IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
VESTTOO LTD., *et al.*[1]	Case No. 23-11160 (MFW)
Debtors.	(Jointly Administered)
	Related D.I. 268, 269

OBJECTION OF THE DEBTORS TO THE MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO SECTION 1121(d)(1) OF THE BANKRUPTCY CODE FOR ENTRY OF AN ORDER TERMINATING EXCLUSIVE PERIODS FOR DEBTORS TO PROPOSE AND SOLICIT ACCEPTANCES OF A PLAN

Vesttoo Ltd. and its affiliated debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), by and through their proposed counsel, DLA Piper LLP (US), hereby submit this objection (this "Objection") to the *Motion of the Official Committee of Unsecured Creditors Pursuant to Section 1121(d)(1) of the Bankruptcy Code for Entry of an Order Terminating the Exclusive Periods for Debtors to Propose and Solicit Acceptances of a Plan* [D.I. 268, 269] (the "Motion to Terminate Exclusivity"), filed on October 22, 2023 by the Official Committee of Unsecured Creditors (the "Committee"). In support of this Objection, the Debtors rely upon and incorporate by reference the *Declaration of Ami Barlev in Support* (the "Barlev Declaration"), a copy of which is attached to this Objection as **Exhibit A**, and the *Amended and restated Declaration of Ami Barlev in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 27], and respectfully state as follows:

[1] Due to the large number of debtor entities in these chapter 11 cases, a complete list of the Debtors 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://dm.epiq11.com/vesttoo.

PRELIMINARY STATEMENT

1. The Debtors object to the Motion to Terminate Exclusivity because it raises "serious matter" and seeks relief that "should not be granted routinely or cavalierly."[2] Here, prior to the filing of the Motion to Terminate Exclusivity, the Debtors offered, and continue to offer, to terminate exclusivity early, on December 1, 2023, and to cooperate with the Committee to propose a liquidating plan, including assisting with the preparation of an accompanying disclosure statement. The Committee does not mention this in its Motion to Terminate Exclusivity.[3]

2. The relief sought by the Committee is not only unique and rare but is based on a false narrative designed to suggest that the Committee alone, admittedly all representative of a single class of creditors, should make all decisions in these chapter 11 cases. This is so despite no basis to do so and the Committee's refusal to meaningfully fulfill their obligation to participate in the formulation of a plan with the Debtors or evaluate the value of assets in the Debtors' possession that third-party valuations suggest could be worth millions of dollars.

3. To set the stage, there are two circumstances relevant to these chapter 11 cases—first are the actions of certain employees that precipitated the chapter 11 filing, namely, the fraudulent production of letters of credit by former insiders. The second is the outbreak of war in the Debtors' home country, which has created a difficult environment for the Debtors to respond to hyper-aggressive demands by the Committee.

4. As to the fraud, the Motion to Terminate Exclusivity presents a false narrative that the Debtors are wasting money trying to "create" some new business that no one would ever

[2] *In re Fountain Powerboat Indus., Inc.*, No. 09-07132-8-RDD, 2009 WL 4738202, at *6 (Bankr. E.D.N.C. Dec. 4, 2009) (citing *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987)).

[3] The Debtors' initial 120-day exclusive period expires on or about December 12, 2023. The Committee filed its Motion to Terminate Exclusivity merely fifty (50) days after the Committee was appointed.

transact with for any reason. The support for this proposition? Because the Committee says so. But this is simply not accurate. The Debtors are not seeking to "create" a new business but are instead seeking to monetize the valuable technology that its indispensable team of data scientists and engineers created. While the Debtors initially proposed on September 5, 2023, in their First Interim Report, that they may seek to reorganize, based on negotiations with the Committee, the Debtors are now seeking a quick, private sale to try to maximize value, while mollifying the Committee's urgent demands.[4] And to satisfy these demands, the Debtors' (reduced) team has been working intently on this process and while there are interested parties; those parties are investment funds that have processes for making investments that take time. Thus, while all are moving expeditiously, to maximize value, the Debtors need that time to focus on a sale without the disruption of the Committee's intimidating discovery and effort to disparage the value proposition.

5. The Committee ignores this, instead repeating over and over that the Debtors are pursuing a lengthy path toward reorganization. *See* Mot. at ¶¶ 1, 25, 51, 52–54. The Committee boldly states that they were forced to file the Motion to Terminate Exclusivity to "stop the Debtors from continuing their wasteful pursuit of a dead-on-arrival reorganization or going concern "Trade Froward" strategy …." *Id.* at ¶ 1. While this is a unique case in which the Committee has disparaged valuable assets and has sought to publicly diminish—and indeed attempt to destroy—the Debtors' asset value, more troubling is that the Committee is doing so knowingly. The Committee knows that the Debtors are not pursuing a path of reorganization, but instead are seeking to monetize their assets to cover the very costs the Committee complains the Debtors have

[4] In fact, as of the filing of this Objection, the Debtors have been in contact with a number of potentially interested parties actively performing due diligence on the Debtors' assets. *See* Barlev Dec. at ¶ 24.

been wasting over the last two months. In their retributive zeal, the Committee will not even allow this process to proceed, while working cooperatively with the Debtors to develop a liquidating plan. These paths are not mutually exclusive as the Committee would have this Court believe.[5] And, the Company began an expense saving exercise prior to filing these cases, having reduced its work for by a near 75% and the Debtors are continuing to evaluate and identity additionally ways to reduce expenses.

6. Prior to and since filing these chapter 11 cases, first, the Debtors have continued to conduct a robust investigation and have reported to both the Court and their stakeholders the results thus far of their investigation, along with having identified individuals within their organization responsible for the fraud. The Debtors have also met with the Committee numerous times since the Committee's appointment, each time freely sharing the details and outcome of the investigation and producing documents—all without the need for the Committee to serve any discovery.

7. Also not mentioned by the Committee—the Debtors have commenced litigation against the Debtors' former founders in Israel and have already seized assets of those individuals. In fact, the Debtors have an approaching response deadline with respect to litigation pending in Israel against such former founders. The Debtors have also recently shared a forthcoming complaint with the Committee to commence litigation against third parties alleged to have been involved in the fraud. The Committee's efforts to prevent the Debtors from compensating professionals utilized in the ordinary course of business includes Israeli counsel primarily responsible for prosecuting such action. This not only risks a slowdown of these Israeli legal proceedings but could prove fatal to such proceedings as well. This is because the Committee's

[5] In addition to the Committee's efforts to denigrate the Debtors' assets, during the evening of October 27, 2023 (Israeli time)—during Shabbat—the U.S. Trustee individually served each of the Debtors' employees via email with its Motion to Convert, causing significant distress to employees already living and working under extremely difficult circumstances. This has only further harmed the Debtors' sale prospects.

continued criticism of the Debtors has been or could be used by the Israeli defendants to undermine the Israeli litigation and unwind the attachments.

8. The Committee's notion that, because the Debtors have been open and transparent about the prepetition fraud, have reported it to them, and have already pursued legal action, there is "cause" to terminate exclusivity finds no basis in law. There is no doubt that the fraud perpetrated by the Debtors' two founders victimized many parties, including creditors and those that work for them, as well as the Debtors' employees, many of whom were shocked and devastated initially by the reporting of the fraud and then as confirmed by the interim results of the investigation.

9. The Committee is so focused on litigation that during the first month of these chapter 11 cases, the Committee flatly refused to even meet with the Debtors or discuss any value maximizing transaction. Accordingly, the Debtors' interim chief executive officer, Ami Barlev, wrote the Committee members and asked to meet with them to discuss how the Debtors' technology, coupled with its employees, are assets of significant value and are marketable. The Committee's reaction was to criticize Mr. Barlev's efforts and claim, without support, that the Debtors had no assets of value other than litigation. Proposed counsel to the Debtors then wrote the Committee's proposed counsel, again asking for a meeting to discuss these issues. While the Committee agreed to a meeting, it appears that this was just to "check the box," for less than 24-hours later, the Committee again reasserted their view that the Debtors' assets had no value and demanded immediate termination of exclusivity. From this time line and the consistent approach the Committee has taken to diminish and disparage the Debtors' assets, it seems the Committee has taken no effort to examine the Debtors' technology or understand that the algorithm and computer learning asset created over the last three years has value and that the problem was not

the technology or lack of value inherent in that technology but that once a legitimate reinsurance transaction was generated using the Debtors' artificial intelligence mechanism, the problem was the fraudulent LOC provided to back that otherwise legitimate transaction.

10. The Committee has not engaged in any evaluation of the value of the Debtors' assets, but instead has disparaged them from the start. Even so, the Debtors have been clear that they will work with the Committee to develop litigation strategies, while also working with the Committee on a liquidating plan. Again, there is no basis in law for termination of exclusivity where a committee refuses to negotiate in good faith. To the contrary, case law provides the exact opposite.[6]

11. The second condition relevant to the Motion to Terminate Exclusivity is that the Debtors are headquartered in Tel Aviv, Israel in what is now a warzone due to an unprecedented attack on the Israeli people on October 7, 2023, by a designated foreign terrorist organization, Hamas.[7] Tel Aviv is the primary target of Hamas missiles. These attacks were Israel's "9/11," as noted by the President of the United States. *See* Remarks by President Biden on the October 7th Terrorist Attacks and the Resilience of the State of Israel and its People | Tel Aviv, Israel (Oct. 18, 2023) (noting that with a country the size of Israel the attacks were actually like 15 9/11s).

12. As noted by the U.S. Secretary of State, Anthony Blinken, the Israeli citizens have shown great bravery like "the grandfather, who drove over an hour to a kibbutz under siege, armed only with a pistol, and rescued his kids and grandkids; the mother who died shielding her teenage

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[6] *See In re Lehigh Valley Pro. Sports Club, Inc.*, No. 00-11296DWS, 2000 WL 290187, at *4 (Bankr. E.D. Pa. Mar. 14, 2000) (noting that "the refusal of creditors to negotiate in good faith supports continuation of exclusivity[]" and that "aggressive litigation posture does not constitute cause" because "[t]o hold otherwise would permit litigious creditors to manufacture 'cause' to shorten the exclusivity period through their own unilateral actions.") (citing *In re Grand Traverse Dev. Co. Ltd. P'ship*, 147 B.R. 418, 421 (Bankr. W.D. Mich. 1992)).

[7] The United States Department of State has designated Hamas a Foreign Terrorist Organization since October 1997 and has listed it as Specially Designated Global Terrorists (SDGTs) since October 2001.

son with her body, giving her life to save his, giving him life for a second time; the volunteer security teams on the kibbutzes, who swiftly rallied to defend their friends and neighbors, despite being heavily outnumber." *See* Remarks of Secretary Anthony J. Blinken and Israeli Prime Minister Benjamin Netanyahu After Their Meeting (Oct. 12, 2023). And the Israeli people are showing remarkable solidarity as "demonstrated in the long lines of people giving bloods, in the hundreds of thousands of reservists who've mobilized, some rushing home from abroad, people around the country opening their homes to fellow citizens displaced from the south." *Id.*

13. What does all this mean right now for companies like Vesttoo? The realities of the war are upending the lives of executives and employees as they deal with the trauma of the Hamas attack, as almost everyone in Israel has lost a relative, a loved one, or a friend, and many are still missing—while a number of employees have been called up to serve as reservist, meaning other employees are left to care for the house and home alone and shoulder an additional burden at work. *See* Mathew Boyle and Deena Shanker, *How Do People Work During War? Israel companies Struggle After Hamas Attack*, Bloomberg, Oct. 25, 2023. This means that Israeli companies have to expect missed deadlines and turn their focus to supporting employees' mental and physical health as the war and related attacks have traumatized the country and brought an unprecedented environment to the State of Israel. *Id*.

14. How has the Committee reacted to this? Notwithstanding a plea from undersigned counsel that the Committee show some sympathy to the Debtors' and their employees and not impose false deadlines and unnecessary pressures, the Committee has demanded that the Debtors immediately terminate all employees and liquidate without considering the value of or trying to sell the assets and goodwill of the Debtors that were developed over a three-year period. And, in support of this, they complain that while the Debtors' employees were dealing with the

unprecedented attack, attending funerals, and worrying about missing relatives and friends, the Debtors were slow to respond to the Committee's request for a detailed list of employees, with a detailed description of the employees' roles and responsibilities, and salaries and benefits for 9-days in the middle of which a war broke out. *See* Mot. at ¶ 26. This should put the Committee's complaints and demands in perspective. The Debtors' employees have demonstrated strength and determination to fulfill their commitment to their creditors and the Court. The Committee should be ashamed and embarrassed by its behavior. The Debtors merely seek three additional weeks to permit interested parties to complete their review of the asset value and to put together an offer to buy assets that can be evaluated by the parties. This time is not only contemplated by the initial exclusivity period; but it does not cause any harm here.

15. For the Court's purposes, many of the issues the Committee raises, in the face of a staff operating in a warzone, are petty and do not constitute "cause" for terminating exclusivity. Indeed, the Debtors have about 42 employees in Israel and approximately 29 cannot be terminated due to the emergency situation in the country.[8] Yet, the Committee has demanded an immediate wind down and employee termination plan. Notwithstanding, the Debtors remain willing to work with the Committee to develop a liquidating plan; keeping the Debtors' initial period of exclusivity in place so this can happen is a far more efficient path forward than having the Committee, who lacks information and access to employees, develop a plan that will ignore key issues. Maintaining exclusivity will further enable the Debtors to (i) continue to work with the Committee to ensure that the litigation commenced in Israel is not negatively impacted, (ii) that the Debtors and their

[8] There are several issues related to employees during wartime that have triggered various labor law protections and the Debtors, 21 days into that war, are working to fully understand these and to determine how to address these issues, which presently prohibit the termination of many of the Debtors' employees.

estates do not violate Israeli labor law, and (iii) that the Debtors and their estates do not incur substantial liability for terminating people that cannot be terminated.

16. This Court should deny the Motion to Terminate Exclusivity in part. Since the Debtors have no present intent to seek to extend exclusivity, the Committee should instead be required to work with the Debtors to formulate an agreed upon plan of liquidation by December 1, while allowing the Debtors to pursue a value maximizing transaction.

BACKGROUND

17. On August 14 and 15, 2023 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the District of Delaware (the "Court").

18. On August 31, 2023, the Office of the United States Trustee for Region 3 appointed five persons to the Committee [D.I. 95]: (i) Clear Blue Specialty Insurance Company and its subsidiary; (ii) Porch.com, Inc.; (iii) Markel Bermuda Limited; (iv) Proventus Holdings, LP; and (v) United Automobile Insurance Co.

19. Since before the inception of these chapter 11 cases (which were filed on an emergency "free-fall basis" due to creditors' race for the assets), the Debtors have been under attack, first by White Rock and its joint provisional liquidators and then under criticism by the Committee for not having filed a perfect case (as if the Debtors had months to prepare a filing instead of two days). The Committee is now objecting to everything the Debtors are filing, even standard first day motions, like continuing insurance policies and use of special purpose professionals.

20. As part of the Debtors' ongoing efforts to investigate and report transparently on prepetition misconduct, on September 7, 2023, the Debtors filed the *Debtors' First Interim Report*

[D.I. 118] (the "First Interim Report"), which, among other things, provides an exhaustive description of the investigative steps taken by the Debtors—steps moving forward regarding rehabilitation of the Debtors—and, importantly, identifies several individuals connected with, and responsible for, the alleged prepetition misconduct, and reporting that such individuals have since been terminated from their positions.[9]

21. In the First Interim Report, the Debtors also discussed the possibility of developing a viable restructuring plan the Debtors refer to as "Trade Forward." *See* First Interim Report at 21–24. Since disclosing this concept, apparently with no work having been performed by the Committee or its professionals, the Committee has expressed strong views that a restructuring was not possible and that they would not allow the Debtors to take the time to purse a value maximizing sale. As such, the Debtors presented a potential sale transaction to those already invested in the Company as a quick means of generating value and transferring expenses—all to provide a net or neutral benefit to the Debtors' estates. The Debtors would then be well-poised to pursue a liquidating plan focused on litigation assets.

22. On October 22, 2023, the Committee filed its Motion to Terminate Exclusivity. After already filing and serving its Motion to Terminate Exclusivity, on October 23, 2023, the Committee served the following discovery on proposed counsel to the Debtors (the "Discovery Requests"):

- The Official Committee of Unsecured Creditors' Request for Production of Documents to the Debtors;
- Notice of Deposition of the Debtors Pursuant to Fed. R. Civ. P. 30(b)(6) [setting November 6, 2023, at 8:00 a.m. (ET) for deposition];
- Notice of Deposition of Chris Gottschalk [setting November 3, 2023, at 2:00 p.m. (ET) for deposition];

[9] The Debtors filed the First Interim Report approximately one week following the Committee's appointment.

- Notice of Deposition of Deposition of Pavel "Pasha" Romanovski [setting November 5, 2023, at 8:00 a.m. (ET) for deposition]; and

- Notice of Deposition of Perella Weinberg Partners Pursuant to Fed. R. Civ. P. 30(b)(6) [setting November 3, 2023, at 10:00 a.m. (ET) for deposition].

23. On October 26, 2023, the Debtors filed their *Motion of the Debtors for Entry of (I) a Protective Order Under Fed. R. Civ. P. 26(c) and (II) an Order Quashing the Committee's Deposition Requests Under Local Rule 7030-1(c)* [D.I. 280] (the "Motion to Quash"). The Motion to Quash sets forth a detailed, yet focused, account of the facts and circumstances leading up to the Committee's filing of the Motion to Terminate Exclusivity and subsequent improper efforts to belatedly take discovery from the Debtors, their management, and their professionals.[10] The Debtors incorporate by reference the factual statements set forth in the Motion to Quash, as verified by the Barlev Declaration attached hereto. For the avoidance of doubt, however, as discussed further below, this Objection will correct the record with respect to numerous misleading, or outright incorrect, averments of the Committee in its Motion to Terminate Exclusivity.

24. Since the filing of the Motion to Terminate Exclusivity, on October 27, 2023, the Office of the United States Trustee for Region 3 (the "U.S. Trustee") filed a *Motion to Convert Chapter 11 Case to a Case Under Chapter 7* [D.I. 281] (the "Motion to Convert"). The U.S. Trustee cites the allegations set forth in the Motion to Terminate Exclusivity (notwithstanding the significant mischaracterizations therein) as the primary impetus for the proposed conversion of these chapter 11 cases. On [October 30, 2023], the Court granted the U.S. Trustee's motion to

[10] For the avoidance of doubt, the Debtors have already disclosed the information demanded by the Committee in its Discovery Requests, making such requests both redundant and unnecessary. Even though the Committee already has this information, the Committee has effectively admitted that it filed the Motion to Terminate Exclusivity without knowledge of cause.

shorten [D.I. 282] with respect to the Motion to Convert [D.I. 285], setting the Motion to Convert for the hearing on November 8, 2023, alongside the Motion to Terminate Exclusivity.

OBJECTION

25. Section 1121(b) of the Bankruptcy Code provides, "Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter." Coupled with the automatic stay under section 362 of the Bankruptcy Code, Congress intended the 120-day exclusive period to provide debtors with both a breathing spell and good faith attempt to negotiate and propose a feasible plan. *See* H.R. Rep. No. 95-595, at 231–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6191. As noted above, the Debtors have not had the normal benefit of the breathing room from the automatic stay, nor has the Committee agreed to negotiate a plan with the Debtors despite the Debtors' herculean efforts during war time conditions to respond to the Committee's numerous demands.

26. When circumstances warrant, "the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section." 11 U.S.C. § 1121(d)(1). "[C]onsidering termination of an exclusivity period "is a serious matter" and termination "should be granted neither routinely nor cavalierly." *See In re Lichtin/Wade, L.L.C.*, 478 B.R. 204, 215 (Bankr. E.D.N.C. 2012). Terminating exclusivity during the initial 120-day period is extremely rare and the moving party seeking to terminate exclusivity during this period bears an excessive burden. *See, e.g., In re Energy Conversion Devices, Inc.*, 474 B.R. 503, 508 (Bankr. E.D. Mich. 2012).

27. Whether "cause" exists is a determination based upon the totality of the circumstances, considering the following non-exhaustive factors:

a. the size and complexity of the case;

b. the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;

c. the existence of good faith progress toward reorganization;

d. the fact that the debtor is paying its bills as they become due;

e. whether the debtor has demonstrated reasonable prospects for filing a viable plan;

f. whether the debtor has made progress in negotiations with its creditors;

g. the amount of time which has elapsed in the case;

h. whether the debtor is seeking an extension of exclusivity to pressure creditors to submit to the debtor's reorganization demands; and

i. whether an unresolved contingency exists.

In re Adelphia Commc'ns Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006); *see also First Am. Bank of N.Y. v. Sw. Gloves & Safety Equip., Inc.*, 64 B.R. 963, 965 (D. Del. 1986). Underpinning each of the above-enumerated factors, however, "[w]hen the Court is determining whether to terminate a debtor's exclusivity, the primary consideration should be whether or not doing so would facilitate moving the case forward. And that is a practical call that can override a mere toting up of the factors." *In re Dow Corning Corp.*, 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997).

28. As noted, a party seeking to terminate the exclusivity period "bears a heavy burden." *In re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 132 (D.N.J. 1995) (quoting *In re Interco, Inc.*, 137 B.R. 999, 1000 (Bankr. E.D. Mo. 1992)). That burden remains heaviest during the initial 120-day exclusive period, sliding down from there upon each request by the debtor to extend exclusivity. *See, e.g.*, *In re Dow Corning Corp.*, 208 B.R. at 664 (Bankr. E.D. Mich. 1997) ("In this Court's opinion, the Debtor's burden gets heavier with each extension it seeks as well as the longer the period of exclusivity lasts; and a creditor's burden to terminate gets lighter with the passage of time.").

29. The Committee does not cite any cases that justify termination. The cases they do cite deal with situations where a debtor moves to extend exclusivity and the court evaluates whether cause exists to extend exclusivity. *See* Mot. at ¶ 46. The Committee simply does not acknowledge that the burden for terminating exclusivity in the initial period is extremely high and they also do not acknowledge that the only basis they assert is they disagree with the Debtors' efforts to maximize value—which is what the Debtors (as well as the Committee, frankly) are obligated to do.

30. The one case the Committee cites to justify termination is based on a breakdown of negotiations: *In re Crescent Beach Inn., Inc.*, 22 B.R. 155, 161 (Bankr. D. Me. 1981). In that case, the Court ordered the termination of exclusivity because of acrimony between the *debtor's principals*—not based on the breakdown of negotiations between the debtor and its creditors. *Id*. at 160. And, this case was rejected by those cases that have actually considered the point, each coming to the opposite conclusion. *See, e.g.*, *In re Lehigh Valley Pro. Sports Club, Inc*., No. 00-11296DWS, 2000 WL 290187, at *4 (Bankr. E.D. Pa. Mar. 14, 2000) (noting that "the refusal of creditors to negotiate in good faith supports continuation of exclusivity[]" and that "aggressive litigation posture does not constitute cause" because "[t]o hold otherwise would permit litigious creditors to manufacture 'cause' to shorten the exclusivity period through their own unilateral actions.") (citing *In re Grand Traverse Dev. Co. Ltd. P'ship*, 147 B.R. 418, 421 (Bankr. W.D. Mich. 1992)).[11]

31. As of the filing of this Objection, a mere 79 days have elapsed since the Petition Date and the Debtors seek only a mere 30 days longer, through December 1, 2023. Since

[11] The other case cited by the Committee for this proposition, *In re R.G. Pharmacy, Inc.*, 374 B.R. 484 (Bankr. D. Conn. 2007), is one where the debtor sought a third extension of exclusivity and since the debtor moved and bore the burden of proof of its third request to extend exclusivity, the court held that the breakdown of negotiations was

the Petition Date, as set forth in greater detail above, the Debtors have taken monumental steps to investigate and begin to prosecute prepetition fraud, terminate those individuals identified as responsible for the wrongdoing, developed a feasible "Trade Forward" business plan, and have progressed with respect to a potential sale process for the Debtors' assets, and have recovered assets from the wrongdoers. In parallel, the Debtors have worked in good faith with the Committee on an agreed upon 2004 Order, have provided over a million and a half documents and other information responsive to Committee requests, and have presented at length to the Committee on the various workstreams, investigations, and plan to maximize value for all stakeholders, primarily the Committee's constituents.[12]

32. By contrast, by all accounts, the Committee's only substantive step taken since its appointment has been to disagree with the Debtors' business judgment, refuse to negotiate, serve discovery, and demand immediate liquidation of the Debtors' assets and termination of all of its employees—hence the Motion to Terminate Exclusivity instead of agreeing to a mutually beneficial solution of working toward a consensual liquidating plan that could be submitted by December 1, 2023.[13]

33. At this stage in these chapter 11 cases, the Committee cannot satisfy its heavy burden to prematurely terminate the Debtors' exclusive right to file plan under section 1121(d) of

significant in that context. This case has no bearing on this situation and the *Grand Traverse Development* and *Lehigh Valley Pro Sports Club* cases are more relevant and persuasive.

[12] In fact, the Debtors' professionals conducting the investigation into prepetition fraud have spent over 10-hours on calls and in person meetings with the Committee going through their investigative findings and answers any questions the Committee has had.

[13] If any of the members of the Committee are unwilling to exercise their fiduciary obligations, whether due to conflicts of interest or any other reason, the U.S. Trustee should immediately take steps to remove such member(s) from the Committee. *See, e.g.*, *In re Pierce*, 237 B.R. 748, 758 (Bankr. E.D. Cal. 1999).

the Bankruptcy Code. Even in the face of the Committee's tactics and lack of good faith efforts to negotiate a plan, the Debtors remain willing to terminate exclusivity early on December 1, 2023.

34. Rather, the Committee's Motion fails for three primary reasons: First, the Committee alleges that the Debtors have no business to reorganize, and the Debtors' assets hold no cognizable value. Second, the Committee argues that the retention of professionals, including those poised to prosecute the Debtors' causes of action, and efforts to maximize value through a sale process is a waste of time, and solely serves to deteriorate value otherwise flowing to unsecured creditors. Third, the Committee has purportedly "lost confidence" in the Debtors' ability to propose a plan.

35. Supported only by a declaration from its proposed financial advisor, the Committee's Motion to Terminate Exclusivity cannot stand on its own. And the Committee has admitted as much by subsequently propounding discovery requests on the Debtors, their management, and their professionals. As set forth in the Motion to Quash, if the Committee truly believed there was sufficient "cause" to justify filing a motion to prematurely terminate exclusivity, there would have been no need for discovery.

36. To be sure, the Motion to Terminate Exclusivity barely touches on the *Adelphia* factors enumerated above—and when it does, the allegations are unsupported and conclusory. The Debtors respectfully submit, as supported by the Barlev Declaration that each of the *Adelphia* factors leads to the conclusion that "cause" does not exist to terminate exclusivity.

A. These chapter 11 cases are complex.

37. Despite the Committee's statements to the contrary, Mot. at ¶ 51, these chapter 11 cases are unquestionably complex. First, the Debtors are located primarily in Israel (a country actively at war), with affiliated debtors domiciled around the world. Second, significant

prepetition fraud has precipitated the filing of these chapter 11 cases, remedial action was taken aggressively by the Debtors, and a robust investigation into this wrongdoing is ongoing. Third, immediately prior to the Petition Date, joint provisional liquidators were appointed over one of the Debtors' non-debtor affiliates in Bermuda, with a concurrent "soft touch" provisional liquidation with respect to certain "affected cells" of White Rock in which the Debtors have a property interest, with continued litigation over the title and control over property of the Debtors related to reinsurance cells, as well as litigation in Israel against certain of the Debtors' founders and others. Finally, the Debtors have been actively developing a "Trade Forward" transaction, engaging in a sale process for certain of their assets, all to maximize the value of the Debtors' estates for the benefit of parties in interest in these cases. The complexity is only heightened given the brinksmanship of the Committee during these chapter 11 cases.

38. Through the Motion to Terminate Exclusivity, the Committee has made clear that notwithstanding detailed analyses and reports to the contrary, it is intent upon overdramatizing its "outrage" and convincing the world that the Debtors' business, and the technology upon which it was built, is illegitimate. *See* Mot. at ¶ 6. The following corrects the record with respect to the Committee's seemingly intentional misstatements riddled throughout the Motion to Terminate Exclusivity:[14]

- "The Debtors' only prepetition business was based on the fraud orchestrated by their former CEO and his accomplices." Mot. at ¶ 1.
    - This is false—the Debtors have disclosed both publicly on the docket and specifically to the Committee a number of significant transactions that were not the result of the prepetition fraud perpetrated by since-terminated individuals. *See* Barlev Dec. at ¶ 15.

[14] Given the significant time and effort put into the various reports and presentations provided to the Committee, it is unfortunate that the Committee decided to misstate or mislead this Court and parties in interest when it had every opportunity to seek clarification or further detail from the Debtors and their professionals prior to filing the Motion to Terminate Exclusivity.

- "Terminating exclusivity now will save the estates at least $8.5 million in cash based on the Debtors' current monthly operational cost expenditures." Mot. at ¶ 1, Newman Dec. at ¶ 13.

    - This is misleading—putting aside that the Debtors cannot reconcile the $8.5 million figure even under its most aggressive assumptions, the cash burn would not simply drop to $0.00 if this Court terminated exclusivity on November 8, 2023. The Committee fails to acknowledge (as has been noted by the U.S. Trustee in its Motion to Convert) that costs would continue to accrue regardless as the Debtors moved toward liquidation. Further, as discussed further below, the Committee has failed to recognize that many of the Debtors' Israeli employees by law cannot be terminated given the recently enacted executive orders in Israel. *See* Barlev Dec. at ⁋⁋ 16–17.

- "At the commencement of these chapter 11 cases, the Debtors claimed to have approximately $30 million in cash and another approximately $64 million in so-called 'restricted cash.'" Mot. at ¶ 2.

    - This is misleading— One of the draft cash flow models provided to the Committee contains an express disclosure providing, "This liquidity analysis / forecast only addresses Vesttoo Ltd. and starts and ends with the cash at Hapoalim. It does not, for example, include the opening/ending cash balances, excludes the circa $33.5m and other small subs (UK & Inc) with circa $1.5m. Incorporating these will increase the cash balances accordingly." In fact, as of the commencement of these chapter 11 cases, Vesttoo Ltd. held cash of approximately $30 million, the Israeli limited partnership Debtors (the Vesttoo Bay LPs) held cash of approximately $33.5 million, and the remaining Debtors held cash of approximately $1.3 million. This is consistent with the cash flow model that was shared with the Committee, the bank statements shared with the Committee, and the Monthly Operating Reports for August filed in these chapter 11 cases. Therefore, the total cash being held by the Debtors at the commencement of these chapter 11 cases was approximately $64 million. In light of the information shared with the Committee, it is wholly unclear how the Committee believes there is an additional $30 million available. *See* Barlev Dec. at ⁋⁋ 18–20.

- "The Debtors' stubborn pursuit of a business transaction in the face of strident Committee opposition caused the Debtors to burn through $11.8 million in August and September *before* accounting for accrued estate professional fees. In other words, the Debtors spent nearly 40% of their unrestricted cash on the filing date in the first six weeks of these proceedings." Mot. at ¶ 2, Newman Dec. at ¶ 8.

    - This is misleading—of the $11.8 million quoted in the Debtors' cash flow forecast, approximately $6.3 million was paid prior to the Petition Date in August, comprising $3.3 million to professionals, $2.4 million in compensation, and $600,000 in operating expenses. Further, the Debtors' cash flow model indicated that the postpetition cash burn, during August and September, would be in the

region of $5.5 million, comprising roughly $3.7 million in compensation (including certain prepetition wage and termination payments that were approved by final order of the Court), $900,000 to professionals (which payments have been disclosed in the OCP Motion [D.I. 263] or the Kroll Retention Application [D.I. 346] and the majority of which is being recovered by the Debtors) and the remainder as ordinary course postpetition expenditures. *See* Barlev Dec. at ⁋ 21.

- In other words, through the end of September, the Debtors spent approximately 8.6% (not 40%) of their unrestricted cash since the Petition Date. *See id.*

B. The Debtors, as will the Committee, need sufficient time to negotiate a plan and prepare adequate disclosures.

39. The Debtors are not asking for any more time than provided by Congress through section 1121 of the Bankruptcy Code. In fact, the Debtors do not need the full 120 days to propose a plan—the Debtors are fully capable of and willing to file a plan by December 1, 2023. The general bar date is not for another month; neither the Debtors nor the Committee know the universe of claims that may be filed against the Debtors.

40. Further, as this Court is aware, regardless of plan proponent, section 1125 of the Bankruptcy Code, as modified by Local Rule 3017-1, mandates at least thirty-five (35) days' notice with respect to a disclosure statement, with at least twenty-eight (28) days for an objection deadline. Even if this Court grants the Committee's Motion to Terminate Exclusivity, it follows that the Committee necessarily is at least sixty (60) days from a confirmation hearing, even on a hypothetical plan of liquidation.

C. The Debtors have attempted to make progress in negotiations with their creditors.

41. The Committee argues that it has "lost confidence" in the Debtors' ability to manage these chapter 11 cases and confirm a plan. Mot. at ¶ 57. However, query whether the Committee ever wanted to the Debtors to succeed in these chapter 11 cases. Rather, the Committee seems determined to denigrate the Debtors' business judgment, disparage the Debtors' technology assets and people, and push for immediate liquidation, no matter the bases or consequences.

42. First and foremost, the Debtors are the *only* fiduciary for the entirety of their estates. *See In re Adelphia Commc'ns Corp.*, 544 F.3d at 424 ("[It is] the debtor's duty to wisely manage the estate's legal claims, and this duty is implicit in the debtor's duty as the estate's only fiduciary.") (internal quotations omitted). By contrast, the Committee owes fiduciary duties only to the class of creditors it represents. *See, e.g.*, *In re Smart World Techs., LLC*, 423 F.3d 166, 175 n.12 (2d Cir. 2005); *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1315 (1st Cir. 1993) (rejecting "erroneous assumption that the [creditors committee] is a fiduciary for the estate as a whole"). And the Committee has stated in its Motion to Terminate Exclusivity that it is only acting for one class of unsecured creditors—the Cedents—thus, the Committee admits it is not acting for the benefit of all creditors.[15] *See* Mot. at ¶ 1 ("The Committee – which represents the only creditor constituency in these cases …"); ¶ 5 n.7 ("[T]he cedents – which include all members of the Committee – are the dominant creditors in these cases, as the Debtors have no secured or other funded debt and only had about $2 million of trade debt."); ¶ 17 ("Each Committee member is a cedent, and they collectively constitute the Debtors' largest creditors.").

43. The Motion to Terminate Exclusivity boils down to a single group of creditors who dominate the Committee disagreeing with the Debtors' business judgment. The Debtors have made every effort to bring the Committee into the fold, provide all requested information, and present on the Israeli litigation and the sale process developed to best maximize value for all stakeholders, and specifically unsecured creditors. These decisions have been made through the sound exercise of the Debtors' business judgment after consultation with experienced professionals. While the Committee will complain about delays in information being provided

[15] The deadline for proofs of claims to be filed is December 1, 2023, so it is not even clear how the Committee can make these allegations.

and the Debtors not meeting their false deadlines, the fact is that the Debtors terminated almost 200 employees before they filed, meaning those left behind have taken on significantly larger workloads (and since the terrorist attacks, even greater workloads), have had to cope with the increased demands of working for a debtor in chapter 11.

44. Curiously, while the Committee has had its eyes locked on punishing the Debtors' innocent employees through immediate liquidation as the only path forward, it has seemingly been unconcerned for roughly 70 would-be higher-priority claimants—the Debtors' employees. The Committee has been chomping at the bit to cut costs in any way possible to slow the cash burn, all the while itself burning over $2 million monthly on professional fees.[16] To that end, the Committee has demanded that the Debtors immediately terminate all their remaining employees, the majority of whom are in Israel.

45. Further to the point, even disregarding the foregoing, these 57 terminated employees would have to first be paid both accrued postpetition compensation as well as severance pay under Israeli law, higher priority claims than those of general unsecured creditors. Flat termination of these employees would have a direct negative impact on the pool of assets available for eventual distribution to general unsecured creditors. By contrast, a proposed requirement of the Debtors' proposed sale process is that a purchaser immediately enter into a transition services agreement with the Debtors, which would retain employees at the purchaser's expense pending closing. Not only is this proposed process moral, but it will save the Debtors' estates significant funds otherwise earmarked for severance pay. The Debtors repeatedly explained to the Committee that one basis for selling the assets with the employees is to transition these employees off the

[16] To ensure strict adherence to budgeting and cost concerns, Debtor expenses postpetition have been, and continue to be, personally supervised and approved by Mr. Barlev.

Debtors' balance sheet without incurring significant separation administrative expenses. In the face of this, it is disappointing that the Committee elected to put forth a false narrative of cash burn going forward when they know the Debtors are proposing concepts to expressly avoid that outcome.

46. Again, however, the Debtors have already explained these points to the Committee *ad nauseum* to no avail. The Committee seems more interested in retribution, pursuing aggressive litigation against the Debtors than finding a solution beneficial to the Debtors' estates and all their creditors. The current "emergency" is one of the Committee's own making. *See, e.g.*, *In re Lehigh Valley Prof'l Sports Club, Inc.*, Case No. 00-11296 (DWS), 2000 WL 290187, at *4 (Bankr. E.D. Pa. Mar. 14, 2000) (refusing to terminate exclusivity and explaining that to hold that "aggressive litigation tactics" constitute cause to terminate exclusivity would allow a "litigious creditor to manufacture 'cause' to shorten the exclusivity period through their own unilateral actions") (citing *In re Grand Traverse Dev. Co. Ltd. P'Ship*, 147 B.R. 418, 421 (Bankr. W.D. Mich. 1992)); *see also, e.g.*, *In re Gibson & Cushman Dredging Corp.*, 101 B.R. 405, 410 (E.D.N.Y. 1989) (affirming bankruptcy court's extension of exclusivity where debtor made "continued attempts to negotiate with the creditors committee" despite "recalcitrance of the creditors and their intent to liquidate rather than negotiate with the debtor to agree [on a plan]").

47. To restate the Debtors' current position: the Debtors are willing and able to propose a plan of liquidation on December 1, 2023 (the general bar date). The Debtors had previously offered to the Committee to consent to termination of the exclusive period on November 15, 2023, should the Debtors not have [a sale term sheet] in hand, just one week following the hearing on the Motion to Terminate Exclusivity. Each of these options would permit the Debtors to exhaust all avenues of a value-maximizing transactions. The Committee would rather waste valuable

estate resources fighting over two weeks or one month. Manufactured "cause" is not cause to prematurely terminate the initial 120-day exclusive period. In light of the negative impact the Committee's Motion to Terminate Exclusivity has had on the process, the Debtors should be given additional time to pursue a sale and they remain committed to that date as a consensual date for termination of exclusivity solely for the Committee to propose a plan should it and the Debtors not come to terms on one.

D. Only 79 days have elapsed since the Petition Date.

48. Unsurprisingly, none of the cases cited by the Committee in its Motion to Terminate Exclusivity involve the proposed termination of the initial 120-day exclusive period. Rather, each decides questions of whether, under the circumstances, the debtor in question would be granted an extension of exclusivity or whether a creditor may terminate exclusivity after several extensions of the initial period. The Committee's failure to cite to factually similar case law is apparent: prematurely terminating exclusivity is an extraordinary remedy rarely acted upon, and only after an overwhelming showing of "cause." *See, e.g.*, *In re Energy Conversion Devices, Inc.*, 474 B.R. 503, 508 (Bankr. E.D. Mich. 2012) (citing *In re Fountain Powerboat Indus., Inc.*, No. 09–07132–8, 2009 WL 4738202, at *7 (Bankr. E.D.N.C. Dec. 4, 2009) (finding only two published cases where courts have found "cause" to reduce the exclusivity period during the initial 120-day period under the statute).

49. As of the filing of this Objection, only 79 days have elapsed since the Petition Date. As discussed above, while the 120-day exclusive period expires on or about December 12, 2023, the Debtors are prepared to file by December 1, 2023, a plan of liquidation contemplating the sale of certain of the Debtors' assets. In fact, the Debtors have made that intention known several times leading up to the filing of the Committee's Motion to Terminate Exclusivity. Not only that, but

the Debtors had even offered to tie exclusivity directly to execution of a [purchase agreement/term sheet] and receipt of a deposit from a purchaser for the Debtors' assets to cover the costs of employees during the process.

E. The Debtors do not need and will not seek an extension of exclusivity.

50. Unlike the myriad of cases irrelevantly cited by the Committee, the Debtors are not seeking an extension of the 120-day exclusive period under section 1121(d) of the Bankruptcy Code. Rather, the Debtors are asking this Court to keep the status quo in place through December 1, 2023, to provide a path permitting a value-maximizing transaction that would bring funds into the estates, reduce both the claims pool and cash burn, and assist individual, vulnerable employees.

CONCLUSION

51. The Committee's efforts thus far in these chapter 11 cases have been value destructive. The Committee has blazed a path of intimidation, brinksmanship, and harassment that has not, and will not, lead to the maximization of value of the Debtors' estates. The Committee's Motion to Terminate Exclusivity is unsupported by evidence and either misstates or misleads this Court as to the facts on the ground with respect to the Debtors and their operations. The Committee has failed to carry its burden to demonstrate "cause" for this Court to prematurely terminate the 120-day exclusive period granted to the Debtors by statute. The Debtors fully intend to continue working with the Committee in good faith, but respectfully request that this Court enter an order denying the Motion to Terminate Exclusivity, in part, granting the Motion to Terminate Exclusivity solely as to the Committee effective as of December 1, 2023, and grant such other and further relief as this Court deems just and proper under the circumstances.

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RESERVATION OF RIGHTS

52. Nothing in this Objection is intended to, nor shall be deemed to, waive any rights, arguments, or defenses the Debtors have or may have with respect to the U.S. Trustee's Motion to Convert, which rights, arguments, and defenses are hereby expressly reserved and preserved.

Dated: November 1, 2023
Wilmington, Delaware

DLA PIPER LLP (US)

/s/ R. Craig Martin

R. Craig Martin (DE 5032)
Stuart M. Brown (DE 4050)
Matthew Sarna (DE 6578)
1201 N. Market Street, Suite 2100
Wilmington, Delaware 19801
Telephone: (302) 468-5700
Facsimile: (302) 394-2341
Email: craig.martin@us.dlapiper.com
stuart.brown@us.dlapiper.com
matthew.sarna@us.dlapiper.com

Proposed Counsel for the Debtors