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

In re:	)	Chapter 11
GLOBAL CLEAN ENERGY HOLDINGS, INC. *et al*.,[1]	)	Case No. 25-90113 (ARP)
	)	(Jointly Administered)
Debtors.	)	**Re: Docket Nos. 16, 57**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION CREDIT, (B) GRANT SENIOR SECURED LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, AND (C) UTILIZE CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION TO PREPETITION PARTIES; (III) MODIFYING THE AUTOMATIC STAY; (IV) AUTHORIZING CONTINUATION OF THE PREPETITION SOA AND SSA, AS AMENDED; (V) AUTHORIZING THE DEBTORS TO ENTER INTO AND PERFORM UNDER POSTPETITION TRANSACTIONS UNDER THE SOA AND SSA; (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF

The undersigned proposed counsel, on behalf of the Official Committee of Unsecured Creditors (the "Committee") of Global Clean Energy Holdings, Inc., and the other above-captioned debtors in possession (collectively, the "Debtors"), hereby objects (the "Objection") to the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Credit, (B) Grant Senior Secured Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to Prepetition Parties; (III) Modifying the Automatic Stay; (IV) Authorizing Continuation of the Prepetition SOA and SSA, as Amended; (V) Authorizing the Debtors to Enter*

[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/GCEHoldings. The location of Debtor Global Clean Energy Holdings, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is: 6451 Rosedale Highway, Bakersfield, California 93308.

Into and Perform Under Postpetition Transactions Under the SOA and SSA; (VI) Scheduling a Final Hearing; and (VII) Granting Related Relief [Docket No. 16] (the "DIP Motion").[2] In support thereof, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. These chapter 11 cases (the "Chapter 11 Cases"), and particularly the DIP Facilities, have been carefully orchestrated in an attempt to lock in from the outset certain critical benefits and advantages for Vitol, the Prepetition Term Lenders, and CTCI (collectively, the "RSA Parties"). These benefits and advantages will be at the direct expense of the one key stakeholder of the Debtors that was not at the table for any of the months of negotiations that culminated in the RSA – unsecured creditors. Unsecured creditors have been left completely in the dark as to what they may eventually obtain at the end of the Chapter 11 Cases because the RSA and the Plan are blank in terms of the dollar amount of the "GUC Cash Pool," which is the only treatment provided to Class 6 General Unsecured Claims. This makes it impossible for the Committee to evaluate the benefits and costs of the DIP Facilities given the tight linkage between the DIP Facilities, the RSA, and the Plan. Among other things, the Debtors have not provided a valuation analysis, a liquidation analysis, or any information in the Disclosure Statement on potential unencumbered assets (or the value thereof) or the value of released or retained litigation claims that may be the only source of recovery for unsecured creditors.

[2] Capitalized terms used but not otherwise defined in this Objection shall have the meanings ascribed to them in the DIP Motion or the DIP RCF Credit Agreement, the DIP Term Loan Credit Agreement, or the DIP CTCI Contract (collectively, the "DIP Credit Agreements"), attached as Exhibits A and B, respectively, to the Interim DIP Order (defined herein), as applicable.

2. As set forth in the objection to the Disclosure Statement filed contemporaneously herewith, the Debtors and other RSA parties are looking to have their cake and eat it too. They are looking to receive the benefits of the chapter 11 cases, but shift the burdens/costs of their chosen process onto unsecured creditors. The Debtors and other RSA Parties are looking to move the cases forward at great speed, but they do not want to provide the type of information that the Committee and unsecured creditors need in order to make informed decisions. The Court should refuse the Debtors' and the other RSA parties' blatant attempts to have it all – the parties that have chosen to be here (*i.e.*, in chapter 11) must pick their path, follow the process, and pay the freight.

3. Through the RSA and DIP Facilities, the Debtors have effectively agreed to cede control of the Chapter 11 Cases and all of their assets to the prepetition secured parties (who also are serving as DIP Lenders). Despite the attempts by others to tilt the playing field against it, the Committee stands ready to fulfill its fiduciary duty and preserve the value that unsecured creditors are entitled to under the Bankruptcy Code. The Committee has hit the ground running to address the information gap and understand the complex nature of the Chapter 11 Cases, including (a) the Debtors' extensive history with the Prepetition RCF Lenders, the Prepetition Term Lenders, and CTCI (and their respective prepetition claims and collateral), (b) the reasons for the problems, delays, and cost overruns that plagued the Bakersfield Facility, (c) the resolution of the dispute with CTCI contemplated under the RSA (where CTCI went from being the target of a $550 million affirmative claim by the Debtors to receiving the full allowance of an approximately $950 million secured claim), (d) other potential litigation claims that the Debtors may be able to assert against the DIP Lenders and the Debtors' officers and directors given, among other things, the ongoing problems with the Bakersfield Facility and the various amendments to the Prepetition Term Loan,

(e) the claims and assets of each Debtor (given that the Debtors have not filed their schedules and statements), and (f) the proposed business plan for the Debtors, the valuation of each of the Debtors, and the feasibility of the Plan.

4. The Committee is focused on determining what unsecured creditors may be legally entitled to under any chapter 11 plan and protecting that value from being seized by other parties at the very start of the Chapter 11 Cases. But the Committee's work is just getting started, it has not had a meaningful ability to investigate and the Debtors owe the Committee considerable diligence information necessary for the Committee to fulfill its role under the Bankruptcy Code. Unfortunately, the Debtors and the DIP Lenders seem to be taking the position that the costs of the Committee's efforts to fulfill its statutory role, which costs are only being incurred because of the Debtors' voluntary chapter 11 filing (filed with the express support of the RSA Parties), must be paid for by unsecured creditors. But that is not what the Bankruptcy Code provides. The costs of the chapter 11 process will be paid for by the Debtors' estates as administrative claims and from a fairness standpoint should be paid for by the parties selecting and benefitting from the chapter 11 process – the RSA Parties.

5. At a high-level, the DIP Facilities (comprised of three separate financings provided by the three non-Debtor parties to the RSA) benefit the RSA Parties, deprive the Debtors' estates and unsecured creditors of fundamental rights, and risk putting the Chapter 11 Cases on a path where the only possible outcome is the one contemplated by the RSA (a secured creditor-driven foreclosure of all of the Debtors' assets with little to no recoveries for unsecured creditors). Simply put, if approved, the DIP Facilities would preclude a chance for a fair and fulsome process to play out in the Chapter 11 Cases. In the Fifth Circuit, the key precedent is *In re Braniff Airways, Inc.*,

700 F. 2d 935 (5th Cir. 1983), which has long held – and continues to hold – that any early/interim case measure (such as DIP financing) that has "the practical effect of dictating some of the terms of any future reorganization plan" is a "short circuit" of Section 1129 and, thus, an impermissible "plan *sub* rosa." *Id*. at 940; *see also In re Laffite's Harbor Dev. I, LP,* 2018 WL 272781, at *2-3 (Bankr. S.D. Tex. Jan. 2, 2018) (rejecting approval of DIP financing, noting that bankruptcy courts "do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender").

6. More than sufficient protections are being provided to the DIP Lenders and the DIP Contractor via the interest payments, fees, budget rights, adequate protection liens and superpriority claims, reimbursement of expenses, reporting rights, and other protections under the Final DIP Order. Those benefits, together with the DIP Lenders' significant interest in seeing the Debtors reorganize (rather than liquidate) in order to pay the RSA Parties back on account of their prepetition claims (which under the Plan are to be satisfied in the form of takeback debt, preferred equity, and reorganized equity), should be more than sufficient for the DIP Lenders. It also would strike an appropriate balance between the interests of the DIP Lenders and the interests of the Bankruptcy Code in providing a forum for a fair resolution of the Debtors' estates. To avoid "short circuiting" the chapter 11 process in favor of the RSA Parties at this stage of the Chapter 11 Cases, the Court should refuse to approve the DIP Facilities unless and until the following issues are addressed.

7. *First*, the relief sought in the DIP Motion would take every dollar from known and potential sources that could otherwise go to unsecured creditors and pledge that value to the DIP

Lenders, the prepetition lenders, and CTCI. These unencumbered assets, including commercial tort claims, proceeds of avoidance actions, and any other unencumbered asset any of the Debtors may own, should be preserved for the benefit of the Debtors' estates. The DIP Lenders also would escape any consequences for potential litigation against them because, if the Committee is successful with a Challenge against the DIP Lenders, the recoveries would round-trip from the DIP Lenders back to themselves since they would hold DIP Liens on the proceeds of such litigation. On a similar theory, based on the need to preserve the value of unencumbered assets for the benefit of the Debtors' unsecured creditors, the Court should also prevent the DIP Lenders, the prepetition lenders, and CTCI from receiving the benefit of additional guarantees, pledges of collateral, and superpriority claims from Debtors that were not already obligated under the respective debt on the Petition Date.[3] In short, the DIP Facilities should not be secured by liens on unencumbered assets at all, the Final DIP Order should expressly exclude previously unencumbered property from the definition of DIP Collateral, and the Final DIP Order should clarify that any superpriority or adequate protection claims will not be paid from such assets of the proceeds thereof.

8. *Second*, the Final DIP Order imposes tight milestones related to the plan process and other case controls on the Chapter 11 Cases. These include, but are not limited to, defaults

[3] For example, the Committee understands that BKRF OCB, LLC is the borrower under the Prepetition Term Loan and there are three guarantors: BKRF OCP, LLC (the direct parent of the borrower), Sustainable Oils, Inc. (a sister company of the borrower), and Bakersfield Renewable Fuels, LLC (the direct subsidiary of the borrower). The other 11 Debtors are not obligated at all under the Prepetion Term Loan (or any prepetition claims of the RSA parties), but are each becoming parties to the DIP Facilities, granting liens on all of their assets (all 11 of those Debtors have not granted any liens on their assets at all on a prepetition basis in favor of the RSA Parties), and granting superpriority claims in favor of the RSA Parties. On the record that exists in front of the Court, these 11 Debtors should not become obligated under the DIP Facilities at all. The Committee's advisors understand that the Debtors' advisors have not forecasted the use of cash by any of these non-obligor entities.

under the DIP Facilities based on missed milestones,[4] the termination of the RSA,[5] or the successful challenge of any lien or claim held by the RSA Parties.[6] The linkage of the DIP Facilities to the RSA unduly hampers the Debtors' ability to maximize value in the Chapter 11 Cases because it dictates the terms for a plan of reorganization and practically prohibits the Debtors from pursuing alternative plans.

9. *Third*, the Final DIP Order would practically eliminate the Committee's ability to conduct a meaningful investigation of the Debtors' alleged secured creditors by imposing an unduly short investigation period and offering an unreasonably small budget for such investigation. The DIP Facilities propose 60 days for the Committee, notwithstanding the facts that the Debtors' own Special Committee investigation has been ongoing for 5.5 months and remains incomplete, and no meaningful conclusions of the Special Committee have been shared with the Committee or in the Disclosure Statement.[7]

10. *Fourth*, an estate waiver under Bankruptcy Code section 506(c), the waiver of the section 552(b) "equities of the case" exception on behalf of the Committee, and the waiver of the marshaling doctrine is inappropriate, particularly here where the net effect of the waivers is to eliminate maybe the only avenue of recovery for the Debtors' estates and to virtually guarantee that costs of the secured lenders' foreclosing on the Debtors' assets will be borne by unsecured

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4 DIP RCF Facility 7.01(f)(iii).

5 DIP RCF Facility 7.01(o).

6 DIP RCF Facility 7.01(f)(xvii).

7 The Disclosure Statement includes merely a **60-word** conclusory two sentences that discusses the investigation and supports the entry into the RSA: "Over the course of the restructuring process, the Disinterested Directors met with the Company's advisors and management team on numerous occasions to consider stakeholder feedback and provide guidance to Global Clean's management team and advisors. The Disinterested Directors ultimately recommended to the Board the entry into the Restructuring Support Agreement, the DIP Facilities, and the filing of these chapter 11 cases." (footnote omitted regarding the ongoing nature of the investigation). Disclosure Statement Art. VI.C.2.

creditor recoveries (the only stakeholder involved who did not voluntarily agree to implement the restructuring under chapter 11 of the Bankruptcy Code).

11. *Finally*, there are various other provisions in the Final DIP Order for which the Committee has proposed language, including consent and notice issues, so that the Committee can perform its duties in these Chapter 11 Cases. The Committee does not view these proposed changes as controversial and does not believe that such changes should be conditioned on reaching an agreement on the larger issues outlined above.

12. The Committee therefore requests that the Court deny the DIP Motion unless and until the Final DIP Order has been modified substantially to ensure that the DIP Facilities, as approved, are fair and reasonable and do not unduly prejudice the Committee, the Debtors' unsecured creditors, and the other parties in interest.

BACKGROUND

I. General Background

13. On April 16, 2025 (the "Petition Date"), each Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas (the "Court"). The Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

14. On the Petition Date, the Debtors filed the DIP Motion, and on April 16, 2025, the Court entered the *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Credit, (B) Grant Senior Secured Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to Prepetition Parties; (III) Modifying the*

Automatic Stay; (IV) Authorizing Continuation of the Prepetition SOA and SSA, as Amended; (V) Authorizing the Debtors to Enter Into and Perform Under Postpetition Transactions Under the SOA and SSA; (VI) Scheduling a Final Hearing; and (VII) Granting Related Relief [Docket No. 57] (the "Interim DIP Order"). The approval of the DIP Facilities on an interim basis enabled the Debtors to access a DIP revolving credit facility, $15 million in new money DIP term loans, and $25 million in payments and reimbursements from contractor CTCI:

(a) **DIP RCF Facility:** a senior secured, superpriority revolving credit facility with a limit of up to $100 million. This facility converts revolving loans from Prepetition RCF Obligations on a dollar-for-dollar basis. Additionally, $25 million of principal Prepetition Term Loan Obligations are rolled into DIP RCF Loans upon the entry of the Interim Order, with the remaining Prepetition RCF Obligations being rolled into DIP RCF Loans upon the entry of the Final Order. *See* DIP Motion ¶ 6.

(b) **DIP Term Loan Facility:** a superpriority, priming secured credit facility with a maximum amount of $75 million. This facility includes $25 million in new money term loans, $15 million of which was available upon the entry of the Interim Order, and a proposed roll up of $50 million of Prepetition Term Loan Obligations into DIP Term Loan Obligations upon the entry of the Final Order. *See Id*.

(c) **DIP CTCI Payment Facility:** provides up to $75 million for goods, services, and other considerations supplied by CTCI under the DIP CTCI Contract. This facility includes $25 million of such goods, services, and other considerations upon entry of the Interim Order, with the balance available upon the entry of the Final Order. *See Id*.

15. On the Petition Date, the Debtors filed the *Joint Chapter 11 Plan of Reorganization of Global Clean Energy Holdings, Inc. and its Debtor Affiliates* [Docket No. 23] (the "Plan") and a related disclosure statement [Docket No. 22] (the "Disclosure Statement"). Also on the Petition

Date, the Debtors filed their *Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Debtors' Proposed Joint Chapter 11 Plan, (III) Approving the Forms of Ballots and Notices in Connection Therewith, (IV) Scheduling Certain Dates with Respect Thereto, and (V) Granting Related Relief* [Docket No. 21] (the "Disclosure Statement Motion"). A hearing on the Disclosure Statement Motion is currently scheduled for May 29, 2025 at 9:00 a.m. (prevailing Central Time).

16. On April 28, 2025, pursuant to Bankruptcy Code section 1102, the United States Trustee for the Southern District of Texas (the "U.S. Trustee") appointed a five-member Committee: (a) Trinity Safety Company, (b) Bragg Investment Company, Inc., (c) J.T. Thorpe & Son, Inc., (d) Molecule Software, Inc., and (e) Castleton Commodities Merchant Trading L.P. *See Notice of Appointment of Committee of Unsecured Creditors* [Docket No. 87].

17. On April 30, 2025, the Committee selected McDermott Will & Emery LLP ("McDermott") to serve as counsel to the Committee.

18. On May 5, 2025, the Committee selected Province LLC ("Province") to serve as the Committee's financial advisor.

II. Committee's Negotiations with the Debtors and DIP Lenders

19. The Committee was only formed on April 28. The Committee has requested numerous documents and background from the Debtors and is in the process of evaluating the information that the Debtors have provided (or promised to provide) on a tight timeline to better understand the context of these cases, the DIP Facilities, and the RSA/Plan. While the Debtors have made some initial progress in responding to the Committee's requests, the Committee is still owed extensive information that the Committee must have in order to form a view on what value

the unsecured creditors should be entitled to in the Chapter 11 Cases and that would otherwise permit the Committee to engage fulsomely on the terms of the Debtors' chapter 11 plan.

20. The Committee has conducted preliminary discussions with the DIP Lenders regarding its objection to the DIP Facilities and will continue to attempt to resolve the objections with the Debtors and the DIP Lenders. However, the Debtors were unwilling to extend the objection deadline beyond May 20—less than three weeks after the Committee's professionals were selected. Accordingly, the Committee is filing this objection even though it continues to analyze information provided by the Debtors, negotiate with the Debtors, and further evaluate the relief sought in the DIP Motion.[8]

OBJECTION

I. The Debtors Have Not Demonstrated That the DIP Facilities In Their Current Form Are Fair, Reasonable, and Adequate

21. To obtain post-petition financing under section 364(d) of the Bankruptcy Code, "a debtor has the burden of demonstrating that (i) the credit transaction is necessary to preserve the estate, and (ii) the terms of the transaction are fair and reasonable given the circumstances." *In re Futures Equity L.L.C.*, No. 00-33682 (BJH), 2001 Bankr. LEXIS 2229, at *14 (Bankr. N.D. Tex. April 11, 2001); *see also In re L.A. Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011).

22. In determining whether to approve postpetition financing, courts consider, among other things, whether the financing is "in the best interests of the estate and its creditors" and whether "the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender." *See, e.g.*, *In re Mid-State Raceway, Inc.*, 323

[8] Accordingly, the Committee reserves the right to file a supplement to this objection in advance of the hearing.

B.R. 40, 60 (Bankr. N.D.N.Y. 2005) (citing *In re Farmland Indus., Inc.,* 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003)); *see also In re LA Dodgers LLC*, 457 B.R. at 312 (citing *In re St. Mary Hosp.,* 86 B.R. 393, 401 (Bankr. E.D. Pa. 1988)); *In re Tenney Vill. Co.*, 104 B.R. 562, 569 (Bankr. D.N.H. 1989) ("The [d]ebtor's pervading obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries.").

23. Courts will ***not*** approve DIP financing where it is designed to favor the lender at the expense of other creditors and is not in the best interests of the estate. *See In re Laffite's Harbor Dev. I, LP*, No. 17-36191-H5-11, 2018 WL 272781, at *3 (Bankr. S.D. Tex. Jan. 2, 2018) (rejecting approval of DIP financing noting that bankruptcy courts "do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the post-petition lender"); *In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 39 (Bankr. S.D.N.Y. 1990) (citing *In re Crouse Grp.*, 71 B.R. 544, 551 (Bankr. E.D. Pa. 1987)) (explaining that courts should not approve proposed financing "where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate."); *Tenney Vill.*, 104 B.R. at 568 (the financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of a secured creditor).

24. The Court must also assess whether "the proposed terms [of the DIP facility] would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets so as to unduly prejudice the rights of other parties in interest." *In re Berry Good, LLC*, 400 B.R. 741,747 (Bankr. D. Ariz. 2008) (internal citations omitted and emphasis added). DIP financing

proposals should not be approved when "a creditor leverages a debtor in possession into making a concession unauthorized by, or in conflict with, the Bankruptcy Code as a condition for the requested credit." *In re Grand Valley Sport & Marine*, 143 B.R. 840, 852 (Bankr. W.D. Mich. 1992).

25. A debtor bears the burden of proving that the proposed post-petition financing satisfies these requirements. *See, e.g.*, *In re Phase-I Molecular Toxicology, Inc.*, 285 B.R. 494, 495 (Bankr. D.N.M. 2002) (explaining that a debtor must prove that the proposed post-petition financing arrangement meets the requirements of 11 U.S.C. §§ 364(c) or (d)).

26. In the Chapter 11 Cases, the Debtors have not met their burden for the reasons set forth below.

A. Liens on Avoidance Actions, Other Causes of Action, and the Proceeds of the Foregoing Are Inappropriate Under the Circumstances

27. Avoidance Actions and other causes of action, including commercial tort claims, which the Committee has not yet had the opportunity to investigate, may comprise one of the Debtors' most valuable unencumbered assets, and thus are crucial sources of value for unsecured creditors. The proposed Final DIP Order provides for a transfer of certain causes of action, including commercial tort claims, and proceeds of any Avoidance Actions[9] to the DIP Lenders on account of DIP Liens. *See* Interim DIP Order at ¶ 15; *see also* DIP Motion ¶29.

28. Courts recognize that avoidance actions and their proceeds are designed to ensure equitable distribution to creditors. *See, e.g.*, *Cullen Ctr. Bank & Trust v. Hensley (In re Criswell)*,

[9] The Interim DIP Order appears to exclude the underlying Avoidance Actions and purports to encumber only proceeds from Avoidance Actions, but the Committee raises both to make clear that it objects to the encumbrance of Avoidance Actions and the proceeds of Avoidance Actions, along with any other unencumbered property of the Debtors, if any exists.

102 F.3d 1411, 1414 (5th Cir. 1997) (stating that Congress enacted avoidance powers to "facilitat[e] the prime bankruptcy policy of equality of distribution among creditors of the debtor."). Indeed, the Fifth Circuit has recognized that the primary reason for such a restriction is that avoidance actions and their proceeds are to be reserved for unsecured creditors. *See Gaudet v. Babin (In re Zedda)*, 103 F.3d 1195, 1203 (5th Cir. 1997) ("A trustee's avoidance powers are intended to benefit the debtor's creditors, as such powers facilitate a trustee's recovery of as much property as possible for distribution to the [unsecured] creditors.") (internal citations omitted); *McFarland v. Leyh (In re Tex. Gen. Petrol. Corp.)*, 52 F.3d 1330, 1335–36 (5th Cir. 1995) ("'[T]he proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits.' . . . The proceeds recovered in avoidance actions should not benefit the reorganized debtor; rather, the proceeds should benefit the unsecured creditors."); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000) (finding that avoidance actions do not constitute property of estate, but are essentially rights held by estate for benefit of unsecured creditors); *Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm L.P. IV*, 229 F.3d 245, 250 (3d Cir. 2000) ("[A]ny recovery [under avoidance powers] is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer."). Accordingly, numerous courts have restricted a debtor's ability to pledge avoidance actions and proceeds as collateral. *See, e.g.*, *In re Innkeepers USA Trust*, No. 10-13800 (SCC) (Bankr. S.D.N.Y. Sept. 2, 2010) [Docket No. 433] ("Regarding the committee's objection to the granting of superpriority claims with respect to avoidance actions or the proceeds thereof, I agree with the committee's position and decline to grant the superpriority claims.").

29. Granting liens on causes of action such as commercial tort claims and the proceeds of avoidance actions is fundamentally at odds with the unique purposes served by avoidance actions. Avoidance actions are distinct creatures of bankruptcy law designed to benefit and ensure equality of distribution among general unsecured creditors. *See ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150, 161 (S.D. Tex. 2009) ("[T]he ultimate purpose of most fraudulent-transfer laws, and in particular § 550, is to protect unsecured creditors and, as far as possible, to make them whole."); *see also Weaver v. Aquila Energy Mktg. Corp. (In re Trans Mktg. Houston, Inc.)*, 117 F.3d 1417, *6 (5th Cir. 1997) (unpublished) (equating "benefit of the estate" under § 550 to benefit of "all unsecured creditors"); *see also In re Cybergenics Corp.*, 226 F.3d at 244, *rev'd en banc,* 330 F.3d 548 (3d Cir. 2003) (identifying underlying intent of avoidance powers to recover valuable assets for estate's benefit); *Buncher Co.*, 229 F.3d at 250 ("The purpose of fraudulent conveyance law is to make available to creditors those assets of the debtor that are rightfully part of the bankruptcy estate, even if they have been transferred away. When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer.") (citations omitted); *In re Sweetwater*, 55 B.R. 724, 731 (D. Utah 1985) ("The avoiding powers are not 'property' but a statutorily created power to recover property."), *rev'd on other grounds*, 884 F.2d 1323 (10th Cir. 1989).

30. This reasoning extends to "proceeds" of avoidance actions and other causes of action, which many courts exempt from the reach of secured creditors. *See In re Klaas Talsma Frisia Hartley, LLC,* No. 10-43790 (DML), 2010 WL 5209363, at *4 (Bankr. N.D. Tex. June 10, 2010) (excluding avoidance actions and proceeds thereof from the secured lender's adequate

protection package); *In re HSAD 3949 Lindell, Ltd.*, No. 10-33986 (BJH), 2010 WL 5209266, at *5 (Bankr. N.D. Tex. Sept. 2, 2010) (adequate protection package excluded "any and all avoidance actions under Chapter 5 of the Bankruptcy Code and any proceeds thereof").

31. In addition, the grant of a security interest in causes of action such as commercial tort claims, avoidance actions, or the proceeds of such causes of action effectively renders moot any investigation or challenge into claims arising under chapter 5 of the Bankruptcy Code or its state law equivalents, in as much as the value of any cause of action resulting from such investigation or challenge would inure to the sole benefit of the DIP Lenders. The DIP Lenders should not be permitted to capture all estate value at the expense of the unsecured creditors and certainly should not be entitled to receive recoveries obtained by the Debtors' estates pursuant to successful claims against the DIP Lenders (proceeds of claims against the DIP Lenders themselves should be carved out of the DIP Collateral). Accordingly, the Final DIP Order should make clear that: (a) the causes of action such as commercial tort claims and Avoidance Actions, as well as the proceeds of the foregoing, shall remain unencumbered under all circumstances, (b) no DIP Liens shall attach to any such unencumbered assets, and (c) any associated superpriority claims shall not be payable from such assets.

32. Based on similar logic, any Debtor that is not currently obligated under the prepetition agreements with the DIP Lenders or CTCI should not become obligated under the DIP Facilities. Their unencumbered assets should be preserved for the benefit of their creditors first and these non-obligors should not be forced to incur a quarter of a billion dollars' worth of obligations under the DIP Facilities when they may receive no benefit whatsoever under the DIP Facilities. At the very least, the Debtors should further explain the decision making behind each

of these Debtors signing on to the DIP Facilities instead of other alternatives – it is not readily apparent to the Committee that the entities were making decisions in their own best interests (as opposed to the interests of other Debtors or interests of creditors of other Debtors), particularly given that there appear to be a few entities with assets but no funded debt.

B. The Inappropriate Linking of the RSA and the DIP Facilities

33. As mentioned above, the Final DIP Order contains termination events and events of default tied to the RSA that will hamstring the Debtors and their ability to maximize the value of the Debtors' estates. This linkage, when combined with the additional DIP financing claims created due to the roll-up of prepetition debt, will hamper the Debtors' ability to consider any alternatives to the RSA, even if they are in the best interests of the Debtors' estates. The links to the RSA merely give the DIP Lenders added leverage to dictate the outcome of the Chapter 11 Cases or else face a liquidation under the DIP Facilities. The Court should not hand the DIP Lenders this sword by approving the DIP Facilities if they are tied so tightly to the RSA (which has not been approved by the Court, nor will it be assumed by the Debtors).

C. The Final DIP Order Improperly Constrains the Committee

34. Under section 1103 of the Bankruptcy Code, the duties of a statutory committee include "investigat[ing] the acts, conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the case . . . and perform[ing] such other services as are in the interest of those represented." 11 U.S.C. § 1103(c). The Final DIP Order hinders the ability of the Committee to fulfill its statutory duties. Specifically, the Final DIP Order limits the Committee's investigation with respect to the prepetition secured obligations by (a) constraining the investigation period to 60 days after the formation of the Committee (a stark contrast to the over

150 days the Debtors' special committee has had since its creation to conduct its investigation, which remains ongoing); (b) requiring the Debtors to have developed and filed a motion seeking standing and attaching a draft complaint prior to the Challenge Deadline in order to obtain a tolling of the applicable challenge deadline; and (c) limiting the funds available to the Committee to conduct an investigation to $75,000.

35. A meaningful opportunity must be provided to investigate the Company's transactions, assess potential litigation claims, and evaluate the liens on the Debtors' assets. The Debtors and the Chapter 11 Cases are complex and the Committee requires an appropriate amount of time of not less than 90 days from the Committee's formation to commence a challenge and an appropriate budget.

36. Additionally, the Final DIP Order should expressly provide that the Committee professionals shall be entitled to seek allowance and payment of any fees and expenses incurred in excess of the investigation budget as administrative expenses and that no party shall be permitted to object to the reasonableness of such fees and expenses on the ground that such amounts exceeded the contemplated budget. *See, e.g., In re S. Foods Grp.*, LLC, No. 19-36313(DRJ) (Bankr. S.D. Tex. Dec. 23, 2019) [Docket No. 608] (providing that amounts incurred by the committee's professionals in excess of the investigation budget constituted, subject to court approval, allowed administrative expenses); *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jun. 7, 2018) [Docket No. 918] (same); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. July 5, 2016) [Docket No. 464] (same).

D. The Section 506(c) Waiver Should Not Be Permitted

37. The Court should not approve any waiver of the estates' rights under section 506(c) of the Bankruptcy Code. *See* Interim DIP Order at ¶ 9. Section 506(c) ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured recoveries, providing that an estate "may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit" to the secured creditor." 11 U.S.C. § 506(c). "The general concept underlying this requirement is the prevention of a windfall to the secured creditor; a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without shouldering the cost." 4 Collier on Bankruptcy ¶ 506.05 (16th Ed. 2020); *see also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 12 (2000) (Section 506(c) is a rule of fundamental fairness for all parties in interest to ensure that secured creditors share some of the administrative expenses for the preservation of their collateral).

38. Here, by having waived the estates' section 506(c) rights, subject to entry of the Final DIP Order, the Debtors agreed to pay for any and all expenses associated with the preservation and disposition of the collateral of the DIP Lenders, and, therefore, precluded any possibility of recovery of costs imposed on the estates for the exclusive benefit of those parties. The "general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs." *In re Codesco Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982).

39. Several courts have held that the statutory mandate embodied in Section 506(c) is not properly subject to waiver. As one court aptly stated, "[t]he debtor and secured creditor do not constitute a legislature. Thus, they have no right to implement a private agreement that effectively

changes the bankruptcy law with regard to the statutory rights of third parties." *In re Colad Grp., Inc.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005); *accord Hartford Fire Ins. Co. v. Norwest Bank Minn (In re Lockwood Corp.)*, 223 B.R. 170, 176 (B.A.P. 8th Cir. 1998) (provision in financing order purporting to immunize postpetition lender from section 506(c) surcharges unenforceable); *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 474 (W.D. Mich. 1991) (waiver of Section 506(c) surcharge rights "not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal").

40. Moreover, a 506(c) waiver is wholly inappropriate absent the payment of all administrative expenses. Until such time as it becomes clear that all costs of administering these Chapter 11 Cases have been adequately provided or reserved for, the Debtors should not be permitted to waive their section 506(c) surcharge rights. As such, the proposed 506(c) waiver is premature and should not be included in the Final DIP Order.

E. The Section 552(b) Waiver Should Not Be Permitted

41. The Final DIP Order seeks to waive section 552(b). The purpose of the equities of the case exception is to "prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code." *In re Cafeteria Operators, L.P.*, 299 B.R. 400, 409 (Bankr. N.D. Tex. 2003) (quoting *In re Patio & Porch Sys. Inc.*, 194 B.R. 569, 575 (Bankr. D. Md. 1996)); *In re Muma Servs.*, 322 B.R. 541, 558-59 (Bankr. D. Del. 2005) (quoting *Delbridge v. Prod. Credit Ass'n & Fed. Land Bank*, 104 B.R. 824, 826 (E.D. Mich. 1989)) ("The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has

appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate to cause the appreciated value."). A prospective waiver of the "equities of the case" exception contained in section 552(b) of the Bankruptcy Code is inappropriate where—as is the case here—unsecured creditor recoveries are virtually zero. The Court should not approve the waiver of the exception as to the Committee. *See In re Metaldyne Corp.*, No. 09-13412 (MG), 2009 WL 2883045, at *6 (Bankr. S.D.N.Y. June 23, 2009) (holding, in the context of a proposed Bankruptcy Code section 552(b) waiver, that "the waiver of an equitable rule is not a finding of fact and the Court, in its discretion, declines to waive prospectively an argument that other parties in interest may make"); *see also In re iGPS Co. LLC*, No. 13-11459 (KG) (Bankr. D. Del. July 1, 2013) [Docket No. 225] (no waiver of the "equities of the case" exception with respect to creditors committee).

F. The Marshaling Waiver Should Not Be Permitted

42. The Final DIP Order indicates that the DIP Lender shall not be subject to "marshaling" or any similar doctrine. *See* Final DIP Order at ¶ 41. Marshaling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or creditor having less security." *Meyer v. United States*, 375 U.S. 233, 237 (1963); *see also In re Advanced Marketing Servs., Inc.*, 360 B.R. 421, 427 n.8 (Bankr. D. Del. 2007) (requiring a "senior secured creditor to first collect its debt against the collateral other than that in which the junior secured creditor holds an interest, thereby leaving that collateral for the junior secured creditor's benefit."). Marshaling can be pursued by creditors' committees for the benefit of unsecured creditors. *See, e.g.*, *In re America's Hobby Ctr., Inc.*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998) ("Because a

debtor in possession has all the rights and powers of a trustee . . . [the Committee] standing in the shoes of the debtor in possession . . . can assert this [marshaling] claim.").

43. Here, the Debtors seek to limit the Court's ability to apply marshaling. The DIP Lenders have liens on a diverse pool of assets, and it makes no sense to waive this doctrine. If, however, the Court determines to grant liens on the proceeds of Avoidance Actions, then the Court should require the DIP Lenders to satisfy their liens from the proceeds of other assets subject to their DIP Liens before they look to proceeds of assets on which they did not have liens pre-petition. In any event, waiving the doctrine early in these Chapter 11 Cases is unwarranted and could unduly harm unsecured creditors unwittingly.

G. Other Objectionable Provisions

44. In addition to those provisions discussed above, the DIP Facility and Final DIP Order contain other objectionable provisions, including without limitation, the following provisions which should be modified in the Final DIP Order as indicated below and as will be shown in a redline form of order that the Committee intends to file prior to the date of the hearing assuming that the Debtors file a proposed Final DIP Order on the docket reasonably in advance of the date of the hearing.

Issue	**Proposed Resolution**
The DIP Credit Agreement and draft Final DIP Order provide for various revised budgets and reporting to be delivered by the Debtors to the DIP Lenders. ***(Paragraphs 14(d), 15(d), 16(d), 19 of the Final DIP Order)***	Language should be added stating that all budgets and reporting materials related to the DIP Facilities provided to the DIP Lenders should also be provided to the Committee, including but not limited to any revised proposed budgets.

Issue	Proposed Resolution
"In connection with any sale process authorized by this Court, whether effectuated through sections 363, 725, or 1123 of the Bankruptcy Code, each of the DIP Secured Parties and the Prepetition Parties may credit bid up to the full amount of their respective outstanding DIP Obligations and/or the relevant Prepetition Obligations, as applicable, in each case including any accrued and unpaid interest, expenses, fees, and other obligations for their respective collateral, without the need for further Court order authorizing the same pursuant to, and to the extent permitted by, section 363(k) of the Bankruptcy Code, subject in each case to the Prepetition Intercreditor Agreement and the DIP Intercreditor Agreement (as defined below), as applicable, and the priorities and reservations of rights set forth herein." ***(Paragraph 22 of the Final DIP Order)***	Language should be added making any credit bid subject to the Challenge Period.
The rollup of the Prepetition RCF Facility and the Prepetition Term Loan contemplated under the Final DIP Order must still be subject to the Challenge Period	Language should be added making the roll-ups subject to the Challenge Period.
"The Debtors shall not sell, transfer, lease, encumber, or otherwise dispose of any portion of the DIP Collateral other than in the ordinary course of business without the prior written consent of the DIP RCF Agent, the DIP RCF Lenders, the DIP Term Loan Agent, the DIP Term Loan Lenders, the Prepetition RCF Secured Parties, the Prepetition Term Loan Secured Parties, the DIP Contractor, and CTCI, as applicable and no such consent shall be implied, from any other action, inaction, or acquiescence by DIP RCF Agent, the DIP Term Loan Agent, the DIP Contractor, the DIP Lenders, or the Prepetition Parties), except as otherwise provided for in the DIP Documents or as ordered by the Court, and subject in all respects to the DIP Intercreditor Agreement."	Language should be added clarifying that any disposal of the DIP Collateral outside the ordinary course of business also requires an order of the Court.

Issue	Proposed Resolution
(Paragraph 25 of the Final DIP Order)	
DIP Lenders' and Prepetition Secured Parties' fees must contain sufficient information for a reasonableness determination and must be subject to reallocation. ***(Paragraph 34 of the Final DIP Order)***	Invoices provided to the Debtors, UST, and Committee should include sufficient detail to ascertain the nature, extent, and reasonableness of the services provided, redacted only to the extent necessary to preserve privileges and immunities. DIP Lenders' and Prepetition Secured Parties' professional fees must be subject to reallocation if Prepetition Secured Parties not secured or if there is a successful challenge.
All but three of the Debtors are Delaware limited liability companies. Such Debtors' members have standing as members of the limited liability company to assert claims. *See* Delaware Limited Liability Company Act, 6 Del. C. §18-1002. Unless the Committee steps into such Debtor's shoes, its estate will not be able to benefit from Avoidance Actions and other claims it may have as each company's sole member, has not, and cannot, exercise these rights. *See, e.g.*, *CML V, LLC v. Bax*, 6 A.3d 238, 241 (Del. Ch. 2019), *aff'd*, 28 A.3d 1037 (Del. 2011), as corrected (Sept. 6. 2011) (holding that the plain language of Section 18-1002 limits standing to "a member or an assignee" and not a creditor); *but see In re The McClatchy Co.*, No. 20-10418 (Bankr. S.D.N.Y. Jul. 6, 2020) (rejecting the argument that the Delaware LLC Act prevented the court from conferring standing on the committee to bring derivative claims on behalf of limited liability company debtors).	The Committee assumes that nobody intends for the Challenge Period and any lawsuit or contested matter stemming therefrom or in connection therewith to be illusory. Accordingly, the Final DIP Order should include a stipulation and agreement from the DIP Lenders, the Prepetition RCF Lenders, the Prepetition Term Loan Lenders, and CTCI that the Court has the authority to confer standing on the Committee to initiate an adversary proceeding or contested matter and that such parties will not raise as a defense in connection with any standing motion, challenge, or adversary proceeding or contested matter the ability of the Committee to file derivative suits on behalf of the Debtors.

RESERVATION OF RIGHTS

45. The Committee and its professionals reserve the right to further object to the DIP Motion and any other ancillary issues on any grounds and to respond to any reply of the Debtors, the DIP Lenders, or any other party-in-interest, either by further submission to this Court, at oral argument or by testimony to be presented at the Final Hearing or any other hearing.

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CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court deny the DIP Motion in its current form. If the Court determines to grant the relief requested in the DIP Motion on a final basis, the Committee respectfully requests that the objections raised herein be addressed and incorporated into a revised proposed final order that is acceptable to the Committee. The Committee further requests that the Court grant such other and further relief as the Court deems just and proper.

Dated: May 20, 2025
Dallas, Texas

MCDERMOTT WILL & EMERY LLP

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CERTIFICATE OF SERVICE

I certify that on May 20, 2025, 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/ Charles R. Gibbs
Charles R. Gibbs