IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	Chapter 11
WESCO AIRCRAFT HOLDINGS, INC., *et al.*,	§	Case No. 23-90611 (DRJ)
Debtors.[1]	§	(Jointly Administered)

STATEMENT OF THE FIRST LIEN NOTEHOLDER GROUP IN SUPPORT OF THE DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THEM TO (A) OBTAIN POSTPETITION FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) GRANTING RELATED RELIEF

The First Lien Noteholder Group, through its undersigned counsel, hereby files this statement in support of the DIP Motion[2] and in opposition to the objection of the ad hoc group of holders of 8.50% notes due 2024 and 9.00% notes due 2026 (the "Unsecured Noteholder Group") [ECF No. 337] and any untimely, unfiled objection of Langur Maize, LLC ("Langur Maize" and, together with the Unsecured Noteholder Group, the "Objectors"),[3] and respectfully submits as follows:

[1] The Debtors operate under the trade name Incora and have previously used the trade names Wesco, Pattonair, Haas, and Adams Aviation. A complete list of the Debtors in these chapter 11 cases, with each one's federal tax identification number and the address of its principal office, is available on the website of the Debtors' noticing agent at http://www.kccllc.net/incora/. The service address for each of the Debtors in these cases is 2601 Meacham Blvd., Ste. 400, Fort Worth, TX 76137.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to such terms in the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing The Debtors to (A) Obtain Position Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief* [ECF No. 84] (the "DIP Motion") or otherwise the Proposed Final Order (as defined herein).

[3] The First Lien Noteholder Group understands that, as of the filing of this statement, all other objections to the DIP Motion have been resolved, including all other objections asserted by the Unsecured Noteholder Group and all objections filed by (i) Bank of America, N.A., as administrative agent under the Prepetition ABL Credit

PRELIMINARY STATEMENT

1. Prior to the filing of these Chapter 11 Cases, the First Lien Noteholder Group, the members of which are the DIP Purchasers, engaged diligently with the Debtors, at their request, to ensure that the Debtors' estates would have robust postpetition financing to fund these Chapter 11 Cases and preserve value for all stakeholders. As a result, the Debtors have benefitted from a smooth start to the Chapter 11 Cases and have been able to successfully stabilize their business, thereby clearing the way for the Debtors to now focus on the core restructuring work needed for the Debtors to emerge from bankruptcy. This simply would not have been possible without the Debtors first having secured the $300 million DIP Financing package provided by the First Lien Noteholder Group.

2. This DIP Financing comprises a carefully crafted integrated set of agreements that:

- provide the Debtors with the liquidity to fund these Chapter 11 Cases that is indisputably necessary and not available from any other source;
- provide the DIP Purchasers with appropriate, customary protections for their investment;
- provide the Prepetition Secured Parties with fair adequate protection for the priming of their liens and use of their cash collateral; and
- preserve the rights of *all* parties in interest, secured and unsecured alike, to challenge prepetition transactions and otherwise defends their interests.

3. No party has challenged the Debtors' critical need for the DIP Financing, nor has any party suggested that any actionable alternative postpetition financing is or may be available. Since the interim approval of the DIP Financing, the First Lien Noteholder Group has actively

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Agreement (the "Prepetition ABL Agent") [ECF No. 299] and (ii) BOKF, NA, in its capacity as successor indenture trustee for the 2024 Unsecured Notes, the 2026 Unsecured Notes and the 2027 Unsecured Notes (the "Unsecured Notes Trustee") [ECF No. 368]. While the First Lien Noteholder Group understands that all of the objections of Langur Maize asserted in its objection filed at ECF No. 289 have been resolved, the First Lien Noteholder Group learned today that Langur Maize had additional objections not raised in its filed objection.

engaged with all parties in interest to seek their support for final approval of the DIP Financing. As a result of these exhaustive efforts, the proposed DIP Financing is now supported by all estate fiduciaries, all secured creditors and representatives for each major unsecured creditor constituency, including the Committee and the Unsecured Notes Trustee, and is opposed only by the Unsecured Noteholder Group and Langur Maize.

4. The proposed final order [ECF No. 382] (the "Proposed Final Order") reflects the numerous changes agreed to by the First Lien Noteholder Group and the Debtors to resolve all of the concerns raised by the Committee, the Unsecured Notes Trustee and other stakeholders and nearly all of those raised by the Unsecured Noteholder Group and Langur Maize, including:

- Post-Trigger Fee Cap: The Post-Trigger Fee Cap has been increased to $6 million. (*See* Proposed Final Order ¶ 4(a).)

- Soft Marshaling: In the event of an enforcement of remedies in accordance with the terms of the Final Order, the DIP Secured Parties and the Prepetition Secured Parties will use commercially reasonable efforts to first satisfy their claims and liens from Collateral other than Avoidance Proceeds or proceeds of claims or causes of actions against the Debtors' current or former directors and officers before seeking to recover from Avoidance Proceeds or proceeds of claims or causes of actions against the Debtors' current or former directors and officers. (*See* Proposed Final Order ¶ 9.)

- Committee Investigation Budget and Information Rights: The Committee's investigation budget has been increased to $150,000. (*See* Proposed Final Order ¶ 20.) The Committee will receive all written financial and other reporting required to be provided to the DIP Agent under the DIP Documents or that is required to be provided to the Prepetition ABL Agent. (*See id.* ¶ 41(a).)

- ABL Collateral Protections: The "Global Specified Availability" threshold is now $15 million, *plus* a contingent reserve to address certain disagreements between the Debtors and the Prepetition ABL Agent regarding the Debtors' manner of calculating Global Specified Availability, which will be reduced over time. (*See* Proposed Final Order ¶ 30(d).) The remaining "U.S. Quarterly Amortization Payments" and "UK Quarterly Amortization Payments" in respect of the prepetition FILO loans will be deemed paid upon entry of the Final Order by increasing the U.S. Revolving Commitment and UK Revolving Commitment. (*See id.* ¶ 30(e).)

- Limitation of Liability: The "Exculpation" provision has been renamed "Limitation of Liability" to make clear that nothing in the Final Order purports to provide exculpation to any parties. (*See* Proposed Final Order ¶ 25.)

- Credit Bidding: Credit bidding rights provided under the Final Order have been made subject to Challenges to Prepetition Liens. (*See* Proposed Final Order ¶ 28.)

- Amendments: Increases in facility-based fees and the creation of additional facility-based fees have been added to the list of amendments to the DIP Note Purchase Agreement requiring prior notice to, and opportunity for objection by, the U.S. Trustee and the Committee. (*See* Proposed Final Order ¶¶ 2(b)(i), 34.)

- 2024 Unsecured Notes/2026 Unsecured Notes Reservation of Rights and Challenges: The rights of the holders of the 2024 Unsecured Notes and the 2026 Unsecured Notes are reserved, upon the Court entering an order reinstating the liens therefor, to seek adequate protection in the same form as the protections given to the Prepetition 1L Notes Secured Parties in paragraphs 13(a), (b), (g), and (j). (*See* Proposed Final Order ¶ 39(a).)

- No Prejudice: Language has been added clarifying that no parties (other than the Debtors) shall be bound by the Debtors' stipulations except in accordance with Challenge Period provisions, including in connection with litigation relating to the Financing Transaction and any chapter 11 plan. (*See* Proposed Final Order ¶ 39(b)–(c).)

- Langur Maize: Language has been added clarifying that the Final Order does not grant or authorize the payment of indemnity, reimbursement or contribution claims to, or costs and expenses incurred by the Prepetition 1.25L Secured Parties in their capacities as such, or any of their Representatives, on account of or relating to the Langur Maize Action or the 2027 Notes Exchange, nor does the Final Order foreclose any challenges, defenses or objections to the validity or status of such indemnity, reimbursement or contribution claims, costs or expenses. (*See* Proposed Final Order ¶ 40.)

- No Prepetition Cross-Defaults: Language has been added clarifying that no Event of Default under Section 7.01(b) of the DIP Note Purchase Agreement will occur solely due to a breach or default under any of the Prepetition Debt Documents. (*See* Proposed Final Order ¶ 41(b).)

- Diminution Claims: To the extent an Acceptable Plan of Reorganization provides for distributions on account of any 507(b) Claim, the Debtors and/or the Prepetition Secured Party will file a notice twenty (20) days ahead of the confirmation hearing. (*See* Proposed Final Order ¶ 41(c).)

5. While the First Lien Noteholder Group and its advisors have worked tirelessly toward a global resolution, proposing and agreeing to every feasible compromise, an agreement to resolve the Unsecured Noteholder Group's and Langur Maize's last remaining objections could not be reached.

6. The Unsecured Noteholder Group's objections—which seek to bar the First Lien Noteholder Group from receiving expense reimbursement under the DIP Financing and otherwise seek to obtain certain litigation advantages for the Unsecured Noteholder Group—are meritless, and the Unsecured Noteholder Group does not offer even a single legal citation or precedent in support of their demands. Cutting through the Unsecured Noteholder Group's rhetoric and incorrect assertions, three fundamental points dispose of these last remaining objections: *First*, the terms of the DIP Financing, including the costs in connection therewith, are an integrated package negotiated by the Debtors in the sound exercise of their business judgment—the terms to which the Unsecured Noteholder Group objects cannot simply be excised while preserving the enormous benefits of the DIP Financing to the Debtors. *Second*, the Unsecured Noteholder Group's attempt to preview claims against the First Lien Noteholder Group is irrelevant because the Proposed Final Order expressly preserves the right of any party to bring claims pursuant to a customary challenge provision that is applicable to all parties in interest. There is no basis for exempting the Unsecured Noteholder Group from these customary provisions. *Third*, nothing in the DIP Documents prevents the Debtors from repaying the DIP Notes with alternative financing in order to terminate the Debtors' expense reimbursement obligations to the First Lien Noteholder Group under the DIP Financing.[4]

[4] For the avoidance of doubt, in the event the DIP Notes were repaid in full, the Proposed Final Order provides for ongoing expense reimbursement obligations to the First Lien Noteholder Group as Adequate Protection. (*See* Proposed Final Order ¶ 13(g)). However, the First Lien Noteholder Group understands this provision is not objectionable to the Unsecured Noteholder Group.

7. Langur Maize, apparently, takes umbrage with the DIP and adequate protection liens on avoidance action proceeds, notwithstanding the resolution of this issue with all parties that filed a timely objection with the Court asserting the matter. While this objection should be disregarded as untimely, it also fails on the merits, as it is contrary to black letter bankruptcy law mandating that unencumbered property be used first to secure DIP financing. *See* 11 U.S.C. § 364(d)(1)(A).

8. For all of the foregoing reasons, those set forth below, and those set forth in the DIP Motion, the supporting declarations and the reply filed by the Debtors [ECF No. 383] (the "Debtors' Reply"), the Court should overrule the Unsecured Noteholder Group's objection and any untimely objection raised by Langur Maize and enter the Proposed Final Order. The First Lien Noteholder Group furthermore hereby joins the Debtors' Reply.

REPLY

I. THE DIP FINANCING IS A PACKAGE DEAL THAT IS FAIR, REASONABLE AND CRITICAL TO PROTECTING THE ESTATES

9. The DIP Financing reflects the terms to which the Debtors, on the one hand, and DIP Purchasers, on the other, were willing to agree through hard-fought, arm's length negotiations. All terms of the DIP Financing are interdependent—it is a package deal, and the Objectors cannot ask the Court to red-pencil the DIP Financing to remove provisions they take issue with while retaining the many benefits conferred thereby.[5]

[5] *See, e.g.*, *In re ION Media Networks, Inc.*, No. 09-13125, 2009 WL 2902568, at *4 (Bankr. S.D.N.Y. July 6, 2009) (evaluating postpetition financing comprehensively); *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 59–60 (Bankr. N.D.N.Y. 2005) (same) (citing *In re Farmland Indus., Inc.*, 294 B.R. 855, 879–80 (Bankr. W.D. Mo. 2003)). *See also In re Ellingsen MacLean Oil Co.*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986), aff'd, 834 F.2d 599 (6th Cir. 1987) ("[T]he bankruptcy court would rightfully be more interested by the requirements and provisions of section 364 of the Code, than it would be by a picayune examination of every legal argument that could be brought against separate provisions of the proposed agreement.").

10. Critically, the Unsecured Noteholder Group and Langur Maize—the sole remaining objectors—do not object to the DIP Financing itself nor to the economics thereof, nor do they challenge the need for the DIP Financing to fund the Chapter 11 Cases. Notwithstanding their general support for the DIP Financing and the extensive accommodations provided to resolve their other objections, the Unsecured Noteholder Group continues to take issue with only two provisions of the Proposed Final Order—the expense reimbursement provided to the First Lien Noteholder Group, (*see* Unsecured Noteholder Obj. [ECF No. 337] ¶¶ 17–18), and the customary challenge period applicable to all parties seeking to challenge the Debtors' stipulations and agreements under the Proposed Final Order, (*see id.* ¶ 26)—and to demand one additional provision—a right for the Unsecured Noteholder Group to move to rescind and disgorge the adequate protection payments and liens granted under the Proposed Final Order, (*see id.* ¶¶ 23–24). Langur Maize, on the other hand, apparently continues to take issue with only the DIP and adequate protection liens on avoidance action proceeds.

11. The Unsecured Noteholder Group correctly notes that the postpetition financing should be evaluated under the business judgment standard unless the terms of the proposed financing would "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of a particular party in interest rather than the estate. (Unsecured Noteholder Obj. ¶ 8 (quoting *In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989))). However, the Unsecured Noteholder Group assiduously avoids any discussion of the very different circumstances in which courts have abandoned the business judgment standard.

12. For example, courts have rejected postpetition financings that "change the rules of a [c]hapter 11 case." *Tenney Vill.*, 104 B.R. at 569. The *Tenney* court rejected the terms of a

postpetition financing that would have, *inter alia*, resulted in the lending "bank . . . effectively operat[ing] the debtor's business," immunized its prepetition liens "from attack not only by the debtor but by a creditors' committee even prior to the appointment of counsel," and waived "preference, fraudulent conveyance, lender liability and subordination claims of the estate." *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (discussing *Tenney*). The *Ames* court additionally decried "[c]lauses providing for absolute control over fees and entrenchment of management clauses." *Id*.

13. The DIP Financing does nothing of the sort, and the Debtors were in no way coerced to agree to its terms. Rather, the DIP Financing provides the DIP Purchasers with customary protections to induce them to lend to a cash-strapped enterprise and provides the Prepetition Secured Parties with customary adequate protection for the priming of their liens. (*See* Laurinaitis Decl. ¶ 13–14, 21–22 [ECF No. 87]; Proposed Final Order ¶ 13.) The DIP Financing furthermore expressly preserves the rights of all parties in interest to assert Challenges to prepetition claims and liens in accordance with the Challenge Period provisions. (*See* Proposed Final Order ¶ 19.)

II. THE EXPENSE REIMBURSEMENT IS REASONABLE AND APPROPRIATE

14. As is customary, the DIP Financing provides for certain indemnification and expense reimbursement obligations to the DIP Agent and the First Lien Noteholder Group providing the DIP. Specifically, expense reimbursement is provided to each of WSFS, in its capacity as DIP Agent, and the First Lien Noteholder Group. (*See* Proposed Final Order ¶ 2(b)(ii).) In addition, the DIP Obligations include customary indemnification with respect to each of WSFS, in its capacity as DIP Agent, and the DIP Purchasers and their respective representatives for matters relating to the DIP Financing and the use of Cash Collateral. (*See* Proposed Final Order ¶ 21; DIP Note Purchase Agreement ¶ 9.03(b).) Additionally, as a component of Adequate Protection, each of the Prepetition ABL Agent, WSFS in its capacity as

the Prepetition 1L Notes Trustee, and the First Lien Noteholder Group have each been granted expense reimbursement rights. (*See* Proposed Final Order ¶¶ 13(g)–(h).)[6]

15. The Unsecured Noteholder Group does not dispute that these cases will involve extensive work by all parties. A plan will need to be formulated and negotiated with necessary parties in interest, exit financing and equity commitments will need to be obtained and the Debtors' business plan and contractual agreements will need to be analyzed and negotiated for assumption or rejection and the allegations and claims brought by the Unsecured Noteholder Group in connection with the Financing Transaction will need to be resolved. The First Lien Noteholder Group has demonstrated its commitment to and confidence in the Debtors' business—including by providing the DIP Financing—and is ready and willing to engage with the Debtors and all parties in interest to ensure the successful reorganization of the Debtors. The expense reimbursement provided to the First Lien Noteholder Group (the members of which are the DIP Purchasers)—for fees and expenses incurred in connection with the Chapter 11 Cases that they have agreed to finance—is a critical element of ensuring the First Lien Noteholder Group is able to do the work necessary to support the Debtors in this process.

16. The Unsecured Noteholder Group summarily asserts, without any legal support or substantive legal argument, that the expense reimbursement provided to the First Lien Noteholder Group somehow "elevat[es] and effectively roll[s] up certain prepetition unsecured indemnity claims . . . into postpetition claims." (*See* Unsecured Noteholder Obj. ¶ 3.)

17. The expense reimbursement is simply a cost of the DIP Financing that remains payable so long as the DIP Notes are outstanding. This is moreover a customary term of DIP

[6] The Proposed Final Order provides expense reimbursement for the First Lien Noteholder Group's fees and expenses as "DIP Fees and Expenses" until the DIP Notes are paid in full. After the payment in full of the DIP Notes, the Proposed Final Order provides expense reimbursement for such fees and expenses as "Adequate Protection Fees and Expenses."

financings approved by this Court and others in this district.[7] Nothing in the DIP Financing prevents the Debtors from repaying the DIP Notes to terminate the expense reimbursement obligations as DIP Fees and Expenses. If the Unsecured Noteholder Group or any other party would like to offer to replace the DIP Notes and finance these Chapter 11 Cases without the expense reimbursement and on better terms than those provided in the DIP Financing, they are welcome to do so.

18. The fact that the members of the First Lien Noteholder Group have an entirely independent, prepetition entitlement to reimbursement of similar expenses does not somehow render the expense reimbursement under the DIP Financing a roll-up. (*See* Unsecured Noteholder Obj. ¶¶ 16–18.) Nor does the Proposed Final Order or the DIP Financing in any way replace, abrogate or modify whatever obligations or rights the Debtors have with respect to prepetition indemnification agreements.

19. Indeed, in resolution of concerns raised by other parties with respect to this issue, (*see* Unsecured Notes Trustee Obj. ¶ 16 [ECF No. 368]; Langur Maize Obj. ¶¶ 6–7 [ECF No. 289]), the Proposed Final Order now includes clarifying language regarding the scope of indemnification and expense reimbursement provided under the DIP Financing. The Proposed Final Order specifies that "nothing in this Final Order shall deem such prepetition indemnification

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[7] *See, e.g.*, *In re Core Sci., Inc.*, Case No. 22-90341 (DRJ) (Bankr. S.D. Tex. Mar. 1, 2023) [ECF No. 608]; *In re Sungard AS New Holdings, LLC*, Case No. 22-90018 (DRJ) (Bankr. S.D. Tex. May 11, 2022) [ECF No. 220]; *In re Neiman Marcus Group LTD LLC*, Case No. 20-32519 (DRJ) (Bankr. S.D. Tex. June 16, 2020) [ECF No. 850]; *In re Hornbeck Offshore Servs., Inc.*, Case No. 20-32679 (DRJ) (Bankr. S.D. Tex. June 15, 2020) [ECF No. 166]; *In re J.C. Penney Co.*, Case No. 20-20182 (DRJ) (Bankr. S.D. Tex. June 5, 2020) [ECF No. 566]; *In re S. Foods Groups, LLC*, Case No. 19-36313 (DRJ) (Bankr. S.D. Tex. Dec. 23, 2019) [ECF No. 608]. In some cases, expense reimbursement is included as a cost of the DIP Financing through the grant of irrevocable adequate protection fees and expenses. *See, e.g.*, *In re Avaya Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 7, 2023) [ECF No. 278]; *In re Core Sci., Inc.*, Case No. 22-90341 (DRJ) (Bankr. S.D. Tex. Mar. 1, 2023) [ECF No. 608]; *In re Frontera Holdings LLC*, Case No. 21-30354 (MI) (Bankr. S.D. Tex. Feb. 23, 2021) [ECF No. 149]; *In re Hornbeck Offshore Servs., Inc.*, Case No. 20-32679 (DRJ) (Bankr. S.D. Tex. June 15, 2020) [ECF No. 166]; *In re S. Foods Groups, LLC*, Case No. 19-36313 (DRJ) (Bankr. S.D. Tex. Dec. 23, 2019) [ECF No. 608].

rights to be postpetition debt." (Proposed Final Order ¶ 21.) The Proposed Final Order also clarifies that (a) the indemnification granted under paragraph 21 is limited to the DIP Secured Parties, (*see* Proposed Final Order ¶ 21), (b) the expense reimbursement provided to the First Lien Noteholder Group as Adequate Protection applies only after the payment in full of the DIP Notes, because, prior to such time, such expense reimbursement is a component of the DIP Obligations, (*see* Proposed Final Order ¶ 13(g)), and (c) the indemnification and expense reimbursement provided to WSFS in its capacity as DIP Agent and the expense reimbursement provided to WSFS in its capacity as Prepetition 1L Notes Trustee do not apply to WSFS in its capacity as Prepetition 1.25L Notes Trustee or as former indenture trustee for the 2027 Unsecured Notes (*see* Proposed Final Order ¶ 40(b)).

20. The Unsecured Noteholder Group also argues that the expense reimbursement somehow "improperly and unfairly prejudices its ability to vindicate its rights that were violated by the Insider Transaction." (*See* Unsecured Noteholder Obj. ¶ 3.)

21. It is not at all clear how the Unsecured Noteholder Group has come to this conclusion, but in any case, the Proposed Final Order clearly preserves the rights of any party to bring Challenges against the Prepetition Secured Parties and prepetition liens and claims, as discussed further below. (*See* Proposed Final Order ¶ 19). Nevertheless, at the express request of the Unsecured Noteholder Group, the First Lien Noteholder Group has agreed to include in the Proposed Final Order extensive language preserving the rights of the Unsecured Noteholder Group in connection with their litigation. (*See id.* ¶ 39).

22. The Unsecured Noteholder Group cannot therefore credibly argue that its rights are being trampled when they are so clearly preserved. The payment of costs of the DIP Financing—the expense reimbursement—in no way affects the Unsecured Noteholder Group or their litigation.

Indeed, the Unsecured Noteholder Group seeks to have it both ways—they wish to have the Chapter 11 Cases funded to provide for a swift and orderly process to resolve their claims and counterclaims against the Debtors and the Prepetition 1L Notes Secured Parties, while also seeking to cherry pick provisions of the very financing enabling that process. While they may not enjoy every provision, it is not their business judgment that is relevant in this instance—it is the Debtors', and the Debtors have amply shown that the DIP Financing is a reasonable exercise thereof.

III. THE CHALLENGE PROVISIONS ARE CUSTOMARY AND APPROPRIATE, AND THE UNSECURED NOTEHOLDER GROUP CANNOT LEVERAGE THE DIP FINANCING TO OBTAIN LITIGATION ADVANTAGES

23. The Challenge provisions of the Proposed Final Order are entirely customary and contain the same terms as DIP financings routinely approved by this Court and others in this district.[8] These provisions apply equally to all parties in interest.

24. Nevertheless, the Unsecured Noteholder Group has taken the position that they should be granted an extension of the Challenge Period for failure to comply with the "no-action" clauses of the indentures for the 2024 Unsecured Notes and 2026 Unsecured Notes. (*See* Unsecured Noteholder Obj. ¶ 26). This position is without merit, and the Unsecured Noteholder Group has failed to cite a single precedent in support thereof. There is no basis for providing the Unsecured Noteholder Group with special treatment that could prolong these Chapter 11 Cases and therefore cause significant harm to the estates.

25. The Unsecured Noteholder Group further attempts to carve out additional, exclusive rights for itself under the Proposed Final Order by also demanding a wholly new provision providing that, if the Prepetition 1L Notes are found to be unsecured as a result of any

[8] *See, e.g.*, *In re Invacare Corp.*, Case No. 23-90068 (CML) (Bankr. S.D. Tex. Mar. 8, 2023) [ECF No. 298]; *In re Party City Holdco Inc.*, Case No. 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [ECF No. 587]; *In re Talen Energy Supply, LLC*, Case No. 22-90054 (MI) (Bankr. S.D. Tex. June 17, 2022) [ECF No. 588].

ongoing or future litigation proceedings, then nothing under the Proposed Final Order "shall prejudice, limit or otherwise impair any rights of the holders of 2024 Unsecured Notes and/or the 2026 Unsecured Notes from requesting that the Court rescind (and the Court to rescind) the adequate protection afforded the holders of the Prepetition 1L Notes or Prepetition 1.25L Notes . . ." (Unsecured Noteholder Obj. ¶ 24). The Unsecured Noteholder Group's request is misguided. First, if the Prepetition 1L Notes are determined to be unsecured, then there would be no diminution claims for the Adequate Protection Liens to secure, and therefore there would be no liens to rescind. Second, this Court directly addressed this issue at the First Day Hearing. (*See* First Day Hr'g Tr. 125:19–25, 126:1–4 [ECF No. 228] (THE COURT: "And right now, the order is silent as to what happens if you win, right? [. . .] That's all you're going to get. Next.").) There is no basis on which to rehash the issue now, particularly in light of the fact that the parties retain all rights to seek relief—if and when appropriate—at a later stage in these Chapter 11 Cases.

IV. AVOIDANCE PROCEEDS ARE APPROPRIATELY INCLUDED IN THE DIP AND ADEQUATE PROTECTION COLLATERAL PACKAGES

26. Though not raised in their objection filed with the Court, Langur Maize alerted the Debtors and the First Lien Noteholder Group on Sunday morning, nearly two weeks after the deadline to object to the DIP Motion, that they intend to argue at the Final Hearing that the DIP and adequate protection liens should have no recourse to Avoidance Proceeds. This objection is untimely, and Langur Maize should not be heard on this issue. The DIP Motion was unmistakably clear that a term of the DIP Financing was the requirement that the Final Order provide for DIP and adequate protection liens on avoidance action proceeds. (*See* DIP Motion ¶¶ 7(f), 10, 11(d).) The liens on Avoidance Proceeds were further discussed at the First Day Hearing. (*See* First Day Hr'g Tr. 35:11–12 [ECF No. 228].) It is inconceivable that Langur Maize could credibly argue that they were unaware that the DIP and adequate protection liens were intended to encumber

Avoidance Proceeds. As such, the Court should not indulge any arguments Langur Maize may make on this issue at the Final Hearing.

27. Regardless, Langur Maize's argument fails under black letter bankruptcy law. Under section 364 of the Bankruptcy Code, liens on unencumbered assets may be granted if unsecured credit cannot be obtained, but priming liens may *only* be granted if credit cannot be obtained without them. *See* 11 U.S.C. § 364(d)(1)(A). Unencumbered assets should be the *first* category of assets used to secure postpetition financing, not the last, because secured creditors have property rights in their collateral and unsecured creditors have no such rights in unencumbered assets. Any suggestion that the Prepetition Secured Parties alone should bear the cost of the DIP Financing is illogical and unsupportable. Postpetition financings are routinely secured by "all assets" blanket collateral packages because the Bankruptcy Code offers unique protections to incentivize the extension of credit to help debtors stabilize and reorganize, thereby preserving value for all stakeholders. This is of course the goal of the U.S. insolvency regime.

28. Proceeds of avoidance actions are no exception to this rule; they are property of the estate and, as such may be pledged to secure postpetition financing and diminution claims of prepetition secured creditors entitled to adequate protection. *See* 11 U.S.C. §§ 361(2); 364(c)(2), (c)(3), (d); 541(a)(3), (a)(4). Indeed, this Court and others in this district have repeatedly approved similar relief.[9]

[9] *See, e.g.*, *In re Invacare Corp.*, Case No. 23-90068 (CML) (Bankr. S.D. Tex. Mar. 8, 2023) [ECF No. 298] (granting liens on avoidance proceeds); *In re Avaya Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. Mar. 7, 2023) [ECF No. 278] (same); *In re Party City Holdco Inc.*, Case No. 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [ECF No. 587] (same); *In re Talen Energy Supply, LLC*, Case No. 22-90054 (MI) (Bankr. S.D. Tex. June 17, 2022) [ECF No. 588] (same); *In re Fieldwood Energy*, Case No. 20-33948 (MI) (Bankr. S.D. Tex. Sept. 15, 2020) [ECF No. 346] (same); *In re Ultra Petrol. Corp.*, Case No. 20-32631 (MI) (Bankr. S.D. Tex. June 16, 2020) [ECF No. 293] (same); *In re Hornbeck Offshore Servs., Inc.*, Case No. 20-32679 (DRJ) (Bankr. S.D. Tex. June 15, 2020) [ECF No. 166] (same); *In re Pioneer Energy Servs. Corp.*, Case No. 20-31425 (DRJ) (Bankr. S.D. Tex. Apr. 07, 2020) [ECF No. 186] (same); *In re Am. Commercial Lines, Inc.*, No. 20-30989 (Bankr. S.D. Tex. Mar. 5, 2020) [ECF No. 202] (same); *In re McDermott Int'l, Inc.*, No. 20-30336 (Bankr. S.D. Tex. Feb. 24, 2020) [ECF

29. The Proposed Final Order, however, is clear that all parties in interest retain the ability to bring challenges against the Prepetition Secured Parties, and that a successful challenge could impair the *prepetition* claims and liens or lead to other remedies. (*See* Proposed Final Order ¶ 19.) This should in no way affect the recovery of valid *postpetition* administrative priority claims. Even if avoidance proceeds were to be recovered from a particular party, the fact that such proceeds would continue to secure the remaining valid administrative priority claims of such party on account of the new money DIP Financing and any surviving adequate protection claims in no way roundtrips any such litigation proceeds—it simply means the Debtors' estates are not entitled to recover twice.

30. Furthermore, the Debtors made a reasonable business decision to pledge avoidance action proceeds as DIP Collateral as a result of the intense arm's-length negotiations that resulted in the DIP Financing. Any contentions to the contrary ignore the reality that liens on avoidance proceeds were part and parcel of the heavily negotiated bargain struck between the Debtors and the DIP Purchasers. The Debtors entered these Chapter 11 Cases with an immediate and critical need for DIP Financing and authorization to use cash collateral. In order to obtain such financing, the Debtors entered into a broad marketing process but only received one third-party indication of interest. (*See* Laurinaitis Decl. ¶¶ 11–14.) As such, the Debtors and the First Lien Noteholder Group engaged in negotiations, which were "extensive, hard-fought and conducted at arm's length over several rounds," (*id.* ¶ 13), resulting in the DIP Financing.

31. Nevertheless, as noted above, as a concession to various parties in interest, the First Lien Noteholder Group has agreed in the Proposed Final Order that

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No. 477] (same); *In re Whiting Petroleum Corp.*, No. 20-32021 (Bankr. S.D. Tex. June 16, 2020) [ECF No. 476] (same); *In re J.C. Penney Co., Inc.*, No. 20-20182 (Bankr. S.D. Tex. June 5, 2020) [ECF No. 566] (same).

> in the event of an enforcement of remedies in accordance with the terms of this Final Order, the DIP Secured Parties and the Prepetition Secured Parties shall use commercially reasonable efforts to first satisfy the claims and liens of such parties from applicable Collateral other than Avoidance Proceeds or proceeds of claims or causes of action against the Debtors' current or former directors and officers before seeking to recover from Avoidance Proceeds or proceeds of claims or causes of action against the Debtors' current or former directors and officers.

(*See* Proposed Final Order ¶ 9.)

32. This construct, which has been agreed to by other parties to resolve their timely objections to the DIP and adequate protection liens on avoidance action proceeds, provides a reasonable compromise position that balances the rights of the DIP Secured Parties and the Prepetition Secured Parties to be paid on account of their respective administrative priority claims from available unencumbered property, including avoidance action and other litigation proceeds, which are indisputably property of the estate that the Debtors may pledge in exchange for advantageous and necessary financing terms, and the interests of the Committee in protecting the interests of unsecured creditors, which are indisputably benefiting from such financing. To that end, this compromise has commonly been utilized in recent cases in this district.[10]

33. To request that the DIP Purchasers and Prepetition Secured Parties be stripped of collateral protections negotiated for and relied upon at this stage in the Chapter 11 Cases would unfairly alter a bargain struck and strip the Prepetition Secured Parties of their statutory rights and

[10] *See, e.g.*, *In re Invacare Corp.*, Case No. 23-90068 (CML) (Bankr. S.D. Tex. Mar. 8, 2023) [ECF No. 298] (providing that DIP Secured Parties and prepetition secured parties use commercially reasonable efforts to satisfy their claims and liens from other collateral before applying avoidance proceeds); *In re Nielsen & Bainbridge, LLC*, Case No. 23-90071 (DRJ) (Bankr. S.D. Tex. Mar. 6, 2023) [ECF No. 249] (providing that DIP Secured Parties and Prepetition ABL Secured Parties use commercially reasonable efforts to satisfy their claims and liens from other collateral before applying avoidance proceeds); *In re Party City Holdco Inc.*, Case No. 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [ECF No. 587] (same); *In re Talen Energy Supply, LLC*, Case No. 22-90054 (MI) (Bankr. S.D. Tex. June 17, 2022) [ECF No. 588] (providing that secured parties use reasonable best efforts to satisfy their claims from other collateral before applying avoidance proceeds).

protections. Instead, this compromise mitigates parties' concerns with respect to liens on Avoidance Proceeds while protecting the Prepetition Secured Parties.

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CONCLUSION

WHEREFORE, for the reasons set forth herein, the DIP Purchasers respectfully requests that the Court overrule all remaining outstanding objections, grant the DIP Motion, enter the Proposed Final Order and grant such other and further relief as is just and proper.

Dated: Houston, Texas
July 9, 2023

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COUNSEL FOR THE FIRST LIEN NOTEHOLDER GROUP

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by electronic delivery on all persons and entities receiving ECF notice in this proceeding on July 9, 20223.

/s/ *John F. Higgins*
John F. Higgins