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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
REVLON, INC., *et al.*,	:	Case No. 22-10760 (DSJ)
	:	(Jointly Administered)
Debtors.[1]	:	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (IV) MODIFYING AUTOMATIC STAY, (V) SCHEDULING A FINAL HEARING, AND (VI) GRANTING RELATED RELIEF

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[1] The last four digits of Debtor Revlon, Inc.'s tax identification number are 2955. Due to the large number of debtor entities in these Chapter 11 Cases, for which the Court granted joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at https://cases.ra.kroll.com/Revlon. The location of the Debtors' service address for purposes of these Chapter 11 Cases is: One New York Plaza, New York, NY 10004.

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The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the Chapter 11 cases of Revlon, Inc. and its affiliated debtors (collectively, the "**Debtors**," the "**Company**," or "**Revlon**") respectfully submits this Objection to the *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Modifying Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* [Docket No. 28] (the "**DIP Financing Motion**").[2] In support of this Objection,[3] the Committee states as follows:

PRELIMINARY STATEMENT

1. Revlon's Chapter 11 case is one of the largest and most important bankruptcies in America. It initiated as a "free-fall" case and, today, is a mess. It will take time, disciplined thought, and effort for this case to reach a rational and legally proper conclusion. There are two upfront concerns.

2. First, no one today knows what Revlon is worth, as a total business enterprise or as an aggregation of business sub-units. The bankruptcy was rushed by an acute liquidity problem. The company has not: (1) announced a reorganization strategy; (2) commenced an organized sale

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[2] On June 17, 2022, the Court entered an order approving the relief requested in the DIP Financing Motion on an interim basis [Docket No. 70] (the "**Interim DIP Order**"). Capitalized terms used in this Objection but not otherwise defined herein shall have the meaning ascribed to them in the DIP Financing Motion and, as applicable, the Interim DIP Order.

[3] This Objection refers to the proposed Final Order on the DIP Financing Motion, as well as certain of the DIP credit agreements, in each case in the form circulated by the BrandCo Lenders' counsel to the Committee and others prior to the date of this Objection. The Committee reserves all rights with respect to any further changes to such documents, including but not limited to all rights and arguments pertaining to the Final Order and credit agreements as originally filed in connection with the DIP Financing Motion.

process, in whole or in part; or (3) published a long-range business plan. Revlon appears to have considerable work to do before its "reorganization value" can be reliably determined and realized.

3. Second, Revlon has one of the most convoluted "value-allocation" dilemmas ever in the history of Chapter 11. A little more than two years before the filing, Revlon reengineered its capital structure. It moved intellectual property (representing an undetermined but quite substantial portion of its value) out of its then-present corporate entities and into new "special purpose" subsidiaries (generally, referred to as the "**BrandCos**"). The BrandCos then guaranteed new debt collateralized by the IP. The move fleeced unsecured creditors at the legacy Revlon companies for the benefit of the new BrandCo Lenders, some of whom simply "traded up" their legacy debt position into this new BrandCo debt. The maneuver was in violation of pre-petition lending arrangements, prompted substantial pre-petition litigation, and raises a host of issues for this bankruptcy to work its way through.

4. This is the prism through which the Court must look at the Debtors' proposed Term DIP Loan. The financing is provided by certain of the BrandCo Lenders. These are the same lenders that: (i) were the beneficiaries of the IP transfers two years ago; (ii) are, today, the primary targets for estate litigation sounding in, among other theories, fraudulent transfer and equitable subordination; and (iii) are clearly motivated to front-run the Chapter 11 process, dismantle the adversary process, and, thereby, seize the company before its value has been determined and/or obstruct all litigation challenges they know are coming for them. The proposed Final Order and Term DIP Credit Agreement narrowly constrict time and funding for a reasonable investigation and an orderly presentation of issues to this Court. This is inconsistent with bankruptcy jurisprudence and inappropriate under the case circumstances.

5. If the objective of Chapter 11 is thoughtful, reasoned negotiation towards a fully consensual resolution, this is no way to go about it. The Committee has repeatedly approached the BrandCo Lenders requesting that they adopt a more accommodative stance. But, as of the date of this filing, they are unwilling. It is now left to the Court to consider the case implications.

6. The following provisions of the final order must be modified to restore a more even-handed Chapter 11 process that is consistent with the Bankruptcy Code:

- **<u>Milestones [Term DIP Credit Agreement ¶ 6.17; ABL DIP Agreement ¶ 6.20]</u>.** The Debtors' proposed milestones require entry into an RSA by November 1, 2022, and the filing of an "Acceptable Plan" by November 30, 2022. To achieve this calendar, the Debtors must begin plan negotiations almost immediately – before the Debtors' revenue for the "critical" holiday season is known[4] and without an opportunity to undertake the kind of operational improvements contemplated by the Bankruptcy Code.

  The Committee believes an extension of the milestones by at least three (3) months [redacted] is required. In order to ensure case progress, the Committee has also suggested that this extended timeline could be coupled with additional, restructuring-oriented interim milestones which would not require the Debtors to commit themselves to a reorganization and business plan structure so early in this case.

- **<u>"Acceptable Plan" [Term DIP Credit Agreement, Definitions]</u>.** The DIP Milestones currently require the Debtors to promulgate an "Acceptable Plan" as to the BrandCo Lenders, requiring not only the repayment of their DIP Term Loans, but also either the supermajority BrandCo Lenders' consent or repayment of the prepetition BrandCo debt in full and in cash. This is tantamount to a *sub rosa* plan, as it drastically narrows the Debtors' (and other constituencies') range of options in structuring a plan and effectively would give the BrandCo Lenders a veto over plan terms (assuming the Debtors are not able to refinance the DIP Obligations). The Term DIP Credit Agreement should not presume the enforceability or the treatment (e.g., payment in full in cash) of any prepetition creditor constituency, especially where, as here, prepetition transactions and litigation demonstrate clear grounds for challenge. The Term DIP Credit Agreement should be revised so as to not to require repayment of prepetition secured debt in full in cash or to otherwise give the Prepetition BrandCo Lenders a veto.

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[4] The Debtors themselves observe that "a third of the revenue of this company" ordinarily "comes in the fourth quarter during the critical holiday season and new product development season that occurs from October till December." June 16, 2022 Hr'g Tr., at 111:14-17.

- **Marshalling and Other Waivers [Final Order ¶¶ 8-11].** The "anti-marshalling" provisions of the DIP Facilities would permit the BrandCo DIP Lenders (as defined below) to repay themselves first from proceeds of litigation against themselves and avoidance actions generally, as well as other unencumbered assets, if any. Moreover, it would allow the BrandCo Lenders to argue that their pre-petition and post-petition loans should be deemed to have been repaid first from the assets of RCPC and its operating subsidiaries, on which they are being granted DIP Liens and retain their prepetition liens on a *pari passu* basis with the 2016 Term Loans, rather than having to look first to the BrandCo assets where they have the exclusive purported secured claims. In this way, their overall recovery would be enhanced at the expense of all other secured and unsecured creditors of the estate whose claims lie at RCPC and its subsidiaries. The waivers of Section 506(c) and Section 552(b) protections further enhance the BrandCo DIP Lender recoveries, in each case by depriving the Company and unsecured creditors of rights provided under the Bankruptcy Code designed to ensure an equitable distribution. This is not appropriate under the extraordinary circumstance presented, in which the lenders are the primary target of billion-dollar litigation. Litigation claims *against* BrandCo DIP Lenders should not be a source of repayment *to* the BrandCo DIP Lenders. If these waivers are to be permitted at all, the Estates must be able to require that the BrandCo DIP Lenders marshal such that any litigation proceeds (particularly from litigation where the BrandCo DIP Lenders are the defendants) are the last proceeds applied for repayment of the Term DIP Loans.

- **Encumbrance of Litigation Claims [Final Order ¶¶ 5(a), 6(a)(ii-iii), 14(b), 15(a-b), 16(a-b)].** The DIP Loans are to be secured, not only by all commercial and business assets, but also all estate causes of action and their proceeds. This includes the proceeds of all avoidance and other actions (including commercial tort claims), including those assertable against the BrandCo Lenders. This is perverse: If the BrandCo Lenders did wrong, they should not be allowed to recoup judgment proceeds as the first source of repayment for the DIP Loans and, worse, they should not be enabled to foreclose on estate claims against themselves if there is a default under the DIP Loans. This is not only uncommercial and unreasonable, it is inappropriate under clear bankruptcy jurisprudence. It effectively gives the BrandCo DIP Lenders a release prior to the Committee's or any other party in interest's having investigated potential claims and allows them to seek satisfaction of their claims from proceeds of their own misconduct. Avoidance Proceeds and other recoveries generated by litigation against the BrandCo DIP Lenders (and those complicit in the BrandCo transactions) should be carved out of the liens and superpriority claims securing the Term DIP Loans. At worst, as noted above, such recoveries should be the last source of repayment for the Term DIP Loans.

- **<u>Challenge Deadline/Budget [Final Order ¶¶ 29-30]</u>.** The Debtors propose a 75-day Challenge Period, and a total budget of $50,000 for the Committee's investigation. Again, this is Revlon. This is not some garden-variety widget company bankruptcy. And, again, the BrandCo issues are of extreme complexity and importance to our jurisprudence.

  - The proposed 75-day Challenge Period should be extended to 120 days (consistent with the requested DIP Milestone extension).

  - There should be no financial limitation on the Committee's investigation. Notably, the Debtors propose to pay the BrandCo Lenders from the Estate for defending any Challenge but to impair the Committee's resources to do so (both by limiting budget *per se* and limiting the scope of permissible charges). This creates a fundamentally unfair playing field.

  - The Company and its current management and advisors were closely involved in the transactions providing cause for the most likely Challenge. Given this, the Committee should be granted automatic standing to assert any Challenge on behalf of the Estates and, once a Challenge is timely filed, the Committee should be allowed to amend its proposed complaint in accordance with the normal rules of civil procedure.

  - The Challenge Period and investigation limitations should be further revised in a variety of ways discussed below, *e.g.*, to permit a Challenge to the 2016 Term Loan, and should not apply to any marshalling, inter-Debtor value allocation, or other plan-related issues.

- **<u>Intercompany DIP [Final Order ¶ 5(c)]</u>.** Through the proposed Intercompany DIP, the BrandCo Lenders receive cash payments of interest on their DIP and prepetition loans from RCPC (as the Borrower on these loans) as adequate protection, while large superpriority secured claims build up at the BrandCo level in their favor, resulting in a transfer of value from the RCPC operating companies to the BrandCos. By contrast, prior to the Petition Date RCPC would pay interest on the BrandCo 2020 loans and make royalty payments under the BrandCo license agreement, which would make a round trip back to RCPC as dividends. The cash flow burden that falls solely upon RCPC, in other words, is the same, but the Intercompany DIP improves the BrandCo Lenders' position by virtue of the creation of Intercompany DIP claims at the BrandCos. Thus, RCPC is obligated to both (i) pay all of the interest which accrues on the prepetition and postpetition BrandCo Loans without any corresponding contribution from the BrandCos and (ii) become liable for the Intercompany DIP obligations due to the BrandCos. RCPC is doubly burdened and the BrandCos are doubly benefited. In order to avoid this "double dip" value transfer in favor of the BrandCo Lenders, the Intercompany DIP should be eliminated, and the BrandCo Lenders and the Estate Parties (including the OCC) can mutually reserve their rights regarding whether license agreement royalties should be paid at a later stage in the case after an investigation of the legitimacy of the 2020 transactions can be conducted and a potential Challenge brought. At a minimum, RCPC should receive an intercompany credit or contribution from the BrandCos for royalty and/or interest payments being made on its behalf.

- **Trade Claims Carveout.** The DIP Facilities do not provide for any carveout for the protection of post-petition trade vendors. But much rides on the Company's ability to purchase materials, produce and ship goods, particularly during the 4th quarter and the Company's liquidity position would benefit if vendors can be induced to provide it with terms instead of shipping COD. The Company is thus vulnerable to trade vendor fears of administrative insolvency, whether realistic or not. The DIP Facilities should include a carve-out for outstanding post-petition trade credit not subject to critical vendor agreements.

- **Credit Bidding [Final Order ¶ 39].** Given the complexities of this case and the BrandCo Lenders status as putative litigation defendants, their credit bidding rights must be subject to the provisions of Bankruptcy Code Section 363(k).

7. Unless these proposed modifications are incorporated into a revised financing arrangement, the DIP Financing Motion should be denied.

RELEVANT FACTUAL BACKGROUND

A. General Case Background.

8. On June 15, 2022 (the "**Petition Date**"), each of the Debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

9. On June 24, 2022, the Office of the United States Trustee appointed the Committee. *See Notice of Appointment of Official Committee of Unsecured Creditors* [Docket No. 121]. The Committee's membership presently consists of: (i) US Bank Trust Company, National Association; (ii) Pension Benefit Guaranty Corporation; (iii) Orlandi, Inc.; (iv) Quotient Technology, Inc.; (v) Stanley B. Dessen; (vi) Eric Biljetina, Independent Executor of the Estate of Jolynne Biljetina; and (vii) Catherine Poulton.

B. Company Background.

10. The Debtors are a beauty products company holding a portfolio of over 20 key brands associated with thousands of products sold in approximately 150 countries worldwide. The company's operations are generally organized into the following reportable segments:

(i) Revlon: Revlon-branded color cosmetics and beauty tools products, ColorSilk and Revlon Professional hair color and care franchises;

(ii) Elizabeth Arden: Elizabeth Arden-branded products, including Ceramide, Prevage, Eight Hour skincare franchises; fragrance portfolio including Green Tea, White Tea, Red Door, and 5th Avenue;

(iii) Portfolio: multi-national brands including Almay, American Crew, CND, Crème of Nature, Cutex, Mitchum, SinfulColors, and smaller regional brands; and

(iv) Fragrances: owned and licensed fragrance brands, including Juicy Couture, Britney Spears, Curve, John Varvatos, Christina Aguilera, and Elizabeth Taylor.

11. The Company attributes the filing of these Chapter 11 Cases to a liquidity position severely constrained "since the onset of COVID-19," detailing pandemic-related supply chain complications, leading to difficulties with inventory, logistics and labor, trade credit, customer concerns, and more. *See Declaration of Robert M. Caruso, Chief Restructuring Officer, (I) In Support of First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2* [Docket No. 30] (the "**Caruso Decl.**") ¶ 9; June 16, 2022 Hr'g Tr., at 24:5-26:19.

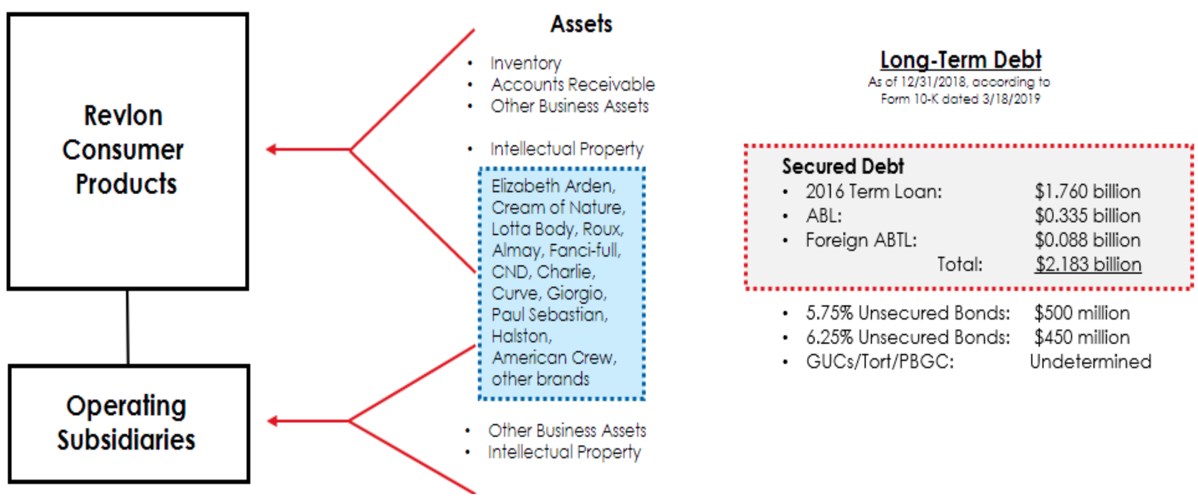
12. However, the Company's liquidity crisis can be traced at least to 2019 (if not earlier), when its financial performance forced auditors to raise going concern warnings and its management commenced a highly unusual and allegedly fraudulent series of transactions that increased its debt load by billions of dollars. *See Complaint*, Case No. 1:20-cv-06352 (S.D.N.Y. Aug. 12, 2020), Docket No. 1 (the "**2020 Dropdown Complaint**"); Caruso Decl. ¶ 81-82. These allegations of fraud and breach of contract provide necessary context for the Company's current

purported liquidity crisis – and for both the timing and strategy of these Chapter 11 Cases and this DIP Financing Motion.

C. **Dropdown Transactions And Allegations.**

13. In 2016, Debtor Revlon Consumer Products Corporation ("**RCPC**") entered into a nearly $2 billion term loan facility to, among other things, finance its acquisition of the Elizabeth Arden brand. *See* Caruso Decl. ¶ 34;[5] 2020 Dropdown Complaint ¶ 1. This 2016 Term Loan Facility was secured by RCPC's intellectual property, including its trademarks and other rights associated with its portfolio of beauty brands. 2020 Dropdown Complaint ¶ 1.

Figure 1: Pre-IP Dropdown



14. By 2019 – prior to the pandemic and the onset of alleged causes of its current liquidity crisis – the Company was facing severe difficulty in servicing its debt load. Caruso Decl. ¶ 81-82; 2020 Dropdown Complaint ¶ 3. As early as August 2019, the Company allegedly began removing the 2016 Term Lenders' collateral to new entities to secure new term loan facilities in

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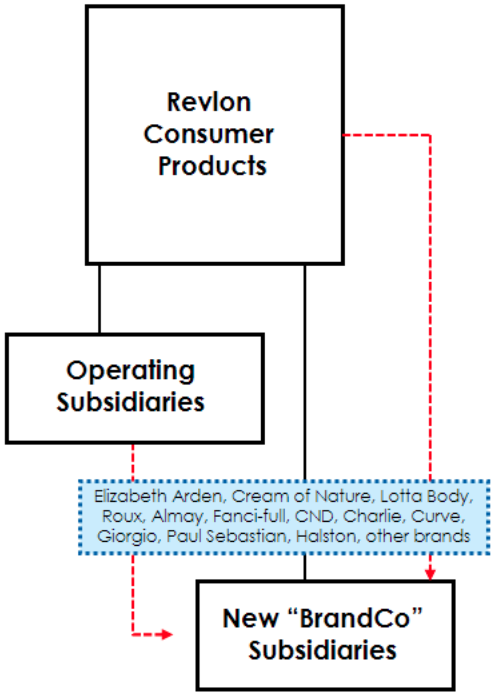
[5] The Company conducts its business exclusively through RCPC and its subsidiaries. Caruso Decl. ¶ 28.

direct breach of the 2016 Term Loan credit agreement. 2020 Dropdown Complaint ¶¶ 4-6 (alleging $200 million loan secured by improperly transferred collateral).

15. Regardless of its propriety, the 2019 transaction did not resolve the Company's financial woes. By March 2020, the Company understood that its audited financial statements for the fiscal year ending December 31 would suggest its inability to continue as a going concern. Caruso Decl. ¶ 82. Revlon thus proposed to drop more of its intellectual property into new "BrandCo" subsidiaries and borrow billions of dollars more against the same intellectual property securing the 2016 Term Loan Facility, effectively subordinating the 2016 Term Loan. *See id.* ¶ 83-84. A significant portion of 2016 Term Loan lenders (the "**<u>Objecting Lenders</u>**") rejected the deal and informed Revlon that it was in default and breach of the 2016 Term Loan such that any purported lender consent was not relevant. *Id.* ¶ 84-85 ("the Objecting Lenders refused to participate in the financing and continued efforts to block any transaction"); 2020 Dropdown Complaint ¶ 10 ("A group of more than 50% of the 2016 Term Lenders…entered into a joint cooperation agreement and made it clear that they would not consent to the threatened 2020 Transaction"), 13 (describing Notice of Default in connection with prior dropdown transaction).

Figure 2: "J. Crew" – Styled IP Dropdown



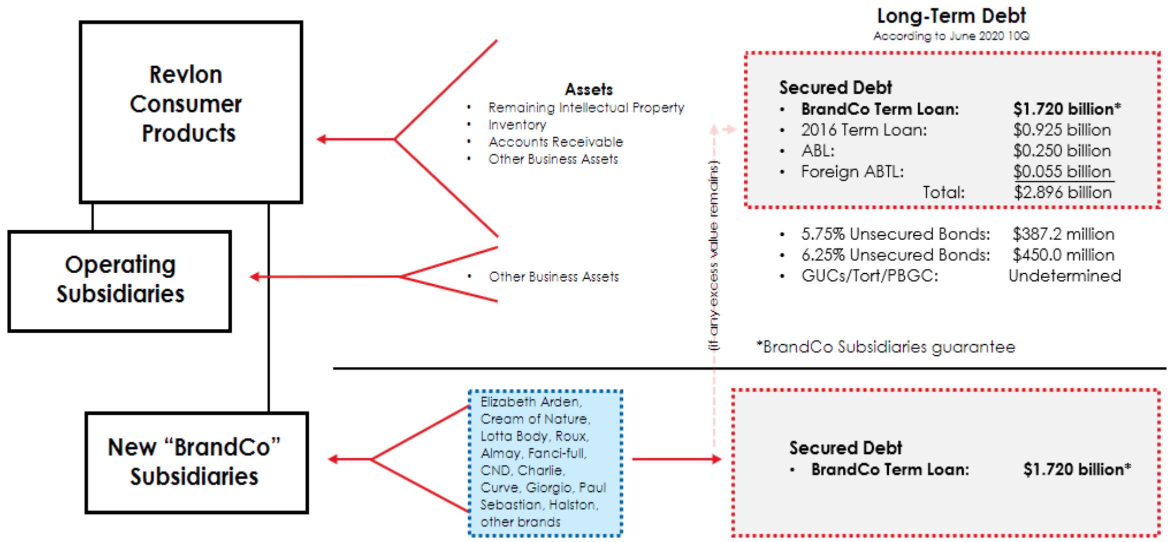
- In 2019, Revlon transferred American Crew IP to a subsidiary. In 2020, repeated this transaction to drop down a substantial portion of remaining IP to the "BrandCo" subsidiaries (*see blue box for IP that was transferred*).
- Term Loan Agreement required majority lender consent (was not provided).
- So, Revlon created an ABL facility to gerrymander the lender vote for the 2020 Dropdown.
- This new $65 million ABL was paid-off two weeks after created. Term lenders sued, but lawsuit dropped after Citibank mistakenly repaid principal balance.

16. What happened next is described differently by the Company and the Objecting Lenders. *Compare* 2020 Dropdown Complaint ¶ 11 ("[Revlon] issue[d] new, unfunded revolver commitments (not real loans, just empty promises to loan) under the 2016 Credit Agreement… These fake commitments rigged the math: RCPC would issue the exact amount of commitments necessary to inch over the 50.0% consent threshold. The new revolver commitments served no legitimate business purpose; rather, they were created solely to manipulate and gerrymander voting on the Proposed Amendment[.]"); *with* Caruso Decl. ¶ 86-87 ("The Objecting Lenders refused to participate in the financing and continued efforts to block any transaction…With the prospects for a new money financing transaction uncertain, the Company entered into a new $65 million incremental revolving facility under the 2016 Term Loan Facility…On May 1, 2020, the Supporting Lenders – who then held the majority of loans outstanding under the 2016 Term Loan Facility – and the Company agreed to the terms of the BrandCo Facilities.").

17. In sum, it appears undisputed that prior to April 23, 2020, the Company lacked lender support for its proposed transaction. On April 23, 2020, the Company opened a $65 million revolving facility, which gave the "Supporting Lenders," now known as the "**BrandCo Lenders**," the majority position needed to close the transaction – and close the $65 million facility – only days later. The $65 million facility was refinanced immediately through the BrandCo transaction. *See* Caruso Decl. ¶ 61 (noting $65 million incurred to refinance revolving loans upon closing); 2020 Dropdown Complaint ¶ 12 ("[T]he new revolvers [were] nothing more than a sham. *The revolving loans were designed to vote against their own fake interest and to vanish only days after being issued*.").

18. Upon the closing of this group of transactions (the "**2020 Dropdown**"), Revlon had created an $815 million new money facility, repaid its short-lived $65 million revolver, and incurred $30 million in fees. Caruso Decl. ¶ 61. Revlon had additionally "rolled up" approximately $950 million of the 2016 Term Loan debt held by the BrandCo Lenders. *Id.* In sum, the Company now owed $1.88 billion to the BrandCo Lenders. *See id.* It had transferred much of the Company's intellectual property to the BrandCo entities subject to license agreements back to other Debtors. *See id.* ¶¶ 63-64. And it had secured the new "**BrandCo Facility**" with first priority liens on the transferred intellectual property and related equity interests. *Id.* ¶ 63.

Figure 3: Post-IP Dropdown



19. Notwithstanding the transfer of all of their intellectual property to the BrandCos, however, RCPC and the Debtors' other operating subsidiaries became liable on the BrandCo Facility as borrowers or guarantors. RCPC granted senior liens on its own and the operating subsidiaries' assets, *pari passu* with the liens securing the 2016 Term Loan obligations. And RCPC has paid all interest and other debt service payments due on the BrandCo Facility through the Petition Date (and would continue to do so under the proposed Final Order). But while the BrandCos guaranteed the BrandCo Facility and pledged their newly acquired intellectual property as security for such facility, they were not obligated to contribute any share of the debt service payments made by RCPC in respect to this facility. Thus, the net result of the 2020 transactions was that (i) RCPC and its secured and unsecured creditors were deprived of the value of the Debtors' intellectual property, but (ii) became primarily liable for the BrandCo Facility obligations and royalty payments due under the BrandCo license agreements.

20. Every stakeholder in Revlon's capital structure, including the Objecting Lenders, unsecured trade creditors, and tort victims, was now approximately $1.7 billion beneath the

BrandCo Lenders in the capital structure. Capital markets reflected this subordination, with newly subordinated debt trading prices for the legacy debt falling precipitously after the 2020 Dropdown while the new BrandCo debt traded at or above par.

21. On August 12, 2020, the Objecting Lenders sued for intentional fraud and breach of contract. *See* 2020 Dropdown Complaint. The Company was granted temporary reprieve from the litigation upon the revelation that only hours prior to the filing of the Objecting Lenders' complaint, Citibank, N.A., as Administrative Agent for the 2016 Term Loans, had repaid the full principal and outstanding interest due on all remaining 2016 Term Loans, in an amount totaling approximately $894 million, apparently by mistake. *See* Caruso Decl. ¶ 13; *Findings of Fact and Conclusions of Law*, Case No. 1:20-cv-06539-JMF, (S.D.N.Y. Feb. 16, 2021), Docket No. 243 (the "Citibank Opinion") (trial court decision denying Citibank demand for repayment from certain Objecting Lenders and describing circumstances surrounding August 11, 2020 wire transfer). Certain lenders chose to accept the payment in full satisfaction of Revlon's obligations under the 2016 Term Loan Facility, and have to date successfully resisted Citibank's attempts to force repayment, thus mooting such lenders' claims relating to the 2020 Dropdown. *See* Caruso Decl. ¶ 13; Citibank Opinion.[6] This led to the voluntary dismissal of the 2020 Dropdown litigation without prejudice and has complicated the Company's relationships with its lenders. *See* Caruso

[6] Citibank's attempt to recover the payment is currently on appeal before the Second Circuit Court of Appeals in a proceeding to which Revlon is not a party. *See* Caruso Decl. ¶ 14. The automatic stay in these Chapter 11 Cases does not apply to Citibank's appeal. *Order Confirming that the Automatic Stay Does Not Apply to the Citibank Appeal* [Docket No. 67].

Decl. ¶ 14; Case No. 1:20-cv-06352-LGS, Docket Nos. 17-18 (voluntary dismissals of 2020 Dropdown litigation).[7]

D. Proposed DIP Financing.

22. Two years and a few days after the closing of the 2020 Dropdown – which hardly seems a coincidence – Revlon commenced these Chapter 11 Cases, proposing approximately $1.4 billion in DIP financing from certain BrandCo Lenders (the "**BrandCo DIP Lenders**"). DIP Financing Motion ¶ 2.

23. Pursuant to the DIP Financing Motion, the Debtors seek authorization to enter into a priming DIP Facility of approximately $2 billion, consisting of:

> (i) a superpriority, senior secured and priming Term DIP Facility in an aggregate principal amount not to exceed $1.025 billion; including a $575 million new money facility and $450 million in an uncommitted accordion available only for a refinancing for the Prepetition ABL Facility potentially available on request of the Debtors;
>
> (ii) a superpriority, senior secured and priming ABL DIP Facility in an aggregate principal amount not to exceed $400 million, consisting of $270 million in LIFO ABL DIP Commitments and $130 million of SISO ABL Obligations; and
>
> (iii) a superpriority junior secured Intercompany DIP Facility in an aggregate principal amount not to exceed the amount of royalty payments owed to the BrandCo Entities as licensors under the BrandCo License Agreements.

Id.

24. The DIP Facilities include a substantial adequate protection package for the Prepetition B-1 BrandCo Lenders in respect of their prepetition holdings: (i) non-default interest paid in cash by RCPC (as opposed to BrandCo under the prepetition facilities); (ii) default interest

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[7] At the First Day Hearing, counsel for certain 2016 Term Lenders who have refused to return Citibank's payment also alleged that the BrandCo transactions should also be recharacterized as a disguised equity financing made to RCPC.

continuing to accrue at the rates provided under the prepetition facility; (iii) payment of professional fees; and (iv) accrual of intercompany receivables due from RCPC as a senior secured claim in favor of the BrandCos in respect of royalty payments pursuant to the Intercompany DIP Facility. In sum, the DIP Facilities burden RCPC with the entire cost of servicing the Prepetition BrandCo Term Loans and Term DIP Loans and allow for the accumulation of value at the BrandCos to bolster the BrandCo Lenders' collateral position and value allocation under the Intercompany DIP Facility.

25. In support of the DIP Financing Motion, the Company's representative stated that the DIP Facilities are the Company's best financing opportunity because, among other things, the BrandCo Lenders would not consent to the Debtors' incurrence of priming financing provided by any other party. *Declaration of Steven M. Zelin in Support of the Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, (B) Use Cash Collateral, and (C) Grant Liens and Provide Superpriority Administrative Expense Claims, (II) Granting Adequate Protection to Certain Prepetition Lenders, (III) Modifying Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 35] (the "**Zelin Decl.**") ¶¶ 11-15. The Debtors did not conduct a competitive process to obtain postpetition financing because they believed "that it was uncertain whether" the consent of the 2016 Term Loan lenders to priming could be attained. *Id.* ¶ 11.

26. [redacted]

[redacted]

(i) [redacted]

(ii) [redacted]

(iii) [redacted]

(iv) [redacted]

(v) [redacted]

27. [redacted] Moreover, the BrandCo DIP Term

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8 [redacted]

9 [redacted]

Lenders' willingness to prime themselves on their own terms is probative of how favorably they view the strategic and potentially case-determinative elements of their own facility.

28. Regardless, the Debtors are continuing to prosecute the DIP Financing Motion and the generous package afforded the BrandCo Lenders thereunder. For instance, as security for the Term Loan DIP Facility, the Debtors would provide a priming first priority security interest and lien on the BrandCo Lenders' existing collateral, and security interests and liens on substantially all assets of the Debtors that were unencumbered as of the Petition Date, *including litigation claims against the BrandCo Lenders and other parties in connection with the 2020 Dropdown*. As discussed in the Preliminary Statement and further below, notwithstanding even the Committee's Challenge opportunity, a number of terms of the DIP Facilities appear intended to bury the BrandCo Lenders' liability and eliminate any chance of recovery by the Estates and aggrieved creditors.

ARGUMENTS

I. The DIP Facilities Are Skewed Too Far In Favor Of The DIP Lenders And Are Not In The Best Interests Of The General Creditor Body.

29. To obtain approval of the DIP Facility, the Debtors must show that the proposed financing is in the "best interests of the company," and "fair, reasonable, and adequate given the circumstances." *See In re L.A. Dodgers LLC*, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011) ("In seeking approval of [DIP financing], the Debtors have the burden of proving that … the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender."); *In re DB Capital Holdings, LLC*, 454 B.R. 804, 822 (Bankr. D. Colo. 2011) (court must determine that the proposed "financing is in the best interests of the estate and its creditors"); *In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (proposed financing 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 the … Debtor's principals who guaranteed its debt."); *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) ("The proposed financing is in the best interests of the general creditor body").

30. Notwithstanding a debtor's claim that a proposed DIP financing arrangement is an exercise of the debtors' business judgment, the Court must conduct its own independent inquiry into whether the proposed financing is fair, reasonable, adequate, and in the best interests of the estates and general creditor body.

31. Because debtors have limited bargaining power when negotiating for post-petition financing, courts do not approve such financing merely on a showing that there was no alternative financing available. *See In re Ames Dep't Stores, Inc*., 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) ("[D]ebtors-in-possession generally enjoy little negotiating power with a proposed lender, particularly where the lender has a pre-petition lien on cash collateral."); *see In re Levitz Home Furnishing, Inc.,* Case No. 05-45189 (BRL) (Bankr. S.D.N.Y. Nov. 10, 2005), Nov. 10, 2005 Hr'g Tr., at 32:14-33:10 [Docket No. 1109] (annexed as **Exhibit 11** to the Declaration of Sharon I. Dwoskin filed herewith (the "**Dwoskin Decl.**") ("Well, let me just comment about the good faith and arm's length, because it's well known when a Debtor is about to go into bankruptcy it is in a deleveraged position with some of the security stakeholder . . . and it [is] well recognized that the deleveraged Debtor was not in a position to fight off any of the demands, outrageous or rageous, whatever they may be, or was constrained to give in. So as your spear carrier the Debtor is less than adequate. The stakeholders at that particular point in time are not in a position to be heard, they are only in a position to be heard in a hearing like this when they are able to come forth and fully protect the interests of the entire estate."); *see also 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.").

32. Instead, courts conduct an independent inquiry into whether the proposed financing is fair, reasonable, adequate, and in the best interests of the estates and general creditor body. *See, e.g., In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 768-69 (Bankr. S.D.N.Y. 2020) (citing *In re Ames Dep't Stores, Inc.*, 115 B.R. at 40) (noting that the business judgment standard applies "so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest"); *In re Barbara K. Enters., Inc,* No. 08-11474 (MG), 2008 WL 2439649, at *14 (Bankr. S.D.N.Y. June 16, 2008) (denying post-petition financing in exercise of the court's "important oversight role" and finding that the court's "normal function in reviewing requests for post-petition financing is to defer to a debtor's own business judgment so long as a request for financing does not 'leverage the bankruptcy process' and unfairly cede control of the reorganization to one party in interest.") (quoting *In re Ames Dep't Stores*, *Inc.,* 115 B.R. at 40). *In re Aqua Assocs.,* 123 B.R. 192, 196 (Bankr. E.D. Pa.1991) (citing *In re Crouse Grp., Inc.*, 71 B.R. 544, 549-51 (Bankr. E.D. Pa.1987)) (debtors must show "terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender").

33. Where proposed financing favors the interests of one class of creditors to the detriment of the estate or at the expense of other creditors, or is being used by a secured creditor to obtain greater protection than it had prepetition, it is not considered fair and reasonable or in the best interests of the estate. *See In re Ames Dep't Stores*, *Inc.,* 115 B.R. at 39 ("[P]roposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate."); *In re Barbara K. Enters., Inc*., 2008 WL 2439649, at *8 ("Any proposal

should provide a pre-petition secured creditor with 'the same level of protection it would have had if there had not been post-petition superpriority financing.'") (quoting *In re Mosello,* 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996)); *see also In re Tenney Vill. Co.*, 104 B.R. at 568 (post-petition financing should not be used in a manner that "pervert[s] the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of only a subset of the secured creditors).

34. Here, the Debtors had zero leverage in negotiating the proposed DIP Facilities with their prepetition lenders: they had only *de minimis* cash on hand and their prepetition lenders refused to be primed. *See* Zelin Decl. at ¶ 12. This reality is reflected in the onerous terms described above, including the self-serving liens on proceeds of avoidance actions and commercial tort claims against the DIP Lenders, waiver of marshalling, and the milestones and other case controls that together comprise a *sub rosa* plan. The proposed DIP Facilities are designed to principally benefit the DIP Lenders to the substantial detriment of other creditors, including general unsecured creditors. They are not, as a result, in the best interests of the estates and should not be approved.

A. The DIP Collateral Inappropriately Includes The Proceeds Of Causes Of Action Against The DIP Lenders And Other Unencumbered Assets.

35. The Final Order proposes to include liens on all of the Debtors' unencumbered assets, including the proceeds of avoidance actions, other causes of action, and other unencumbered estate assets. Avoidance actions, in particular, should not be part of the DIP Collateral as they are property of the estate – not property of the Debtors – that effectuate the policy of equal treatment of creditors under the Bankruptcy Code. *See Bethlehem Steel Corp. v. Moran Towing Corp. (In re Bethlehem Steel Corp.)*, 390 B.R. 784, 786 (Bankr. S.D.N.Y. 2008) ("Avoidance actions brought pursuant to the Bankruptcy Code never belonged to the Debtor, but

rather were creditor claims . . . ."). The intent behind avoidance powers and a debtor's power to bring causes of actions is to allow the debtor-in-possession to gain recoveries for the benefit of all unsecured creditors. *See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV*, 229 F.3d 245, 250 (3d Cir. 2000); *In re Cybergenics Corp.*, 226 F.3d 237, 243-44 (3d Cir. 2000) (explaining that avoidance actions are tools to fulfill the "obligation[] to maximize the bankruptcy estate for the benefit of creditors" and may not be pursued to "benefit . . . the debtors themselves"); *Bear, Stearns Sec. Corp. v. Gredd,* 275 B.R. 190, 194 (S.D.N.Y. 2002) (citing *Wyle v. C.H. Rider & Fam. (In re United Energy Corp.)*, 944 F.2d 589, 597 (9th Cir.1991)) ("the purpose of § 547 is to ensure fair distribution between creditors, while the purpose of § 548 is to protect the estate itself for the benefit of all creditors"); *In re Sweetwater*, 55 B.R. 724, 735 (D. Utah 1985) (avoiding powers are meant to benefit creditors generally and promote equitable distribution among all creditors).

36. While certain courts have granted liens on the proceeds of avoidance actions to DIP lenders in other cases, the reasoning is that where a trustee recovers specific property that had been secured by a lender's prepetition lien, that prepetition security interest may attach to the proceeds of that avoidance action. *See, e.g.*, *In re Pearson Indus*., *Inc.*, 178 B.R. 753, 764 (Bankr. C.D. Ill. 1995). By contrast, where a prepetition lien would *not* extend to such proceeds, granting a DIP lien on such proceeds is inappropriate: "the secured creditor cannot improve its position because of the trustee's exercise of the avoiding powers and assert an additional claim by claiming it from the trustee . . . ." *See id.*

37. A key issue in this case is likely to be whether prepetition liens were properly granted to the BrandCo Lenders in the 2020 Dropdown, whether the dropdown of the intellectual property assets was fraudulent as to creditors, and whether the considerable fees and interest

payments distributed to the BrandCo Lenders can be avoided. By taking a senior secured position on *all* causes of action and their proceeds, including any actions challenging the 2020 Dropdown, the BrandCo DIP Lenders are attempting to moot this issue and give themselves the practical equivalent of the full release found in the Debtors' stipulations. But, since any such postpetition lien should only be permitted to replace a valid prepetition lien, the Final Order should not grant the BrandCo Lenders a postpetition lien on the proceeds of the very actions *that challenge their prepetition liens* and the cash proceeds derived therefrom.

38. There may also be substantial value attributable to other causes of action, including commercial tort claims, and such value should likewise be available for the Debtors' unsecured creditors. Inchoate commercial tort claims are not typically part of a secured lender's prepetition collateral package, as they likely are not specifically identified in the applicable security agreements and financing statements. *See* UCC § 9-108(e)(1) ("A description only by type of collateral defined in [the Uniform Commercial Code] is an insufficient description of … a commercial tort claim….") (alteration in original). And, a related provision of the UCC prohibits attachment of a security interest in after-acquired commercial tort claims. *See* UCC § 9-204(b)(2) ("A security interest does not attach under a term constituting an after-acquired property clause to … a commercial tort claim….").

39. These DIP Facilities have been specially crafted to provide liens on the proceeds of all causes of action for the benefit of the BrandCo DIP Lenders at the expense of other creditors. They also provide superpriority claims that can be satisfied by proceeds of litigation against the same lenders. Such provisions are neither fair nor reasonable, and have not been included in final DIP orders in recent large chapter 11 cases in this District and elsewhere, particularly where the DIP lenders were targets of investigation and challenge. *See, e.g., In re Neiman Marcus Grp. Ltd.*,

Case No. 20-32519 (Bankr. S.D. Tex. June 16, 2020) [Docket No. 850 at ¶¶ 5(a)(2); 5(b); 6; 9(c)] (annexed as **Exhibit 1** to the Dwoskin Decl.) (carving avoidance actions and claims regarding MyTheresa and against the parent entity from DIP liens, providing that superpriority claims do not attach to most MyTheresa causes of action, and carving avoidance actions out of adequate protection claims and liens); *In re Barney's New York, Inc*., Case No. 19-36300 (Bankr. S.D.N.Y. Sept. 5, 2019) [Docket No. 222 at ¶¶ 35, 37] (annexed as **Exhibit 2** to the Dwoskin Decl.) (excluding all avoidance actions and proceeds from DIP collateral and adequate protection liens and excluding avoidance actions against trade creditors and employees from superpriority claim). Accordingly, the Court should not permit inclusion of any unencumbered assets as DIP Collateral. At a minimum, the DIP Liens should not extend to avoidance actions and other causes of action against the BrandCo Lenders.

B. The Estate Waivers Are Neither Fair Nor Reasonable.

40. The Final Order further insulates the lenders from having to "pay the freight" of these cases through the various estate waivers (e.g., Section 506(c) waiver, Section 552(b) waiver, marshalling waiver). The net effect of these waivers is to eliminate a further avenue of recovery for the Debtors' estates and to virtually guarantee that the costs of liquidating the secured lenders' collateral will be borne by unsecured creditors. Such waivers, because they are binding upon all parties in interest, should not be granted absent compelling reasons. *See Hen House, Harford Underwriters Ins. Co. v. Union Planters Bank N.A. (In re Hen House Interstate Inc.)*, 530 U.S. 1, 11-12 (2000) (holding that a debtor-in-possession "is obliged to seek recovery under [Bankruptcy Code Section 506(c)] whenever his fiduciary duties so require"); *see also In re NEC Holdings Corp.*, No. 10-11890 (CSS) (Bankr. D. Del. July 13, 2010), July 13, 2010 Hr'g Tr., at 101:9 [Docket No. 224] (annexed as **Exhibit 12** to the Dwoskin Decl.) (stating that "you don't give a 506 waiver over an objection by the committee"); *In re Metaldyne Corp.*, No. 09-13412 MG, 2009

WL 2883045, at *5 (Bankr. S.D.N.Y. June 23, 2009) (Court ordinarily skeptical of the need for a Section 506(c) waiver); *In re Codesco, Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) ("The underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs.").[10]

41. Agreements which prohibit surcharging under Bankruptcy Code Section 506(c) have been held unenforceable because such provisions "operate as a windfall to the secured creditor at the expense of administrative claimants." *Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.*), 223 B.R. 170, 176 (8th Cir. BAP 1998); *see also Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus. Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) ("[Section] 506(c) is designed to prevent a windfall to the secured creditor . . . The rule understandably shifts to the secured party . . . the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate . . .") (internal citation omitted); *In re Codesco, Inc.*, 18 B.R. at 230 ("[t]he underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs").

42. When combined with postpetition liens on the proceeds of actions against the BrandCo Lenders, the marshaling waiver is particularly troubling, as it would permit the BrandCo DIP Lenders to argue that their DIP Loans should be deemed paid *first* out of any litigation

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[10] *See also 2012-2014 Final Report and Recommendations of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11*, at 230 (Dec. 8, 2014), available at commission.abi.org ("The trustee's ability to invoke, and the court's authority to review, claims brought under section 506(c) should be preserved for the benefit of the entire estate.").

recoveries (including against themselves) so as to preserve the value of their prepetition liens (if any) and claims against the other BrandCo and RCPC assets. The ability to require the DIP Lenders to marshal should be preserved such that unencumbered assets, avoidance actions, and other causes of action (particularly against the DIP Lenders themselves) are the last sources of payment on the DIP Loans, and the collateral position of prepetition secured creditors cannot be improved by proceeds derived from their own misconduct.

43. As detailed above, this is not a typical chapter 11 case, and the BrandCo Lenders are not typical commercial lenders struggling against pandemic-related logistics constraints. Here, trade claimants are being asked to rely on the DIP financing to continue to do business with the Debtors and facilitate operations. But they will be left without a source of payment in the event of a DIP default, and the BrandCo DIP Lenders refuse to make advances to provide for repayment of trade claims. Under the facts presented, including facially persuasive claims against those same DIP Lenders to avoid the 2020 Dropdown and recover significant value for creditors lower in the capital structure, granting the ability of defendant prepetition lenders to, in effect, moot litigation and deprive trade creditors of recoveries through marshalling and other equitable remedies under the Bankruptcy Code is extraordinary and inequitable.

44. Moreover, even if there is no successful Challenge, the marshalling waiver would permit the BrandCo DIP Lenders to argue that the Term DIP Loans should be deemed paid off first from RCPC asset value, preserving the full value of the BrandCos for repayment of the BrandCo Lenders' prepetition loans and reducing the value available to RCPC and the operating subsidiary creditors (which include substantially all general unsecured creditors). This is neither fair nor reasonable, and is designed solely to benefit the BrandCo Lenders.

45. Accordingly, these estate waivers should not be approved. *See e.g., In re Lockwood Corp.*, 223 B.R. at 176 (denying enforceability of Section 506(c) waiver); *In re Colad Grp., Inc.*, 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (denying approval of post-petition financing agreement to the extent that it waived estates' Section 506(c) rights); *see also In re Sears Holding Corp*., Case No. 18-23538 (Bankr. S.D.N.Y. Dec. 28, 2018) [Docket No. 1436 at ¶¶ K, M] (annexed as **Exhibit 5** to the Dwoskin Decl.) (with respect to litigation target and junior DIP lender ESL Investments, Inc., ("**ESL**"), no waivers of Section 506(c) rights, equities of the case under Section 552(b), or marshaling as to prepetition debt); *In re Nine West Holdings, Inc.*, Case No. 18-10947 (Bankr. S.D.N.Y. June 28, 2018) [Docket No. 450 at ¶ 10(f)] (annexed as **Exhibit 3** to the Dwoskin Decl.) (DIP lenders shall use commercially reasonable efforts to use all collateral other than proceeds of estate causes of action to repay DIP claims).); *In re Chesapeake Energy Corp.*, Case No. 20-33233 (Bankr. S.D. Tex. July 31, 2020) [Docket No. 597 at ¶ 26] (annexed as **Exhibit 6** to the Dwoskin Decl.) ("DIP Secured Parties shall use commercially reasonable efforts to first use all DIP Collateral other than Avoidance Action Proceeds to repay the DIP Obligations.").

C. The Intercompany DIP Facility Is Unnecessary And Is Neither Fair Nor Reasonable.

46. The Debtors propose that the Intercompany DIP Facility is necessary because it allows RCPC to retain cash. They posit that RCPC is obligated to continue making royalty payments to the BrandCos, and that the BrandCos would not "upstream" that money to RCPC without a superpriority lien. Therefore, they claim, the Intercompany DIP Facility simply preserves all parties' rights.

47. The Debtors are incorrect. The Bankruptcy Code does not obligate RCPC to make royalty payments to the BrandCos on a current basis during the course of the Chapter 11 case. The Intercompany DIP Facility, however, effectively converts what would otherwise be, at best, an

unsecured intercompany administrative claim (subject to challenge) into a senior secured DIP obligation, and increases the value of the BrandCo Lenders' claim during the pendency of the case, without providing a corresponding benefit to the Debtors' estates. As noted above, it would burden RCPC with having to both pay interest (at a rate of approximately $30 million per quarter)) on the DIP Term Facility (without any corresponding obligation of the BrandCos to contribute to such payment) and to incur a secured claim (accruing at approximately $22.5 million per quarter) in favor of the BrandCos for such royalties.

48. Based on information provided by the Debtors' counsel, prior to the Petition Date, RCPC would pay the interest due on the Prepetition BrandCo Facility from its own funds for the benefit of the BrandCos which guaranteed that facility. RCPC would also pay royalties to the BrandCos under these license agreements, but those funds would be round-tripped and dividended back to RCPC, meaning that the BrandCos neither built up cash nor accrued a claim for these royalties. Under the proposed Intercompany DIP Facility, the BrandCos would continue to benefit from RCPC's payment of interest on the Term DIP Loans and Prepetition BrandCo Tranche B-1 Loans, but, in addition, the BrandCos would be vested with a secured claim (potentially in excess of $100 million on an annual basis) against RCPC, causing a shift in value from RCPC to the BrandCos. Thus, the Intercompany DIP Facility would result in a "double dip" – both interest and adequate protection payments, on top of a secured claim – significantly more favorable to the BrandCos and the BrandCo Lenders who are their sole creditors.[11] The Intercompany DIP Facility should not be approved. At a minimum, the BrandCos should be required to bear their share of

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[11] The Committee reserves its rights as to whether RCPC has a right to seek to recover all or a portion of these deemed royalty payments under a theory of contribution or otherwise.

the interest payments made on the DIP Term Facility through an intercompany credit or contribution claim.

D. The Final Order Should Not Give The Prepetition BrandCo Lenders A Veto Right Over The Plan.

49. The DIP Milestones are tied to the Debtors' promulgation of an "Acceptable Plan of Reorganization," defined in the Term DIP Credit Agreement as "a Chapter 11 Plan for each of the Cases that, upon the consummation thereof, provides for (a) the termination of all unused Commitments hereunder and the indefeasible payment in full in cash of all of the Obligations under the Loan Documents and (b) the indefeasible payment in cash of all of the 'First Lien Obligations' under and as defined in the Prepetition BrandCo Facility Agreement or such other treatment as is agreed to by holders of at least two-thirds in aggregate principal amount of such claims." *See DIP Credit Agreement* [Docket No. 44]. In other words, any plan to be proposed in this Chapter 11 Case must pay off the *prepetition* BrandCo debt in full in cash, or have the support of a supermajority of prepetition BrandCo Lenders.

50. This is far beyond what the Bankruptcy Code permits. DIP facilities routinely require a plan to either have the consent of the DIP lenders or repay the DIP. This provision is different: it extends the veto power over a plan (and, concomitantly, to declare an event of default under the DIP Facilities, stripping Revlon of desperately needed liquidity) to *prepetition* lenders on account of *prepetition* debt. This is particularly egregious here, because the BrandCo Lenders' prepetition debt (and the validity of the liens securing such debt) is subject to significant challenge.

51. While DIP loans facilitate the reorganization process by providing debtors necessary liquidity to maximize enterprise value, they cannot be the mechanism by which to determine how a debtor's value is to be allocated among its prepetition stakeholders. Indeed, attempts to use pre-plan transactions to "circumvent the Code's procedural safeguards" have

consistently been found to be impermissible overreach. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017); *see also Institutional Creds. of Cont'l Airlines, Inc. v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.)*, 780 F.2d 1223, 1227-28 (5th Cir. 1986) ("Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan."); *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets."); *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) ("The Bankruptcy Court cannot, under the guise of Section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements."). Thus, courts will reject proposed DIP loans where the terms of such loans "include concessions to creditors or parties in interest that are unauthorized under, or in conflict with, provisions under the Bankruptcy Code." *In re LATAM Airlines Grp. S.A.*, 620 B.R. at 816, 820 (denying a DIP facility as a *sub rosa* plan because its mandate that "only a Company Approved Reorganization Plan may be confirmed in these Chapter 11 Cases, regardless of exclusivity, or an Event of Default will be triggered . . . . effectively lock[s] up any future plan of reorganization . . ." and because it "dictates key terms of an eventual plan of reorganization by prematurely allocating reorganization value to LATAM's existing equity holders."); *In re Belk Props., LLC*, 421 B.R. 221, 226 (Bankr. N.D. Miss. 2009) (rejecting as a "*sub rosa* chapter 11 plan" proposed DIP financing that would enable the lender to obtain a controlling equity stake in the debtor).

52. This provision of the Term DIP Credit Agreement is an impermissible *sub rosa* plan. It dictates the key terms of an eventual plan by prematurely requiring the Debtors to allocate value to the BrandCo Lenders' prepetition debt or risk a DIP Event of Default, essentially placing that debt at the very top of the waterfall and giving the BrandCo Lenders a veto over plan terms – once again effectively mooting litigation as to whether the liens granted to the BrandCo Lenders in the 2020 Dropdown were proper (among other things). It denies to all creditors the protections of Sections 1123, 1126 and 1129 of the Bankruptcy Code, including holding the Debtors to their burden of proving that the plan provides the same treatment for each claim or interest in a particular class, that it was proposed in good faith, that it is in the best interest of creditors, and that it does not discriminate unfairly and is fair and equitable. As noted herein, under its current terms, it would obstruct the Committee's efforts to fulfill its fiduciary obligation to investigate the 2020 Dropdown and prosecute any appropriate litigation against the BrandCo Lenders.

II. The Proposed Challenge Period, Budget, And Milestones Are Unreasonable And Not In The Best Interests Of The Estates.

53. The proposed Challenge Period and Investigation Budget incorporated into the DIP Facilities establish a timeline for these cases that ignores the complexity of reorganizing a company of this scale and geographic breadth through the process mandated by the Bankruptcy Code. They also ignore the complexity of the financial transactions that have fractured the Debtors' creditor constituency and plunged stakeholders into litigation for the last several years and the ongoing operational challenges of integrating several different business lines.

54. First, the Final Order should grant the Committee automatic standing to pursue Challenges. Requiring the Committee to conduct motion practice to obtain standing would be inefficient and a waste of the estates' limited resources. Orders conferring standing to creditor committees are routine where, as here, the debtor has waived the right to pursue the relevant

challenges itself. *See In re Quebecor World (USA) Inc.*, Case No. 08-10152 (Bankr. S.D.N.Y. Apr. 1, 2008), Docket No. 470 (annexed as **Exhibit 7** to the Dwoskin Decl.) (providing creditors' committee with automatic standing to file an objection or complaint against prepetition lenders on behalf of the debtors' estates); *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D.N.Y. Mar. 29, 2006), Docket No. 721 (annexed as **Exhibit 8** to the Dwoskin Decl.) (same).

55. Second, the 75-day Challenge Period should be materially extended. Revlon is one of the largest cosmetics companies in the world and has been embroiled in complex litigation over the 2020 Dropdown for years: the scale of the investigation that the Committee must do – because the Debtors have disabled themselves from conducting it through their stipulations, admissions and releases – is immense and cannot be reasonably done within the proposed Challenge Period, which is substantially shorter than the challenge periods routinely granted in other cases. *See, e.g., In re Sears Holding Corp.*, Case No. 18-23538 (Bankr. S.D.N.Y.) [Docket No. 955 at ¶ H.g; Docket No. 1436 at ¶ G] (annexed as **Exhibits 4 and 5** to the Dwoskin Decl.) (actions against ESL and former CEO Eddie Lampert not subject to challenge deadline); *In re Eastman Kodak Co.*, Case No. 12-10202 (Bankr. S.D.N.Y. Feb. 16, 2012), Docket No. 375 (annexed as **Exhibit 9** to the Dwoskin Decl.) (investigation period ended 180 days after entry of final order); *In re Quebecor World (USA) Inc.*, Case No. 08-10152 (Bankr. S.D.N.Y. Apr. 1, 2008), Docket No. 470 (annexed as **Exhibit 7** to the Dwoskin Decl.) (investigation period ended 120 days after entry of final order).

56. Third, the $50,000 Investigation Budget is both too low, given the scope of the investigation that must be conducted, and profoundly unfair, given that the Term DIP Lenders and prepetition BrandCo Lenders get their fees paid by the Debtors' estates for defending Challenges. *See In re Ames Dep't Stores*, *Inc.* 115 B.R. at 38 (requiring post-petition financing order to provide creditors' committee with a reasonable carve-out in order to preserve the adversary system); *In re*

Sears, Case No. 18-23538 (Bankr. S.D.N.Y. Nov. 30, 2018) [Docket No. 955 at ¶ 21(h) n.4] (annexed as **Exhibit 4** to the Dwoskin Decl.) (providing that investigation and litigation against ESL could be funded without limit from senior DIP proceeds and carve-out); *In re Nine West Holdings, Inc.*, Case No. 18-10947 (Bankr. S.D.N.Y. June 28, 2018) [Docket No. 450 at ¶ 27] (annexed as **Exhibit 3** to the Dwoskin Decl.) (providing that to the extent the committee incurs fees in excess of the investigation budget, the committee can seek payment of such fees as an administrative expense); *In re Toys "R" Us, Inc.*, Case No. 17-34665 (Bankr. E.D. Va. Oct. 24, 2017) [Docket No. 711 at ¶ 27] (annexed as **Exhibit 10** to the Dwoskin Decl.) (same). As a result, the Challenge provisions should be revised to (i) increase both the Challenge deadline and budget by substantial margins, (ii) add express language to reflect that the Investigation Budget does not serve as a cap or limitation on the amount of fees that Committee professionals may incur as an administrative claim (which must be paid under Bankruptcy Code Section 1129(a)(9)(A) under a confirmed plan) in connection with an Investigation; (iii) remove the language preventing the Committee from using the Investigation Budget to litigate a Challenge; (iv) clarify that the Challenge Period does not apply to any Section 552(b), Section 506(c), marshaling, or inter-Debtor value allocation issues, or other plan-related issues; and (v) allow for the Committee to be granted automatic standing to assert Challenges.

57. Fourth, the Milestones governing entry into an RSA and filing a plan and disclosure statement should be extended. These Milestones are currently set at November 1 and November 30, 2022, respectively, which would require substantive negotiations to commence months earlier despite the fact that "the greatest volume of the Company's sales takes place during the holiday

season." Caruso Decl. ¶ 131.[12] Neither the Debtors nor potential investors or purchasers will have a current sense of the Debtors' liquidity and value until after the fourth quarter. Given the disproportionality of their holiday season revenue, establishing an artificially abbreviated Milestone for the RSA and plan is likely to skew the Debtors' marketing and restructuring process in favor of the BrandCo Lenders.

58. The DIP Milestones are also particularly problematic in view of the complexity of the Debtors' operations and their need to undertake operational as well as balance sheet restructuring. In prior years, the Debtors took on billions in leverage to acquire new brands that expanded the size and scope of operations and revenues by a considerable multiple. Since 2016, the Company has been struggling to integrate Elizabeth Arden (among others), service its debt obligations, and otherwise formulate and execute on a business plan. The Company entered Chapter 11 in free fall, with no plan and scant creditor support, facing considerable investigations and litigation relating to prior conduct. It is simply not reasonable to believe that it can develop a plan during the early days of their chapter 11 case and during the Company's busiest and most critical operational period.[13]

59. The Debtors should be permitted to negotiate and prepare a revised go-forward business plan based on actual results in this most critical period.

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[12] The proposed DIP Facilities establish April 1, 2023, as the deadline for entry of a confirmation order, and April 15, 2023, as the plan effective date.

[13] For instance, given that many customers will accrue substantial credits related to coupons and other factors, the fourth quarter results will become known long after the early fall timeframe during which plan discussions will have to occur to meet the November 1 RSA deadline. These results will be critical in testing the assumptions in the Debtors' business plan on which the total enterprise valuation and inter-Debtor allocation of that value reflected in the reorganization plan will be based.

60. In order to address this concern, the Committee believes an extension of the milestones by at least three (3) months [redacted] is required. In order to ensure case progress, the Committee has also suggested that this extended timeline could be coupled with additional, interim milestones which would not require the Debtors to commit themselves to a firm plan structure so early in this case.

III. Other Aspects Of The DIP Facilities And Final Order Should Not Be Approved.

61. As set forth above, the DIP Facilities contain numerous other provisions that cannot withstand scrutiny and, therefore, should not be approved.

(i) Credit Bidding: Given the complexities of these Cases and the status of the BrandCo Lenders as putative defendants in Challenge litigation, any credit bid rights should be subject in all respects to Bankruptcy Code Section 363(k).

(ii) Amendments to DIP Loan Documents: The Committee should receive notice of all amendments to the DIP Loan Documents (not just those the Debtors and Lenders deem material), and should have the opportunity to bring its objections, if any, before the Court within five (5) days of receiving notice. To the extent that any amendment materially and adversely affects the interests of the Committee or general unsecured creditors, such amendment should be subject to the Committee's consent.

(iii) Releases: The Debtors' stipulations in paragraph G of the Final Order should not include a release of claims by the Debtors. Such a release is too broad, as it encompasses all Prepetition Secured Parties and their Representatives and potential affirmative claims against such parties. These should be limited to the stipulations and admissions with respect to claims and liens only. Any releases should be granted only under a confirmed plan.

(iv) Remedies Notice Period: The Committee and other creditors should be able to raise any arguments with respect to Events of Default during the Remedies Notice Period, and should not be limited to arguments about whether an Event of Default has occurred and is continuing.

62. In addition, the following revisions should be made to the DIP Credit Agreements:

(i) Events of Default: The following provisions should be amended or deleted:

a. **Term DIP Credit Agreement; Section 8.1(a)** – This provision in the Term DIP Credit Agreement provides a broad cross-default to the royalty agreements. As a result, it provides *prepetition* BrandCo Lenders the opportunity to declare DIP defaults through their rights under the royalty agreements and related prepetition loan provisions, in effect giving all BrandCo Lenders the ability to call a DIP default upon a successful challenge. This Term DIP Credit Agreement provision should be deleted.

b. **Term DIP Credit Agreement, Sections 8.1(l)(vi), (x) and (xvi); ABL DIP Credit Agreement; Sections8.1(m)(vi) and (x)** – The language of these provisions in both DIP Credit Agreements (e.g. "assist, support or otherwise participate") is overly broad and vague and may (i) limit positions that the Debtors may take in litigation or otherwise impinge on their fiduciary duties; (ii) limit the ability of the Debtors to cooperating with the Committee to investigate claims against the DIP Lenders; and, therefore provides the DIP Lenders with undue case control. The provisions should be deleted.

c. **Term DIP Credit Agreement; Section 8.1(l)(i)** – This provision provides that a grant of adequate protection to holders of Prepetition BrandCo Permitted Prior Liens constitutes an immediate Event of Default. This provision should be deleted.

d. **Term DIP Credit Agreement; Section 8.1(l)(xviii); ABL Credit Agreement 8.1(l)(xviii)** – Filing of a Chapter 11 Plan by a non-Debtor entity should not constitute an Event of Default as the Debtors have no control over such action. These provisions provide the Lenders with undue case control and should be deleted.

e. **Term Credit Agreement Section 8.1(l)(xix) and ABL Credit Agreement 8.1(l)(xviii)** – DIP Lender approval for the filing of a sale motion should be limited to prospective sales that will not result in the respective DIP Obligations being paid in full. DIP Lenders should not be able to impair a sale process where the DIP Obligations are likely to be paid off. These provisions should be deleted.

f. **Term Credit Agreement Section 8.1(l)(xxii) and ABL Credit Agreement 8.1(l)(xxi)** – these provisions should be revised such that the Debtors' termination of an RSA in accordance with its fiduciary obligations would not constitute an Event of Default; and

g. **ABL Credit Agreement 8.1(l)(xxii)** – rejection or termination of the BrandCo License Agreements should not constitute an Event of Default under the ABL Credit Agreement for the reasons provided in Section (a) above. This provision should be deleted.

(ii) Budget and Variances: Variance terms should allow for a carry-over of revenue that exceeds forecasted revenue for a given reporting period and expenses that are less than forecast to the next reporting period.

RESERVATION OF RIGHTS

63. The Committee and its members reserve all of their respective rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, to raise additional objections during the final hearing on the DIP Financing Motion, and to negotiate and document alternative post-petition financing terms and proposals.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Committee respectfully requests that the Court: (i) sustain this Objection; (ii) deny the relief requested in the DIP Financing Motion, or grant the relief sought in the DIP Financing Motion with the changes described herein; and (iii) grant the Committee such other and further relief as is just and proper.

Dated: July 20, 2022
New York, New York

Respectfully submitted,

BROWN RUDNICK LLP

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