

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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IN RE:

ALLWAYS EAST TRANSPORTATION, INC.

Chapter 11
Case No. 16-22589(RDD)

Debtor.
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**FINAL ORDER AUTHORIZING DEBTOR TO (1) INCUR POST-
PETITION SECURED INDEBTEDNESS AND GRANTING
SECURITY INTERESTS PURSUANT TO SECTIONS 105(a),
363(e) AND 364(c)(2) and (3) OF THE BANKRUPTCY CODE, (2)
ASSUME VEHICLES LEASE UNDER SECTION 365 OF THE
BANKRUPTCY CODE AND (3) ENTER INTO SURETY BOND
AGREEMENTS IN CONNECTION WITH DUTCHESS COUNTY
CONTRACT PURSUANT TO SECTION 363(b) OF THE
BANKRUPTCY CODE**

UPON the motion, dated August 9, 2016, of Allways East Transportation, Inc., (the “**Debtor**”), seeking entry of interim and final orders authorizing the Debtor to (1) incur post-petition secured indebtedness from Merchants Automotive Group, Inc. (“Merchants”) and granting Merchants secured liens pursuant to sections 363(b), 364(c)(2) and (3) and 365 of the Bankruptcy Code, (2) assume its vehicles lease with Merchants and (3) enter into various agreements related to the issuance of a surety performance bond in connection with the Debtor’s Dutchess County contract the “**Motion**”), filed by the Debtor in the above-captioned chapter 11 case (the “**Case**”); the Debtor having filed a voluntary petition for reorganization pursuant to chapter 11 of title 11, United States Code (the “**Bankruptcy Code**”), on April 28, 2016 (the “**Petition Date**”), and the Debtor having requested in the Motion entry of interim and final orders:

(1) authorizing and approving, pursuant to section 364(c) of the Bankruptcy Code, the Debtor to obtain debtor in possession financing (the “**DIP Loan**”) from Merchants Automotive Group, Inc. (the “**Merchants**”) pursuant to the terms and conditions of (a) this Interim Order and any final order on the Motion (the “**Final Order**”) entered after a Final Hearing (as defined herein below), and (b) the loan agreement and all ancillary documents referred to in the Motion, the Interim Order, or any Final Order and/or required to be executed by the Debtor in connection therewith (collectively, the “**DIP Loan Documents**”);

(2) granting Merchants a perfected security interest in the DIP Collateral (as defined below), including (i) a perfected first priority lien in the Debtor’s accounts receivable relating to the Services Contract (as defined below) in an amount up to 75% of the indebtedness existing at any time under the DIP Loan and the proceeds therefrom; (ii) a perfected first priority lien on all unencumbered vehicles owned by the Debtor whenever acquired; and (iii) pursuant to section 364(c)(3) of the Bankruptcy Code, a perfected junior lien on all vehicles of the Debtor that are encumbered by valid, perfected and non-avoidable liens as of the commencement of the Chapter 11 Case and the proceeds therefrom;

(3) authorizing and approving, pursuant to section 363 of the Bankruptcy Code, the Debtor’s use of Cash Collateral (as defined herein below);

(4) authorizing the Debtor to make payments to Merchants pursuant to the DIP Loan Documents, and

(5) granting any further and related relief as the Court deems just and equitable.

And an interim hearing having been held on August 12, 2016; and upon due deliberation thereon the Court having entered an order granting the Motion on an interim basis on August 12, 2016 (the “**Interim Order**”); and a final hearing having been held on October 18, 2016; and

upon due deliberation thereon, good and sufficient cause appearing therefor, and it appearing to be in the best interests of the Debtor's estate and creditors;

THE COURT HEREBY FINDS, DETERMINES AND CONCLUDES THAT¹:

A. On the Petition Date, the Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"). The Debtor is continuing in the management and possession of its business and properties as debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. Consideration of the Motion constitutes a "core proceeding" as defined in 28 U.S.C. §§ 157(b)(2)(A), (D), (G), (K), (M) and (O). This Court has jurisdiction over this proceeding and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157 and 1334.

C. Prior to the Petition Date, on October 26, 2011, Merchants and the Debtor entered into a Master Open End Lease Agreement (the "**Master Agreement**") wherein Merchants agreed to lease certain small passenger buses and minivans to Debtor for use in its business, and Debtor agreed to pay rent to Merchants pursuant to the terms of the Master Agreement and the attendant Lease Schedules thereto (the "**Lease Schedules**," and together with the Master Agreement, the "**Lease**").

D. To effectuate the Debtor's reorganization, the Debtor, or its affiliate Always North Transportation, Inc., ("**ANT**") intends to enter into an agreement with the County of Dutchess, New York ("**Dutchess**") for transportation services (the "**Services Contract**"). All of the vehicles that may be used by ANT in performance of the Services Contract, if applicable, are leased or sub-leased by the Debtor to ANT, and in many cases leased by the Merchants to the

¹ Findings of fact contained herein shall be construed as conclusions of law, and conclusions of law herein shall be construed as findings of fact.

Debtor under the Lease. As a condition of Dutchess entering into the Services Contract, the Debtor and/or ANT is required to post a performance bond.

E. To obtain the necessary capital for the Debtor to procure the performance bond and to confirm a plan of reorganization, the Debtor has applied to the Court for authority pursuant to Bankruptcy Code § 364, to obtain debtor-in-possession financing from Merchants. A summary of the material terms of the DIP Loan include, but are not limited to:

(1). Co-Obligors: The Debtor and ANT (together, the “**Borrowers**”) are jointly and severally liable under the DIP Loan Documents.

(2). Type/Amount: A line of credit not to exceed the maximum principal amount of \$325,000 and a letter of credit facility in the maximum amount of \$300,000 (the “**DIP Loan**”). The DIP Loan shall be secured by the DIP Collateral (defined below).

(3). Purpose: DIP Loan will be made available to the Borrowers in accordance with the Interim Order and this Order and the DIP Loan Documents for the following uses: for the payment of administrative expense claims, cure costs and attorneys’ fees associated with the Lease, for the payment of bank fees, lender’s attorneys’ fees and costs associated with the DIP Loan and obtaining a letter of credit, and for other costs and expenses necessary for the reorganization of the Debtor.

(4). Closing Date: On a date agreed to by the parties within 30 days of the Bankruptcy Court’s entry of an order approving the DIP Loan (the “**Closing Date**”), the parties shall execute the DIP Loan Documents.

(5). Maturity: The DIP Loan shall be payable in full on the first day of the twenty-fourth month following the Closing Date (the “**Maturity Date**”).

(6). Interest Rate/Payments: The DIP Loan shall accrue interest at the rate of five percent (5%) per annum. Payments on the DIP Loan shall be due on the first day of each month and paid in equal monthly installments of principal and interest, amortized over a period of twenty-four months. The net proceeds of the sale of any vehicle that comprises part of the DIP Collateral shall be applied to principal of the DIP Loan, but the sale or other liquidation of DIP Collateral shall not affect the Maturity Date. If necessary, the DIP Loan will be re-amortized monthly to maintain equal installments of principal and interest from an event reducing the principal amount until the Maturity Date.

(7). Priority and Collateral: As collateral for the DIP Loan, Merchants will be granted: (i) a perfected first priority lien in the Debtor's accounts receivable relating to the Services Contract in an amount up to 75% of the indebtedness existing at any time under the DIP Loan and the proceeds therefrom; (ii) a perfected first priority lien on at least 92 presently unencumbered vehicles presently owned by the Borrowers, and (iii) a perfected first priority lien on all vehicles presently subject to any Lease Schedule as the Debtor pays off its obligations under the Lease with respect to such vehicle(s).

(8). Adequate Protection and Use of Cash Collateral: The Borrowers shall ensure that the value of current, non-delinquent, accounts receivable is at all times an amount greater than seventy-five percent (75%) of the balance (including any letters of credit outstanding) remaining on the DIP Loan. If at any point prior to the Maturity Date, the value of current, non-delinquent, accounts receivable drops below this threshold, the Borrowers shall make an additional payment of principal to reduce the amount due under the DIP Loan until this condition is satisfied. The Borrowers shall provide Merchants with monthly reports of their accounts receivable to ensure compliance with this provision.

(9). Assignment of Proceeds from Services Contract: To the extent permitted by applicable law, the Borrowers will assign the proceeds of the Services Contract to Merchants and provide for direct payment of the DIP Loan by Dutchess.

(10). Cross-Default/Cross-Collateralization: In addition to the DIP Loan, the DIP Collateral shall secure the Debtor's performance under the Lease. The DIP Documents shall provide for the Cross-Collateralization and Cross-Default between the DIP Loan and the Lease.

(11). Defaults: In addition to the occurrence of any event of default under the Lease, an event of default under the DIP Loan shall occur if (i) the Borrowers fail to make a payment due under the DIP Loan when such payment becomes due; (ii) either Borrower defaults under the Services Contract; (iii) the Borrowers fails to maintain the minimum 75% value to loan threshold after ten (10) days of a notice of deficiency; (iv) the Debtor fails to confirm a plan of reorganization in the Case; or (v) the Borrowers fail to comply with any other terms or condition to be set forth in the DIP Documents. Upon an event of default, all amounts due under the DIP Loan may be accelerated, with interest bearing on any unpaid amount at the rate of eighteen percent (18%) per annum.

F. Merchants is willing to advance funds to the Debtor only upon the terms and conditions contained in the Interim Order, this Order and the other DIP Loan Documents, as modified herein.

G. The Debtor is unable to obtain sufficient levels of unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code to maintain and conduct its businesses.

H. The Debtor is unable to obtain the necessary financing as unsecured credit allowable under section 364(a), (b) or (c)(1) of the Bankruptcy Code. Additionally, the Debtor

is unable to procure the necessary financing on more favorable terms than those offered by Merchants or provided in this Order.

I. The terms and conditions of the DIP Loan, as set forth in the DIP Loan Documents, and the fees paid and to be paid thereunder (i) are fair, reasonable, and the best available under the circumstances; (ii) reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duties; and (iii) are supported by reasonably equivalent value and consideration.

J. The credit and financial accommodations to be extended under the DIP Loan are being extended by Merchants in good faith; the Debtor and Merchants have negotiated the terms and conditions contained in this Order in an arms' length, open and honest fashion; and Merchants the Agents and the Lenders are entitled to the full protections of section 364(e) of the Bankruptcy Code.

K. It is in the best interests of the Debtor's estate and creditors that the Debtor be allowed to finance its operations under the terms and conditions set forth herein.

L. The Debtor has demonstrated sound business judgment for assumption of the Lease.

M. The obtaining of a surety bond from Endurance is necessary for the Debtor and ANY to obtain renewal of the Services Contract.

N. Always North Transportation, Inc. has agreed to assign all of its interests in and to the Services Contract to the Debtor in accordance with the Assignment Agreement annexed hereto as **Exhibit "A"**. Such Assignment Agreement may not be amended, modified or changed, nor shall any waiver of any provision become effective without approval of the Court during the pendency of the Chapter 11 case.

O. Sufficient and adequate notice of the Motion has been provided under the present circumstances pursuant to Bankruptcy Rules 2002, 4001(b), (c) and (d) and 9014 and section

102(1) of the Bankruptcy Code, as required by sections 363(b) and 364(c) of the Bankruptcy Code, and no further notice of, or interim or preliminary hearing on, the Motion or this Order is necessary or required.

P. Good, adequate and sufficient cause has been shown to justify the granting of the relief requested in the Motion and the immediate entry of this Order.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. **Motion Granted.** The Motion is granted on a final basis to the extent and in accordance with the terms and conditions set forth in this Order. Any objections to the Motion with respect to the entry of this Order to the extent not withdrawn, waived or otherwise resolved, and all reservations of rights included therein (but subject to all reservation of rights included herein), if any, are hereby denied and overruled.

2. **Authorization to Borrow.** The Debtor is authorized to (a) borrow funds and obtain extensions of credit up to \$625,000 pursuant to the DIP Loan Documents, (b) enter into the DIP Loan; (c) execute and deliver the DIP Loan Documents; and (d) use the proceeds of the DIP Loan in a manner consistent with the DIP Loan Documents. The Debtor is hereby authorized and directed to do and perform all acts and to make, execute and deliver all instruments and documents that may be required or necessary for the performance by the Debtor under the DIP Loan Documents. Merchants' right to decline to provide advances to the Debtor under the DIP Loan, in its sole and absolute discretion, is preserved.

3. **Use of Funds.** Pursuant to the terms and conditions of this Order and the DIP Loan Documents, the Debtor is authorized to use the advances under the DIP Loan Documents. The Debtor's rights to use the extensions of credit under the DIP Loan Documents shall terminate upon the earlier of (i) the occurrence of an Event of Default (defined below) in accordance with the provisions of paragraph 10 hereof, or (ii) upon the occurrence of the Maturity Date. Nothing in this Order shall authorize the disposition of any assets of the Debtor

outside the ordinary course of business or other proceeds resulting therefrom, except as permitted under the DIP Loan Documents (subject to any required court approval).

4. **Grant of Security Interest.** Upon the entry of the Interim Order effective as of the Petition Date, and in an amount equal to the post-petition advances made under the DIP Loan (including any letters of credit outstanding) and any amounts due under the Lease, together with all additional interest, costs and fees due thereunder, Merchants is hereby granted the following security interests and liens against the assets of the Debtor, all of which shall immediately be valid, binding, permanent, continuing, enforceable and non-avoidable (collectively, the “**DIP Liens**”): (i) pursuant to § 364(c)(2) and (3) of the Bankruptcy Code, a perfected first priority lien in the Debtor’s accounts receivable relating to the Services Contract in an amount up to 75% of the indebtedness existing at any time under the DIP Loan and the proceeds therefrom (together, the “**Cash Collateral**”); (ii) pursuant to § 364(c)(2) of the Bankruptcy Code, a perfected first priority lien on the unencumbered vehicles (consisting of at least 92 automobiles, trucks, trailers, vans, busses, or other conveyances) presently owned by the Debtor; and (iii) pursuant to § 364(c)(2) of the Bankruptcy Code, a perfected first priority lien on any vehicles acquired by the Debtor after the Petition Date (specifically consisting any vehicles presently subject to any Lease Schedule that becomes property of the estate upon the Debtor completing or paying of its obligations under the Lease with respect to such vehicle(s)) (collectively, including the Cash Collateral, the “**DIP Collateral**”). The DIP Liens shall (a) be deemed effective and perfected as of the Petition Date and without the necessity of the Debtor or Merchants incurring the expense for the execution, recordation or filing of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or without the necessity of Merchants taking possession or control of applicable assets, and (b) extend and attach to all DIP Collateral and any proceeds of DIP Collateral which is presently in existence or is hereafter acquired (whether acquired prior to or subsequent to the Petition Date) and which is owned by

the Debtor or in which the Debtor has any interest, whether held by the Debtor or by others for any of the Debtor's accounts, wherever located. Nevertheless, Merchants shall be and hereby is authorized to take any action it deems necessary or appropriate to perfect the DIP Liens, including but not limited to filing financing statements, all of which shall be deemed to have been filed on the date of entry of this Order.

5. **Assignment of Services Contract.** The Debtor is authorized to assign the proceeds of the Services Contract to Merchants and provide for direct payment of the DIP Loan by Dutchess.

6. **Relief from Automatic Stay.** The automatic stay imposed under section 362(a) of the Bankruptcy Code is hereby modified as necessary to (i) permit the Debtor to grant the DIP Liens and to incur all liabilities and obligations to Merchants under and in connection with the DIP Loan Documents, the Interim Order and this Order, (ii) authorize Merchants to retain and apply payments hereunder; and (iii) authorize Merchants to enforce the provisions of the Interim Order, this Order or the DIP Loan Documents.

7. **Use of Cash Collateral and Adequate Protection.** The Debtor is hereby authorized to use the Cash Collateral, in accordance with the terms and conditions of the Interim Order and this Order, until the earlier of (a) an Event of Default or (b) the Maturity Date. As adequate protection for any post-petition diminution in value of the DIP Collateral, the Debtor shall ensure that the value of current, non-delinquent, accounts receivable relating to the Services Contract is at all times an amount greater than seventy-five percent (75%) of the balance (including any letters of credit outstanding) remaining on the DIP Loan. If at any point prior to the Maturity Date, the value of current, non-delinquent, accounts receivable drops below this threshold, either the Debtor or ANT shall make an additional payment of principal to reduce the amount due under the DIP Loan until this condition is satisfied.

8. **Reporting.** The Debtor shall provide Merchants with all financial and other reporting in full compliance with the Lease and the DIP Loan Documents.

9. **No Senior Liens/Sale of DIP Collateral.** From and after entry of the Interim Order, unless Merchants has provided its prior written consent or the DIP Loan has been indefeasibly paid in full, there shall not be entered in these proceedings, or in any other proceeding related to this Case, any order which authorizes the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, or collateral interest or other lien on all or any portion of the DIP Collateral and/or entitled to priority administrative status which is superior to or *pari passu* with those granted pursuant to this Order to Merchants. The Debtor shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral without the prior written consent (by email or otherwise) of Merchants (which shall not be unreasonably withheld or delayed) required under the applicable DIP Loan Documents, except as otherwise provided for in the DIP Loan Documents and this Order and approved by the Bankruptcy Court to the extent required under applicable bankruptcy law.

10. **Default.** The Debtor shall be in default under the Interim Order or this Order upon the occurrence of any of the following events (an “**Event of Default**”): (a) the occurrence of any event of default under the Lease, (b) the Borrowers failure to make a payment due under the DIP Loan when such payment becomes due; (c) the occurrence of a default under the Services Contract; (d) the Borrowers failure to maintain the minimum 75% value to loan threshold set forth in Paragraph 7 herein, after ten (10) days of a notice of deficiency; (e) the Debtor failure to confirm a plan of reorganization; or (f) the Borrowers failure to comply with any other terms or condition set forth in the DIP Loan Documents.

11. **Rights and Remedies Upon Occurrence of Event(s) of Default.** Upon the occurrence of an Event of Default, and after giving any notice and/or opportunity to cure required by the Interim Order, this Order and/or the DIP Agreement, if applicable, all amounts

due under the DIP Loan may be accelerated, with interest bearing on any unpaid amount at the rate of eighteen percent (18%) per annum. In addition, upon the filing a notice of default and election to accelerate with the Bankruptcy Court, Merchants is authorized to exercise its remedies pursuant to the DIP Loan Documents and applicable law.

12. **Survival.** This Order shall be binding upon and inure to the benefit of Merchants, the Debtor and their respective successors and assigns, including, without limitation, any trustee, responsible officer, examiner, estate administrator or representative, or similar person appointed in a case for the Debtor under any chapter of the Bankruptcy Code. The provisions of this Order and any actions taken pursuant to this Order shall, to the extent permitted by applicable law, survive entry of any orders which may be entered confirming any plan of reorganization or which may be entered converting these bankruptcy cases from Chapter 11 to Chapter 7 of the Bankruptcy Code. The terms and provisions of this Order, as well as the secured claims granted by this Order, shall (to the extent permitted by applicable law) continue in this or any subsequent or related case under the Bankruptcy Code and shall continue notwithstanding any dismissal of the Debtor's case, and such claims shall maintain their priority as provided by the Interim Order and this Order until the DIP Loan is satisfied in full.

13. **Good Faith Under Section 364(e).** Merchants shall be entitled to the benefits and protections of this Order, including the protections afforded pursuant to Bankruptcy Code § 364(e), with respect to all post-petition advances and/or financial accommodations made by Merchants to or for the benefit of the Debtor. Pursuant to the provisions of Bankruptcy Code § 364(e), the secured status of Merchants' post-petition advances shall be binding on the Debtor or any successor trustee or trustees even if this Order is reversed or modified on appeal.

14. **Authority To Assume the Lease.** The Debtor is hereby authorized, on a final basis, to assume the Lease. The Court shall retain jurisdiction over the determination of any cure amounts required to be paid in connection with the assumption of the Lease.

15. **Authority To Enter Into Surety Documents.** The Debtor and its affiliate, ANT, are hereby each authorized to enter into any and all documentation as required by Endurance Insurance, Inc. to issue the performance bond required for the Services Contract serviced by the Debtor.

16. **Effective Immediately.** The terms and conditions of this Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Order. Specifically, pursuant to the Interim Order and this Order, the fourteen (14) day automatic stay period of Bankruptcy Rule 6004 is expressly inapplicable to the Interim Order, this Order and the transactions, including, without limitation, transfers contemplated hereby, and accordingly, this Order shall become operative immediately upon entry on the docket.

17. **Inconsistency.** To the extent that any of the provisions of this Order shall conflict with any of the provisions of the DIP Loan Documents, the DIP Loan Documents is deemed to control and shall supersede the conflicting provision(s). To the extent that any of the provisions of this Order shall conflict with any order of the Court authorizing the Debtor to continue the use of pre-petition bank accounts, cash management systems and/or business forms, or any similar orders, then this Order is deemed to control and supersede the conflicting provision(s) in said orders.

18. **Modifications.** Merchants and the Debtors may amend, modify or supplement any of the provisions of the DIP Loan Documents (each a “Modification” and, collectively, the “Modifications”) without further order of the Court, provided that (a) such Modification is not material, (b) the Office of the United States Trustee and the official committee of unsecured creditors appointed in the Chapter 11 Cases (any such committee, if formed, the “Committee”), provide their written consent in advance, which consent shall not be unreasonably withheld, and (c) notice of such Modification is filed with the Court at least two business days prior to the

proposed effective date thereof, provided, however, that filing with the Court shall not be required with respect to any Modification that in addition to being non-material is also technical and/or ministerial. The foregoing provisions shall not apply to any forbearance or waiver by Merchants with respect to any events of default which may have occurred (and the foregoing provisions shall not limit or impair Merchants' absolute discretion to agree to such forbearance or waiver), provided that such forbearance or waiver is not itself conditioned upon the Debtor's agreeing to any Modification that is material.

19. **Retention of Jurisdiction.** This Court shall retain jurisdiction over any disputes related to or arising from this Order, including but not limited to any action, suit, or proceeding for the interpretation and enforcement of the DIP Loan, DIP Loan Documents, or the collection of any amount allegedly payable pursuant to any of the foregoing documents.

20. **Enforceability.** This Order shall constitute findings of fact and conclusions of law pursuant to the Bankruptcy Rule 7052 and shall take effect and be fully enforceable immediately upon execution hereof

Dated: White Plains, New York
October 19, 2016

/s/Robert D. Drain
HON. ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE