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

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| In re<br><br>FULCRUM BIOENERGY, INC., *et al.*,[1]<br><br>Debtors. | Chapter 11<br><br>Case No. 24-12008 (TMH)<br><br>(Jointly Administered)<br><br>**Re: D.I. 11 & 103.** |

**REPLY IN SUPPORT OF DEBTORS' EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 AND 507 (I) AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED SUPERPRIORITY POSTPETITION FINANCING; (II) GRANTING (A) LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS AND (B) ADEQUATE PROTECTION TO CERTAIN PREPETITION BONDHOLDERS; (III) AUTHORIZING USE OF CASH COLLATERAL; (IV) SCHEDULING A FINAL HEARING; AND (V) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this reply (this "Reply") in support of the *Debtors' Emergency Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection To Certain Prepetition Bondholders; (III) Authorizing Use Of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [D.I. 11] (the "DIP Motion")[2] and in response to

[1] The debtors and debtors in possession in these chapter 11 cases, along with each debtor's federal tax identification numbers are: Fulcrum BioEnergy, Inc. (3733); Fulcrum Sierra BioFuels, LLC (1833); Fulcrum Sierra Finance Company, LLC (4287); and Fulcrum Sierra Holdings, LLC (8498). The location of the Debtors' service address is: Fulcrum BioEnergy Inc., P.O. Box 220 Pleasanton, CA 94566.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the First Day Declaration and the DIP Motion.

the *Objection of the Official Committee of Unsecured Creditors to Debtors' Emergency Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection To Certain Prepetition Bondholders; (III) Authorizing Use Of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [D.I. 103] (the "Objection") filed by the official committee of unsecured creditors (the "Committee"). In further support of the DIP Motion and this Reply, the Debtors state as follows:

## PRELIMINARY STATEMENT[3]

1. The Committee's true complaint about the DIP Financing is not about the Debtors' need for financing – this is undisputed. It is also undisputed that that there is no alternative financing available on better terms; indeed, the only available financing is from the DIP Lender.

2. The Committee obscures its actual objection until the end of its preliminary statement, where it finally states its goals and intentions in these cases: the Committee will object to the DIP financing, bidding procedures, and the sale unless the DIP Lender and the Bondholders agree to set aside funds for general unsecured creditors and confirm a plan, regardless of whether the absolute priority rule entitles general unsecured creditors to any recovery. *See* Obj. ¶ 6. As judges on this Court have said for years, it is not a requirement for a lender to make payments to unsecured creditors when they are otherwise entitled to none to access chapter 11 ("There is

[3] The Debtors, Committee, the DIP Lender and the Bondholders are in discussion to attempt to resolve the Objections raised by the Committee. Notwithstanding the filing of this Reply, the Debtors will continue to attempt to resolve all remaining Objections.

nothing that requires a buyer to pay anything to the unsecured if it feels that the enterprise does not have that value." *In re Boomerang Tube, LLC*, Case No. 15-11247 (MFW) (Bankr. D. Del. July 17, 2015) [D.I. 276], Hr'g. Tr. 105:21-06:6; "[W]e take the pre-petition capital structure as we find it. What we do care about is are we maximizing value and if the bankruptcy process is being used for the purpose of maximizing value, then that value falls the way it falls and there's nothing wrong with doing that." *In re Nova Wildcat Shur-line Holdings, Inc., et al*, Case No. 23-10114 (CTG) (Bankr. D. Del. Mar. 2, 2023) [D.I. 212], Hr'g. Tr. 87:6-21). What is required is maximizing value and that a secured creditor pay for the anticipated administrative costs of the case, which is precisely what this DIP financing does in these chapter 11 cases.

3. The Committee also complains at length about the risk of administrative insolvency. What they fail to note for the Court, however, is that the primary risk of administrative insolvency will come from the Committee's professional fees, not the Debtors' inability to pay for anticipated expenditures during the sale process. It simply cannot be the rule that the Court will refuse to approve DIP financing due to overbudget spending by the Committee's professionals, which the Debtors have no ability to control. This would be an unprecedented result that would create the wrong incentives for chapter 11 cases.

4. As detailed below, the DIP budget provides the Committee professionals with approximately 40% of the budget allocated for the Debtors' professionals (financial advisor and counsel). This is well in excess of the 25-30% "rule of thumb" that this Court has typically stated should be allocated for Committee's professionals. *See In re Nova Wildcat Shur-line Holdings, Inc., et al*, Case No. 23-10114 (CTG) (Bankr. D. Del. Mar. 2, 2023) [D.I. 212], Hr'g Tr. 87:23-88:6 (stating that it is customary and reasonable that the committee's professional fees are around a quarter of that of the debtors). In its objection, the Committee requests a budget of

$850,000 for their professionals, totaling more than 71% of the Debtors' budgeted professional fees. There is no justification for the Committee professionals incurring close to the same amount of fees as the Debtors' professionals, who have many more tasks and obligations in these chapter 11 cases.

5. Finally, as with the Committee's objections to the bidding procedures motion, the Debtors have been engaged in extensive and continuous negotiations with the Committee since their appointment, providing multiple extensions of the objection deadlines and moving the final hearing on approval of the DIP Motion for more than a week. During this time, the Debtors, the DIP Lender, and the Bondholders have incorporated language into the final DIP order to address many of the Committee's complaints, as set forth in the final DIP order attached to this Reply as **Exhibit A**. With respect to the remaining objections, the provisions of the final DIP order are market, reflect a package financing from the DIP Lender, and are a sound exercise of the Debtors' business judgment.

6. For the reasons set forth herein, the Objection should be overruled, and the DIP Motion should be approved.

## REPLY

### I. The Estates are Administratively Solvent.

7. Much of the Committee's objection focuses on the assertion that the DIP Facility does not provide sufficient funds to ensure administrative solvency. Obj. ¶ 14. This is incorrect. The carefully negotiated DIP budget and revised DIP budget (the "Revised Budget"), attached hereto as **Exhibit B** covers all anticipated administrative expenses that the Debtors predict, plus an appropriate budget for the Committee's professionals. Under the Revised Budget, the DIP Lender continues to provide up to $5 million dollars of DIP funding, and they have further

consented to the Debtors using the savings the Debtors have been able to achieve to pay for all expected administrative costs through a sale.

8. Contrary to the Committee's statement, in no way are the DIP Lender and the Bondholders getting a "free option" to run a sale process. *See* Obj. ¶¶ 15, 17. Upon final approval of the DIP Financing, the DIP Lender will be committed to extending up to $5 million dollars of new money financing and the Bondholders have consented to the priming of their liens with this loan. Every dollar spent – including the fees of the Committee's professionals – erodes the collateral base of the Bondholders. There is no "free option" being given here.

9. The only potential administrative cost that may not be covered by the Revised Budget is if the Committee incurs an excessive amount of professional fees. None of the cases cited by the Committee supports the proposition that a DIP lender must ensure that every dollar incurred by the Committee professionals must be paid. For example, in both *In re Allen Family Foods Inc*., Case No. 11-11764 (KJC) (Bankr. D. Del. Aug. 2, 2011), and *In re Townsends Inc., et al*., Case No. 10-14092 (CSS) (Bankr. D. Del. Jan. 21, 2011), this Court commented about administrative solvency related to the payment of section 503(b)(9) claims, which do not exist in these cases. Nowhere did these courts say that for a DIP loan to be approved it must cover any and all fees incurred by committee professionals.[4]

10. The Debtors were very mindful when selecting their professionals and negotiated hard to ensure that the fees of Development Specialists, Inc. ("DSI"), the Debtors' investment banker, were the lowest possible while still ensuring that a qualified investment banker would conduct the sale process. Indeed, even though DSI is pursuing a dual role of investment

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[4] Here, the Committee retained more professional firms than the Debtors (3 sets for the UCC and 2 for the Debtors), which also increases the Committee's fees.

banker and financial adviser, its budgeted fees are less than what is budgeted for the Committee's financial advisor. The Court should require the Committee to utilize the same discipline. The Committee's professionals are well respected and experienced, but also are expensive. The decision to retain them was the Committee's prerogative, but that choice has a consequence – their higher rates will consume their budgeted fees more quickly than less expensive options.

11. As stated above, it simply cannot be that the Committee can cause administrative insolvency through their professionals' fees and then use that outcome to defeat financing that no party disputes the Debtors desperately need and is the only option available. Establishing this unprecedented rule would create only the wrong incentives in chapter 11.

## II. There is No Rule that Lenders Must Provide for a Recovery to Unsecured Creditors if the Value of the Debtors' Assets are Less than the Secured Debt.

12. The Committee demands that the DIP Lender and the Bondholders not only cover the administrative costs of the sale process, but also provide funding to pay for confirmation of a liquidating plan and "carve-out" a recovery for unsecured creditors. Of course, these are all laudable goals and the Debtors hope that the sale process results in bids with sufficient value that may enable such a result. It is not, however, a legal *requirement* that access to chapter 11 is contingent upon the existence of these items and, of course, the Committee cites no legal authority for its demands. *See* Obj. ¶18.

13. To the contrary, the case law in this District has been consistent over the decades that this is *not* a requirement. For example, in *Boomerang Tube*[5], Judge Walrath ruled that "[t]here is nothing wrong with the DIP that's paying only for a sale process or a process where the result will be the DIP lenders will end up owing the company. There's nothing that requires a

[5] The excerpt from the transcript is attached hereto as **Exhibit C**.

buyer to pay anything to the unsecured if it feels that the enterprise does not have that value." Case No. 15-11247 (MFW) (Bankr. D. Del. July 17, 2015) [D.I. 276], Hr'g. Tr. at 105:21-06:15.

14. Judge Goldblatt issued a similar ruling in *In re Nova Wildcat Shur-line Holdings, Inc., et al.*[6], stating "I am not one who believes that there necessarily needs to be a recovery for unsecured in order to legitimately invoke the bankruptcy process. I think that we take the pre-petition capital structure as we find it. What we do care about is are we maximizing value and if the bankruptcy process is being used for the purpose of maximizing value, then that value falls the way it falls and there's nothing wrong with doing that. On the flip side, if you're a secured creditor and want to invoke the bankruptcy process for the purpose of what will likely be maximizing the value of your collateral, you don't get to impose the costs of that on other people. So, you've got to pay the freight associated with running a process that will maximize your value. And that includes paying the expected administrative expenses and the administrative expenses include reasonable committee fees." Case No. 23-10114 (CTG) (Bankr. D. Del. Mar, 2, 2023) [D.I. 212], Hr'g. Tr. 87:6-21.

15. In *In re NEC Holdings Corp., et al.,*[7] Judge Sontchi ruled the same: stating, "I generally have held in the past that you can run a case for the benefit of a secured creditor. It's the crime of having collateral that some people seem to say that they can't. They've got to pay the freight, and the freight is, at least -- the freight is not necessarily a tip to the unsecureds, but the freight is certainly an administratively solvent estate. And while there's not a guarantee, there has to be something other than a wing and a prayer on the payment of the admin claims. . . It doesn't

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[6] The excerpt from the transcript is attached hereto as **Exhibit D**.

[7] The excerpt from the transcript is attached hereto as **Exhibit E**.

need to be in the DIP budget, necessarily, but there has to be something – and again, not a *guarantee*, but something, some evidence that there's a possibility – probability that they'll be paid." Case No. 10-11890 (CSS) (Bankr. D. Del. July 13, 2010), [D.I. 224], Hr'g. Tr. 100:12-101:6.

16. The Debtors will present evidence to the Court at the hearing that the Revised Budget approved by the DIP Lender and the Bondholders does precisely this – provides for the payment of expected administrative expenses but does not guarantee a tip to unsecured creditors.

17. The Committee's objection that the DIP Financing should be denied unless there is a gift for its constituency should be overruled.

## III. The Lien Package for the DIP Lender and the Bondholders is Appropriate.

### A. The (i) Bankruptcy Code Explicitly Authorizes the Debtor to Grant Liens on Previously Unencumbered Assets and (ii) the DIP Lender Has Granted the Committee a Carve-out.

18. First, the Committee's objection to liens on the proceeds of avoidance actions is moot given that the DIP Lender and the Bondholders have agreed to not seek liens on avoidance actions. *See* Final DIP Order at § 2.2.

19. With respect to other unencumbered assets, which the Debtors believe is limited to commercial tort claims, at least presently the Debtors are not presently aware of any such claims. That said, the practical impact of a lien on commercial tort claims is minimized due to (a) the fact that the DIP Lenders' liens will be extinguished through their successful credit bid or overbid, and (b) at the request of the Committee, the DIP Lenders and the Bondholders have agreed to "soft-marshal" against such assets, covenanting to look to other collateral before seeking recovery against commercial tort claims.

20. Notwithstanding, liens on commercial tort claims are permissible where, as here, the liens are the subject of a heavily negotiated financing package that will fund these chapter 11 cases and there is no alternative financing available that does not seek liens on such assets. *See* 11 U.S.C. § 364(c)(2). It is typical and customary for a secured creditor to receive superpriority claims and liens on all assets if, without such DIP Liens on otherwise unencumbered assets, the DIP lender is otherwise unwilling to provide post-petition financing. *See e.g.*, *In re Timber Pharm., Inc*., Case No. 23-11878 (JKS) (Bankr. D. Del. Dec. 15, 2023) [D.I. 125] at ⁋ 5 (the DIP lender is granted superpriority claims and liens on DIP collateral, including but not limited to commercial tort claims); *In re Yellow Corp*., Case No. 23-11069 (CTG) (Bankr. D. Del. Sept. 15, 2023) [D.I. 571] at ⁋⁋ 7-8 (the DIP lender is granted superpriority claims and liens on unencumbered properties that included all tangible and intangible prepetition and postpetition property of the DIP loan parties); *In re Western Global Airlines, Inc*., No. 23-11093 (KBO) (Bankr. D. Del. Sept. 12, 2023) [D.I. 236] at ⁋ 9 (DIP secured parties are granted superpriority claims and liens on all unencumbered assets)*; In re Southcross Energy Partners*, Case No. 19-10702 (MFW) (Bankr. D. Del. May 7, 2019) [D.I. 200] at ⁋ 8 (DIP lender is granted superpriority claims and liens on unencumbered properties, including but not limited to commercial tort claims); *In re Avenue Stores*, Case No. 19-11842 (LSS) (Bankr. D. Del. Aug. 13, 2019) [D.I. 223] at ¶ II(A) (same); *In re Emerge Energy Services*, Case No. 19-11563 (KBO) (Bankr. D. Del. Aug. 14, 2019) [D.I. 209] at ¶ 13 (same).

21. The Debtors were on the verge of a chapter 7 filing when the DIP Lender and the Bondholders handed this case a "lifeline." *In re Fulcrum BioEnergy, Inc., et al*., Case No. 24-12008 (TMH) (Bankr. D. Del. Sept. 12, 2024), Hr'g Tr. 6:6-19. The granting of DIP liens to the DIP Lender and adequate protection liens to the Secured Bondholders on previously

unencumbered assets was negotiated in good faith and at arm's length, as is typical for DIP loans under the Debtors' circumstances. The encumbrance of commercial tort claims and their proceeds were an essential component to obtaining post-petition financing and it is this financing that allows the Debtors to run a sale process to maximize recoveries for their stakeholders. The Committee's objection should be overruled.

## IV. A Superpriorty Claim at Fulcrum Parent is Appropriate Because the DIP Financing Allows for a Sale of Fulcrum Parent's Assets.

22. As explained at the First Day Hearing, the funding being provided by the DIP Lender and the Bondholders to conduct the sale process provides the ability to sell the assets of Fulcrum Parent and Fulcrum Parent's lenders have refused to provide any funding for a sale of their assets,[8] yet the DIP Lender and the Bondholders agreed to do so at the Debtors' request as some potential bidders had stated that they would only bid for all of the Debtors' assets, not only the project company's assets. This sale process benefits Fulcrum Parent's creditors, justifying the superpriority claims at that entity. Absent such a claim, creditors of Fulcrum Parent would be receiving a "free ride" on the DIP financing and, as such, the superpriority claim should be approved.

## V. The Milestones in the DIP Terms are Reasonable under the Circumstances.

23. The milestones in the DIP Financing are reasonable under the circumstances and allow for a thorough sale process designed to maximize bids and value for the Debtors' assets.

24. Under the DIP, an auction must be held no later than sixty (60) days after the Petition Date, and an order approving the sale shall be entered no later than sixty-five (65)

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[8] As previously explained to the Court, the Debtors refused to grant any DIP lien or adequate protection liens at Fulcrum Parent and limited the DIP Lender and the Bondholders to an unsecured superpriority claim at that entity.

days. Although of course, the Debtors would prefer additional time, faced with no funding other than the DIP financing and an extensive prepetition marketing process, the timeline is reasonable and should be approved as a reasonable exercise of the Debtors' business judgment. *See In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. De. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of a lender." Further, under the business judgment rule, "courts will not second-guess a business decision so long as the management exercised a minimum level of care in arriving at the decision."); *In Spansion, Inc*., 426 B.R. 114, 140 (Bankr. D. Del. 2010) ("It is not appropriate to substitute the judgment of the objecting creditors over the business judgment of the Debtors."); *In re AbitibiBowater Inc*., 418 B.R. 815, 831 (Bankr. D. Del. 2009) (In determining whether the Debtors have exercised sound business judgment in selecting the DIP Facility, a court need only "examine whether a reasonable business person would make a similar decision under similar circumstances.").

25. Further, courts in this District have approved sale processes that were on similar, and indeed shorter timelines under appropriate circumstances. *See In re iSun Inc., et al*., Case No. 24-11144 (TMH) [D.I. 183] (the Court approved a sale process of fifty-one (51) days) ; *In re Amerimark Interactive, LLC*, Case No. 23-10438 (TMH) [D.I. 146] (the Court approved a sale process of forty-one (41) days) ; *In re HyLife Foods Windom LLC*, Case No. 23-10520 (TMH) [D.I. 114] (the Court approved a sale process of twenty-nine (29) days); *In re MediaMath Holdings, Inc*., Case No. 23-10882 (LSS) [D.I. 187] (the Court approved a sale process of forty-nine (49) days); *In re Independent Pet Partners Holdings, LLC*, Case No. 23-10153 (LSS) [D.I. 187] (the Court approved a sale process of forty-three (43) days); *In re Sientra, Inc.*, Case No. 24-10245 (JTD) [D.I. 123] (the Court approve a sale process of forty-three (43) days); *In re Tricida, Inc*., Case No. 23-10024 (JTD) [D.I. 100] (the Court approved a sale of process of thirty-five (35)

days); *In re Structurlam Mass Timber U.S., Inc*., Case No. 23-10497 (CTG) [D.I. 87] (the Court approved a sale process of thirty-three (33) days); *In re Express, Inc*., Case No. 24-10831 (KBO); *In re Casa Systems, Inc*., Case No. 24-10695 (KBO) [D.I. 427] (the Court approved a sale process of fifty-one (51) days); *In re Supply Source Enterprises, Inc*., Case No. 24-11054 (BLS) [D.I. 173] (the Court approved a sale process of forty-nine (49) days); *In re 99 Cents Only Stores LLC*, Case No. 24-10719 (JKS) [D.I. 463] (the Court approved a sale process of forty-five (45) days); *In re Timber Pharmaceuticals, Inc.*, Case No. 23-11878 (JKS) [D.I. 126] (the Court approved a sale process of sixty-three (63) days). Here, moreover, the Stalking Horse Bidder and the DIP Lender is not an insider but is a true third-party new money lender. All of the typical concerns over a rushed sale to an insider that would give that insider an unfair advantage over other bidders are simply not present.

26. Additionally, the Committee's request for a thirty (30) day extension of the sale process fails for the simple reason that the Debtors do not have funding for this extension. The Committee has not come to the Debtors with alternative DIP financing that would fund this extension and no such financing exists.

27. The Committee attempts to overcome these facts by repeatedly stating that the Debtors have not commissioned a separate valuation of their assets. Respectfully, this argument makes no sense. *See* Obj. ¶ 28.

28. The entire point of a marketing and sale process is to allow the "market" to set the value of the assets, not a paid expert. Indeed, in numerous valuation disputes, courts in this District have stated that an expert's valuation is less reliable than a true market test, which is precisely what the Debtors are seeking to do here. *See VFB LLC v. Campbell Soup Co.,* 482 F.3d 624, 632-33 (stating that "absent some reason to distrust it, the market price is 'a more reliable

measure of the stock's value than the subjective estimates of one or two expert witnesses,'" quoting *In re Prince*, 85 F.3d 314, 320 (7th Cir. 1996)); *In re Samson Res. Corp.,* No. 15-11934 (BLS), 2023 WL 4003815, at *1 (Bankr. D. Del. June 14, 2023) ("It is black letter law in this Circuit that the gold standard for determining the value of an asset is to sell it in an open and fair market. A thing is worth what a willing buyer will pay to a willing seller following a proper marketing process."), *cert. denied*, No. 15-11934 (BLS), 2024 WL 2390401 (Bankr. D. Del. May 23, 2024); *In re Horsehead Holding Corp., et al.,* Case No. 16-10287 (CSS) (Bankr. D. Del. Sept. 2, 2016) [D.I. 1640], Hr'g. Tr. 7:22–8:7 (stating that allowing a market check would have provided evidence other than expert valuation testimony that the Court could reply on); *In re Allonhill, LLC*, Case No. 14-10663 (KG), 2019 WL 1868610, at *1 (Bankr. D. Del. Apr. 25, 2019), *aff'd in part, remanded in part*, No. 13-11482 (KG), 2020 WL 1542376 (D. Del. Mar. 31, 2020) (confirming the Court's previous view that a "market test – reflecting the actual price a willing buyer agrees to pay – is the best determination of fair market value," and a thorough and arm's length market test is the best evidence of fair market value at the time of a § 363 sale).

29. Here, the Debtors will achieve the "market" price for their assets through the proposed sale process. The Debtors' assets were marketed extensively prepetition and with the assistance of DSI, the Debtors continue to extensively market their assets postpetition. As of the date of this Reply, DSI has contacted approximately two hundred and five (232) potential purchasers, which includes any party that engaged with the Debtors or RPA prepetition, and nineteen (22) of those parties have requested or executed a NDA in order to conduct due diligence. Additionally, four (4) parties have conducted site visits at the Sierra Plant with three (4) visits scheduled in the coming days. DSI also submitted a teaser to (i) BioMass Magazine, which was sent to 78,403 entities and individuals via email, 12,361 of which were opened and 1,577 interacted

with the linked material; (ii) SAF Magazine, which was sent to 159,902 entities and individuals via email, 26,292 of which were opened and 550 interacted with the linked material; and (iii) the bid solicitation notice was advertised on the Daily DAC and National Law Review websites for three concurrent weeks commencing on September 19, 2024 and the sale has been exposed to over 38,800 individuals and 392 interacted with the linked material.

30. For the reasons stated above, the Objection should be overruled.

## VI. The Waivers of Sections 506(c) and 552(b) of the Bankruptcy Code are Warranted.

### A. The Section 506(c) Waiver is Appropriate.

31. The Committee also objects to the Debtors' waiver of their section 506(c) surcharge rights. Obj. ¶ 32. Section 506(c) of the Bankruptcy Code provides a debtor the right to "recovery from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of" such property. 11 U.S.C. § 506(c). Section 506(c) claims are available to, and are an asset of, the Debtors, and not any other party in interest. *See In re Smart World Techs., LLC*, 423 F.3d 166, 181-82 (2d Cir. 2005) ("Section 506(c) … allows only the 'trustee' or debtor-in-possession, to take advantage of this exception … § 1109(b) does not entitle parties in interest, such as [the debtor]'s creditors, to usurp the debtor-in-possession's role as legal representative of the estate.").

32. Additionally, a section 506(c) waiver is appropriate where, as here, a secured creditor has agreed to pay, from its collateral, estate administrative costs and subordinate its liens to the carve out for professional fees and other administrative expenses, as the DIP Lenders and Bondholders have done here. *See, e.g.*, *In re Mineral Park, Inc.*, Case No. 14-11996 (KJC) (Bankr. D. Del. Sept. 23, 2014), Hr'g Tr. 43:10–12 (overruling the committee's objection and stating "given what [the secured lenders are] funding, I think [they've] paid for a 506(c) waiver

and I would be willing to grant it"); *In re MPM Silicones, LLC*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. May 23, 2014), Hr'g Tr. 58:11–12; 93:12–20, (where a carve-out is provided, a 506(c) waiver is often an "acceptable trade-off").

33. Further, it is well-established that the right to waive the 506(c) surcharge is within a debtor's discretion. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (holding that only a trustee or a debtor in possession may seek recovery under section 506(c)). The Debtors have the sole authority and discretion to waive such rights, and the Debtors believe that such waiver is justified in light of the facts and circumstances of these cases. The DIP Lenders or the Bondholders would not have agreed to provide the DIP Loan nor consented to the Debtors' continued use of Cash Collateral without a section 506(c) waiver, and the Debtors determined, in their business judgment, that such a waiver was reasonable and appropriate in light of the considerable benefits arising from the DIP Facility and consensual use of cash collateral.

B. The 552(b) Waiver is Reasonable and Appropriate.

34. The Committee also objects to the Debtors' agreement to waive the "equities of the case" exception under section 552(b) of the Bankruptcy Code. *See* Obj. ¶¶ 35-36. The Debtors believe that such waiver is reasonable and appropriate in light of the circumstances of the chapter 11 cases. Section 552(b) of the Bankruptcy Code generally ensures that an entity's prepetition security interest in the proceeds of collateral extends to such proceeds acquired postpetition, subject to a limited exception from this general rule to the extent that the "equities of the case" so require. *See* 11 U.S.C. § 552(b)(1).

35. This exception has been found to be inapplicable where the secured creditor possesses a lien over substantially all the debtor's assets such that any appreciation in estate assets will almost necessarily originate from the use of the lender's cash collateral. *See Muma Servs.*

*Inc.*, 322 B.R. 541, 559 (Bankr. D. Del. 2005). Here, the Debtors have stipulated (subject to the challenge period under the DIP order) that the Bondholders have liens in substantially all of the Debtors' assets. Moreover, there has been no showing by the Committee that the Bondholders will obtain a windfall as a result of this waiver.

36. Further, in cases where secured parties have agreed to subordinate their claims to a carve-out and have agreed to be primed by substantial postpetition financing—as the Bondholders have done here—courts in this District routinely have approved waivers of the "equities of the case" exception as part of adequate protection packages. *See, e.g., In re Never Slip Holdings, Inc*., Case No. 24-10663(LSS) (Bankr. D. Del. Apr. 26, 2024) [D.I. 133] (approving waiver of section 552(b) "equities of the case" exception upon entry of the final order); *In re Joann Inc*., No. 24-10418(CTG) (Bankr. D. Del. Apr. 12, 2024) [D.I. 224] (same); *In re Lucky Bucks, LLC*, Case No. 23-10758 (KBO) (Bankr. D. Del. July 14, 2023) [D.I. 169] (same); *In re DeCurtis Holdings, LLC*, Case No. 23-10548 (JKS) (Bankr. D. Del. June 23, 2023) [D.I. 285] (same); *In re Plastiq Inc*., Case No. 23-10671 (BLS) (Bankr. D. Del. June 22, 2023) [D.I. 138] (same); *In re Christmas Tree Shops, LLC*, Case No. 23-10576 (TMH) (Bankr. D. Del. June 5, 2023) [D.I. 229] (same); *In re Structurlam Mass Timber U.S., Inc*., Case No. 23-10497 (CTG) (Bankr. D. Del. May 19, 2023) [D.I. 136] (same); *In re Tritek International Inc*., Case No. 23-10520 (TMH) (Bankr. D. Del. May 19, 2023) [D.I. 116] (same); *In re Amerimark Interactive, LLC*, Case No. 23-10438 (TMH) (Bankr. D. Del. May 9, 2023) [D.I. 190] (same); *In re Virgin Orbit Holdings, Inc*., Case No. 23-10405 (KBO) (Bankr. D. Del. May 1, 2023) [D.I. 202] (same); *In re SiO2 Medical Products, Inc*., Case No. 23-10366 (JTD) [D.I. 216] (Bankr. D. Del. April 26, 2023) (same); *In re Ryze Renewables II, LLC*, No. 23-10289 (BLS) (Bankr. D. Del. April 11, 2023) [D.I. 96] (same).

37. The benefit provided by the DIP Lender and the Bondholders to the estates are clear, through the funding of a new money DIP loan, use of cash collateral, and subordination of the Bondholders' liens, and justify the waiver of §506(c), the "equities of the case" under § 552(b), and the equitable doctrine of marshalling of collateral.[9]

38. For the reasons stated, the Committee's objection for the Waivers of sections 506(c) and 552(b) should be overruled.

## VII. Most of the Remaining "Objectionable Provisions" Have Been Mooted through Language Added to the Final DIP Order.

39. The Committee rounds out its Objection with a bullet point list of unsupported objections. *See* Obj. ¶ 37. Not only do courts not rewrite the terms of a proposed financing, but these points have been mooted.

| ISSUE | RESPONSE |
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| **DIP Proceeds Restriction**: The Committee requests the following language in the final DIP order: "Notwithstanding the provisions of this Final Financing Order, the Carve-Out, the proceeds of the DIP Facility, and DIP Collateral may be used for the allowed fees and expenses incurred by the Committee and its professionals in furtherance of its duties as set forth under section 1103 of the Bankruptcy Code, including, but not limited to, any objection filed to the DIP Motion, any objection to credit bidding, any objection filed to any disclosure statement or plan of reorganization or liquidation filed in these Chapter 11 Cases, and any objection or other pleading contesting whether the DIP Lender or the Prepetition Bonds Secured Parties have the right to the exercise of remedies, including the | Clarifying language has been added to the Final DIP Order that the Committee may use DIP proceeds to perform its functions in these cases, provided that the Committee may not use DIP proceeds to sue the DIP Lender or the Bondholders. *See* Final DIP Order at 5.4. |

[9] Subject to the DIP Lender's and the Bondholders' agreement to "soft marshal" with respect to commercial tort claims.

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| prosecution of any such motions and objections." | |
| **Definition of "Indemnified Person" is Overly Broad:**<br>Indemnification of the DIP Lender under the DIP Facility must be limited solely to its capacity and role as the DIP Lender. Moreover, indemnification rights should not extent to any unnamed affiliates of the DIP Lender (or each of their respective officers, directors, employees, attorneys, agents, and representatives) or to the DIP Lender in other capacities in these chapter 11 cases, including the DIP Lender's capacity as the Stalking Horse Bidder. | The Final DIP Order has been revised to provide that the DIP Lender and its affiliates will only receive indemnification in their respective capacities as the DIP Lender and/or officers, directors, employees, attorneys, agents and representatives of the DIP Lender. *See* Final DIP Order § 1.4 |
| **Credit Bidding:**<br>The Official Committee of Unsecured Creditors (the "Committee") preserves and reserves its rights to object to any credit bid put forth by the DIP Lender and/or the Prepetition Bonds Secured Parties if taken before expiration of the Challenge Deadline. The failure of the Committee to object to a bid put forth by the DIP Lenders or the Prepetition Bonds Secured Parties, or the Court's approval of any such credit bid shall not (a) prejudice or impair the rights of the Committee to bring a Challenge or otherwise challenge the nature, extent, validity, priority, perfection or amount of the alleged liens, security interests and claims or (b) release the DIP Lender or the Prepetition Bond Secured Parties from any causes of action which can be brought by or on behalf of the Debtors' estates. | This issue has been addressed in the Debtors' Reply to the Committee's Objection to the Debtors' Bidding Procedures Motion. *See* Reply in Support of the Debtors' Bidding Procedures Motion ¶¶ 30-31. The DIP Lender should have an unqualified right to credit bid the full amount of its DIP Loan. Additionally, any credit bid by the Bondholders is already subject to section 363(k) and the challenge period. *See* Final DIP Order at 5.14. |
| **Releases**:<br>The releases granted to the DIP Lender and the Prepetition Bonds Secured Parties should expressly be limited to the DIP Lender and the Prepetition Bond Secured Parties in their roles as such. Moreover, such releases should not be extended to each of these parties unnamed successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants, professionals, | Section 4.1 of the DIP Order already provides that the "releases … contained in the Interim Order and this Final Order" shall be subject to the challenge rights set forth in section 4.1. |

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| officers, directors, members, managers, shareholders, and employees, past, present and future, and their respective heirs, predecessors, successors and assigns except for in their specific capacity as related to the DIP Facility and the Prepetition Bond Obligations. | |
| **Carve-Out**:<br>The Committee believes that payment under the Carve-Out should not be conditioned on complying with the timing under the Approved Budget for professional fees. Carve-Out amounts should be payable regardless of when the fees are incurred by estate professionals | This objection is mooted by new language added to the Final DIP Order that permits the Debtors to escrow the full amount of budgeted professional fees upon entry of the Final DIP Order. *See* Final DIP Order § 2.4. |
| **Remedies Period**:<br>The Final Financing Order should include language making clear that during the Remedies Notice Period, in the event the Debtors seek an emergency hearing from the Court, the Remedies Notice Period shall be stayed pending resolution of such dispute by the Bankruptcy Court. | The Final DIP Order provides the Debtors with 7 business days upon the receipt of written notice from the DIP Lender of the existence and occurrence of a DIP Termination Event. During this period of time, the Debtors and/or Committee will be able to seek an emergency hearing from the Court. *See* Final DIP Order § 3.3 |
| **Material Amendments:**<br>The Committee should receive notice of all material amendments, and all material amendments should be approved by the Court regardless of whether they fall under the limited definition of "Material DIP Amendments" as set forth in the Interim Financing Order. | The Debtors have agreed to provide the Committee with notice of any amendment to the DIP Loan Documents, regardless of whether the Debtors believe such amendment is material. If the Committee believes that any such amendment is problematic they may seek relief from the Court. *See* Final DIP Order § 1.3(d). |
| **Estate Professional Fees**:<br>(a) The Professional Fee Escrow should be fully funded before payment of any DIP Fees and DIP Lender Expenses and the Professional Fee Escrow should be fully funded following a DIP draw (versus funded weekly in accordance with the Approved Budget as required by the Interim Financing Order).<br>(b) The Professional Fee Escrow should not be reduced in any event any Approved Budget is adjusted down.<br>(c) Reduction of the amount of Professional Fees included in any Approved Budget should require the consent of the Debtors and Committee. | Item (a) has been addressed above.<br>Item (b) is addressed through language added in the Final DIP Order. *See* Final DIP Order at footnote 7 on page 31.<br>Item (c) is mooted as the DIP Lender has agreed that the full amount of budgeted professional fees may be escrowed upon entry of the Final DIP Order. *See* Final DIP Order § 2.4.<br>Item (d): the DIP Lender does not objection to the Committee professionals sharing their budget between each professional firm. The DIP Lender has not agreed to permit the use of any excess amount of the Debtors' professional fees for the Committee. |

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| (d) To the extent any of Committee's counsel and financial advisors (the "Committee Professionals") have unused fee amounts in the Approved Budget, the excess of one goes to the other, if needed; provided, that if the Debtors' professionals have unused fee amounts in the Approved Budget, any excess shall be paid to the Committee Professionals, if necessary | |
| **Committee Professional Fee Budget and Challenge Budget**:<br>The Committee Professionals are presently budgeted at $360,000, collectively, which is just 30% of the $1,185,000 for which the Debtors' professionals are budgeted, and less than the minimum $400,000 cash required to be paid to DIP Lenders counsel (and the DIP Lender's additional fees, even in just that capacity will get paid out of the sales proceeds and, on information and belief, are already in excess of $400,000). The Committee Professionals' fee budget must be increased to $850,000 so that the Committee can properly discharge its fiduciary duties in these chapter 11 cases. Moreover, the Challenge Budget should be increased from $25,000 to $75,000. | This objection is addressed above. *See* Reply ¶ 4. |
| **DIP Lender Fees:**<br>Any fees and expenses payable to the DIP Lender's professionals should be explicitly limited to those incurred in the DIP Lender's capacity as DIP Lender and should not include any fees and expenses incurred in the capacity of Stalking Horse Bidder. | The language in the Final DIP Order is sufficiently clear that the fees and expenses payable to the DIP Lender is limited to the DIP Lender's capacity as DIP Lender. *See* Final DIP Order § 5.15. |
| **Financial Reporting**:<br>All weekly financial reporting the Debtors send to the DIP Lender and Prepetition Bonds Secured Parties pursuant to Paragraph 2.5(b) of the Interim Financing Order and the DIP Loan Documents should be simultaneously provided to the Committee. | The DIP Lender has agreed and resolved this objection. *See* Final DIP Order § 2.5(b). |

## RESERVATION OF RIGHTS

40. For the avoidance of doubt, the Debtors reserves its rights to supplement this Reply to the extent that any party raises additional issues or arguments with respect to the proposed DIP Financing.

## CONCLUSION

WHEREFORE, for reasons set forth herein, the Debtors respectfully request that the Court overrule the Committee's Objection (to the extent still outstanding), grant the DIP Motion, enter the proposed Final DIP Order, and grant such other and further relief as is just and proper.

*[Signature page follows]*

Dated: October 7, 2024
Wilmington, Delaware

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

*/s/ Curtis S. Miller*

Robert J. Dehney, Sr. (No. 3578)
Curtis S. Miller (No. 4583)
Daniel B. Butz (No. 4227)
Clint M. Carlisle (No. 7313)
Avery Jue Meng (No. 7238)
1201 N. Market Street, 16th Floor
Wilmington, Delaware 19801
Telephone: (302) 658-9200
Email: rdehney@morrisnichols.com
cmiller@morrisnichols.com
dbutz@morrisnichols.com
ccarlisle@morrisnichols.com
ameng@morrisnichols.com

*Proposed Counsel to the Debtors and Debtors in Possession*

**EXHIBIT A**

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

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| In re: | Chapter 11 |
| FULCRUM BIOENERGY, INC., et al., | Case No. 24-12008 (TMH) |
| Debtors.[1] | (Jointly Administered) |

**FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 AND 507 (I) AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED SUPERPRIORITY POSTPETITION FINANCING; (II) GRANTING (A) LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS AND (B) ADEQUATE PROTECTION TO CERTAIN PREPETITION BONDHOLDERS; (III) AUTHORIZING USE OF CASH COLLATERAL; (IV) SCHEDULING A FINAL HEARING; AND (V) GRANTING RELATED RELIEF**

Upon the *Debtors' Emergency Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503 and 507 (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection To Certain Prepetition Bondholders; (III) Authorizing Use Of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* (the "**Motion**")[2] of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (collectively, the "**Chapter 11 Cases**"), for entry of a final order (this "**Final Order**"), pursuant to sections 105, 361, 362, 363, 364(c)(1), 364(c)(2) 364(c)(3), 364(d), 364(e), 503 and 507 of Title 11 of the United States Code (the "**Bankruptcy Code**"), Rules 2002, 4001(b) and (c), 6004, and 9014 of the Federal Rules of

[1] The debtors and debtors in possession in these chapter 11 cases, along with each debtor's federal tax identification numbers are: Fulcrum BioEnergy, Inc. (3733); Fulcrum Sierra BioFuels, LLC (1833); Fulcrum Sierra Finance Company, LLC (4287); and Fulcrum Sierra Holdings, LLC (8498). The Debtors' service address is: Fulcrum BioEnergy Inc., P.O. Box 220 Pleasanton, CA 94566.

[2] Each capitalized term used but not defined herein shall have the meaning ascribed to it in the applicable DIP Loan Documents (as defined below).

Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Rule 4001-2 of the Local Bankruptcy Rules (the "**Local Rules**") for the United States Bankruptcy Court for the District of Delaware (this "**Court**"), requesting, among other things:

(1) authorization for the Borrower (as defined in the DIP Note (as defined below)) to obtain postpetition financing pursuant to the DIP Facility (as defined below), and for each of the Guarantors (as defined in the DIP Note) to guarantee unconditionally on a joint and several basis, and subject to the terms and limitations set forth in the DIP Note in all respects, the Borrower's obligations under the DIP Facility, consisting of a senior secured super-priority term loan facility (the "**DIP Facility**"), on the terms and conditions substantially in the form annexed hereto as **Exhibit A** (as the same may be amended, restated, amended and restated, supplemented, waived, extended, or otherwise modified from time to time, the "**DIP Note**" and, together with any other related agreements, documents, security agreements, or pledge agreements, including the Interim Order and (when entered) this Final Order, collectively, the "**DIP Loan Documents**"), by and among the Borrower, the Guarantors, Switch, Ltd. ("**Switch**"), as lender (in such capacity together with its permitted successor and assigns, the "**DIP Lender**"), in an aggregate principal amount of up to $5.0 million in term loan commitments available as term loans (the "**DIP Loans**") to the Borrowers. Upon entry of the Interim Order, $3,204,103 (the "**Interim DIP Loan**") was made available to the Borrowers, and the remainder of the DIP Facility shall be available upon entry of this Final Order.

(2) authorization for the Debtors to execute, deliver, and enter into the DIP Loan Documents and to perform all of the Debtors' respective obligations thereunder, and such other and further acts as may be required in connection with the DIP Loan Documents;

(3) authorization for the Debtors to pay the principal, interest, fees, expenses and other amounts payable to the DIP Lender pursuant to the DIP Loan Documents, including, without limitation, all loans, advances, debts, liabilities and obligations for the performance of covenants, tasks or duties or for payment of monetary amounts (whether or not such performance is then required or contingent, or such amounts are liquidated or determinable) owing by Borrower to the DIP Lender arising under the DIP Loan Documents, and all covenants and duties regarding such amounts, of any kind or nature, present or future, arising under the DIP Loan Documents, including all principal, interest, fees, charges, expenses, reasonable and documented attorneys' fees and any other sum chargeable to Borrower under the DIP Loan Documents (such obligations, the "**DIP Obligations**");

(4) authorization for the Debtors, immediately upon entry of this Final Order, to use proceeds of the DIP Facility solely for the purposes permitted under the DIP Loan Documents and solely in accordance with this Final Order and the applicable Approved Budget (as defined below), subject to permitted variances and other exclusions set forth in the DIP Loan Documents;

(5) the grant and approval of superpriority administrative expense claim status, pursuant to sections 364(c)(1), 503(b)(1) and 507(b) of the Bankruptcy Code, to the DIP Lender, in respect of all DIP Obligations, subject and subordinate only to the Carve-Out (as defined below);

(6) granting the DIP Lender valid, enforceable, non-avoidable, automatically and fully perfected DIP Liens (as defined below) in all DIP Collateral (as defined below) to secure the DIP Obligations, which DIP Liens shall be subject and subordinate to the Carve-Out;

(7) authorization for the Debtors to use, solely in accordance with the Approved Budget (subject to permitted variances and other exclusions set forth in the DIP Loan Documents) and the limitations provided herein and in the DIP Loan Documents, any Cash Collateral in which any of

the Prepetition Bonds Secured Parties (as defined below) may have an interest, and the granting of adequate protection solely to the extent of any diminution in the value of their respective interests in the Prepetition Bonds Collateral, including, without limitation, the Cash Collateral, as a result of (i) the incurrence of the DIP Obligations, (ii) the Debtors' use of Cash Collateral, (iii) the subordination of the Prepetition Bond Obligations to the DIP Obligations and the Carve-Out, (iv) any other diminution in value of the Prepetition Bonds Collateral arising from the Debtors' use, sale, or disposition of such Prepetition Bonds Collateral or the proceeds thereof, (v) the priming of the Prepetition Bond Liens by the DIP Liens, and (vi) the imposition of the automatic stay pursuant to section 362 of the Bankruptcy Code (collectively, "**Diminution in Value**");

(8) the modification of the automatic stay imposed by section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of this Final Order and the other DIP Loan Documents to the extent hereinafter set forth;

(9) a waiver of the Debtors' ability to surcharge pursuant to section 506(c) of the Bankruptcy Code against any DIP Collateral and the Prepetition Bonds Collateral, and any right of the Debtors under the "equities of the case" exception in section 552(b) of the Bankruptcy Code;

(10) this Court's waiver of any applicable stay (including under Bankruptcy Rule 6004) and providing for immediate effectiveness of this Final Order; and

(11) granting the Debtors such other and further relief as is just and proper.

The Court having considered the evidence submitted and arguments made at the interim hearing held on September 12, 2024 (the "**Interim Hearing**") and the final hearing held on October 9, 2024 (the "**Final Hearing**"); and the Court having entered, on an interim basis, the relief requested in the DIP Motion [D.I. 52] (the "**Interim Order**"); and the Court having found that, under the circumstances, due and sufficient notice of the Motion and Final Hearing was

provided by the Debtors as set forth in Paragraph D of this Final Order, and upon the record made by the Debtors at the Final Hearing, including the Motion, the Declaration of Mark Smith in Support of First Day Relief (the "**First Day Declaration**"), [Docket No. 9]; any exhibits in connection with the foregoing, and the filings and pleadings in these Chapter 11 Cases; and the Court having found that the final relief requested in the Motion is fair and reasonable and is in the best interests of the Debtors, the Debtors' bankruptcy estates (as defined under section 541 of the Bankruptcy Code, the "**Estates**"), their stakeholders and other parties in interest, and represents a sound exercise of the Debtors' business judgment and is essential for the continued operation and maintenance of the Debtors' businesses; and all objections, if any, to the relief requested in the Motion having been withdrawn, resolved, or overruled by the Court; and after due deliberation sufficient cause appearing therefor;

**THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW**:[3]

(A) Petition Date. On September 9, 2024 (the "Petition Date"), each Debtor filed a voluntary petition for relief (each, a "**Petition**") under chapter 11 of the Bankruptcy Code. The Debtors continue to operate and maintain their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No chapter 11 trustee or examiner has been appointed in any of the Chapter 11 Cases.

(B) Jurisdiction and Venue. This Court has jurisdiction over these Cases, the Debtors, property of the Debtors' Estates and this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*,

[3] The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Pursuant to Rule 9013-1(f) of the Local Rules, the Debtors consent to the entry of a final judgment or order with respect to the Motion if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105, 361, 362, 363, 364, 503 and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 9013 and 9014 and Local Rules 7007-1, 9013-1, 9013-4, and 9014-2.

(C) Committee Formation. On September 19, 2024, the official committee of unsecured creditors (the "Committee") was appointed under section 1102 of the Bankruptcy Code in these Chapter 11 Cases [D.I. 74].

(D) Interim Order. On September 12, 2024, the Court entered the Interim Order, pursuant to which the Debtors were authorized to, among other things, obtain financing from the DIP Lender on an interim basis in accordance with the terms of the DIP Documents and the Interim Order.

(E) Notice. Good and sufficient notice of the Motion under the circumstances has been provided in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Rules.

(F) Parties' Acknowledgments, Agreements, and Stipulations. In requesting the DIP Facility and use of Cash Collateral, and in exchange for and as a material inducement to the DIP Lender and the Prepetition Bonds Secured Parties to agree to provide, or consent to, the DIP Facility, access to the Cash Collateral, and subordination of the Prepetition Bond Liens (as defined below) to the DIP Obligations and Carve-Out, as provided herein, and as a condition to providing financing under the DIP Facility and consenting to the use of Cash Collateral as set forth herein,

subject to the rights of parties in interest (other than the Debtors) set forth in Section 4.1 of this Final Order, the Debtors admit, stipulate, acknowledge, and agree, as follows:

(i) Prepetition Biofuels Bond Obligations. Certain of the Debtors are party to certain prepetition agreements relating to tax-exempt bonds issued by the Director of the State of Nevada Department of Business and Industry, as conduit bond issuer (in such capacity, the "**Biofuels Bonds Conduit Issuer**"), and such agreements and related documents include: (a) that certain Trust Indenture, dated as of October 1, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bond Indenture**"), by and between the Biofuels Bonds Conduit Issuer and UMB Bank, N.A., as successor trustee (in such capacity, the "**Biofuels Trustee**"), as trustee for the bonds issued pursuant to the Biofuels Indenture (the "**Biofuels Bonds**" and the holders of such bonds, the "**Biofuels Bondholders**") which, *inter alia*, assigned all of the Biofuels Bonds Conduit Issuer's interests in any of the Biofuels Bond Documents (other than the Unassigned Director's Rights (as defined in the Biofuels Bond Indenture)) to the Biofuels Trustee, (b) that certain Second Amended and Restated Collateral Agency and Account Agreement, dated as of March 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bonds Collateral Agency Agreement**"), by and among Debtor Fulcrum Sierra BioFuels, LLC ("**Biofuels**") and UMB Bank, N.A., as successor collateral agent and securities intermediary (in such capacity, the "**Biofuels Collateral Agent**", and together with the Biofuels Trustee and the Biofuels Bondholders, the "**Prepetition Biofuels Bonds Secured Parties**"), (c) that certain Financing Agreement, dated as of October 1, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bonds Financing Agreement**"), by and between the Biofuels Bonds Conduit Issuer and Biofuels, (d) that certain

Security Agreement, dated as of October 1, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bonds Security Agreement**"), by and between Biofuels and the Biofuels Collateral Agent, (e) that certain Guaranty Agreement, dated as of October 1, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bonds Guaranty Agreement**"), by and between Debtor Fulcrum BioEnergy, Inc., as guarantor (in such capacity, the "**Biofuels Bonds Guarantor**", and together with Biofuels, the "**Biofuels Bonds Obligors**") and the Biofuels Trustee, (f) that certain Expense Reimbursement Agreement, dated as of May 23, 2024 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Prepetition Expense Reimbursement Agreement**"), by and between the Debtors, the Prepetition Trustees, and the Prepetition Bonds Collateral Agents, (g) that certain Membership Interest Pledge Agreement, dated as of October 1, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "Biofuels Bonds Pledge Agreement"), by and between Debtor Fulcrum Sierra Finance Company, LLC, as pledgor and the Biofuels Collateral Agent, and (h) that certain Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing made by Biofuels, as grantor, to the Biofuels Trustee, for the benefit of the Biofuels Collateral Agent, as beneficiary, dated as of October 26, 2017 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Biofuels Bonds Mortgage**").[4] Pursuant to the Biofuels Bond Indenture, the Biofuels Bonds

[4] The Biofuels Bonds Indenture, Biofuels Bonds, Biofuels Bonds Collateral Agency Agreement, Biofuels Bonds Financing Agreement, Biofuels Bonds Security Agreement, Biofuels Bonds Guaranty Agreement, Prepetition Expense Reimbursement Agreement, Biofuels Bonds Pledge Agreement, and Biofuels Bonds Mortgage, together with all other agreements, documents, and instruments executed and/or delivered with, to or in favor of the Prepetition Biofuels Bonds Secured Parties, including, without limitation, all security agreements, deposit account control agreements, control agreements, notes, guarantees, mortgages, promissory notes, pledge agreements, Uniform Commercial Code financing statements, documents, and instruments, including any fee letters, executed and/or delivered in connection therewith or related thereto, are referred to herein as the "**Biofuels Bond Documents**."

Conduit Issuer issued Biofuels Bonds with an aggregate principal amount of $175,000,000.00. As of the Petition Date, approximately $168,067,871.14 of principal and unpaid interest under the Biofuels Bonds Indenture was outstanding, which amount is comprised of $152,605,094.57 in principal amount, and accrued and unpaid interest in the amount of $15,462,776.57 (and, together with any other amounts outstanding under the Biofuels Bond Documents, including interest, fees, and expenses, the "**Prepetition Biofuels Bond Obligations**"). The Prepetition Biofuels Bond Obligations are obligations of the Biofuels Bond Obligors pursuant to the Biofuels Bonds Documents. The Prepetition Biofuels Bond Obligations are secured by first priority security interests in and liens (subject only to any liens permitted under the Biofuels Bond Documents) on the "Collateral" or "Pledged Collateral" (as such terms are defined in the Biofuels Bond Documents) and the Mortgaged Property (as defined in the Biofuels Bonds Mortgage) (collectively, such Collateral, Pledged Collateral and Mortgage Property, collectively, the "**Prepetition Biofuels Bonds Collateral**" and such liens and security interests on such Prepetition Biofuels Bonds Collateral, the "**Prepetition Biofuels Bond Liens**").

(ii) Prepetition Holdings Bond Obligations. Certain of the Debtors are party to certain prepetition agreements relating to tax-exempt bonds issued by the Director of the State of Nevada Department of Business and Industry, as conduit bond issuer (in such capacity, the "**Holdings Bonds Conduit Issuer**"), and such agreements and related documents include: (a) that certain Trust Indenture, dated as of September 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds Indenture**" and together with the Biofuels Bond Indenture, the "**Prepetition Indentures**"), by and between the Holdings Bonds Conduit Issuer and UMB Bank, N.A., as successor trustee (in such capacity, the "**Holdings Trustee**" and together with the Biofuels Trustee, the "**Prepetition**

**Trustees**"), as trustee for the bonds issued pursuant to the Holdings Indenture (the "**Holdings Bonds**" and together with the Biofuels Bonds, the "**Prepetition Bonds**"; and the holders of the Holdings Bonds, the "**Holdings Bondholders**" and together with the Biofuels Bondholders, the "**Prepetition Bondholders**") which, *inter alia*, assigned all of the Holdings Bonds Conduit Issuer's interests in any of the Holdings Bond Documents (other than the Unassigned Director's Rights (as defined in the Holdings Bond Indenture)) to the Holdings Trustee; (b) that certain Second Amended and Restated Collateral Agency and Account Agreement, dated as of December 1, 2020 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds Collateral Agency Agreement**" and together with the Biofuels Bonds Collateral Agency Agreement, the "**Collateral Agency Agreements**"), by and among Debtor Fulcrum Sierra Holdings, LLC ("**Holdings**") and UMB Bank, N.A., as successor collateral agent and securities intermediary (in such capacity, the "**Holdings Collateral Agent**", and together with the Biofuels Collateral Agent, the "**Prepetition Bonds Collateral Agents**"; the Holdings Collateral Agent together with the Holdings Trustee and the Holdings Bondholders, the "**Prepetition Holdings Bonds Secured Parties**"; and the Prepetition Biofuels Bonds Secured Parties and the Prepetition Holdings Bonds Secured Parties, collectively, the "**Prepetition Bonds Secured Parties**"), (c) that certain Financing Agreement, dated as of September 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds Financing Agreement**", and together with the Biofuels Bonds Financing Agreement, the "**Prepetition Financing Agreements**"), by and between the Holdings Bonds Conduit Issuer and Holdings, (d) that certain Security Agreement, dated as of September 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds FSH Security Agreement**"), by and between Holdings and the

Holdings Collateral Agent, (e) that certain Security Agreement, dated as of September 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds FSFC Security Agreement**", and together with the Holdings Bonds FSH Security Agreement, the "**Holdings Bonds Security Agreements**"), by and between Debtor Fulcrum Sierra Finance Company, LLC and the Holdings Collateral Agent, (f) that certain Guaranty Agreement, dated as of September 1, 2018 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Holdings Bonds Guaranty Agreement**", and together with the Biofuels Bonds Guaranty Agreement, the "**Prepetition Bonds Guaranty Agreements**"), by and between Debtor Fulcrum BioEnergy, Inc. (in such capacity, the "**Holdings Bonds Guarantor**", and together with Holdings, the "**Holdings Bonds Obligors**", and the Holdings Bonds Obligors collectively with the Biofuels Bonds Obligors, the "**Prepetition Obligors**") and the Holdings Trustee, and (g) the Expense Reimbursement Agreement.[5] Pursuant to the Holdings Bond Indenture, the Holdings Bonds Conduit Issuer issued Holdings Bonds with an aggregate principal amount of $114,000,000.00. As of the Petition Date, approximately $113,982,595.13 of principal and unpaid interest under the Holdings Bonds Indenture was outstanding, which amount is comprised of $104,067,583.40 in principal amount, and accrued and unpaid interest in the amount of $9,915,011.73 (and, together with any other amounts outstanding under the Holdings Bond Documents, including interest, fees, and expenses, the "**Prepetition Holdings Bond Obligations**", and together with the Prepetition Biofuels Bond Obligations, the

[5] The Holdings Bonds Indenture, Holdings Bonds, Holdings Bonds Collateral Agency Agreement, Holdings Bonds Financing Agreement, Holdings Bonds Security Agreements, Holdings Bonds Guaranty Agreement, and Prepetition Expense Reimbursement Agreement together with all other agreements, documents, and instruments executed and/or delivered with, to or in favor of the Prepetition Holdings Bonds Secured Parties (as defined below), including, without limitation, all security agreements, deposit account control agreements, control agreements, notes, guarantees, mortgages, promissory notes, pledge agreements, Uniform Commercial Code financing statements, documents, and instruments, including any fee letters, executed and/or delivered in connection therewith or related thereto, are referred to herein as the "**Holdings Bond Documents**." The Biofuels Bond Documents together with the Holdings Bond Documents are referred to herein as the "**Prepetition Bond Documents**."

"**Prepetition Bond Obligations**"). The Prepetition Holdings Bond Obligations are obligations of the Holdings Bond Obligors pursuant to the Holdings Bond Documents. The Prepetition Holdings Bond Obligations are secured by first priority security interests in and liens (subject only to any liens permitted under the Biofuels Bond Documents) on the "Collateral" (as such terms are defined in the Holdings Bond Documents) (the "**Prepetition Holdings Bonds Collateral**" and together with the Prepetition Biofuels Bonds Collateral, the "**Prepetition Bonds Collateral**"; and such liens and security interests on such Prepetition Holdings Bonds Collateral, the "**Prepetition Holdings Bond Liens**", and together with the Prepetition Biofuels Bond Liens, the "**Prepetition Bond Liens**").

(iii) Prepetition Biofuels Bonds Collateral. To secure the Prepetition Biofuels Bond Obligations, the Debtors entered into certain guaranty and collateral agreements and certain other security documents, including the Biofuels Bonds Mortgage, Biofuels Bonds Pledge Agreement, and the Biofuels Bonds Security Agreement, governing the Prepetition Biofuels Bonds Secured Parties' security interests in the Prepetition Biofuels Bonds Collateral (such agreements, as amended, restated, amended and restated, supplemented or otherwise modified from time to time, and together with any ancillary collateral documents, including, without limitation, any related mortgages and deeds of trust, the "**Prepetition Biofuels Bonds Collateral Documents**"). Pursuant to the Prepetition Biofuels Bonds Collateral Documents, and on the terms set forth therein, the Debtors granted to the Prepetition Bonds Secured Parties the Prepetition Biofuels Bond Liens on the Prepetition Biofuels Bonds Collateral.

(iv) Prepetition Holdings Bonds Collateral. To secure the Prepetition Holdings Bond Obligations, the Debtors entered into certain guaranty and collateral agreements and certain other security documents, including the Holdings Bonds Security Agreements, governing the

Prepetition Holdings Bonds Secured Parties' security interests in the Prepetition Holdings Bonds Collateral (such agreements, as amended, restated, amended and restated, supplemented or otherwise modified from time to time, and together with any ancillary collateral documents, including, without limitation, any related mortgages and deeds of trust, the "**Prepetition Holdings Bonds Collateral Documents**", and together with the Prepetition Biofuels Bonds Collateral Documents, the "**Prepetition Bonds Collateral Documents**"). Pursuant to the Prepetition Holdings Bonds Collateral Documents, and on the terms set forth therein, the Debtors granted to the Prepetition Holdings Bonds Secured Parties the Prepetition Holdings Bond Liens on the Prepetition Holdings Bonds Collateral.

(v) Validity of Prepetition Biofuels Bond Obligations. The Prepetition Biofuels Bond Obligations owing to the Prepetition Biofuels Bonds Secured Parties constitute legal, valid, and binding obligations of the Debtors and the other Prepetition Biofuels Obligors, enforceable against them in accordance with their respective terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of the Prepetition Biofuels Bond Obligations owing to the applicable Prepetition Biofuels Bonds Secured Parties is subject to avoidance, recharacterization, reduction, set-off, offset, counterclaim, cross-claim, recoupment, defenses, disallowance, impairment, recovery, subordination, or any other challenges pursuant to the Bankruptcy Code or applicable non-bankruptcy law or regulation by any person or entity, including in any Successor Cases (as defined below).

(vi) Validity of Prepetition Holdings Bond Obligations. The Prepetition Holdings Bond Obligations owing to the Prepetition Holdings Bonds Secured Parties constitute legal, valid, and binding obligations of the Debtors and the other Prepetition Holdings Obligors, enforceable against them in accordance with their respective terms (other than in respect of the

stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of the Prepetition Holdings Bond Obligations owing to the applicable Prepetition Holdings Bonds Secured Parties is subject to avoidance, recharacterization, reduction, set-off, offset, counterclaim, cross-claim, recoupment, defenses, disallowance, impairment, recovery, subordination, or any other challenges pursuant to the Bankruptcy Code or applicable non-bankruptcy law or regulation by any person or entity, including in any Successor Cases (as defined below).

(vii) Validity of Prepetition Biofuels Bond Liens. The Prepetition Biofuels Bond Liens granted to the Prepetition Biofuels Bonds Secured Parties constitute legal, valid, binding, enforceable (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and perfected security interests in and liens on the Prepetition Biofuels Bonds Collateral, were granted to, or for the benefit of, the Prepetition Biofuels Bonds Secured Parties for fair consideration and reasonably equivalent value, and are not subject to defense, counterclaim, recharacterization, subordination, avoidance, or recovery pursuant to the Bankruptcy Code or applicable non-bankruptcy law or regulation by any person or entity.

(viii) Validity of Prepetition Holdings Bond Liens. The Prepetition Holdings Bond Liens granted to the Prepetition Holdings Bonds Secured Parties constitute legal, valid, binding, enforceable (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and perfected security interests in and liens on the Prepetition Holdings Bonds Collateral, were granted to, or for the benefit of, the Prepetition Holdings Bonds Secured Parties for fair consideration and reasonably equivalent value, and are not subject to defense, counterclaim, recharacterization, subordination, avoidance, or recovery pursuant to the Bankruptcy Code or applicable non-bankruptcy law or regulation by any person or entity.

(ix) No Challenges/Claims. Subject to section 4.1 of this Final Order, no offsets, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition Bond Liens or Prepetition Bond Obligations exist, and no portion of the Prepetition Bond Liens or Prepetition Bond Obligations is subject to any challenge or defense including, without limitation, avoidance, disallowance, disgorgement, recharacterization, or subordination (equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law. The Debtors and their Estates have no valid Claims (as such term is defined in section 101(5) of the Bankruptcy Code) objections, challenges, causes of action, and/or choses in action against any of the Prepetition Bonds Secured Parties or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors or employees with respect to the Prepetition Bond Documents, the Prepetition Bond Obligations, the Prepetition Bond Liens, or otherwise, whether arising at law or at equity, including, without limitation, any challenge, recharacterization, subordination, avoidance, recovery, disallowance, reduction, or other claims arising under or pursuant to sections 105, 502, 510, 541, 542 through 553, inclusive, or 558 of the Bankruptcy Code or applicable state law equivalents. The Prepetition Bond Obligations constitute allowed, secured claims within the meaning of sections 502 and 506 of the Bankruptcy Code.

(x) Indemnity. The DIP Lender has acted in good faith, and without negligence or violation of public policy or law, in respect of all actions taken by it in connection with or related in any way to negotiating, implementing, documenting, or obtaining the requisite approvals of the DIP Facility and the use of Cash Collateral, including in respect of the granting of the DIP Liens and the Prepetition Bonds Secured Parties Adequate Protection Liens (as defined below), any challenges or objections to the DIP Facility or the use of Cash Collateral, and all documents related to any and all transactions contemplated by the foregoing. Accordingly, the DIP Lender shall be

and hereby is indemnified and held harmless by the Debtors in respect of any claim or liability incurred in respect thereof or in any way related thereto in accordance with and as set forth in the DIP Loan Documents, *provided that* no such parties will be indemnified for any cost, expense, or liability to the extent determined in a final, non-appealable judgment of a court of competent jurisdiction to have resulted primarily from such parties' gross negligence or willful misconduct. No exception or defense exists in contract, law, or equity as to any obligation set forth, as the case may be, in this paragraph E(vi), in the Prepetition Bond Documents, or in the DIP Loan Documents, to the Debtors' obligation to indemnify and/or hold harmless the Prepetition Bonds Secured Parties or the DIP Lender, as the case may be.

(xi) Release. Each of the Debtors, their Estates and the Prepetition Obligors, on their own behalf and on behalf of each of their past, present and future predecessors, successors, heirs, subsidiaries, and assigns have agreed to provide releases to each of the Released Parties (as defined below) as provided in Section 5.17 of this Final Order.

(xii) Cash Collateral. The Debtors admit, stipulate, acknowledge, and agree that, in each case, except for any and all proceeds of the DIP Loans, all other cash of the Debtors, wherever located, and all cash equivalents, including cash in deposit accounts of the Debtors, as income, proceeds, products, rents or profits of other Prepetition Bonds Collateral, or otherwise, constitutes "cash collateral" of the Prepetition Bonds Secured Parties within the meaning of section 363(a) of the Bankruptcy Code (the "**Cash Collateral**"); provided, however, that Wells Fargo account ended -2912 is not Cash Collateral as defined in this subsection (xii).

(G) Findings Regarding the Postpetition Financing and Use of Cash Collateral.

(i) Request for Postpetition Financing. The Debtors have requested from the DIP Lender, and the DIP Lender is willing, subject to the terms of this Final Order and satisfaction

of the conditions set forth in the DIP Loan Documents, to extend the DIP Loans on the terms and conditions set forth in this Final Order and the DIP Loan Documents, respectively.

(ii) Need for Postpetition Financing and Use of Cash Collateral. The Debtors do not have sufficient liquidity, including Cash Collateral, without the financing requested in the Motion. The Debtors' ability to fund their operations and other efforts and activities is essential to the Debtors' continued viability as the Debtors seek to maximize the value of the assets of the Estates for the benefit of all creditors of the Debtors. The ability of the Debtors to obtain sufficient working capital and liquidity through the proposed postpetition financing arrangements with the DIP Lender and the use of Cash Collateral as set forth in this Final Order, the DIP Note and the other DIP Loan Documents, as applicable, is vital to the preservation, maximization, and maintenance of the going concern value of each Debtor. Accordingly, the Debtors have an immediate need to obtain the postpetition financing and to use Cash Collateral as set forth in this Final Order to, among other things, permit the orderly implementation and pursuit of a comprehensive marketing and sale process, and preserve and maximize the value of the assets of the Debtors' Estates to maximize the recovery to all creditors of the Estates.

(iii) No Credit Available on More Favorable Terms. The Debtors are unable to procure financing (x) in the form of unsecured credit allowable as an administrative expense under sections 364(a), 364(b), or 503(b)(1) of the Bankruptcy Code, (y) in exchange for the grant of a superpriority administrative expense under section 364(c)(1) of the Bankruptcy Code, or (z) in exchange for the grant of liens on property of the Estates pursuant to sections 364(c)(2) or 364(c)(3) of the Bankruptcy Code. The Debtors assert in the Motion, the First Day Declaration, and in the DIP Declaration, and demonstrated at the Interim Hearing, that it would be futile under the circumstances for the Debtors to undertake further efforts to seek, and they would not obtain,

the necessary postpetition financing, let alone on terms more favorable, taken as a whole, than the financing offered by the DIP Lender pursuant to the DIP Loan Documents. In light of the foregoing, and considering the futility of all other alternatives, the Debtors have reasonably and properly concluded, in the exercise of their sound business judgment, that the DIP Facility represents the best financing available to the Debtors at this time, and are in the best interests of the Debtors, their Estates, and all of their stakeholders.

(iv) Budget. The Debtors prepared and delivered to the DIP Lender an initial budget (the "**Initial Budget**"), a copy of which was attached to the Interim Order as Exhibit B. The Initial Budget reflected the Debtors' projected receipts, disbursements, net cash flow, liquidity and loans for each calendar week during the period from the Petition Date through and including the end of the ninth (9th) calendar week following the Petition Date (the Initial Budget and each subsequent budget approved by the DIP Lender in its sole discretion and then in effect, the "**Approved Budget**"), in each case, subject to (i) with respect to any (A) for the first three Variance Testing Dates (which shall be each Friday of each week after the date hereof) commencing with the first full week after the date hereof, the period commencing on the Petition Date and ending on such Variance Testing Date and (B) thereafter, the four-week period ending on such Variance Testing Date (the "**Variance Testing Period**"), (X) in respect of the aggregate amount of Actual Disbursement Amounts (as defined in the DIP Note), 15% for such Variance Testing Period and (Y) in respect of Actual Cash Receipts (as defined in the DIP Note) 15% for such Variance Testing Period ("**Permitted Variances**"); and (ii) other exclusions set forth in the DIP Loan Documents. The Debtors believe that the Initial Budget is reasonable under the facts and circumstances. The DIP Lender is relying upon the Debtors' agreement to comply with the terms set forth in the DIP Note, the other DIP Loan Documents, and this Final Order, and with the Approved Budget, in

determining to enter into the postpetition financing arrangements provided for herein and to consent to the Debtors' use of Cash Collateral as set forth herein. The Prepetition Biofuels Bonds Secured Parties are relying upon the Debtors' agreement to comply on the terms set forth in the Initial Budget (and thereafter any Approved Budget) and this Final Order in determining to consent to the use of Cash Collateral and entering into the postpetition financing arrangements provided for herein. The Debtors shall provide the DIP Lender a revised proposed budget every other Thursday commencing with the second Thursday after the date hereof and continuing each two week period thereafter (each, a "**Proposed Budget**"). If a Proposed Budget is approved by the DIP Lender, it shall become the Approved Budget.

(v) Sale Process. The DIP Lender's willingness to make the DIP Loans and the Prepetition Bonds Secured Parties' willingness to consent to the use of Cash Collateral (each on the terms and subject to the conditions set forth in the DIP Loan Documents and this Final Order) is predicated upon (i) the Debtors filing a motion seeking approval of an order approving, among other things, the DIP Lender as a stalking horse bidder, the Bidding Procedures, the Break-Up Fee, and the Expense Reimbursement (each as defined in the Stalking Horse Purchase Agreement, as defined in the DIP Note) in the form attached as Exhibit A to the Stalking Horse Purchase Agreement and otherwise in form and substance acceptable to DIP Lender (the "**Bidding Procedures Order**" and the motion seeking entry of such order, the "**Bidding Procedures Motion**") in accordance with the Milestones (as defined in the DIP Note) and (ii) the Debtors' agreement to the Milestones as set forth in the DIP Note. Absent such arrangements, the DIP Lender and the Prepetition Bonds Secured Parties would not have agreed to make the DIP Loans or consent to the use of Cash Collateral as provided in the DIP Loan Documents and this Final Order.

(vi) Certain Conditions to DIP Facility. The DIP Lender's willingness to make the DIP Loans is conditioned upon, among other conditions set forth in the DIP Note: (a) the Debtors obtaining Court approval to enter into the DIP Loan Documents and to incur all of the obligations thereunder, and to confer upon the DIP Lender all applicable rights, powers, and remedies thereunder in each case as modified by this Final Order; (b) the Debtors' obtaining Court approval of and compliance with the "**Milestones**" set forth in the DIP Note, which are hereby approved in all respects; and (c) the DIP Lender being granted, as security for the prompt payment of the DIP Facility and all other obligations of the Debtors under the DIP Loan Documents, perfected security interests in and liens upon all property and assets of the Debtors, other than assets of Fulcrum BioEnergy, Inc., including, but not limited to, a valid and perfected security interest in and lien upon all of the following now existing or hereafter arising or acquired property and assets: (i) all property and assets comprising Prepetition Bonds Collateral and (ii) all other property and assets of the Debtors, including any property or assets consisting of "**Excluded Collateral**"[6] under any of the Prepetition Bond Documents and any other Collateral Documents (as defined in the DIP Note) (collectively hereinafter referred to as the "**DIP Collateral**", provided, however, that DIP Collateral shall not include the proceeds (the "**Avoidance Proceeds**") of any claim or cause of action (other than a claim or cause of action against Sierra Pacific Power Company d/b/a NV Energy, Tahoe-Reno Industrial Center, LLC, or TRI General Improvement

[6] For the avoidance of doubt, DIP Collateral shall not include the FT Catalyst and FT CANS (as defined in the DIP Note). Further, DIP Collateral shall not include Wells Fargo account ended -2912 (the "**Wells Fargo LC Account**"); provided, that the Debtors admit, stipulate, acknowledge, and agree that (i) the Debtors have not deposited or otherwise transferred any funds into the Wells Fargo LC Account since the Petition Date; (ii) the Debtors will not deposit or otherwise transfer any funds into the Wells Fargo LC Account absent the written consent of the DIP Lender; (iii) if the letters of credit collateralized by the funds held in the Wells Fargo LC Account expire without draw or are otherwise released without draw, then the Debtors' and their estates' interests in such funds shall constitute DIP Collateral; (iv) the Debtors shall not make or permit any party other than Wells Fargo to withdraw any of the funds held in the Wells Fargo LC Account absent the written consent of the DIP Lender; and (v) the Debtors shall not use the funds currently held in the Wells Fargo LC Account for any purpose other than as cash collateral for letters of credit held by Wells Fargo.

District) arising under or pursuant to chapter 5 of the Bankruptcy Code or under any other similar provisions of applicable state, federal, or foreign law (including any other avoidance actions under the Bankruptcy Code) (collectively, the "**Avoidance Actions**")).

(vii) Business Judgment and Good Faith Pursuant to Section 364(e). Any credit extended, loans made, and other financial accommodations extended to the Debtors by the DIP Lender, including, without limitation, pursuant to this Final Order, has been extended, issued, or made, as the case may be, in "good faith" within the meaning of section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Facility, the DIP Liens, and the DIP Superpriority Claim (as defined below) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code.

(viii) Sections 506(c) and 552(b). The Debtors have agreed as a condition to obtaining financing under the DIP Facility and the use of Cash Collateral as set forth in this Final Order that as a material inducement to the DIP Lender to agree to provide the DIP Facility and the Prepetition Bonds Secured Parties' consent to the priming by the DIP Facility and to the use of Cash Collateral as set forth in this Final Order, and in exchange for (a) the DIP Lender's willingness to provide the DIP Facility to the extent set forth herein, (b) the DIP Lender's and the Prepetition Bonds Secured Parties' agreement to subordinate their liens and superpriority claims to the Carve-Out, and (c) the consensual use of Cash Collateral consistent with the Approved Budget, the terms of the DIP Note, and the terms of this Final Order, the DIP Lender and each of the Prepetition Bonds Secured Parties are entitled to receive (1) a waiver of any equities of the case exceptions or claims under section 552(b) of the Bankruptcy Code, and (2) a waiver of the provisions of section 506(c) of the Bankruptcy Code.

(ix) Good Cause. Good cause has been shown for the entry of this Final Order. The relief requested in the Motion is necessary, essential, and appropriate under the circumstances as its implementation will, among other things, provide the Debtors with the necessary liquidity to (1) pursue a Court-approved marketing and sale process, (2) preserve and maximize the value of the Debtors' Estates for the benefit of all the Debtors' creditors, and (3) avoid immediate and irreparable harm to the Debtors, their creditors, and their assets. The terms of the DIP Facility and this Final Order are fair and reasonable, reflect each Debtor's exercise of its business judgment, and are supported by reasonably equivalent value and fair consideration. The DIP Facility and this Final Order are the product of reasonable, arm's length, good faith negotiations between the Debtors, the DIP Lender and the Prepetition Bonds Secured Parties.

(x) Adequate Protection. The Prepetition Bonds Secured Parties are entitled, pursuant to sections 361, 362, 363, and 364 of the Bankruptcy Code, to receive adequate protection against any Diminution in Value of their respective interests in the Prepetition Bonds Collateral (including Cash Collateral), as set forth in this Final Order. Any and all liens, claims, and encumbrances that may exist in the Prepetition Bonds Collateral and are junior to the Prepetition Bonds Liens have no interest in the Prepetition Bonds Collateral and are not entitled to adequate protection.

(xi) Immediate Entry. Sufficient cause exists for immediate entry of this Final Order pursuant to Bankruptcy Rule 4001(c)(2). Any objections that were made (to the extent such objections have not been withdrawn, waived, resolved, or settled) are hereby overruled on the merits.

(xii) Final Hearing. Notice of the Final Hearing and the relief requested in the Motion has been provided by the Debtors, whether by facsimile, electronic mail, overnight courier

or hand delivery, to (a) the Office of the United States Trustee for the District of Delaware, (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) the DIP Lender; (d) the Biofuels Trustee, (e) PLC Administration LLC; (f) the Office of the United States Attorney for the District of Delaware; (g) the Internal Revenue Service; (h) all parties that, to the best of the Debtor's knowledge, information, and belief, have asserted a lien in the Debtor's assets; (i) the Securities and Exchange Commission; (j) the Banks; (k) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (l) any such other party entitled to notice pursuant to Local Rule 9013-1(m). Under the circumstances, such notice of the Final Hearing and the relief requested in the Motion complies with section 102(1) of the Bankruptcy Code, Bankruptcy Rules 2002 and 4001(b) and (c), and the Local Rules.

Based upon the foregoing, and upon the record made before the Court at the Final Hearing and after due consideration and good cause appearing therefor;

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT**:

Section 1. Authorization and Conditions to Financing and Use of Cash Collateral.

1.1 Motion Granted. The Motion is granted on an interim basis solely to the extent provided in this Final Order. Any objections to the entry of this Final Order that have not been withdrawn, waived, resolved, or settled, are hereby denied and overruled on the merits.

1.2 Authorization of DIP Financing and Use of Cash Collateral.

(a) The Debtors were authorized by the Interim Order to immediately borrow, incur, and guarantee (as applicable) the DIP Loans, pursuant to the terms and conditions of the DIP Loan Documents, the Interim Order and the Approved Budget, in an aggregate principal amount not to exceed $3,204,103, and are hereby authorized to immediately borrow, incur, and guarantee (as applicable) the DIP Loans, pursuant to the terms and conditions of the DIP Loan

Documents, this Final Order and the Approved Budget, an additional aggregate principal amount not to exceed $1,795,897 (the "Final DIP Loan").

(b) The Debtors are authorized by this Final Order to (i) borrow under the DIP Facility and use Cash Collateral during the period (the "**Final Financing Period**") commencing on the date of the Interim Order through the occurrence of a DIP Termination Event (as defined below) solely in accordance with, and for the purposes permitted by, the DIP Loan Documents, this Final Order and the Approved Budget and (ii) pay all interest, costs, fees, and other amounts and obligations accrued or accruing under the DIP Note and other DIP Loan Documents, all pursuant to the terms and conditions of this Final Order, the Approved Budget, the DIP Note, and the other DIP Loan Documents.

1.3 Financing Documents.

(a) Authorization. The Debtors are hereby authorized to enter into, execute, deliver, and perform all obligations under the DIP Loan Documents. No obligation, payment, transfer, or grant of security hereunder or under the DIP Loan Documents shall be stayed, restrained, voidable, avoidable, or recoverable under the Bankruptcy Code or under any applicable state, federal, or foreign law (including, without limitation, under chapter 5 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, or similar statute or foreign law), or be subject to any defense, reduction, setoff, counterclaim, recoupment, offset, recharacterization, subordination (whether equitable, contractual or otherwise), cross-claims, or any other challenge under the Bankruptcy Code or any applicable law, rule, or regulation by any person or entity.

(b) Approval; Evidence of Borrowing Arrangements. The DIP Loan Documents and DIP Obligations shall be valid, binding, and enforceable against the Debtors, their

Estates, and any successors thereto, including, without limitation, any trustee appointed in any of these Chapter 11 Cases or any case under chapter 7 of the Bankruptcy Code upon the conversion of any of these Chapter 11 Cases (collectively, the "**Successor Cases**"), and their creditors and other parties in interest, in each case, in accordance with the terms of this Final Order and the DIP Loan Documents.

(c) Payment of DIP Fees and Other Expenses. Any and all fees and expenses payable pursuant to the DIP Loan Documents (collectively, any and all such fees and expenses, the "**DIP Fees**") are hereby approved and the Debtors are hereby authorized to pay, in cash, all reasonable and documented out-of-pocket costs, disbursements, and expenses the DIP Lender incurred at any time, as provided by the DIP Loan Documents and this Final Order in accordance with Section 5.15 hereof upon the presentment to the Office of the U.S. Trustee, counsel for the Committee, and the Debtors of their fee and expense statements or invoices, in summary form, which shall not be required to contain time entries but shall include the number of hours billed by the applicable professional and a summary statement of services provided and the expenses incurred (redacted if necessary for privileged, confidential or otherwise sensitive information), to the extent available in the Approved Budget and in accordance with the DIP Note. For the avoidance of doubt, the professionals to the DIP Lender shall not be required to file an application seeking compensation for services or reimbursement of expenses with the Court or comply with the U.S. Trustee fee guidelines. Within ten (10) calendar days of presentment of such statements, if no written objection to the reasonableness of the fees and expenses charged in any such invoice (or portion thereof) is made by the U.S. Trustee, the Committee (if any), or the Debtors, the Debtors shall pay in cash all such fees and expenses of the DIP Lender, and its advisors and professionals. Any such objection to the payment of such fees or expenses shall specify in writing the amount of

the contested fees and expenses and the detailed basis for such objection. To the extent such an objection only contests a portion of an invoice, the undisputed portion thereof shall be promptly paid. If any such objection to payment of an invoice (or any portion thereof) is not otherwise resolved between the objecting party and the issuer of the invoice, either party may submit such dispute to the Court for a determination as to the reasonableness of the relevant disputed fees and expenses set forth in the invoice. This Court shall resolve any dispute as to the reasonableness of any fees and expenses. Except as otherwise provided in this Final Order, the DIP Fees shall not be subject to any offset, defense, claim, counterclaim, or diminution of any type, kind, or nature whatsoever.

(d) Amendments to DIP Loan Documents. Subject to the terms and conditions of the applicable DIP Loan Documents, the Debtors and the DIP Lender may make amendments, modifications, or supplements to any DIP Loan Document, and the DIP Lender may waive any provisions in the DIP Loan Documents, without further approval of the Court; *provided that* the Debtors and DIP Lender shall provide the Committee with a copy of any such amendments; *provided further that* any amendments, modifications, or supplements to any DIP Loan Documents that operate to increase the aggregate commitments, the rate of interest payable thereunder, or existing fees, or to add new fees thereunder (excluding, for the avoidance of doubt, any amendment, consent or waiver fee) other than as currently provided in the DIP Loan Documents (collectively, the "**Material DIP Amendments**"), shall be filed with the Court, and the Debtors shall provide not less than three (3) Business Days prior written notice of any Material DIP Amendment and the proposed the effective date thereof to (i) counsel to the Committee and (ii) the U.S. Trustee; *provided*, *further*, *that* the consent of the foregoing parties will not be necessary to effectuate any such amendment, modification or supplement, except that any Material DIP

Amendment that is subject to an objection filed and served on the DIP Lender and the Debtors within three (3) Business Days following receipt of such Material DIP Amendment must be approved by the Court prior to becoming effective. For the avoidance of doubt, the Debtors must receive written consent as to any Material DIP Amendment prior to filing notice thereof with the Court from the Biofuels Trustee.

1.4 Indemnification. The Debtors are authorized to indemnify and hold harmless the DIP Lender and each of its affiliates, and each such Person's respective officers, directors, employees, attorneys, agents and representatives (each, an "Indemnified Person"), solely in their respective capacities as DIP Lender and/or officers, directors, employees, attorneys, agents and representatives of the DIP Lender, in accordance with, and as set forth in, the DIP Note, including that the Debtors shall not be liable for indemnification to an Indemnified Person to the extent that any such suit, action, proceeding, claim, damage, loss, liability or expense results solely from that Indemnified Person's fraud, gross negligence, or willful misconduct as determined in a final non-appealable judgment by a court of competent jurisdiction.

Section 2. Postpetition Lien; Superpriority Administrative Claim Status.

2.1 Postpetition Lien.

(a) Postpetition DIP Lien Granting. To secure performance and payment when due (whether at the stated maturity, by acceleration or otherwise) of any and all DIP Obligations of the Debtors to the DIP Lender of whatever kind, nature, or description, whether absolute or contingent, now existing or hereafter arising, the DIP Lender shall have and is hereby granted, effective as of the Petition Date, continuing, valid, binding, enforceable, non-avoidable, and automatically and properly perfected security interests in and liens (collectively, the "**DIP Liens**")

in and upon all DIP Collateral, subject and subordinate to the Carve-Out and the rankings and priority set forth in Section 2.1(b) below.

(b) DIP Lien Priority in DIP Collateral. The DIP Liens on the DIP Collateral securing the DIP Obligations shall be first and senior in priority to all other interests and liens of every kind, nature, and description, whether created consensually, by an order of the Court or otherwise, including, without limitation, liens or security interests granted in favor of third parties in conjunction with sections 363, 364, or any other section of the Bankruptcy Code or other applicable law; *provided*, *however*, *that* the DIP Liens on (A) the Prepetition Bonds Collateral (whether in existence on the Petition Date or hereafter arising) shall be subject to the Carve-Out; and (B) any other assets of the Debtors ("**Unencumbered Assets**") that were not subject to any validly perfected liens or security interest as of the Petition Date (including Avoidance Proceeds) shall be subject and subordinate to the Carve-Out. For the avoidance of doubt, the DIP Liens shall prime and be senior to the Prepetition Bond Liens of the Prepetition Bonds Secured Parties on the Prepetition Bonds Collateral.

(c) Postpetition Lien Perfection. This Final Order shall be sufficient and conclusive evidence of the priority, perfection, and validity of the DIP Liens, the Prepetition Bonds Secured Parties Adequate Protection Liens, and the other security interests granted herein, effective as of the Petition Date, without any further act and without regard to any other federal, state, or local requirements or law requiring notice, filing, registration, recording, or possession of the DIP Collateral, or other act to validate or perfect such security interest or lien, including, without limitation, control agreements with any financial institution(s) party to a control agreement or other depository account consisting of DIP Collateral, or requirement to register liens on any certificates of title (a "**Perfection Act**"). Notwithstanding the foregoing, if the DIP Lender or the

Prepetition Trustees, as applicable, shall, in their sole discretion, elect for any reason to file, record, or otherwise effectuate any Perfection Act, then the DIP Lender or Prepetition Trustees, as applicable, is authorized to perform such act, and the Debtors are authorized and directed to perform such act to the extent necessary or required by the DIP Loan Documents and this Final Order, which act or acts shall be deemed to have been accomplished as of the date and time of entry of this Final Order notwithstanding the date and time actually accomplished, and, in such event, the subject filing or recording office is authorized to accept, file, or record any document in regard to such act in accordance with applicable law. The DIP Lender or Prepetition Trustees, as applicable, may choose to file, record, or present a certified copy of this Final Order in the same manner as a Perfection Act, which shall be tantamount to a Perfection Act, and, in such event, the subject filing or recording office is authorized to accept, file, or record such certified copy of this Final Order in accordance with applicable law. Should the DIP Lender or Prepetition Trustees, as applicable, so choose and attempt to file, record, or perform a Perfection Act, no defect or failure in connection with such attempt shall in any way limit, waive, or alter the validity, enforceability, attachment, priority, or perfection of the postpetition liens and security interests granted herein by virtue of the entry of this Final Order.

(d) To the extent that any applicable non-bankruptcy law otherwise would restrict the granting, scope, enforceability, attachment, or perfection of any liens and security interests granted and created by this Final Order (including the DIP Liens and the Prepetition Bonds Secured Parties Adequate Protection Liens) or otherwise would impose filing or registration requirements with respect to such liens and security interests, such law is hereby preempted to the maximum extent permitted by the Bankruptcy Code, applicable federal or foreign law, and the judicial power and authority of this Court; *provided*, *however*, *that* nothing herein shall excuse the

Debtors from payment of any local fees, if any, required in connection with such liens. By virtue of the terms of this Final Order, to the extent that the DIP Lender or Prepetition Trustees, as applicable, has filed Uniform Commercial Code financing statements, mortgages, deeds of trust, or other security or perfection documents under the names of any of the Debtors (including all Guarantors), such filings shall be deemed to properly perfect its liens and security interests granted and confirmed by this Final Order without further action by the DIP Lender or Prepetition Trustees, as applicable.

(e) Except as provided in this Final Order, the DIP Liens, the DIP Superpriority Claim, the Prepetition Bonds Secured Parties Adequate Protection Liens, and the Prepetition Bonds Secured Parties Adequate Protection Claims (as defined below) (i) shall not be made subject to or *pari passu* with (A) any lien, security interest, or claim heretofore or hereinafter granted in any of these Chapter 11 Cases or any Successor Cases and shall be valid and enforceable against the Debtors, their Estates, any trustee, or any other estate representative appointed or elected in these Chapter 11 Cases or any Successor Cases and/or upon the dismissal of any of these Chapter 11 Cases or any Successor Cases; (B) any lien that is avoided and preserved for the benefit of the Debtors and their Estates under section 551 of the Bankruptcy Code or otherwise; and (C) any intercompany or affiliate lien or claim; and (ii) shall not be subject to sections 510, 549, 550, or 551 of the Bankruptcy Code.

2.2 Superpriority Administrative Expenses.

(a) DIP Loans. Subject to the Carve-Out, on account of all DIP Obligations now existing or hereafter arising pursuant to this Final Order, the DIP Loan Documents, or otherwise, the DIP Lender is granted allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code, having priority in right of payment over any and all

other obligations, liabilities, and indebtedness of the Debtors (including, for the avoidance of doubt, Debtor Fulcrum BioEnergy, Inc.), whether now in existence or hereafter incurred by the Debtors, and over any and all administrative expenses or priority claims of the kind specified in, or ordered pursuant to, *inter alia*, sections 105, 326, 328, 330, 331, 364(c)(1), 365, 503(b), 507(a), 507(b), 546(c), 1113, or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy, or attachment, which allowed superpriority administrative claim shall be payable from and have recourse to all prepetition and postpetition property of the Debtors (including, for the avoidance of doubt, Debtor Fulcrum BioEnergy, Inc.) and all proceeds thereof (but not including proceeds of Avoidance Actions) (such superpriority administrative expense claim, the "**DIP Superpriority Claim**").

2.3 Carve-Out. For purposes of this Final Order, "**Carve-Out**" shall mean: (i) all fees required to be paid to the Clerk of the Court and to the U.S. Trustee under section 1930(a) of title 28 of the United States Code plus interest at the statutory rate (without regard to the notice set forth in (iii) below) (collectively, the "**Statutory Fees**"); plus the sum of (ii) all reasonable fees and expenses up to $25,000 incurred by a trustee under section 726(b) of the Bankruptcy Code (without regard to the notice set forth in (iii) below) (the "**Chapter 7 Trustee Carve-Out**"); (iii) to the extent allowed at any time, whether by final order, interim order, procedural order, or otherwise, subject to the Approved Budget,[7] all unpaid fees, costs, disbursements and expenses (the "**Allowed Professional Fees**") incurred or earned by persons or firms retained by the Debtors pursuant to sections 327, 328, or 363 of the Bankruptcy Code (the "**Debtor Professionals**") or the Committee pursuant to sections 327, 328 or 1103 of the Bankruptcy Code (the "**Committee**

[7] For the avoidance of doubt, any future Proposed Budget or Approved Budget may not reduce the amount of budgeted fees available for estate Professionals.

**Professionals**" and, together with the Debtor Professionals, the "**Professionals**") at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (as defined below), whether allowed by the Court prior to, on or after delivery of a Carve-Out Trigger Notice (the "**Pre-Trigger Carve-Out Cap**"); (iv) Allowed Professional Fees of Professional in an aggregate amount not to exceed $250,000 (inclusive of any prepetition retainer held by the applicable Professional Person to the extent not previously applied or returned) incurred after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice to the extent allowed at any time, whether by final order, interim order, procedural order, or otherwise; and (v) all expenses that are budgeted and incurred prior to delivery of the Carve-Out Trigger Notice (such date, the "**Trigger Date**"), (the amounts set forth in this clause (iv) being the "**Post-Carve-Out Trigger Notice Cap**" and such amounts set forth in clauses (i) through (v), the "**Carve-Out Cap**"); *provided that*, nothing herein shall be construed to impair any party's ability to object to court approval of the fees, expenses, reimbursement of expenses or compensation of any Professional Person. For purposes of the foregoing, "**Carve-Out Trigger Notice**" shall mean a written notice delivered by email by the DIP Lender to the Debtors, their restructuring counsel, counsel to the Prepetition Trustees, the U.S. Trustee, and counsel to the Committee (collectively, the "**Carve-Out Trigger Notice Parties**"), which notice may be delivered following the occurrence and during the continuation of a DIP Termination Event, and shall describe in reasonable detail such DIP Termination Event that is alleged to have occurred and be continuing and stating that the Post-Carve-Out Trigger Notice Cap has been invoked. Neither the DIP Lender nor the Prepetition Bonds Secured Parties shall be responsible for the payment or reimbursement of any fees or disbursements of any Professional Person incurred in connection with the Chapter 11 Cases or any Successor Cases under any chapter of the Bankruptcy

Code, other than payment or reimbursement of any fees or disbursements from proceeds of DIP Collateral to the extent of the Carve-Out. Nothing in this Final Order or otherwise shall be construed to obligate the DIP Lender or the Prepetition Bonds Secured Parties, in any way, to pay compensation to, or to reimburse expenses of, any Professional Person or to guarantee that the Debtors have sufficient funds to pay such compensation or reimbursement.

2.4 **Professional Fees Escrow Account.** Consistent with the *Final Order (I) Authorizing the Debtors to (A) Continue to Operate their Cash Management System and Maintain Existing Bank Accounts and (II) Granting Related Relief*, the Debtors are authorized to maintain the segregated bank account held in trust for and exclusively available for the payment of fees and expenses of Professionals pursuant to this Final Order (the "**Professional Fees Escrow Account**") in the amount equal to, but not to exceed, the Allowed Professional Fees budgeted for Professionals retained by the Debtors and a Committee, if any (the "**Budgeted Professional Expenses**"). Except for funding the DIP Proceeds, including the Carve-Out, the DIP Lender shall have no responsibility, liability, or obligation whatsoever to fund, direct payment or reimbursement of any fees or disbursements, or otherwise ensure that the Debtors fund the Professional Fees Escrow Account or that the Professional Fees Escrow Account has funds equal to the aggregate amount of the Budgeted Professional Expenses for any applicable period. The Debtors are authorized and directed to fund the Professional Fees Escrow Account in an amount up to, but not to exceed, the Budgeted Professional Expenses for the full budget period upon entry of this Final Order. Such funds shall be held in the identifiable segregated account for the benefit of the Professionals to be applied to the Allowed Professional Fees of the Professionals that are approved for payment pursuant to one or more orders of this Court. Any Allowed Professional Fees payable to the Professionals shall be paid first out of the Professional Fees Escrow Account.

2.5 Prepetition Bonds Secured Parties Adequate Protection.

(a) Adequate Protection Claims and Liens. The Prepetition Bonds Secured Parties are entitled, pursuant to sections 361, 363(e), 364(d)(1), 503(b), 507(a), and 507(b) of the Bankruptcy Code and effective as of the Petition Date, to adequate protection of their respective interests in the Prepetition Bonds Collateral, including any Cash Collateral, in an amount equal to the aggregate Diminution in Value of the Prepetition Bonds Secured Parties' interests in the Prepetition Bonds Collateral from and after the Petition Date. On account of such adequate protection, the Prepetition Bonds Secured Parties are hereby granted the following, in each case subject to the DIP Liens and the Carve-Out (collectively, the "**Adequate Protection**"):

(i) Prepetition Adequate Protection Liens. Subject to Section 4.1 and in addition to all valid and enforceable security interests existing in favor of the Prepetition Bonds Secured Parties and not in substitution thereof, the Prepetition Bonds Secured Parties are hereby granted (effective and perfected upon the date of the Interim Order and without the necessity of any Perfection Act) valid and perfected postpetition replacement security interests in and liens upon the DIP Collateral (the "**Prepetition Adequate Protection Liens**"), which liens shall be, with respect to: (A) the Prepetition Bonds Collateral (whether in existence on the Petition Date or hereafter arising), subject and subordinate solely to the Carve-Out, Permitted Liens and the DIP Liens; and (B) Unencumbered Assets, subject to the Carve-Out and the DIP Liens.

(ii) Adequate Protection Superpriority Claims. To the extent of any Diminution in Value, the Prepetition Bonds Secured Parties are hereby granted allowed superpriority administrative expense claims pursuant to sections 503(b), 507(a), and 507(b) of the Bankruptcy Code (the "**Prepetition Bonds Secured Parties Adequate Protection Claims**"), which shall be allowed claims against each of the Debtors (jointly and severally), with priority (except as

otherwise provided herein) over any and all administrative expenses and all other claims against the Debtors now existing or hereafter arising, of any kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and all other administrative expenses or other claims arising under any other provision of the Bankruptcy Code, including, without limitation, sections 105, 326, 327, 328, 330, 331, 365, 503(b), 507(a), 507(b), or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other nonconsensual lien, levy, or attachment. The Prepetition Bonds Secured Parties Adequate Protection Claims shall be payable from and have recourse to all pre- and post-petition property of the Debtors, subject to the Carve-Out, Permitted Liens, and the DIP Superpriority Claims.

(b) Reporting. The Debtors shall timely provide the Prepetition Bonds Secured Parties with (x) reasonable access to the Debtors' facilities, management, books, and records required under the Prepetition Bond Documents and shall timely provide the Prepetition Bonds Secured Parties and Committee with (y) copies of all financial reporting provided to the DIP Lender pursuant to the DIP Loan Documents substantially simultaneously with such delivery to the DIP Lender.

2.6 Permitted Lien Adequate Protection. To the extent that any party has a Permitted Lien[8] or any other valid, enforceable, perfected and non-avoidable lien, claim, or encumbrance on or in the Prepetition Bonds Collateral that is senior to or *pari passu* with the Prepetition Bond Liens, such party shall be entitled to the Adequate Protection, including the Prepetition Adequate

[8] For purposes of this Interim Order, "**Permitted Liens**" shall mean any liens that are senior by operation of law (including any such liens that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code) or that were, as of the Petition Date, valid, properly perfected, non-avoidable and senior in priority to the Prepetition Bond Liens.

Protection Liens and the Prepetition Bonds Secured Parties Adequate Protection Claims in the order of priority of such liens as of the Petition Date.

Section 3. DIP Termination Events; Waivers; Rights and Remedies; Relief from Stay.

3.1 DIP Termination Events. Each of the following shall constitute a "DIP Termination Event" unless waived in writing by the DIP Lender and in accordance with the applicable DIP Loan Documents: (i) the occurrence of any "**Event of Default**" as that term is defined in the DIP Note; (ii) any failure to meet or satisfy any Milestone in accordance with the applicable DIP Loan Documents; (iii) the occurrence of the "**Maturity Date**" as defined in the DIP Note; (iv) any material violation, breach, or default by any Debtor with respect to any of its obligations under this Final Order or the DIP Loan Documents; (v) the termination of the DIP Loan Documents, or the modification of this Final Order in a manner adverse to the DIP Lender or any of the Prepetition Bonds Secured Parties without the prior written consent of such party; (vi) entry of any order authorizing any party in interest to reclaim any of the DIP Collateral, granting any party in interest relief from the automatic stay with respect to the DIP Collateral, or requiring that Debtors turnover any of the DIP Collateral, in each case prior to full, final and indefeasible repayment in full in cash of all DIP Obligations and Prepetition Bond Obligations and with respect to DIP Collateral having value in excess of $100,000; (vii) conversion of any Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code; (viii) a trustee is appointed or elected in any Chapter 11 Case, or an examiner with the power to operate the Debtors' businesses is appointed in any Case; (ix) the date that is thirty-five (35) calendar days following the entry of the Interim Order if a Final Order is not entered in form and substance acceptable to the DIP Lender and the Prepetition Bonds Secured Parties by such date; (xi) the date of the Final Hearing, if this Final Order is modified at the Final Hearing in a manner unacceptable to the DIP Lender or the Prepetition Bonds Secured Parties; (xii) the

Debtors shall withdraw the Bidding Procedures Motion and/or propose an Alternative Transaction[9] that, in any case, does not provide for the repayment in full, in cash, of the DIP Obligations directly from the proceeds of such Alternative Transaction and upon the initial closing of such Alternative Transaction; (xiii) the DIP Lender shall have received a Phase II environmental site assessment of the Real Property (as defined in the Stalking Horse Purchase Agreement), conducted by a firm selected by the DIP Lender, which contains evidence of contamination at the applicable site(s) above applicable thresholds such that any further investigation or that are above the amounts listed in the Phase I environmental site assessment or similar report previously received by the DIP Lender or any Material Remediation (as defined in the Stalking Horse Purchase Agreement) is required to achieve a level of completion of either Historical Recognized Environmental Condition (HREC) or Controlled Recognized Environmental Condition (CREC) as defined in the ASTM 1527 standard for Phase I Environmental Site Assessments; provided that a copy of the Phase II environmental site assessment was provided to the Debtors within a reasonable time upon receipt by the DIP Lender; provided, further, that the DIP Lender may not terminate if the Debtors agree to reduce the Purchase Price (as defined in the Stalking Horse Purchase Agreement) by the amount of the estimated costs of the Material Remediation; and (xiv) any modification, amendment, vacatur or stay of this Final Order in any manner not consented to in writing by the DIP Lender and the Biofuels Trustee.

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[9] "**Alternative Transaction**" means any transaction (or series of transactions), whether direct or indirect, concerning a sale, merger, acquisition, issuance, financing, recapitalization, reorganization, liquidation, transfer, or other disposition, in each case, pursuant to which all or a portion of the Acquired Assets (as defined in the Stalking Horse Purchase Agreement) are to be transferred to any individual, corporation, partnership, limited liability company, joint venture, association, trust, unincorporated organization, labor union, estate, government or other governmental or regulatory body, agency or political subdivision thereof of any nature, whether foreign, federal, state or local, or any agency, branch, department, official, entity, instrumentality or authority thereof, or any court, judicial body, tribunal, arbitrator or arbitration panel (public or private) of applicable jurisdiction or other entity or group other than the DIP Lender or any of its Affiliates or any plan of reorganization that does not contemplate or that does not permit the sale of the Acquired Assets to the DIP Lender pursuant to the Stalking Horse Purchase Agreement.

3.2 Additional DIP Termination Events.

(a) Prior to the payment in full in cash of all Prepetition Bond Obligations and all DIP Obligations, any request by the Debtors with respect to the following shall also constitute a DIP Termination Event: (i) to obtain postpetition loans or other financial accommodations pursuant to section 364(c) or 364(d) of the Bankruptcy Code that does not provide for the repayment in full in cash of the DIP Obligations at the initial closing of such transaction, other than as provided in this Final Order or as may be otherwise permitted pursuant to the DIP Loan Documents; (ii) to challenge the application of any payments authorized by this Final Order pursuant to section 506(b) of the Bankruptcy Code; (iii) to propose or support any challenge pursuant to Section 4.1 of this Final Order, or any challenge by any party in interest seeking to limit or prevent the DIP Lender or the Prepetition Bonds Secured Parties from exercising their credit bid rights in connection with the sale of any assets of the Debtors; *provided*, *that* the Debtors' response to any information request by a party in interest shall not constitute "support" of a challenge; or (iv), except the extent permitted under Section 3.4 hereof if the Debtors dispute the validity or the occurrence of a DIP Termination Event, to seek relief under the Bankruptcy Code, including, without limitation, under section 105 of the Bankruptcy Code, to the extent any such relief would interfere with or modify (A) the rights and remedies of the DIP Lender or any of the Prepetition Bonds Secured Parties against the Debtors as provided in this Final Order, any of the DIP Loan Documents or any of the Prepetition Bond Documents (B) the exercise of such rights or remedies by the DIP Lender or any of the Prepetition Bonds Secured Parties against the Debtors in accordance with the DIP Loan Documents, this Final Order or the Prepetition Bond Documents; *provided*, *however*, *that* the DIP Lender and the Biofuels Trustee may otherwise consent in writing,

but no such consent shall be implied from any other action, inaction, or acquiescence by the DIP Lender and the Prepetition Bonds Secured Parties.

(b) It shall also be a DIP Termination Event if the Debtors propose or support any chapter 11 plan or the sale of all or substantially all of the Debtors' assets (other than pursuant to the Sale Procedures Motion and the Sale Motion), or seek entry of an order confirming a chapter 11 plan or approving such non-conforming sale, that is not conditioned upon the payment of the DIP Obligations, in full in cash, directly from the proceeds of such transaction and upon the initial closing of such transaction, without the written consent of the DIP Lender and the Biofuels Trustee, as applicable.

3.3 Rights and Remedies upon a DIP Termination Event. Upon the expiration of seven (7) business days following the delivery of a written notice by the DIP Lender of the occurrence of and during the continuance of a DIP Termination Event (such seven (7) business day period, the "**Remedies Notice Period**"), (a) the DIP Lender shall be entitled to take any act or exercise any right or remedy as provided in this Final Order or any DIP Loan Document, as applicable, including, without limitation, (i) declare all DIP Obligations owing under the DIP Loan Documents to be immediately due and payable; (ii) terminate, reduce, or restrict any commitment to extend additional credit to the Debtors to the extent any such commitment remains; (iii) terminate the DIP Facility and any DIP Loan Document as to any future liability or obligation of the DIP Lender, but without affecting any of the DIP Obligations or the DIP Liens securing the DIP Obligations; (iv) invoke the right to charge interest at the default rate under the DIP Loan Documents; and/or (v) stop lending; and (b) the Biofuels Trustee shall (i) be entitled to terminate and/or revoke the Debtors' right, if any, under this Final Order and the other DIP Loan Documents to use any Cash Collateral and all such authority to use Cash Collateral shall cease and (ii) have automatic and

immediate relief from the automatic stay with respect to the Prepetition Bonds Collateral (without regard to the passage of time provided for in Fed. R. Bankr. P. 4001(a)(3)), and shall be entitled to exercise all rights and remedies available under the Prepetition Bond Documents and applicable non-bankruptcy law. For the avoidance of doubt, notwithstanding the foregoing, during the Remedies Notice Period, the Debtors may use Cash Collateral to fund the (i) Carve-Out; (ii) budgeted expenses incurred but not paid as of the date of delivery of the notice; and (iii) payroll and other expenses critical to the administration of the Debtors' estates strictly in accordance with this Final Order and the Approved Budget, or that have otherwise been approved in advance in writing by the DIP Lender.

3.4 Modification of Automatic Stay. The automatic stay provisions of section 362 of the Bankruptcy Code and any other restriction imposed by an order of the Court or applicable law are hereby modified without further notice, application, or order of the Court to the extent necessary to (i) permit the DIP Lender and Prepetition Trustees to perform any act authorized or permitted under or by virtue of the Interim Order and this Final Order, the DIP Note, or the other DIP Loan Documents, as applicable, including, without limitation, (i) to implement the postpetition financing arrangements authorized by the Interim Order and this Final Order, (ii) to take any act to create, validate, evidence, attach or perfect any lien, security interest, right or claim in the DIP Collateral, (iii) to assess, charge, collect, advance, deduct and receive payments with respect to the Prepetition Bond Obligations and DIP Obligations (or any portion thereof), including, without limitation, all interests, fees, costs, and expenses permitted under any of the DIP Loan Documents, and (iv) subject to the Remedies Notice Period, and *provided that* the Debtors or any party in interest with requisite standing has not obtained an order from this Court to the contrary prior to the expiration of the Remedies Notice Period, to take any action and

exercise all rights and remedies provided to it by the Interim Order and this Final Order, the DIP Loan Documents, or applicable law. For the avoidance of doubt, the Debtors may seek an emergency hearing during the Remedies Notice Period to dispute the validity or occurrence of a DIP Termination Event.

Section 4. Representations and Covenants.

4.1 Reservation of Third Party Challenge Rights. The stipulations, releases, agreements, and admissions contained in the Interim Order and this Final Order, including, without limitation, paragraph E hereof, and the releases contained in clause (vii) thereof, and paragraph 5.17 hereof (collectively, the "**Prepetition Lien and Claim Matters**"), shall be binding on the Debtors, any subsequent trustee, responsible person, examiner with expanded powers, any other estate representative and all creditors and parties-in-interest, and all of their successors in interest and assigns, including without limitation the Committee, unless, and solely to the extent that (a) a party-in-interest has sought standing and requisite authority to commence a Challenge (as defined below) (other than the Debtors, as to which the ability to commence any Challenge is irrevocably waived and relinquished) by timely filing an appropriate pleading (which shall include as an attachment or exhibit any applicable adversary complaint) under the Bankruptcy Code and Bankruptcy Rules, including, without limitation, as required pursuant to Part VII of the Bankruptcy Rules (in each case subject to the limitations set forth in this paragraph 4.1) challenging all or any portion of the Prepetition Lien and Claim Matters (each such proceeding or appropriate pleading commencing an adversary proceeding or other contested matter, a "**Challenge**") by no later than (i) the date which is 75 calendar days after entry of the Interim Order, (ii) any such later date as has been agreed to, in writing, by the Biofuels Trustee, or (iii) such later date as set by an order of the Court for cause shown (such time period established by the foregoing clauses (i) through (iii),

the "**Challenge Period**"); *provided that* if a chapter 11 trustee is appointed or the Chapter 11 Cases are converted to cases under chapter 7 prior to the expiration of the Challenge Period, the chapter 11 or chapter 7 trustee, as applicable, shall have until the later of (1) the expiration of the Challenge Period, and (2) the thirtieth (30th) day after the appointment of the chapter 11 trustee or conversion of the Chapter 11 Cases to cases under chapter 7, as applicable, to commence a Challenge; *provided further*, if any adversary proceeding or contested matter is timely filed and is pending on the date, if any, on which any of the Chapter 11 Cases are converted to chapter 7, the chapter 7 trustee may continue to prosecute such adversary proceeding or contested matter on behalf of the Debtors' estates, without any further authorization or order of the Court; *provided further* that the filing of a motion seeking standing to file a Challenge before the expiration of the Challenge Period, which attaches a complaint initiating a Challenge, shall extend the Challenge Period with respect to that party until two business days after the Court approves the standing motion, or such other time period ordered by the Court in approving the standing motion.

4.2 Binding Effect. To the extent no Challenge is timely commenced by the expiration of the Challenge Period, or to the extent such proceeding does not result in a final non-appealable judgment or order of this Court that is inconsistent with the Prepetition Lien and Claim Matters, then, without further notice, motion or application to, or order of or hearing before this Court, and without the need or requirement to file any proof of claim, the Prepetition Lien and Claim Matters shall become binding, conclusive and final on any person, entity or party-in-interest in the Cases and their successors and assigns, and in any Successor Case for all purposes, and shall not be subject to any challenge or objection by any party-in-interest, including, without limitation, a trustee, responsible individual, examiner with expanded powers or other representative of the Debtors' estates. Notwithstanding the foregoing, if any Challenge Proceeding is timely

commenced, Prepetition Lien and Claims Matters shall nonetheless remain binding and preclusive (as provided in this paragraph) on the Debtors, the Committee (if any), and any other person, entity or party-in-interest, except as to any such findings and admissions that were expressly and successfully challenged in such Challenge Proceeding as set forth in a final, non-appealable order of a court of competent jurisdiction. Nothing in the Interim Order or this Final Order vests or confers on any Person (as defined in the Bankruptcy Code), including the Committee (if any), standing or authority to pursue any cause of action belonging to the Debtors or their estates, including, without limitation, claims and defenses with respect to the Prepetition Bond Documents or the Prepetition Bond Liens on the Prepetition Bonds Collateral.

Section 5. Other Rights and DIP Obligations.

5.1 No Modification or Stay of this Final Order. The DIP Lender has acted in good faith in connection with the DIP Facility and with this Final Order, and their reliance on this Final Order is in good faith, and the DIP Lender is entitled to the protections of section 364(e) of the Bankruptcy Code.

5.2 Rights of Access and Information. The Debtors shall comply with the rights of access and information afforded to the DIP Lender under the DIP Loan Documents and the Prepetition Bonds Secured Parties under the Prepetition Bond Documents.

5.3 Power to Waive Rights; Duties to Third Parties.

(a) Subject to the terms of the DIP Loan Documents, the DIP Lender shall have the right to waive any of the terms, rights, and remedies provided or acknowledged in this Final Order that are in favor of the DIP Lender (the "**DIP Lender Rights**"), and shall have no obligation or duty to any other party with respect to the exercise or enforcement, or failure to exercise or enforce, any DIP Lender Rights; *provided that*, the DIP Lender shall obtain the prior written

consent of the Prepetition Trustee for any waiver that affects any rights of the applicable Prepetition Bonds Secured Parties hereunder or any treatment of the Prepetition Bond Obligations. Any waiver by the DIP Lender of any DIP Lender Rights shall not be nor shall it constitute a continuing waiver unless otherwise expressly provided therein. Any delay in or failure to exercise or enforce any DIP Lender Right shall neither constitute a waiver of such DIP Lender Right, subject the DIP Lender to any liability to any other party, nor cause or enable any party other than the Debtors to rely upon or in any way seek to assert as a defense to any obligation owed by the Debtors to the DIP Lender.

(b) The Prepetition Trustee shall have the right to waive any of the terms, rights, and remedies provided or acknowledged in this Final Order that are in favor of the applicable Prepetition Bondholders (the "**Prepetition Bondholder Rights**"), and shall have no obligation or duty to any other party with respect to the exercise or enforcement, or failure to exercise or enforce, any Prepetition Bondholder Rights; *provided that*, the Prepetition Trustee shall obtain the prior written consent of the DIP Lender for any waiver that affects any rights of the DIP Lender hereunder or any treatment of the DIP Obligations. Any waiver by the Prepetition Trustee of any Prepetition Bondholder Rights shall not be nor shall it constitute a continuing waiver unless otherwise expressly provided therein. Any delay in or failure to exercise or enforce any Prepetition Bondholder Right shall neither constitute a waiver of such Prepetition Bondholder Right, subject the Prepetition Trustee or any Prepetition Bondholder to any liability to any other party, nor cause or enable any party other than the Debtors to rely upon or in any way seek to assert as a defense to any obligation owed by the Debtors to the Prepetition Trustee or any Prepetition Bondholder.

5.4 No Unauthorized Disposition of Collateral; Use of Cash Collateral; Investigation Budget.

(a) The Debtors shall not sell, transfer, lease, encumber, use, or otherwise dispose of any portion of the DIP Collateral (including receivables and Cash Collateral), other than pursuant to the terms of this Final Order or as permitted by the DIP Loan Documents, and the Debtors are authorized to use Cash Collateral solely in a manner consistent with this Final Order, the Approved Budget and the DIP Loan Documents (including permitted variances and exclusions to the Approved Budget permitted thereunder).

(b) Notwithstanding anything herein to the contrary, no portion of the proceeds of the DIP Facility, the DIP Collateral or the Prepetition Bonds Collateral, including Cash Collateral, may be used for the payment of professional fees, disbursements, costs, or expenses incurred by any person in connection with (i) preventing, hindering, impeding, or delaying any of the DIP Lender's or Prepetition Bonds Secured Parties' enforcement or realization upon, or exercise of rights in respect of, any of the DIP Collateral or Prepetition Bonds Collateral, other than to seek (based on a good faith assertion) a determination that a DIP Termination Event (as defined below) has not occurred or is not continuing or in connection with a remedies hearing, (ii) seeking to amend or modify any of the rights or interests granted to the DIP Lender or Prepetition Bonds Secured Parties under this Final Order or the DIP Loan Documents, including seeking to use Cash Collateral on a contested basis, (iii) asserting, commencing, or prosecuting any claims or causes of action, including, without limitation, any Challenge or any other actions under chapter 5 of the Bankruptcy Code (or any similar law), against the DIP Lender or any Prepetition Bonds Secured Party, or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors, or employees, or (iv) asserting, joining, commencing, supporting, investigating,

or prosecuting any Challenge, or any other action for any claim, counterclaim, action, cause of action, proceeding, application, motion, objection, defense, or other contested matter seeking any order, judgment, determination, or similar relief against, or adverse to the material interests of the DIP Lender or any Prepetition Bonds Secured Party, arising out of, in connection with, or relating to the DIP Loan Documents or the Prepetition Bond Documents, or the transactions contemplated thereunder, including, without limitation, (A) any action arising under the Bankruptcy Code, (B) any so-called "lender liability" claims and causes of action, (C) any action with respect to the validity and extent of the DIP Obligations or the Prepetition Bond Obligations or the validity, extent, perfection and priority of the DIP Liens or the Prepetition Bond Liens, (D) any action seeking to invalidate, set aside, avoid, reduce, set off, offset, re-characterize, subordinate (whether equitable, contractual, or otherwise), recoup against, disallow, impair, raise any defenses, cross-claims, or counterclaims, or raise any other challenges under the Bankruptcy Code or any other applicable domestic or foreign law or regulation against, or with respect to, the DIP Liens or the Prepetition Bond Liens, in whole or in part, or (E) appeal or otherwise challenge the Interim Order or this Final Order. Notwithstanding the foregoing, no more than $75,000 in the aggregate of the proceeds of the DIP Facility, DIP Collateral, or Cash Collateral may be used by any Committee in connection with the investigation of, but not litigation of, any potential Challenge. For the avoidance of doubt, this section 5.4 shall not limit in any way the ability of the Committee have its fees and expenses paid from the proceeds of the DIP Collateral in connection with matters other than a potential Challenge, subject to the Approved Budget, provided, however, that the Committee shall not be permitted to use DIP Collateral to pay any fees and expenses incurred by the Committee related to the pursuit of any Challenge.

5.5 No Waiver. The failure of the DIP Lender or the Prepetition Bondholders, as applicable, to seek relief or otherwise exercise their rights and remedies under the DIP Loan Documents, the DIP Facility, the Prepetition Bond Documents, or this Final Order, as applicable, shall not constitute a waiver of any of the DIP Lender's or Prepetition Bondholders' rights hereunder, thereunder, or otherwise. Notwithstanding anything herein, the entry of this Final Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair the rights of the DIP Lender or the Prepetition Bondholders under the Bankruptcy Code or under non-bankruptcy law, including, without limitation, the rights of the DIP Lender and the Prepetition Bondholders to: (a) request conversion of the Chapter 11 Cases to cases under chapter 7, dismissal of the Chapter 11 Cases, or the appointment of a trustee in the Chapter 11 Cases; (b) propose, subject to the provisions of section 1121 of the Bankruptcy Code, a plan; or (c) exercise any of the rights, claims, or privileges (whether legal, equitable, or otherwise) of the DIP Lender or the Prepetition Bondholders.

5.6 Maintenance of Collateral. Unless the DIP Lender otherwise consents in writing, until (i) the payment in full in cash or otherwise acceptable satisfaction of all DIP Obligations and (ii) the termination of the DIP Lender's obligations to extend credit under the DIP Facility, the Debtors shall comply with the covenants contained in the DIP Loan Documents regarding the maintenance and insurance of the DIP Collateral. Upon entry of the Interim Order and this Final Order and to the fullest extent provided by applicable law, the DIP Lender shall be, and shall be deemed to be, without any further action or notice, named as an additional insured and loss payee on each insurance policy maintained by the Debtors that in any way relates to the DIP Collateral.

5.7 Reservation of Rights. The terms, conditions, and provisions of the Interim Order and this Final Order are in addition to and without prejudice to the rights of the DIP Lender and

each Prepetition Bonds Secured Party, as applicable, to pursue any and all rights and remedies under the Bankruptcy Code, the DIP Loan Documents, the Prepetition Bond Documents, or any other applicable agreement or law, including, without limitation, rights to seek adequate protection and/or additional or different adequate protection, to seek relief from the automatic stay, to seek an injunction, to oppose any request for use of Cash Collateral or granting of any interest in the DIP Collateral or the Prepetition Bonds Collateral, as applicable, or priority in favor of any other party, to object to any sale of assets, and to object to applications for allowance and/or payment of compensation of professionals or other parties seeking compensation or reimbursement from the Estates.

5.8 Binding Effect.

(a) All of the provisions of the Interim Order, this Final Order, and the DIP Loan Documents, the DIP Obligations, all liens, and claims granted hereunder in favor of the DIP Lender and each of the Prepetition Bonds Secured Parties, and any and all rights, remedies, privileges, immunities and benefits in favor of the DIP Lender and each Prepetition Bonds Secured Party set forth herein, including, without limitation, the parties' acknowledgements, stipulations, and agreements in Paragraph E of this Final Order, subject to Section 4.1 hereof (without each of which the DIP Lender would not have entered into or provided funds under the DIP Loan Documents and the Prepetition Bonds Secured Parties would not have consented to the priming of the Prepetition Bond Liens as set forth herein and use of Cash Collateral provided for hereunder) provided or acknowledged in the Interim Order and this Final Order, and any actions taken pursuant thereto, shall be effective and enforceable as of the Petition Date immediately upon entry of this Final Order and not subject to any stay of execution or effectiveness (all of which are hereby waived), notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, and 9024, or any

other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, shall continue in full force and effect, and shall survive entry of any other order or action, including, without limitation, any order which may be entered confirming any chapter 11 plan providing for the refinancing, repayment, or replacement of the DIP Obligations, converting one or more of the Chapter 11 Cases to any other chapter under the Bankruptcy Code, dismissing one or more of the Chapter 11 Cases, approving any sale of any or all of the DIP Collateral or the Prepetition Bonds Collateral, or vacating, terminating, reconsidering, revoking, or otherwise modifying this Final Order or any provision hereof.

(b) Nothing in these Chapter 11 Cases may impair the DIP Superpriority Claim, the Prepetition Bonds Secured Parties Adequate Protection Claims, and the DIP Lender's and the Prepetition Bonds Secured Parties' respective liens on and security interests in the DIP Collateral and the Prepetition Bonds Collateral, respectively, and all other claims, liens, adequate protections, and other rights granted pursuant to the terms of the Interim Order or this Final Order, which shall continue in full force and effect notwithstanding any dismissal of one or more of the Chapter 11 Cases until the DIP Obligations and Prepetition Bond Obligations are indefeasibly paid and satisfied in full. Notwithstanding any such dismissal, this Court shall retain jurisdiction for the purposes of enforcing all such claims, liens, protections, and rights referenced in this paragraph and otherwise in the Interim Order and this Final Order.

(c) Except as set forth in this Final Order, in the event this Court modifies or reverses on appeal any of the provisions of this Final Order or any of the DIP Loan Documents, such modifications, reversals, vacatur, or stays shall not affect the (i) validity, priority, or enforceability of any DIP Obligations incurred prior to the actual receipt of written notice by the DIP Lender of the effective date of such modification, reversal, vacatur, or stay, (ii) validity,

priority, or enforceability of the DIP Liens, the DIP Superpriority Claim, the Prepetition Bonds Secured Parties Adequate Protection Liens and the Prepetition Bonds Secured Parties Adequate Protection Claims or (iii) rights or priorities of the DIP Lender or any Prepetition Bonds Secured Party pursuant to the Interim Order or this Final Order with respect to the DIP Collateral or any portion of the DIP Obligations. All such liens, security interests, claims and other benefits shall be governed in all respects by the original provisions of the Interim Order and this Final Order, and the DIP Lender and the Prepetition Bonds Secured Parties shall be entitled to all the rights, remedies, privileges and benefits arising under sections 364(e) and 363(m) of the Bankruptcy Code.

(d) This Final Order shall be binding upon the Debtors, all parties in interest in the Chapter 11 Cases, and their respective successors and assigns, including, without limitation, (i) any trustee or other fiduciary appointed in the Chapter 11 Cases or any subsequently converted bankruptcy case(s) of any Debtor and (ii) any liquidator, receiver, administrator, or similar such person or entity appointed in any jurisdiction or under any applicable law. This Final Order shall also inure to the benefit of the Debtors, DIP Lender, and each of their respective successors and assigns.

5.9 No Discharge. The DIP Obligations and the obligations of the Debtors with respect to adequate protection hereunder, including granting the Prepetition Bonds Secured Parties Adequate Protection Liens and the Prepetition Bonds Secured Parties Adequate Protection Claims, shall not be discharged by the entry of an order confirming any plan of reorganization in any of these Chapter 11 Cases, notwithstanding the provisions of section 1141(d) of the Bankruptcy Code, unless such obligations have been indefeasibly paid in full in cash, on or before the effective date of such confirmed plan of reorganization, or the DIP Lender has otherwise agreed in writing.

5.10 No Priming of Prepetition Bond Obligations. Notwithstanding anything to the contrary herein, from and after the entry of this Final Order, absent the express written consent of the applicable Prepetition Bondholders and the DIP Lender, no Debtor shall seek authorization from this Court to obtain or incur any indebtedness or enter into an alternative financing facility other than the DIP Facility (a "**Competing DIP Facility**") seeking to impose liens on any Prepetition Bonds Collateral ranking on a *pari passu* or priming basis with respect to the Prepetition Bond Liens held by the Prepetition Bonds Secured Parties or the DIP Liens held by the DIP Lender; *provided*, *however*, *that* nothing herein shall preclude the Debtors from seeking authorization to incur any indebtedness or enter into any Competing DIP Facility that provides for the payment in full in cash of the DIP Obligations at the initial closing of such Competing DIP Facility.

5.11 Section 506(c) Waiver. No costs or expenses of administration which have been or may be incurred in these Chapter 11 Cases at any time (including, without limitation, any costs and expenses incurred in connection with the preservation, protection, or enhancement of value by the DIP Lender upon the DIP Collateral, or by the Prepetition Bonds Secured Parties upon the Prepetition Bonds Collateral, as applicable) shall be charged against the DIP Lender or the Prepetition Bonds Secured Parties, or any of the DIP Obligations or Prepetition Bond Obligations or the DIP Collateral or the Prepetition Bonds Collateral pursuant to sections 105 or 506(c) of the Bankruptcy Code or otherwise without the prior express written consent of the affected DIP Lender and/or affected Prepetition Bonds Secured Parties, in their sole discretion, and no such consent shall be implied, directly or indirectly, from any other action, inaction, or acquiescence by any such agents or creditors (including, without limitation, consent to the Carve-Out or the approval of any budget hereunder).

5.12 Section 552(b) Waiver. The Debtors have agreed as a condition to obtaining financing under the DIP Facility and using Cash Collateral as provided in this Final Order that the Prepetition Bonds Secured Parties are and shall each be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and that the "equities of the case" exception under section 552(b) shall not apply to the DIP Lender, the DIP Obligations, the Prepetition Bonds Secured Parties, or the Prepetition Bond Obligations.

5.13 "Soft" Marshaling/Application of Proceeds.

(a) The DIP Lender and the Prepetition Bonds Secured Parties shall not be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP Collateral or the Prepetition Bonds Collateral, as applicable, and all proceeds shall be received and applied in accordance with the DIP Loan Documents and the Prepetition Bond Documents, as applicable; *provided, however*, that in the event the DIP Lender or Prepetition Bonds Secured Parties seek to exercise remedies against the DIP Collateral or the Prepetition Bonds Collateral, they agree that they shall use reasonable efforts to first seek to recover against DIP Collateral other than commercial tort claims.

(b) Notwithstanding anything to the contrary in this Final Order, the respective DIP Obligations shall be satisfied from the proceeds of DIP Collateral.

5.14 Right to Credit Bid. The Debtors acknowledge and agree that the DIP Lender and each of the Prepetition Bonds Secured Parties shall have the right to credit bid the full amount of the DIP Obligations and the Prepetition Bond Obligations, respectively, in connection with any sale of the Debtors' assets pursuant to the Sale Motion or otherwise; *provided* that any credit bid by the Prepetition Bonds Secured Parties shall: (i) be subject to section 363(k) of the Bankruptcy Code; (ii) be subject to the rights of parties in interest under Section 4.1 hereof; and

(ii) include cash sufficient to satisfy all DIP Obligations in full in cash, which shall indefeasibly paid in full in cash upon the initial closing of any Alternative Transaction that includes a credit bid by the Prepetition Bonds Secured Parties.

5.15 Payment of DIP Lender Fees and Expenses. Subject to the procedures set forth in paragraph 1.3 of this Final Order, the Debtors shall pay (i) the fees and expenses of the DIP Lender, including its counsel and other advisors, in connection with the Chapter 11 Cases included to the extent reimbursable under the DIP Facility, the DIP Note, or the other DIP Loan Documents, as applicable, whether incurred before or after the Petition Date and (ii) all out-of-pocket costs and expenses of the DIP Lender incurred in connection with the Chapter 11 Cases, including, without limitation, fees and disbursements of counsel in connection with the enforcement or preservation of any rights under the DIP Facility, the DIP Note, or the other DIP Loan Documents, in each of (i) and (ii), to the extent available in the Approved Budget and in accordance with the DIP Note.

5.16 Limits on Lender Liability.

(a) Solely as a result of making any loan under the DIP Note, authorizing the use of Cash Collateral or in exercising any rights or remedies as and when permitted pursuant to the Interim Order and this Final Order or the DIP Loan Documents, the DIP Lender, and the Prepetition Bonds Secured Parties, shall not be deemed to (i) be in control of the operations of the Debtors or to be acting as a "controlling person," "responsible person," or "owner or operator" with respect to the operation or management of the Debtors, so long as the such party's actions do not constitute, within the meaning of 42 U.S.C. § 9601(20)(F), actual participation in the management or operational affairs of a facility owned or operated by a Debtor, or otherwise cause liability to arise to the federal or state government or the status of responsible person or managing agent to exist under applicable law (as such terms, or any similar terms, are used in the Internal

Revenue Code, WARN Act, the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., as amended, or any similar federal or state statute) or (ii) owe any fiduciary duty to any of the Debtors. Furthermore, nothing in in the Interim Order or this Final Order shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or any of the Prepetition Bonds Secured Parties, of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors and their respective affiliates (as defined in section 101(2) of the Bankruptcy Code).

(b) As to the United States, its agencies, departments, or agents, nothing in this Final Order or the DIP Loan Documents shall discharge, release or otherwise preclude any valid right of setoff or recoupment that any such entity may have.

5.17 Release. Each of the Debtors, their Estates and the Prepetition Obligors, on their own behalf and on behalf of each of their past, present and future predecessors, successors, heirs, subsidiaries, and assigns, hereby forever, unconditionally, permanently, and irrevocably release, discharge, and acquit the DIP Lender and (in such capacity) each of its successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants, professionals, officers, directors, members, managers, shareholders, and employees, past, present and future, and its respective heirs, predecessors, successors and assigns and, subject to section 4.1 of this Final Order, each of the Prepetition Bonds Secured Parties, and (in such capacity) each of its successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants, professionals, officers, directors, members, managers, shareholders, and employees, past, present and future, and its heirs, predecessors, successors and assigns (collectively, the "**Released Parties**") of and from any and all claims, controversies, disputes,

liabilities, obligations, demands, damages, expenses (including, without limitation, attorneys' fees), debts, liens, actions, and causes of action of any and every nature whatsoever, whether arising in law or otherwise, and whether known or unknown, matured or contingent, arising under, in connection with, or relating to (i) the Prepetition Bond Obligations and the DIP Facility or (ii) the DIP Loan Documents and the Prepetition Bond Documents, as applicable, including, without limitation, (a) any so-called "lender liability" or equitable subordination claims or defenses, (b) any and all "claims" (as defined in the Bankruptcy Code) and causes of action arising under the Bankruptcy Code, and (c) any and all offsets, defenses, claims, counterclaims, set off rights, objections, challenges, causes of action, and/or choses in action of any kind or nature whatsoever, whether arising at law or in equity, including any recharacterization, recoupment, subordination, avoidance, or other claim or cause of action arising under or pursuant to section 105 or chapter 5 of the Bankruptcy Code or under any other similar provisions of applicable state, federal, or foreign law, including, without limitation, any right to assert any disgorgement or recovery, in each case, with respect to the extent, amount, validity, enforceability, priority, security, and perfection of any of the Prepetition Bond Obligations and the DIP Obligations, the Prepetition Bond Documents and the DIP Loan Documents, or the Prepetition Bond Liens and the DIP Liens, and further waive and release any defense, right of counterclaim, right of setoff, or deduction to the payment of the Prepetition Bond Obligations and the DIP Obligations that the Debtors now have or may claim to have against the Released Parties, arising under, in connection with, based upon, or related to any and all acts, omissions, conduct undertaken, or events occurring prior to entry of the Interim Order or this Final Order; *provided* that, solely for the Prepetition Bonds Secured Parties and (in such capacity) each of their respective successors, assigns, affiliates, parents, subsidiaries, partners, controlling persons, representatives, agents, attorneys, advisors, financial advisors, consultants,

professionals, officers, directors, members, managers, shareholders, and employees, past, present and future, and their respective heirs, predecessors, successors and assigns. The Debtors are authorized in any payoff letter or similar agreement into which they enter upon payment in full of any DIP Obligations to provide a waiver and release substantially similar to the waiver and release set forth in this Section 5.17 of the DIP Lender and their related parties.

5.18 Survival. The provisions of the Interim Order and this Final Order, the validity, priority, and enforceability of the DIP Liens, the DIP Superpriority Claim, the Prepetition Bonds Secured Parties Adequate Protection Liens, the Prepetition Bonds Secured Parties Adequate Protection Claims, and any actions taken pursuant hereto shall survive, and shall not be modified, impaired or discharged by, entry of any order that may be entered (a) confirming any plan of reorganization in any of these Chapter 11 Cases, (b) converting any or all of these Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code, (c) dismissing any or all of these Chapter 11 Cases, (d) terminating the joint administration of these Chapter 11 Cases or any other act or omission, (e) approving the sale of any DIP Collateral pursuant to section 363(b) of the Bankruptcy Code (except to the extent permitted by the DIP Loan Documents), or (f) pursuant to which the Court abstains from hearing any of these Chapter 11 Cases. The terms and provisions of the Interim Order or this Final Order, including the claims, liens, security interests, and other protections (as applicable) granted to the DIP Lender and the Prepetition Bonds Secured Parties pursuant to the Interim Order or this Final Order, notwithstanding the entry of any such order, shall continue in any of these Chapter 11 Cases, following dismissal of any of these Chapter 11 Cases or any Successor Cases, and shall maintain their priority as provided by the Interim Order or this Final Order until (i) in respect of the DIP Facility, all of the DIP Obligations, pursuant to the DIP Loan Documents and this Final Order, have been indefeasibly paid in full in cash (such payment being

without prejudice to any terms or provisions contained in the DIP Facility which survive such discharge by their terms) and all commitments to extend credit under the DIP Facility are terminated, and (ii) in respect of the Prepetition Bond Obligations, all of the adequate protection obligations owed to the Prepetition Bonds Secured Parties provided for in the Interim Order or this Final Order and under the Prepetition Bond Documents have been indefeasibly paid in full in cash.

5.19 Proofs of Claim. None of the Prepetition Bonds Secured Parties shall be required to file proofs of claim in any of these Chapter 11 Cases or subsequent cases of any of the Debtors under any chapter of the Bankruptcy Code, and the Debtors' Stipulations in the Interim Order or this Final Order shall be deemed to constitute a timely filed proof of claim against the applicable Debtor(s). Notwithstanding the foregoing, the Prepetition Trustee (on behalf of itself and the applicable Prepetition Bondholders) is hereby authorized and entitled, in its discretion, but not required, to file (and amend and/or supplement, as applicable) a master proof of claim in the Debtors' lead Case (and such master proof of claim shall be also deemed filed in each of the Debtors' individual Cases) for any claims of the applicable Prepetition Bonds Secured Parties arising from the Prepetition Bond Documents or in respect of the Prepetition Bond Obligations; *provided*, *however*, *that* nothing in the Interim Order or this Final Order shall waive the right of any Prepetition Bondholder to file its own proof of claim against any of the Debtors.

5.20 No Third Party Rights. Except as specifically provided for herein, the Interim Order or this Final Order does not create any rights for the benefit of any third party, creditor, equity holders, or any direct, indirect, or incidental beneficiary.

5.21 No Avoidance. No obligations incurred or payments or other transfers made by or on behalf of the Debtors on account of the DIP Facility shall be avoidable or recoverable from the DIP Lender under any section of the Bankruptcy Code, or any other federal, state, or other

applicable law, *provided that*, nothing within this paragraph is intended to limit or curtail the provisions of Section 4.1 hereof, with respect to the Prepetition Bond Obligations.

5.22 Reliance on Order. All postpetition advances under the DIP Loan Documents are made in reliance on the Interim Order and this Final Order.

5.23 Payments Free and Clear. Subject to Section 4.1, any and all payments or proceeds remitted to the DIP Lender pursuant to the provisions of the Interim Order or this Final Order, any subsequent order of this Court or the DIP Loan Documents, shall, subject to the terms of this Section 5.23, be irrevocable, received free and clear of any claims, charge, assessment, or other liability, including, without limitation, any such claim or charge arising out of or based on, directly or indirectly, section 506(c) of the Bankruptcy Code or section 552(b) of the Bankruptcy Code, whether asserted or assessed by, through or on behalf of the Debtors, and in the case of payments made or proceeds remitted after the delivery of a Trigger Notice, subject to the Carve-Out in all respects.

5.24 No Direct Obligation To Pay Allowed Professional Fees. None of the DIP Lenders or the Prepetition Biofuels Bonds Secured Parties shall be responsible for the payment or reimbursement of any fees or disbursements of any Professional Person incurred in connection with the Chapter 11 Cases or any successor cases under any chapter of the Bankruptcy Code. Nothing in the Interim Order or this Final Order or otherwise shall be construed to obligate the DIP Lender or the Prepetition Biofuels Bonds Secured Parties, in any way, to pay compensation to, or to reimburse expenses of, any Professional Person or to guarantee that the Debtors have sufficient funds to pay such compensation or reimbursement.

5.25 Limited Effect. In the event of a conflict between the terms and provisions of any of the DIP Loan Documents and the Interim Order or this Final Order, the terms and provisions of the Interim Order and this Final Order shall govern.

5.26 Headings. Section headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Final Order.

5.27 Bankruptcy Rules. The requirements of Bankruptcy Rules 4001, 6003, and 6004, in each case to the extent applicable, are satisfied by the contents of the Motion.

5.28 General Authorization. The Debtors, the DIP Lender, and the Prepetition Bonds Secured Parties are authorized to take any and all actions necessary to effectuate the relief granted in this Final Order.

5.29 Retention of Exclusive Jurisdiction. This Court shall retain jurisdiction and power with respect to all matters arising from or related to the implementation or interpretation of this Final Order, the DIP Note, and the other DIP Loan Documents.

**EXHIBIT B**

**Fulcrum Sierra BioFuels, LLC**

Detailed Debtor-in-Possession - Proposed Budget

| Expense | Description | Actual 09/13/24 1 | Actual 09/20/24 2 | Forecast 09/27/24 3 | Forecast 10/04/24 4 | Forecast 10/11/24 5 | Forecast 10/18/24 6 | Bids Due Forecast 10/25/24 7 | Auction Forecast 11/01/24 8 | Forecast 11/08/24 9 | Sale Hearing 11/11/2024 Closing Forecast 11/15/24 10 | DIP Budget Totals |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Operations** | | | | | | | | | | | | |
| 3rd Coast Energy Services | Sierra site security | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 15,000 | $ 150,000 |
| Franke Management | Sierra warehouse | - | - | 16,795 | - | - | - | 17,500 | - | - | - | 34,295 |
| NV Energy | Biorefinery & FPF utilities | - | 20,329 | - | - | - | 25,000 | - | - | - | 25,000 | 70,329 |
| Water Supply | Water Utilities | - | - | 1,644 | - | - | 2,000 | - | - | - | 2,000 | 5,644 |
| Sky Fiber | Biorefinery internet | 1,897 | - | - | - | 1,900 | - | - | - | 1,900 | - | 5,697 |
| Summit Fire & Security | Required annual fire water system inspection | 16,950 | - | - | - | - | - | - | - | - | - | 16,950 |
| Rubiconn | IT Service Provider | 5,268 | - | - | 5,000 | - | - | 5,000 | - | - | 5,000 | 20,268 |
| AT&T | Internet | - | - | 1,326 | - | - | - | - | - | - | - | 1,326 |
| Waste Management | Trash Services | - | - | 4,000 | - | - | - | 4,000 | - | - | - | 8,000 |
| Canyon General Improvement District | Water Utilities | - | - | 85 | - | 100 | - | - | - | 100 | - | 285 |
| Other | Bank Fees | 286 | - | - | - | 2,000 | - | - | - | 2,000 | - | 4,286 |
| | | - | - | - | - | - | - | - | - | - | - | - |
| --- | | - | - | - | - | - | - | - | - | - | - | - |
| **Sub-Total: Operations** | | **$ 39,401** | **$ 35,329** | **$ 38,850** | **$ 20,000** | **$ 19,000** | **$ 42,000** | **$ 41,500** | **$ 15,000** | **$ 19,000** | **$ 47,000** | **$ 317,080** |
| **Contract Labor:** | | | | | | | | | | | | |
| Mark Smith | Chief Restructuring Officer | $ 40,150 | $ 25,000 | $ 25,000 | $ 25,000 | $ 47,350 | $ 25,000 | $ 25,000 | $ 25,000 | $ 25,000 | $ 25,000 | $ 287,500 |
| Rick Barraza | Restructuring oversight, preparation and support | 31,150 | 16,000 | 16,000 | 16,000 | 24,850 | 16,000 | 16,000 | 16,000 | 16,000 | 16,000 | 184,000 |
| Michael Huie | Controller - Accounting financial stmts and support | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 12,000 | 120,000 |
| Jeff Brorman | Sierra GM - site preservation | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 5,230 | 52,300 |
| Lorra Hennig | AP Manager - Accounting support | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 5,600 | 56,000 |
| Oscar Mora | Sierra Biorefinery Supervisor - site preservation | - | - | - | - | - | - | - | - | - | - | - |
| --- | --- | - | - | - | - | - | - | - | - | - | - | - |
| --- | --- | - | - | - | - | - | - | - | - | - | - | - |
| **Sub-Total: Contract Labor** | | **$ 94,130** | **$ 63,830** | **$ 63,830** | **$ 63,830** | **$ 95,030** | **$ 63,830** | **$ 63,830** | **$ 63,830** | **$ 63,830** | **$ 63,830** | **$ 699,800** |
| **Insurance:** | | | | | | | | | | | | |
| Property Insurance (Marsh) | 3-month renewal of FPF property coverage | $ - | $ - | $ - | $ - | $ 150,000 | $ - | $ - | $ - | $ - | $ - | $ 150,000 |
| Builder's Risk (Marsh) | 3-month renewal of biorefinery property coverage | - | - | - | - | 135,070 | - | - | - | - | - | 135,070 |
| Casualty (AFCO Credit Corp) | Casualty coverage through 11/01/24 | - | 45,042 | 43,519 | - | - | - | - | - | - | - | 88,561 |
| Directors & Officers (Marsh) | Renew D&O, current coverage expires 9/15/24 | 1,125,000 | - | - | - | - | - | - | - | - | - | 1,125,000 |
| --- | | - | - | - | - | - | - | - | - | - | - | - |
| **Sub-Total: Insurance** | | **$ 1,125,000** | **$ 45,042** | **$ 43,519** | **$ -** | **$ 285,070** | **$ -** | **$ -** | **$ -** | **$ -** | **$ -** | **$ 1,498,631** |
| **Legal, Restructuring & Other** | | | | | | | | | | | | |
| Debtor Professionals | | | | | | | | | | | | |
| Morris, Nichols, Arsht, & Tunnell LLP | Restructuring counsel | $ 125,000 | $ 125,000 | $ 125,000 | $ - | $ 400,000 | $ - | $ - | $ - | $ - | $ 220,000 | $ 995,000 |
| DSI | Financial advisors & investment bankers | - | - | 80,000 | - | 80,000 | - | - | - | - | 40,000 | 200,000 |
| Verita | Claims agent | 100,000 | - | - | - | 150,000 | - | - | - | - | 65,000 | 315,000 |
| Real Estate Attorney | Real Estate Attorney | - | - | - | - | - | - | - | - | - | 50,000 | 50,000 |
| Unsecured Creditors Committee | | - | - | - | - | - | - | - | - | - | - | - |
| Legal | --- | 80,000 | - | - | - | 160,000 | - | - | - | - | 65,000 | 305,000 |
| Financial Advisors | --- | 40,000 | - | - | - | 80,000 | - | - | - | - | 32,500 | 152,500 |
| Switch Ltd. Professionals | | - | - | - | - | - | - | - | - | - | - | - |
| LW & RL Fees | | - | - | 400,000 | - | - | - | - | - | - | - | 400,000 |
| US Trustee Fees [1] | --- | - | - | - | - | - | - | 20,991 | - | - | - | 20,991 |
| Independent Directors Fees | Carin Barth and Andrew Kidd | - | - | - | 65,000 | - | - | - | 65,000 | - | - | 130,000 |
| FDM - Utility Deposit | | - | - | - | - | - | - | - | - | - | - | - |
| **Sub-Total: Legal & Restructuring** | | **$ 345,000** | **$ 125,000** | **$ 605,000** | **$ 65,000** | **$ 870,000** | **$ -** | **$ 20,991** | **$ 65,000** | **$ -** | **$ 472,500** | **$ 2,568,491** |
| **TOTALS** | | **$ 1,603,531** | **$ 269,201** | **$ 751,199** | **$ 148,830** | **$ 1,269,100** | **$ 105,830** | **$ 126,321** | **$ 143,830** | **$ 82,830** | **$ 583,330** | **$ 5,084,002** |
| | Beginning cash balance | 91,339 | $ 1,691,911 | $ 1,422,710 | $ 671,511 | $ 522,681 | $ 1,049,478 | $ 943,648 | $ 817,327 | $ 673,497 | $ 590,667 | 91,339 |
| | Net Cash activity | (1,603,531) | (269,201) | (751,199) | (148,830) | (1,269,100) | (105,830) | (126,321) | (143,830) | (82,830) | (583,330) | (5,084,002) |
| | DIP Funding | 3,204,103 | - | - | - | 1,795,897 | - | - | - | - | - | 5,000,000 |
| | Ending cash balance | $ 1,691,911 | $ 1,422,710 | $ 671,511 | $ 522,681 | $ 1,049,478 | $ 943,648 | $ 817,327 | $ 673,497 | $ 590,667 | $ 7,337 | $ 7,337 |

*[1] The UST fees for the fourth quarter are estimated at $20,000. In addition, the anticipated sale proceeds could trigger an additional UST fee of $80,000, that are subject to the carve-out provision in the interim DIP financing order and payable by January 2025.*

**EXHIBIT C**

with an expression of interest and excessive debt.

So these discussions are happening among the Debtors, the term lenders and the Committee. And so to the extent there is someone out there who's interested and who might come to a point where they could pay off the debt, we would make a waiver request for the term lenders. They've already given us one in connection with the valuation one. And so we would do that and you know I think at that point the Debtors would be able to pursue providing diligence to interested parties; again, under certain circumstances with the consent of the term lenders.

So the process does have a way of working. It's not sort of a just a door shut. If people are coming forward the Debtors would have an opportunity to seek a waiver and then provide that information.

MR. POHL: Just one response, Your Honor, on the fees. We're not beholding to Lazard since they're not today doing a sale process. Lots of hungry bankers out there. I'm pretty confident that we can find one much less; perhaps, even the Committee's advisor. Thank you.

THE COURT: Anybody else. Well let me give some preliminary thoughts. I think in a discussion with counsel from the Committee I made it clear I'm not sure that their argument that the fact that the DIP is "tied to the PSA" that results in the Unsecured Creditors getting zero is a

convincing argument. There's nothing wrong with the DIP that's paying only for a sale process or a process where the result will be the DIP lenders will end up owing the company. There's nothing that requires a buyer to pay anything to the unsecured's if it feels that the enterprise does not have that value.

What Courts do require is that any process in the bankruptcy case has to include the commitment to pay for the cost of that process. And I think that this DIP does. It pays for the administrative expenses or all expenses that are anticipated to accrue during the period of the process and that is, I think, all that is required. But I am concerned with the restrictions on the Debtors' ability to pursue alternatives to the PSA either through a sale or through another plan.

The Debtor has a fiduciary duty to consider all options and I will direct the Debtor to fulfill that duty. I am concerned; in fact, I direct the Debtor to answer any questions from anybody expressing any interest in the company either through a sale or through a competing plan. I think that it is inappropriate for anybody to tie the Debtors' hands with respect to that.

I cannot require the lender to pay the costs of a full sale process. But that has to be balanced against the Debtors' fiduciary duty. And if anybody expresses any

**EXHIBIT D**

MR. ANGELO: No, please --

THE COURT: -- it might be helpful if I shared some overarching thoughts, so that you all have a sense of sort of where we are and what the target is that everyone is shooting at here.

I am not one who believes that there necessarily needs to be a recovery for unsecureds in order to legitimately invoke the bankruptcy process. I think that we take the pre-petition capital structure as we find it. What we do care about is are we maximizing value and if the bankruptcy process is being used for the purpose of maximizing value, then that value falls the way it falls and there's nothing wrong with doing that.

On the flip side, if you're a secured creditor and want to invoke the bankruptcy process for the purpose of what will likely be maximizing the value of your collateral, you don't get to impose the costs of that on other people. So, you've got to pay the freight associated with running a process that will maximize your value. And that includes paying the expected administrative expenses and the administrative expenses include reasonable committee fees.

MR. ANGELO: Certainly.

THE COURT: And so, there's an issue we have here about the Committee budget and whether it's reasonable. I think that's a topic that I'm going to hear from both sides on

but my initial reaction, for what it's worth, is that my sense of what's customary is something around a quarter of what the Debtor -- a quarter or more of what the Debtors' professional fees are and that I think there's a concern with the current proposal about being, sort of, out of market in terms of what's typically approved in this court.

MR. ANGELO: Understood, Your Honor.

THE COURT: I hear the point that what we're taking is some value that is otherwise unencumbered and spending it. And my 40,000 foot view, and I'm saying this to both sides, I'm happy to hear from everyone, my 40,000 foot view is that as long as it's being spent with a view towards maximizing the aggregate recoveries, the fact that what we're spending our, essentially, you know, Chapter 5 causes of action or commercial tort claims is really no different than if we had, you know, had a thousand dollars sitting in an account that was not subject to a lien.

I think the duty of the debtor in possession, right, exercising the obligations of a trustee, is to use all of the assets at its disposal with a view towards maximizing the total recovery and then allocation falls according to the statutory waterfall.

And so those are my initial thoughts. So, I have concerns about the budgets. I'm not moved by the argument that it looks like there might not be a recovery and that we might

**EXHIBIT E**

that needs to be tempered with 503(b)(9) claimants being left out in the lurch.

THE COURT: All right.

MR. PALACIO: Thank you, Your Honor.

THE COURT: Anyone else? I assume the Term B issues have been resolved?

MR. ATHANAS: They have, Your Honor.

THE COURT: Okay. Just wanted to make sure.

Let me give you some thoughts, maybe, before you reply.

MR. ATHANAS: Certainly, Your Honor.

THE COURT: 503(b)(9), the lender is not a guarantor of the 503(b)(9) or any other admin claims, and neither is the debtor. Mr. Palacio's right in that I generally have held in the past that you can run a case for the benefit of a secured creditor. It's the crime of having collateral that some people seem to say that they can't. They've got to pay the freight, and the freight is, at least -- the freight is not necessarily a tip to the unsecureds, but the freight is certainly an administratively solvent estate. And while there's not a guarantee, there has to be something other than a wing and a prayer on the payment of the admin claims. And counsel very honestly and appropriately answered the question that at least it's unclear, as we stand here, and it's quite unclear whether 503(b)(9) claims would be paid. It doesn't need to be in the

DIP budget, necessarily, but there has to be something -- and again, not a guarantee, but something, some evidence that there's a possibility -- probability that they'll be paid. Excuse me. And I don't -- I really don't see that, as we stood here today. So I don't know how you address it, but that's a thought.

Another thought is this is a position I inherited from Judge Walsh years ago, and I agree with it, which is basically you don't give a 506 waiver over an objection by the committee. And if necessary, we'll have a substantial contribution hearing -- not a substantial -- I'm sorry, but we'll have a hearing on 506(c), and in twenty years, he's never had one. So I would not be inclined to give a 506(c) waiver.

I'm okay with the milestones, I think, for the reasons I articulated with the committee, with Mr. Feinstein. I don't think I'm putting the case on a highway to a sale that's inappropriate. But Judge Walsh will decide that, and if the secured creditor calls a default based on that, I'll look on it at the merits. I don't think it's inappropriate, frankly, to give them the "leverage" at this time. They are lending money. It is their collateral at risk. It is not inappropriate for them to agree to fund a case based on certain conditions, provided they're reasonable and within the confines of the law. So as we sit here today, I'm okay with sale milestones.

The rollup, I really would like to hear more from the