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

In re:	)	Chapter 11
	)	
VERTEX ENERGY, INC., *et al.*,[1]	)	Case No. 24-90507 (CML)
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	**Re: Docket Nos. 20, 23**

OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' EMERGENCY MOTIONS TO OBTAIN POSTPETITION DEBTOR-IN-POSSESSION FINANCING AND CONTINUATION OF THE INTERMEDIATION CONTRACTS

The Official Committee of Unsecured Creditors (the "Committee") of Vertex Energy, Inc. and its debtor affiliates (collectively, the "Debtors" or "Company") in the above-captioned cases (the "Chapter 11 Cases") by and through its undersigned proposed counsel, hereby submits this omnibus objection (this "Objection") to final approval of the *Debtors' Emergency Motion Seeking Entry of Interim and Final Orders (I) Authorizing the Debtor's to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (IV) Granting Adequate Protection to the Pre-Petition Term Loan Secured Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 20] (the "DIP Motion") and the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing Continuation of the Intermediation Contracts, as Amended, (II) Authorizing the Debtors to Enter into and Perform Postpetition Intermediation Transactions and Postpetition Hedging Transactions, (III) Providing*

[1] A complete list of each of the Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/vertex. The location of Debtor Vertex Energy, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 1331 Gemini Street, Suite 250, Houston, Texas 77058.

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Superpriority Administrative Expense Status and Liens in Respect of Postpetition Intermediation Transactions, (IV) Granting Adequate Protection to the Intermediation Provider, (V) Providing Superpriority Administrative Expense Status in Respect of Purchaser Support Agreements, (VI) Modifying the Automatic Stay, (VII) Setting Final Hearing, and (VIII) Granting Related Relief [Docket No. 23] (the "Intermediation Motion" and with the DIP Motion, the "Motions").[2]

PRELIMINARY STATEMENT

1. The Debtors and certain of its Prepetition Term Loan Lenders (the "Consenting Term Loan Lenders" or "DIP Lenders") have entered into a *Restructuring Support Agreement* (the "RSA") and proposed debtor-in-possession financing facility which requires the Debtors to sprint toward a restructuring transaction at lightning speed, whether it be a credit bid sale to the DIP Lenders, a sale to a third party, or a recapitalization pursuant to a chapter 11 plan. If the Debtors' sale process is unable to generate any third-party bids for substantially all of the Debtors' assets by the October 23 indication of interest deadline (the "IOI Deadline")—a mere six days from now—then the DIP Lenders will rush to seek court approval of a credit bid sale on November 18. Alternatively, if the sale process yields multiple bids by the IOI Deadline, then the Debtors will hold an auction and proceed to a sale hearing on December 16.

2. The Committee strongly believes that the Debtors' sale process would greatly benefit from additional time. The Committee understands there is significant third-party interest in the Debtors' assets. Moreover, the Committee has already identified a number of additional potential buyers and is working with the Debtors' professionals to ensure these parties are contacted. For these reasons, the Committee believes that at least a three-week extension of the IOI Deadline (and subsequent milestones) is necessary to ensure the Debtors are afforded enough

[2] Capitalized terms used herein that are not otherwise defined shall have the meanings ascribed to them in the First Day Declaration (as defined below) or the DIP Motion, as applicable.

time to realize a value-maximizing transaction. Moreover, any sale of the Debtors' assets to the DIP Lenders through a credit bid should not be subject to Court approval until the Committee has had the opportunity to conduct an appropriate investigation into the validity and enforceability of the DIP Lenders' claims and liens. Under the Complex Case Rules, the Committee has until December 7, 2024 to conduct that investigation.[3]

3. In addition to the untenable and prejudicial milestones, which are also integral to the Intermediation Motion, the Committee has identified a number of objectionable provisions in the proposed order granting the DIP Motion on a final basis (the "Final DIP Order") including, without limitation: (a) a non-market roll-up of prepetition loans which may render the estates administratively insolvent, (b) the exclusion of any budget for the Committee to evaluate the Consenting Term Loan Lenders' prepetition liens and claims, (c) the extension of the DIP Lenders' liens to proceeds of avoidance actions, and (d) preemptive waivers of key common law and statutory rights benefitting unsecured creditors (*e.g.*, protections under Bankruptcy Code sections 506(c) and 552(b), and the equitable doctrine of marshaling).

4. The Committee appreciates that the Debtors are in a tough position and likely had little choice but to accede to the Consenting Term Loan Lenders' desired timeline and burdensome financing proposal. While there may be benefits to closing a sale quickly and preserving the going concern value of the Debtors' businesses, the Debtors must prosecute these cases in a procedurally fair manner and cannot pursue a path that hands the keys to the DIP Lenders and fails to protect the basic rights of general unsecured creditors. There is ample precedent standing for the

[3] To facilitate the Committee's ability to complete its investigation, the Procedures for Complex Cases in the Southern District of Texas (the "Complex Case Rules") mandate that a committee should have a minimum of 60 days from its appointment to investigate the prepetition claims and liens. *See* Procedures for Complex Cases in the Southern District of Texas ¶ C(9) (Jan. 2023). Here, the Committee has simply not had enough time to fulfill these obligations.

proposition that the chapter 11 process should not be used to effectuate foreclosure remedies that secured creditors could exercise outside of the chapter 11 process, unless other creditors, including general unsecured creditors, receive some material benefit.

5. To be clear, the Committee is committed to working with the Debtors and DIP Lenders about consensually resolving its issues with the DIP Motion and the Intermediation Motion. However, absent meaningful modifications to the milestones and the objectionable provisions in the Final DIP Order and final order approving the Intermediation Motion, the Committee is duty bound to respectfully request that the Court deny both Motions without prejudice.

BACKGROUND

A. General Background

6. Prior to the Petition Date, the Debtors and various lenders (the "Prepetition Term Loan Lenders") were parties to a $125 million term loan credit agreement (the "Prepetition Credit Agreement"). As disclosed in the *Declaration of R. Seth Bullock, Chief Restructuring Officer of Vertex Energy, Inc., In Support of the Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 18] (the "First Day Declaration"), starting in 2023, the Debtors began facing operational and market headwinds. *See* First Day Declaration ¶ 17.

7. By the summer of 2024, the Debtors were discussing strategic alternative transactions with the Consenting Term Loan Lenders. *Id.* ¶ 18. Over the course of that summer, the Prepetition Credit Agreement was amended three times to provide a total of $60 million in new financing.

Amendment Date	New Money Loans Provided
June 25, 2024	$15.0 million
July 24, 2024	$20.0 million
August 23, 2024	$25.0 million

Total	***$60.0 million***

8. In the weeks following the August 23 injection of $25.0 million, the Debtors and Consenting Term Loan Lenders negotiated a number of key documents that serve as the cornerstones for these Chapter 11 Cases.

- ***DIP Financing***. Pursuant to the DIP Motion, the Debtors are seeking authorization to enter into a $280 million debtor-in-possession financing facility (the "DIP Facility") consisting of (a) $80 million new money term loan (the "New Money Term Loans"), and (b) the conversion of up to $200 million on a 2.5:1 basis of amounts outstanding under the Prepetition Credit Agreement (such loans, the "Roll Up Loans" and with the New Money Term Loans, the "DIP Loans").[4] The DIP Facility is being provided by the DIP Lenders.

- ***Restructuring Support Agreement***. The Debtors and Consenting Term Loan Lenders are parties to the RSA. The RSA is an agreement among the parties to work towards a restructuring transaction, which will either be a recapitalization transaction or an asset sale (including, potentially, a credit bid from the DIP Lenders/Consenting Term Loan Lenders).

- ***Plan of Reorganization.*** The Debtors filed the *Joint Chapter 11 Plan of Vertex Energy, Inc. and Its Debtor Affiliates*. [Docket No. 21] (the "Draft Plan"). The Draft Plan does not provide general unsecured creditors with any guaranteed recovery and instead provides them with the *pro rata* share of excess distributable cash if the Debtors close an asset sale.

B. Bidding Procedures Order & Sale Process

9. Whether the Debtors pursue a recapitalization transaction or an asset sale will depend on the success of the Debtors' ongoing sale process. Prior to the Petition Date, on September 3, 2024, the Debtors launched the sale process, which has continued post-petition. *Id.* ¶ 22. On September 25, the Bankruptcy Court entered an order [Docket No. 55] (the "Bidding

[4] On September 25, 2024, the Court entered an *Interim Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtor to Use Cash Collateral, (III) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (IV) Granting Adequate Protection to the Pre-petition Term Loan Secured Parties, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* [Docket No. 53] (the "Interim DIP Order").

Procedures Order")[5] approving a sale schedule. As summarized in the table below, the Bidding Procedures Order requires third parties to submit indications of interest by October 23, 2024. If the Consenting Term Loan Lenders are the only "acceptable bidder" then one set of milestones applies. If at least one other bidder emerges, then a separate set of milestones applies.

Scenario	Event	Milestone Date
	Indication of Interest Deadline	October 23
No Acceptable Bidders + Credit Bid Sale is Pursued	Credit Bid Sale Objection Deadline and Adequate Assurance Objection Deadline	November 11
	Sale Hearing Date	November 18
At Least One Acceptable Bidder	Qualified Bid Deadline	November 22
	Auction (if any)	November 25
	Successful Bidder Sale Objection Deadline and Adequate Assurance Objection Deadline	December 9
	Sale Hearing Date	December 16

10. The above sale timeline allows the Debtors to satisfy the below procedural milestones set forth in the RSA and documents governing the DIP Facility.

Event	RSA / DIP Milestones Date
IOI Deadline	October 29
Disclosure Statement Order	November 13
Credit Bid Sale Order	December 3
Qualified Bid Deadline	November 28
Third Party Sale Order	December 23
Confirmation Order	December 28
Plan Effective Date	January 17

[5] The Bidding Procedures Order was entered prior to the formation of the Committee and accordingly, the Committee did not have an opportunity to provide comments to the order. The Committee expects that, consistent with the Debtors' fiduciary duties, potential bidders will not be barred from participating in the Debtors' sale process if they fail to submit a proposal prior to the IOI Deadline.

OBJECTION

I. THE DIP MOTION CANNOT BE APPROVED SINCE DEBTORS CANNOT SATISFY THEIR BURDEN UNDER SECTION 364(D) OF THE BANKRUPTCY CODE.

11. To obtain post-petition financing under section 364(d) of the Bankruptcy Code, "a debtor has the burden of demonstrating that (i) the credit transaction is necessary to preserve the estate, and (ii) the terms of the transaction are fair and reasonable given the circumstances." *In re Futures Equity L.L.C.*, No. 00-33682 (BJH), 2001 Bankr. LEXIS 2229, at *14 (Bankr. N.D. Tex. April 11, 2001); *see also In re L.A. Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011). For example, courts will not find that a debtor exercised reasonable business judgment by entering into debtor-in-possession financing that: (a) is designed to favor secured lenders at the expense of other creditors; (b) converts the bankruptcy process from one designed to benefit all creditors in to one designed for the sole or primary benefit of the debtor's secured lenders; or (c) is not in the best interests of the estate. *See In re Laffite's Harbor Dev. I, LP*, No. 17-36191 (KKB), 2018 WL 272781, at *2-3 (Bankr. S.D. Tex. Jan. 2, 2018); *see also In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (9th Cir. BAP 1992) ("[C]ourts look to whether the proposed terms would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest.") (internal citations omitted). Here, the proposed DIP Facility includes a number of provisions that are designed to favor the DIP Lenders over general unsecured creditors. Accordingly, under the circumstances, the Court should deny the DIP Motion without prejudice.

A. The Roll Up Should Be Eliminated or Must Be Modified

12. As a general matter, roll ups are disfavored forms of post-petition financing because they (a) typically help one creditor constituency rather than provide an economic benefit to the

debtor, (b) are contrary to the fundamental priority scheme of the Bankruptcy Code, and (c) severely limit a debtor's ability to pursue different reorganization paths. *See, e.g., In re Saybrook Mfg. Co.*, 963 F.2d 1490, 1493–96 (11th Cir. 1992) (noting that post-petition cross-collateralization is an "extremely controversial form of Chapter 11 financing" before holding it was not authorized by Section 364); Hr'g Tr. 67:9-10, *In re Bruin E&P Partners, LLC,* No. 20-33605 (MI) (Bankr. S.D. Tex Jul. 17, 2020) (where Judge Isgur noted roll ups are "heavily disfavored under the Bankruptcy Code"). One of the reasons courts view roll ups with skepticism is that they have the effect of severely limiting a debtor's ability to pursue different reorganization paths. *See* 3 COLLIER ON BANKRUPTCY 364.06[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (noting that roll up financings "shift the dynamics of chapter 11 reorganization dramatically," by, among other things, creating structural impediments to plan alternatives). This is because roll ups have the effect of giving prepetition debt administrative expense status, meaning a debtor is required to repay such claims in full, in cash if it intends to pay off the facility during the case or in connection with a confirmed plan of reorganization. Moreover, roll up loans—like the DIP Facility at issue here—enhance lenders' collateral packages by providing liens over unencumbered assets.[6]

13. Here, approval of the Roll Up Loans will greatly increase the likelihood that general unsecured creditors do not receive a distribution in these cases. The DIP Motion seeks approval of a $280 million DIP Facility with a 2.5:1 roll up: $80 million in New Money Term Loans and $200 million of Roll Up Loans. At the same time, the DIP Lenders are reserving the right to credit bid the DIP Loans but have not provided the Debtors (or the Committee) with a reserve price that

[6] The Committee is continuing to analyze what unencumbered assets of the Debtors will provide collateral support to the DIP Lenders.

ensures the credit bid will exceed $280 million. Put simply, if the DIP Motion and proposed Roll Up Loans are approved, there is a substantial risk that the DIP Lenders will have the right to determine whether the Debtors' estates are administratively insolvent. Granting the DIP Lenders this power cannot be in the best interests of the estates. Accordingly, the DIP Motion must be denied.

14. To the extent the Court is inclined to approve some of the Roll Up Loans, it should do so in a way that minimizes the risk identified above. Here, the Debtors obtained $60 million in new money financing in three months prior to the Petition Date. Limiting the roll up to those loans would be much more appropriate as it would minimize the risk of the DIP Lenders being able to create an administratively insolvent estate.

15. Furthermore, as set forth in the *Declaration of David MacGreevey* (the "MacGreevey Declaration") filed simultaneously herewith, limiting the Roll Up Loans to $60 million would bring the DIP Facility in line with current market conditions. In order to determine whether the proposed 2.5:1 roll up was consistent with other recent debtor in possession financing facilities, the Committee's proposed financial advisor (AlixPartners) analyzed the financing facilities in other chapter 11 cases looking at business that satisfied the following criteria: (a) received senior debtor-in-possession financing facilities within 18 months of the Company's bankruptcy filing, and (b) the DIP facility granted on a final basis included new money commitment amounts ranging from $50 million to $110 million. *See* MacGreevey Declaration at 4. This search resulted in a set of twelve comparable debtor in possession financing facilities (the "Peer Set"). *Id*. The Peer Set suggests a "market" roll up for the DIP Facility is 0.5:1. By limiting the Roll Up Loans to $60 million, the DIP Facility would have a roll up ratio of 0.75:1.0 (*i.e.*, in line with comparable financing facilities). The DIP Facility's current ratio of 2.5:1 is well outside

the realm of reasonableness (to say nothing of the risk that granting this roll up results in an administratively insolvent estate). Accordingly, the proposed $200 million in Roll Up Loans should not be approved.

B. The Committee Should Have a Meaningful Investigation Budget

16. Under section 1103(c)(2) of the Bankruptcy Code, the Committee has a statutory duty to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor" and "any other matter relevant to the case or to the formulation of a plan." 11 U.S.C. § 1103(c)(2). The Final DIP Order will contain a number of stipulations, admissions, agreements, and releases by the Debtors that are binding on their estates and all parties in interest unless timely challenged by the Committee. At the same time, the proposed Final DIP Order does something gob smacking: it sets aside no budget for the Committee to conduct its investigation. This formulation is highly unusual. The DIP Lenders' attempt to frustrate the Committee's investigation in its infancy raises troubling inferences and should be remedied. Accordingly, the DIP Motion should not be approved without the addition of standard language granting the Committee an investigation budget of at least $250,000. *See, e.g.*, *In re Speedcast Int'l Ltd.*, No. 20-32243 (MI) (Bankr. S.D. Tex. May 20, 2020) [Docket No. 239] (providing a $250,000 cap for the investigation budget); *In re Sanchez Energy Corp.*, No. 19-34508 (MI) (Bankr. S.D. Tex. Jan. 22, 2020) [Docket No. 865] (same); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Sept. 25, 2016) [Docket No. 497] (providing a $500,000 cap for the investigation of liens and claims).

17. Relatedly, the Debtors' current set of sale milestones prejudices the Committee's ability to complete its investigation. In the scenario where only the DIP Lenders/Consenting Term Loan Lenders submit a proposal by the IOI Deadline, the objection deadline to the credit bid sale is November 11. However, the Complex Case Rules mandate that a committee should have a minimum of 60 days from its appointment to investigate the prepetition claims and liens of the

lenders. *See* Procedures for Complex Cases in the Southern District of Texas ¶ C(9) (Jan. 2023). Here, the Committee was appointed on October 8, meaning the Challenge Period should run through at least December 7. By setting the objection deadline to a credit bid sale on November 11, the Bidding Procedures Order effectively requires the Committee to conclude its investigation 26 days before the time required under the Complex Case Rules (i.e., a reduction of roughly half the minimum amount of time. Under these circumstances, when the Committee has simply not had an opportunity to evaluate what challenges may exist, such a restrictive timeline should not be approved. The Committee's suggestion of moving back all sale-related milestones at least three weeks would help ameliorate this problem, as would express language in the Final DIP Order reserving the Committee's rights to object a credit bid sale to the DIP Lenders on the grounds that the Committee has not had sufficient time to conclude its investigation.

C. *The Final DIP Order Should Protect Unsecured Creditors' Statutory and Common Law Rights*

18. General unsecured creditors are currently being asked to subsidize a sale process that is only benefitting the DIP Lenders. While the Bankruptcy Code and common law provides unsecured creditors with protections to avoid this outcome, the proposed Final DIP Order would strip the Committee of these protections through preemptive waivers. The Bankruptcy Court should not approve a Final DIP Order that includes these waivers, especially when the Debtors have not established how entry into the proposed DIP Facility—which may leave the estates administratively insolvent—is in the estates' best interests. *See* May 3, 2024 Hr'g Tr. 36:6-10, *In re Casa Systems Inc.*, No. 24-10695 (KBO) (Bankr. D. Del.) [Docket No. 290] ("[I]t starts with Judge Walsh's statement, long, long ago, that he will never approve waivers over a Committee objection, and I don't think we deviate as a collective Court here from that position.").

19. As set forth below, the proposed Final DIP Order should be modified to preserve the following protections benefitting unsecured creditors (a) the right to realize the proceeds of avoidance actions; (b) right to surcharge collateral pursuant to Bankruptcy Code section 506(c); (c) the right to invoke the "equities of the case" exception under Bankruptcy Code section 552(b); and (d) the right to invoke the equitable doctrine of marshaling.

i. **The Final DIP Order Should Not Grant the DIP Lenders Liens on Avoidance Actions or Avoidance Action Proceeds**

20. In its efforts to ensure that general unsecured creditors are denied every potential avenue for a recovery in these cases, the DIP Lenders are looking to have their liens extend to the estates' Avoidance Actions and proceeds thereof. These actions and their proceeds are for the benefit of general unsecured creditors—not secured creditors—because avoidance actions are not property of a debtor's estate, but rather a construct of bankruptcy law for the benefit of unsecured creditors. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.14 n.1 ("The avoiding powers of a debtor in possession granted in chapter 5 of the [Bankruptcy] Code are not property of the estate but statutorily created powers to recover property.").

21. Here, the combination of the Roll Up Loans and liens on Avoidance Action proceeds effectively insulates the DIP Lenders from any Committee challenge. For example, under the proposed Final DIP Order, if the Committee successfully asserted a constructive fraudulent conveyance claim with respect to a portion of the DIP Lenders' collateral package, the DIP Lenders would simply assert that any proceeds arising from that avoidance action is also their collateral. Assuming the DIP Lenders seek to obtain substantially all of the Debtors' assets for less than a $280 million credit bid—which is a real possibility, especially in the absence of a reserve price—the value of a successful avoidance action would be round-tripped back to the DIP Lenders to satisfy the DIP Lenders' remaining administrative expense claims. The DIP Lenders

should not be allowed to expand their collateral package to these potentially valuable assets at the expense of general unsecured creditors. Accordingly, any Final DIP Order should expressly exclude such assets from the DIP Lenders' collateral package and clarify that any superpriority or adequate protection claims will not be paid from such assets or the proceeds thereof. *See In re Klaas Talsma Frisia Hartley, LLC*, No. 10–43790–DML–11, 2010 WL 5209363, at *4 (Bankr. N.D. Tex. Jun. 10, 2010) (excluding avoidance actions and proceeds thereof from the adequate protection package provided to Wells Fargo, a prepetition secured lender); *In re HSAD 3949 Lindell, Ltd.*, No. 10–33986–BJH, 2010 WL 5209266, at *5 (Bankr. N.D. Tex. Sept. 2, 2010) (adequate protection package excluded "any and all avoidance actions under Chapter 5 of the Bankruptcy Code and any proceeds thereof").

ii. The Final DIP Order Should Not Preemptively Waive Rights Under Bankruptcy Code Section 506(c)

22. Bankruptcy Code Section 506(c) provides in relevant part: "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim…." 11 U.S.C. § 506(c). Courts have noted that Section 506(c) helps ensure that general unsecured creditors do not bear the costs of a secured lender liquidating its collateral. *See, e.g., In re Visual Indus., Inc.*, 57 F. 3d 321, 325 (3d Cir. 1995) ("section 506(c) is designed to prevent a windfall to the secured creditor"). Notably, many courts have found that *per se* section 506(c) waivers are unenforceable. *See, e.g.*, *In re Hen House Interstate, Inc.*, 150 F.3d 868, 872 (8th Cir. 1998) (deeming a section 506(c) waiver "unenforceable"), *vacated on other grounds*, 177 F.3d 719 (8th Cir. 1999); *In re Ridgeline Structure, Inc.*, 154 B.R. 831, 832 (Bankr. D. N.H. 1993) (deeming a section 506(c) waiver "against public policy and unenforceable per se"). Other courts view such waivers skeptically and decline to approve them absent committee consent. *See, e.g.*,

Mar. 20, 2007 Hr'g Tr. at 21:7-13, *In re Mortg. Lenders Network USA, Inc.*, Case No. 07-10146 (PJW) (Bankr. D. Del.), [Docket No. 346] (the court noting: "If the Committee doesn't agree with the waiver, it doesn't happen.").

23. The Committee does not consent to the Debtors' proposed waiver of its rights under section 506(c). Here, the Debtors are running an extremely expedited sale process at the behest of the DIP Lenders. If the proposed final DIP Order is approved and the DIP Lenders' credit bid closes, there is significant risk that the estates will be administratively insolvent and general unsecured creditors will have virtually no path to recovery in these cases. Under these circumstances, the Final DIP Order should expressly preserve all parties' rights under Bankruptcy Code section 506(c).

iii. The Final DIP Order Should Not Preemptively Waive of the "Equities of the Case" Exception

24. Section 552(b) of the Bankruptcy Code provides that a secured creditor's prepetition lien will attach to the postpetition proceeds of its prepetition collateral "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." 11 U.S.C.§ 552(b)(1). Unlike many other provisions of the Bankruptcy Code, the equities of the case exception is not a power that must be invoked by the debtor and is instead vested in "the court." Consistent with the plain terms of the Bankruptcy Code, a number of courts have declined to impose section 552(b) waivers over committee objections. *See, e.g.,* July 28, 2016, Hr'g Tr. 134:19-25 *In re Linn Energy, LLC*, Case No. 16-60040 (DRJ) (Bankr. S.D. Tex.), [Docket No. 746] (noting that preservation of the official committee's right to seek application of section 552(b) exception "really just conforms with applicable Circuit law anyway"). Here, to the extent the proposed final DIP Order purports to preclude the Court (or any creditors) from invoking section 552(b), such preemption should not be enforceable.

iv. The Final DIP Order Cannot Waive Creditors' Marshalling Rights

25. The equitable doctrine of marshaling is a creditor right that "rests upon the principle that a creditor having two funds to satisfy his debt may not, by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." *Meyer v. U.S.*, 375 U.S. 233, 236 (1963) (citation omitted). The equitable right of marshaling belongs to creditors, not debtors. Thus, the Debtors cannot forcibly waive the rights of creditors as to do so would amount to a nonconsensual third-party release. *See Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 2086-2087 (2024). (finding Bankruptcy Code does not authorize non-consensual third-party releases). Accordingly, the Final DIP Order should be modified to remove any purported waiver of creditors' marshalling rights.

26. Separately, the Roll Up Loans preclude the Committee from being able to agree to what is often referred to as "soft marshaling" whereby the DIP Lenders would agree look last to previously unencumbered collateral when satisfying the DIP Facility's obligations. If the Final DIP Order only required the Debtors to satisfy $120 million in DIP Loans—$80 million in New Money Term Loans and $60 million in Roll Up Loans—the Committee could more easily get comfortable that the value of the Avoidance Action proceeds would flow to unsecured creditors. However, when the amount of DIP Loans to be satisfied is multiplied by 2.5—and the bar to clear rises to $280 million—soft marshalling language becomes an illusory protection.

II. OTHER ASPECTS OF THE DIP FACILITY AND FINAL DIP ORDER SHOULD NOT BE APPROVED.

27. As set forth below, the Committee has a number of other technical objections to the DIP Facility:

i. Credit Bidding. Any credit bid rights should be subject in all respects to section 363(k) of the Bankruptcy Code, particularly in the event of a successful challenge.

ii. Requirements for Bringing Challenges. For any challenge proceeding that could be

brought by the Committee by the challenge deadline, the Committee should not be required to file a motion to obtain standing. Requiring the Committee to file a standing motion only increases the time and administrative cost of prosecuting a challenge. Courts have routinely granted a creditors' committee standing in post-petition financing orders to bring a challenge to prepetition liens and claims. *See, e.g., In re Patriot Well Solutions LLC*, Case No. 20-33642 (DRJ) (Bankr. S.D. Tex. Aug. 12, 2020) [Docket No. 167] (granting Committee standing to commence a Challenge Action without being required to file a motion or other request for such standing); *In re Lockwood Holdings,* Case No. 18-30197 (DRJ) (Bankr. S.D. Tex. Apr. 30, 2018) [Docket. No 359] (granting Committee automatic standing to file a Challenge Action without the need for further Court order). Eliminating a requirement for the Committee to file a standing motion makes particular sense here, where the Debtors do not have their own challenge period under the Interim DIP Order.

iii. Notice and Reporting Requirements. The Debtors should provide the Committee with reasonable notice in advance of entering into any amendments to the DIP Documents. The Committee should also receive copies of all DIP Facility related reporting given to the DIP Lenders by the Company.

iv. Post-Carve Out Trigger Notice Cap. The Post-Carve Out Trigger Notice Cap should be increased from $500,000 to $1,000,000.

v. Consultation Rights. The Committee should be given consultation rights with respect to the identity of the Plan Administrator and the amount to be funded as part of the Wind Down Reserve.

vi. Termination of the RSA. If the RSA terminates, that should not result in an automatic default under the DIP Credit Agreement. To allow otherwise effectively precludes the Debtors from exercising their fiduciary duty to obtain a higher or otherwise better deal.

III. THE COMMITTEE'S PROTECTIONS IN THE FINAL DIP ORDER SHOULD ALSO BE REFLECTED IN THE FINAL INTERMEDIATION ORDER

28. In addition to seeking final relief with respect to the DIP Motion, the Debtors are also seeking final relief with respect to the Intermediation Motion. Under the Intermediation Motion, the Debtors are seeking various forms of relief to maintain their prepetition supply of crude oil from Macquarie Energy North America Trading, Inc. ("Macquarie") and related parties. The proposed Final Intermediation Order contains a number of problematic provisions identical to those in the proposed Final DIP Order. Specifically:

i. Preemptive Waivers. The Final Intermediation Order should remove the preemptive waivers of rights under Bankruptcy Code Sections 506(c) and 552(b) and under the

equitable doctrine of marshaling.

ii. Requirements for Bringing Challenges. Whatever requirements the Committee must meet in order to bring a challenge under the Final DIP Order should also be reflected in the Final Intermediation Order.

29. Finally, the proposed Final Intermediation Order would also include a finding that Macquarie was over-secured as of the Petition Date. The Committee is in no position to stipulate to such a legal conclusion, especially at this early stage in the cases. Accordingly, that conclusion should remain subject to the Committee's challenge period.

RESERVATION OF RIGHTS

30. This Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights to supplement and amend this Objection, including by filing declarations in support thereof, to introduce evidence at any hearing relating to this Objection, and to further object to the Motions on any grounds that may be appropriate.

CONCLUSION

31. WHEREFORE, the Committee requests that the Court deny the Motions without prejudice.

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Dated: Houston, Texas
October 17, 2024

Respectfully Submitted,

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Proposed Counsel to the Official Committee of Unsecured Creditors

Certificate of Service

I certify that on October 17, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

By: /s/ *Jennifer J. Hardy*
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