

# Recent Developments in Post-Petition DIP Financing

42<sup>ND</sup> ANNUAL JAY L. WESTBROOK BANKRUPTCY CONFERENCE  
NOVEMBER 17, 2023

---

HON. E. LEE MORRIS, U.S. BANKRUPTCY COURT, N.D. TEX.  
GABRIEL MORGAN, WEIL, GOTSHAL & MANGES LLP  
KELLI S. NORFLEET, HAYNES AND BOONE, LLP

0

## Executive Summary

---

- Recently Debtors and lenders have become increasingly creative with respect to DIP financing for their chapter 11 cases.
- These materials summarize a few recent DIP trends and provide additional thoughts about how parties continue to innovate and use DIP financing to achieve desired outcomes
- This presentation covers the following recent trends and innovations in DIP financing:
  - Pre-plan releases of equity sponsors providing DIP financing that typically would be available only, if at all, as part of confirmation of a chapter 11 plan;
  - Recent developments in “roll-ups” and related issues;
  - Structuring of refinancing DIPs to eliminate typical DIP lender control of chapter 11 cases and allow alternative plans to be pursued by a debtor;
  - Inclusion of “equity-linked features” in DIP financing arrangements and other mechanisms for a DIP lender to convert DIP loans to equity; and
  - Interplay of “position enhancing” transactions and DIP financings

1

## Pre-Plan Releases: *Katerra Inc.* (S.D. Tex. 2021)

- Releases for equity sponsors typically occur under confirmed chapter 11 plans after an investigation by the Debtors and/or Creditors' Committee
- In a final DIP order in the chapter 11 cases of its portfolio company, Katerra, SoftBank achieved a full release from prepetition liability
- SoftBank was a majority equity holder of, and DIP lender to, Katerra, a provider of new build, construction, and renovation services
- Prior to chapter 11, Katerra raised ~\$3 billion in equity capital—over \$2 billion from SoftBank
- SoftBank determined not to provide financial support to Katerra and to exit its investment in Katerra, protecting itself from any liability arising from its involvement
- SoftBank achieved its early release largely due to four factors:
  - (i) SoftBank did not have control over the Debtors' board;
  - (ii) SoftBank received no prepetition money from Katerra;
  - (iii) SoftBank had no prepetition debt claim against Katerra; and
  - (iv) SoftBank provided DIP financing where no other sufficient capital was available



2

## Pre-Plan Releases (cont'd): Additional Terms of *Katerra* DIP

	<i>Katerra</i>
DIP Size & Structure	<ul style="list-style-type: none"> <li>• \$35mm DIP promissory note to fund a sale process and wind down</li> </ul>
Applicable Fees	<ul style="list-style-type: none"> <li>• Katerra paid out-of-pocket expenses, including fees and expenses of counsel, one local counsel in relevant jurisdictions, and other advisors</li> </ul>
Maturity Date	<ul style="list-style-type: none"> <li>• Short tenor: earlier of (a) consummation of a sale of substantially all of Katerra's assets; (b) acceleration of DIP Note; (c) 43 days after entry of Interim DIP Order (or such later date as SoftBank agreed) if the Final DIP Order had not been entered before expiration of the 43-day period; (d) substantial consummation of a chapter 11 plan confirmed pursuant to a final and non-appealable order entered by the Bankruptcy Court; and (e) 78 days after Petition Date</li> </ul>
Release Feature	<ul style="list-style-type: none"> <li>• As a condition to the financing: broad release provision on behalf of SoftBank (and affiliated parties) at Final DIP Hearing</li> <li>• Releases followed an investigation of the "Released Claims" by a special committee of Katerra's board</li> </ul>

- The sequence of events and timing in *Katerra* underscores the importance of the outcome as a new development in DIP financing strategies
  - Typically, a debtor receives interim approval to borrow on its DIP at its first-day hearing, with the DIP being fully approved on a final basis at a subsequent "second-day" hearing 20–30 days later
  - A DIP lender with a prepetition relationship with the debtor then must wait until consummation of a chapter 11 plan (*i.e.*, end of chapter 11 case) to obtain a release
  - In *Katerra's* case, after 44 days of litigation, negotiation, and eventual settlement between Creditors' Committee, SoftBank, and Debtors, Bankruptcy Court approved the release provisions as part of the DIP financing on a final basis, well before the plan process even started
  - As part of the settlement, Debtors also agreed to pursue replacement DIP financing to take out SoftBank and, if replacement financing could be procured, SoftBank agreed to reduce its DIP claim by \$1mm and cap its attorneys' fees at \$3mm (replacement financing did not happen)

3

## Pre-Plan Releases (cont'd): *Altera Infrastructure L.P.* (S.D. Tex. 2022)



- Following *Katerra*, *Altera* structured a *Katerra*-esque DIP financing package
  - Brookfield, sponsor to *Altera*, a midstream services provider to oil & gas companies, provided equity and debt capital to *Altera* before chapter 11
    - Less than one year before filing, *Altera* consummated an exchange transaction: Brookfield exchanged \$699mm of unsecured debt to secured notes

### Terms of *Altera* DIP

- Brookfield proposed a \$70mm DIP facility (\$50mm new-money, \$20mm roll-up) on a junior basis, conditioned (initially) on a broad release for Brookfield as part of the DIP financing
- Like the *Katerra* DIP, the *Altera* DIP had a short tenor—no more than four months after Petition Date
- DIP also included (i) 1.50% upfront fee, (ii) 1.50% exit fee, and (iii) 5.50% ticking fee (based on unused DIP commitments between entry of Interim DIP Order and Final DIP Order or termination and/or maturity)
- Contemporaneously with the DIP, *Altera* filed an RSA outlining a plan and post-emergence equity structure with Brookfield as majority equity holder
- Multiple parties objected to the proposed financing, citing concerns with the early-stage release for Brookfield, especially in light of the prepetition debt exchange
- To settle, Brookfield removed the release from the DIP Order (moving it to the chapter 11 plan) and obtained approval of the term loan facility on a final basis 56 days into the bankruptcy
- Settlement also included: (i) an equity split between noteholders and Brookfield at 13% and 87%, respectively, and (ii) a commitment to undertake a rights offering for up to \$96.51mm of new common stock
- Unlike SoftBank in *Katerra*, Brookfield in *Altera* sought both a DIP-stage release **and** continued interests in the Debtors (*i.e.*, majority of reorganized equity) on account of a prepetition debt claim

## Pre-Plan Releases (cont'd): *Performance Powersports Group Investor, LLC* (D. Del. 2023)

- Similar to *Katerra* and *Altera*, the Debtors in *Performance Powersports* sought approval of a junior \$10mm DIP loan provided by their prepetition equity sponsor, Kinderhook, conditioned on a broad release for Kinderhook to be included in the final DIP order
- Kinderhook also was the stalking horse bidder under the Debtors' bidding procedures, pursuant to which the Debtors sought approval of a \$2.2mm break fee in favor of Kinderhook
- The Bankruptcy Court found that the broad releases in favor of Kinderhook, which did not exclude claims for fraud and willful misconduct, were impermissible at the DIP financing stage
- Judge Silverstein remarked she has never been asked to approve a release for a DIP lender 30 days into the case and indicated she would not approve the release at that hearing
  - Instead of a final ruling on the issue, the parties opted for a second interim DIP order and adjourned the release issue for a later final DIP hearing
- At the final hearing, the Debtors (i) clarified that only the Debtors (not third parties) were releasing Kinderhook and (ii) presented evidence of an independent investigation, which found that the claims to be released had no value
  - In light of the foregoing, Judge Silverstein overruled objections related to the release and approved the DIP financing on a final basis with the release included, finding that the (i) financing was necessary, (ii) financing required approval of the release as part of the deal, and (iii) "tradeoff [for the release], if anything, is minimal"

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Recent Developments in Post-Petition DIP Financing

Also available as part of the eCourse

[2023 Jay L. Westbrook Bankruptcy eConference](#)

First appeared as part of the conference materials for the  
42<sup>nd</sup> Annual Jay L. Westbrook Bankruptcy Conference session  
"Recent Developments in Post-Petition DIP Financing"