UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

	§	**Chapter 11**
In re:	§	
	§	**Case No. 20-43597-339**
BRIGGS & STRATTON	§	**(Jointly Administered)**
CORPORATION, *et al.*,	§	
	§	
Debtors.	§	Related Docket Nos. 35, 399, 403

REPLY OF JPMORGAN CHASE BANK, N.A., AS PREPETITION AGENT AND DIP AGENT, TO COMMITTEE AND AD HOC NOTEHOLDER GROUP OBJECTIONS TO ENTRY OF FINAL ORDER (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING, (II) AUTHORIZING DEBTORS TO USE CASH COLLATERAL, (III) GRANTING LIENS AND SUPERPRIORITY CLAIMS, (IV) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (V) MODIFYING AUTOMATIC STAY, AND (VI) GRANTING RELATED RELIEF

JPMorgan Chase Bank, N.A., in its capacities as agent (in such capacities, the "Agent") for the lenders under each of the Debtors' prepetition ABL credit facility and DIP ABL facility (collectively, the "ABL Lenders"), submits this reply to the objections (collectively, the "Objections")[1] of the Official Committee of Unsecured Creditors (the "Committee") and an ad hoc group of senior unsecured noteholders (the "Ad Hoc Group," and together with the Committee, the "Objecting Parties") to entry of the proposed final order approving the Debtors' DIP financing (the "Proposed Final Order") sought by the *Motion of the Debtors For Interim and Final Orders*

[1] *Objection of the Official Committee of Unsecured Creditors to Motion of Debtors For Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing, and (VII) Granting Related Relief* (Docket No. 399) (the "Committee Objection");

Objection of Ad Hoc Group of Senior Noteholders to Motion of Debtors For Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing, and (VII) Granting Related Relief (Docket No. 403) (the "Ad Hoc Group Objection").

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(I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing, and (VII) Granting Related Relief (Docket No. 35) (the "DIP Motion"). In support hereof, the Agent incorporates by reference the replies to the Objections filed by the Debtors and KPS Capital Partners, LP, in its capacities as the stalking horse bidder and DIP term lender ("KPS"), to the extent applicable, and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee and the Ad Hoc Group spill much ink in their Objections attempting to portray the Debtors' DIP financing as a scheme engineered by the Debtors, the ABL Lenders and KPS to effectively steal the company out from under the unsecured creditors, but they conveniently ignore the actual facts of this case that tell a contrary story and cannot reasonably be controverted.

2. Starting in March of 2020, faced with a near-term liquidity shortfall, imminent maturities on their funded debt and the prospect of a near-term payment default under their unsecured notes, the Debtors hired various advisors, including Houlihan as their investment banker, and engaged in a months-long, robust process for raising capital and finding a comprehensive solution to the company's balance sheet. *See* Snellenbarger Decl.,[2] ¶ 11; Lewis

[2] *Declaration of Reid Snellenbarger in Support of Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Hearing, and (E) Assumption and Assignment Procedures and (II) Granting Related Relief* (Docket No. 53-1).

Decl.,[3] ¶ 21; Ficks First Day Decl.,[4] ¶ 81. As part of this capital-raise process, the Debtors reached out to over 125 potential investors. Peluchiwski Decl.,[5] ¶ 8. "The only actionable proposals the [Debtors] received during the capital raise process were for an in-court sale process." *Id.* Based on that market feedback and the noteholders' inability to formulate an actionable out-of-court restructuring, the Debtors and their advisors "determined that there was no viable out-of-court scenario in which [the Debtors] could service their debt obligations." Snellenbarger Decl., ¶ 16. Thus, the Debtors and their advisors—not the ABL Lenders, as the Objecting Parties would have the Court believe—determined, based on the company's available options, that "pursuing a sale of the assets and equity interests in chapter 11 provided the best opportunity to maximize the value of such assets for the benefit of Briggs & Stratton's creditors." *Id.*

3. Houlihan and the Debtors then pivoted to a full-scale sale marketing process, which they commenced in earnest in mid-May (though the market was aware that assets of the company were for sale dating back to March, 2020 based on various public announcements made by the Debtors). *See id.*, ¶¶ 13-21; Peluchiwski Decl., ¶¶ 8, 27. This process involved the Debtors reaching out to strategic buyers and the potential capital-raise investors, who pivoted to evaluating a potential sale transaction rather than a financing transaction. *See* Peluchiwski Decl., ¶¶ 8-9. This

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[3] *Declaration of Jeffrey Lewis in Support of Motion of the Debtors For Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection To Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing, and (VII) Granting Related Relief* (Docket No. 36).

[4] *Declaration of Jeffrey Ficks, Financial Advisor of Briggs & Stratton Corporation, in Support of the Debtors' Chapter 11 Petitions and First Day Relief* (Docket No. 51).

[5] *Supplemental Declaration of William G. Peluchiwski in Support of Motion of Debtors for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Hearing, and (E) Assumption and Assignment Procedures and (II) Granting Related Relief,* filed contemporaneously herewith.

process ultimately resulted in numerous written offers and the signing of a stalking horse purchase agreement with KPS for a top-line purchase price of $550 million (the "Stalking Horse Bid"), the highest and best offer received. *Id.*, ¶ 16.

4. Concurrently, the Debtors, the Agent and the ABL Lenders engaged in extensive negotiations over several weeks concerning a DIP financing package to support the sale process. *See* Lewis Decl., ¶¶ 28-29. The Debtors sought and received numerous DIP financing proposals from other investors but determined that the ABL Lenders' proposed financing "offered superior economic terms to any of the other proposals received by the Debtors." *See id.*, ¶ 28. Notably, the noteholders that now plead for additional time to formulate a DIP financing proposal were actively engaged with the Debtors for months pre-filing and failed to submit a DIP proposal. *See* Peluchiwski Decl., ¶ 13.

5. The DIP financing package negotiated between the Debtors and the ABL Lenders weeks before KPS became the DIP term lender provided the Debtors the longest postpetition marketing runway possible based on (i) the $550 million market-tested valuation of the Debtors' assets evidenced by the Stalking Horse Bid[6] and (ii) the projected $175 million administrative costs of these cases through the anticipated sale closing date of October 9, 2020. *See* Interim DIP Order,[7] Exhibit B (Initial ABL DIP Budget) (reflecting an aggregate loan balance of $523.3 million as of the projected closing of the sale compared to the $550 million gross purchase price (subject to certain purchase price adjustments) under the Stalking Horse Bid).

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[6] The Stalking Horse Bid includes certain potential purchase price adjustments to the $550 million gross purchase price that could result in lower net proceeds available for distribution to creditors.

[7] *Interim Order (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection to Prepetition Secured Parties, (V) Modifying Automatic Stay, and (VI) Scheduling a Final Hearing* (Docket No. 123) ("Interim DIP Order").

6. Upon reaching agreement on such financing terms, the Agent worked closely with Houlihan to syndicate the $265 million DIP term loan to both noteholders and outside investors. *See* Lewis Decl., ¶ 30. Again contrary to the Objecting Parties' unsupported narrative, the Debtors did not seek any DIP financing from KPS until it became evident, as a filing became imminent, that the DIP term loan would not be fully syndicated in time. *See* Peluchiwski Decl., ¶ 36. The Debtors and the ABL Lenders ultimately agreed to let KPS provide the full $265 million DIP term loan based on KPS making several material concessions, including (i) accepting the economic terms initially negotiated between the Debtors and the Agent[8] (which were materially more Debtor-friendly than the earlier KPS proposals) and (ii) permitting the Debtors to close on a higher or otherwise better sale bid without KPS' consent. *See* Interim DIP Order, Exhibit A (form of DIP Credit Agreement), § 1.01 (definition of "Qualified Sale").

REPLY

7. The Objections as they relate to the ABL Lenders can be distilled down into three principal arguments:

a) The ABL Lenders compelled the Debtors to pursue a quick sale of their assets to KPS at "what appears to be an artificially low purchase price" to obtain full recovery on their debt claims at the expense of the Debtors' estates and other creditors;

b) The contemplated refinancing of the prepetition ABL obligations with DIP term loan proceeds should not be approved because it would prevent the possibility of a future "cram down" of the ABL Lenders' outstanding prepetition claims; and

c) Certain customary protections granted to the ABL Lenders and limitations imposed on the Committee should be struck or materially modified.

The Agent responds to each argument in turn below.

[8] The only material economic change required by KPS was to change the call protection from a "soft" call to a "hard" call.

I. The DIP Financing Provided by the ABL Lenders and KPS Was the Best Available Financing Option to Facilitate the Debtors' Only Viable Option for Preserving and Maximizing Value Under the Circumstances.

8. The Objecting Parties confuse cause and effect when they assert that the ABL Lenders are using aggressive milestones in the DIP financing to force the Debtors to effectuate a quick sale to KPS to the detriment of the Debtors' estates and other creditors. The confluence of many external forces—including a near-term liquidity shortfall and the inability to get a maturity extension, payment-default waiver, forbearance or actionable restructuring proposal from the very noteholders that now object to the process—drove the Debtors to pursue the current sale case strategy. *Supra* ¶¶ 2-3. This was the only decision the Debtors could responsibly make under the circumstances to save the company and maximize value, and they made it independently without compulsion by the Agent or the ABL Lenders. *Id.*

9. Likewise, the combination of the roughly $550 million market value of the Debtors' assets established by the Stalking Horse Bid and the substantial funding needs of the Debtors during this "inventory build" phase of their business cycle dictated the length of the postpetition marketing runway—not the Agent or the ABL Lenders. *See supra* ¶ 5. The sale milestones set forth in the DIP Credit Agreement merely track the maximum runway permitted by these economic realities and are designed to avoid the very administrative insolvency that the Objecting Parties decry the ABL Lenders are trying to cause. Indeed, if this Court were to order a materially longer postpetition marketing process as the Objecting Parties request, the likely result would be administrative insolvency no matter what the milestones are and no matter if KPS, the noteholders or other investors provide the DIP term loan on substantially similar terms.

10. The cases that the Committee claims support denial of the Proposed Final Order either have nothing to do with DIP financing,[9] actually lend affirmative support to entry of the Proposed Final Order[10] or are easily distinguishable based on the particular—and far more egregious—facts at issue therein.[11] In the *Laffite's Harbor* case, the Debtors did not solicit or entertain any DIP financing proposals other than the onerous package it presented for approval. *In re Laffite's Harbor*, 2018 WL 272781, *2 (Bankr. S.D. Tex. 2018). That lack of solicitation led the court to find "the Debtors did not make even a rudimentary effort to comply with section 364(d)(1) before seeking approval of a transaction that would prime [the prepetition secured lender's] lien" and impose other restructuring terms that "amount[ed] to a sub rosa plan." *Id.* at *3. Here, the Debtors completed a fulsome DIP marketing process, and the DIP financing does

[9] *See, e.g.*, *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986) (involving dispute over whether section 363 purchaser purchased assets in good faith).

[10] *See, e.g.*, *In re Farmland Indus., Inc.*, 294 B.R. 855 (Bankr. W.D. Mo. 2003), *appeal dismissed*, No. 03-00472 (W.D. Mo. Jan. 9, 2004) (approving comprehensive DIP financing amendment with sale milestones over objection of creditors' committee and ad hoc group of noteholders as proper exercise of debtors' business judgment, noting court should interfere with the debtor's judgment "only if it is made clear that those decisions are, *inter alia*, clearly erroneous, made arbitrarily, are in breach of the officers' and directors' fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code"); *In re FCX, Inc.*, 54 B.R. 833 (Bankr. E.D.N.C. 1985) (approving DIP financing and cash collateral order that included cross-collateralization of prepetition and postpetition debt of DIP lender after making modifications already addressed in the Proposed Final Order); *In re Defender Drug Stores, Inc.*, 145 B.R. 312 (B.A.P. 9th Cir. 1992) (affirming decision to approve payment to DIP lender in exchange for extension of DIP maturity).

[11] *See, e.g.*, *In re Laffite's Harbor Dev. I, LP*, 2018 WL 272781 (Bankr. S.D. Tex. Jan. 2, 2018) (denying proposed nonconsensual priming DIP financing, stating that "Debtors did not make even a rudimentary effort to comply with section 364(d)(1)"); *In re Mid-State Raceway*, 323 B.R. 40 (Bankr. N.D.N.Y. 2005) (approving working capital DIP financing agreement provided by shareholder that permitted DIP lender right to appoint CEO and two directors, but denying other documents locking in plan terms, including debt-for-equity conversions, as part of cram-down plan); *In re Tenney Village Co.*, 104 B.R. 562 (Bankr. D.N.H. 1989) (denying DIP financing based on, among other things, (i) waiver and release of all challenges to prepetition liens and claims as well as lender liability, avoidance and other claims prior to creditors' committee retaining counsel and (ii) delegation of virtually all operational control to the DIP lender, including appointment of CEO).

not impose the kinds of core restructuring terms that are ordinarily found in a plan of reorganization.

11. Similarly, in *Mid-State Raceway*, the court approved a working capital DIP loan even though it gave the lender the right to appoint a CEO and two directors, noting that even that level of control was a "reasonable quid pro quo." *In re Mid-State Raceway*, 323 B.R. 40, 62 (Bankr. N.D.N.Y. 2005). What the court refused to approve were two other financing arrangements—a capital improvement loan and a post-confirmation loan—that again imposed specific core terms and conditions of a plan of reorganization, including converting the DIP loans to a controlling equity stake in the reorganized company, distributing reorganized equity to the prepetition shareholders and cramming down the prepetition secured lender. *Id.* Here, the Agent is not seeking to circumvent the plan process by imposing plan terms in the DIP financing; there is no equity grant; there is no cram-down.

12. *In re Tenney Village* had similarly egregious facts. There, the New Hampshire bankruptcy court denied a DIP financing proposal because of the extreme operational control it would have bestowed upon the DIP lender. *In re Tenney Village Co., Inc.*, 104 B.R. at 567 (Bankr. D. N.H. 1989). If approved, the proposed DIP financing would have, among other things, (i) given the DIP lender absolute consent rights over all planned business improvements and marketing plans and (ii) required all debtor work to be done under the direct supervision of the DIP lender's consultant. *Id*. at 568. "[T]he [DIP lender] would in effect operate the Debtor's business." *Id*. The Agent and ABL Lenders play no such role here; rather, the DIP ABL facility is a classic asset-based lending structure.

13. Furthermore, the case upon which the Committee relies for the standard it asks this Court to apply, *In re Farmland Industries*, actually contradicts the Committee's position and lends

support to final approval of the DIP financing in this case. In *Farmland*, the court approved a comprehensive amendment to a previously authorized DIP financing agreement; the amendment, among other things, reduced the debtor's borrowing capacity and imposed milestones for the debtors to market and sell their assets that the creditors' committee claimed were too stringent. *In re Farmland Industries*, 294 B.R. 855, 861 (Bankr. W.D. Mo. 2003). The court found that the debtors exercised sound, reasonable business judgment in entering into the amendment and that the amendment was fair, reasonable, necessary and in the best interests of the estate. *Id.* at 881-89. The court was satisfied by the Debtors' business judgment "even if it meant being saddled with some things they would not like" because "a public fight over their financing—and whether it was about to be terminated—would seriously damage their relationships with their customers and suppliers." *Id.* at 882. In its opinion, the court acknowledged that "the DIP Lenders drove a hard bargain"—but "debtors may have to enter into hard bargains to acquire (or continue to receive) the funds needed for reorganization." *Id.* at 885-86. The court further reasoned that while certain terms of the amendment "might appear to be extreme or even unreasonable" in isolation, "taken in context, and considering the relative circumstances of the parties," the amendment as a whole was reasonable. *Id.* at 886. The same rationales apply here. The Debtors have exercised their business judgment to obtain fair, reasonable and necessary financing that is in the best interests of the estates. DIP financing requires hard bargains made by all parties and, in this case, involved concessions by both the Debtors and the ABL Lenders.

14. Based on the foregoing, the present DIP financing package was, and remains, the Debtors' best financing option to maximize the value of the Debtors' assets and should be approved on a final basis as set forth in the Proposed Final Order.

II. The Contemplated Refinancing of the Prepetition ABL Obligations With DIP Term Loan Proceeds is an Indispensable Component of the DIP Financing Negotiated With the ABL Lenders and Is In the Best Interests of the Debtors' Estates.

15. The DIP financing package provided by the ABL Lenders and KPS plainly satisfies the requirements of section 364. As described in detail above and in the Debtors' reply, the Debtors' DIP financing came after extensive prepetition solicitation efforts and remains, one month into these cases, not only the best available financing option for the Debtors, but the only one available to continue to fund these cases. *See* Lewis Decl., ¶ 34 ("The DIP Facilities, including the Roll-Up, are the Debtors' best and only postpetition financing option."). The Objecting Parties tellingly do not—and cannot—dispute this fact. Rather, they attempt to shift attention to the possibility of a theoretical future noteholder-led DIP term loan on substantially similar terms that has not materialized to date despite the noteholders being organized, represented by legal and financial advisors and engaged with the company for months now. *See* Peluchiwski Decl., ¶ 13. The mere assertion of another party "working towards formulating a competing DIP facility," particularly as we approach the one month anniversary of these cases, respectfully cannot override the compelling evidence presented by the Debtors that the current DIP financing is the best—and still only—option available to finance these cases in a responsible manner. *See In re ION Media Networks, Inc.*, 2009 WL 2902568, at *2 (Bankr. S.D.N.Y. July 6, 2009) (denying motion for reconsideration after approving a DIP where a third party, two days ***before*** the final hearing, proposed a DIP alternative that "was subject to satisfactory completion of certain diligence"; "[r]elevant features of the financing must be evaluated, including non-economic elements such as the timing and certainty of closing") (emphasis added).

16. The evidence is clear and compelling that the Debtors exercised prudent business judgment in entering into the current DIP financing arrangements and that the terms thereof—including the proposed refinancing of the remaining prepetition ABL obligations—taken as a

whole are in the best interests of the Debtors' estates. The ABL DIP facility, in particular, has provided, and will continue to provide, the Debtors substantial value, including:

- $412.5 million of commitments (subject to a reduction to $350 million upon entry of the final DIP order), including $73 million of new money commitments that were projected to be required in the first month of these cases to bridge the Debtors to the final DIP order;
- a 5.25 percent reduction in interest rate between what the Debtors would otherwise have been required to pay on prepetition ABL obligations and what they are required to pay on DIP ABL loans;
- fully functioning ABL facilities in both the U.S. and Switzerland that permit the Debtors to borrow, repay and reborrow DIP ABL loans, including with proceeds of the DIP term loan, which permits the Debtors to further reduce interest expense in these cases;
- a forbearance on the ABL Lenders' rights to take direct enforcement action against the assets of the Debtors' valuable Swiss and Australian non-Debtor subsidiaries based on continuing events of default under the prepetition ABL credit agreement; and
- the other tangible and intangible commercial benefits of the Debtors having the support and commitments of their secured lenders and avoiding protracted litigation at the outset of the cases concerning priming, adequate protection and the like.

17. The Objecting Parties are happy to reap the benefits provided by the ABL Lenders to date but ask this Court to now prohibit the Debtors from following through on the agreed-upon refinancing of the remaining outstanding prepetition ABL obligations that is at the very core of the bargain struck with the ABL Lenders. Such outcome is not legally justified and is fundamentally unfair.

18. Additionally, the ABL Lenders are oversecured. Using postpetition loans to repay an oversecured prepetition creditor that stands to receive payment in full will not harm the Debtors' estates and other creditors. Under such circumstances, the refinancing merely affects the timing, not the amount or certainty, of the ABL Lenders' recovery. Additionally, because the evidence shows, and no party disputes, that the ABL Lenders are oversecured, the refinance is a net neutral for the Debtors' estates.

19. Refinancings and "roll-ups," particularly involving ABL facilities, are frequently approved in this district and around the country. *See* DIP Motion, ¶ 60 (listing cases); *see also In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 510-11 (Bankr. D. Del. 2010) ("[P]repetition secured claims can be paid off through a 'roll-up,'" and "[t]here is no per se rule against paying pre-petition secured claims outside of a plan of reorganization. Indeed, such payments are routinely made in a number of different contexts."). The facts of this case are at least as compelling as those present in the other cases in which refinancings and roll-ups have been approved.

20. The Committee's cited cases, on the other hand, are not persuasive (and are either misleading or not applicable). The Committee's first case, *New World Pasta,* does say roll-up provisions "have the effect of improving the priority of a prepetition creditor." But the court's comment is in passing and in a footnote, and the financing at issue did not even involve a roll-up. *Official Comm. of Unsecured Creditors of New World Pasta Co. v. New World Pasta Co.*, 322 B.R. 560, 569 (M.D. Pa. 2005) ("These analogies [to roll-ups and cross-collateralization] have little relevance to the instant case."). Rather, that case involved the wholly unrelated issue of whether a DIP financing covenant prohibiting the debtor from proposing any reorganization plan without the consent of the DIP lender constituted a lock-up agreement that was prohibited by sections 1126 and 1129 of the Bankruptcy Code. *See id.* at 566-72.

21. The Committee's next case, *Tenney Village,* is cited for the proposition that section 364 "does not authorize … administrative expense priority for prepetition debt." *See* Committee Obj., ¶ 37. However, this ruling was based on the proposed cross-collateralization (which is not what is happening in this case) "attempt[ing] to give administrative expense priority to the *unsecured* portion of the [bank's] pre-petition debt." *In re Tenney Vill. Co., Inc.*, 104 B.R. 562, 570 (Bankr. D.N.H. 1989) (emphasis added). Here, the evidence shows, and the Committee

concedes in its Objection (*see* ¶ 3 thereof), that the prepetition ABL Lenders are oversecured and are being refinanced by a third-party junior lender rather than attempting to cross-collateralize their prepetition and postpetition debt. *See* Lewis Decl., ¶ 33.

22. The Committee's other three cases, *Saybrook*, *Monach* and *Vanguard*, are all cited with parentheticals involving cross-collateralization. But as the Committee's own case explains, cross-collateralization is not the same as a roll-up let alone the contemplated refinancing by a third-party junior DIP lender here. *See New World Pasta*, 322 B.R. at 569 ("[C]ross-collateralization is where a lender seeks to use postpetition assets to secure prepetition loans, whereas a roll-up is where prepetition claims are transformed into postpetition, administrative expenses."). These cases are at best not relevant, and at worst misleading; the DIP financing here contemplates that upon entry of the Proposed Final Order, all prepetition obligations will be refinanced and paid off. Cross-collateralization between the ABL Lenders' prepetition and postpetition obligations is not contemplated.

23. The Committee also opposes a refinancing here because it claims it would (i) "ensure an administratively insolvent estate if the Debtors deviate from the case strategy articulated by the ABL Lenders (and KPS)," (ii) eliminate defects in the ABL Lenders' prepetition collateral package and (iii) prevent a "cram-down" of the ABL Lenders' outstanding prepetition claims. The first two assertions are just flat wrong, and the "cram-down" argument cannot overcome the Debtors' prudent exercise of business judgment in agreeing to the refinancing as part of the broader DIP financing package based on the facts at play here. The contemplated refinancing has no impact whatsoever on the risk of administrative insolvency in these cases other than potentially making it less likely than the Objecting Parties' desired alternative. Whether the remaining prepetition ABL obligations are refinanced or remain outstanding, neither the

incremental funding needs of the Debtors nor the total amount of secured debt with either DIP or adequate protection superpriority administrative claims materially changes. What would change for the worse, however, is the administrative costs of these cases between higher interest costs, the need to find alternative DIP financing, the loss of the current ABL facility mechanics and any litigation relating to the foregoing.

24. Likewise, the contemplated refinancing would not eliminate any defects in the ABL Lenders' prepetition collateral package if any were to exist. To the extent that the ABL Lenders' prepetition liens or claims are successfully challenged, the Proposed Final Order makes clear that this Court will retain the ability to fashion an appropriate remedy notwithstanding approval of the refinancing today. *See* Proposed Final Order, ¶ 10(c).[12]

25. The Committee's last argument, that the contemplated refinancing should be denied because it would disable a "cram down" of the ABL Lenders' prepetition claims, should be rejected. The Agent does not dispute that refinancing the prepetition ABL obligations would remove the possibility of those claims being subject to "cram down" in these cases, but submits that preserving such right does not come close to outweighing the substantial value provided to the Debtors' estates by the current DIP financing package.

26. The prospect of a "cram-down" plan in these cases is highly speculative (if not theoretical) and, if pursued, would be contrary to the best interests of the Debtors' estates. At

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[12] Paragraph 10(c) of the Proposed Final Order provides, in pertinent part: "In the event that (i) there is a timely successful challenge to the repayment of the Prepetition ABL Obligations pursuant to this Order based on a successful challenge to the validity, enforceability, extent, perfection, or priority of the Prepetition ABL Obligations or the liens securing the same and (ii) such challenge has been deemed successful and approved by a final non-appealable order, then pursuant to and subject to the limitations contained in this paragraph 10, the Court shall have the power to unwind or otherwise modify such repayment of Prepetition ABL Obligations made before entry of such final nonappealable order (which might include the disgorgement or reallocation of interest, fees, principal, or other incremental consideration paid in respect of the Prepetition ABL Obligations or the avoidance of liens and/or guarantees with respect to the Debtors), as the Court shall determine after notice and a hearing."

present, there is no actionable proposal on the table for any competing plan, let alone a cram-down plan, that would warrant the Debtors' pursuit in lieu of the current sale strategy with a binding Stalking Horse Bid in hand and the opportunity to increase value via an auction. Even if a cram-down proposal were to emerge at some point in the future, the Debtors would need to find replacement financing now to provide a window for that possibility, would likely lose the Stalking Horse Bid and be required to pay the approximately $20 million in break-up protections, and would suffer commercial damage caused by the lack of certainty around exit. In the face of these consequences, the most likely scenario is that the Objecting Parties would have to litigate termination of the Debtors' exclusivity period to pursue such a cram-down plan which would only add to the administrative cost, delay and uncertainty of exit.

27. Separate and apart from the foregoing, any attempted cram-down of the prepetition ABL Lenders' remaining prepetition claims would surely result in extensive, costly, protracted litigation. The substantial costs of that litigation borne by the Agent and ABL Lenders would be fully reimbursable by the estates, secured under the prepetition ABL credit agreement and payable as adequate protection and/or under section 506(b) of the Bankruptcy Code. *See* 11 U.S.C. §§ 361, 363(c)(2), 363(e), 364(d)(1) and 506(b). The corresponding costs incurred by the Committee and the Debtors would also dramatically increase the administrative costs of these cases and without question render these cases administratively insolvent based on the Debtors' projections. *See* Exhibit E of Committee Obj. (updated DIP budget), at 8.

28. And even if all of these contingencies miraculously fell into place and the Objecting Parties were able to find somebody to fund the process (all of which the ABL Lenders view as highly unlikely), what would the unsecured creditors likely achieve by the preservation of this "cram-down" right? The ABL Lenders would continue to receive current payment of postpetition

interest and fees during these cases under section 506(b) of the Bankruptcy Code and/or as adequate protection. After a contested plan process, including appeals, the ABL Lenders would at worst likely receive take-back term debt in the full amount of their claims secured by a first priority lien on substantially all of the assets of the reorganized company (*i.e.*, the same collateral currently securing its prepetition claims). Importantly, this is not a case where the Committee or noteholders could reasonably expect to reduce the quantum of the ABL Lenders' debt through bifurcation of their claims followed by "cram-down." The ABL Lenders' remaining prepetition claims are by any measure oversecured today as the Committee concedes in its Objection.[13] *See* Committee Obj., ¶ 3 ("And, since the Debtors endorse the sale strategy, they will not come forward with the evidence showing enormous collateral cushion, which obviously exists…"); Lewis Decl., ¶ 33.

29. As the foregoing makes manifest, preserving the theoretical right to pursue a "cram-down" strategy at the cost of losing the current DIP financing and also potentially the Stalking Horse Bid, and damaging the business and substantially increasing administrative costs along the way, is contrary to the best interests of the Debtors' estates. The Debtors therefore exercised prudent business judgment when they determined to relinquish this theoretical and potentially value-destructive cram-down right in exchange for the substantial value provided by the current

[13] While the evidence reflects that the ABL Lenders were oversecured as of the Petition Date and remain so today, the substantial projected administrative costs of these cases even based on the current runway that the Committee claims is too short would make it impossible for the Debtors to provide adequate protection in connection with any attempt to have any replacement DIP financing "prime" the prepetition ABL claims. *See In re Swedeland Dev. Grp., Inc.*, 16 F.3d 552, 567 (3d Cir. 1994) ("Congress did not contemplate that a creditor could find its priority position eroded and, as compensation for the erosion, be offered an opportunity to recoup dependent upon the success of a business with inherently risky prospects."); *In re LTAP US, LLP*, No. 10-14125, 2011 WL 67161, at *3-4 (Bankr. D. Del. Feb. 18, 2011) (denying a motion for priming DIP financing where debtor failed to establish adequate protection) ("It has to mean something to be a fully secured lender.").

DIP financing package. The Agent respectfully submits that the Court should affirm such business judgment and reject the Objecting Parties' request to prohibit the contemplated refinancing.

III. The Various Other Customary DIP Lender Protections and Limitations on Committee Rights Subject to the Objections Should be Approved as Part of the Overall DIP Financing Package.

30. The Committee also objects to a number of specific provisions in the Proposed Final Order that are both customary for DIP financing arrangements of this type and fully justified as part of the comprehensive, fully-integrated DIP financing package that was extensively negotiated between the Debtors and the ABL Lenders. Each such objection is addressed briefly below.

A. The Prepetition ABL Lenders' Adequate Protection Package Approved Pursuant to the Interim DIP Order Should Not Be Modified.

31. The Committee raises four objections to the prepetition ABL Lenders' adequate protection package. First, the Committee requests that if the prepetition ABL obligations are ultimately determined to be undersecured, any adequate protection payments of interest and professional fees should be recharacterized and applied to the repayment of principal. *See* Committee Obj., ¶ 45. The Agent respectfully submits that the Court should not even consider this objection since (i) the Committee readily concedes in its Objection that the prepetition ABL Lenders are "obviously" oversecured,[14] (ii) adequate protection covering the interim period pursuant to the Interim DIP Order is not subject to retroactive modification under the express terms of such order[15] and (iii) there should be no remaining prepetition ABL obligations requiring

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[14] *See* Committee Obj., ¶ 3 ("And, since the Debtors endorse the sale strategy, they will not come forward with the evidence showing enormous collateral cushion, which obviously exists . . . .").

[15] *See* Interim DIP Order, ¶ 40(d) ("Adequate Protection Obligations incurred prior to the effective date of any such reversal, stay, modification, or vacatur shall be governed in all respects by the original provisions of this [Interim DIP] Order. . . .").

adequate protection following the contemplated refinancing of the prepetition ABL obligations upon entry of the Proposed Final Order. Nonetheless, in an effort to narrow the disputed issues, the ABL Lenders are willing to modify the Proposed Final Order to provide for the recharacterization of any interest and fee payments as payments of principal solely to the extent this Court were to enter a final, non-appealable order after notice and a hearing finding that the prepetition ABL obligations are undersecured and that there is insufficient diminution in the value of the prepetition ABL Lenders' interests to otherwise cover such interest and fee payments.

32. Second, the Committee requests that any and all adequate protection liens be limited to the diminution in value of the prepetitition ABL Lenders' collateral resulting from the "use, sale or lease" of such collateral with all parties' rights reserved regarding whether any collateral diminution has occurred. *See* Committee Obj., ¶ 45. The Proposed Final Order already makes clear both that (i) the prepetition ABL Lenders' adequate protection is granted pursuant to sections 361, 363(c)(2), 363(e) and 364(d)(1) of the Bankruptcy Code and (ii) such adequate protection is limited to the aggregate postpetition diminution in collateral value in an amount to be adjudicated in the future, if applicable. *See* Proposed Final Order, ¶ 20(a). To the extent that the Committee is seeking to limit such adequate protection rights to those solely under section 363(e) and not the other aforementioned sections, such objection has no basis in fact or law and should be denied.

33. Third, the Committee asserts that the adequate protection liens and administrative claims granted to the Agent and prepetition ABL Lenders should not encumber or be satisfied from proceeds of avoidance actions. There is nothing in section 361 of the Bankruptcy Code that limits the assets on which adequate protection liens may be granted, but such objection should be denied regardless for the same reasons set forth below with respect to recovery of DIP obligations from

avoidance action proceeds. *See infra* ¶¶ 35-37; *see, e.g., In re Foresight Energy LP*, Case No. 20-41308 (Bankr. E.D. Mo. Apr. 9, 2020) [ECF 267][16] (granting adequate protection lien on proceeds of avoidance actions); *In re Abengoa Bioenergy US Holding LLC*, Case No. 16-41161 (Bankr. E.D. Mo. July 14, 2016) [ECF 471] (granting adequate protection lien on proceeds of avoidance actions, despite committee's objection); *In re Arch Coal, Inc.*, Case No. 16-40120 (Bankr. E.D. Mo. Feb. 25, 2016) [ECF 415] (same).

34. Fourth, the Committee in passing takes issue with any payment of prepetition professional fees to the Agent and prepetition ABL Lenders. To the extent that any such prepetition professional fees were paid after the filing, the amount of such payment (i) was *de minimis*, (ii) represents an amount of adequate protection payment expressly permitted under section 361 of the Bankruptcy Code to the extent of diminution in value and (iii) even if returned, will be repaid in full in cash in any event pursuant to the refinancing of the prepetition ABL obligations.

B. The Agent's DIP Liens on Unencumbered Property of the Debtors, including Avoidance Action Proceeds, Should Be Approved.

35. The principal thrust of the Committee's objection here is that the Court should not permit the proceeds of avoidance actions to be a source of recovery on account of the ABL Lenders' DIP liens and claims. *See* Committee Obj., ¶¶ 34-36. The Agent disagrees. Avoidance action proceeds are property of the estate under the express terms of the Bankruptcy Code. 11 U.S.C. § 541(a)(3) ("Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title."); 11 U.S.C. § 541(a)(4) ("Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.").

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[16] All ECF cites herein refer to the accompanying case number and not the Debtors' cases.

Like all other property of the estate, proceeds of avoidance actions may be pledged to secure DIP obligations and may be used to satisfy superpriority administrative claims. *See, e.g., In re Foresight Energy LP*, Case No. 20-41308 (Bankr. E.D. Mo. Apr. 9, 2020) [ECF 267] (granting DIP lien on proceeds of avoidance actions); *In re Peabody Energy Corporation,* Case No. 16-42529 (Bankr. E.D. Mo. May 18, 2016) [ECF 544] (same); *In re Abengoa Bioenergy US Holding LLC*, Case No. 16-41161 (Bankr. E.D. Mo. July 14, 2016) [ECF 471] (granting DIP lien on proceeds of avoidance actions, despite committee's objection); *In re Arch Coal, Inc.*, Case No. 16-40120 (Bankr. E.D. Mo. Feb. 25, 2016) [ECF 415] (same); *In re Falcon Products, Inc.*, Case No. 05-41108 (Bankr. E.D. Mo. Mar. 1, 2005) [ECF 213] (granting DIP lien on proceeds of avoidance actions).

36. None of the cases the Committee cites in support of its position actually say that DIP liens cannot (or should not) encumber avoidance action proceeds. Rather, the Committee's cases involved nuanced facts and legal questions unrelated to whether avoidance action proceeds can be subject to DIP liens.[17] Furthermore, contrary to the Committee's suggestion otherwise, there is no requirement that proceeds of avoidance actions be reserved for unsecured creditors as a special class. Rather, the proceeds of avoidance actions are "for the benefit of the estate." 11 U.S.C. § 550(a). The Seventh Circuit has stated that section 550(a) does not require "that some

[17] *See In re Cybergenics Corp.*, 226 F.3d 237 (3d Cir. 2000), *rev'd en banc* 330 F.3d 548 (3d Cir. 2003) (ruling that state law fraudulent conveyance claim not sold as part of all assets sale because it belonged to creditor, not the estate, under wording of New Jersey fraudulent conveyance law); *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011) (ruling in connection with plan confirmation (and having nothing to do with DIP financing) that even creditors that did not have right to pursue avoidance actions may receive the benefit of any such actions under section 544(b) of the Bankruptcy Code); *In re Crawford*, 274 B.R. 798 (B.A.P. 8th Cir. 2002) (reversing bankruptcy court's chapter 7 decision that permitted the debtor to avoid a lien); *In re Harstad v. First American Bank*, 39 F.3d 898 (8th Cir. 1994) (ruling in context of post-confirmation adversary proceeding that debtor lacked standing to bring avoidance action because plan neither provided for debtor to retain such right nor provided that any recoveries would go to pay creditors in accordance with the plan).

benefit flow to unsecured creditors. … Section 550(a) speaks of benefit to the estate—which in bankruptcy parlance denotes the set of all potentially interested parties—rather than to any particular class of creditors." *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 293 (7th Cir. 2003) ("The estate's *ex ante* benefit is all that the statute requires. That much would be clear if the secured creditors had purchased for $30 million in cash (paid into [the] estate before [debtor's] assets were sold) the right to pursue the preference-recovery actions; it is no less clear when the incoming cash takes the form of DIP financing that is secured in part by the promise that preference-recovery actions can be used to make good any losses the secured lenders otherwise must absorb.").

37. Here, liens on avoidance action proceeds were an expressly bargained-for benefit granted to the ABL Lenders, and the Debtors determined—as fiduciaries of their estates and in their business judgment—that such liens were warranted and value-maximizing given the overall benefits of the DIP financing. Thus, the DIP Liens on avoidance action proceeds are appropriate in these cases, just as they have been in other cases. *See, e.g., In re Foresight Energy LP*, Case No. 20-41308 (Bankr. E.D. Mo. Apr. 9, 2020) [ECF 267] (granting DIP lien on proceeds of avoidance actions); *In re Peabody Energy Corporation,* Case No. 16-42529 (Bankr. E.D. Mo. May 18, 2016) [ECF 544] (same); *In re Abengoa Bioenergy US Holding LLC*, Case No. 16-41161 (Bankr. E.D. Mo. July 14, 2016) [ECF 471] (granting DIP lien on proceeds of avoidance actions, despite committee's objection); *In re Arch Coal, Inc.*, Case No. 16-40120 (Bankr. E.D. Mo. Feb. 25, 2016) [ECF 415] (same); *In re Falcon Products, Inc.*, Case No. 05-41108 (Bankr. E.D. Mo. Mar. 1, 2005) [ECF 213] (granting DIP lien on proceeds of avoidance actions).

38. The Committee's further argument that the Agent's DIP Liens should not encumber other unencumbered property should likewise be rejected for the same reasons. Unencumbered

property is still property of the Debtors' estates that is available to satisfy DIP obligations via DIP liens and superpriority administrative claims. *See supra*, ¶ 35. Notably, the Committee cites only one case in support of this aggressive position, *In re Four Seasons Marine & Cycle, Inc.*, 263 B.R. 764 (Bankr. E.D. Tex. 2001), which contains extremely distinguishable facts and in any event does not support the Committee's argument. That ruling in *Four Seasons,* a chapter 7 case (following conversion from chapter 11), did not involve a DIP financing proposal at all. *See id.* at 764. Instead, the court considered whether to grant a secured lender a replacement lien on unencumbered assets as restitution for the debtor using the secured lender's cash collateral without consent or court authority. *See id.* After expressly confirming that the grant of a replacement lien on unencumbered property is an available remedy, the court decided against granting such a lien because it would hurt the chapter 7 trustee and other creditors rather than the debtor that committed the wrong. *See id.* at 770 ("These [forms of restitution] have included the imposition of a replacement lien upon other unencumbered property of the estate. . . ."); *id.* at 771.

C. Section 506(c), Section 552(b) and Marshaling Waivers are Routinely Granted and Should be Approved in this Case.

39. The Committee contends—in one sentence, without any case law or other support—that the 506(c), 552(b) "equities of the case" and "marshaling" waivers contained in the Proposed Final Order should be stricken. These waivers are customary protections provided to prepetition secured parties and DIP lenders that are routinely approved in this district and around the country. *See, e.g., In re True Religion Apparel, Inc.,* Case No. 20-1094 (Bankr. D. Del. May 29, 2020) [ECF 278] (approving 506(c), 552(b) and marshaling waivers despite creditors' committee objection that case may be administratively insolvent); *In* re *Payless Holdings, LLC*, Case No. 19-40883 (Bankr. E.D. Mo. July 31, 2019) [ECF 1428] (approving 506(c), 552(b) and marshaling waivers despite creditors' committee objection); *In re Noranda Aluminum, Inc.*, Case

No. 16-10083 (Bankr. E.D. Mo. Mar. 11, 2016) [ECF 392] (approving 506(c), 552(b) and marshaling waivers despite creditors' committee objection); *In re Arch Coal, Inc.*, Case No. 16-40120 (Bankr. E.D. Mo. Feb. 25, 2016) [ECF 415] (approving 506(c), 552(b) and marshaling waivers despite creditors' committee objection); *In re Bakers Footwear Group, Inc.*, Case No. 12-49658 (Bankr. E.D. Mo. November 5, 2012) (approving 506(c), 552(b) and marshaling waivers); *In re Gen. Growth Properties, Inc.*, 412 B.R. 122, 127 (Bankr. S.D.N.Y. 2009) ("In light of the Lenders' agreement to subordinate their liens and superpriority claims to the Carve–Out, the Lenders are entitled to a waiver of (i) the provisions of section 506(c) of the Bankruptcy Code and (ii) any "equities of the case" claims under section 552(b) of the Bankruptcy Code, in each case, in respect of the DIP Documents.") (also approving marshaling waiver).

40. Such customary waivers should likewise be approved in this case. First, the waivers (i) were given by the Debtors in exchange for the DIP financing and all accompanying benefits, including the ABL Lenders' agreement to fund these cases in accordance with the Debtors' good-faith projections reflected in the DIP budget and to subordinate all DIP Obligations and adequate protection obligations to the Carve-Out, (ii) are an integral component of the DIP financing, and (iii) are required by the Agent and the ABL Lenders. Second, the Bankruptcy Code does not require secured lenders to, in effect, guaranty the administrative costs of a case as the Committee suggests. *See, e.g., In re Grimland, Inc.*, 243 F.3d 228, 233 (5th Cir. 2001) ("The default rule in bankruptcy is … that administrative expenses are paid out of the estate and not by the secured creditors of the debtor."). Third, the Agent and ABL Lenders worked diligently with the Debtors before the filing to support and facilitate a value-maximizing strategy (instead of liquidation) that was designed to avoid administrative insolvency. As a result, the Debtors' projections reflect administrative solvency assuming the Court approves the Proposed Final Order and bidding

procedures proposed by the Debtors. Fourth, the Committee, by asking to lengthen the proposed case timeline, is inconsistently demanding that administrative costs must increase while simultaneously complaining about the risks of administrative insolvency. *See* Committee Obj., ¶¶ 14(i), 30-33. Allowing a claimant to seek to surcharge lenders' collateral upon administrative insolvency, when the claimant itself would be the primary cause of such insolvency, is inappropriate.[18] Fifth, the fact that these cases are already close to projected administrative insolvency and the Objecting Parties are pressing for substantial additional administrative expense burn is a further reason that these waivers are absolutely critical for the Agent and ABL Lenders. *See In re Exide Holdings, Inc.*, Case No. 20-11157 (Bankr. D. Del. June 18, 2020), Hearing Transcript at p. 68 ("[Y]es, certain things are being waived like 506(c) and 552(a) … [b]ut … this is part of a global package, a not unusual global package at all for a combination of new money from an existing lender and a new lender in a borderline administratively insolvent case. I think they would be insane and commercially unreasonable if they were to lend under different terms.").

41. Additionally, the Supreme Court of the United States has held that the "trustee is the only party empowered to invoke" section 506(c). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 14 (2000) (affirming *en banc* Eighth Circuit decision). Therefore, a debtor should be permitted to waive surcharge claims in the exercise of its business judgment and in exchange for significant benefits, just as the Debtors did here. Similarly, "[u]nsecured creditors cannot invoke the equitable doctrine of marshaling," *In re Advanced Mktg.*

[18] A 506(c) waiver is particularly appropriate in a case like this where the ABL Lenders could have liquidated their collateral without impairment of their claims but instead committed to DIP financing to provide the Debtors an opportunity to pursue a value-maximizing transaction that at the very least contemplates assumption of significant unsecured claims pursuant to the Stalking Horse Bid.

Servs., Inc., 360 B.R. 421, 427 (Bankr. D. Del. 2007), because it is a protection reserved for junior secured creditors—not unsecured creditors.

42. For the foregoing reasons, the Court should approve these customary waivers rather than jeopardize the highly negotiated DIP financing package obtained by the Debtors.

D. The Committee's Challenge Period and Budget are Appropriate for These Cases.

43. The Committee's challenge deadline in the Proposed Final Order is 60 days after formation. This deadline is consistent with this Court's *Chapter 11 Guidelines* for "Cash Collateral and Financing Orders" (¶ 1(a)(ii)) (committee's challenge period should be "at least sixty (60) days from the date of its formation") and gives the Committee more than enough time to review the relatively few collateral security documents memorializing the Agent's liens under the prepetition ABL facility. The proposed $150,000 challenge budget for the Committee is likewise sufficient to complete such diligence, which should take only a few days if done efficiently.

E. The Committee's Carve-Out is More Than Sufficient and Should Be Approved.

44. The Agent believes the Committee professionals' pre-default carve-out, which includes the added protection of $175,000 per week (*i.e.*, $700,000 per month) being deposited into a professional fee reserve account and excluded from the DIP Collateral pending allowance and payment to the Committee professionals, is sufficient—and indeed generous—based on the facts and circumstances of these cases. While the Agent similarly believes that the Committee's post-default carve-out of $200,000 is sufficient, the ABL Lenders are willing to increase that cap to $350,000 to bring it proportionately in line with the post-default cap for the Debtors' professionals (*i.e.,* a two-week estimated run rate in the DIP budget). As the Debtors' DIP budget makes crystal clear, allocating materially more dollars to the Committee professionals in these

cases would constrict the Debtors' borrowing availability due to a corresponding increase in the DIP ABL carve-out reserve and could itself render the Debtors administratively insolvent absent a material shortening of the contemplated marketing/auction timeline. *See* Ficks Decl.,[19] ¶¶ 12-13. It is indeed ironic that the Committee expresses concern about administrative insolvency throughout its Objection while at the same time presses for substantially higher administrative expenses in the forms of a longer sale runway and a higher Committee carve-out.

F. The DIP Default Provisions are Appropriate.

45. The provisions relating to remedies after the occurrence of a DIP event of default contained in the Proposed Final Order are customary and should be approved. The ABL Lenders should have the right to exercise default-related rights and remedies under the DIP loan documents and final order upon the occurrence of a DIP event of default. Curtailing such rights in any way would remove a core bargained-for right that is included in almost every DIP facility and prepetition facility. The ABL Lenders should not have to bear the risk of the Debtors failing to perform an extensively negotiated obligation in the DIP documents only to have the Committee or any other party have the ability to ask this Court to require the ABL Lenders to continue to perform their obligations in the face of such default. However, the Agent is willing to accommodate the Committee's request to modify the Proposed Final Order to permit the Debtors to continue to use cash collateral in accordance with the DIP budget pending an expedited hearing before this Court on whether a DIP event of default actually occurred.

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[19] *Declaration of Jeffrey Ficks in Support of Motion of Debtors (1) for Entry of an Order (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bid Protections, (C) Scheduling Auction and Sale Hearing, (D) Form and Manner of Notice of Sale, Auction, and Hearing, and (E) Assumption and Assignment Procedures and (II) Granting Related Relief and (2) for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Superpriority Claims, (IV) Granting Adequate Protection to Prepetition Secured Parties, (V) Modifying Automatic Stay, (VI) Scheduling Final Hearing and (VII) Granting Related Relief,* filed contemporaneously herewith.

G. The ABL Lenders' Credit Bid Rights Should Not Be Subject to Later Challenge.

46. To the extent the Committee is asking the Court to permit later challenge to the ABL Lenders' right to credit bid their DIP obligations, whether for "cause" under section 363(k) or otherwise, such request should be denied. Because the remaining prepetition ABL obligations will be refinanced in full by proceeds of the DIP term loan upon entry of a final order, any objection to the prepetition ABL Lenders' go-forward credit bid rights is moot.

CONCLUSION

47. The Objecting Parties ask this Court to measure the current DIP financing arrangements against a perfect world in which all options were costless and available to the Debtors and no difficult decisions had to be made. Unfortunately the world in which we live and the company operates—particularly in the midst of a global pandemic—is far from perfect and the Debtors had to make prudent choices based on the best options available to them at the time. The Objections have not changed the uncontroverted facts that the current DIP financing was, and remains, the best—and only—financing package available to the Debtors and that the Debtors have realized, and will continue to realize, substantial value from having the DIP financing in place and finally approved. Accordingly, the Agent respectively requests that the Court deny the Objections in their entirety with prejudice and enter the Proposed Final Order in the form submitted for entry.

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Dated: August 17, 2020
St. Louis, Missouri

Respectfully submitted,

/s/ Brian C. Walsh

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August 17, 2020

/s/ Brian C. Walsh
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