete with unsupported and incorrect allegations, certain of which will be addressed below, the Committee provides no authority for undoing secured creditor rights in collateral simply because other creditors claim to have lien challenges.

6. Second, there is no adequate protection that can be offered to CVI that could compensate it for the diminution of the value of its collateral in Chapter 11. CVI is massively undersecured. The Debtors are not generating new collateral. There are no meaningful unencumbered assets. The Debtors' base-line projections reveal that over 90% of the

approximately $46 million to be generated from the fleet sale will be used to pay for administrative expenses, with almost half of that going to estate advisors.[4] Moreover, the Debtors have regularly underestimated the quantum of advisory fees, so even this extraordinary 90% figure may be understated. CVI's adequate protection claims also have administrative expense priority. As a result of the forgoing, the Debtors' Chapter 11 estates are at severe risk of being administratively insolvent, to the extent they are not already.

7. Further, CVI will not agree to an extension of the existing Carve-Out for estate professional fees. Professional fees have already significantly depleted CVI's Cash Collateral, and such fees are even now projected in the Updated Cash Collateral Budget to be over $13 million in the agreed budget, which is almost twice the $6.9 million that the Debtors project creditors will receive from net proceeds of vehicle sales.[5] CVI will honor the agreed Carve-Out for estate professional fees set forth in the Prior Interim Cash Collateral Orders, including certain post-termination amounts, but that is the end of it. This causes no prejudice to the rights of unsecured creditors either, as there is no right or claim that benefits unsecured creditors in Chapter 11 that cannot be vindicated in chapter 7.

8. Accordingly, the Court should deny any request for use of Cash Collateral on any terms other than those set forth in the Proposed Consensual Cash Collateral Order.

BACKGROUND

I. CVI's Claims

9. CVI is the sole holder of three series of notes, all of which were issued by Fisker Inc.: (i) A-1 senior convertible notes due 2025 (the "Series A-1 Notes") issued in the amount of

[4] These figures assume that the ratio of receipts and disbursements will remain consistent beyond the period covered by the Updated Cash Collateral Budget through the completion of the fleet sale.

[5] *See* Updated Cash Collateral Budget.

$340 million on July 11, 2023; (ii) Series B-1 senior convertible notes due 2025 (the "Series B-1 Notes," and together with the Series A-1 Notes, the "Prepetition 2025 Secured Notes") issued in the amount of $170 million on September 29, 2023; and (iii) a senior secured promissory note (the "Bridge Secured Note" and, together with the Prepetition 2025 Secured Notes, the "Prepetition Secured Notes") issued in the amount of $3,456,000 on May 10, 2024. Under the Prepetition Secured Notes, CVI is owed a principal amount of not less than $186,506,000 plus interest, fees and other amounts owed under the Prepetition Secured Notes Documents (as defined below).[6]

10. The Prepetition 2025 Secured Notes were issued under the following documents:

- the Securities Purchase Agreement, dated July 10, 2023 (as amended by that certain (i) Amendment No. 1 to Securities Purchase Agreement, dated September 29, 2023, (ii) Amendment and Waiver Agreement, dated November 22, 2023, (iii) Second Amendment and Waiver Agreement, dated January 21, 2024, and (iv) Third Amendment and Waiver Agreement, dated March 18, 2024, the "Prepetition Securities Purchase Agreement"), between CVI and Fisker Inc.; [7] and

- the Indenture, dated July 11, 2023 (as supplemented by (x) the First Supplemental Indenture, dated July 11, 2023, with respect to the Series A-1 Notes, (y) the Second Supplemental Indenture, dated September 29, 2023, with respect to the Series B-1 Notes, and (z) the Third Supplemental Indenture, dated November 22, 2023, the "Prepetition Secured Indenture"), between Wilmington Savings Funds Society, FSB, as Trustee, and Fisker Inc.

11. The Bridge Secured Note was issued under the Securities Purchase Agreement, dated as of May 10, 2024 (the "Bridge Note Securities Purchase Agreement"), between CVI and Fisker Inc.

II. The Security Documents for the Prepetition Notes

12. The Prepetition Secured Notes are secured by (a) guarantees from the Debtors and certain non-Debtor subsidiaries and (b) liens on substantially all the Debtors' assets and property

[6] Fourth Interim Cash Collateral Order ¶ F(i)(a).

[7] Together with any agreements, amendments, supplements, restatements or other modifications specifically referenced herein, each agreement and other document referenced herein is as amended, restated, supplemented or otherwise modified.

and on certain assets of non-Debtor subsidiaries. The following documents (collectively with the Prepetition Securities Purchase Agreement, the Prepetition Secured Indenture and the Bridge Note Securities Purchase Agreement, the "Prepetition Secured Notes Documents") provide for, and govern, such guarantees and security grants with respect to the Debtors:[8]

- the Pledge Agreement, dated as of November 22, 2023, between CVI, Fisker Inc., Fisker Group Inc. and Fisker GmbH ("Fisker Austria"), as amended and restated by the Amended and Restated Security and Pledge Agreement, dated December 28, 2023, between CVI, the Debtors and Fisker Austria;[9]

- the Guaranty Agreement, dated December 28, 2023, between CVI, the Debtors and Fisker Austria;

- the Intellectual Property Security Agreement, dated December 15, 2023, the Supplemental Intellectual Property Security Agreement, dated January 31, 2024, the certain Supplemental Intellectual Property Security Agreement, dated March 29, 2024, each of which was between, among others, CVI, Fisker Inc., Fisker Group Inc., Platinum IPR LLC and Fisker Austria; and the Intellectual Property Security Agreement, dated May 10, 2024, among Fisker Inc. and CVI;

- the Securities Account Control Agreement, dated as of January 23, 2024 (the "US SACA"), between Fisker Group Inc., CVI and SS&C GIDS, Inc., as transfer agent of JPMorgan Prime Money Market Fund and other JPMorgan Mutual Funds;

- the Blocked Account Control Agreement, dated January 18, 2024 (the "US DACA"), between Fisker Group Inc., Terra Energy Inc., Fisker TN LLC, CVI and JPMorgan Chase Bank N.A. (the "Account Bank");[10]

- the Security and Pledge Agreement, dated as of May 10, 2024, by and between CVI and the Debtors;

- the Guaranty Agreement, dated May 10, 2024 (the "Bridge Note Guaranty Agreement"), granted by the Debtors and Fisker GmbH (Germany) ("Fisker Germany"), Fisker (GB) Limited ("Fisker UK"), and Fisker France SAS ("Fisker

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[8] True and correct copies of the Prepetition Secured Notes Documents and the Perfection Filings (as defined below) are attached as exhibits to the Feld Declaration.

[9] Fisker Inc. and Fisker Group (as applicable) also pledged the shares of Fisker Austria, Fisker Belgium, Fisker France, Fisker Germany and Fisker UK (each as defined herein) as collateral to secure the Prepetition Secured Notes pursuant to various share pledge or similar agreements (collectively, the "Share Pledges"). The Share Pledges are attached as exhibits to the Feld Declaration.

[10] On May 31, 2024, CVI issued a shifting control notice to the Account Bank with respect to certain US bank accounts. At the Debtors' request, CVI subsequently authorized transfers of funds from such accounts to the Debtors to satisfy certain of their obligations, including employee payroll, before the Petition Date.

France");[11] and

- the Senior Intercreditor Agreement, dated May 10, 2024, between CVI, the Debtors, Fisker Germany, Fisker UK, Fisker France, Fisker Denmark and Fisker Norway.[12]

13. The liens on the collateral granted by the Prepetition Secured Notes Documents are properly recorded and perfected against the Debtors under applicable law by the filing of the UCC-1s and the entry into the US DACA and US SACA (the "UCC Filings"). Although technically unnecessary for perfection purposes, CVI has also made applicable registrations with the United States Patents and Trademark Office in respect of its security over the Debtors' patents and trademarks (together with the UCC Filings, the "Perfection Filings").

14. The Debtors have stipulated in the Prior Interim Cash Collateral Orders, subject to customary challenge rights by third parties, (i) that they are indebted and liable to CVI for the Prepetition Secured Obligations and (ii) to the validity, enforceability and non-avoidability of CVI's liens on substantially all the Debtors' assets, including Cash Collateral (which includes proceeds of sales of other collateral). *See Prior Interim Cash Collateral Orders* ¶¶ F(i), (iii), (vii).

III. The Prior Interim Cash Collateral Orders

15. Since their bankruptcy filing in mid-June, the Debtors have funded these Chapter 11 Cases with CVI's Cash Collateral in accordance with the Prior Interim Cash Collateral Orders and the one-week budgets applicable thereto. Such use has been subject to the consent of CVI. Most recently, under the Fourth Interim Cash Collateral Order, CVI consented to the Debtors' use

[11] On May 17, 2024, Fisker Denmark ApS ("Fisker Denmark"), Fisker Sweden AB ("Fisker Sweden"), Fisker Norway AS ("Fisker Norway") and Fisker Belgium SRL ("Fisker Belgium") acceded as guarantors to the Bridge Note Guaranty Agreement.

[12] Additionally, (i) Fisker Austria granted an Austrian-law governed pledge of all of its receivables to secure the Prepetition 2025 Secured Notes, (ii) Fisker Austria provided an Austrian law guarantee agreement in respect of the Prepetition 2025 Secured Notes, (iii) Fisker Germany, Fisker UK, Fisker France, Fisker Denmark, Fisker Norway, Fisker Sweden and Fisker Belgium granted various local law security documents to secure the Prepetition 2025 Secured Notes, the Bridge Secured Note or both.

of its Cash Collateral until no later than July 29, 2024 to facilitate the approval of the fleet sale transaction and allow time for the Debtors to attempt to reach a potential consensual and efficient resolution of the Debtors' bankruptcy proceedings (including the allocation of all assets and proceeds) with CVI and the Committee.

16. As purported adequate protection for the use of Cash Collateral and CVI's other collateral, the Debtors have granted to CVI (i) superpriority claims and replacement liens (including, upon entry of a final order, on proceeds of avoidance action), in each case to the extent of any diminution in value of CVI's interests in collateral and (ii) the accrual (but not current payment) of postpetition interest and professional fees. *Id.* ¶ 3. The Prior Interim Cash Collateral Orders expressly provide that nothing included shall "prejudice, impair, or otherwise affect any of [CVI's] rights to seek any other or supplemental relief in respect of the Debtors (including, as the case may be, any other or additional adequate protection)." *Id.* ¶ 19(f). The Prior Interim Cash Collateral Orders also provide that nothing therein shall "be construed as a consent by [CVI] that it is adequately protected." *Id.* ¶ I.

17. The Prior Interim Cash Collateral Orders also each include a Carve-Out for estate professional fees that comes ahead of CVI's prepetition and adequate protection liens. This Carve-Out covers accrued professional fees of estate professionals through termination of the applicable Prior Interim Cash Collateral Order and some amount of post-termination "burial" expenses to be negotiated between CVI, the Debtors and the Committee (or, if no such agreement can be reached, as determined by the Court). *Id.* ¶ 12.

18. As stated above, the Debtors' stipulations with respect to CVI's claims and liens is subject to potential challenges by third parties, including the Committee. Any such challenge must be brought within 75 days of entry of the first Interim Cash Collateral Order. *See* Fourth Interim

Cash Collateral Order ¶ 10(b). Pursuant to paragraph 11 of the Prior Interim Cash Collateral Orders, Cash Collateral may not be used to investigate or challenge CVI's claims or liens, except that the Committee may use up to $75,000 to investigate (but not prosecute or initiate the prosecution of) any challenge of the Debtors' stipulations.

OBJECTION TO ANY NON-CONSENSUAL USE OF CASH COLLATERAL

19. Any objection to the Proposed Consensual Cash Collateral Order should be overruled, and any request to use Cash Collateral non-consensually on any other terms must be denied.[13]

I. CVI Has Valid Liens

20. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may only use cash collateral if "(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." Under section 363(e) of the Bankruptcy Code, the court may only grant the nonconsensual use of Cash Collateral if the creditor's interest in such cash collateral is adequately protected.

21. To be entitled to adequate protection, a secured creditor has the burden of proof on the validity, priority or extent of its interest. 11 U.S.C. § 363(p)(2). The Feld Declaration and the exhibits attached thereto evidencing CVI's valid senior liens on substantially all the Debtors' assets and property easily satisfy this burden, and CVI is unaware of cases where such documentation was insufficient to satisfy a secured creditor's burden of proof. *See In re Megan-Racine Assocs., Inc.*, 192 B.R. 321, 325-26 (Bankr. N.D.N.Y. 1995), *rev'd on other grounds* 198 B.R. 650

[13] The Debtors filed on July 26 a proposed order that would authorize them to use Cash Collateral on a final basis non-consensually [D.I. 306], but in light of the agreement between CVI and the Debtors on the Proposed Consensual Cash Collateral Order, the Debtors are not pursuing approval of the Docket No. 306 proposed order at this time.

(N.D.N.Y.), *rev'd* 102 F.3d 671 (2d Cir. 1996) ("The determination of lien validity [under section 363(p)(2)] is subject to informal examination and not extensive litigation."); *see also* 3 COLLIER ON BANKRUPTCY P 363.05 (16th 2024) ("As is the case under section 362, the less extensive nature of the contested matter form of litigation will permit some examination of lien validity but not extensive litigation of counterclaims."). Moreover, the Debtors have stipulated to such facts in each of the Interim Cash Collateral Orders. *See* Interim Cash Collateral Orders, ¶¶ E, F. The fact that the stipulations in the Prior Interim Cash Collateral Orders are subject to potential challenges, as is typical and in accordance with Local Rule 4001-2(a)(i)(Q), can be said in every case and does not negate these fundamental secured creditor protections. CVI's claims and liens are valid unless proven otherwise and are, thus, entitled to adequate protection. *See In re Miller*, 320 B.R. 203, 209-10 (Bankr. N.D. Ala. 2005) (holding that a secured creditor retains rights under its liens until after action to avoid the lien is decided).

22. The debtor, in turn, bears the burden of proving that it can adequately protect the secured creditor's interest in cash collateral. 11 U.S.C. § 363(p)(1). Here, satisfying that burden is impossible.

II. The Debtors Cannot Adequately Protect CVI's Interests in the Debtors' Collateral

23. Adequate protection is derived from the Fifth Amendment and is meant to protect secured creditors' property rights. *See In re Dispirito*, 371 B.R. 695, 698 (Bankr. D.N.J. 2007) ("The concept of adequate protection finds its basis in the Fifth Amendment's protection of property interests."). "The focus of [the adequate protection] requirement is to protect a secured creditor from diminution in the value of its interest in the particular collateral during the period of use by the debtor." *In re Satcon Tech. Corp.*, No. 12-12869 (KG), 2012 WL 6091160, at *6 (Bankr. D. Del. 2012) (citing *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994)).

24. Section 361 of the Bankruptcy Code lists examples of forms of adequate protection, including periodic cash payments, replacement liens and any such other relief that provides the party entitled to adequate protection with the "indubitable equivalent" of its interest. 11 U.S.C. § 361. Adequate protection must completely compensate a secured creditor for the use of its cash collateral. *See In re Hari Ram, Inc.*, 507 B.R. 114, 121 (Bankr. M.D. Pa. 2014) ("When deciding a proposal for adequate protection of a secured creditor's interest, the proponent 'should as nearly as possible under the circumstances of the case provide the creditor with the value of his bargained for rights.'") (quoting *In re Am. Mariner Indus., Inc.*, 734 F.2d 426, 425 (9th Cir. 1984)). What constitutes adequate protection is "decided on a case-by-case basis." *In re Sharon Steel Corp.*, 159 B.R. 165, 169 (Bankr. W.D. Pa. 1993).

25. In determining whether adequate protection is provided, courts may examine the property's "equity cushion," which is the surplus of value remaining after the amount of the secured creditor's claim (and, if any, senior claims) is subtracted from the fair market value of the property securing the secured creditor's claim. *In re GVM, Inc.*, 605 B.R. 315, 327 (Bankr. M.D. Pa. 2019); *see also In re Elmira Litho., Inc.*, 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994) ("An equity cushion . . . provides adequate protection if it is sufficiently large to ensure that the secured creditor will be able to recover its entire debt from the security at the completion of the case.").

26. The Debtors argue that there is no diminution in value here and that the value of CVI's collateral is "relatively stable" because the Debtors' fleet sale fixes the price of the Debtors' otherwise-depreciating cars and the Debtors' cash position is increasing. Debtors' Conversion Objection ¶ 59. This assertion ignores the fact that CVI's security interests on all collateral, taken as a whole, are diminishing.

27. The conversion of vehicles into cash does nothing to increase the value of those

vehicles. The Updated Cash Collateral Budget shows that the Debtors' unrestricted cash is projected to decrease by approximately $10.6 million over the next 8 weeks notwithstanding the sale of substantially all of the cars. *See, e.g.*, *In re Hari Ram*, 507 B.R. at 126 (determining that adequate protection package was insufficient where, among other things, cash was being depleted and postpetition interest was going unpaid). This demonstrates a clear diminution in value for which CVI must be adequately protected.

28. Furthermore, the value of CVI's security interests is not protected simply because cash collateral is being used to pay administrative expenses. Cash used to pay administrative expenses still causes a diminution in the overall value a secured creditor's security interests, as generally, "fees and expenses are not chargeable against secured collateral[.] Instead, they ordinarily may be charged only against the surplus of the debtor's estate." *In re Towne, Inc.*, 536 F. App'x 265, 268 (3d Cir. 2013) (citing *Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325-26 (3d Cir. 1995)). Section 506(c) of the Bankruptcy Code provides a "limited exception to this rule" that provides for a surcharge of collateral only if the costs in question are "reasonable and necessary to the preservation or disposal of the property" and "the expenditures provide a *direct* benefit to the secured creditors." *In re Towne, Inc.*, 536 F. App'x at 268. No party has attempted to assert a section 506(c) surcharge claim here, and the right for parties to do so is fully reserved in the Proposed Consensual Cash Collateral Order.[14] And the payment of estate professional fees also represents a significant diminution in value, now running at a rate of two million per week.

29. There can be no adequate protection here. The Debtors cannot make cash payments. All assets are encumbered and the Debtors are not generating new collateral. With the

[14] Proposed Consensual Cash Collateral Order ¶ L.

fleet sale closing soon, the only asset of these estates will be a pot of cash, and every dollar out the door results in a dollar of diminution for which CVI cannot be adequately protected. Therefore, replacement liens would only provide CVI with the same security interests that it already has. *See, e.g. In re Swedeland Dev. Grp.*, 16 F.3d at 564 (affirming that, among other things, the continuance of a secured creditor's existing liens does not constitute adequate protection); *In re Hari Ram, Inc.*, 507 B.R. at 125 (holding that a debtor projecting near-term negative cash flows could not provide creditor with adequate protection for use of cash collateral because, among other things, the future proceeds on which the debtor offered replacement liens were already encumbered by the creditor's liens); *In re LTAP US, LLLP*, No. 10-14125 (KG), 2011 Bankr. LEXIS 667, at *9 (Bankr. D. Del. Feb. 18, 2011) ("providing [secured creditor] with a replacement lien on assets against which it already has a lien is illusory. Debtor must provide [secured creditor] with additional collateral, and there is none.").

30. The superpriority claims provided by the Debtors are also illusory for the same reasons, as well as the fact that CVI is severely undersecured. Any resulting adequate protection claim would have administrative priority, thereby deepening the administrative insolvency of these Chapter 11 Cases.

III. CVI Will Not Agree to Expansion of the Carve-Out

31. CVI had agreed to a Carve-Out for estate professionals for fees incurred through July 29, 2024 and for some additional amount to be agreed thereafter to cover "burial" expenses, subject in each case to CVI's right to object to the allowance of any fee applications filed by such professionals. *See* Fourth Interim Cash Collateral Orders ¶ 12. CVI will not extend this carve-out and it cannot be compelled to do so. *See, e.g.*, *Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortg. Corp. (In re Blackwood Assocs., L.P.)*, 153 F.3d 61, 68 (2d Cir. 1998) ("[A]bsent an

agreement to the contrary, a secured creditor's collateral may only be charged for administrative expenses, including attorney's fees, to the extent these expenses directly benefited that secured creditor.") (emphasis added); *In re Cal. Webbing Indus., Inc.*, 370 B.R. 480, 486 (Bankr. D.R.I. 2007) (refusing to use secured creditor's cash collateral to pay legal fees for the debtor and creditors' committee where the secured creditor did not consent to such use of its collateral). The Bankruptcy Court for the Eastern District of Pennsylvania explained the rule governing carve-outs explicitly:

> The term "carve out" is one of those uniquely bankruptcy phrases . . . that appears nowhere in the bankruptcy statute but connotes definite meaning to parties. It is an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien position. It commonly arises in two contexts. . . . Carve outs are . . . common in Chapter 11 cases in favor of debtor's attorneys as part of cash collateral agreements. In . . . these circumstances, it is essential to note that the carve out is a product of agreement between the secured party and the beneficiary of the carve out. As the Second Circuit stated:
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> > The Code thus deliberately protects and preserves the interests of secured creditors in property in which they have a security interest, and accordingly takes the concept of adequate protection very seriously. The Code also establishes that a secured creditor's collateral may only be diminished to the extent that the secured creditor waives its right to the protections afforded by the Code, or to the extent that the expense priority directly confers a benefit on the secured creditor.
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> *Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortg. Corp. (In re Blackwood Assocs., L.P.)*, 153 F.3d 61, 68 (2d Cir. 1998).
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> Reasoning thusly, the Court refused debtor's counsel demand that it be paid from cash collateral returned to the mortgage lender when the debtor failed to meet the terms of the cash collateral stipulation. This opinion underscores the underpinnings of the carve-out concept.

In re White Glove, No. 98-12493 (DWS), 1998 WL 731611, at *6-7 (Bankr. E.D. Pa. Oct. 14,

1998). These cases and basic principles of due process make clear that, without CVI's consent, an expansion of the existing Carve-Out cannot be approved.

THERE ARE NO "EQUITABLE" OR OTHER CONSIDERATIONS THAT CHANGE THIS RESULT

32. The Committee argues that the Court should use its equitable powers to deprive CVI of its contractual rights, based on the Committee's unsupported allegations of claims against CVI. While the Committee's objection to conversion is now moot, that pleading spent most of its pages spinning out elaborate, charged attacks against CVI, without supporting evidence, and indeed with barely even a pretense of how they relate to the issues before the Court now.[15] These issues are irrelevant for today and CVI could simply stop there, but the Committee's unsupported accounts have now been repeated to the Court several times and filed publicly, and CVI is compelled to note a few basic facts to correct the record.

33. **CVI's Notes Are the Arm's-Length, Contractual Agreements of a Well-Represented Public Company.** For all its rhetoric, the Committee never asserts that CVI did anything but abide by the terms of the Notes themselves, which Fisker used to raise the hundreds of millions it needed to advance its ambitious objectives. Fisker is a public company, overseen by its management and a board of directors. It was represented by capable counsel in entering into these transactions.

34. Moreover, because Fisker is public, the CVI Notes are public. Complete versions of all of the agreements attendant to the CVI Notes were publicly filed with form 8-K filings which are available on Fisker's website and the SEC's website today.[16] Fisker also filed proxy statements

[15] The Committee's loose attempts to tie its allegations of inequitable conduct to CVI's burden of proof under section 363(p)(2), or the applicability of the "equities of the case" exception to CVI's right to proceeds of collateral under section 552(b) of the Bankruptcy Code, are unsupported by any case law or meaningful analysis.

[16] Fisker July 10, 2023 8-K (Exs. 4.1-4.3; 10.1) available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/58a4974b-34b3-44e5-becc-26dec9619d48.pdf; Fisker September 29, 2023 8-K (Exs. 4.1-4.3; 10.1)

with the SEC regarding the Prepetition 2025 Secured Notes, and then held shareholder votes of approval.[17] The agreements and Fisker's ability to deliver additional shares thereunder were overwhelmingly approved by Fisker's stockholders.[18]

35. **Fisker's Failure to Meet Mandatory SEC Filing Deadlines was a Clear Event of Default.** The CVI Note SPA obligates Fisker to meet SEC filing deadlines in no uncertain terms. SPA Section 4.1(f) provides:

> Reporting Status. Until the date on which the Buyers shall have sold all of the Securities (the "**Reporting Period**"), the Company shall timely file all reports required to be filed with the SEC pursuant to the 1934 Act[.]

36. The Committee's effort to claim that this was only a "best efforts" obligation (Committee Br. pp. 10, 21) contradicts the express terms of the document. The Committee really should not be "baffled" as to why both Fisker and CVI thought that an event of default had occurred when Fisker failed to meet the well-known SEC deadline—it is because it was a clear event of default.

37. **Fisker's Failure to Meet Mandatory SEC Filing Deadlines Was a Serious Issue.** The Committee says, without citation, that Fisker failing to complete its SEC filing requirements was somehow not a real or serious default. Committee Br. at pp. 4, 21. That is incorrect. Leaving aside what the failure to file signaled about issues at the company at the time, as Fisker itself explained in its later public filings, this failure to file created an impending prohibition on Fisker

available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/4c38b51e-aca4-4f03-b0be-1fb80a48d420.pdf.

[17] Fisker August 3, 2023 Proxy Statement, available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/41c58bd5-f985-452f-a748-08710fbef6e6.pdf; Fisker February 9, 2024 Proxy Statement, available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/458b8414-77a9-4c66-9ab9-a9c72298fd34.pdf.

[18] *See* Fisker September 2023 8-K (1,427,965,079 in favor vs. 15,725,495 against) available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/4855fa98-006f-4eed-ab5d-c72ccba1762f.pdf; Fisker March 2024 8-K (1,446,476,714 for vs. 45,249,811 against) available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/b2a93a98-cfa9-4ea5-b43b-863cf104f571.pdf.

issuing any new securities pursuant to its existing shelf registration once it filed its next 10-K and prevented the filing of any new shelf registration on Form S-3.

> Absent relief, as a result of our failure to timely file a periodic report with the SEC, we are currently ineligible to file a registration statement on Form S-3, which may impair our ability to raise capital on terms favorable to us, in a timely manner or at all. […] Form S-3 enables eligible issuers to conduct primary offerings under Rule 415 of the Securities Act of 1933, as amended (the "Securities Act"). […] As a result of our failure to timely file our Quarterly Report on Form 10-Q for the quarter ended September 30, 2023, absent a waiver of the Form S-3 eligibility requirements, we are ineligible to file new registration statements on Form S-3 until no earlier than December 1, 2024. In the event of the absence of a waiver, our S-3 ineligibility may significantly impair our ability to raise necessary capital needed for our business. […] Any of the foregoing may impair our ability to raise capital on terms favorable to us, in a timely manner or at all.

Fisker November 2024 10-Q.[19] This was a significant restriction on Fisker's ability to access additional capital to fund its highly capital-intensive operations, as Fisker disclosed. This, coupled with Fisker's self-identified prior publicly disclosed risk factors revealed that access to additional capital was a significant concern. *Id.; see also*, Fisker March 2023 10-K ("If we cannot raise additional funds when we need or want them, our operations and prospects could be negatively affected.").[20] This also cut off Debtors' and CVI's ability to exercise additional commitment rights in the Notes, which likewise relied on the Company's ability to issue public securities. *See* SPA §§ 1(b)(ii); 4.1(l)(2); 6(b).

38. **Fisker Received a Significant Benefit in CVI's Limited Waiver.** The event of default gave CVI the right to accelerate its Notes. 2025 Note at § 4(b) (Event of Default

[19] Available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/9d7f654d-5a55-45a9-81c1-7e1ec581b195.pdf.

[20] Available at: https://d18rn0p25nwr6d.cloudfront.net/CIK-0001720990/d9b2f57a-5e9c-4d31-a3d1-f1badd970ae7.pdf.

Redemption Right). This, in turn, would have cross-defaulted the 2026 notes as well. 2026 Note at § 4(xv). In another arm's-length transaction, Fisker—again overseen by its management and board of directors and represented by competent counsel—entered into a waiver agreement in exchange for additional collateral.[21] This is hardly an unusual event. The same agreement also allowed Fisker to access an additional $90 million of restricted cash. *Id.*

39. As stated, none of the above need or are ripe for resolution today. Proceeds of the estate are not being distributed. These claims can continue to be investigated and pursued by a chapter 7 trustee, and CVI would defend them vigorously. There is no authority for depriving CVI of its right to adequate protection as a secured creditor based on allegations alone, however many times repeated.

RESERVATION OF RIGHTS

40. CVI reserves all rights, claims, defenses and remedies, including, without limitation, the right to supplement and amend this Objection, to raise further and other objections prior to or at the July 29, 2024 hearing, to introduce evidence prior to or at the July 29, 2024 hearing and to introduce any other relevant information in support of the positions set forth in this Objection prior to or at the July 29, 2024 hearing.

[21] Fisker November 2023 10-Q (Ex. 10.2).

WHEREFORE, CVI respectfully requests that this Court (i) enter the Proposed Consensual Cash Collateral Order, (ii) deny any request for non-consensual use of Cash Collateral, including on the terms set forth in the Proposed Nonconsensual Cash Collateral Order, and (iii) grant such other and further relief as is necessary and just.

Dated: July 28, 2024
Wilmington, Delaware

/s/ Richard M. Beck

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