

DIP Financing Issues: Vendors, Landlords, and DIP Priority

- Following recent high-profile administratively insolvent chapter 11 cases (*e.g.*, Party City II, RAD II, 99 Cents Only, Big Lots, At Home Group), vendors, landlords, and other commercial counterparties are taking a more active and litigious approach on DIP financing at the outset of chapter 11 cases
- Key issues include:
 - Enhanced scrutiny of DIP Budgets
 - Timing/protection for stub rent, postpetition payables, etc.
 - Vendors with enhanced rights (*e.g.*, concession and consignment vendors) and/or that are not subject to enforceable executory contracts seek incremental credit protections that undermine superpriority status of DIP claims
 - Payment in advance, escrows, DIP carve-outs, etc.
 - Objections to 506(c)/552(b) waivers absent payment in full of all or a subset of key administrative expenses
- Negotiating dynamics often dictated by strategic importance of vendor/landlord base to the business and purpose of the case (going-concern sale/reorganization vs. liquidation)

DIP Financing Issues: Governance

- In certain high-profile recent filings, lenders have conditioned DIP financing on governance-related provisions that address both independence (*e.g.*, special committees of independent directors) and go-forward management
- Often occur in cases involving prepetition fraud or other alleged misconduct, but not always a prerequisite
 - *Fat Brands* – DIP lenders required an overhaul of the Debtors’ governance as a condition to providing postpetition financing
 - *First Brands* – DIP lenders required the resignation of the Founder/CEO and appointment of the CRO as Interim CEO, amid a Special Committee investigation into prepetition off-balance sheet financing arrangements
- DIP lenders requiring such provisions often seek “no control” findings in financing orders (*See Saks Global*, Final DIP Order, *Findings of Fact and Conclusions of Law at ¶ G*)