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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
WEWORK INC., *et al*.,	Case No. 23-19865 (JKS)
Debtors.[1]	(Jointly Administered)

DEBTORS' OMNIBUS REPLY IN SUPPORT OF THE DEBTORS' MOTIONS FOR (A) ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING, (II) GRANTING LIENS AND PROVIDING CLAIMS WITH SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) MODIFYING THE AUTOMATIC STAY, AND (IV) GRANTING RELATED RELIEF AND (B) FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES, (III) SCHEDULING A FINAL HEARING, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) GRANTING RELATED RELIEF

1 A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at https://dm.epiq11.com/WeWork. The location of Debtor WeWork Inc.'s principal place of business is 12 East 49th Street, 3rd Floor, New York, NY 10017; the Debtors' service address in these chapter 11 cases is WeWork Inc. c/o Epiq Corporate Restructuring, LLC 10300 SW Allen Blvd. Beaverton, OR 97005.

The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this reply (the "Reply") in response to the several objections filed by various groups of landlords at [Docket Nos. 294, 295, 364–69, 371–76, and 384] (the "Objections," filed by the "Landlords"). In support of this Reply, the Debtors state the following: [2]

Preliminary Statement

1. As described more fully in the First Day Declaration, the Debtors commenced these chapter 11 cases with a pressing need to effectuate a holistic solution through a comprehensive restructuring transaction and a review of the Debtors' lease portfolio. While today, flexible workspace makes up just two percent of total office supply in the United States, it is projected to reach 30 percent of supply in the long term. Accordingly, the Debtors are well positioned for future growth and profitability, but to get there, these chapter 11 cases must conclude successfully. And while the Debtors achieved a soft landing into chapter 11 with this Court's assistance, the Debtors must swiftly secure continued use of cash collateral and access to the DIP Facilities to ensure a successful restructuring.

2. Approximately $59 million of letters of credit ("LCs") will come due under the Debtors' prepetition LC facility (the "Prepetition LC Facility") by December 31, 2023. Pursuant to the terms of the prepetition LC Facility, a chapter 11 filing by WeWork trigged an event of default. As a result of that default, LCs issued under the Prepetition LC Facility will not renew in the ordinary course of the Debtors' business.

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2 A detailed description of the Debtors and their businesses, including the facts and circumstances giving rise to the Debtors' chapter 11 cases, is set forth in the *Declaration of David Tolley, Chief Executive Officer of WeWork Inc., in Support of the Chapter 11 Petitions and First Day Motions* [Docket No. 21] (the "First Day Declaration"); capitalized terms used but not immediately defined herein shall have the meanings ascribed to them in the First Day Declaration, *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 186] (the "DIP Motion"), or elsewhere in this Reply, as applicable.

3. It is vital that the Debtors maintain access to LCs during the pendency of these chapter 11 cases. A significant portion of the leases that the Debtors and their affiliates are party to require that, in their capacities as tenants, such entities provide LCs as security for such leases. If the Debtors fail to maintain the LCs (including by failing to replace them in advance of their expiration), the resulting default under such leases would materially undermine ongoing landlord negotiations, inhibit assumption of such leases, and jeopardize the Debtors' broader restructuring.

4. Indeed, without the ability to continue renewing, reissuing, and collateralizing LCs, the issuing banks will distribute (as some already have) mass notices of non-renewal to the Debtors' landlords. Such non-renewal notices would very likely cause the Debtors' landlords to liquidate their LCs, severely constraining the Debtors' ability to renegotiate and/or assume leases, and crystalizing hundreds of millions of dollars in prepetition secured claims against the Debtors.[3]

5. The proposed DIP Facilities represent the only path to avoid this outcome. After significant discussions with the Debtors' advisors and after hard-fought negotiations with the Ad Hoc Group and the SoftBank Parties, both pre- and post-petition, the Debtors have determined in their sound business judgment that *there is no path* to continued issuance of LCs other than the entry into the DIP Facilities. As a result of these chapter 11 cases, the issuing banks under the Prepetition LC Facility have no obligation to continue to furnish LCs—and absent the terms of the DIP Facilities, they will stop doing so.

6. The Debtors and the DIP Secured Parties have charted a path to avoid such a value-destructive result. The DIP Secured Parties have committed significant new money in the form of new LCs and new cash to collateralize such LCs. In other words, the issuing banks under

[3] The Objections generally underscore this point as nearly all of them fixate on preserving LC rights as security under the relevant leases.

the DIP Facilities (the "DIP LC Issuers") and SoftBank Vision Fund II-2 L.P. (the "DIP Term Lender") have accepted increased exposure and are lending continued credit that they were not otherwise required to extend. And without it, the Debtors' ability to succeed in chapter 11 would be crippled.

7. The Debtors sought, and continue to seek, to work constructively with any party in interest to reach a consensual resolution to their issues with the proposed DIP Order and/or Cash Collateral Order. To that end, the Debtors have negotiated at length with the Official Committee of Unsecured Creditors (the "Committee"), the U.S. Trustee, and numerous Landlords to try to achieve consensus. While progress was made at narrowing the number of issues on which disagreement remained, the Debtors and the Landlords were unable to reach agreement on all points.[4] And, as noted above, a further extension of time was not possible due to the immediate need to renew LCs.

8. In order to reach agreement with the Committee and the U.S. Trustee, as well as numerous landlord parties, both the Debtors and their lenders have made numerous, significant concessions with respect to the DIP Order[5] and the Cash Collateral Order[6] (collectively, the "Concessions"), including:

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[4] The Debtors are sincerely grateful for the time and effort the Committee and the U.S. Trustee spent reaching a consensual resolution to the issues the Committee raised informally and to the issues in the UST Objection such that the Committee does not object to the relief sought by the DIP Motion or the Cash Collateral Motion and the U.S. Trustee's issues are resolved. The Debtors look forward to continuing to work constructively with the Committee and the U.S. Trustee during the pendency of these chapter 11 cases.

[5] "DIP Order" refers to the proposed *Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 396].

[6] "Cash Collateral Order" refers to the proposed *Final Order (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Scheduling a Final Hearing, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief*, filed contemporaneously herewith (and together with the DIP Order, the "Orders")

a. ***Recovery from Unencumbered Collateral.*** The Debtors and the DIP Secured Parties agreed, in the event of enforcement against collateral, to first look to collateral other than proceeds of chapter 5 causes of action, claims against SoftBank Parties, or proceeds of leases.

b. ***Notice Rights.*** The Debtors have agreed to provide the Committee with notice of any amendments to any of the DIP documents.

c. ***Stub Rent Reserve.*** The Debtors and the DIP Secured Parties agreed to establish a segregated reserve for estimated stub rent due, including 1/3 of such amount to be funded on the earlier of (i) March 11, 2024, or (i) 7 days prior to the confirmation hearing (the "Stub Rent Reserve").

d. ***DIP Term Loan Priority.*** The Debtors and Secured Parties have agreed to insert clarifying language into the DIP Order to reflect that DIP Term Loan claims are entitled to postpetition secured status, consistent with their prepetition priority, not administrative priority status.

e. ***Challenge Rights.*** The DIP Term Lender has agreed to provide the Committee with an opportunity to investigate and challenge liens and claims under the prepetition LC facility, provided that should the Committee pursue any such challenge, and succeed, the DIP Term Lender shall not be in a worse position than it would have been absent entry into the DIP Facilities.

f. ***Investigation Budget.*** The Debtors and DIP Secured Parties have provided for an increased investigation budget for the Committee.

g. ***Termination Cure Period.*** The Debtors and DIP Secured Parties have agreed to extend the cure period for breach of the Cash Collateral Order from five days to seven days.

h. ***Milestones.*** The Debtors and DIP Secured Parties have consented to a two-week extension of certain milestones.

i. ***Section 345.*** The DIP LC Banks have agreed to bear the risk of default of banks holding LCs under the DIP LC Facility, unless such facilities are collateralized U.S. Trustee authorized depositories.

9. The scope of the Concessions is evidence that the good faith negotiations of the Debtors, the Committee, and the DIP Secured Parties have developed meaningful consensus surrounding the DIP Facilities and use of Cash Collateral.

10. The Landlords collectively raise numerous issues regarding the DIP Facility and Cash Collateral Order, all of which are without merit. ***First***, certain Landlords assert that the DIP Facility involves a roll-up of prepetition indebtedness. This reflects a fundamental misunderstanding of the DIP Facility. To the contrary, the provision of a new LC facility on a postpetition basis, when the Prepetition LC Facility is not continuing by its terms, *is* the provision of new money. Further, the DIP Term Lender's contribution of cash to fund the DIP LC Collateral Accounts in order to collateralize the letters of credit constitutes the provision of substantial new value, which will prevent diminution of the estates to the extent the LCs are drawn by giving the DIP LC Issuers a source of recovery other than the Debtors' assets. Additionally, even though this is a new money contribution, the DIP Term Lender agreed to a modified challenge period, provided that no successful challenge can leave the DIP Term Lender in a worse position than had the DIP Facilities not occurred.

11. ***Second***, certain of the Landlords object to the DIP Motion and Cash Collateral Motion on the basis that a 13-week cash flow forecast associated therewith purportedly makes no provision for stub rent. This, those Landlords argue, forces constituents to bear the risk of alleged administrative insolvency. Administrative claims must be paid in full on the effective date. The effective date was beyond the projected cash flow window and thus there was no line for stub rent. The Debtors intend to pay allowed stub rent claims promptly after the effective date, but there is no right to payment today. And, one of the Concessions made is the establishment of the Stub Rent Reserve, which should provide certain Landlords with assurance that the Debtors mean what they say. The DIP Facilities make proceeding through these chapter 11 cases possible and, if anything, greatly bolster the prospect of paying stub rent claims and all other claims.

12. ***Third***, certain Landlords take issue with the waiver of certain claims rising under sections 506 and 552 of the Bankruptcy Code. Yet, these are claims that are property of the Debtors, and which the Debtors, in a sound exercise of their business judgment, waived as good and valuable consideration for access to the DIP Facilities.

13. ***Fourth***, certain of the Landlords take issue with the language of footnote 4 in the Cash Collateral Order, which provides a reservation of rights in favor of the DIP Secured Parties. While this language is still in dispute, the Debtors and the Prepetition Secured Parties have negotiated with the Landlords at length about making further revisions to assuage any concerns, despite the same Landlords agreed to this language at the Interim Hearing. Despite the Debtors' good faith efforts, the Landlords have drawn an all-or-nothing line in the sand. The Landlords simply do not accept that the Prepetition Secured Parties will reserve any rights whatsoever with respect to subsequently seeking to attach liens to the leases. The Debtors believe that the proposed

language does not raise the issue of whether a lien should attach to any lease that does not permit such attachment today, and so the Court need not decide this issue at this time.

14. For the foregoing reasons, and as more comprehensively argued herein, the Objections should be overruled and the Debtors should be authorized to enter into the DIP Facilities in order to successfully proceed through, and emerge from, chapter 11.

Reply

I. The Debtors' Decision to Enter into the DIP LC Facility Reflects the Reasonable Exercise of their Business Judgment.

15. Entry into the DIP Facilities reflects a reasonable exercise of the Debtors' business judgment and provides significant benefits to the Debtors' estates as a whole. Courts grant considerable deference to a debtor's business judgment in obtaining postpetition secured credit, so long as the agreement to obtain such credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code. *In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender."). Indeed, courts "will uphold the board's decisions as long as they are attributable 'to any rational purpose.'" *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992).

16. As set forth in the Baird Declaration,[7] the Debtors negotiated the terms of the DIP LC Facility with the DIP Secured Parties in good faith, at arm's-length, and with the assistance of their advisors. Baird Decl. ¶ 18. The Debtors believe that they have obtained the best financing available under the circumstances. The DIP Secured Parties were the only viable options given

[7] The "Baird Declaration" refers to the *Declaration of James H. Baird in Support of Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 392].

both the time constraints and the size of the commitments required. Baird Decl. ¶ 26. This fact is further underscored by the fact that any alternative lender would have needed to address the substantial collateral the DIP Term Lender had already provided to back the already-issued LCs. This would have been prohibitively expensive. Simply put, there is no alternative DIP available to the Debtors, and certainly no alternative available on better terms. Moreover, both DIP LC Issuers have longstanding relationships with the Debtors and are therefore familiar with the Debtors' business, operations, finances, and capital structure. Baird Decl. ¶ 13. There is no doubt, and indeed no party has alleged to the contrary, that the DIP LC Facility was negotiated in good faith and at arm's length. Moreover, the Landlords do not identify ***any*** other lender who would provide postpetition financing to the Debtors—let alone on better terms. For these and the other reasons set forth in the Baird Declaration, the Debtors' entry into the DIP LC Facility is a valid exercise of their business judgment.

II. The Debtors Need Access to the DIP Facilities.

17. It is critical that the Debtors enter into the proposed DIP Facilities, which will allow them to maintain access to LCs. A significant number of the leases in the Debtors' and non-Debtors' real estate portfolio require that they provide LCs as security for the leases. Baird Decl. ¶ 11. However, the Debtors' chapter 11 filing triggered an event of default under the Prepetition Credit Agreement. *Id*. Because this event of default was triggered, the prepetition LCs will not automatically renew in the ordinary course, as was previously customary, but will instead expire over the coming weeks and throughout these chapter 11 cases. *Id*. If the Debtors fail to maintain the LCs (including by failing to replace the LCs in advance of an expiration date), the Debtors will likely be in default under those leases and landlords could invoke their right to draw the applicable LCs in full, creating additional secured claims. *Id*.

18. Furthermore, the ability to issue and renew LCs during these chapter 11 cases is critical to the Debtors' and their non-Debtor affiliates' ongoing lease portfolio optimalization efforts and their go-forward business. Baird Decl. ¶ 12. The Debtors currently have approximately $700 million of LCs undrawn and outstanding under the prepetition LC Facility that may expire at various points during these chapter 11 cases, and the Debtors will suffer several consequences if they lack sufficient LC renewal capacity when these prepetition LCs come due. *Id*. First, existing undrawn LCs will expire without a replacement, forcing landlords to choose between losing such credit support or drawing on the expiring prepetition LCs. Since landlords would likely choose to draw the LCs, the lack of LC renewal capacity will crystalize hundreds of millions of dollars in secured claims against the Debtors. *Id*. Second, the Debtors' lease rationalization strategy would be adversely impacted as landlords would likely be unwilling to engage with the Debtors absent some form of security. *Id*. Third, the Debtors' likelihood of obtaining the Exit LC Facility to support their post-emergence needs may be reduced because a significant amount of Prepetition Cash Collateral, which will otherwise be reserved for the Exit LC Facility under the Restructuring Support Agreement ("RSA"), will instead be utilized to fund draws under expiring LCs. *Id*. Once that cash collateral is applied towards LC draws, it may never be returned to use to obtain the cash collateralized Exit LC Facility. *Id*. Therefore, the Debtors should be granted timely access to the DIP Facilities in light of these negative consequences.

III. The Debtors Should Be Authorized to Pay the Fees Required by the DIP Secured Parties Under the DIP Documents.

19. As set forth in the Baird Declaration, under the DIP Documents, the Debtors have agreed, subject to Court approval and finalization of the DIP Credit Agreement, to pay certain fees to the DIP Secured Parties. Here, the Debtors will pay, among other event-specific fees, a per annum letter of credit fee, a percent fee on unused issuing commitments, and a 0.125 percent

fronting fee. Baird Decl. ¶ 20. Courts in this Circuit have approved similar fees in large chapter 11 cases. *See In re Cyxtera Techs, Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. June 6, 2023) (approving a 6.0 percent backstop fee and 3.0 percent commitment fee); *In re Akorn, Inc.*, No. 20-11177 (KBO) (Bankr. D. Del. May 22, 2022) (approving a commitment fee of approximately 3.0 percent of the DIP loans, a backstop fee of approximately 2.0 percent of the DIP loans, and a fronting premium of approximately 0.50 percent of the DIP loans); *In re ATD Corporation*, No. 18-12221 (KJC) (Bankr. D. Del. Oct. 26, 2018) (approving a cash fee approximately 2.0 percent of the overall DIP facility); *In re PES Holdings LLC*, No. 18-10122 (KG) (Bankr. D. Del. Jan. 22, 2018) (same); *In re Toys "R" US, Inc.,* No. 17-34665 (KLP) (Bankr. E.D.Va. Sept. 19, 2017) (approving aggregate fees that were just less than 3.0 percent of the overall DIP facility).

20. These fees are the product of arm's-length and good-faith negotiations among the Debtors and the DIP Secured Parties; are integral components of the overall terms of the DIP Facilities; and are required by the DIP Secured Parties as consideration for the extension of postpetition financing. Notably, without access to the DIP Facilities, the Debtors may require an alternative source of debtor-in-possession financing, the proceeds of which would be used to post as collateral for the benefit of their landlords. Such a facility would almost certainly be significantly more costly than the fees associated with the DIP Facilities. Accordingly, the Court should authorize the applicable Debtors to pay the bargained-for fees provided under the DIP Documents in connection with entering into and performing under the same.

IV. The Proposed Surcharge, Marshaling and "Equities of the Case" Waivers are Appropriate and Permitted.

21. Certain Landlords asserts that the waivers of the Debtors' section 506(c) surcharge rights, section 552(b) "equities of the case" exception, and rights to seek marshaling are inappropriate and prejudicially shift value to the DIP Secured Parties at the expense of unsecured

creditors. Those Landlords suggests that a waiver of surcharge rights, marshalling, and equities of the case exception should not be allowed here because there is a risk of administrative insolvency. *See, e.g.*, Landlord Objection at [Docket No. 368, ¶ 10]. Each of these waivers were necessary inducements for the DIP Secured Parties to provide DIP funds. The Landlords' arguments lack merit, ignore the practical commercial circumstances justifying these provisions, and should be overruled.

A. The Section 506(c) Waiver Is Appropriate and Necessary.

22. Section 506(c) of the Bankruptcy Code provides a debtor the right to "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of" such property. 11 U.S.C. § 506(c).

23. As a threshold matter, surcharge under section 506(c) of the Bankruptcy Code is limited and subject to a high evidentiary standard. *See, e.g.*, *In re Visual Industries, Inc.*, 57 F.3d 321, 324 (3d Cir. 1995) ("The general rule is that post-petition administrative expenses and the general cost of reorganization ordinarily may not be charged to or against secured collateral."); *In re Delta Towers, Ltd.*, 924 F.2d 74, 76 (5th Cir. 1991) (observing that section 506(c) of the Bankruptcy Code "furnishes an exception to the general rule" only when the claimant can show the expenses were necessary, reasonable, and for the primary benefit of the secured creditor).

24. The discretion to grant a section 506(c) waiver belongs solely the Debtors, and the Debtors believe that here such a waiver is justified. Claims pursuant to section 506(c) of the Bankruptcy Code are property of the Debtors' estates and belong to no other party in interest. *See Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (holding that "the trustee is the only party empowered to invoke" section 506(c)); *see also In re Smart World Techs., LLC*, 423 F.3d 166, 181–82 (2d Cir. 2005) ("Section 506(c) . . . allows only the 'trustee,' or debtor-in-possession, to take advantage of this exception . . . . We read *Hartford Underwriter*s

to stand for the proposition that § 1109(b) does not entitle parties in interest, such as Smart World's creditors, to usurp the debtor-in-possession's role as legal representative of the estate."); *In re River Ctr. Holdings, LLC*, 394 B.R. 704, 717 (Bankr. S.D.N.Y. 2008) ("The Supreme Court has made clear that only the trustee has the power, under the plain language of the Code, to assert a section 506(c) claim."). Section 506(c) of the Bankruptcy Code provides a debtor the right to "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of" such property. *See* 11 U.S.C. §506(c). Because the Debtors are the only parties that can bring claims under section 506(c), they are also entitled to settle or trade these claims, in their business judgment, in exchange for appropriate consideration.

25. Furthermore, granting the DIP Secured Parties a waiver under section 506(c) of the Bankruptcy Code does not provide them a windfall or otherwise create a risk that the costs of the Debtors' estates would be borne by unsecured creditors. The Debtors have stipulated that the Prepetition Secured Parties hold valid, perfected liens on the Prepetition Collateral and the Prepetition Secured Parties are allowing the Debtors' consensual use of Cash Collateral. In this context, it would be inappropriate and counterproductive to require the Prepetition Secured Parties to pay twice for such consensual use by allowing other parties to commence subsequent litigation to surcharge their collateral. Indeed, a waiver of section 506(c) of the Bankruptcy Code is particularly appropriate where a secured creditor has agreed to pay, from its collateral, estate administrative costs and subordinate its liens to the carve out for professional fees and other administrative expenses. *See, e.g., In re Mineral Park, Inc.*, No. 14-11996 (Bankr. D. Del.), Hr'g Tr. 43:10–12, Sept. 23, 2014 (overruling committee's objection and stating "given what [the secured lenders are] funding, I think [they've] paid for a 506(c) waiver and I would be willing to grant it"); *In re MPM Silicones, LLC*, No. 14-22503 (Bankr. S.D.N.Y.), Hr'g Tr. 58:11–12; 93:12–

20, May 23, 2014 (where a carve-out is provided, a 506(c) waiver is often an "acceptable trade-off").

26. Simply put, section 506(c) waivers are standard with respect to postpetition financings or consensual use of cash collateral between sophisticated parties, the Debtors have sole authority and discretion to waive such rights, and the Debtors believe that such waiver is justified here. Here, the DIP Secured Parties did not (and would not) provide their commitments under the DIP Facilities or consent to use of their cash collateral without a section 506(c) waiver, and the Debtors determined that such a waiver was preferable to protracted litigation. The Debtors also believe that no potential lender would make postpetition financing available on similar terms without such a waiver.

27. Moreover, courts in this district routinely grant 506(c) waivers in connection with negotiated debtor-in-possession financing facilities and where use of cash collateral is consented to. *See In re Cyxtera Techs, Inc.*, No. 23-14853 (JKS) (Bankr. D.N.J. July 19, 2023) [Docket No. 297] (granting a 506(c) waiver in connection with DIP financing and consensual use of cash collateral); *In re Bed Bath & Beyond, Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. June 15, 2023) [Docket No. 729] (same); *In re David's Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. May 24, 2023) [Docket No. 285] (same); *In re Rite Aid Corp.*, (Bankr. D.N.J. Oct. 17, 2023) [Docket No. 120] (same, on an interim basis).

B. The Section 552(b) Equities of the Case Waiver Is Appropriate.

28. Certain Landlords argue that the waiver of the "equities of the case" exception under section 552(b) of the Bankruptcy Code is inappropriate because unsecured creditor recoveries remain uncertain. *See, e.g.*, Objection [Docket No. 369, ¶ 4(a). The Debtors disagree and believe that such waiver is reasonable and appropriate in light of the circumstances.

29. Section 552(b) of the Bankruptcy Code generally ensures that an entity's prepetition security interest in the proceeds of collateral does not extend to such proceeds acquired postpetition, subject to a limited exception from this general rule to the extent that the "equities of the case" so require. *See* 11 U.S.C. § 552(b)(1). A waiver of this exception here is justified for a number of reasons.

30. ***First***, the "equities of the case" exception is narrowly applied, meaning that it is typical for debtors to provide the section 552(b) waiver as part of a consensual adequate protection package, particularly where, as here, it is another bargaining chip that the debtor may use to facilitate negotiations with the secured creditor and provide such creditor protection against the diminution in value of its collateral. *See, e.g., MPM Silicones, LLC*, No. 14-22503 (Bankr. S.D.N.Y.), Hr'g Tr. 85:4–8, 93: 21-25, May 23, 2014 (overruling committee's objection and holding that the section 552(b) equities of the case exception is "waived to the extent it's needed to protect against any diminution").

31. ***Second***, the section 552(b) waiver is also appropriate where, as here, the Prepetition Secured Parties have agreed to a carve out from their collateral to fund the Debtors' operations and fees and expenses of other parties, such as U.S. Trustee fees and the Committee's professional fees. *See, e.g.*, *In re AbitibiBowater, Inc.*, No. 09-11296 (Bankr. D. Del.), Hr'g Tr. 35:4 18, June 4, 2009 (finding that such waivers are usually granted "in cases in which it looks like . . . the lenders are doing the right thing in terms of . . . providing for payment of administrative expenses"); *In re Am. Media, Inc.*, No. 10-16149 (MG), 2010 WL 5141244, at *4 (Bankr. S.D.N.Y. Dec. 6, 2010) ("In light of the Prepetition Agent's and Prepetition Lenders' agreement to subordinate their liens and superpriority claims to the Carve Out . . .and to permit the use of their Cash Collateral as set forth herein, the Prepetition Agent and Prepetition Lenders are entitled to

(a) a waiver of any 'equities of the case' claims under section 552(b) of the Bankruptcy Code and (b) a waiver of the provisions of section 506(c) of the Bankruptcy Code.").

32. The section 552(b) waiver that the Debtors agreed to was part of heavily negotiated DIP Facilities that greatly enhance the Debtors' ability to achieve the goals necessary to timely emerge from these chapter 11 cases and such waiver strikes the appropriate balance between preserving the DIP Secured Parties' rights and furthering the rehabilitative purposes of the Bankruptcy Code. As with section 506(c) waivers, section 552(b) waivers are customarily negotiated as part of DIP financing facilities or in granting consensual use of cash collateral—regardless of whether or not a party objects. Without the waiver, the DIP Secured Parties would not have provided the financing embodied in the DIP Facilities or would have imposed other, less favorable terms.

V. SVF's Consideration Under the DIP Facilities Is a Contribution of New Money.

a. SVF's Obligations Under the Prepetition LC Facility.

33. On December 27, 2019, WeWork Companies U.S. LLC ("WeWork Obligor"), the DIP Term Lender, SVF II GP (Jersey) Limited and SB Global Advisers Limited, the Issuing Banks, Goldman (as senior tranche administrative agent and shared collateral agent), and Kroll (as junior tranche administrative agent) entered into that certain Credit Agreement (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "Prepetition Credit Agreement").[8] Pursuant to the Prepetition Credit Agreement, there are two tranches of LCs: a senior tranche and a junior tranche (collectively, the "Prepetition LC Facility"). The obligations under the Prepetition LC Facility and certain cash management and

[8] Capitalized terms used in this section but not defined herein shall have the meanings ascribed to them in the Prepetition Credit Agreement.

swap/derivative obligations provided by parties to the Prepetition LC Facility (or their affiliates) are secured by the assets and equity interests of certain Debtor entities. The DIP Term Lender has also secured such obligations by collaterally assigning its right to call up to approximately $2.5 billion in capital from SoftBank.

34. As of the Petition Date, Goldman, JPMorgan, Deutsche Bank, OneIM Fund I LP ("One IM"), and certain other financial institutions (collectively, the "Issuing Banks") have issued several letters of credit under the LC Facility. The DIP Term Lender is jointly and severally liable on the Prepetition LC Facility with the WeWork Obligor (collectively, the "Obligors") and is subrogated to the Issuing Banks' and other secured parties' rights against WeWork Obligor to the extent the DIP Term Lender pays, reimburses, or cash collateralizes obligations under the Prepetition LC Facility, and such payments, reimbursements, and cash collateral are not reimbursed by the WeWork Obligor pursuant to that certain reimbursement agreement, dated as of December 20, 2022 by and among the Obligors (the "Reimbursement Agreement").

35. In the event that the relevant Debtor fails to make timely rent payments or otherwise defaults in the performance of its leases, the landlords can draw funds under their respective LCs after providing notice to the Debtor (and some have indeed done so). The WeWork Obligor and/or the DIP Term Lender, as applicable, must prepay or reimburse the LC Facility for the amount drawn under the applicable LC and various fees in relation thereto pursuant to the terms and conditions set forth in the Prepetition Credit Agreement.

36. As of the Petition Date, and in connection with the Satisfaction Letter executed by the WeWork Obligor, the DIP Term Lender, Goldman, Kroll, and certain of the Issuing Banks, the DIP Term Lender reimbursed approximately $179.5 million for the senior tranche of the Prepetition LC Facility and approximately $542.6 million for the junior tranche of the Prepetition

LC Facility, posted approximately $808.8 million of cash to collateralize the undrawn senior tranche of the LC Facility, and paid approximately $50.6 million pertaining to various fees and expenses under the LC Credit Agreement. As of the Petition Date and pursuant to the Reimbursement Agreement, the WeWork LC Facility Obligor's total indebtedness to the DIP Term Lender in its capacity as subrogee under the LC Facility with respect to such reimbursement, cash collateral, and other payments was approximately $1.6 billion.

b. The DIP LC Facility.

37. The DIP LC Facility will allow the Debtors to maintain access to LCs during these chapter 11 cases, which is critical to preserving the value of the estate. A significant number of the Debtors' leases require that the Debtors provide LCs in their capacity as tenants as security for the leases. Baird Decl. ¶ 11. However, since a chapter 11 filing triggers an event of default under the leases, many of the LCs will not automatically renew. *Id*. Upon a failure to renew an LC, many of the landlords under the leases will be able to draw on the applicable LCs in full, creating additional secured claims. *Id*. The Debtors have approximately $700 million of undrawn and outstanding LCs under the prepetition LC Facility that may expire at various points during these chapter 11 cases. *Id*. Specifically, there is approximately $59 million of LCs due for renewal by December 31, 2023, under the prepetition LC Facility. *Id*. The Debtors will face numerous negative consequences if they lack sufficient LC renewal capacity when these prepetition LCs come due (whether by December 31 or at various other intervals during these chapter 11 cases). *Id*.

38. To prevent a cascade of negative consequences due to insufficient renewal capacity, the DIP LC Facility extends the Prepetition LC Facility by enabling the Debtors to renew LCs following the Petition Date in accordance with their historical practice of extending secured LCs

to support present and future lease obligations. Baird Decl. at ¶ 17. The DIP LC Facility is expected to afford the Debtors and their non-Debtor affiliates with sufficient LC capacity to continue their ordinary course operations and preserve value as they undertake efforts to rationalize their lease portfolio. *Id*. at 19.

39. If approved, the DIP Facilities shall consist of (a) a senior secured, first priority cash collateralized debtor-in-possession "first out" letter of credit facility (the "DIP LC Facility"); and (b) a senior secured, first priority debtor-in-possession "last out" term loan "C" facility (the "DIP Term Facility" together with the DIP LC Facility, the "DIP Facilities") the proceeds of which will fully cash collateralize LCs under the DIP LC Facility. Baird Decl. ¶ 3.

40. Without access to the DIP LC Facility, the Debtors would face significant value disruption that would substantially hinder their operations and harm member relationships. After evaluating banking options with their advisors, it became clear to the Debtors that Goldman and JPMorgan (the "DIP LC Issuers") were the only viable options given time constraints and the size of the commitments required. Baird Decl. ¶ 13. Accordingly, the Debtors and their advisors commenced discussions with the DIP LC Issuers and other key stakeholders, which culminated in a consensual deal regarding the DIP LC Facility.

c. The DIP Term Lender's Contribution Is Not a Roll-Up.

41. "Most simply, a [roll-up] is the payment of pre-petition debt with the proceeds of a post-petition loan." *Delaware Trust Co. v. Energy Future Intermediate Holdings, LLC* 527 B.R. 157, 166 (D. Del. 2015); *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 511 (Bankr. D. Del. 2010). In other words, there are three elements of a roll-up: (1) there must be a prepetition loan; (2) there must be a paydown of the prepetition loan with the proceeds of a postpetition financing

facility; and (3) the amount due under the postpetition facility on account of the paydown must be senior in priority. The elements must be met conjunctively.

42. Here, as a factual matter, the three elements of a rollup are not met. While there was a Prepetition LC Facility, by its terms, such facility is not continuing as a result of the commencement of these chapter 11 cases and no new LCs will be issued thereunder. The Prepetition LC Facility is not, in any way, being paid down with the proceeds of a postpetition facility. The DIP Term Lender funded cash to collateralize the Prepetition LC Facility in order to satisfy LC draws if they are made. But, upon expiration of the LCs, the DIP Term Lender is exclusively entitled to return of all remaining cash collateral. The Debtors, the DIP LC Issuers, and the DIP Term Lender have, as the result of hard-fought negotiations, agreed on the terms of the DIP LC Facility to provide for continued issuance of LCs and collateralization thereof postpetition. Notably absent is a paydown of the prior facility in order to secure higher interest rates on account of the same dollar value loan. Here, the entirety of the DIP LC Facility is new money. And without it, the ability of the Debtors to succeed in chapter 11 would be in doubt. Notwithstanding what appears to be an earnest misunderstanding on the Landlords' part, the DIP LC Facility is not a rollup of the Prepetition LC Facility.

43. Accordingly, at best, the assertion that the DIP Facilities constitute a rollup subject to challenge demonstrates, at least, a mistake of fact. With that misconception dispelled, the Objections should be overruled, and the DIP Order should be entered.

VI. The Debtors Will be Able to Pay Stub Rent, But Need Not Pay Before the Effective Date.

44. Certain of the Landlords raise concerns regarding the payment of stub rent and an asserted risk of administrative insolvency. The Debtors, however, have a strong business with a loyal customer base. Moreover, the proposed DIP Facilities provide the Debtors access to

sufficient LC capacity to fund operations and emerge from these chapter 11 cases in short order. The strong support of the Debtors' lenders, evidenced by the RSA and the pending plan of reorganization, along with the Debtors' business plan and performance thus far during these chapter 11 cases, should serve to further abate any concerns. Indeed, the RSA contemplates a plan that would pay administrative creditors in full. Accordingly, the Court should not require payment to administrative claimholders, including payment of stub rent, until the Debtors' emergence from chapter 11, as required by section 1129(a)(9)(A) of the Bankruptcy Code. It is notable that the Landlords do not produce *any* evidence that the Debtors will fail to pay allowed stub rent claims when due by law—instead, their objections seem to be an attempt to extract payment early. Moreover, the Debtors' agreement to establish the Stub Rent Reserve should entirely moot this line of objection.

a. The Landlords Are Not Entitled to Immediate Payment of Stub Rent.

i. Section 365(d)(3) Does Not Require Immediate Payment of Stub Rent.

45. Landlords argue they are entitled to the immediate payment of some or all of the stub rent.[9] This argument is without support. While the initial 13-week cash flow forecast did not provide a separate line item for allowed stub rent claims, that says nothing of whether the Debtors will be able to pay it when due—on the effective date. Timing for this payment is appropriate in light of: (a) the Debtors' liquidity position; (b) the anticipated timeline of these chapter 11 cases; and (c) the productive and ongoing discussions with various landlords regarding deferrals and waivers of stub rent (and postpetition rent) in connection with lease negotiations. Making such payments immediately is simply not possible given such constraints, nor would it be prudent for

[9] *See, e.g.*, Objection [Docket No. 365, ¶ 5] (objecting on the basis that Landlords bear risk equal to other administrative creditors by only being entitled to receive stub rent at the conclusion of the case).

the Debtors to spend money now on expenses that are not required to be paid until later. Courts have previously held that the simple cost savings (let alone the need to avoid jeopardizing the success of the entire restructuring) from foregoing immediate payment of stub rent justifies postponing such payment. *See, e.g.*, *In re HQ Glob. Holdings, Inc.*, 282 B.R. 169, 175 (Bankr. D. Del. 2002). As such, the Debtors' request for DIP financing is not the proper context to adjudicate issues related to the stub rent. As discussed below, the Debtors are under no legal obligation to make such payments at this time, and the stub rent can be paid alongside most other administrative claims—upon the effective date of a chapter 11 plan.

46. The Landlords fail to demonstrate that they are entitled to immediate payment of stub rent. Section 365(d)(3) of the Bankruptcy Code provides, in pertinent part, that the "trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property . . . ." 11 U.S.C. § 365(d)(3). The Third Circuit has adopted the "billing date" approach with regard to section 365(d)(3), meaning that an "obligation arises under a lease for purposes of 11 U.S.C. § 365(d)(3) when the legally enforceable duty to perform arises under that lease." *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 2011 (3d Cir. 2001). Here, the obligation to pay the stub rent arose before the Petition Date of the applicable Debtor. *See, e.g.*, *In re HQ Glob. Holdings, Inc.*, 282 B.R. at 173. As such, section 365(d)(3) does not serve as a basis for the immediate payment of the stub rent.

ii. Section 503(b) Does Not Require Immediate Payment of Stub Rent.

47. The Landlords further argue that section 503(b) requires immediate payment of the stub rent. This is also wrong. Although the Debtors acknowledge that claims arising under section 503(b) of the Bankruptcy Code will be paid upon emergence, section 503(b) does not require the immediate payment of the stub rent. While the timing of payment of a claim arising

under section 503(b) is within the Court's discretion, a claimant must show "necessity" to qualify for "exceptional immediate payment." *In re Global Home Products, LLC,* No. 06-10340 (KG), 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006) (denying request for immediate payment where debtors would "suffer a substantial hardship").

48. The Debtors would likewise suffer substantial hardship if required to immediately pay the section 503(b) claims. Indeed, given the fragility of the Debtors' businesses at this time, a requirement that the Debtors now pay, in full, 503(b) claims would both undermine and jeopardize the Debtors' operations and their ability to preserve value as they undertake efforts to rationalize their lease portfolio. The holders of section 503(b) claims, on the other hand, have not shown that they would suffer any hardship, other than the delay in payment inherent in chapter 11, if their claims are simply paid at a later date. Thus, section 503(b) also does not serve as a basis for the immediate payment of a portion of the stub rent.

iii. The Landlords Have Not Met Their Burden for Immediate Payment of Stub Rent.

49. The Landlords cannot meet their burden to justify immediate payment of a portion of stub rent. Courts in the Third Circuit weigh three factors in determining whether to order the immediate payment of administrative expense claims generally: (a) the prejudice to the debtors; (b) the hardship to the claimant; and (c) the potential detriment to other creditors. *See In re Garden Ridge Corp.*, 323 B.R. 135, 143 (Bankr. D. Del. 2005). In applying this test, Courts generally defer to a debtor's business judgment and have generally declined to require immediate payment of stub rent in similar circumstances. *See In re Goodys' Family Clothing, Inc.*, 392 B.R. 604, 617 (Bankr. D. Del. 2008), *aff'd* 401 B.R. 656 (D. Del. 2009), *aff'd* 610 F.3d 812 (3d Cir. 2010) (explaining that an "equal distribution among creditors" does not require simultaneous distribution).

50. The application of these factors weighs strongly against requiring the immediate payment of the stub rent. ***First***, immediate payment of the stub rent will prejudice the Debtors because it will negatively impact the Debtors' already strained balance sheet. ***Second***, to compel immediate payment of the stub rent, the Landlords must show that they will face some harm if they do not receive such payment, not just that the Debtors have the ability to pay. *In re Continental Airlines, Inc.*, 146 B.R. 520, 531 (Bankr. D. Del. 1992). Here, the Landlords assert fairness concerns regarding the payment of stub rent, arguing that they will not be paid their administrative claims upon emergence. But the Landlords are being asked to bear no greater burden than holders of all types of administrative claims bear in every chapter 11 case. Thus, their argument provides no justifiable basis in the law. In fact, the very existence of the Stub Rent Escrow serves to mitigate whatever harm the Landlords believe they face. ***Third***, paying the stub rent now will prejudice other creditors, as it would favor Landlords over other administrative creditors that hold administrative expense claims, disrupting the goal of an orderly and equal distribution among similarly situated creditors. *See, e.g., In re Global Home Prods., LLC*, 2006 Bankr. LEXIS *3608, at *10-11 (Bankr. D. Del. Dec. 21, 2006). For these reasons, the Landlords fail to establish that they meet any of these factors.

iv. The Landlords Are Not Entitled to Payment of Stub Rent or Other Consideration as Adequate Protection.

51. The Landlords also argue that they are entitled to stub rent as adequate protection under section 363(e) of the Bankruptcy Code. This position is also not supported by the law. Courts in the Third Circuit have held that "lessors are not entitled to adequate protection pending the lessee's decision to assume or reject." *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385, 390 (Bankr. W.D.Pa. 1985). Accordingly, the Landlords present no compelling legal, logical, or

equitable theory as to why they are entitled to adequate protection here; in any case, such request for adequate protection is more properly presented in the form of a motion.

52. Moreover, the Landlords have not demonstrated (nor can they) any loss to the value of their property caused by the Debtors' ongoing use of their leases that requires adequate protection. Adequate protection is meant to protect a party against the decrease of value of its property resulting from use, not to insure against a risk that an administrative claim may not be paid in full. With respect to the leases that have not been rejected, there is little doubt that a landlord's property is meant to be leased, so landlords cannot argue that ordinary course use of the property consistent with prepetition use of the property decreases that leasehold's value. And, with respect to the leases that have been rejected to date, the Debtors have already vacated all such properties, and thus are no longer "using" such properties in the parlance of adequate protection. Accordingly, the Landlords present no compelling legal, logical, or equitable theory as to why they are entitled to adequate protection here.

v. The Landlords' Position Is Protected by LCs.

53. Waiting until emergence for payment of stub rent is not a real risk for many of the Landlords. While the Debtors merely propose to treat them equally to other similarly positioned creditors, the Landlords' leases are frequently secured by LCs (or other collateral such as surety bonds) that have already been issued and provide for up to three months' payment upon an event of default. Thus, any concern that the Landlords bear any material economic risk in waiting for stub rent is misplaced. The Debtors intend to pay stub rent claims when due and no sooner. But, to the extent they are unable, the Landlords would presumably draw on the relevant LC or other security and still be paid. As a result, there is no credible harm that will befall such Landlords by waiting to receive stub rent until they are entitled to receive it. If anything, such Landlords' relative position will *improve* when the Debtors are able to renew LCs under the DIP LC Facility.

b. Immediate Payment of Stub Rent Will Eliminate Liquidity and Increase Costs.

54. The Debtors have negotiated the terms of the DIP Facilities with the DIP Secured Parties, which provides vital support for the Debtors' ability to renew LCs in the ordinary course of business and to bolster liquidity to support the Debtors' operations while paying for the administration of these chapter 11 cases. Given the importance of preserving liquidity, the Debtors, in their business judgment, determined that stub rent should be paid upon emergence from chapter 11, when payment would be required. Making such payments immediately is simply not possible, nor would it be desirable.

55. The Landlords provide no justification for requiring the Debtors to jeopardize the entirety of the chapter 11 cases and their efforts to rationalize their lease portfolio merely to meet the Landlords' demands. *See*, *e.g. In re HQ Glob. Holdings, Inc.*, 282 B.R. at 175 ("[p]ostponing the liquidation of each Stub Rent claim will reduce legal fees for both the Debtors and the Landlords and be more economic and efficient of judicial resources. Therefore, we conclude that liquidation and payment of the Stub Rent should be deferred until after the Debtors decide to assume or reject the leases.").

56. For these reasons, the Debtors believe that they are under no legal obligation, and should not be forced, to make such payments at this time, and the Objections demanding such payment should be overruled.

c. The DIP Facilities Are Essential to Ensure the Debtors Can Pay Administrative Claims.

57. The DIP Facilities are essential to preserve the value of the Debtors' estates. As described in greater detail in the Baird Declaration, without access to the DIP Facilities, the Debtors would experience significant business disruption, may need to meaningfully curtail their operations due to the inability to renew or otherwise honor LCs, and may face other

value-destructive consequences. Failure to obtain access to the DIP Facilities at this crucial juncture in these chapter 11 cases would lead to an onslaught of LC draws, resulting in additional prepetition secured claims against the Debtors that would further impair recoveries.

d. The DIP Facilities Serve to Ensure Landlord Rights are Preserved.

58. The proposed DIP Facilities not only preserve the Debtors' viability as a go-forward enterprise, but also ensure that the rights of landlords party to the prepetition LC Facility are unimpeded by the Debtors' reorganization through these chapter 11 cases.

59. A significant number of the leases in the Debtors' and non-Debtors' real-estate portfolio are secured under the Prepetition LC Facility, which is comprised of LCs that will expire and must be renewed at various intervals throughout these chapter 11 cases. If the Debtors fail to maintain the LCs (including by failing to replace the LCs in advance of an expiration date), the Debtors will likely be in default under those leases. Upon default, landlords could invoke their right to draw the applicable LCs in full, crystalizing hundreds of millions of dollars in secured claims.

60. Currently, there are approximately $690 million of LCs undrawn and outstanding under the prepetition LC Facility. If the Debtors lack sufficient LC renewal capacity when these prepetition LCs come due, existing undrawn LCs will mature without a replacement, forcing landlords to make the difficult choice between losing such credit support or drawing on the expiring prepetition LCs. Since landlords would likely choose to draw the LCs, the lack of LC renewal capacity will result in crystalized secured claims against the Debtors.

61. Because the Debtors' and non-Debtors' ability to continue extending LCs during these chapter 11 cases is essential to the Debtors' continued operation and the preservation of their assets, access to the DIP Facilities will enable the Debtors to continue operating in the ordinary course, and fulfill their obligations to stakeholders, including landlord counterparties, through

these chapter 11 cases. Landlords will benefit from the LC structure under the DIP Facilities because it will enable the Debtors to issue and renew secured LCs to secure present and future lease obligations in a manner consistent with the Prepetition LC Facility. The Debtors' ability to continue this prepetition practice will only preserve the status quo for landlords, their tenants, and the Debtors' members, and avoid needlessly harmful operational disruptions for all.

62. Critically, the LC construct under the DIP Facilities will not prejudice the Debtors' landlord counterparties because the DIP LC Facility: (i) in no way impairs or terminates landlords' ability to draw on LCs as they come due; and (ii) secures the Debtors' rent and lease obligations to landlords. Lastly, because the Debtors and DIP Secured Parties have agreed to establish the Stub Rent Escrow, the Landlords should be assured that stub rent will be paid when due.

VII. The Reservation of Rights Regarding Liens on Leases is Appropriate.

63. The DIP Secured Parties and the Prepetition Secured Parties have provided significant new value to the Debtors and their estates, and their contributions make this reorganization possible. However, the provision of new value is not free, and is given for good and valuable consideration. One form of consideration is protection from certain downside risk by the attachment of liens to a variety of forms of collateral. In this case, through the Cash Collateral Order, the DIP Secured Parties and the Prepetition Secured Parties have negotiated for a commonly granted compromise: a reservation of rights to assert that their liens should attach to leases. While certain Landlords dislike this aspect of the deal and instead prefer for the Prepetition Secured Parties to reserve no rights whatsoever with respect to the leases, it is not uncommon, let alone unprecedented to grant this consideration. And the Landlords arguments lack support in this Circuit.

64. For the avoidance of doubt, the Cash Collateral Order does not create or otherwise perfect a lien on any leases today, except where such lease does not prohibit attachment by its

terms. Instead, to the extent that applicable law would permit such a lien, or where the terms of the relevant lease would not foreclose such a lien, the DIP Secured Parties and the Prepetition Secured Parties have reserved their rights to seek to attach such a lien in a court of competent jurisdiction.

65. It is commonplace to insert language preserving the rights of all parties on a potential override of anti-pledge provisions, particularly in complex chapter 11 cases where debtors are party to numerous leases. *See, e.g.*, *In re Bed Bath & Beyond, Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. June 15, 2023) [Docket No. 729, ¶ 5]; *In re American Physician Partners, LLC*, No. 23-11469 (BLS) (Bankr. D. Del. Nov. 2, 2023) [Docket No. 435, ¶ 3(i)]; *In re EYP Group Holdings, Inc.*, No. 22-10367 (MFW) (Bankr. D. Del. May 25, 2022) [Docket No. 149, ¶ 5]; *In re Emerge Energy Services LP*, No. 19-11563 (KBO) (Bankr. D. Del. Aug. 14, 2019) [Docket No. 209, ¶ 21(c)]; *In re Dixie Electric, LLC*, No. 18-12477 (KG) (Bankr. D. Del. Dec. 10, 2018) [Docket No. 124, ¶ 16(c)]; *In re Party City Holdco Inc.*, 23-90005 (DRJ) (Bankr. S.D. Tex. Mar. 3, 2023) [Docket No. 587, ¶ 7(a)]; *In re Paper Source, Inc.*, No. 21-30660 (KLP) (Bankr. E.D. Va. Apr. 2, 2021) [Docket No. 309, ¶ 5]; *In re Gulfport Energy Corp.*, No. 20-35562 (DRJ) (Bankr. S.D. Tex. Dec. 28, 2020) [Docket No. 468, ¶ 2(l)]; *In re Westmoreland Coal Co.*, No. 18-35672 (DRJ) (Bankr. S.D. Tex. Nov. 15, 2018) [Docket No. 520, ¶ 3].

66. Indeed, in many other complex chapter 11 cases in this Circuit, courts have either permitted the attachment of adequate protection liens to leases or have deemed such restrictions inconsistent with the Bankruptcy Code, or have permitted such attachment except where proscribed by relevant law. *See In re Indep. Pet Partners Holdings, LLC*, Case No. 21-10152 (LSS) (Bankr. D. Del. Mar. 3, 2023) [Docket No. 242]; *In re Enjoy Techn., Inc.*, Case No. 22-10580 (JKS) (Bankr. D. Del. July 26, 2022) [Docket No. 200]; *In re Global Eagle Ent. Inc.*,

Case No. 20-11835 (JTD) (Bankr. D. Del. Aug. 18, 2020) [Docket No. 233]; *In re Carestream Health, Inc.*, Case No. 22-10778 (JKS) (Bankr. D. Del. Sept. 28. 2022) [Docket No. 179]; *In re Phoenix Servs. Topco LLC*, Case No. 22-10906 (MFW) (Bankr. D. Del. Nov. 2, 2022) [Docket No. 237]; *In re Extraction Oil & Gas, Inc.*, Case No. 20-11548 (CSS) (Bankr. D. Del. July 20, 2020) [Docket No. 303]. The Debtors should not be deprived of the same ability to negotiate consideration with their lenders. The Cash Collateral Order was heavily negotiated by sophisticated parties, and this provision was a necessary form of consideration. Accordingly, and in light of the substantial precedent for this provision, the Objections to the Cash Collateral Order should be overruled.

Conclusion

67. For all the foregoing reasons, the Debtors respectfully request that the Court overrule the Objections and enter the DIP Order and the Cash Collateral Order.

[*Remainder of page intentionally left blank.*]

WHEREFORE, the Debtors respectfully request the Court to (a) grant the DIP Motion and Cash Collateral Motion, and (b) grant the Debtors such other relief as is just and proper.

Dated: December 9, 2023

/s/ Michael D. Sirota

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