Hearing Date: April 25, 2017 at 2:00 p m. (Eastern Time)
Objection Deadline: April 18, 2017 at 4:00 p m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
SUNEDISON, INC., *et al.*,	Chapter 11 Case No. 16-10992 (SMB) (Jointly Administered)
Debtors.[1]	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' LIMITED OBJECTION TO DEBTORS' MOTION FOR ORDER (I) AUTHORIZING DEBTORS (A) TO OBTAIN REPLACEMENT POSTPETITION FINANCING PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), AND 364(e), (B) TO UTILIZE CASH COLLATERAL PURSUANT TO BANKRUPTCY CODE SECTION 363, AND (C) TO REPAY EXISTING POSTPETITION FINANCING PURSUANT TO BANKRUPTCY CODE SECTION 363(b), (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES PURSUANT TO BANKRUPTCY CODE SECTIONS 361, 362, 363 AND 364 AND (III) SCHEDULING HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND (c)

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number are as follows: SunEdison, Inc. (5767); SunEdison DG, LLC (N/A); SUNE Wind Holdings, Inc. (2144); SUNE Hawaii Solar Holdings, LLC (0994); First Wind Solar Portfolio, LLC (5014); First Wind California Holdings, LLC (7697); SunEdison Holdings Corporation (8669); SunEdison Utility Holdings, Inc. (6443); SunEdison International, Inc. (4551); SUNE ML 1, LLC (3132); MEMC Pasadena, Inc. (5238); Solaicx (1969); SunEdison Contracting, LLC (3819); NVT, LLC (5370); NVT Licenses, LLC (5445); Team-Solar, Inc. (7782); SunEdison Canada, LLC (6287); Enflex Corporation (5515); Fotowatio Renewable Ventures, Inc. (1788); Silver Ridge Power Holdings, LLC (5886); SunEdison International, LLC (1567); Sun Edison LLC (1450); SunEdison Products Singapore Pte. Ltd. (7373); SunEdison Residential Services, LLC (5787); PVT Solar, Inc. (3308); SEV Merger Sub Inc. (N/A); Sunflower Renewable Holdings 1, LLC (6273); Blue Sky West Capital, LLC (7962); First Wind Oakfield Portfolio, LLC (3711); First Wind Panhandle Holdings III, LLC (4238); DSP Renewables, LLC (5513); Hancock Renewables Holdings, LLC (N/A); EverStream HoldCo Fund I, LLC (9564); Buckthorn Renewables Holdings, LLC (7616); Greenmountain Wind Holdings, LLC (N/A); Rattlesnake Flat Holdings, LLC (N/A); Somerset Wind Holdings, LLC (N/A); SunE Waiawa Holdings, LLC (9757); SunE Minnesota Holdings, LLC (8926); SunE MN Development Holdings, LLC (5388); and SunE MN Development, LLC (8669). The address of the Debtors' corporate headquarters is 13736 Riverport Dr., Maryland Heights, Missouri 63043.

The Official Committee of Unsecured Creditors (the "Committee") of SunEdison, Inc. ("SUNE") and its affiliated debtors and debtors in possession (collectively, the "Debtors") hereby submits this limited objection (the "Objection") to the *Debtors' Motion for Order (I) Authorizing Debtors (A) To Obtain Replacement Postpetition Financing Pursuant to Bankruptcy Code Sections 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), and 364(e), (B) To Utilize Cash Collateral Pursuant to Bankruptcy Code Section 363, and (C) To Repay Existing Postpetition Financing Pursuant to Bankruptcy Code Section 363(b), (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to Bankruptcy Code Sections 361, 362, 363 and 364 and (III) Scheduling Hearing Pursuant to Bankruptcy Rules 4001(b) and (c)* [Dkt. No. 2732] (the "New DIP Motion").

PRELIMINARY STATEMENT

The New DIP Motion is the latest in a series of actions taken by the Debtors, apparently at the behest of their pre-petition secured creditors, to further those creditors' aim of liquidating the Debtors' assets for the secured creditors' exclusive benefit. As with prior actions along the same lines, this alliance once again comes at the disproportionately unfair expense of the Debtors' unsecured creditors, who had no input into the purportedly lengthy negotiation of the replacement post-petition financing (the "New DIP"). The Committee did not even receive a draft of the proposed agreement governing the New DIP until barely a week before the deadline to object.

The New DIP Motion crystalizes what has been increasingly apparent in these cases for some time—the Debtors appear to have abandoned any pretense of preserving their estates for the benefit of *all* of their constituencies, and instead are primarily focused on maximizing the recoveries of their pre-petition secured creditors. This state of affairs is especially apparent in

light of the Debtors' recently filed proposed plan of reorganization [Dkt. No. 2671] (the "Proposed Plan"), which contemplates nominal distributions to the unsecured creditors mainly from settlement of the Committee's objection to the existing debtor in possession financing (the "Existing DIP"), though even some of those previously bargained for protections are eroded by the New DIP. As explained below, the New DIP further erodes those already inadequate distributions through, among other things, unreasonable financial terms that would force the Debtors to pay above-market up-front fees and interest rates on the New DIP, as well as certain non-financial terms that allow the prepetition secured lenders to extract additional value by effectively reneging on prior agreements intended to protect what little value exists in the estates for the benefit of the unsecured creditors and undermining certain existing causes of action filed by the Committee and other unsecured creditors. At the same time, contrary to the statements made by Philip Gund in his declaration in support of the New DIP Motion [Dkt. No. 2733] (the "Gund Declaration"), the New DIP provides no incremental liquidity to the Debtors—aside from simply paying off the Existing DIP—and in fact causes at least US ***$77.4 million*** in cash from the Debtors' already thin balance sheet to evaporate into the prepetition secured lenders' pockets.[2] The New DIP also purports to carry over and finalize the roll-up of over US $300 million of the Existing DIP, even though under the terms of the Existing DIP Order [Dkt. No. 523] and the Local Bankruptcy Rules, the roll-up should be unwound entirely because it has

[2] Mr. Gund states without elaboration that the New DIP "will provide approximately $65 million in new money." Gund Declaration ¶ 10. However, the Debtors have submitted documents detailing the "sources and uses" for the new financing that appear to indicate that the Debtors will in fact turn over US $77,410,414.33 from their existing accounts to, among other things, pay for the US [redacted] in fees associated with the New DIP. *See Notice of Supplemental Filing to the Debtors' Motion for Order (I) Authorizing Debtors (A) To Obtain Replacement Postpetition Financing Pursuant to Bankruptcy Code Sections 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), and 364(e), (B) To Utilize Cash Collateral Pursuant to Bankruptcy Code Section 363, and (C) To Repay Existing Postpetition Financing Pursuant to Bankruptcy Code Section 363(b), (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to Bankruptcy Code Sections 361, 362, 363 and 364 and (III) Scheduling Hearing Pursuant to Bankruptcy Rules 4001(b) and (c)* [Dkt. No. 2772] (the "Supplemental Filing in Support of New DIP Motion"), Exhibit A ("Term Sheet"), Annex A "Sources and Uses."

"unduly advantaged" the holders of those loans and they weren't secured by this amount on the Petition Date. *See* Existing DIP Order ¶ 2(b)(iii).

These terms are objectionable in light of the negotiating dynamics between the Debtors and the pre-petition secured lenders. In the New DIP Motion, the Debtors justify the terms of the New DIP by claiming that they were severely restricted in their ability to negotiate given the imminent maturity of the Existing DIP and the need for financing in order to continue these cases under chapter 11 in order to "carry out their restructuring goals." New DIP Motion ¶ 29.[3] Of course, the need to renegotiate the Existing DIP would have been readily apparent to them and their pre-petition creditors for many months, so they should not be heard to wield timing as a justification for unreasonable terms.[4]

Rather, the New DIP will actually hurt the value of the collective Debtors' estate. Unsurprisingly, the Debtors fail to mention that, under the Proposed Plan, their "restructuring goals" inure almost entirely to the benefit of the prepetition secured lenders—including each lender to the New DIP. Of all the stakeholders here, it is these prepetition secured lenders that have, by far, the greatest interest in remaining in chapter 11. The secured lenders stand to lose hundreds of millions of dollars in value—primarily from the contemplated sales of the YieldCo interests—if the Debtors allowed the Existing DIP to mature and these cases were converted to chapter 7. The consequences to the secured lenders of not providing additional financing in the form of the New DIP is so apparent that in any true arm's-length negotiation, the Debtors should have been able to extract significant concessions and safeguards. They did not.

[3] The debtors also state that they did not bother to shop around for alternative funding sources based on alleged belief that to do so would have been futile. *See* New DIP Motion ¶ 5. The Committee reserves the right to supplement this objection if and when it has had a chance to depose the relevant witnesses on this point.

[4] Given their many requests for extensions of their exclusivity period, the Debtors cannot credibly argue that they expected to have a plan confirmed in advance of the maturity of the Existing DIP. *See* Dkt. Nos. 826, 1492, 2152, and 2455.

Indeed, the terms of the New DIP are worse than the Existing DIP, and show virtually no regard for the interests of the estates as a whole. The New DIP permits the Debtors' post-petition lenders to once again place liens on currently unencumbered collateral ***at any point*** before the maturity of the New DIP facility. *See* Supplemental Filing in Support of New DIP Motion, Exhibit A ("Term Sheet") at 8. The New DIP requires the Debtors to incur an additional US [REDACTED] in fees immediately, when once again the majority of the debt being incurred by the Debtors is simply various rolled-up amounts (or in this case, the refinancing of those rolled-up amounts) of the prepetition secured lenders' original (and potentially infirm) claims. The New DIP requires a laundry list of mandatory repayments and prepayments, including a required US $55.0 million repayment on October 31, 2017, which represents almost all of the remaining liquidity this New DIP leaves the Debtors upon refinancing, and for which the New DIP lenders are nonetheless charging their full [REDACTED] fees. Finally, the New DIP Order contemplates that the Tranche B Roll-Up Loans, including approximately US [REDACTED] in interest accrued in the previous year, will be fully and finally rolled-up, apparently not subject to the local rule requiring this Court retain the ability to unwind all or a portion of any postpetition protection by virtue of that roll-up. *See* New DIP Order ¶ 2(b)(v). These terms and provisions are a detriment to the estates and their creditors—at least those creditors that were not prepetition secured lenders.

The New DIP does not, at the end of the day, provide new liquidity that benefits all creditors. Instead, the effect of the New DIP will be to force the Debtors to hastily proceed with their Proposed Plan—a plan that purports to settle claims of unsecured creditors out from under the Committee in exchange for a fraction of their worth—before the new schedule of required repayments fully devours their remaining liquidity. Under this New DIP, the *de minimis*

recoveries that might trickle down to the general unsecureds are further, unjustifiably diluted by the Debtors' incurrence of tens of millions of dollars in fees, additional interest expenses, and other administrative costs—including the professional fee burn seen in what amounts to a liquidation of the Debtors' assets. The result will be woefully deficient recoveries for unsecured creditors, while the prepetition secured lenders will have used the benefit of the chapter 11 process to liquidate their collateral at the expense of others.

For these reasons, and as explained in more detail below, even assuming that refinancing the Existing DIP is necessary to keep these cases in chapter 11, the Debtors have failed to carry their burden of showing that the terms of the New DIP are necessary to preserve the Debtors' estates for the benefit of *all* creditors, or that those terms are fair and reasonable under the circumstances. Indeed, given these circumstances, the Committee is highly skeptical that continuing these cases under chapter 11 will provide any benefit to unsecured creditors relative to a chapter 7 liquidation, and is strongly considering moving to convert the cases.

In the immediate absence of a motion to convert, the Committee submits that it would take no position on approval of the New DIP ***if*** the Debtors and New DIP lenders were to agree to modify certain objectionable terms to reduce the impact those terms otherwise would have on the ultimate recoveries to unsecured creditors in these cases and preserve the right to unwind the roll-up and keep the settlement intact. To this end, the Committee has sought to address its concerns outside the context of litigation, by providing the relevant lender parties with proposed changes that would achieve this result. While the Committee remains hopeful that it can reach an agreement outside of litigation, to date, those lender parties have not incorporated such changes into the New DIP.

OBJECTION

I. Legal Framework

Debtor-in-possession financing should only be approved if it "is in the best of interest of creditors generally." *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985). In addition, the terms of the proposed financing should only be approved if they are fair and reasonable under the circumstances, comport with basic notions of fairness and equity, and will ultimately inure to the benefit of the debtor's estate. *See In re Aqua Associates,* 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); *Ames Department Stores*, 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990). A debtor, for the sake of obtaining DIP financing promptly, cannot abrogate its fiduciary duties to its chapter 11 estate and its creditors. *Id.* at 38.

Section 364 financing is not a "secured lenders act" allowing a post-petition secured lender to undo the level "playing field" contemplated by the Bankruptcy Code. As the court in *Ames Department Stores* observed:

> Acknowledging that Congress, in Chapter 11 delicately balanced the hope of debtors to reorganize and the expectations of creditors for payment, the courts have focused their attention on proposed terms that would tilt the conduct of the bankruptcy case; prejudice, at an early stage, the powers and rights that the Bankruptcy Code confers for the benefit of all creditors; or ***leverage the Chapter 11 process*** . . .

Id at 37 (emphasis added); *see also RTC v. Official Unsecured Creditors Comm. (In re Defender Drug Stores, Inc.)*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (emphasizing 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"); *In re Mid-State Raceway*, 323 B.R. 40, 59 (Bankr. N.D.N.Y. 2005) (same); *In re Tenney Village Co., Inc.,* 104 B.R. 562, 568 (Bankr. D. N.H. 1989) (financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of

creditors . . . to one specially crafted for the benefit" of the secured creditor); *In re FCX, Inc.*, 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985) ("[T]he court should not ignore the basic injustice of an agreement in which the debtor, acting out of desperation, has compromised the rights of unsecured creditors").

It is a fundamental tenet of bankruptcy law that a debtor in possession has "an affirmative, overarching duty to reorganize and maximize estate assets for the benefit of all creditors," not just a select few. *In re R.H. Macy & Co.*, 170 B.R. 69, 74 (Bankr. S.D.N.Y. 1994) (*citing NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) ("In Chapter 11 cases where no trustee is appointed, § 1107(a) provides that the debtor-in-possession, *i.e.*, the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate"); *In re Penn Traffic Co.*, 524 F.3d 373, 382 (2d Cir. 2008) ("The interests of the creditors collectively and the bankrupt estate as a whole will not yield easily to the convenience or advantage of one creditor out of many") (citations omitted).

Finally, and importantly, a debtor's obligations to justify the terms of a given financing and to administer the estate for the benefit of <u>all</u> creditors are not abrogated simply because its financing options are limited. *See In re LandSource Communities Development, LLC*, Case No. 08-11111 (Bankr. D. Del. 2008), Hr'g Tr. 206:12-16, July 14, 2008 (in a hearing on a proposed DIP, the court stated that "[t]he standard here is not that there's only one option available to the Debtor, and therefore the Court has to approve it. In my view such an arrangement has to be fair and reasonable under the circumstances. And I don't think this proposed D-I-P financing is"). If it is indeed the case—as it appears to be here—that the estate is being administered for the

benefit of a certain class of creditors, courts will not give deference to the exigencies of the moment or allow path-dependence to control the ultimate outcome of the case. Just because obtaining additional DIP financing might be the Debtors' only path to proceed with their proposed plan, that is not a sufficient reason for the Court to approve unfair terms or relieve the Debtors of their obligation to negotiate at arm's length for fair and reasonable terms. Courts have often recognized this principle in the context of sale objections, which is particularly relevant here as the New DIP is essentially a lifeboat to keep these chapter 11 cases afloat long enough for the secured creditors to capture the benefit of the Debtors' anticipated sale of their valuable interests in the YieldCos to Brookfield. *See, e.g.*, *In re Encore Healthcare Associates*, 312 B.R. 52, 57 (Bankr. E.D.Pa. 2004) (denying sale procedures because "the proposed sale not only generates funds solely of the secured creditor which could not realize value of its collateral by foreclosing and selling the assets itself but more significantly advances no purpose of a chapter 11 proceeding"); *In re Gulf Coast Oil Corp*., 404 B.R. 407, 428 (Bankr. S.D.Tex. 2009) (denying a sale motion because the "only effect of the bankruptcy process would be to transfer the debtors' assets to its secured creditor with benefits that the creditor could not achieve through foreclosure"); *In re Duro Industries, Inc*., 2002 WL 34159091 at *5 (Bankr. D. Mass. Oct. 7, 2002) ("where all equity in a debtor's assets belongs to the secured creditor, with no appreciable expectation of a remainder for unsecured creditors, the liquidation of the assets serves no bankruptcy process and should not be permitted to occur in bankruptcy").

Here, the Debtors have failed to meet their burden of showing that the New DIP is fair and reasonable under the circumstances for three reasons: (1) the fees and interest rates called for by the New DIP are far too high given the prevailing market and the secured lenders' vested interest in continuing these cases in chapter 11; (2) the sources and uses for the New DIP

demonstrate that it will not benefit the entire estate, but rather only the secured creditors; and (3) certain non-financial terms in the New DIP arguably give the parties to it license to further increase their recoveries at the expense of the unsecured creditors.

II. The Financial Terms Of The New DIP Are Not Fair And Reasonable Under The Circumstances

a. Fees and Rates

The New DIP provides that the lenders and their agents will receive tens of millions of dollars in upfront fees and OID for their agreement to enter into the New DIP. These fees are excessive and unwarranted in light of the circumstances and should not be allowed to dilute potential recoveries by the unsecured creditors.

As an initial matter, it is questionable whether this transaction warrants the payment of lender fees at all, much less the substantial ones the lenders seek here. As explained below, the sole use for the New DIP funds is to take out the Existing DIP. Moreover, the lenders into the New DIP are culled exclusively from parties that are lenders to the Existing DIP. In effect, the New DIP simply transfers money from one of the lenders' pockets to the other—all for a ████ fee. The Debtors offer no adequate justification for why these lenders should be so heavily compensated for shuffling their own money around but adding no incremental value to the estate.

The substantial fees contemplated by the New DIP are even more questionable in light of the fact that the existing secured lenders are already heavily invested in seeing the chapter 11 process through to the end. If the existing DIP matures without alternative financing in place, the Debtors will likely be forced to convert these cases to chapter 7 in the near term. Such a result would be anathema to the secured lenders, who stand to reap hundreds of millions of dollars in incremental value from the sale of the Debtors' interests in the YieldCos. This dynamic is no secret, and the Debtors should have been able to use it as leverage to negotiate

favorable financing terms for the New DIP. Instead, they have asked the Court to approve a refinancing that is generally more onerous than the Existing DIP. The Debtors had substantial leverage, but apparently did not exercise that leverage for the benefit of all of their creditors.

The Committee recognizes that additional financing may be necessary if the Debtors are going to keep these cases on the chapter 11 track. But the Debtors have not established that the New DIP terms they negotiated, much less remaining in chapter 11 altogether, is in the interest of the entire estate.[5] Although courts cannot compel a party to offer financing to a debtor, there is a limit to the fees and conditions that can be imposed on the estate in exchange for additional financing. *See In re Defender Drug Stores, Inc.*, 145 B.R. at 317; *In re Ames. Dept. Stores*, 115 B.R. at 39. For the reasons described above, the Debtors have failed to establish that the lucrative fee and interest terms of the New DIP are within that limit under these circumstances.

b. Sources and Uses

In their motion to approve the New DIP, the Debtors repeatedly claim that this agreement will provide unalloyed benefits for the estate, primarily by "allowing [the debtors] to carry out their restructuring goals" (New DIP Motion ¶¶ 24, 29). Tellingly, the motion has nothing to say about what those goals are.

From the perspective of the unsecured creditors, on its face this New DIP does more harm than good to the estate as a whole. For starters, it provides <u>no</u> incremental liquidity to the Debtors. Every dollar of the US $640 million in funds coming in is earmarked to take out obligations under the existing DIP. *See* Term Sheet at 2. And even that US $640 million is not enough to satisfy the terms of this new deal—rather, the Debtors must come out-of-pocket for an

[5] Indeed, throughout their Motion, the Debtors simply assume that working towards confirmation of the proposed plan is in the best interests of the estate, without even considering other alternatives. (*See, e.g.*, New DIP Motion ¶¶ 1, 6, 23, 26, 33, 52.) But, as this Court has noted on several occasions, it is far from clear that this is the best outcome for the estate as a whole. *See, e.g.*, Scheduling and Discovery Dispute Hr'g Tr. at 15:4-15, Jan. 10, 2017 (COURT: "I mean, why are we wasting—why are we spending time with a bankruptcy [if there are not going to be distributions to unsecured creditors]?")

additional US $77 million to satisfy additional obligations under the Existing DIP. *Id*., Annex A ("Sources and Uses"). The New DIP also requires the Debtors to pay down an additional US $55 million of the "new money" within approximately six months. *Id.* at 8.[6] The New DIP thus injects no liquidity into the estate and in fact worsens the debtors' liquidity constraints. And the Debtors have provided no indication of where they expect this additional money to come from.

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The appropriate remedy for the Debtors' failure to carry their burden of showing the financial terms of the New DIP are fair and reasonable under the circumstances and benefit the estate as a whole, short of denying the New DIP Motion and potentially triggering a conversion, is to require that the Debtors and lenders to the New DIP insert language in the deal documents and in the proposed court order ensuring that the New DIP fees and expenses will have no effect on the ultimate recovery of the remainder of the bankruptcy estate, and should instead come exclusively out of the secured creditors' recoveries. In addition, other untenable provisions must be removed (as discussed below). If these cases are to proceed through chapter 11 for the sole benefit of the secured lenders, those lenders should pay for that privilege, not the Debtors' unsecured creditors.

III. Certain Non-Financial Terms Of The New DIP Further Show That It Is Neither Fair And Reasonable Nor Designed To Benefit The Estate As A Whole.

In addition to the objectionable financial terms of the New DIP, the New DIP contains several objectionable non-financial provisions. The general purpose of these is to allow the prepetition secured lenders to reach their hands even further into the Debtors' unsecured creditors' pockets. It does so in three ways: (1) by modifying the terms of the Existing DIP to

[6] The New DIP also requires the Debtors to make additional mandatory prepayments on a monthly basis throughout the term of the loan, the amount of which depends on certain conditions, and the overall effect of which is to require the Debtors to make payments on the New DIP whenever their cash-on-hand rises above a certain level. *See* Term Sheet at 6-7.

expand the definition of "guarantors" and "collateral" in a way that will potentially increase the New DIP Lenders' hold on the Debtors' assets, (2) by modifying the Committee Annex of the Existing DIP to arguably roll back agreements struck with the Committee during settlement negotiations over the Existing DIP, and (3) by purporting to bar the Committee from continuing to pursue its OID Allowance Objections (as defined in the Stipulation and Agreed Order [Dkt. No. 8] in *Official Committee of Unsecured Creditors v. Wells Fargo Bank, N.A.*, Adv. Pro. No. 16-01228 (the "Filed Committee Adversary Proceeding")), as well as BOKF's Objection to Proofs of Claim Nos. 1490 and 3555 [Dkt. No. No. 1455] (together, the "OID Objections"). Despite the Debtors' assurances in the New DIP Motion that the unsecured creditors' rights will be unaffected by the New DIP (*see, e.g.*, New DIP Motion ¶ 4), the language of the governing documents appears to tell a different story. The Debtors should be required to modify and/or clarify these terms prior to Court approval of the New DIP.

a. Guarantors and Collateral

The Court should require the Debtors to clarify the extent of the guarantees and collateral backstopping the New DIP before approving it. The Term Sheet for the New DIP contains language which basically leaves open-ended the extent of the collateral securing the new money. To wit, the Term Sheet provides that, in addition to the guarantors and collateral securing the Existing DIP, the New DIP will be guaranteed by "such additional entities that are agreed to by the Borrower and the Required Commitment Parties," as well as "senior superpriority priming liens on such assets and equity of the Additional Guarantors that are agreed to by the Borrower and the Required Commitment Parties." Term Sheet at 1, 8. The Required Commitment Parties are a majority of the New DIP lenders. Thus, the Term Sheet indicates that the parties to the

New DIP believe that they can expand the scope of the collateral securing the New DIP at their ***sole*** discretion.

The potentially negative effect of this language on the unsecured creditors is obvious—it gives the New DIP Lenders and the Debtors a blank check to encumber the few remaining pockets of value in the estate. Although the Debtors and New DIP lenders have represented to the Committee that they did not intend to expand the scope of collateral beyond what was called for under the Existing DIP, to date they have also offered no assurance that they will not seek to do so in the future. The Committee therefore has no recourse but to raise the issue here, and ask the Court to conclude that this language is neither fair nor reasonable under the circumstances and should be omitted or modified.

b. Committee Annex

As currently written, the New DIP modifies an important and heavily negotiated term in the Committee Annex to the Existing DIP Order, and the Court should also require the Debtors to excise or clarify this language in the Committee Annex before approving the New DIP.

The Committee Annex provides that, upon repayment of the Term Loan Facility and L/C Facility portions of the Existing DIP facility, the DIP Lenders and the other Prepetition Secured Parties waived their right to receive 10% of any proceeds above US $175 million from the sale of assets of Non-Prepetition Obligors. It is unquestioned that the proposed New DIP repays the relevant pieces of the Existing DIP. Thus, should the Court approve the New DIP, the terms of that provision would become effective, entitling the unsecured creditors to their share of certain asset sales. Rather than honor the bargain that was struck after weeks of negotiation, however, the Debtors and the New DIP lenders here expect to roll forward the triggering event for this provision such that it only becomes effective once the new DIP money loan is repaid. *See*

Committee Settlement Annex, Annex II of the draft New DIP Credit Agreement at 8-9, “After repayment of the **Replacement New Money** DIP facility […] the Replacement DIP Lenders and Prepetition Secured Parties waive any right to receive 10 percent […]” (emphasis added). As with the rest of the proposed DIP, these terms were modified without any input from the Committee—the very party who stands to lose the benefit of its earlier bargain.

There is simply no basis upon which the New DIP lenders should be permitted to fundamentally alter the bargain struck between the Existing DIP lenders and the Committee. This “roll-forward” represents a change to the Committee Annex without the Committee’s consent, which is expressly forbidden by the Existing DIP Order, and should be disallowed by this Court.

c. OID Objections

The Debtors’ proposed order approving the New DIP (the “Proposed New DIP Order” [Dkt. No. 2774, Exhibit 1]) contains language that, if put into effect, would arguably foreclose the pending OID Objections. Paragraph 9 of the Proposed New DIP Order purports to limit third-party rights, bind all parties to the Claims Stipulations, bar challenges and claims, and render the Prepetition First Lien Secured Obligations and the Prepetition Second Lien Obligations allowed claims in full, in each case subject only to the Filed Committee Adversary Proceeding. Moreover, the Claims Stipulations in the Proposed New DIP Order provide that “there exist no claims or causes of action against any of the DIP Agent, the other DIP Secured Parties, the Existing DIP Secured Parties, or the Prepetition Secured Parties . . . other than the claims and causes in the [Filed Committee Adversary Proceeding].” This language appears intended to undermine the OID Objections (which, in addition to the stand-alone objection filed

by BOKF, have been carved out of the Adversary Proceeding pursuant to the Stipulation referenced above) and should be modified or excised prior to any approval of the New DIP.

IV. The Outstanding US $300 Million Tranche B Roll-up Should Be Unwound

Finally, the Court should unwind the outstanding US $300 million Tranche B Roll-Up. In addition to the US $640 million in "new" money, the New DIP Motion also seeks Court approval to extend the roll-up of US $300 million of pre-petition debt and approximately US [redacted] in PIK interest that comprises a portion of the Tranche B Roll-Up Loans in the Existing DIP. The Court should deny this request.

Local Bankruptcy Rule 4001-2(k)(3) provides that any order approving a roll-up shall:

> reserve[] the right of the Court to unwind, after notice and hearing, the post-petition protection provided to the pre-petition lender or the pay down of the pre-petition debt, whichever is applicable, in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, or priority of the pre-petition lender's claims or liens, or a determination that the pre-petition debt was undersecured as of the petition date, and the cross-collateralization or rollup unduly advantaged the lender.

Based on the results of the completed asset sales, coupled with the professional fee burn and other administrative expenses in this case, it has now become abundantly clear that the second lien prepetition claims will suffer a substantial deficiency regardless of the precise terms on which these cases are concluded. *See, e.g.* Declaration of Homer Parkhill in Support of New DIP Motion [Dkt. No. 2732] ¶ 11 (acknowledging that the prepetition second lien lenders will be impaired). Indeed, it appears likely that even the rolled-up portion of those claims may be undersecured, particularly in light of the Committee's pending Adversary Proceeding and the OID Objections, which may substantially reduce the second liens' overall claims.[7]

[7] While the exact distributions that may be available from the Debtors' estate is unclear, there is no doubt that the prepetition second lien lenders as a whole will be undersecured. Moreover, with regard to the Tranche B Roll-Up Loans specifically, the Committee reserves the right to supplement this Objection with additional information gleaned through discovery or otherwise when it becomes available.

Moreover, it is self-evident that the second lien lenders have garnered an undue advantage from the partial roll-up of its prepetition claims. Among other things, the accrual of US ██████ in PIK interest is a substantial benefit that second lien lenders would not have been entitled to as holders of an undersecured claim as of the Petition Date. Fundamentally, in the case of a partially secured creditor, as the second lien lenders clearly are, the Bankruptcy Code prohibits the allowance against and payment by the bankruptcy estate of postpetition interest. *See* 11 U.S.C. § 506(b). The second lien lenders circumvented that prohibition in the Existing DIP by carving a $300 million slice out of approximately $950 million in Prepetition Second Lien Obligations, rolling-up that slice into the Existing DIP and thereafter purporting to accrue approximately ██████ in pay-in-kind interest on that slice to assert as administrative expenses against these bankruptcy estates.[8] Unfortunately in these cases, allowing the Tranche B Roll-Up Lenders' claim for an additional ██████ of what should be disallowed unmatured interest under section 502(b)(2) of the Bankruptcy Code constitutes undue advantage and then some.[9] The lenders advantaged themselves early in the case with the idea that stability and the chapter 11 process would reap substantial returns for all parties and ultimately benefit everyone. This has unfortunately not been shown to be accurate. The second lien lenders will have a substantial unsecured deficiency claim at the culmination of these cases, a fact made evident by the terms of the Proposed Plan itself.

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[8] Notably, as Defendants in the Committee's Adversary Proceeding, the second lien lenders sang a much different tune, insisting to the Court that the January 11, 2016 financing was a single integrated facility, pieces of which should not be treated in isolation. *See* February 16, 2017 Hr'g Tr. at 29:3-13 (L. Crowley) ("If you look at the company's own filings, the 8-K that they filed announcing the transaction, it's plain as day that the company went through a single integrated set of restructuring transactions in January of 2016. And in fact, we share collateral with the indenture trustee that Mr. Platt represents. There's a single collateral agent -- a collateral agency agreement, and a single collateral pool, that both sides signed. So, the idea that you can sort of disconnect the exchange on the notes and the term loan, I think, is completely unrealistic.")

[9] The same is true of the ██████ in PIK interest on the $50 million rolled-up slice which the New DIP, if approved, would be used to pay off in cash in full.

Thus, because it is readily apparent that the second lien lenders were undersecured as of the Petition Date, and because the those lenders have received undue advantages from the roll-up of their pre-petition debt, the prerequisites for unwinding this portion of the Existing DIP have been satisfied. The Court should therefore invoke Local Rule 4001-2(k)(3) and order that the Tranche B Roll-Up Loans be unwound.

CONCLUSION

For the foregoing reasons, the Committee respectfully requests that the Court enter an order (i) conditioning the approval of the New DIP Motion on the Debtors' undertaking to modify the terms of the New DIP to adequately address the issues raised herein; and (ii) granting such other relief as the Court deems just and proper.

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Respectfully submitted,

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