Docket #0114 Date Filed: 06/20/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
PLASTIQ INC., *et al.*,[1]	)	Case No. 23-10671 (BLS)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Re: Docket Nos. 11, 23 & 79**

REPLY IN SUPPORT OF
THE DEBTORS' DIP MOTION AND BIDDING PROCEDURES MOTION

The above-captioned debtors and debtors in possession (collectively, the "**Debtors**") hereby file this reply in support of the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 11] (the "**DIP Motion**"), and the *Debtors' Motion for Entry of (A) an Order (I) Approving Bidding Procedures in Connection with the Sale of the Debtors' Assets and Related Bid Protections, (II) Approving Form and Manner of Notice, (III) Scheduling Auction and Sale Hearing, (IV) Authorizing Procedures Governing Assumption and Assignment of Certain Contracts and Unexpired Leases, and (V) Granting Related Relief; and (B) an Order (I) Approving the Purchase Agreements, and (II) Authorizing a Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests* [Docket No. 23] (the "**Bidding Procedures Motion**"), and in response to the objection thereto filed by the Official Committee of

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Plastiq Inc. (6125), PLV Inc. d/b/a/ PLV TX Branch Inc. (5084), and Nearside Business Corp. (N/A). The corporate headquarters and the mailing address for the Debtors is 1475 Folsom Street, Suite 400, San Francisco, California 94103.

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Unsecured Creditors (the "**Committee**") [Docket No. 79] (the "**Objection**").[2] In further support thereof, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. Since executing the LOI in March 2023, the Debtors, the DIP Lenders, and the Stalking Horse Bidder, a strategic third-party purchaser, have extensively negotiated in good faith to formulate a comprehensive transaction that preserves going-concern value, improves the Debtors' operations, and maximizes value for all stakeholders. The Objection, however, ignores the reality of the transaction and the Debtors' current circumstances. Specifically, the Objection overlooks the Debtors' efforts to execute an out-of-court transaction, and that uncontroverted fact that when it was apparent a value maximizing was not viable out of court, they immediately shifted their focus to securing post-petition financing and a going-concern stalking horse agreement. The results speak for themselves. The DIP Facility has allowed, and will continue to allow, the Debtors to access financing and Cash Collateral to provide sufficient liquidity to continue ordinary course business operations, preserve employee jobs, continue key commercial relationships, and run a fulsome sale process. The Stalking Horse Bid enables the Debtors to satisfy the Prepetition Secured Obligations and the DIP Facility, assumes various liabilities, and preserves jobs for rank-and-file employees.

2. As of the Petition Date, all of the Debtors' cash was encumbered by liens held by the Prepetition Secured Parties. Absent the $7.5 million of new money and access to Cash Collateral committed by the DIP Lenders, the Debtors' only option would have been a value-destructive fire sale of their assets, likely through a chapter 7 proceeding. In exchange for their

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration, the DIP Motion, or the Bidding Procedures Motion, as applicable.

committed financing that ensures a going-concern sale of the Debtors' assets, the DIP Lenders bargained for reasonable protections afforded under sections 361 and 364 of the Bankruptcy Code and routinely granted by this Court, and no other party has offered to provide financing. Those protections are integral components of the agreement reached among the Debtors and the DIP Lenders, were a material inducement for the DIP Facility, represent an exercise of the Debtors' reasonable business judgment, and should be approved.

3. The Committee attempts to paint a canvass that reflects a flawed sale process with a subpar value stalking horse bid. However, nothing could be further from the truth. In the months following the termination of their de-SPAC transaction and the collapse of Silicon Valley Bank—which housed the Debtors' entire cash management system and was critical to their business operations—the Debtors acted promptly to implement appropriate and necessary cost-saving measures to preserve and maximize value. To that end, the Debtors designed the Bidding Procedures to facilitate an open and fair public sale designed to maximize value for their estates. The proposed Bidding Procedures and Bid Protections are not novel; rather, the bargained-for provisions, are routinely approved in this jurisdiction, and entirely appropriate. Indeed, courts regularly approve aggregate bid protections of up to 5%—the total amount requested here—under *O'Brien*. And, if the Stalking Horse APA is so undervalued as compared to the two dated and irrelevant de-SPAC related valuations upon which the Committee bases its Objection, the Bidding Procedures and potential auction process will bear that out.

4. There is zero support for the Committee's contention that delaying the sale process for an unexplained amount of time will result in more value. To the contrary, doing so would be value destructive. The Debtors do not have cash from operations or committed additional financing to continue these cases into the month of August and incur upwards of $700,000 per

week in operating expenses. Delaying the sale closing beyond July 31, 2023, will not only jeopardize the Debtors' ability to sell the business as a going concern. The Committee's requests, in fact, are sure to harm the very constituents whose interests the Committee is charged with protecting—unsecured creditors who will have a continuing business relationship with the Debtors.

5. The Debtors have contacted 199 potential purchasers since February of 2023, including the eight additional parties suggested by the Committee (of which two immediately passed on the opportunity). At the conclusion of the customary 60-day sale process, the Debtors will have fully market tested the value of their assets. The Court should overrule the Objection because the DIP Facility provides sufficient liquidity to pay all administrative claims through this court-supervised sale process, as contemplated by the Bidding Procedures.

REPLY

I. THE DIP FACILITY SHOULD BE APPROVED.

6. Whether or not to approve proposed debtor in possession financing rests on the exercise of the Debtors' business judgment. Instead of focusing on the benefits the Debtors are receiving through the liquidity provided by the DIP Facility and an orderly sales process, which provides certainty and other benefits to the Debtors, their employees, creditors and other stakeholders, the Committee inappropriately seeks to supplant the Debtors' business judgment with its own judgment through objections to discrete, negotiated aspects of the DIP Facility. Courts routinely hold, however, that "[i]t is not appropriate to substitute the judgment of . . . objecting creditors [for] the business judgment of a debtor."[3] Courts also grant significant

[3] *In re Spansion, Inc.*, 426 B.R. 114, 140 (Bankr. D. Del. 2010).

latitude to the business judgment of a debtor as a tacit acknowledgement that a debtor is in a much more informed and educated position to make sound business decisions.[4]

a. The Economic Terms of the DIP Facility Are Reasonable Under the Circumstances, and They Satisfy the Business Judgment Standard.

7. The DIP Facility represents the best—***and indeed, the only***—postpetition financing option available to the Debtors. To determine whether the Debtors have met the business judgment standard, a court need only "examine whether a reasonable business person would make a similar decision under similar circumstances."[5] In considering whether the terms of postpetition financing are fair and reasonable, courts consider the terms in light of the relative circumstances of both the debtor and the potential lender.[6]

8. Unfortunately, these chapter 11 cases are indicative of the commercial and legal reality that debtors cannot compel third parties to lend and, most relevant here, that the DIP Facility, in the Debtors' business judgment, is reasonable given the unique challenges facing the Debtors and the facts and circumstances of these chapter 11 cases. Indeed, no other party has offered to make alternative financing available to the Debtors, and the Committee (which is represented by sophisticated legal and financial advisors) has not identified a single potential source of alternative financing to the Debtors, let alone financing on terms better than the DIP Facility.

9. When viewed in the context of the Debtors' critical need for liquidity and access to Cash Collateral, entry into the DIP Facility represents a sound exercise of the Debtors' business

[4] *See In re Marvel Entm't Grp, Inc.*, 273 B.R. 58, 78 (D. Del. 2002) ("'[U]nder the business judgment rule, a board's 'decisions will not be disturbed if they can be attributed to any rational purpose' and a court 'will not substitute its own notions of what is or is not sound business judgment.'").

[5] *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009).

[6] *In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003) (finding financing terms, many of which favored the DIP lender, reasonable when "taken in context, and considering the relative circumstances of the parties").

judgment. The Objection does not dispute that the Debtors require additional liquidity to prosecute and meet administrative obligations during these chapter 11 cases and consummate a value-maximizing sale. Rather, the Objection seeks to compel the DIP Lenders to upsize the DIP Facility while attempting to renegotiate the economic terms and reduce the DIP Lenders' collateral. However, the DIP Facility should be considered holistically—it provides the Debtors with the ability to fund day-to-day operations, pay employee expenses, and meet all administrative obligations through the conclusion of the sale process on terms that are acceptable to the Debtors in their business judgment. Importantly, the Stalking Horse APA ensures that the DIP Facility and Prepetition Secured Obligations will be paid in full, going-concern will be preserved, certain unsecured claims will be assumed, and parties will have a business partner with whom to transact post-sale.

b. Granting the DIP Lenders Liens on Proceeds of Avoidance Actions and Unencumbered Assets Is Appropriate.

10. Granting liens and claims against unencumbered and postpetition property is explicitly authorized by the Bankruptcy Code.[7] As courts have acknowledged, it is reasonable for an existing lender to secure its new money postpetition loans with unencumbered assets, including avoidance action proceeds, and avoidance action proceeds are especially appropriate where, as here, there are few, if any, unencumbered assets.[8]

[7] *See* 11 U.S.C. § 364(c)(2) (authorizing debtors to obtain credit "secured by a lien on property of the estate that is not otherwise subject to a lien" when unsecured credit is unavailable); 11 U.S.C. § 361(2) ("adequate protection may be provided by . . . an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property").

[8] *See In re TECT Aerospace Grp. Holdings, Inc., et al.*, No. 21-10670 (KBO) (Bankr. D. Del. May 11, 2021) Hr'g Tr. 28:14–28:20 [Docket No. 172] ("[A]t least I haven't heard it that [the lender] was over-secured as of the petition date. So … isn't it reasonable that [the lender] secure its new money DIP by collateral that's unencumbered? How else does it protect itself?"); *In re Quorum Health Corp.*, No. 20-10766 (KBO) (Bankr. D. Del. May 6, 2020) Hr'g Tr. 225:19–225:20 [Docket No. 296] ("The liens on avoidance actions do not trouble me given the lack of unencumbered collateral available to the DIP lenders."); *In re AppliedTheory Corp.*, 2008 WL 1869770, at*1 (Bankr. S.D.N.Y. Apr. 24, 2008) ("I was surprised to see the Creditors' Committee arguing that under no circumstances could the Lenders have a claim on the proceeds of avoidance actions and other initially unencumbered assets, even if necessary to give

11. Aside from a desire to make the proceeds of these assets available for the unsecured creditors, the Committee's justification for this particular objection is unclear. Even if there are unencumbered assets, the Debtors, in their business judgment, may pledge such assets to secure new money financing where, as here, it is needed to fulfill the Debtors' goal of running a process designed to preserve and maximize the value of the Debtors' estates for the benefit of all stakeholders. The DIP Lenders are, through the DIP Facility, providing the Debtors with $7.5 million in new money financing and have consented to the use of the Cash Collateral, including the $3.5 million in Cash Collateral that the Debtors were holding as of the Petition Date. The anticipated consumption of the Cash Collateral during the chapter 11 cases is significant and justifies the provision of adequate protection, including liens on previously unencumbered assets, if any. The Debtors accepted the best (and only) financing available, and the provision of the specific liens contemplated was negotiated and required as a condition of the DIP Facility.

12. Moreover, section 507(b) of the Bankruptcy Code provides for a superpriority claim for any diminution of value of the Prepetition Secured Parties' collateral, which claim would be payable ahead of general unsecured creditors. The use of Cash Collateral by the Debtors (including to pay for fees of the Committee professionals) necessarily results in a diminution of the value of the collateral of the Prepetition Secured Parties. To the extent the Prepetition Secured Parties are undersecured, they are likely the Debtors' largest general unsecured creditor (and thus the Committee's largest constituent) by multiples. The Committee provides no persuasive reason why the Debtors should not be allowed to provide liens on the proceeds of avoidance actions, or

them adequate protection. … those assets can [] be encumbered (or made available to satisfy superpriority claims), if necessary to provide adequate protection. That's expressly authorized under section 361(2).").

other unencumbered assets, to secure financing that is in the estates' best interests and enables the sale of the Debtors' assets for the benefit of their creditors.

c. The Proposed Committee Budget Is More Than Sufficient for the Committee to Fulfill its Fiduciary Duties.

13. The Committee argues that the $500,000 overall Committee budget and $25,000 investigation budget are insufficient to fulfill its fiduciary duties and unreasonable in the context of these cases. The Committee requests that its overall budget be increased to $1.1 million and its investigation budget be increased to $75,000. This request is based solely on the allegation that a committee is entitled to 30-40% of the total budget allocated for debtor professionals, but provides absolutely no support regarding what, exactly, the Committee needs to do to justify a two-fold increase in its proposed budget. However, the Debtors can point to recent cases that fall well below this mark.[9] In truth, the appropriate amount for the Committee depends on the facts and circumstances of each case, and the Committee has failed to even allege a justification in this case.

14. Aside from the fact that a request for more than $1 million to supervise a 363 sale process is excessive, the Debtors' line item contains numerous fees and expenses that are not applicable to a Committee. The Debtors are operating with the bare-minimum number of employees and do not have an operational C-suite—they do not have a chief financial officer or a controller, and the Debtors have only one member of the finance team remaining. As a result, Portage Point is filling the void and supporting a substantial portion of the Debtors' executive management and operational functions. The fallacy underlying the Committee's budget request is demonstrated by the breakdown attached hereto as **Exhibit A**, which delineates certain fees included in the Debtors' line item that are not applicable to a committee, such as independent

[9] *See e.g.*, *In re Armstrong Flooring, Inc.*, Case No. 22-10426 (MFW) (Bankr. D. Del. June 7, 2022) (20 percent of the debtors budgeted fees); *In re Stimwave Technologies Inc.*, Case No. 22-10541 (KBO) (Bankr. D. Del. July 14, 2022) (19.6 percent of debtors budgeted fees).

director fees, Portage Point's professionals providing interim management services, and Portage Point's sale fee.

15. The Committee is not providing operational support and will not be tasked with the myriad drafting, negotiation, and diligence that will necessarily be required by the Debtors' professionals throughout the sale process while handling the day-to-day administration of the chapter 11 cases. Thus, the Committee's unsupported demand for an amount one-third of the Debtors' budget, especially considering the circumstances of these chapter 11 cases, has no realistic basis and is unjustified. However, the Debtors are continuing to review the Approved Budget and are committed to working with the Committee to attempt to increase their budgeted fees.

d. The Committee's Request for a Wind-Down Budget is Unfounded.

16. As a threshold matter, the appropriate exit strategy for these chapter 11 cases is an issue for another day. The DIP Lenders are providing financing to pay professional fees and other operational expenses on an ongoing basis that will enable the Debtors to run an open and fair marketing and sale process. At the conclusion of that sale process, the DIP Facility will be fully drawn, and the funds will be used to pay all remaining administrative claims. In other words, the DIP Lenders are paying the freight of these chapter 11 cases and that is all that is required of the DIP Lenders. The Committee's position that the DIP Facility must be sufficient to fund a plan process is simply unfounded. Regardless, it is the Debtors' hope and goal that the sale process will permit the Debtors with an ability to confirm a chapter 11 plan. In fact, the Debtors anticipate filing a combined disclosure statement and plan and scheduling the hearing to consider interim approval on the date scheduled for the sale hearing.

e. The Section 506(c) and 552(b) Waivers are Appropriate and Consistent with Orders of Courts in this District.

17. The Committee objects to the waiver of the estates' rights under section 506(c) of the Bankruptcy Code. Such waivers are routine in this District where, as here, lenders have agreed provide the Debtors with sufficient liquidity to fund the working capital, payroll, and other administrative expenses as provided in the Approved Budget. This is the *quid pro quo* for the Debtors waiving their right to surcharge, and the Debtors are within their business judgment to agree to waive section 506(c) claims to obtain the DIP Facility.[10]

18. The Committee also objects to the waiver of the "equities of the case" exception under section 552(b) of the Bankruptcy Code. Like the section 506(c) waiver, the section 552(b) waiver is part of an arm's-length negotiated arrangement, is required under the DIP Facility, and should be approved. Section 552(b) waivers are common in chapter 11 cases where, as here, the Prepetition Secured Parties have agreed to a carve-out from their collateral to fund the Debtors' operations and fees and expenses of other parties.[11]

f. The Waiver of Marshalling Rights is Appropriate.

19. The Committee further objects to the waiver of any rights with respect to the marshaling doctrine. However, "unsecured creditors cannot invoke the equitable doctrine of marshalling," which is a remedy applicable between secured creditors.[12] The purpose of the

[10] *In re Redden*, No. 04-12335(PJW), 2013 WL 5436368, at *2 (Bankr. D. Del. Sept. 30, 2013) (holding that the trustee is the only party empowered to invoke section 506(c)); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 12-13 (2000) (explaining that the decision to seek to surcharge collateral under section 506(c) belongs to the debtor and may be exercised in the debtor's discretion).

[11] *See In re Stacy's, Inc.*, 508 B.R. 370, 380–81 (Bankr. D.S.C. 2014) (declining to apply equities of the case exception where secured lender had already agreed to carve-out and estate was only able to continue operating through the use of the lender's cash collateral); *In re Hostess Brands, Inc.*, Case No. 13-02223 (RDD) (Bankr. S.D.N.Y. 2012) Hr'g Tr. 58–59, Feb. 2, 2012 (secured creditors' "willingness to provide for a carve-out upfront as opposed to letting the professionals hang on that point" was a sufficient "tradeoff" to justify section 552(b) waiver).

[12] *In re Advanced Mktg. Servs., Inc.*, 360 B.R. 421, 429 n.8 (CSS) (Bankr. D. Del. 2007) (holding that unsecured creditors could not direct secured lenders to satisfy their claim using different collateral).

doctrine is to protect the interests of junior secured creditors, not unsecured creditors. Nevertheless, the marshalling waiver was a negotiated aspect of the DIP Facility, and there is nothing unreasonable about granting such a customary waiver.

II. THE BIDDING PROCEDURES MOTION SHOULD BE APPROVED.

20. The Debtors' overriding goal in the chapter 11 cases is to maximize recovery for the benefit of the Debtors' estates through a court-approved sale process. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling an estate's assets.[13] To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy transactions.[14] Approval of the Bidding Procedures is in the best interest of the Debtors' estates because they will provide certainty to potential bidders in the market and facilitate the Debtors' ongoing efforts to maximize the value of their assets to secure the greatest possible benefit for all of the Debtor's stakeholders.

21. While the Committee is obviously disappointed in the Stalking Horse APA purchase price, the Objection incorrectly focuses on one and two year old valuations of a completely different company operating in a vastly different market. As recently as 2022, the Debtors employed upwards of 200 employees. However, that number has been reduced to

[13] *See, e.g.*, *In re Integrated Resources, Inc.*, 147 B.R. 650, 656–57 (S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a trustee or debtor in possession are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid"); *see also In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) ("Indeed, under normal circumstances the court would defer to the [debtor's] business judgment so long as there is a legitimate business justification."); *In re Spansion, Inc.*, 426 B.R. 114, 140 (Bankr. D. Del. 2010) (noting that "[i]t is not appropriate to substitute the judgment of . . . creditors over the business judgment of the [d]ebtors," in the context of a dispute over the proper direction of a debtor's reorganization).

[14] *In re Fin. News Network, Inc.*, 126 B.R. 152, 156 (Bankr. S.D.N.Y. 1991) ("court-imposed rules for the disposition of assets . . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates").

approximately 45 as of the Petition Date due to numerous business disruptions, including the collapse of Silicon Valley Bank. Further while the NASDAQ hit an all-time high of 16,057 in 2021, and a high of 15,832 in 2022, when the Debtors received market valuations of $550 million and $480 million, respectively, it has fallen as low as 10,386 in 2023. If the Stalking Horse APA is so undervalued, the sale process, including a potential auction, will bear that out. As the Court has stated, "[a] wealth of authority teaches that when a willing buyer and a willing seller transact, both being at arms' length, neither being under compulsion to buy or sell, and both having reasonable knowledge of relevant facts, the sale price establishes fair market value."[15]

22. **Extension of Time.** The Committee requests an extension of the sale timeline without any real basis in fact or law. The Objection contains no support as to how this extension would actually improve the sale process, or how this process would be funded, as the Debtors' timeline is constrained by their liquidity. The Debtors do not have the liquidity to fund their operations and these cases into August. Nevertheless, the Debtors, with the consent of the DIP Lenders and the Stalking Horse Bidder, have agreed to extend certain of the Bidding Procedures' proposed dates and deadlines as set forth in the table below:[16]

Event	Current Date	New Date
Bid Deadline	July 14	July 20
Auction	July 18	July 25
Sale Hearing	July 24	July 27
Sale Closing	July 31	N/A (unchanged)

[15] *In re Samson Resources Corp. (Kravitz v. Samson Energy Co., LLC)*, Adv. Pro. No. 17-51524 (BLS) (June 14, 2023) at pg. 49-50.

[16] The Court has routinely approved 60 day sale processes. *See e.g.*, *In re Big Village Holding LLC,* Case No. 23-10174 (CTG) (Bankr. D. Del. March 13, 2023) (approving a sale within 61 days of the petition date); *In re Lucky Brand Dungarees, LLC*, Case No. 20-11768 (CSS) (Bankr. D. Del. July 30, 2020) (42 days) *In re Karmaloop, Inc.*, Case No. 15-10635 (MFW) (Bankr. D. Del. May 21, 2015) [D.I. 234] (52 days); *In re Coda Holdings, Inc.*, Case No. 13-11153 (CSS) (Bankr. D. Del. June 11, 2013)[D.I. 252] (42 days); *In re Questex Media Group, Inc.*, Case No. 09-13423 (MFW) (Bankr. D. Del. Nov. 24, 2009) [D.I. 240] (51 days).

23. **Assumption of the Colonnade Liability.** The Objection asserts that the Stalking Horse Bid should not provide any value to Colonnade. Colonnade is nothing more than an assumed liability. How the Debtors value the assumption of this liability is not a question for the Bidding Procedures Motion, but, instead, represents a sale issue. Further, a purchaser's assumption of a single liability is not a *sub rosa* plan. Purchasers have the right to choose which liabilities (if any) that they wish to assume. This is not something new; it happens in every single chapter 11 sale case throughout the country. Moreover, the payment terms between Colonnade and the Stalking Horse Bidder are not an issue for the Debtors or the Court. It is a compromise negotiated between two commercial parties. What is important is that an asserted liability of approximately $70 million will be assumed and will not dilute recoveries to the other general unsecured creditors.

24. **Equity to Blue Torch.** The Objection raises issues with the Stalking Horse APA issuing preferred equity to Blue Torch. Regardless of the form of the consideration, the fact remains that the DIP Lenders and Prepetition Secured Lenders have agreed that the combination of cash ($27.5 million) and preferred equity (which is limited to the face amount of preferred equity received, and represents part of the Stalking Horse Bidder's financing structure for the transaction, as opposed to a controlling stake in the Stalking Horse Bidder) satisfies the Debtors' obligations under the DIP and the Prepetition Term Loans. The satisfaction of such senior secured claims actually benefits the Debtors and the stakeholders represented by the Committee—unsecured creditors. But again, that is not an issue for the Bidding Procedures—how the Debtors value that portion of the Stalking Horse APA is an issue for the sale hearing.

25. **Avoidance Actions.** There is no support for the Committee's arguments that the avoidance actions should not be sold and should be preserved for unsecured creditors. To the

contrary, avoidance claims are assets of these estates and the sale of such actions is customary and appropriate. Buyers often purchase the estate's right to pursue such causes of action because it does not make good business sense for the acquirer to subject its employees, customers, and vendors to potential suit. As noted in *In re Real Mex Restaurants Inc*., "the sale or release of these types of claims is not unusual as it relates to general Chapter 5 causes of action and including fraudulent conveyance claims for business reasons."[17] There is simply nothing extraordinary about the sale of avoidance actions, and there is no reason to disapprove the sale of such actions here. In fact, many of the Committee's constituents will benefit from this provision.

26. In any event, this is a sale issue, not a bid procedures issue. To the extent that there is an auction with a competing bidder, that bidder may or may not wish to acquire the avoidance actions, which may moot this argument. The Debtors have a fiduciary duty to maximize value of all of their assets through the sale, and the Bidding Procedures simply provide the mechanism through which bids can be obtained for the maximum potential consideration.

27. **Bid Protections.** The Bid Protections, as provided in the Stalking Horse APA and the proposed Bidding Procedures, are reasonable under the circumstances and are the result of a protracted, hard fought and arms-length negotiation with the Stalking Horse Bidder. In an ideal world the Debtors would prefer a lower (or no) break-up fee and a lower (or no) expense reimbursement requirement. However, few debtors have this luxury, and the Debtors are not the exception to the rule. What is clear is that the Debtors did their best to negotiate the lowest break-up fee and expense reimbursement possible, but in the end the Stalking Horse APA amounted, in effect, to an aggregate sale transaction package. The Debtors, in the sound exercise of their business judgment and in consultation with their advisors, determined that the benefits of the

[17] Case No. 11-13122 (BLS) (Bankr. D. Del. Feb. 10, 2012).

package far exceeded the downside of not having a stalking horse bid that would serve as a definitive, non-contingent sale of the Debtors' assets as a going-concern. Under the circumstances, the Debtors believe that the Stalking Horse APA, taken as a whole, is reasonable and represents the best opportunity for the Debtors to maximize the value of their estates.

28. The Bid Protections (including the Break-Up Fee and the Expense Reimbursement Amount) represent "actual, necessary costs and expenses" of preserving the Debtors' estates under section 503(b) of the Bankruptcy Code and are consistent with the Third Circuit's decision in *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*.[18] In *O'Brien*, the Third Circuit Court of Appeal explained that "the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." [19] A break-up fee can satisfy the *O'Brien* standard if it will "provide some benefit to the debtor's estate."[20]

29. The Stalking Horse Bidder expressly conditioned its willingness to enter into the Stalking Horse APA upon the Debtors' agreement to, and the Court's approval of, the Bid Protections. The Stalking Horse APA assisted in facilitating a smooth entry into chapter 11 by providing certainty that the Debtors would continue as a going-concern. It also jumpstarted the Debtors' sale process and provided a floor for subsequent bids. Thus, the Bid Protections are necessary to preserve the value of the Debtors' estate,

30. Finally, the Break-Up Fee (3% of the Purchase Price) and the Expense Reimbursement (up to 2% of the Purchase Price for reasonable, actual, and documented expenses)

[18] 181 F.3d 527 (3d Cir. 1999).

[19] *Id*. at 535 (finding that break-up fees or expenses are allowable under section 503(b) of the Bankruptcy Code if the fees were actually necessary to preserve the value of the estate).

[20] *Id.* at 536.

are well within the range of percentages routinely approved by this Court in other chapter 11 cases in this District.[21]

CONCLUSION

31. For the reasons set forth above and in the DIP Motion and the Bidding Procedures Motion, the Court should overrule the Objection.

Dated: June 20, 2023
Wilmington, Delaware

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[21] *In re Teligent, Inc.*, Case No. 21-11332 (BLS) (Bankr. D. Del. Dec. 15, 2021) (approving bid protections totaling 5.2% of stalking horse bid); *In re ActiveCare, Inc.*, Case No. 18-11659 (LSS) (Bankr. D. Del. Aug. 17, 2018) (approving bid protections totaling 7.5% of stalking horse bid); *In re Orexigen Therapeutics, Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Apr. 23, 2018) (approving bid protections totaling 7.33% of stalking horse bid); *In re Verengo, Inc.*, Case No. 16-12098 (BLS) (Bankr. D. Del. Oct. 17, 2016) (approving 4% breakup fee with 1.5% expense reimbursement for total of 5.5% of stalking horse bid); *In re Nirvanix, Inc.*, Case No. 13-12595 (BLS) (Bankr. D. Del. Oct. 23, 2013) (approving bid protections totaling 11% of stalking horse bid); *In re First Place Fin. Corp.*, Case No. 12-12961 (BLS) (Bankr. D. Del. Nov. 26, 2012) (approving bid protections totaling 6.6% of transaction value); *In re Hub Holding Corp.*, Case No. 09-11770 (PJW) (Bankr. D. Del. June 30, 2009) (approving bid protections totaling 6.43% of stalking horse bid).

EXHIBIT A

INITIAL APPROVED DIP BUDGET - May 24, 2023

DEBTOR ADVISOR FEE DETAIL	*Week 1*	*Week 2*	*Week 3*	*Week 4*	*Week 5*	*Week 6*	*Week 7*	*Week 8*	*Week 9*	*Week 10*	*Week 11*	
Week Ending	**5/28/23**	**6/4/23**	**6/11/23**	**6/18/23**	**6/25/23**	**7/2/23**	**7/9/23**	**7/16/23**	**7/23/23**	**7/30/23**	**8/6/23**	**11-Weel Total**
Debtor Advisors												
Young Conaway	200,000	150,000	100,000	75,000	75,000	100,000	100,000	175,000	175,000	200,000	250,000	1,600,000
Latham & Watkins	-	-	-	15,000	-	-	-	-	-	-	-	15,000
Claims Agent (KCC)	-	-	60,000	-	-	-	90,000	-	-	-	75,000	225,000
Independent Directors	-	50,000	-	-	-	50,000	-	-	-	50,000	-	150,000
Portage Point - Sale Fee	-	-	-	-	-	-	-	-	-	-	1,250,000	1,250,000
Portage Point - Rx CRO	37,000	37,000	18,500	9,250	9,250	9,250	18,500	25,438	30,188	30,188	30,063	254,625
Portage Point - Rx Deputy CRO	41,563	41,563	41,563	41,563	41,563	41,563	41,563	41,563	41,563	41,563	41,563	457,188
Portage Point - Hourly Fees	84,550	84,550	81,425	81,425	81,425	79,850	87,725	91,650	85,325	85,325	82,175	925,425
Total Debtor Advisors	**363,113**	**363,113**	**301,488**	**222,238**	**207,238**	**280,663**	**337,788**	**333,650**	**332,075**	**407,075**	**1,728,800**	**4,877,238**
Non-Applicable Debtor Advisors												
Independent Directors	-	(50,000)	-	-	-	(50,000)	-	-	-	(50,000)	-	(150,000)
Claims Agent (KCC)	-	-	(60,000)	-	-	-	(90,000)	-	-	-	(75,000)	(225,000)
Portage Point - Sale Fee	-	-	-	-	-	-	-	-	-	-	(1,250,000)	(1,250,000)
Portage Point - Sale Process Hourly	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(12,500)	(137,500)
(66%) Portage Point - Rx CRO	(24,667)	(24,667)	(12,333)	(6,167)	(6,167)	(6,167)	(12,333)	(16,958)	(20,125)	(20,125)	(20,042)	(169,750)
(100%) Portage Point - Rx Deputy CRO	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(41,563)	(457,188)
Total Non-Applicable Debtor Advisors	**(78,729)**	**(128,729)**	**(126,396)**	**(60,229)**	**(60,229)**	**(110,229)**	**(156,396)**	**(71,021)**	**(74,188)**	**(124,188)**	**(1,399,104)**	**(2,389,438)**
Net Debtor Advisors	**284,383**	**234,383**	**175,092**	**162,008**	**147,008**	**170,433**	**181,392**	**262,629**	**257,888**	**282,888**	**329,696**	**2,487,800**