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

In re:	§	**Chapter 11**
SERTA SIMMONS BEDDING, LLC, *et al.*,	§	**Case No. 23-90020 (DRJ)**
	§	**Jointly Administered**
Debtors.[1]	§	
	§	**Re: Docket Nos. 545, 810, 824, 825, 874**

AD HOC PRIORITY LENDER GROUP'S (I) STATEMENT IN SUPPORT OF CONFIRMATION OF DEBTORS' CHAPTER 11 PLAN AND (II) JOINDER IN DEBTORS' CONFIRMATION BRIEF AND RESERVATION OF RIGHTS

The ad hoc group of PTL Lenders represented by the PTL Group Advisors (as constituted from time to time, the "***Ad Hoc Priority Lender Group***"), through its undersigned counsel, hereby files this statement (this "***Statement***") in support of the *First Amended Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors (With Technical Modifications)* [Docket No. 874] (as may be further modified, amended, or supplemented from time to time, and together with all exhibits and schedules thereto, the "***Plan***"),[2] joins in the *Debtors' Memorandum of Law in Support of Confirmation of Modified First Amended Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors* [Docket No. 879] (the "***Confirmation Brief***"), and

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Dawn Intermediate, LLC (6123); Serta Simmons Bedding, LLC (1874); Serta International Holdco, LLC (6101); National Bedding Company L.L.C. (0695); SSB Manufacturing Company (5743); The Simmons Manufacturing Co., LLC (0960); Dreamwell, Ltd. (2419); SSB Hospitality, LLC (2016); SSB Logistics, LLC (6691); Simmons Bedding Company, LLC (2552); Tuft & Needle, LLC (6215); Tomorrow Sleep LLC (0678); SSB Retail, LLC (9245); and World of Sleep Outlets, LLC (0957). The Debtors' corporate headquarters and service address for these chapter 11 cases is 2451 Industry Avenue, Doraville, Georgia 30360.

[2] Capitalized terms used but not defined herein have the meaning ascribed to them in the Plan, Disclosure Statement, or DIP Order, as applicable.

responds to the objections to confirmation filed by Citadel Equity Fund Ltd. ("***Citadel***"),[3] an ad hoc group of Non-PTL Lenders (the "***Non-PTL Lender Ad Hoc Group***"),[4] and LCM XXII Ltd., LCM XXIII Ltd., LCM XXIV Ltd., LCM XXV Ltd., LCM 26 Ltd., LCM 27 Ltd. and LCM 28 Ltd. (collectively, the "***LCM Lenders***" and, together with Citadel and the Non-PTL Lender Ad Hoc Group, the "***Objectors***"),[5] and, in support of this Statement, respectfully represents as follows:

PRELIMINARY STATEMENT

1. The Ad Hoc Priority Lender Group supports confirmation of the Plan and the value-maximizing framework that it embodies. Outside of the Objectors, the Plan is supported by all of the major constituents in these Chapter 11 Cases, including the Creditors' Committee.[6] Throughout these Chapter 11 Cases, the Ad Hoc Priority Lender Group's primary objective has been to provide substantial de-leveraging to the Debtors' capital structure in order to strengthen the Debtors' business going forward and facilitate the Debtors' swift emergence from chapter 11. The Plan is the culmination of these efforts and should be confirmed because it promotes the best interests of all of the Debtors' stakeholders, including the Debtors' employees, customers, suppliers, and creditors.

2. Since the spring of 2020 when members of the Ad Hoc Priority Lender Group mobilized in the early and uncertain days of the pandemic to provide the Debtors with $200 million

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[3] *Citadel's (A) Supplemental Brief in Support of Limited Joinder to Claim Objection to Favored Lenders' Indemnity Claims and (B) Objection to Debtors' First Amended Joint Chapter 11 Plan of Reorganization* [Docket No. 810] (the "***Citadel Objection***").

[4] *Objection of the Ad Hoc Group of First Lien Lenders to the First Amended Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors* [Docket No. 824] (the "***Non-PTL Lender Objection***").

[5] *LCM Lenders' Joinder in Objection of the Ad Hoc Group of First Lien Lenders to the First Amended Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors* [Docket No. 825] (the "***LCM Joinder***" and, together with the Citadel Objection and the Non-PTL Lender Objection, the "***Objections***").

[6] *See Statement of the Official Committee of Unsecured Creditors in Support of Confirmation of the First Amended Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors* [Docket No. 832].

of urgently needed new liquidity and a $400 million reduction in their outstanding funded debt obligations, the Ad Hoc Priority Lender Group has been a steadfast partner to the Company. Indeed, when the Debtors approached the Ad Hoc Priority Lender Group in the fall of 2022 with respect to their unfortunately unsustainable capital structure, they re-engaged with the Company in extensive good faith and arm's-length negotiations regarding a path forward. Those negotiations ultimately culminated in the execution of the Restructuring Support Agreement by the Debtors, the Consenting Creditors, and the Consenting Equity Holders prior to the commencement of these Chapter 11 Cases.

3. The Ad Hoc Priority Lender Group has since continued to work tirelessly to facilitate an expeditious and consensual process, including by agreeing to the consensual use of cash collateral as part of the Debtors' debtor-in-possession financing facility, negotiating the Creditors' Committee Global Settlement—which resolved a potentially protracted and unnecessary confirmation dispute with the Creditors' Committee—and forging a path for the Debtors to immediately emerge from bankruptcy notwithstanding the existence of any pending appeals in the litigation challenging the 2020 Transaction. The alternative would have been for the Ad Hoc Priority Lender Group to refuse to support a plan until the appellate process had run its course, leaving the Company languishing in bankruptcy (including post-confirmation of a plan). The Ad Hoc Priority Lender Group's willingness to move forward expeditiously is made possible by the Postpetition Indemnity (defined below), which the Objectors unfairly deride and mischaracterize as an inappropriate assumption of a prepetition claim that they argue could be disallowed, subordinated, or otherwise challenged under the Bankruptcy Code. Nothing could be further from the truth.

4. The Postpetition Indemnity is a standard indemnification provision in the Plan and New Term Loan Credit Facility Agreement and a crucial element of the integrated, package deal that has been agreed in good faith between the PTL Lenders and the Debtors. The Postpetition Indemnity directly benefits the Debtors, and reflects a sound exercise of the Debtors' business judgment, because without it the support needed to confirm a plan on an expedited timetable would not have existed.

5. Stated another way, the Postpetition Indemnity is a new go-forward obligation of the Reorganized Debtors—it is not a prepetition indemnity claim arising under the PTL Credit Agreement. Nevertheless, even assuming *arguendo* that the Objectors are correct and the obligations under the Postpetition Indemnity are somehow dependent on the allowance of prepetition indemnity claims, the Objectors fail to establish the elements for disallowance, fail to establish the elements for subordination, and, in any event, are barred by the DIP Order now from challenging the validity and/or priority of such claims, which constitute "Prepetition PTL Obligations" under the DIP Order. The bar under the DIP Order arises not because the Objectors fell victim to some trap under the documents but because, after substantial discussion on the record,[7] the Objectors affirmatively chose not to seek standing and file a proper challenge.

6. Citadel, perhaps recognizing that it cannot prevail in invalidating the Postpetition Indemnity as a legal matter, also attacks the Postpetition Indemnity on feasibility grounds, asserting that the potential quantum of the Reorganized Debtors' indemnification obligation—which Citadel posits with no factual support as approaching $350 million—renders the Plan infeasible. However, the Non-PTL Lender defendants' prospects of prevailing in the ongoing litigation concerning the 2020 Transaction (let alone the timing thereof) is necessarily speculative.

[7] *See* Mar. 1, 2023 Hr'g Tr. at 24:9-25 25:1-26:6; 29:4-32:12; 41:13-42:12.

There has never been a judgment entered against the PTL Lenders, let alone any effort by any court to quantify any purported damages allegedly sustained by the Non-PTL Lenders. In fact, the only judgment entered with respect to these disputes was by this Court and was *in favor* of the Debtors and the PTL Lenders. Further, another requirement of the Restructuring Support Agreement is that the Court rule in favor of the Debtors and the PTL Lenders on their remaining claim that they did not breach the implied covenant of good faith and fair dealing. So if the Court confirms the Plan, it will do so after ruling in favor of the Debtors and the PTL Lenders and reaffirming the validity of the 2020 Transaction, rendering the potential for a claim under the Postpetition Indemnity even more remote.

7. Notwithstanding these facts, Citadel attacks the Plan's feasibility based on an inflated, unweighted, and undiscounted claim amount which appears to be pulled out of thin air and expressly contradicts the prior judgment of this Court. To borrow Citadel's own words: this is "a matter of basic finance" and unfortunately for Citadel's position, their math does not comport with the economic reality of how future speculative events are calculated and accounted for.

8. Finally, as set forth in the Confirmation Brief and as will be demonstrated by the Debtors through the evidence submitted at the Confirmation Hearing, the Plan satisfies the confirmation requirements enumerated in section 1129 of the Bankruptcy Code and represents a viable path to emergence from chapter 11. The Plan is unquestionably fair and equitable, as well as in the best interests of the Debtors and their estates, and represents an optimal outcome for all of the Debtors' stakeholders. Accordingly, for the reasons set forth herein and in the Confirmation Brief, the Ad Hoc Priority Lender Group supports confirmation of the Plan.

REPLY

I. THE POSTPETITION INDEMNITY IS VALID AND DOES NOT RENDER THE PLAN INFEASIBLE.

9. The Plan and New Term Loan Credit Facility Agreement provide for certain Indemnification Obligations, including the Debtors' obligation to indemnify the PTL Lenders with respect to "all present and future actions, suits, and proceedings against the PTL Lenders or their respective Related Parties in connection with or related to the Adversary Proceeding, the Prepetition Adversary Actions, and/or any other claims, proceedings, actions, or causes of action in connection with or related to the PTL Credit Agreement, the Exchange Agreement, the Intercreditor Agreements, and/or the 2020 Transaction on the same terms and limitations as afforded under the PTL Credit Agreement and New Term Loan Credit Facility" (such obligation, the "***Postpetition Indemnity***").[8] In their Objections, the Objectors advance two theories as to why the Postpetition Indemnity is improper: (i) certain prepetition indemnity claims under the PTL Credit Agreement (the "***PTL Indemnification Claims***") are subject to disallowance pursuant to section 502(e)(1)(B) of the Bankruptcy Code and cannot be assumed by the Debtors and (ii) the potential quantum of damages for which the PTL Lenders could assert under the Postpetition Indemnity renders the Plan infeasible. Both arguments are fundamentally flawed and should be overruled.

A. The Postpetition Indemnity Arises Under the New Term Loan Credit Facility Agreement and Is a New Go-Forward Obligation of the Reorganized Debtors.

10. The Objections rest their argument almost entirely on the prepetition claim objection previously raised in their reservation of rights and related joinders with respect to the Challenge Deadline, which objection addressed solely the allowance of prepetition claims, and did

[8] Plan § 8.5(b).

not address the Plan or confirmation at all.[9] Indeed, the Objectors spill considerable ink rehashing their views as to why the prepetition PTL Indemnification Claims (not any go-forward indemnification obligations) should be disallowed pursuant to section 502(e)(1)(B) of the Bankruptcy Code. However, in the process, they gloss over the fact that any obligations on account of the Postpetition Indemnity are not prepetition PTL Indemnification Claims; rather, the Postpetition Indemnity is a new go-forward obligation of the Reorganized Debtors that arises under the New Term Loan Credit Facility Agreement and, therefore, does not require the Court to engage in an analysis under section 502 of the Bankruptcy Code. Accordingly, the Objectors' lengthy discussion on the disallowance of contingent co-liability claims, while educational, is irrelevant.[10]

11. Section 8.5(b) of the Plan provides that:

> Following the Effective Date, the PTL Lenders shall be indemnified by the Reorganized Debtors with respect to all present and future actions, suits, and proceedings against the PTL Lenders or their respective Related Parties in connection with or related to the Adversary Proceeding, the Prepetition Adversary Actions, and/or any other claims, proceedings, actions, or causes of action in connection with or related to the PTL Credit Agreement, the Exchange Agreement, the Intercreditor Agreements, and/or the 2020 Transaction on the same terms and limitations as afforded under the PTL Credit Agreement and New Term Loan Credit Facility.[11]

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[9] *See The Ad Hoc Group of First Lien Lenders' (I) Statement and Reservation of Rights With Respect to the Challenge Deadline and (II) Objection to the Favored Lenders' Indemnity Claims* [Docket No. 656] (the "***PTL Indemnification Claim Objection***").

[10] Similarly, Citadel's arguments that the Postpetition Indemnity contravenes the general rule that an executory contract must be assumed or rejected *cum onere*, or the prohibition against assumption of contracts "to make a loan, or extend other debt financing or financial accommodations" under section 365(c)(2) of the Bankruptcy Code, are equally irrelevant. As noted above, the Postpetition Indemnity is a post-exit obligation that arises under the New Term Loan Credit Facility Agreement. As clarified in the modified Plan filed at Docket No. 874, the Debtors are not assuming any contract "to make a loan, or extend other debt financing or financial accommodations," nor are they assuming any part of an existing contract.

[11] Plan § 8.5(b).

As the Non-PTL Lender Group correctly observes, Section 8.5(b) of the Plan matches Section 9.03(b) of the New Term Loan Credit Facility Agreement.[12] And for good reason: the Postpetition Indemnity is a negotiated term of the New Term Loan Credit Facility Agreement.

12. Although the Citadel Objection makes no mention of Section 9.03(b) of the New Term Loan Credit Facility Agreement, the Non-PTL Lender Objection addresses it briefly, stating that the Debtors "cannot cure or otherwise circumvent the consequences of Section 8.5(b) of the Plan" simply by inserting similar language in "the Plan Supplement."[13] This argument, however, is premised on two flawed assumptions. The first being that the Postpetition Indemnity is a disallowable prepetition claim that the Debtors are attempting to have "ride through" the Chapter 11 Cases. The second being that by virtue of being part of the Plan Supplement, each and every provision of the New Term Loan Credit Facility Agreement—a contract that will not be entered into unless and until the Plan is confirmed—must be scrutinized through the lens of the Bankruptcy Code. Both are simply inaccurate.

13. It is standard for credit agreements, including in the context of exit financings, to contain indemnification provisions for the benefit of prepetition lenders. In fact, Section 9.03(b) of the New Term Loan Credit Facility Agreement is substantially similar to the indemnification provisions contained in numerous credit agreements for takeback facilities recently approved by this Court,[14] as well as credit agreements under which certain of the defendants in the Adversary

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[12] *See* New Term Loan Credit Facility Agreement § 9.03(b).

[13] Non-PTL Lender Group Objection ¶¶ 43-44.

[14] *See, e.g., In re Avaya, Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. 2023) [Docket No. 384]; *In re Gulfport Energy Corp.*, Case No. 20-35562 (DRJ) (Bankr. S.D. Tex. 2021) [Docket No. 1391]; *In re Washington Prime Group, Inc.*, Case No. 21-31948 (MI) (Bankr. S.D. Tex. 2021) [Docket No. 1117]; *In re iQor Holdings Inc.*, Case No. 20-34500 (DRJ) (Bankr. S.D. Tex. 2020) [Docket No. 224]; *In re Hornbeck Offshore Services, Inc.*, Case No. 20-32679 (DRJ) (Bankr. S.D. Tex. 2020) [Docket No. 307]; *In re Neiman Marcus Group Ltd LLC*, Case No. 20-32519 (DRJ) (Bankr. S.D. Tex. 2020) [Docket No. 1904]; *In re McDermott International, Inc.*, Case No. 20-30336 (DRJ) (Bankr. S.D. Tex. 2020) [Docket No. 969]; *In re Monitronics International, Inc.*, Case No. 19-

Proceeding are party.[15] To the extent the scope of the Postpetition Indemnity differs from that of other comparable indemnification provisions, it is axiomatic that contracting parties are free to negotiate and bargain for their respective rights and obligations. Indeed, "[t]he sole fact that an entity becomes a debtor-in-possession subject to court control and statutory obligations and duties under Title 11 of the United States Code does not remove the entity's 'freedom of contract' rights."[16] The Debtors are no exception.

14. The Non-PTL Lender Group contends that the Postpetition Indemnity "denies the Debtors the finality of bankruptcy and the fresh start embodied in the Bankruptcy Code."[17] Ironically, it is the scorched-earth litigation strategy of the Non-PTL Lender Group and certain of the other Objectors that have been the source of the delay of the Debtors' emergence from chapter 11. The Postpetition Indemnity, in contrast, is an integral component of, and a condition for the Consenting Creditors' support for, the Plan, without which the Debtors would languish in chapter 11 indefinitely pending final resolution of the ongoing litigation concerning the 2020 Transaction.

15. Moreover, the Postpetition Indemnity is a product of extensive, arm's-length negotiations and was granted in exchange for the Consenting Creditors' concrete and substantial contributions of value throughout these Chapter 11 Cases. In particular, the Ad Hoc Priority Lender Group provided the Debtors with considerable support by, among other things, (i) entering into the Restructuring Support Agreement, which has been fundamental in paving a path forward

33650, (DRJ) (Bankr. S.D. Tex. 2019) [Docket No. 223]; *In re Vanguard Natural Resources, Inc*., Case No. 19-31786 (DRJ) (Bankr. S.D. Tex. 2019) [Docket No. 600].

[15] *See*, *e.g.*, Revlon, Inc., Annual Report (Form 10-Q) (Aug. 6, 2020), Ex. 4.3 (BrandCo Credit Agreement, dated as of May 7, 2020). Upon information and belief, certain Envision Healthcare credit agreements included a broad indemnification provision that expressly applied to transactions undertaken with the company, including with related premiums and other protections.

[16] *In re Ionosphere Clubs, Inc.*, 103 B.R. 501, 504 (Bankr. S.D.N.Y. 1989).

[17] Non-PTL Lender Group Objection ¶ 37.

in these cases and equitizes nearly $1.9 billion of the Debtors' funded debt obligations, (ii) agreeing to the Debtors' use of cash collateral, (iii) supporting the Debtors in stakeholder negotiations, including with the Creditors' Committee, (iv) voting to accept the Plan, and (v) making other concessions that have resulted in the settlements and compromises embodied in the Plan. As such, the Postpetition Indemnity is a bargained for, go-forward right that was negotiated as part of this integrated package, allowing the Debtors to emerge from bankruptcy expeditiously, without the need to obtain a final, non-appealable order in the Adversary Proceeding.

16. In short, the Postpetition Indemnity is a new go-forward obligation that arises under the New Term Loan Credit Facility Agreement and, therefore, is not subject to disallowance as a prepetition claim under section 502(e)(1)(B) of the Bankruptcy Code or otherwise. The Postpetition Indemnity is a lawfully bargained-for term, given in exchange for the significant contributions and concessions provided by the Consenting Creditors, which inure not only to the benefit of the Debtors, but all stakeholders in these Chapter 11 Cases. Accordingly, the Objectors' misguided objection to the Postpetition Indemnity should be overruled.

B. The Bankruptcy Code Does Not Mandate Either Disallowance or Subordination of the PTL Indemnification Claims.

17. Even if the Court were to determine that the Postpetition Indemnity somehow requires the existence of valid prepetition PTL Indemnification Claims (which, to be clear, it does not), the Objecting Lenders' requests for disallowance of the prepetition PTL Indemnification Claims under section 502(e)(1)(B) or subordination under section 509(b) of the Bankruptcy Code not only lack merit, but are barred by the DIP Order. Although the Ad Hoc Priority Lender Group

will not rehash all of its arguments regarding the underlying merits of the Postpetition Indemnity Claim Objection here,[18] a few points are worth addressing.

18. ***First***, the Objectors cannot establish co-liability on the part of the Debtors and the PTL Lenders for the PTL Indemnification Claims, which necessarily invalidates any grounds for disallowance under section 502(e)(1)(B) of the Bankruptcy Code. As the Objectors are eager to point out, a claim may be disallowed under section 502(e)(1)(B) where "(i) the debtor is co-liable with the claimant; (ii) the claim is contingent; and (iii) the claim is for reimbursement or contribution."[19] The Non-PTL Lenders have gone out of their way multiple times in this Court to argue that their claims against the PTL Lenders are independent of their claims against the Debtors—yet they now do an about face and argue that the parties are "co-liable" under section 502(e)(1)(B).[20] However, the fundamental purpose of section 502(e)(1)(B)—and the co-liability requirement, in particular—is to prevent the Debtors from having to make double payment on a

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[18] *See Ad Hoc Priority Lender Group's Response to (1) the Ad Hoc Group of First Lien Lenders' (I) Statement and Reservation of Rights With Respect to the Challenge Deadline and (II) Objection to the Prepetition PTL Secured Parties' Indemnity Claims and (2) Joinders Thereto* [Docket No. 789].

[19] Citadel Objection ¶ 28 ("Embedded in this language are three elements necessary for a claim against the Debtors to be disallowed under this provision: (i) the debtor is co-liable with the claimant; (ii) the claim is contingent; and (iii) the claim is for reimbursement or contribution.") (quoting *In re Alta Mesa Res.*, Case No. 19-35133, 2022 Bankr. LEXIS 3649, at *10-11 (Bankr. S.D. Tex. December 28, 2022); Non-PTL Lender Group Objection ¶ 25 (same)).

[20] *See* Jan. 27, 2023 Hr'g Tr. at 18:24–19:3, 19:6–9 ("So the way I see it, we could pursue our claims against the lenders. The extent that there was a claim asserted under the indemnity, that's not our claim, that's their claim, maybe at some point down the road pursuant to the assumption provision in the Plan . . . we would be essentially treated as unsecured creditors that are entitled to whatever the Plan provides and we have whatever rights we have in that capacity."); *Serta Simmons Bedding, LLC v. AG Centre Street P'ship L.P.*, Adv. Case No. 23-09001 (DRJ) (Bankr. S.D. Tex. 2023), *Amended Answering Defendants' Answer to the Amended Adversary Complaint, Counterclaims and Third-Party Claims* [Docket No. 148] ¶¶ 340, 362 (asserting prayer for ratable distribution under Non-PTL Term Loan Agreement and requests for disgorgement from PTL Lenders, apparently in an effort to create direct liability on the part of the PTL Lenders); Mar. 28 Hr'g Tr. at 41:3–24 ("The good faith and fair dealing issue isn't necessarily the same for the lenders in Serta. You could imagine a world where Serta are trying to raise money in the transaction I'm about to go through acted in good faith but that the lenders didn't."); *id.* 47:16–23 ("[T]hat's why I also think the good faith and fair dealing argument is different as between the lenders and the company[.]").

claim,[21] an eventuality that the Objectors themselves have implicitly disclaimed by insisting that the Non-PTL Lenders' claims are distinct from the PTL Indemnification Claims. If the Objectors are correct on this point and the Non-PTL Lenders' claims are in fact distinct, they cannot establish co-liability, or, therefore, disallowance under section 502(e)(1)(B) of the Bankruptcy Code.

19. ***Second***, the Objectors' inability to establish co-liability is fatal to their objections under section 509(c) of the Bankruptcy Code, which requires subordination of any claim "for reimbursement or contribution, of an entity ***that is liable with the debtor*** on . . . such creditor's claim, until such creditor's claim is paid in full."[22] Absent co-liability, the subordination requirement does not apply.

20. ***Third***, the failure to establish grounds for subordination of the PTL Indemnification Claims under section 509(c) of the Bankruptcy Code is, in turn, fatal to the Non-PTL Lender Group's hypothetical absolute priority rule argument that, if the PTL Indemnification Claims must be subordinated, the purported treatment of these PTL Indemnification Claims under the Plan—that they ride through and recover in full (which is not an accurate description)—would be "neither fair nor equitable." To the contrary, by the terms of the PTL Credit Agreement itself, any PTL Indemnification Claims are part of the secured obligations thereunder and are entitled to be paid on a superpriority basis.[23] These PTL Indemnification Claims, therefore, would be priority secured claims under the Plan and, as such, would rightfully be entitled to "a full recovery" thereunder.

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[21] *See In re Tri-Union Dev. Corp.*, 314 B.R. 611, 618 (Bankr. S.D. Tex. 2004) (observing that the "stated purpose" of section 502(e)(1)(B) is "preventing double payment"; "as shown by the legislative history of § 502(e)(1)(B), this section was 'enacted to prevent . . . competition between a creditors and [its] guarantor for limited proceeds of the estate'") (citations omitted); *id.* at 621 ("As set forth in detail above, the purpose of § 502(e) is to assure that multiple parties are not given distributions for the same liability.").

[22] 11 U.S.C. § 509(c) (emphasis added); *see also* Non-PTL Lender Group Objection ¶ 40 (acknowledging that co-liability is a necessary element for subordination under section 509(c)); Citadel Objection ¶¶ 58-60 (same).

[23] *See Exhibits to Debtors' Witness List and Joint Exhibit List* [Docket No. 865-42], Ex. 252 (PTL Credit Agreement) § 2.01(a).

21. ***Lastly***, the Objectors are bound by the stipulations in the DIP Order regarding the validity and priority of the PTL Indemnification Obligations. By definition, the Debtors' Indemnification Obligations are "Obligations" under the PTL Credit Agreement, which are, in turn, "Prepetition PTL Obligations" under the DIP Order.[24] The stipulations in the DIP Order regarding the validity and priority of the Prepetition PTL Obligations were subject to challenge by "a party in interest that has sought and obtained standing and the requisite authority to commence a Challenge . . . and has timely commenced a Challenge" by April 10, 2023.[25] Although the Non-PTL Lender Group filed the PTL Indemnification Claim Objection on April 10, 2023, none of the Objectors sought (let alone obtained) standing and authority to commence a Challenge, and the mere filing of the PTL Indemnification Claim Objection—which was filed without any return date and never noticed for hearing—does not equate to commencing a Challenge under the rubric set forth in the DIP Order. The Objectors understood the import of the Challenge Deadline and consciously made the decision not to timely commence a Challenge. As such, the Objectors are bound by the stipulations in the DIP Order and are barred from seeking disallowance or subordination of the PTL Indemnification Claims.[26]

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[24] *See id.* (def.) (defining "Obligations"); DIP Order ¶ F(ii).

[25] *See* DIP Order ¶¶ F(vi) ("Each of the Debtors acknowledge that . . . the Prepetition PTL Obligations . . . constitute legal, valid, and binding obligations of the Debtors and their applicable affiliates, enforceable against them in accordance with their respective terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of . . . the Prepetition PTL Obligations owing to . . . the Prepetition PTL Lenders, respectively, is subject to avoidance, recharacterization, reduction, set-off, offset, counterclaim, cross-claim, recoupment, defenses, disallowance, impairment, recovery, subordination, or any other challenges pursuant to the Bankruptcy Code or applicable nonbankruptcy law or regulation by any person or entity, including in any Successor Cases."); 43 ("[T]he stipulations (including the Debtors' Stipulations) . . . became valid and binding upon and inured to the benefit of the Debtors, the DIP Credit Parties, the Prepetition Secured Creditors, all other creditors of any of the Debtors, the Committee and all other parties in interest and their respective successors and assigns, . . . solely to the extent that, (a) a party in interest that has sought and obtained standing and the requisite authority to commence a Challenge . . . and has timely commenced a Challenge by the earlier of (i) the date of entry of an order confirming a plan of reorganization and (ii) April 10, 2023[.]").

[26] *See, e.g.*, *AIMCO CLO 10 Ltd. v. Revlon, Inc. (In re Revlon Inc.)*, No. 22-10760, 2023 WL 2229352, at *10 (Bankr. S.D.N.Y. Feb. 14, 2023) (finding claims related to a prepetition financing transaction to be derivative

C. The Postpetition Indemnity Does Not Impact the Plan's Feasibility.

22. Citadel's assertion that the potential future crystallization of the Indemnification Obligations render the Plan infeasible under section 1129(a)(11) of the Bankruptcy Code is both misguided and inconsistent with applicable law. Section 1129(a)(11) of the Bankruptcy Code simply requires that a debtor show that confirmation of a proposed plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."[27] It does not require a debtor to prove that its reorganization will be successful no matter what could potentially happen in the future. Indeed, applicable law is clear that a debtor needs only to demonstrate that its plan has a "reasonable assurance of commercial viability."[28]

23. Here, the Debtors have readily met that burden. The Financial Projections are based on assumptions that the Debtors, in their business judgment, believe are reasonable under the circumstances and Citadel has not presented any evidence to suggest otherwise.[29] Indeed, the Financial Projections reflect adjusted EBITDA well north of $100 million (and as high as $228 million) per year and $112 million of cash on hand upon emergence.[30] In addition, the Plan provides for a $1.6 billion reduction in the Debtors' total funded debt (from approximately $1.9 billion) and access to $100 million of new capital. With the deleveraged capital structure and liquidity enhancements to be achieved through the Plan, there can be no serious contention that

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claims belonging exclusively to the debtors' bankruptcy estates and, therefore, barred due to lenders' failure to seek standing by the challenge deadline).

27 11 U.S.C. § 1129(a)(11).

28 *Matter re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1165-66 (5th Cir. 1993) (citation omitted); *see also In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 801 (5th Cir. 1997) ("All the bankruptcy court must find is that the plan offer 'a reasonable probability of success.'") (citation omitted).

29 *See Declaration of John Linker in Support of Confirmation of Joint Chapter 11 Plan of Serta Simmons Bedding, LLC and Its Affiliated Debtors* ¶¶ 19–27.

30 *See* Financial Projections at 4–5.

the Debtors will need to liquidate or further reorganize soon after emergence—even in the face of unanticipated costs.

24. Citadel's only critique of the Financial Projections is that they do not anticipate liability on account of the Indemnity Obligations—which Citadel posits as approaching $350 million, a number apparently pulled from thin air. However, "just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility."[31] Any liability on account of the Indemnification Obligations is speculative as well as years away from being liquidated.[32] Moreover, here, confirmation is expressly contingent upon the Court ruling in favor of the Debtors and the PTL Lenders on the claims underlying the litigation, rendering any future liability that much more remote.

25. As such, it is no surprise that the Debtors, in their business judgment, determined that any such liability was both too uncertain and too remote to warrant inclusion in the Financial Projections.[33] Further, even if the Debtors were inclined to include such a contingent obligation in their projections, the obligation would necessarily be discounted to account for both the present value and the attendant uncertainty (including the fact that the only judgment entered with respect to these disputes was by this Court and was *in favor* of the Debtors and the PTL Lenders).

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[31] *In re Idearc Inc.*, 423 B.R. 138, 167 (Bankr. N.D. Tex. 2009), *subsequently aff'd sub nom. In re Idearc, Inc.*, 662 F.3d 315 (5th Cir. 2011) (quoting *In re Cajun Elec. Power Co-op., Inc.*, 230 B.R. 715, 745 (Bankr. M.D. La. 1999) ("However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds since a guarantee of the future is not required.")).

[32] *See In re Fuel Barons, Inc.*, 488 B.R. 783, 789 (Bankr. N.D. Ga. 2013) ("[T]he indemnification claims . . . are contingent until the claimant's underlying liability has been determined."); *In re Caribbean Petroleum Corp.*, No. 10-12553 (KG), 2012 WL 1899322, at *8 (Bankr. D. Del. May 24, 2012), *aff'd* 566 Fed. Appx. 169 (3rd Cir. 2014) ("A claim is contingent until the claimant has both incurred liability and made payment on that liability.").

[33] *See In re T-H New Orleans*, 116 F.3d at 802 ("Where the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible.").

II. THE PLAN IS FAIR AND EQUITABLE AND DOES NOT VIOLATE THE ABSOLUTE PRIORITY RULE.

26. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of impaired unsecured claims that did not accept such plan if, pursuant to the plan, no holder of a claim or interest that is junior to the interests of such class will receive or retain any property on account of their junior interest.[34] This requirement is often referred to as the "absolute priority rule," however, the word "absolute" is a misnomer. Courts recognize that "there are some cases in which property can transfer to junior interests not 'on account of' those interests but for other reasons."[35] One such exception is the "new value" exception or corollary to the absolute priority rule.[36]

27. The new value exception allows interest holders to retain their interest or receive a distribution under the Plan in exchange for postpetition capital contributions.[37] There are four requirements for the new value exception. The contribution must be (1) new; (2) reasonably equivalent to the value received in return; (3) necessary to an effective reorganization; and (4) in the form of money or money's worth.[38] In such cases, courts have found that the retention of an

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[34] 11 U.S.C. § 1129(b)(2)(B)(ii).

[35] *In re PWS Holding Corp.*, 228 F.3d 224, 238 (3d Cir. 2000).

[36] District and bankruptcy courts in the Fifth Circuit have explicitly stated that the new value exception to the absolute priority rule survived the codification of the Bankruptcy Code. *See, e.g.*, *In re Way Apartments, D.T.*, 201 B.R. 444, 455 (N.D. Tex. 1996) ("This Court hereby holds that the 'new value exception' did survive codification in the Bankruptcy Code of the absolute priority rule."); *see also In re Cypresswood Land Partners, I*, 409 B.R. 396, 438 (Bankr. S.D. Tex. 2009); *In re OCA, Inc.*, 357 B.R. 72, 89 (Bankr. E.D. La. 2006). While the Fifth Circuit in *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)* originally opined on the new value exception, the Fifth Circuit later withdrew and deleted this portion of its opinion, specifically stating, "the bankruptcy court's opinion on the 'new value exception' to the absolute priority rule has been vacated and we express no view whatever on that part of the bankruptcy court's decision." 995 F.2d 1274, 1284 (5th Cir. 1991). In *Bank of N.Y. Trust Co. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, the Fifth Circuit, yet again, declined to opine on the issue, deciding the case on other grounds. 584 F.3d 229, 247 (5th Cir. 2009).

[37] *In re Way Apartments*, 201 B.R. at 456.

[38] *Id.*; *see also In re Cypresswood*, 409 B.R. at 438.

equity interest by, or a distribution to, existing equity is not "on account" of the prior equity interest, but rather, the result of a new contribution. Here, each of the requirements of the new value exception are met: the holders of Intermediate Equity Interests are redeeming their membership interests in SSB LLC, which redemption triggers a cash tax refund that is more than forty times the proposed distribution of $1.5 million, which cash inures to the benefit of the Reorganized Debtors and their business.

28. Moreover, the Plan incorporates a global settlement that includes numerous concessions from the Debtors, the Creditors' Committee, the Consenting Creditors, and the Consenting Equity Holders—all of which will enable the Debtors to reorganize and emerge from chapter 11 quickly, efficiently, and—subject to the approval of aforementioned arrangement with the Consenting Equity Holders—with an expected $62 million tax refund on the horizon. With such facts, it is simply difficult to countenance how the Plan is not fair and equitable.[39]

JOINDER AND RESERVATION OF RIGHTS

29. As of the filing of this Statement, the Ad Hoc Priority Lender Group understands that, with the exception of the objections raised by the Objectors, the U.S. Trustee, Cameron Thierry, the Minority Licensees, and Alan and Ruth Humphries, all objections to confirmation of the Plan have been consensually resolved. To the extent any objections remain outstanding as of the Confirmation Hearing, the Ad Hoc Priority Lender Group joins in the replies thereto set forth in the Confirmation Brief.

[39] *See, e.g., In re Charter Commc'ns*, 419 B.R. 221, 269 (Bankr. S.D.N.Y. 2009) (holding that a global settlement incorporated in a prepackaged chapter 11 plan that granted consideration to an existing equity holder did not violate the absolute priority rule because the property received and retained by the equity holder was not "on account of" his prepetition equity interest, but rather, was on account of his significant concessions in a global settlement that made a successful reorganization possible).

30. The Ad Hoc Priority Lender Group reserves the right to (a) amend or supplement this Statement, and otherwise take any additional or further action with respect to the Plan or the matters addressed therein, (b) respond to any objection to confirmation of the Plan, whether or not addressed herein or in the Confirmation Brief, and (c) be heard before the Court with respect to the Plan.

CONCLUSION

31. For the reasons set forth herein and in the Confirmation Brief, the Ad Hoc Priority Lender Group respectfully requests that the Court enter an order (i) overruling any remaining objections to confirmation of the Plan, (ii) confirming the Plan, and (iii) granting such other and further relief as the Court may deem just and appropriate.

Dated: May 14, 2023
Houston, Texas

Respectfully submitted,

/s/ Bruce J. Ruzinsky

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Certificate of Service

I certify that on May 14, 2023, 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.

/s/ Bruce J. Ruzinsky
Bruce J. Ruzinsky