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

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| In re: | ) | Chapter 11 |
| | ) | |
| ADVANTAGE HOLDCO, INC. et al., | ) | Case No. 20-11259 |
| | ) | |
| Debtors. | ) | (Jointly Administered) |
| | ) | |

**OBJECTION OF ALLEGHENY CASUALTY COMPANY AND INTERNATIONAL FIDELITY INSURANCE COMPANY TO CONFIRMATION OF THE *AMENDED* JOINT CHAPTER 11 PLAN OF LIQUIDATION OF ADVANTAGE HOLDCO, INC. ET AL.**

Allegheny Casualty Company ("Allegheny Casualty") and International Fidelity Insurance Company ("International Fidelity" and together with International Fidelity, "IFIC") objects to confirmation of the *Amended* Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation of Advantage Holdco, Inc. et al. (Dkt. #1001):

## BACKGROUND

1. On May 26, 2020 (the "Petition Date"), the debtors (together, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

A. The Bonds, Indemnity Agreement and Letter of Credit

2. Prior to the Petition Date, the Debtors operated at airports nationwide under concession agreements negotiated with airport authorities or other supervising governmental entities (the "Airport Concession Agreements"). *See* Declaration of Alfred C. Farrell, Chief Financial Officer of Advantage Holdco, Inc., in Support of Chapter 11 Petitions and First Day Pleadings (the "Farrell Declaration") (Dkt. #15) at ¶ 10.

3. Pursuant to the Airport Concession Agreements, the Debtors were typically granted a nonexclusive right to operate a car rental concession at a particular airport in exchange for a defined

concession fee (the "Concession Fees"). *See* Debtors' Motion (I) Authorizing, but not Directing, Debtors to Continue to Operate their On-Airport Locations and Pay Prepetition Claims in the Ordinary Course; (II) Authorizing and Directing Banks to Honor Prepetition Checks and Fund Transfers for Authorized Payments, and (III) Granting Related Relief (the "Airport Motion") (Dkt. # 12) at ¶ 7.

4. Generally, these Airport Authorities required the Debtors to obtain surety bonds to secure their obligation to pay these Concession Fees. *Airport Motion*, ¶ 13. Based on the terms of each surety bond, an Airport Authority was generally named as a bond obligee. *Airport Motion*, ¶ 14. If a valid claim was later filed against a surety bond, the surety company would pay the claim and then, based on rights of indemnity and/or subrogation, seek reimbursement from the Debtors directly or based on any collateral.

5. For a number of these Airport Concession Agreements, the Debtors obtained surety bonds from IFIC (the "Bonds") in connection with a General Agreement of Indemnity dated March 12, 2015 (the "Indemnity Agreement") executed by and between the Debtors and IFIC. A true and correct list of these Bonds is attached as Exhibit A. A true and correct copy of the Indemnity Agreement is attached as Exhibit B.

6. The Indemnity Agreement creates a contractual right of indemnification and/or right of exoneration (in the form of collateral) on behalf of IFIC inclusive of any fees and costs incurred by IFIC. S*ee* Indemnity Agreement, § 2.

7. The Indemnity Agreement expressly states that any such amounts owed in connection with the Indemnity Agreement shall be "promptly" paid and that '[p]ayments not made…within 10 days after demand…shall bear interest[.]" S*ee* Indemnity Agreement, § 2.

8. The Indemnity Agreement provides that "the Debtors shall deposit with the Surety on demand an amount of money or other collateral security acceptable to the Surety…and Surety shall have the right to use the [collateral security] or any portion thereof[.]" *See* Indemnity Agreement, § 3.

9. In connection with the Bonds and the Indemnity Agreement and as security for the IFIC's suretyship, prior to the Petition Date, certain of the Debtors and/or their non-debtor affiliates caused the issuance of an Irrevocable Standby Letter of Credit in favor of the Surety in the amount of $1,750,000 (together with any amendment or modification thereto, the "Letter of Credit").

10. As the Debtors are aware, IFIC has partially drawn down on the Letter of Credit in the amount of $500,000, which amount it continues to hold as security, to the extent not already applied by IFIC.

B. IFIC's Rights Reflected and Preserved in the Final DIP Order

11. On July 1, 2020, the Court entered the Final Order (I) Authorizing Debtor to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§105, 361, 362 and 364; (II) Granting Liens and Super-Priority Claims; and (III) Granting Related Relief (the "Final DIP Order") (Dkt. #324).

12. The Final DIP Order contains the following language related to IFIC:

> (a) Nothing in the Interim Order, **this Final Order or the Motion shall in any way *prime or affect the rights* of International Fidelity Insurance Company or Allegheny Casualty Company** or their past, present or future parents, subsidiaries or affiliates (the "Surety") as to: (i) ***any funds it is holding* and/or being held for it presently or in the future, whether in trust, as security, or otherwise, including any proceeds due or to become due any of the Debtors or their non-debtor affiliates in relation to contracts bonded by the Surety**; (ii) any substitutions or replacements of said funds including accretions to and interest earned on said funds; or (iii) ***any letter of credit* (and any proceeds thereof) related to any indemnity, collateral trust, bond or agreements (including any and all amendment(s) or modification(s) thereto) between or involving the Surety and any of the Debtors or any of the Debtors' non-debtor affiliates** (collectively, (i) to (iii) the "Surety Assets"). **Nothing in the Interim Order, this Final Order or**

**Motion shall affect the rights of the Surety under any *current or future indemnity, collateral trust,* or related agreements between or involving the Surety and any of the Debtors or any of the Debtors' non-debtor affiliates as to the Surety Assets or otherwise, including, but not limited to, the Agreement of Indemnity** executed by Advantage Opco, LLC and Advantage Holdco, Inc., on or about March 12, 2014…Nothing herein is an admission by the Surety or the Debtors, or a determination by the Bankruptcy Court, regarding any claims under any bonds, and the Surety and the Debtors reserve any and all rights, remedies and defenses in connection therewith. **Notwithstanding anything herein to the contrary, and subject to the terms herein, the Debtors hereby agree that, during the pendency of these proceedings, the Debtors shall, in accordance with and subject to applicable law, reimburse the Surety for attorneys' fees incurred and to be incurred by the Surety in accordance with the terms of any agreement among the parties**. For certainty, any Surety Assets that are not Surety Collateral shall be subject to the terms of this Final Order in all respects.

(b) Notwithstanding anything herein to the contrary, the Surety agrees that, if, as determined in the discretion of the Surety or the Court, **the Surety's aggregate gross exposure under any and all active and inactive bonds, plus up to $200,000 for reasonable and documented expenses and attorneys' fees incurred and to be incurred by the Surety, plus any and all unpaid premiums, and plus any and all losses, costs and/or expenses incurred or to be incurred by the Surety under any active or inactive bonds, and to the extent that the amounts recoverable from any letter of credit (or the proceeds thereof) delivered to secure any Debtors' performance under an agreement between the Surety and any Debtor are equal to or less than the value of any letter of credit or proceeds thereof, then the Surety's only recourse for recovery of sums due or which may become due the Surety under or in connection with any indemnity agreement, bond or similar instrument shall be the letter(s) of credit and the proceeds thereof, provided that the Surety is able to successfully draw on said letter of credit and receive the proceeds thereof.**

Final DIP Order, § 26 (emphasis added).

13. Based on the Final DIP Order, the Debtors agreed to comply with the terms of the Indemnity Agreement and to further recognize that liens or trust fund claims held by IFIC and each Bond obligee (the "Bond Obligees" or each a "Bond Obligee") cannot be primed. *Id*.

14. The Debtors further agreed to reimburse IFIC for attorneys' fees and costs (together, the "Legal Fees") incurred and to be incurred in accordance with the terms of any agreement among the parties including the Indemnity Agreement. *See* Final DIP Order, § 26(a).

15. Notwithstanding the foregoing, section 26(b) of the Final DIP Order provides for an exception to the Debtors obligation to directly reimburse IFIC for its Legal Fees. Specifically, if, as determined in the discretion of IFIC or the Court, IFIC's aggregate gross exposure under the Bonds, plus up to $200,000 for reasonable and documented Legal Fees, plus any and all unpaid premiums, and plus any and all losses, costs and/or expenses incurred or to be incurred by IFIC under the Bonds, and to the extent that the amounts recoverable from the Letter of Credit (or the proceeds thereof) are *equal to or less than* the value of Letter of Credit (or the proceeds thereof), then IFIC's only recourse for recovery of sums due or which may become due shall be the Letter of Credit (or the proceeds thereof), provided that the Surety is able to successfully draw on the Letter of Credit and receive the proceeds thereof. *See* Final DIP Order, § 26(b) (emphasis added).

16. Neither IFIC nor the Court has made the determination in section 26(b) of the Final DIP Order. Thus, the Debtors are obligated to promptly pay IFIC's Legal Fees. *See* Final DIP Order, § 26(a). Indeed, the Debtors have acknowledged as much. *See* Exhibit C which is a true and correct copy of an email from Debtors' counsel acknowledging this obligation.

C. IFIC's Rights Reflected and Preserved in the Sale Orders

17. On June 1, 2020, this Court authorized the sale of certain of the Debtors' assets to Orlando Rentco by way of an order (A) Approving Sale of Debtors' Assets Free and Clear of Liens, Claims, Interests, Encumbrances, (B) Authorizing Assumption and Assignment of Unexpired Leases and Executory Contracts and (C) Granting Related Relief (the "Orlando Rentco Sale Order") (Dkt. #330).

18. The Orlando Rentco Sale Order provides with respect to IFIC that:

> Notwithstanding any other provision of this Order, any sale agreement or any related documents (the "Sale Documents"), the rights of International Fidelity Insurance Case Company and Allegheny Casualty Company (individually and collectively, the "Surety") against the Debtors and/or their non-debtor affiliates in connection with: (i) any surety bonds or related instruments previously or in the future issued and/or executed by the Surety on behalf of any of the Debtors and/or any of their non-debtor affiliates (the "Bonds"); (ii) any indemnity or indemnity-related agreement, including that certain Agreement of Indemnity executed by Debtors Advantage Opco, LLC and Advantage Holdco, Inc., on or about March 12, 2015 (collectively, the "Indemnity Agreement"); and (iii) any related documents (i), (ii), and (iii), collectively, are hereafter referred to as the "Surety Documents") are neither affected nor impaired by the Sale Documents. Pursuant to the terms of the Sale Documents, unless otherwise agreed to by the Surety in writing, the applicable Bonds that serve as collateral for any of the Assumed Contracts (as defined in the Sale Documents) will be replaced by the Buyer on or before the Final Closing (as defined in the Sale Documents) pursuant to the Sale Documents such that such Bonds are fully released and fully discharged or to the extent applicable superseded by other bond(s) ("Discharge Obligation"). **In addition, the rights of the Surety (or its affiliate(s)) in connection with any letter of credit (and any amendment(s) or modification(s) thereto) relating to any of the Debtors or their non-debtor affiliates, including the Irrevocable Standby Letter of Creditor, together with any amendments or modifications thereto [ ] in favor of the Surety in the amount of $1,750,000 issued on or about December 1, 2017, and any amendments thereto, and any and all proceeds thereof, shall not be affected or impaired by the Sale Documents, and *neither the [Letter of Credit] nor any proceeds therefrom constitute property of the bankruptcy estate*.**

Orlando Rentco Sale Order, § 20 (emphasis added).

19. On June 1, 2020, this Court also authorized the sale of the Debtor's remaining assets, including at least one of the Airport Concession Agreements, to Sixt Rent A Car by way of an order (A) Approving Asset Purchase Agreement, (II) Authorizing Sale to Sixt Rent A Car, LLC of Certain Assets Free and Clear of all Liens, Claims, Encumbrances, and Other Interests, (III) Approving the Assumption and Assignment of Certain Executory Contracts, and (IV) Granting Related Relief (the "Sixt Rent A Car Sale Order" and together with the Orlando Rentco Sale Order, the "Sale Orders"). (Dkt. #327). Pursuant to the Sixt Rent A Car Sale Order, the following language provides with respect to the Bonds that:

> In addition, **the rights of the Surety (or its affiliate(s)) in connection with any letter of credit (and any amendment(s) or modification(s) thereto) relating to any of the Debtors or their nondebtor affiliates, including the Irrevocable Standby Letter of Creditor, together with any amendments or modifications thereto [ ] in favor of the Surety in the amount of $1,750,000 issued on or about December 1, 2017, and any amendments thereto, and any and all proceeds thereof, shall not be affected or impaired by the Asset Purchase Agreement, *and neither the [Letter of Credit] nor any proceeds therefrom constitute property of the bankruptcy estate***. Notwithstanding any other provision in the Asset Purchase Agreement, all set-off and recoupment rights of Surety and any blige or beneficiary under any of the Bonds are preserved against the Debtors and their non-debtor affiliates, and, to the extent applicable, said set-off and recoupment rights shall attach to the proceeds of any sale in the same priority as already exists. Further, notwithstanding any other provision in the Asset Purchase Agreement, unless the Surety provides its express written consent, the Surety Documents may not be assumed, assumed and assigned, or otherwise used in any manner for the direct or indirect benefit of any Purchaser, any of the Debtors or any other related entities. Notwithstanding anything herein to the contrary, the Surety reserves its rights to: refuse to modify, extend the term of, or increase the amount of, any bond, including the Bonds; cancel, terminate or take any other action with respect to the Bonds, to the extent permitted by law; and refuse to issue any new bond to the Debtors, their non-debtor affiliates or any other person or entity

Sixt Rent A Car Sale Order, § 38 (emphasis added).

20. Hence, under both Sale Orders, the Debtors acknowledge that the Letter of Credit and any proceeds therefrom do not constitute property of the estate. *See* Orlando Rentco Sale Order, § 20; Sixt Rent A Car Sale Order, § 38.

D. The Debtors' Recognition of the Status of Letter of Credit in the Claims Objection

21. On September 21, 2020, the Court established the bar date for the proofs of claims and administrative expenses claims that, respectively, arose prior to the Petition Date or from the Petition Date through September 30, 2020 (Dkt. #497).

22. By the bar date, IFIC filed proofs of claims ("Proofs of Claims") and administrative expense claims ("Administrative Expense Claims" and together with the Proofs of Claims, the "POCs") against each of the Debtors asserting that specific portions of the claims underlying the POCs were

entitled to be treated as a secured claim while other portions were entitled to be treated as an administrative expense claims. These POCs also assert general unsecured claims. *Id*.

23. On November 10, 2021, the Debtors filed an Objection to the Incorrectly Classified Claims of International Fidelity Insurance Company and Allegheny Casualty Company (the "Claims Objection") to the POCs (Dkt. #1026).

24. Pursuant to the Claims Objection, the Debtors seek to reclassify the entirety of the POCs as general unsecured claims. *See generally* Claims Objection. The argument set forth by the Debtors as to why IFIC does not possess a secured claim is that the Letter of Credit is not property of the estate.

E. IFIC's Treatment in the Amended Plan

25. On October 26, 2021, the Debtors filed the *Amended* Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation of Advantage Holdco, Inc. et al. (the "Amended Plan") (Dkt. #1001).

26. Pursuant to the Amended Plan, the Debtors' bankruptcy has enabled them to "monetize their portfolio of Concession Agreements…[by] transferring certain of their Concession Agreements to two parties, Sixt Rent A Car LLC ("Sixt") and Orlando Rentco LLC ("Orlando Rentco")…[and rejecting] the Concession Agreements and related leases that were not acquired by Sixt or Orlando Rentco." Amended Plan, III (A).

27. The Amended Plan further provides that as of the Effective Date:

(a) liens and other security interest in property of the Debtors' Estates shall be deemed fully released without any further action of any party; (*Id*., X(E))

(b) "[t]o the fullest extent permissible under bankruptcy law…beneficiaries of Surety Bonds…shall be precluded from asserting or pursuing additional or amended claims against any Surety Bond[.]"; (*Id*., X(M))

(c) "letters of credit…or similar collateral…shall terminate and such collateral shall (within 30 days from the Effective Date)" be released or returned to the DIP Lender; (*Id*.)

(d) Releasing Parties that opt out of the Consensual Third-Party Releases shall forfeit their distributions under the Amended Plan; (*Id*., XV(G))

(e) IFIC shall be classified a Miscellaneous Secured Creditor in Class 1(f). (*Id*., VII(A)(7)).

28. As a Class 1(f) creditor, the Amended Plan characterizes IFIC as *unimpaired* and treats IFIC as follows:

> [o]n the Effective Date, in full and final satisfaction of its Miscellaneous Secured Claim, IFIC shall continue to hold the Irrevocable Standby Letter of Credit previously issued in the amount of $1,750,000.00 in favor of IFIC in connection with its issuance of surety bonds and the cash proceeds thereof (the "IFIC Letter of Credit") plus reimbursement of IFIC's reasonable, documented attorney's fees to the extent provided under the Final DIP Order ("IFIC Legal Fees"). For the avoidance of doubt, the Debtors are obligated to pay IFIC Legal Fees only to the extent IFIC's Miscellaneous Secured Claim plus up to $200,000 of reasonable, documented IFIC Legal Fees exceed the value of the IFIC Letter of Credit. **Any such reimbursement of IFIC Legal Fees shall be treated, to the extent Allowed, as an Administrative Expense Claim and paid in Cash by the Debtors on the Effective Date or by the DIP Lender from the Priority Claim Reserve as soon as practicable following the Effective Date**. **Within 14 days after the Effective Date, IFIC shall provide the DIP Lender with a final accounting of its Miscellaneous Secured Claim and the IFIC Legal Fees ("IFIC's Final Accounting")**. **The DIP Lender shall have 30 days after the receipt of IFIC's Final Accounting to bring a challenge to IFIC's Final Accounting in the Bankruptcy Court. IFIC shall be permitted to draw and apply the IFIC Letter of Credit to satisfy its Miscellaneous Secured Claim and, to the extent permissible under the Plan and the Final DIP Order, the IFIC Legal Fees only upon the earlier of (i) the receipt of written confirmation from the DIP Lender agreeing with IFIC's Final Accounting and (ii) the later of (a) the expiration of the foregoing challenge period and (b) the entry of a Final Order establishing the Allowed amount of IFIC's Miscellaneous Secured Claim and the IFIC Legal Fees**. Substantially contemporaneously with its draw and application of the IFIC Letter of Credit, **IFIC shall turnover to the DIP Lender the proceeds of the IFIC Letter of Credit that exceed IFIC's Miscellaneous Secured Claim and, to the extent Allowed, up to $200,000 of reasonable, documented IFIC Legal Fees. For the avoidance of doubt, no provision of this Plan shall relieve IFIC of its continuing obligation to turnover to the Debtors or the DIP**

**Lender the amount of the IFIC Letter of Credit that exceeds IFIC's exposure on Surety Bonds**.

*Id*., VII (A)(7). In summary, based on the Amended Plan as currently structured, IFIC's Miscellaneous Secured Claim shall be satisfied as follows:

a) IFIC shall continue to hold the Letter of Credit (and any cash proceeds thereof);

b) IFIC shall be reimbursed its Legal Fees consistent with the Final DIP Order;

c) In contrast to the Final DIP Order, IFIC shall be reimbursed its Legal Fees as an allowed Administrative Expense Claim payable following the Effective Date;

d) IFIC shall be required to provide the DIP Lender with a Final Accounting 14 days after the Effective Date with the DIP Lender permitted to then challenge this Final Accounting 30 days thereafter;

e) IFIC shall be permitted to draw and apply the Letter of Credit only upon the earlier of (i) the receipt of written confirmation from the DIP Lender agreeing with the Final Accounting and (ii) the later of (a) the expiration of the foregoing challenge period and (b) the entry of a Final Order establishing the allowed amount of IFIC's Miscellaneous Secured Claim and its Legal Fees;

f) Contemporaneously with this draw, IFIC is then required to turnover to the DIP Lender the proceeds of the IFIC Letter of Credit that exceed IFIC's Miscellaneous Secured Claim and, to the extent Allowed, up to $200,000 of reasonable, documented IFIC Legal Fees.

*Id*.

F. Treatment of IFIC in Connection with Plan Voting and Impact of the Amended Plan's Consensual Third Party Release Provision

29. Allegheny Casualty and International Fidelity each filed Proofs of Claims against each of the seven Debtors.

30. Because the Amended Plan alleges IFIC is an *unimpaired* secured creditor, neither Allegheny Casualty nor International Fidelity were permitted to vote based on these respective secured claims. Nonetheless, they were permitted to vote based on the unsecured claims they also sought in the Proofs of Claims. Though Allegheny Casualty and International Fidelity both asserted unsecured claims

against each Debtor, each were permitted to vote only once due to the Limited Substantive Consolidation provision in the Amended Plan that the Debtors chose (without any known authority) to exercise retroactively prior to confirmation. Amended Plan, VII (C).

31. IFIC further both voted to opt-out of the Consensual Third-Party Release provision. Amended Plan, VII (C). This Consensual Third-Party Release seeks to deny distributions to claim holders that opt-out of the release however. *Id.* It is not clear whether the scope of the release is intended to deny distributions only in connection with unsecured claims held by creditors or, instead, all claims (i.e. secured or administrative expense claims) held by a creditor that opts out of the release. *Id.*

**Basis for Objection**

32. Eight basic grounds exist for IFIC's objection to confirmation of the Amended Plan. First, the provisions of the Amended Plan exceed the jurisdiction of the Court as the Amended Plan seeks to interfere with an interest of IFIC's that is not property of the estate.

33. Second, the Amended Plan places unreasonable restrictions on IFIC's rights as a creditor by restricting its rights to the Letter of Credit and imposing conditions on IFIC to such extent that it cannot be fully compensated for its claims and Legal Fees.

34. Third, the Amended Plan is not confirmable due to IFIC being improperly characterized as an unimpaired creditor when it is quite clearly impaired. As an impaired creditor that rejects the Amended Plan in its current form, the Amended Plan cannot be confirmed since it fails to pass the best interests of the creditors test.

35. Fourth, IFIC has been deprived of its rights to fully vote its Proofs of Claims. Based on an unauthorized application of the Limited Substantive Consolidation provision of the Amended Plan, Allegheny Casualty and International Fidelity were permitted only to vote once based on their respective

unsecured claims even though they each filed seven claims. Further, as impaired secured creditors, they have been denied the right to vote their secured claims altogether.

36. Fifth, the Amended Plan is not proposed in good faith since it deprives IFIC access to its bargained for credit in the form of the Letter of Credit and prevents IFIC from being timely compensated for its Legal Fees.

37. Sixth, IFIC objects since the Third Party Release provision treats IFIC unequally among the Class 6 General Unsecured Class since it is required to tender more valuable consideration in exchange for the same percentage of recovery, and IFIC is treated unequally because of the restrictions against its rights on letter of credit.

38. Seventh, the Amended Plan violates the Bankruptcy Code by releasing liens and other secured interests of creditors without their consent.

39. Finally, IFIC objects to the Amended Plan since its treatment of IFIC is radically different than the treatment a surety normally can expect to receive in a Chapter 11 bankruptcy case.

**OBJECTION**

40. Under 11 U.S.C. § 1129, a plan cannot be confirmed unless it meets the requirements listed in the Code. *See Beal Bank SSB v. Waters Edge Ltd. Partnership*, 248 B.R. 668, 678 (D. Mass. 2000). As set forth below, the Amended Plan is not confirmable as a result of the outrageous treatment of IFIC in this case.[1]

1. *This Court Does Not Have Any Jurisdiction to Interfere with IFIC's Ability to Rely Upon the Letter of Credit*

1 It is important that this Court find that the Amended Plan is dead on arrival in order to take away any concern of the surety community that such treatment of a surety may not be tolerated by a court, as well as any fear by any party that would otherwise request a letter of credit to protect itself that this protection may be extinguished through a debtors' Plan.

41. IFIC objects to the Amended Plan on the basis that the plan places unreasonable restrictions on IFIC's rights as a creditor by restricting its rights to the Letter of Credit. Further, the Amended plan changes the terms of the Letter of Credit, a contract that is not property of the estate, without IFIC's consent. Thus, the Court lacks subject matter jurisdiction to alter IFIC's rights under the Letter of Credit. *See e.g., In re Prime Motor Inns, Inc.*, 130 B.R. 610,613 (S.D. Fla. 1991) (holding bankruptcy court lacked subject matter jurisdiction to enjoin payment or distribution of proceeds under the letter of credit). 28 U.S.C. § 1334 confers jurisdiction only with regard to contracts or affairs of the debtors and not to contracts between third parties. *Id*. (citing *In re Zenith Laboratories, Inc*.), 104 B.R. 667, 668 (Bankr. D.N.J. 1989).

42. It is settled that neither letters of credit nor any proceeds therefrom constitute property of the bankruptcy estate. *See e.g., In re S-Tran Holdings, Inc*., 414 B.R. 28, 33 (Bankr. D. Del. 2009) ("Courts have recognized the 'well-established' rule of bankruptcy law that 'a letter of credit and proceeds therefrom are not property of the debtor's estate."). Where a creditor is seeking proceeds from a letter of credit and "it is not pursuing the pledged collateral ... the proceeds of a letter of credit are not property of the estate." *Id*. (quoting *OCH Liquidation Trust v. Discover Re* (*In re Oakwood Homes*), 342 B.R. 59, 67 (Bankr. D. Del. 2006)) (citations and internal punctuation omitted; emphasis in original)).

43. Further, a letter of credit is a separate contract, independent of the underlying obligations or transactions that gave rise to its issuance, and that strict adherence to this principle is necessary to protect the integrity of letters of credit as a valuable commercial tool. *Graham v. West Virginia* (*In re War Eagle Const. Co.*), 283 B.R. 193, 201 (S.D.W. Va. 2002). Thus, once a obligee complies with the terms of the letter of credit, an account party may not prevent the issuing bank from distributing the proceeds of the letter of credit, absent fraud in the underlying contract. *Banque Paribas v. Hamilton*

*Indus. Int'l, Inc*., 767 F.2d 380, 385 (7th Cir. 1985); *Demczyk v. Mutual Life Ins. Co.* (*In re Graham Square*), 126 F. 3d 823 (6th Cir. 1997).

44. Consistent with this rule, the Sale Orders acknowledge that the Letter of Credit and any proceeds therefrom do not constitute property of the Debtors' estates. *See* Orlando Rentco Sale Order, § 20; Sixt Rent A Car Sale Order, § 38.

45. Likewise, the Final DIP Order recognizes that IFIC should be allowed to access the Letter of Credit to pay its claims. *See* Final DIP Order §26(b)

46. Moreover, in the Claims Objection, the Debtors object to the Proofs of Claims in part based on an argument that Letter of Credit is not property of the estate. Claims Objection, ¶ 20.

47. Here, the Letter of Credit is "a separate contract, independent of the underlying obligations or transactions that give rise to its issuance." *Hvizdak v. Shenzhen Dev. Bank, Co*., 2010 U.S. Dist. LEXIS 149790, *6 (M.D. Fla. 2010). Thus, the Court should not allow the Debtors' plan to restrain IFIC's rights under the letter of credit between IFIC and the Issuer. *See In re Prime Motor Inns*, 130 B.R. at 614 ("The Bankruptcy Court is not empowered to interfere with a contract between non-debtors because it perceives that carrying out the contract could adversely affect the estate."); *In re Graham Square*, 126 F. 3d at 827 ("[O]nce a beneficiary complies with the terms of the letter of credit, an account party may not prevent the issuing bank from distributing the proceeds of the letter of credit. . . .").

48. Based on the foregoing, IFIC objects to the Amended Plan as it seeks to restrict IFIC's access to the Letter of Credit and proceeds therefrom. Specifically, the Amended Plan only permits IFIC access to the Letter of Credit only upon the earlier of (i) written confirmation by the DIP Lender agreeing to the Final Accounting or (ii) the later of (a) the expiration of the challenge period and (b) the entry of an order allowing IFIC's claims and Legal Fees. This improperly imposes restrictions on the

Letter of Credit which do not otherwise exist, even though such Letter of Credit is not property of the estate.

2. *The Amended Plan Places Unreasonable Restrictions on IFIC's Rights*

49. Even assuming the Court concludes it has jurisdiction to exercise rights over the Letter of Credit (and proceeds thereof), the Amended Plan should nonetheless not be confirmed since it places unreasonable restrictions on IFIC's rights in connection with the Letter of Credit.

50. During the pendency of this Chapter 11, the Debtors have not attempted to restrict IFIC's access to the Letter of Credit to such as extent as in the Amended Plan. The Debtors never sought to place any burdens or restrictions on IFIC in the Final DIP Order. *See* Final DIP Order, § 26(b). In both the Sale Orders and Claims Objections, the Debtors conceded that the Letter of Credit is not property of the estate. *See* Claims Objection, ¶ 20; Orlando Rentco Sale Order, § 20; Sixt Rent A Car Sale Order, § 38. The Amended Plan is an entirely different breed altogether in the scope of its reach that will effectively deprive IFIC of important bargained for rights to access the Letter of Credit if its claims and Legal Fees are not paid by the Debtors.

51. Specifically, the Amended Plan only permits IFIC to be reimbursed for its Legal Fees after the Effective Date. Amended Plan, VII (A)(7). Even then, before it can be reimbursed, IFIC must provide the DIP Lender with a Final Accounting. *Id*. The DIP Lender is then provided with a 30 day challenge period. *Id*. IFIC is only then permitted access to the Letter of Credit the earlier of (i) the receipt of written confirmation from the DIP Lender agreeing with the Final Accounting and (ii) the later of (a) the expiration of the foregoing challenge period and (b) the entry of a Final Order establishing the Allowed amount of IFIC's Miscellaneous Secured Claim and its Legal Fees.[2]

2 The Amended Plan even goes further by requiring IFIC to draw down on the Letter of Credit and to turnover the proceeds to the DIP Lender. There is no basis in the Bankruptcy Code for such a requirement.

52. The artificial deadlines set forth above are insufficient since IFIC is currently addressing claims made on the Bonds[3] and may face future claims on the Bonds since the Amended Plan envisions only cancelling the Bonds. Indeed, the Debtors' latest Monthly Operating Report shows an outstanding amount due to the Dallas Fort-Worth International Airport for rent. *See* September 202 Monthly Operating Report (Dkt. #979). This clearly demonstrates that IFIC faces a real risk of current and future exposure.

53. Indeed, cancellation is not the same as a release. *See e.g.*, *Farris v. Kolb*, 135 So. 3d 674, 676 (La. App. 2d Circ. 2013) (Parties executed document to cancel surety bond where Court held "there is no language in the motion and order to cancel surety bond that would give this court any reason to assume that the intent of Plaintiff was to release Defendants from any liability or the mismanagement of Plaintiff's trust funds."); *Hitachi Zosen Clearing Inc. v. Liberty Mut. Ins. Co.*, 1996 WL 388432 at * 5 (N.D. Ill. July 8, 1996) (discussing a Plaintiff's right to cancel surety did not release Defendant from its obligations); Bruce W. Hoover, *The Impact of Bankruptcy on terminating Surety and Fidelity Bonds*, American Bankr. Institute Journal (Oct. 2008)(when cancelling a surety bond, the obligations of the surety are limited to obligations that existed or accrued up until the time of termination. The termination applies only to prospective obligations).

54. Hence, after the Bonds are merely cancelled (as opposed to released), there remains tail exposure on the Bonds that IFIC will face well after the Amended Plan (in current form) requires IFIC to turnover the proceeds of the Letter of Credit. This tail exposure lasts for a year after the Bonds are cancelled or, where inactive, the Bonds expire. While the Amended Plan seeks to preclude Bond Obligees from asserting claims against the Bonds, this prohibition only applies to "the fullest extent

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3 It appears that the open claims on those bonds which bear numbers 616008 and 673377 (issued, respectively, to the

permissible under bankruptcy law" leaving up in the air whether or not claims may continue to be asserted on the Bonds and shifting any risk thereof to the IFIC by cutting off IFIC's rights to the Letter of Credit (and proceed thereof). *See generally* Amended Plan, X(M).

55. This tail exposure is real. IFIC has further incurred Legal Fees and will undoubtedly incur additional Legal Fees after the artificial deadlines in the Amended Plan. IFIC shall need to seek reimbursement from the Letter of Credit for these amounts to the extent not otherwise paid by the Debtor and its successor in interest. Should IFIC be required to abide by the language in the Amended Plan as currently drafted, IFIC will soon be prevented from accessing its primary and ongoing source of collateral.

3. *Since IFIC is an Impaired Creditor, the Amended Plan Cannot be Confirmed Since It Fails to Pass the Best Interests of the Creditors Test*

56. Section 1129(a)(7)(A)(ii) requires bankruptcy courts to determine what creditors would receive under a hypothetical chapter 7 liquidation, and compare that amount to what the same creditors would receive under a chapter 11 reorganization. *Schoenmann v. Bank of the West* (*In re Tenderloin Health*), 849 F.3d 1231, 1237 (9th Cir. 2017). It provides that a bankruptcy court may confirm a chapter 11 plan only if each holder of an impaired claim "will receive or retain ... property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A)(ii). The purpose of the best interest of the creditors test is to ensure that creditors "are no worse off under a plan of reorganization than they would be with the Debtor in [C]hapter 7." *In re Kellogg Square P'ship.*, 160 B.R. 343, 358 (Bankr. D. Minn.1993).

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City of Albuquerque and City of El Paso) may not be resolved prior to these artificial deadlines.

57. In a hypothetical Chapter 7, IFIC would maintain unrestricted rights to the Letter of Credit that it could draw down on as claims and Legal Fees accrue. *See e.g., S-Tran Holdings*, 414 B.R. at 33; Final DIP Order, § 26; Orlando Rentco Sale Order, § 20; Sixt Rent A Car Sale Order, § 38. IFIC would further not need to return the Letter of Credit (and proceeds thereof) until after the tail exposure completely ends on the Bonds and all claims are fully resolved and/or adjudicated. Moreover, IFIC would not be subject to a challenge period nor would it be required to provide a final accounting for all claims and Legal Fees on such a short time frame. Finally, IFIC would not be required to participate in distribution under the Amended Plan in exchange for giving up access in the Letter of Credit and valuable claims against certain third parties such as, and possibly, the Bank of Montreal in its capacity as issuer of the Letter of Credit through the mechanisms of the Consensual Third Party Release (discussed in more detail *infra*.).

58. Hence, IFIC is in a worse position that it would be under a hypothetical Chapter 7. Based on the same factual predicate, IFIC is an impaired creditor. A claim is impaired if the plan alters the legal, equitable, or contractual rights of the claimant. *See* 11 U.S.C. § 1124(a)(1); *Ultra Wyo., Inc. v. Ad Hoc Comm. of Unsecured Creditors* (*In re Ultra Petroleum Corp.*), 913 F.3d 533, 540-42 (5th Cir. 2019) (reversing bankruptcy court's finding of impairment on the ground that a creditor is impaired under section 1124(1) "only if the plan itself alters a claimant's legal, equitable, [or] contractual rights."). That is, if a plan of reorganization does not leave the creditor's rights entirely unaltered, the creditor's claim is impaired. *Solow v. PPI Enters. (U.S.), Inc.* (*In re PPI Enters. (U.S.), Inc.*), 324 F.3d 197, 202 (3d. Cir. 2003); *In re W.R. Grace & Co.*, 475 B.R. 34, 151 (Bank. D. Del. 2012) (recognizing the bankruptcy Code creates a presumption of impairment which can only be overcome if the reorganization plan leaves the creditors' non-bankruptcy rights completely unaltered); *In re Coram Healthcare Corp.*, 315 B.R. 321, 351 (Bank. D. Del. 2004).

59. Moreover, IFIC's impairment is not impacted by the possession of a Letter of Credit. It is longstanding law that a creditor with access to multiple sources for payment of a debt may prove the whole claim against a debtor without regarding to collateral from other sources especially one which the Debtors seek to deprive IFIC the full use from. The only limitation is that the creditor cannot attain more that the total amount of debt. *See e.g., In re F.W.D.C., Inc.,* 1558 B.R. 523, 528 (Bankr. S.D. Fla. 1993) (holding that the creditor "Chase would have been allowed to prove a claim for the full amount of indebtedness against the Previously Consolidated Debtor, as guarantor, without deducting the value of the Chase Debtors collateral securing such indebtedness to reflect its receipts thereof.")

60. Clearly, for the reasons set forth above, IFIC's legal and contractual rights are being altered. The Amended Plan cannot be confirmed since it cannot pass the best interests of the creditors test and IFIC voted its unsecured claims to reject the Amended Plan. *See* 11 U.S.C. § 1129(a)(7)(A).

4. *IFIC Has Been Unjustly Denied Its Rights to Vote Against the Amended Plan*

61. In its POCs, IFIC asserted administrative, secured and unsecured claims.

62. The Amended Plan characterizes Class 6 General Unsecured Claims as impaired with rights to vote for or against confirmation of the Amended Plan. Amended Plan, VII(A)(13).

63. Both Allegheny Casualty and IFIC assert unsecured claims against each Debtor. However, each were permitted to vote only once due to the Limited Substantive Consolidation provision in the Amended Plan that Debtors chose to exercise retroactively prior to confirmation. Amended Plan, VII(C). Further, it appears the Amended Plan treats all unsecured creditors as voting one class retroactively, without court confirmation.

64. Although the Plan purports to substantively consolidate the Debtors for purposes of the *Plan*, it seems that Debtor's attempt to substantively consolidate Creditor's voting power pursuant to the plan. *See* Amended Plan at 50; *see also Id.* At 4.

65. Substantive consolidation has been described as a process that treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities. *Huntington Nat'l Bank v. Richardson* (*In re Cyberco Holdings, Inc.*), 734 F.3d 432, 438 (6th Cir. 2013). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor. *Id.* When two bankrupt entities are involved, "[s]ubstantive consolidation usually results in, *inter alia*, pooling the assets of, and claims against, the two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans." *In re Augie/Restivo Baking Co*., 860 F.2d 515, 518 (2nd Cir. 1988). As an equitable remedy, substantive consolidation is to be used to afford creditors equitable treatment and thus may be ordered when the benefits to creditors exceed the harm suffered. *Lisanti v. Lubetkin* (*In re Lisanti Foods, Inc.*), 329 B.R. 491 (Bankr. D.N.J. 2005). The party requesting substantive consolidation must show: (1) a substantial identity between the entities to be consolidated; (2) that consolidation is necessary to avoid harm or to achieve some benefit; and (3) in the event that the creditor shows harm, that the benefits of consolidation heavily outweigh the harm. *Id.*

66. Further, under appropriate circumstances, a single creditor may exercise more than one vote. The key to the analysis lies in the fact that the plain language of the statute states that holders of "more than one-half of allowed claims" must vote to accept a plan. 11 U.S.C. § 1126. As such, the number of claims, not creditors, is the touchstone. Thus, for example, in *Figter Ltd. v. Teachers Ins. and Annuity Ass'n of America*, (*In re Figter Ltd.*), 118 F.3d 635 (9th Cir. 1997), the Ninth Circuit held that a secured creditor who purchased 21 of the 34 unsecured claims that comprised the only impaired class was entitled to vote each of those claims against confirmation of the debtor's plan. Id. at 640. Similarly, in *In re Gilbert*, 104 B.R. 206 (Bankr. W.D. Mo. 1989), the bankruptcy court held that an unsecured creditor who originally held only one of five unsecured claims was permitted to vote a second claim that

he had purchased solely for the purpose of satisfying the numerosity requirement of plan confirmation. *Id*. at 211.

67. Whether a single creditor may vote more than one claim will depend on whether the claims held by such creditor are sufficiently "separate" to warrant more than one vote. *Id.* While the separate nature of claims is a factual inquiry, courts often consider two key indicators: (1) whether the claims in question derive from independent underlying transactions with the debtor, and (2) whether separate proofs of claim were (or will be) filed for the claims. *Id*. Thus, a creditor with "multiple claims, has a voting right for each claim it holds." *Concord Square Apartments of Wood Cty, Ltd. v. Ottawa Properties, Inc.* (*In re Concord Square Apartments of Wood Cty., Ltd.*), 174 B.R. 71, 74 (Bankr. S.D. Ohio 1994). If allowed claims are to be counted, they must be counted regardless of whose hands they happen to be in. *In re Figter Ltd.*, 118 F.3d at 640. Each proof of claim can give rise to only one allowed claim for purposes of 11 U.S.C. § 1126 so long as that claim represents an obligation capable of satisfaction separate from other debts that are the subject of proofs of claim filed by the creditor. *In re Jones,* 2012 Bankr. LEXIS 1076, *8 (Bankr. M.D. Ga. 2012). Such a rule prohibits a creditor from multiplying the effect of its vote by splitting a single liability across multiple proofs of claim, while allowing the creditor to limit its vote by consolidating multiple liabilities into a single proof of claim. *Id.*

68. Here, IFIC and Allegheny had filed separate proof of claims for claims arising against the seven Debtors. However, as noted above, each received only one vote on the confirmation of the Amended Plan. It seems that the Debtor's purpose is to rely upon the Substantive Consolidation provision to consolidate IFIC's claims into one single claim and one single vote, and to retroactively make one voting class of unsecured creditors. *But see In re Kreider,* 2006 Bankr. LEXIS 2948, *8 (Bankr. E.D. Pa. 2006) (noting that debtors premise that multiple claims voted by a single creditor are counted as a single vote is "simply incorrect"). Thus, IFIC objects to the Amended Plan because it was

entitled to multiple votes on the Amended Plan in accordance with its seven separate claims against the estate. Debtors' Plan seeks to retroactively consolidate all General Unsecured Creditors as once class for voting purposes without court approval of the Limited Consolidation Provision.

69. Though the Amended Plan characterizes IFIC's secured claims as unimpaired (Amended Plan, VII(A)(7)), IFIC is in fact impaired as to its secured claim, including any setoff and recoupment rights, as set forth in section 3 of this Objection. Hence, the Amended Plan cannot be confirmed since IFIC was not given an opportunity to vote as an impaired secured creditor. This outright denial of a voting right violates the Bankruptcy Code in at least two respects. First, Section 1129(a)(7) requires that an impaired class either accept a plan or receive as much as it would under a Chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7); *In re Gillette Associates, Ltd.*, 101 B.R. 866, 1989 Bankr. LEXIS 887 (Bankr. N.D. Ohio 1989). In this case, IFIC has not accepted the Amended Plan and indeed it was outright denied the right to vote its secured claim. Moreover, the Amended Plan fails the best interests of the creditors test as explained in section 3 of this Objection.

70. Hence the Amended Plan violates Section 1129(a)(7) but also Section 1129(a)(8). This section "requires, as a condition of consensual confirmation, that each class of claims and interests either accept the plan or be unimpaired." 7 Collier on Bankruptcy P 1124.02 (16th 2021); *see also In re Combustion Eng'g, Inc*., 295 B.R. 459, 484 (Bankr. D. Del. 2003) (withholding confirmation of the plan until creditors were given an opportunity to vote). Clearly, the Plan has failed to comply with Section 1129(a)(8) since IFIC is neither unimpaired nor voted to accept the Amended Plan.

5. *The Amended Plan is Not Proposed in Good Faith*

71. Pursuant to 11 U.S.C. § 1129(a)(3), a plan is confirmable only if it is proposed in good faith. *In re Am. Cap. Equip., LLC*, 688 F.3d 145, 156–57 (3d Cir. 2012). In analyzing whether a plan has been proposed in good faith under § 1129(a)(3), "the important point of inquiry is the plan itself and

whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Combustion Eng'g*, 391 F.3d at 247 (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir.2000)); *In re Frascella Enter., Inc.*, 360 B.R. 435, 446 (E.D. Pa. 2007) (quoting *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000)). The factors which a court should consider in determining a debtor's good faith include if the plan: (1) fosters a result consistent with the [Bankruptcy] Code's objectives, (citations omitted); (2) has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected, (citations omitted); and (3) [exhibited] a fundamental fairness in dealing with the creditors (citations omitted). *Genesis Health Ventures, Inc.*, 266 B.R. 591, 609 (Bankr. D. Del. 2001) (citations omitted); *In re W.R. Grace & Co.*, 475 B.R. 34, 87–88 (D. Del. 2012).

72. In this case, the Amended Plan has not been proposed in good faith since it is unfair to deprive IFIC access to its bargained for credit in the form of the Letter of Credit and to prevent IFIC from being timely compensated for its Legal Fees. As has been plainly recognized elsewhere in this case and by Debtors' counsel themselves, the Letter of Credit is not even a part of the Debtors' bankruptcy estates. *See e.g.*, Final DIP Order, § 26; Orlando Rentco Sale Order, § 20; Sixt Rent A Car Sale Order, § 38.

73. Moreover, it is also unfair and a violation of the objectives of the Bankruptcy Code to deny IFIC the right to fully vote its unsecured claim and to vote at all as an impaired secured creditor. *See* 11 U.S.C. §§ 1129(a)(7), 1129(a)(8). The Amended Plan contradicts (and is not consistent with) other aspects of Bankruptcy Code as well. The Amended Plan violates the best interests of the creditors test under Section 1129(a)(7) since IFIC would receive better treatment under a hypothetical Chapter 7. The Amended Plan also violates the provisions of Section 1129(b)(2) by releasing all liens and other secured interests as of the Effective Date. Amended Plan, X(E). Unless a secured creditor such as IFIC

consents to such a release (which IFIC has clearly not done), this is not the "fair and equitable" treatment envisioned by the Bankruptcy Code. *See* 11 U.S.C. § 1129(b)(2).

74. Finally, as discussed more fully below, the Amended Plan requires IFIC as a condition for receiving distributions to release more valuable claims than other members of the Class 6 Unsecured Class. This is patently unfair and a further basis for denial of confirmation of the Amended Plan.[4]

6. *The Third Party Release provision treats IFIC unequally among the Class 6 Unsecured Creditor Class.*

75. Pursuant to 11 U.S.C. § 1123(a)(4), a plan shall "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest…" 11 U.S.C. § 1123(a)(4).

76. In *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986), the United States Court of Appeals for the District of Columbia reviewed the confirmation of a plan that required a creditor to release its claims against its guarantors in order to receive distributions as an unsecured creditor. *Id*. at 1143 – 1144. The D.C. Circuit concluded that this creditor received unequal treatment in violation of Section 1123(a)(4) because it was required to release a more valuable direct guaranty claim than the other unsecured creditors. *Id.* at 1152. *AOV Indus*. concluded that "it is unfair to require a creditor to pay a higher price for the same benefit." *Id*. at 1154; *accord In re Monroe Well Serv.*, 80 B.R. 324, 335 (Bankr. E.D. Pa. 1987) (citing *AOV Indus*.).

77. Based on the Indemnity Agreement and Letter of Credit, respectively, IFIC has indemnity claims against any non-debtor affiliates and rights against the Bank of Montreal in its capacity as issuer of the Letter of Credit. Due to the broad scope of the Consensual Third Party Release that applies to

4 Nor have Debtors shown adequate justification for requiring third party releases in this case. See, e.g., *In re Millennium Lab Holdings II, LLC*, 543 B.R. 703 (Bankr. D. Del.) (noting the hallmarks of permissible nonconsensual releases are fairness, necessity to the reorganization, and specific factual findings to support these conclusions).

"any Claim, Cause of Action, obligation, suit, judgement, damages, debt, right, remedy or liability", this potentially could deny IFIC rights against these non-debtor third parties. Further, because the definition of Released Parties is so broad under the Amended Plan, it is not possible to determine whether this would include the issuer of the letter of credit.

78. These are valuable claims not possessed by other members of the unsecured class. Mandating that IFIC release these disproportionately valuable right represents unequal treatment in violation of the Bankruptcy Code.[5] *Id*.

79. The Third Party Release also denies a distribution under the Amended Plan to any claim holder that opts out of the release. Amended Plan, XV(G). This language therein suggests that the scope of this release covers all the claims a creditors possesses including secured or administrative expense claims even though it is only voting its unsecured claims. This violates the Bankruptcy Code since the Debtors must pay all administrative expense claims in full for the Plan to be confirmed. *See* 11 U.S.C. § 1129(a)(9). Moreover, unless a secured creditor consents (which IFIC has not done so), there is no basis to simply strip a secured creditor of its interests without its consent without any form of recompense. For this reason, the Amended Plan cannot be confirmed.

7. *The Amended Plan releases liens and other security interests in violation of the Bankruptcy Code*

80. IFIC is a secured creditor by way of its rights of setoff and recoupment. The law is clear that such rights may not be disturbed.

81. Recoupment, a creditor's right long recognized in bankruptcy proceedings, is not in the nature of a mere lien, but is a defense to a claim for payment. *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir.

5 Moreover, even if there were no third-party releases, the Plan treats IFIC unequally compared to other creditors whereas the plan seeks to restrain its rights under the Letter of Credit. The plan does not seek to affect any other creditor's rights under a Letter of Credit this way.

1984) ("[W]here the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim . . . ."). In other words, the recoupment is used to determine the proper liability on amounts owed. *Reiter v. Cooper*, 507 U.S. 258, 265 n. 2 (1993); *In re Holford*, 896 F.2d 176, 178 (5th Cir. 1990).

82. Setoff "gives a creditor the right 'to offset a mutual debt owing by such creditor to the debtor,' provided that both debts arose before commencement of the bankruptcy action and are in fact mutual." *In re University Medical Center*, 973 F.2d 1065, 1079 (*quoting In re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990). While setoff rights are defined and delineated by applicable non-bankruptcy law, the Bankruptcy Code recognizes and preserves these rights: "11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995); *see also In re Luongo*, 259 F.3d 323, 333 (5th Cir. 2001) ("It is impossible for us to ignore the clear statement of § 553 that this title. . . does not affect any right of a creditor to offset . . . .").

83. Hence, the Amended Plan violates the Bankruptcy Code due to Section X(E). Therein, the Amended Plan states that "all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be deemed fully released without any further action of any party…" Amended Plan, X(E).

84. To the extent this could be applied to IFIC's lien rights or the lien rights held by any of its Bond Obligees, IFIC objects to this provision of the Amended Plan as it clearly violates the Bankruptcy Code.

8. *Treatment of IFIC in the Amended Plan Drastically Different in Other Contexts*

85. To resolve its objections to the Amended Plan, IFC proposes that the treatment of its claims claim be changed to the following:

Notwithstanding anything in this Amended Plan (including in the Release of Lien provision found in Section X(E) hereof), the Plan Supplement, and Confirmation Order to contrary, the liens, secured interests (including setoff and recoupment rights) and trust fund claims of IFIC and any Bond obligee ("IFIC Bond Obligee") to which it is subrogated are fully preserved. Further, notwithstanding anything in this Amended Plan, the Plan Supplement, and Confirmation Order to contrary, IFIC's rights of subrogation and indemnity including any such rights arising out of the General Agreement of Indemnity dated March 12, 2015 or the Bonds are fully preserved. Further, notwithstanding anything in this Amended Plan (including the Consensual Third Party Release provision found in XV(G) hereof), the Plan Supplement and Confirmation Order to the contrary, IFIC's rights to the Irrevocable Standby Letter of Credit previously issued in the amount of $1,750,000.00 in favor of IFIC in connection with the issuance of surety bonds and cash proceeds thereof (the "IFIC Letter of Credit") are fully preserved and unrestricted.

IFIC shall have a Miscellaneous Secured Claim to the extent it is subrogated to any IFIC Bond Obligee that possess a secured claim, including setoff and recoupment rights and, to the extent of any setoff and recoupment rights IFIC possesses in connection with Bond claims. Otherwise, IFIC shall have a Class 6 General Unsecured Claims for any such amounts provided such amounts arose prior to the Petition Date, and administrative claims for any post-petition claim of IFIC.

[o]n the Effective Date, in full and final satisfaction of its Claim, IFIC shall continue to hold the "IFIC Letter of Credit, plus receive reimbursement of IFIC's Legal Fees. For the avoidance of doubt, the Debtors are obligated to pay IFIC Legal Fees as an Administrative Expense Claim on the Effective Date; unless it is determined in the discretion of the Surety or the Court, that the Surety's aggregate gross exposure under any and all active and inactive bonds, plus up to $200,000 for reasonable and documented IFIC Legal Fees, plus any and all unpaid premiums, and plus any and all losses, costs and/or expenses incurred or to be incurred by the Surety under any active or inactive bonds, and to the extent that the amounts recoverable from the IFIC Letter of Credit are equal to or less than the value of the Letter of Credit, provided that IFIC is able to successfully draw on the Letter of Credit, and receive the proceeds thereof.

After the Effective Date, IFIC shall be permitted to draw on and apply the IFIC Letter of Credit, and proceeds thereof, to satisfy its Claims. Once IFIC determines it no longer has any tail exposure on the Bonds and all claims on the Bonds have been fully resolved, IFIC shall turnover to the DIP Lender the remaining proceeds of the IFIC Letter of Credit (to the extent that the Letter of Credit has been drawn upon) that exceed IFIC's Claims, including for, unpaid premiums, losses costs and expenses, including legal fees and costs.

86. This language is consistent with the treatment a surety company normally receives in a

Chapter 11 Bankruptcy case where a surety's rights to its collateral are respected (especially where collateral is coming from a third party) and contractually bargained for rights under the Indemnity Agreement to recover Legal Fees and to address pending and future claims pass through the bankruptcy case infringed. *See e.g.*, Confirmation Orders (Dkt. #3787) in *re Pursue Pharma L.P.*, Case No. 19-23549 (Bankr. S.D.N.Y. Sept. 17, 2021), pp. 104 – 105; Confirmation Order (Dkt. # 1005) in *re Frontier Communications Corporation*, Case No. 20-22476 (Bankr. S.D.N.Y. Aug. 27, 2021), pp. 21 – 22; Confirmation Order (Dkt. #1246) in *re LSC Communications, Inc.*, Case No. 20-10950 (Bankr. S.D.N.Y. Feb. 24, 2021), pp. 35 to 36; Confirmation Order (Dkt. # 1509) in *re Extraction Oil & Gas, Inc.* (Bankr. D. Del. Dec. 23, 2020), pp. 68 - 69; Second Amended Plan (Dkt. # 194) in *re Industrial & Crane Services, Inc.* (Bankr. S.D. Miss. May 13, 2021), pp. 11 to 14.

## CONCLUSION

87. In over 100 cases where the undersigned has represented a surety, the surety's treatment has never been proposed in the way that it is being proposed in the Amended Plan, improperly cutting off IFIC's rights to look to the Letter of Credit it is holding and the proceeds thereof. Such treatment is outlandish, would drastically change the way sureties have to deal with bond principals and indemnitors in connection with future bond requests and impact the way parties regard letters of credit for their protection. This abhorrent treatment of IFIC must be stopped now and confirmation of the Amended Plan denied.

## RESERVATION OF RIGHTS

88. The submission of this Objection by IFIC is not intended as, and shall not be construed as: (a) IFIC's admission of any liability or waiver of any defenses or limitation of any rights of IFIC with respect to any claims against any one or more of the Bonds or under any indemnity agreement in favor of IFIC, including the Indemnity Agreement; (b) IFIC's waiver or release of any right to

exoneration it may have against anyone with respect to any of the Bonds; (c) IFIC's waiver or release of its right to be subrogated to the rights of one or more of the parties paid in connection with the Bonds; (d) an election of remedy; or (e) consent to the determination of any of the Debtors' liability to IFIC by any particular court, including, without limitation, the Bankruptcy Court.

89. IFIC reserves the right to object and put forth any argument in relation to any motion filed by the Debtors for the Bankruptcy Court's authorization of assumption and assignment of executory contracts and unexpired leases, and to raise any arguments by any other party in their objection(s) to the Amended Plan.

90. IFIC expressly reserves, and does not waive, any and all of its rights, claims, defenses, limitations, and/or exclusions in connection with its and any of the Debtors' or its affiliates' rights and obligations under any Indemnity Agreement, the Bonds, applicable law, or otherwise. IFIC further reserves all rights to assert any and all such rights, claims, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, any of its rights to have any non-core matter relating to the interpretation of its contractual rights and Debtors' contractual obligations adjudicated by the United States District Court).

91. IFIC further reserves all of its rights to raise any issues contained in this Objection and any other related issues in any procedurally appropriate contested matter and/or adversary proceeding, including, without limitation, (i) objections to confirmation of any future revision to any plan including the Amended Plan (ii) a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief; (iii) or an objection to any subsequent motion seeking approval of an asset sale to any prospective asset purchaser with respect to any contractual rights that may be adversely affected by a sale motion or the confirmation of any plan including the Amended Plan.

MCELROY, DEUTSCH, MULVANEY
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Dated: December 4, 2021

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