

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

In re:

ADVANTAGE HOLDCO, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 20-11259 (CTG)

(Jointly Administered)

Re: Docket Nos. 1026

**DEBTORS' REPLY IN SUPPORT OF THE OBJECTION TO
THE INCORRECTLY CLASSIFIED CLAIMS OF INTERNATIONAL
FIDELITY INSURANCE COMPANY AND ALLEGHENY CASUALTY COMPANY**

The debtors and debtors in possession (collectively, the “Debtors”) in the above-captioned cases submit this reply in support of its objection [Docket No. 1026] (the “Objection”) seeking entry of an order reclassifying the priority claims and administrative expenses asserted by International Fidelity Insurance Company and Allegheny Casualty Company (together, “IFIC”)² in multiple, substantially identical proof of claim and administrative expense forms³ filed against each Debtor (the “Claims”) and in opposition to IFIC’s response to the Objection [Docket No. 1047] (the “Response”).⁴ In support of the Reply, the Debtors state the following:

PRELIMINARY STATEMENT

1. Prior to the Petition Date, IFIC provided Bonds to secure the Debtors’ operational performance to third party Obligees. Throughout these cases, IFIC has claimed that it is entitled

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Advantage Holdco, Inc. (4832); Advantage Opco, LLC (9101); Advantage Vehicles LLC (6217); E-Z Rent A Car, LLC (2538); Central Florida Paint & Body, LLC (1183); Advantage Vehicle Financing LLC (7263); and RAC Vehicle Financing, LLC (8375). The Debtors’ address is PO Box 2818, Windermere, FL, 34786.

² For purposes of the Claims, International Fidelity Insurance Company and Allegheny Casualty Company operate as one entity.

³ Claim Nos. 10189, 10191, 10193, 10195, 10196, 10197, 10198–10200, 10202, 10204–10207, 20004–20011, 20013–200018 (collectively, the “IFIC POC”).

⁴ Capitalized terms used but not defined herein shall have the meaning provided in the Objection.

to an administrative expense because it *might* have exposure under the Bonds for administrative expenses incurred by the Obligees. Now, more than fifteen months after the Debtors ceased operations and rejected or assigned each of its underlying Concession Agreements with the Obligees, IFIC still says it *might* have exposure. IFIC, however, does not allege, let alone provide any evidence of administrative expenses incurred or asserted by an Obligee that could be applied against the Bonds. Further, based on the documents provided by IFIC, such claims cannot exist because the period to report claims under each Bond has expired.

2. The only unpaid claim IFIC has actually identified is a claim for reimbursement of its legal fees under provisions in the Final DIP Order. Those provisions provide that the estates will be liable to reimburse up to \$200,000 of IFIC's legal fees *if* IFIC's claims exceed the value of its \$1,750,000 Letter of Credit. IFIC has not even attempted to carry its burden to make this showing. Instead, IFIC argues that whether it is undersecured cannot be determined until all bond reporting periods have expired (despite its own documents showing that the reporting periods have, in fact, expired). Until that time, IFIC argues that, so long as IFIC believes (in its discretion) that it *may* be unsecured, the estates are obligated to pay its legal fees. As such, IFIC has also objected to the Debtors' proposed plan that provides a \$200,000 reserve for IFIC's legal fees pending resolution of the bond issue.

3. IFIC's reading of the negotiated Final DIP Order language is indefensible. The Final DIP Order is clear—if IFIC is determined to be undersecured, then the Debtors are obligated to pay up to \$200,000 of their legitimate legal fees. The Debtors therefore set up a reserve in the Plan, even though they strongly believe that IFIC is significantly oversecured. Amazingly, this is not satisfactory to IFIC—it wants to be paid now from the estate's limited funds, without proving the requisite threshold.

4. For the reasons stated below, IFIC has entirely failed to satisfy its burden of proof to show that any of its claims are entitled to treatment as administrative expenses.

ARGUMENT

I. IFIC’s Secured Claims, If Any, Are Limited to Claims for Setoff and Recoupment

5. Initially, there appears to be no dispute at this time regarding IFIC’s secured claim. The parties agree that IFIC does not hold a security interest in any assets of the estates and, therefore, is not entitled to any distribution on account of a secured claim. Response ¶ 23. Instead, IFIC alleges that its Claims are secured to the extent of any direct setoff or recoupment rights or its rights of subrogation to any Obligees’ setoff or recoupment rights. The Debtors do not, at this time, take a position on the existence or validity of such setoff or recoupment rights. The Debtors reserve the right to challenge such claims in the future. Further, the Debtors’ proposed Plan preserves any valid setoff and recoupment rights parties may hold. *See* Sections VII.A. and XI.J. of the Plan.

II. IFIC Failed to Show Any Administrative Expense

6. The Debtors oppose IFIC’s request for an administrative expense claim. IFIC does not present evidence of any claim that may be entitled to administrative expense priority. An administrative expense claimant has the burden to “demonstrate that the claim: (1) arises out of a post-petition transaction with the debtor (or trustee); and (2) benefits the estate.”⁵ “Unlike the burden of going forward which may shift to the objecting party, the burden of persuasion always

⁵ *In re Buffets of Bensalem, LLC*, 2010 WL 4922536, at *2 (Bankr. D.N.J. Nov. 23, 2010); *see also In re Molnar Bros.*, 200 B.R. 555, 559 (Bankr. D.N.J. 1996); *In re Hanlin Group, Inc.* 176 B.R. 329, 333 (Bankr. D.N.J. 1995); *In re Lease-A-Fleet, Inc.*, 140 B.R. 840, 846 (Bankr. E.D. Pa. 1992).

remains with the claimant.”⁶ Where a claimant fails to meet this burden in response to an objection, the appropriate remedy is to disallow its request for administrative expense treatment.⁷

7. IFIC identifies three categories of claims that it argues are entitled to administrative expense treatment: (i) unpaid bond premiums incurred during these cases, (ii) IFIC’s asserted right to subrogate or otherwise recover against the estate for any Obligees’ unpaid administrative expense claim, and (iii) IFIC’s legal fees.

8. Each of IFIC’s requested administrative expenses relates to 27 Bonds that IFIC issued to Obligees to secure the Debtors’ performance under Concession Agreements. The Debtors sold or terminated five of those Concession Agreements prior to the Petition Date. Less than five weeks after the Petition Date, the Debtors rejected 15 Concession Agreements effective as of June 30, 2020 and sold the remaining seven in connection with two section 363 sales approved on July 1, 2021. *See* Docket Nos. 327, 330, 360. After the Debtors ceased operating under the Concession Agreements, their continuing obligation to maintain surety bonds ended.

9. For the reasons stated below, IFIC has failed to satisfy its burden of proof to show that its claims are entitled treated as administrative expenses.

A. IFIC Presents No Evidence of Existing or Potential Unpaid Postpetition Premiums

10. IFIC summarily asserts that it is entitled to an administrative expense claim for “any and all unpaid premiums” arising from issuing or continuing surety bonds on the Debtors’ behalf. Response ¶¶ 14, 21. However, IFIC does not provide evidence of any unpaid postpetition premium. Nor does it even allege that any such premium exists.

⁶ *In re Molnar Bros.*, 200 B.R. 555, 559 (Bankr. D.N.J. 1996); *see also In re Bellman Farms, Inc.*, 140 B.R. 986, 994 (Bankr.N.D.S.D.1991).

⁷ *In re Buffets of Bensalem, LLC*, 2010 WL 4922536, at *3 (Bankr. D.N.J. Nov. 23, 2010).

11. IFIC also does not (and cannot) show any likelihood of an administrative expense for future premiums. The Debtors ceased operations over fifteen months ago and have sold or rejected each of the Concession Agreements connected with IFIC's Bonds. Thus, the Debtors no longer have any requirement or need to provide surety bonds.

12. IFIC has failed to show any claim for unpaid postpetition premiums that is entitled to administrative expense treatment. This portion of its claim must be disallowed.

B. Unpaid Administrative Expenses from Obligees

13. IFIC's request for an administrative expense based on hypothetical unpaid administrative expenses of Obligees to the Bonds also fails for three independent reasons. First, again, IFIC fails to provide evidence of or even allege the existence of an administrative expense that has been asserted against a Bond or that may be made against a Bond. Second, the Debtors have or will satisfy all postpetition rent and other Concession Agreement obligations. Third, even if potential claims existed, IFIC's own documents show that the Obligees' time to assert claims against the Bonds has expired.

14. Following the Petition Date, the Debtors operated under the Concession Agreements for a brief period, ceasing operations and rejecting or selling the Concession Agreement five weeks into these cases, on approximately June 30, 2020. During this period, the Debtors paid their obligations under Concession Agreements, including stub rent. *See* Docket Nos. 151, 391, 450, 514 (Debtors' Monthly Operating Reports); Docket No. 68-1 (Approved Budget).

15. Further, on September 21, 2020, the Court entered a bar date order establishing October 23, 2020 as the deadline to submit an administrative expense form for claims that arose from the Petition Date through September 30, 2020, more than three months after the Debtors ceased operations. Docket No. 497. In the 18 months since the Petition Date, only one Obligee

has filed an application for an administrative expense. Claim No. 20012. That claim (for \$39,667.17) arose in connection with negotiations over 363 sale cure costs. The claim will either be resolved through the ongoing negotiations or paid through the proposed Plan.⁸

16. IFIC also does not provide evidence or allege any specific future Obligor administrative expenses or even explain how one could arise. Again, the history of these cases shows that the Debtors paid their postpetition obligations to Obligees, ceased operations 15 months ago, and that only one Obligor sought an administrative expense. IFIC's attempt to paint the procedural history of these cases as an "indication [that future Obligor administrative expense] claims are likely" is wholly unsupported. Response ¶ 38.

17. Additionally, IFIC provides no evidentiary support for the chart attached as Exhibit A to its Response, which shows that certain Bonds have not expired (referred to as "active") or have expired but still have open tail reporting periods (referred to as "inactive"). To the contrary, the documents provided by IFIC, attached as **Exhibit B** hereto, fail to show any active Bonds or inactive Bonds with open reporting periods. A chart summarizing the status of each Bond is attached as **Exhibit A** hereto.

18. Each Bond was issued for a one year term and was extended for subsequent one year terms until the Debtors ceased operating under the related Concession Agreement. Each Bond, in turn, provided "claims made" coverage—in order to recover from a Bond, the Obligor

⁸ Dallas/Fort Worth International Airport Board ("DFW") sought an administrative expense for \$39,667.17. Claim No. 20012. The Debtors assigned one of its two Concession Agreements with DFW through a 363 sale. Docket No. 330. Following the sale, the Debtors have been negotiating a resolution to DFW's administrative expense claim. If DFW's administrative expense is not resolved through agreement, it will be paid through the proposed Plan. Moreover, as discussed below, DFW is now time-barred from asserting a claim against the Bonds.

was required to assert a claim during the Bond's term or, under certain Bonds, before the expiration of a "tail" reporting period.⁹

19. On Exhibit A to the Response, IFIC alleges that six Bonds remain active and 15 Bonds are inactive. However, the Bonds and related documents provided from IFIC and attached here as **Exhibit B** fail to show that any Bond reporting period, including any tail period, remains unexpired.¹⁰ Further, IFIC does not allege, let alone show, that any Obligee asserted an administrative expense against the Bonds before the applicable reporting periods expired.

20. IFIC's allegations on Exhibit A to the Response are also inconsistent with the history of these cases and IFIC's own allegations. For example, on Exhibit A to the Response, IFIC alleges that six Bonds remain active. However, as mentioned, Bonds were extended, if at all, for twelve-month periods. The Debtors' obligation to maintain surety bonds ended when they rejected or sold their remaining Concession Agreements and ceased operations over 15 months ago. IFIC does not attempt to explain why or how any Bonds could still be active well over a year later.¹¹

21. Likewise, on Exhibit A to the Response, IFIC also alleges that four Bonds have been inactive for more than a year. In its Response, IFIC alleges that "tail exposure lasts for a year after the Bonds are cancelled or, where inactive, the Bonds expire." Response ¶ 37. On October 23, 2020, IFIC filed its proof of claim and alleged that Bonds number 692434, 616017, 616016, and 616018 were inactive. Yet, these same Bonds—for which IFIC alleges total exposure of

⁹ For example, the Bonds commonly state the following or a materially identical version thereof: "[n]o claim shall be had or maintained against the Surety on this instrument unless such be brought or instituted and process served upon the Surety prior to the expiration date of the bond" or the tail period, were applicable.

¹⁰ The expiration of the reporting period under the Bonds is summarized in the chart on **Exhibit A** hereto.

¹¹ IFIC's position is made more perplexing by the fact that the other two surety bond providers in these cases have fully resolved their bonds and released their collateral securing the Debtors' obligations.

\$494,307.00—are still listed as inactive more than a year later. IFIC does not attempt to explain how the tail periods on these Bonds could still be open.

22. IFIC has failed to show an administrative expense (either existing or potential) that could be asserted against a Bond. Therefore, this request for an administrative expense must be denied.

C. IFIC Has Not Shown It Is Entitled to Reimbursement of Legal Fees Under the Final DIP Order

23. As discussed in the Objection, Paragraph 26(a) and (b) of the Final DIP Order provide—in language negotiated and agreed to by IFIC at the time—that the estates will reimburse IFIC for reasonable legal fees *if* the sum of IFIC’s Claims, plus \$200,000 in reasonable and documented legal fees, is greater than the amount of the \$1,750,000 Letter of Credit securing the Debtors’ obligations to IFIC. Said another way, the estates are obligated to reimburse IFIC’s legal fees from estate cash only if IFIC is undersecured. Otherwise, IFIC must look to the IFIC Letter of Credit, a non-estate asset.

24. For months, IFIC has argued that Obligees could still assert bond claims that, in total, might exceed the IFIC Letter of Credit. As of the filing of this Reply, however, IFIC has not provided any documentation to support its allegations. To the contrary, on Exhibit A to the Response, IFIC alleges that only one Bond has been drawn. Further, IFIC admits in its confirmation objection that it has not determined whether it is undersecured, but nonetheless argues that the estates are required to reimburse its legal fees now. Docket No. 1050 (IFIC Conf. Obj.) ¶ 16. IFIC has also rebuffed the Debtors’ attempts to negotiate a resolution or, at least, understand IFIC’s position on its bond exposure.

25. IFIC continues to obfuscate its bond exposure in its Response and in its objection to confirmation, and argues that, under the terms of the Final DIP Order, until IFIC determines that

it is oversecured, the estates must pay IFIC's legal fees monthly. Yet this is not what the agreed language of the Final DIP Order says.

26. Whether IFIC is entitled to reimbursement of its legal fees from the Debtors' limited cash now, versus from the IFIC Letter of Credit is entirely controlled by Paragraph 26 of the Final DIP Order. In relevant part, Paragraph 26(a) provides:

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 attorney's fees incurred and to be incurred by the Surety in accordance with the terms of any agreement among the parties.

27. In turn, Paragraph 26(b) provides:

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.

28. Together, Paragraph 26 (a) and (b) provides that the estates will reimburse IFIC for reasonable legal fees if the sum of its Claims, plus \$200,000 in reasonable and documented legal fees, is less than the amount of the IFIC Letter of Credit.

29. IFIC argues that Paragraph 26 requires the estates to reimburse its legal fees as they become due until there has been a determination of whether IFIC is undersecured. As IFIC argues in its confirmation objection: "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."

Docket No. 1050 (IFIC Conf. Obj.) ¶ 16. However, the first sentence of Paragraph 26(b) says that the estates will be liable “if” IFIC is determined to be undersecured, not “until” such determination.¹²

30. Next, in an attempt to avoid its negotiated language and prerequisite, undersecured requirement in Paragraph 26 of the Final DIP Order, IFIC argues that, because “the Indemnity and Bonds benefited the Debtors’ estates during the pendency of the Administrative Claims Period, associated Legal Fees that were incurred during this period also benefitted the estate.” Response ¶ 39. Such a position is a vague attempt to evade the Third Circuit’s onerous requirements to receive payment for a substantial contribution.¹³ IFIC has not even attempted to satisfy that high burden. There is no evidence regarding the nature of IFIC’s work in these cases.

31. IFIC attempts to support its position that its legal fees are due now by citing an email from Debtors’ counsel agreeing to pay IFIC’s legal fees attached to the Response as Exhibit C. This argument is a red herring and fails to address the inconsistent messages from IFIC’s counsel and management. First, the cited email was made 10 months after the entry of the Final DIP Order. Even if parole evidence were admissible, an email sent 10 months after entry of the order is not evidence of the intent of the language. Further, the email was a result of IFIC providing unsupported information about its bond exposure. As shown on the email chain attached to the Response as Exhibit C, on April 2, 2021, IFIC’s counsel circulated a spreadsheet (similar the chart attached as Exhibit A to the Response) suggesting that IFIC was woefully undersecured. In

¹² Further, the determination of whether IFIC is undersecured under Paragraph 26(b) must be made by agreement or by the Court. IFIC also has control over the information needed to determine whether it is undersecured. The Debtors counsel and representatives have been working for months to understand IFIC’s position. However, other than counsel’s unsupported summary charts, the only information IFIC has provided to date shows that it is highly oversecured. IFIC cannot be allowed to perpetually argue that it *may* be undersecured or even that it *believes* that it is undersecured while at the same time failing or refusing to provide proof of such position.

¹³ See *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944 (3d Cir. 1994).

reliance, on April 8, 2021, counsel for the Debtors agreed that IFIC's fees would be paid. However, upon further review, including discussions between business representatives for IFIC and the Debtors, it became clear that there were substantial questions as to whether IFIC was undersecured, and in fact it has been the Debtors' belief for some time that IFIC is in fact comfortably oversecured, even including the payment of up to \$200,000 from the bond.

32. IFIC's position has been, and still is, that it cannot tell whether it will ultimately be under or oversecured until more Bond reporting periods have expired with the passage of time. The Debtors' proposed Plan provides a \$200,000.00 reserve of IFIC's legal fees to allow for this passage of time. Until that determination is made, IFIC is not entitled to payment of its legal fees.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached to the Objection as Exhibit A, granting the relief sought in the Objection and such other and further relief to the Debtors as the Court may deem proper.

Dated: December 8, 2021
Wilmington, Delaware

COLE SCHOTZ P.C.

/s/ Andrew J. Roth-Moore

Justin R. Alberto (No. 5126)
Norman L. Pernick (No. 2290)
Patrick J. Reilley (No. 4451)
Andrew J. Roth-Moore (No. 5988)
500 Delaware Ave., Suite 1410
Wilmington, DE 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
Email: jalberto@coleschotz.com
npernick@coleschotz.com
preilley@coleschotz.com
aroth-moore@coleschotz.com

Counsel to the Debtors and Debtors in Possession