IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
AMERICAN APPAREL, LLC, *et al.*,[1]	:	Case No. 16-12551
Debtors.	:	(Joint Administration Requested)

MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION SENIOR SECURED SUPERPRIORITY FINANCING PURSUANT TO 11 U.S.C. §§ 361, 362, 363(c), 363(e), 364(c), 364(d)(1), 364(e) AND 507 AND (B) UTILIZE CASH COLLATERAL, (II) GRANTING PRIMING LIENS, PRIORITY LIENS AND SUPERPRIORITY CLAIMS TO THE DIP SECURED PARTIES, (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES, (IV) SCHEDULING A FINAL HEARING PURSUANT TO RULES 4001(b) AND (c) OF THE BANKRUPTCY RULES AND (V) GRANTING RELATED RELIEF

[1] The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): American Apparel, LLC (0601); American Apparel (USA), LLC (8940); American Apparel Retail, Inc. (7829); American Apparel Dyeing & Finishing, Inc. (0324); KCL Knitting, LLC (9518); and Fresh Air Freight, Inc. (3870). The address of each of the Debtors is 747 Warehouse Street, Los Angeles, California 90021.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby move this Court pursuant to sections 105, 107, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), 364(e), and 507 of Bankruptcy Code, Rules 2002, 4001, 9014 and 9018 of the Bankruptcy Rules, and Local Rules 4001-2 and 9018-1(b), for the entry of an order, substantially in the form attached as Exhibit 1 (the "Interim Order"), and a final order (the "Final Order"), (i) authorizing the Debtors to (a) obtain postpetition financing pursuant to a superpriority debtor-in-possession financing facility on the terms described herein and (b) utilize cash collateral; (ii) granting liens and superpriority administrative claims; (iii) scheduling a final hearing with respect to the relief requested herein; and (iv) granting related relief (the "Motion"). In support of this Motion, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. As more fully described in this Motion and in the *Declaration of Mark Weinsten in Support of First Day Pleadings* (the "First Day Declaration"), the Debtors' primary objective in filing these Cases (as defined below) is to consummate a sale (the "Sale") of their business or some or all of their assets to Gildan Activewear SRL (the "Stalking Horse"). To achieve this objective, the Debtors seek immediate access to the proposed $30 million debtor-in-possession super-priority financing facility (the "DIP Credit Facility").[2] This proposed postpetition financing will, among other things, provide the capital necessary to allow the Debtors to continue operating without material disruption to their businesses, during the chapter 11 cases for the period pending the Sale, all in an effort to maximize the value of their estates for the benefit of creditors.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Interim Order and the DIP Credit Agreement, as applicable.

2. The Debtors' domestic retail and wholesale operations will continue operating in the ordinary course until the closing of a Sale in order to preserve the value of the Debtors' estates to ensure a value-maximizing transaction. However, the Debtors currently do not have sufficient cash to operate for more than a week. Therefore, absent entry into the DIP Credit Facility, the Debtors will have no alternative but to immediately cease operating and convert these Cases to cases under chapter 7. The funds provided by the DIP Credit Facility will ensure the Debtors avoid that fate and permit them to continue operating and advancing the sales process to a conclusion. For the 30-day period commencing upon the entry of the Interim Order, the Debtors intend to borrow $10 million of the proceeds of the DIP Credit Facility.

3. The DIP Credit Facility was the product of an extensive, arm's-length negotiation with the DIP Lenders (as defined below), and no competing proposal provided the Debtors with a similarly beneficial set of comprehensive terms. Encina Business Credit, LLC, as administrative agent and collateral agent (in such capacities, the "DIP Agent") and the DIP Lenders (as defined below) have agreed to provide a $30 million revolving credit facility. The borrowings under the DIP Credit Facility are governed by an interest rate of LIBOR plus 5.25% and the facility matures on May 7, 2017, subject to mandatory prepayment from net sales proceeds. The DIP Lenders will be entitled to a $5,000 per month administration fee, a 2.0% closing fee and a 0.5% commitment fee. In addition, the DIP Agent, for the benefit of itself and the DIP Lenders, will receive a superpriority administrative claim with respect to, and liens and priming liens on, substantially all of the Prepetition Collateral, except the Excluded Interests (as defined below) and certain other exceptions described herein.

4. As set forth in the Burian Declaration (as defined below), the DIP Credit Facility was preceded by a competitive marketing process designed to secure postpetition financing on

the best available terms. Numerous third party financing sources were contacted, as well as prepetition secured creditors. The Debtors received six proposals. The proposal submitted by the DIP Lenders, as amended by subsequent negotiations between the DIP Lenders and the Debtors and their advisors, was determined to be the most advantageous proposal, with the most favorable economics and having the consent of the Prepetition Primed Secured Lenders (as defined below). Moreover, the DIP Lenders, having previously conducted preliminary diligence on the Debtors, were familiar with the Debtors' business and capital structure and, critically, was prepared to move quickly toward finalizing the DIP Credit Facility. Importantly, holders of approximately 90% of the Debtors' prepetition secured debt (the "Prepetition Primed Secured Lenders") have consented to the Debtors' incurrence of the DIP Credit Facility, including the granting of priming liens and a superpriority administrative claim to the DIP Agent, on behalf of itself and the DIP Lenders, which far exceeds the consent threshold of over 50% of such debt (*i.e.*, "Required Lenders" as defined in the Prepetition Credit Agreement (as defined herein)) required under the Prepetition Credit Agreement in these circumstances.

5. By this Motion, the Debtors also seek authorization to use Cash Collateral (as defined below) in the ordinary course of business to, among other things, provide working capital and for other general corporate purposes, with the objective of providing the Debtors with the funding necessary to continue their operations until the consummation of the Sale.

6. The DIP Credit Facility paves the way for the Debtors only and best option — to execute on a sales process that will monetize certain of the Debtors' assets in the most value-maximizing manner for the benefit of all stakeholders. In addition, the DIP Credit Facility was negotiated in good faith, is a sound exercise of the Debtors' business judgment and is in the best interests of the estates. As a result, the Debtors respectfully request that the Court grant this

Motion and thereby authorize the Debtors to obtain postpetition financing and to use Cash Collateral pursuant to the terms set forth in this Motion, that certain Senior Secured, Super-Priority Debtor-In-Possession Credit Agreement attached as Exhibit A to the Interim Order (the "DIP Credit Agreement"), the Interim Order and the Final Order.

JURISDICTION AND VENUE

7. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. sections 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. section 157(b). Venue for this matter is proper in this district pursuant to 28 U.S.C. sections 1408 and 1409.

GENERAL BACKGROUND

8. On the date hereof (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"). The Debtors are continuing in possession of their properties and are managing their businesses, as debtors in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No official committee of unsecured creditors has been appointed in these cases.

9. The Debtors are one of the largest apparel manufacturers in North America, employing approximately 4,700 employees across three active manufacturing facilities, one distribution facility and approximately 110 retail stores in the United States. The Debtors filed for chapter 11 in October 2015, confirmed a fully consensual plan of reorganization in January 2016, and substantially consummated that plan of reorganization on February 5, 2016.

10. Unfortunately, the business turnaround plan upon which the Debtors' plan of reorganization was premised failed. As it became clear during the summer of 2016 that the Debtors could not continue as they were, the Debtors hired an investment banker and began a robust sales process, seeking a buyer for substantially all of their assets. The prepetition component of that process is now complete. The Debtors have selected Gildan Activewear SRL

as the stalking horse bidder for their intellectual property and certain of their wholesale assets, and have commenced these chapter 11 cases (the "Cases") with the hope of selling the entirety of their business as a going concern in a competitive auction to be held before year end. The Debtors intend to continue operating as usual in these Cases during the period leading up to the auction so as to preserve the value of their businesses, thereby encouraging a going concern sale that would save jobs and maximize returns to creditors. Additional information regarding the Debtors and these Cases, including the Debtors' businesses, corporate structure, financial condition and the reasons for and objectives of these cases, is set forth in the Declaration of Mark Weinsten in Support of First Day Pleadings (the "First Day Declaration"), filed contemporaneously herewith and incorporated herein by reference.

RELIEF REQUESTED

11. By this Motion, the Debtors seek entry of the Interim and Final Orders, pursuant to sections 105, 107, 361, 362, 363(c), 363(e), 364(c), 364(d)(1), 364(e), and 507 of Bankruptcy Code, Rules 2002, 4001, 9014 and 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 4001-2 and 9018-1(b) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"):

(a) authorizing the Debtors to obtain postpetition financing, as set forth below and in the DIP Credit Agreement, with Encina Business Credit, LLC, as administrative agent and collateral agent, and the lender or lenders party thereto from time to time (the "DIP Lenders" and, together with the DIP Agent, the "DIP Secured Parties"), with funds thereunder available for use in accordance with the budget (as amended, modified or updated in accordance with the DIP Credit Agreement, the "Budget")[3] and the other terms set forth in the DIP Credit Agreement;

[3] The Budget is attached as Exhibit 2 hereto.

(b) authorizing the Debtors to execute and enter into the DIP Credit Documents and to perform such other and further acts as may be required in connection with the DIP Credit Documents;

(c) authorizing the Debtors to grant (i) security interests in and liens on the DIP Collateral (including liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code) and (ii) superpriority claims (including a superpriority administrative claim pursuant to section 364(c)(1) of the Bankruptcy Code);

(d) authorizing the Debtors' use of cash collateral (as such term is defined in section 363(a) of the Bankruptcy Code), including, without limitation, all of the Debtors' cash on hand as of the Petition Date (the "Cash Collateral");

(e) authorizing the Debtors to provide adequate protection of the liens and security interests of the Prepetition Secured Lenders and Prepetition Agent under the Prepetition Credit Facility (collectively, the "Prepetition Liens"), which Prepetition Liens (except with respect to the Excluded Interests) will be primed by the liens securing the repayment of the DIP Credit Facility in accordance with the Interim Order and the DIP Credit Agreement;

(f) authorizing the Borrower to use Cash Collateral and the proceeds from the DIP Credit Facility upon entry of the Interim Order (i) to pay related postpetition transaction costs, fees and expenses with respect to the DIP Credit Facility, (ii) to provide working capital and for other general corporate purposes, (iii) to fund the Carve-Out, and (iv) to pay administration costs of the Cases and claims or amounts approved by the Bankruptcy Court;

(g) modifying the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to implement the terms of the DIP Credit Agreement, Interim Order, Final Order, and as otherwise provided herein;

(h) scheduling an emergency interim hearing on this Motion for this Court to consider entry of the Interim Order, which authorizes the Debtors to borrow up to an aggregate principal or face amount not to exceed $10,000,000 on an interim basis in accordance with the terms of the DIP Credit Facility and Interim Order;

(i) scheduling of a final hearing (the "Final Hearing") on the Motion to consider entry of a Final Order authorizing the borrowings under the DIP Credit Facility on a final basis and approval of notice procedures with respect thereto; and

(j) granting certain related relief.

FACTUAL BACKGROUND

I. The Debtors' Prepetition Obligations

12. As of the Petition Date, the Debtors' material funded debt obligations consist of the Prepetition Credit Facility (as defined below), which has an aggregate principal amount of approximately $215 million, divided into three loan tranches, as described below. Additionally, American Apparel, LLC ("AA") has guaranteed one of its United Kingdom subsidiary's obligations under a $15 million unsecured note due October 15, 2020.

A. The Prepetition Credit Facility

13. On October 5, 2015, each of the Debtors commenced chapter 11 cases with this Court (the "Prior Chapter 11 Cases") in order to pursue and effectuate a pre-arranged plan of reorganization (the "Prior Plan"). During the Prior Chapter 11 Cases, the Debtors had access to a $90 million debtor-in-possession credit facility (the "Prior DIP Facility"). Upon the effective date of the Prior Plan, the loans outstanding under the Prior DIP Facility were converted to loans under that certain Credit Agreement dated February 5, 2016 (as amended, supplemented or otherwise modified from time to time, the "Prepetition Credit Agreement"; as filed as part of the plan supplement in the Prior Chapter 11 Cases, the "Original Prepetition Credit Agreement"), by and among certain of the Debtors as borrowers, the Prepetition Secured Lenders and Wilmington Trust, National Association (the "Prepetition Agent"), as administrative agent (the "Prepetition Credit Facility").[4] In addition to the converted loans under the Prior DIP Facility, at inception,

[4] A copy of the Original Prepetition Credit Agreement is attached as part of Exhibit A to the Declaration of Beth D. Vogel, Esq. in support of the Motion, filed contemporaneously herewith (the "Vogel Declaration"). The documentation evidencing the Prepetition Credit Facility as of the Petition Date is represented by the amended and restated Prepetition Credit Agreement and subsequent amendments thereto, which are attached as Exhibits B through E of the Vogel Declaration.

the Prepetition Secured Lenders extended new credit in the amount of $30 million pursuant to the Prepetition Credit Facility (collectively, the "Exit Loans").

14. The Original Prepetition Credit Agreement included permitted debt and lien baskets for a $40,000,000 secured credit facility, which was contemplated to be subject to an intercreditor arrangement.[5] The Debtors subsequently used these baskets to incur a second tranche of loans funded by certain of the Prepetition Secured Lenders in the aggregate amount of $37,000,000 (such loans, the "Initial Additional Loans"). These incremental loans were documented by two amendments to the Prepetition Credit Agreement entered into between April and May 2016.

15. In July and August of 2016, the Debtors were in need of additional funding. Again, certain of the Prepetition Secured Lenders agreed to provide such funding — this time in the aggregate amount of $20,000,000. As "Required Lenders" under the Prepetition Credit Agreement, these lenders amended the debt and lien baskets under the Prepetition Credit Agreement to effect these incremental loans (such loans, together with the Initial Additional Loans, the "Additional Loans"). As contemplated under Section 7.01(j) of the Prepetition Credit Agreement and the definition of "Intercreditor Agreement" therein, a payment waterfall was established for the Additional Loans and the Exit Loans, whereby such loans, akin to a typical senior asset-backed loan facility, would receive a "first-out" distribution of the proceeds of the Debtors' inventory and accounts receivable and a "second-out" distribution on assets other than inventory, accounts receivable and intellectual property (the "Other Collateral").

16. In September and October 2016, the Debtors sought additional incremental funding from the Prepetition Secured Lenders. Those lenders that funded the Additional Loans

[5] See Original Prepetition Credit Agreement §§ 7.02(j) & 7.03(a)(xiv).

agreed, through four amendments to the Prepetition Credit Agreement, to fund a third tranche of loans in the aggregate amount of $25,000,001 (such loans, the "IP Additional Loans"). Similar to the amendments entered into in connection with the Additional Loans, these amendments were entered into with the duly given consent of the Required Lenders. The IP Additional Loans are entitled to a 35% "first out" distribution of the proceeds of the Debtors' intellectual property, with the remaining 65% distributable to the Exit Loans. The IP Additional Loans also share a "second out" entitlement to the proceeds of accounts receivable and inventory pro rata with the Exit Loans and have a "third out" entitlement on the proceeds of Other Collateral.

17. The payment priorities for the Exit Loans, Additional Loans and IP Additional Loans are set forth in Section 2.01(e) of the Prepetition Credit Agreement and are summarized in the following table:

Loan Tranche	Total Obligations Outstanding	Payment Priority
Exit Loans	$130,507,817	**First priority**: 65% of IP collateral; Other Collateral **Second priority**: accounts receivable and inventory (shared pro rata with the IP Additional Loans)
Additional Loans	$59,730,000	**First priority**: accounts receivable and inventory **Second priority**: Other Collateral
IP Additional Loans	$25,319,468	**First Priority**: 35% of IP collateral **Second Priority**: accounts receivable and inventory (shared pro rata with the Exit Loans) **Third Priority**: Other Collateral

18. As of the Petition Date, approximately $780,000 of accrued cash interest on the foregoing loans remains unpaid and outstanding, and there is an aggregate amount of approximately $1.6 million of accrued interest with respect to such loans, inclusive of the foregoing unpaid portion. *See* First Day Decl. ¶ 27.

B. Guaranty Obligations

19. On March 25, 2015, one of the Foreign Affiliates, American Apparel (Carnaby) Limited, entered into a credit agreement to borrow $15 million from Standard General L.P. ("Standard General"), with interest accruing at 14% per annum and with AA as guarantor (the "Standard General Credit Facility"). In connection with negotiations surrounding the Prior Chapter 11 Cases, AA agreed to reinstate its guarantee of the Standard General Credit Facility. Upon the filing of these Cases, the outstanding obligations under the Standard General Credit Facility, which AA guarantees, accelerated and are now due.

II. The Debtors' Immediate Need for Liquidity

20. The Debtors are in need of an immediate infusion of liquidity. As of the Petition Date, the Debtors have only approximately $5.1 million in cash with which to operate their businesses and fund these Cases. Without an infusion of incremental liquidity, the Debtors will not be able to operate their businesses beyond next week.

21. Following their emergence from the Prior Chapter 11 Cases, the Debtors began executing on their then-Chief Executive Officer's turnaround plan, which contemplated an overhaul of the Debtors' operational systems and processes to improve quality and reduce losses, while at the same time attempting to increase sales through the design of new and seasonal apparel and developing e-commerce. Unfortunately, the turnaround plan was not successful and the anticipated stabilization and gains in revenue were not fully realized. Among other things, the Debtors: (a) were not able to optimize their product acquisition and merchandising process, which would have been used to effectively track and plan what items to manufacture, when to manufacture them, when these items would be available in stores and which stores to make these items available in; (b) failed to improve its historically underperforming e-commerce platform; (c) experienced delays in implementing improvements in quality control measures that were

aimed at improving customer satisfaction; and (d) did not have a unified and consistent marketing plan designed to attract interest in the Company's core customer base. *See* First Day Decl. ¶ 33.

22. The failure of these and other aspects of the turnaround plan led to a further decline in revenue and, in the face of mounting losses, members of the Company's senior management began to resign, including the Company's Chief Financial Officer and (most recently) the Chief Executive Officer. These resignations spurred the loss of several key wholesale accounts, which the Debtors have been unable to regain and further contributed to the Debtors' lack of liquidity.

23. In the months leading up to the filing of these Cases, the Debtors were borrowing more than $2 million each week to operate their businesses. This cost structure was not sustainable. As a result, the Debtors began to explore strategic options, including a sale of some or all of their assets.

III. Prepetition Sale Process and Stalking Horse Bid

24. In August 2016, Houlihan Lokey Capital Inc. ("Houlihan") commenced a prepetition marketing process for the sale of part or substantially all of the Debtors' businesses or assets, including the Debtors' intellectual property (the "IP Assets"). Houlihan conducted a robust three-month marketing process, canvassing the market and contacting potential strategic and financial buyers that Houlihan thought might be interested in parts of or all of the Debtors' businesses. After engaging in extensive negotiations with all interested parties, the Debtors determined that the bid submitted by the Stalking Horse, who submitted a bid for the Debtors' intellectual property, wholesale inventory and, at the Stalking Horse's option, certain of the Debtors' manufacturing and distribution facilities, was the highest, best and only viable bid under

the circumstances. Thereafter, the Debtors' advisors worked with the Stalking Horse to finalize the Stalking Horse asset purchase agreement.

25. The Debtors, with Houlihan's assistance, intend to continue the marketing process for substantially all of their assets during the first several weeks of these Cases and to seek court approval of the sale to the Stalking Horse or another third party in the event a higher or better offer emerges at an auction.

26. During the course of marketing the Debtors' businesses and assets prepetition, potential purchasers expressed to the Debtors that the value of the IP Assets and other key assets will be maximally preserved if the Debtors continue to operate in the ordinary course until the consummation of a sale. *See* Burian Decl. ¶ 7. Postpetition financing such as represented by the DIP Credit Facility, therefore, would be necessary to fund the chapter 11 cases and to permit the Debtors to operate in a manner that will lead to a value-maximizing transaction. Absent such additional financing, it is likely that the Debtors will be forced to close stores en masse or be compelled to seek an immediate liquidation under chapter 7. *See* Weinsten Decl. ¶ 5.

IV. Debtors' Efforts to Obtain Postpetition Financing

27. In October 2016, Houlihan commenced a process to market a proposed debtor-in-possession financing to third party financing sources, as further described in the Declaration of Saul E. Burian in support of this Motion (the "Burian Declaration"). In particular, the Debtors and Houlihan sought proposals from a number of potential financing sources, which included both 18 third party lenders (the "Third Party Lenders") and the Debtors' existing secured lenders (the "Existing Lenders" and, together with the Third Party Lenders, the "Potential Financing Parties"). Of the Potential Financing Parties that were contacted, seven executed non-disclosure agreements and received access to an electronic data room containing due diligence information related to the Debtors and their financing needs. Ultimately, the Debtors received six proposals

for possible debtor in possession financing, all of which came from Third Party Lenders (together, the "Third Party DIP Proposals").

28. The Debtors, with the advice of their advisors, carefully scrutinized the Third Party DIP Proposals, including the DIP Lenders' proposal. As the chart below summarizes, and as is discussed in further detail in the Burian Declaration, the Debtors determined that the DIP Credit Facility was superior to the Third Party DIP Proposals in a number of important respects. Consequently, on November 14, 2016, the Debtors reached agreement on the terms of the DIP Credit Agreement with the DIP Lenders.

Issue	DIP Credit Facility Terms	Supportive Factors
Cost	Reasonable interest rate, 2% Closing Fee and a $150,000 Commitment Fee	The DIP Credit Facility fee and interest rate economics were superior to all other proposals.
Familiarity	The DIP Lenders are familiar with the Debtors' business and capital structure.	Having previously conducted diligence on the Debtors, the DIP Lenders did not need substantial time getting up to speed on the Debtors.
Exigency	DIP Credit Agreement executed on November 14, 2016	The DIP Lenders, due to their familiarity with the Debtors, were prepared to move quickly toward a transaction.
Consent	Prepetition Primed Secured Lenders consent to the priming of the Prepetition Liens by the DIP Liens.	Avoids a dispute regarding the priming of the Prepetition Liens.

MATERIAL TERMS OF THE DIP CREDIT FACILITY

29. The principal terms of the DIP Credit Facility are as follows:[6]

Required Disclosures	Summary of Material Terms
Borrowers *DIP Credit Agreement, Schedule 1.01*	American Apparel (USA), LLC, as the Lead Borrower, and the other Borrowers party to the DIP Credit Agreement and listed on Schedule 1.01

[6] This summary is qualified, in its entirety by the provisions of the DIP Credit Agreement and the Interim Order. Unless otherwise set forth in this summary, capitalized terms used within this summary shall have the meanings ascribed to them in the Interim Order and the DIP Credit Agreement, as applicable.

Required Disclosures	Summary of Material Terms
Guarantors *DIP Credit Agreement, § 1.01*	(a) AA and each Subsidiary of the Lead Borrower that is not a Borrower (other than CFC or CFC Holdco) and (b) each other Subsidiary of AA that shall be required to execute and deliver a Facility Guaranty.
DIP Agent *DIP Credit Agreement, Introductory Paragraph & Art. IX*	Encina Business Credit, LLC, as administrative agent and collateral agent in connection with the DIP Credit Facility.
DIP Lenders *DIP Credit Agreement, Introductory Paragraph & Schedule 2.01*	The lender or lenders party to the DIP Credit Agreement from time to time.
DIP Credit Facility *DIP Credit Agreement, Introductory Paragraph & Schedule 2.01*	Senior secured super-priority revolving credit facility in an aggregate principal amount not to exceed $30 million.
Use of Cash Collateral *DIP Credit Agreement, Introductory Paragraph & § 7.11* *Interim Order ¶ 3*	Upon authorization from this Court, the Debtors may use the Cash Collateral and proceeds of the DIP Loans solely (i) pay the DIP Fees and Expenses (as in the Interim Order); (ii) pay the fees and expenses of Professional Persons (as defined below); and (iii) to make disbursements in the ordinary course of the Debtors' business and pay for the costs of administering these Cases in accordance with the Budget.
Carve-Out *Interim Order ¶ 14*	The DIP Credit Agreement provides a carve-out (the "Carve-Out") for (i)(1) quarterly fees required to be paid to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6) and (2) fees required to be paid to the Clerk of the Bankruptcy Court pursuant to 28 U.S.C. § 156(c), (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code not to exceed $50,000 in the aggregate, (iii) all accrued and unpaid amounts under any key employee retention or incentive plans that (1) have been approved pursuant to an order of the Bankruptcy Court during the Cases, (2) are in accordance with the Budget and (3) are reasonably acceptable to a majority of the Prepetition Secured Lenders; (iv) professional fees and expenses allowed by the Court, to the extent such amounts (1) are allowed by the Court at any time (i.e., before or after the Carve-Out Trigger Date) on a final basis and (2) for only so long as the DIP Obligations remain outstanding, are in accordance with the Budget, except that, if a Final Order is entered, such amounts that are incurred during the period ending on the date of the Final Order shall not be subject to the Budget; provided that professional fees and expenses incurred after the Carve Out Trigger Date shall not exceed $2,750,000 with respect to Professional Persons of the Debtors and $250,000 with respect to the Professional Persons of the Committee, in the aggregate amount of $3,000,000 (the "Professional Expense Cap"). Upon the Borrower's receipt of a Carve-Out Notice, a portion of proceeds from the DIP Credit Facility in the amount $2,750,000 with respect to the Professional Persons of the Debtors and $250,000 with respect to the Professional Persons of the Committee plus an amount

Required Disclosures	Summary of Material Terms
	equal to the aggregate unpaid professional fees, costs and expenses incurred at any time before the Carve Out Trigger Date will be deposited into a Carve-Out Account solely for purposes of funding the Carve-Out. To the extent the Debtors' Professional Persons have amounts outstanding from the period before the Carve-Out Trigger Date because such amounts exceeded the amounts set forth in the Budget, they shall be permitted to offset such amounts against the Professional Expense Cap.
Interest Rate and Fees *DIP Credit Agreement, §§ 1.01, 2.08, 2.09*	Interest shall accrue at Libor plus 5.25% *per annum* in the case of LIBOR Rate Loans and Libor plus 4.25% *per annum* in the case of Base Rate Loans The Default Rate shall be the interest rate or rate otherwise applicable thereto plus 2.0% *per annum*. There shall be a Closing Fee of $600,000 and a Commitment Fee for the account of each Lender equal to the Commitment Fee Percentage (0.50% *per annum*) *multiplied* by the actual daily amount by which the Aggregate Commitments exceed the Total Outstandings during the immediately preceding quarter.
Priority and Security *DIP Credit Agreement, § 8.03* *Interim Order ¶¶ 7-9*	The DIP Lenders under the DIP Credit Facility shall be afforded certain liens and claims, including priming liens (as discussed in paragraphs 37 and 38 of this Motion) and superpriority claims on certain property of the estate; provided, however, that so long as the Prepetition Obligations representing Exit Loans held by Standard General, L.P. or its affiliates (the "SG Exit Loans") remain outstanding, the DIP Liens shall not (i) extend to the portion of the Debtors' Intellectual Property and Equipment (each term as defined in the DIP Credit Agreement) representing 20% of the value of such property at any given time (the "Excluded Interests") nor (ii) prime the Prepetition Liens on the Excluded Interests (including such Prepetition Liens that secure all of the SG Exit Loans). The DIP Liens are senior and superior in priority to all other secured and unsecured creditors of the Debtors' estates, subject only to (i) the Carve-Out and (ii) any valid, perfected, enforceable and non-avoidable liens existing as of the Commencement Date (other than the Prepetition Liens) that are senior to Prepetition Liens.
Intercreditor Provisions *Interim Order ¶ 21*	The DIP Liens on the DIP Collateral, including proceeds of any Avoidance Actions (solely as encumbered hereunder), and the Superpriority Claim in favor of or held for the benefit of the DIP Secured Parties has and shall be senior and have priority over any lien or security interest in the Prepetition Collateral, the Adequate Protection Liens, or Adequate Protection Priority Claims that any Prepetition Secured Creditor now has or may hereafter acquire. For so long as the DIP Obligations remain outstanding, the sale or disposition of any or all of the Debtors' assets (subject to limited exceptions) shall be subject to the exclusive consent of the DIP Secured Parties, and in connection with any such sale or disposition

Required Disclosures	Summary of Material Terms
	(i) each Prepetition Secured Lender shall be deemed to have consented to such sale or disposition of such assets and all the terms applicable thereto, (ii) each Prepetition Lender shall be deemed to have directed the Prepetition Agent to assign to the DIP Agent all of the Prepetition Agent's rights to control the disposition of such assets and (iii) the DIP Agent shall have the exclusive right to control or take or refrain from taking any action to direct, or otherwise consent to, the sale or disposition of such assets, subject to certain notice requirements. In connection with any such sale or disposition, each Prepetition Secured Party shall execute and deliver (or shall direct the Prepetition Agent to execute and deliver) such consents, termination statements and releases as the DIP Agent (or any agent acting on its behalf) shall reasonably request to consent to such sale or disposition, if necessary, and release the Prepetition Liens on the DIP Collateral in connection with such sale or disposition (including a sale or disposition by foreclosure) by any DIP Secured Party (or by a Debtor with the consent of the DIP Secured Parties and the Court); provided that the Prepetition Liens or the Existing Senior Liens (as applicable) shall attach to the proceeds of any such assets disposed of or sold to the same extent and priority of such Prepetition Liens or the Existing Senior Liens (as applicable) prior to such disposition or sale with the Prepetition Payment Priority (as defined in the Interim Order). Notwithstanding anything in the Interim Order or DIP Credit Documents to the contrary, in the event the Debtors sell, transfer, assign or otherwise dispose of DIP Collateral that constitutes Intellectual Property upon which the Prepetition Agent has a Prepetition Lien pursuant to an order of the Court entered under section 363(b) of the Bankruptcy Code, eighty percent (80%) of the net proceeds of such sale, transfer, assignment, or other disposition of such Intellectual Property shall be applied to prepay the DIP Obligations in accordance with the DIP Credit Agreement, with the remaining twenty percent (20%) to the Prepetition Secured Parties for application, upon entry of a subsequent order of the Court, to the Exit Loans (including all of the SG Exit Loans) and in a manner that leaves all of the SG Exit Loans unaffected by the priming nature of the DIP Liens as provided for herein; provided that, solely for purposes of this paragraph 21(b), in the case of a 363 Sale or a sale, transfer, assignment, or other disposition of a material portion of the Debtors' assets under section 363(b) of the Bankruptcy Code in which Intellectual Property is included (a "Mixed Asset Sale"), solely for the purpose of repaying the DIP Credit Facility, the allocation of net proceeds from a Mixed Sale (such proceeds, the "Mixed Asset Sale Proceeds") as among such Intellectual Property and the other assets disposed of in such Mixed Asset Sale shall be as set forth in an order of the Court, and if such allocation is not set forth in an order of the Court, the DIP Secured Parties and the Prepetition Secured Parties agree that not more than fifty percent (50%) of the aggregate value realized in connection with such Mixed Asset Sale shall be allocated to such Intellectual Property; provided, further, that such allocation of Mixed Asset Sale Proceeds shall not be binding on any of the

Required Disclosures	Summary of Material Terms
	Prepetition Secured Parties in connection with their respective entitlements to such Mixed Asset Sale Proceeds and all rights of such Prepetition Secured Parties with respect thereto shall be preserved in all respects. None of the Prepetition Secured Parties shall exercise any remedies with respect to the DIP Collateral, including seeking relief from the automatic stay or furnishing a Termination Declaration, during the Standstill Period.
Approved Budget *DIP Credit Agreement, § 5.05; Schedule 1.03*	Cash Collateral and proceeds of the DIP financing may be used to operate the business of the Debtors to the extent permitted by the Budget that was prepared in good faith by the management of the Borrowers.
Conditions Precedent *DIP Credit Agreement, Art. IV*	Conditions precedent include without limitation (i) execution and delivery of the DIP Credit Agreement and related loan documents; (ii) entry of the material first day orders and the Interim Order in form and substance reasonably satisfactory to the DIP Agent and DIP Lenders, including the Cash Management Order; (iii) DIP Agent's receipt and approval of the Budget; and (iv) payment of certain fees and expenses owing as of the Closing Date.
Representations and Warranties *DIP Credit Agreement, Art. V*	Includes standard representations and warranties, as modified to include representations and warranties as are customary in debtor-in-possessions loan agreements of this type, including the representation that the Initial Budget and each subsequent DIP Budget delivered to the Agent was prepared in good faith on the basis of the assumptions stated therein, which assumptions were fair in light of the conditions existing at the time of delivery of such forecasts, and represented, at the time of delivery, the Loan Parties' best estimate of its future financial performance.
Events of Default *DIP Credit Agreement, § 8.01* *Interim Order ¶ 25*	The DIP Credit Agreement provides for standard events of default for a facility of this type, including, without limitation, the following bankruptcy-related defaults: • Amendment or Reversal of DIP Orders. The entry of an order in the Chapter 11 Case which stays, modifies (in any manner materially adverse to the DIP Agent and the DIP Lenders and other Credit Parties), or reverses any DIP Order or which otherwise materially adversely affects, as determined by the DIP Agent in its reasonable discretion, the effectiveness of any DIP Order without the express written consent of the DIP Agent; or • Appointment of Trustee or Examiner; Conversion. An order with respect to the Chapter 11 Case shall be entered by the Bankruptcy Court either (i) appointing a trustee or of any examiner having expanded powers to operate all or any part of any Loan Party's business, or (ii) converting the Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code; or

Required Disclosures	Summary of Material Terms
	• Final DIP Order. The failure of the Bankruptcy Court to enter a Final DIP Order, in form and substance satisfactory to the Agent, within thirty (30) days after the Petition Date; or • Relief From Automatic Stay. The entry of any order which provides relief from the automatic stay otherwise imposed pursuant to Section 362 of the Bankruptcy Code which permits any creditor to (i) realize upon, or to exercise any right or remedy with respect to (x) any material portion of the Collateral included in (or eligible for inclusion in) the Borrowing Base or (y) any other Collateral, to the extent such realization or exercise of rights or remedies would be reasonably likely to have a Material Adverse Effect, or (ii) to terminate any license, franchise, or similar agreement, where such termination would reasonably be likely to have a Material Adverse Effect; or • Super-Priority Claims. The filing of any application by any Loan Party without the express prior written consent of the Agent for the approval of any super-priority claim in the Chapter 11 Case which is pari passu with or senior to the priority of the claims of the DIP Agent, the DIP Lenders and other Credit Parties for the Obligations, or there shall arise any such super-priority claim under the Bankruptcy Code, except with respect to the Professional Fee Carve Out and as set forth in the DIP Orders; or • Payment of Pre-Petition Indebtedness. The payment or other discharge by any Loan Party of any pre-petition Indebtedness, except as expressly permitted hereunder, under any DIP Order, or in the DIP Budget or by other order in the Chapter 11 Case to which order the DIP Agent has provided its written consent; or • Adequate Protection. The entry of any order in the Chapter 11 Case which provides adequate protection, or the granting by any Loan Party of similar relief in favor of any one or more of a Loan Party's pre-petition creditors, contrary to the terms and conditions of any DIP Order or the terms hereof; or • Compliance with Orders. The failure of any Loan Party to comply in all material respects with the terms and conditions of the DIP Orders, Cash Management Order, or the Sale Order; or • Certain Motions. The filing of any motion by any Loan Party seeking, or the entry of any order in the Chapter 11 Case: (i) (A) permitting working capital or other financing (other than ordinary course trade credit, unsecured debt) for any Loan Party from any Person other than the DIP Agent (unless the proceeds of such financing are used to pay all Obligations

Required Disclosures	Summary of Material Terms
	in full), (B) granting a Lien on, or security interest in (other than a Permitted Encumbrance, the Professional Fee Carve Out and as set forth in the DIP Orders) any of the Collateral, other than with respect to the DIP Credit Agreement (unless such Liens are granted in connection with a financing, the proceeds of which are applied to the payment in full of all Obligations), (C) except as permitted by the DIP Credit Agreement and the DIP Orders, permitting the use of any of the Collateral pursuant to Section 363(c) of the Bankruptcy Code without the prior written consent of the DIP Agent, (D) subject to the entry and terms of the DIP Orders, permitting recovery from any portion of the Collateral any costs or expenses of preserving or disposing of such Collateral under Section 506(c) of the Bankruptcy Code, or (E) dismissing the Chapter 11 Case; or • Filing of Disclosure Statement and Plan of Reorganization. The filing of a motion by any Loan Party seeking approval of a Disclosure Statement and a Plan of Reorganization, or the entry of an order confirming a Plan of Reorganization, that in either case does not require repayment in full in cash of all Obligations on the Consummation Date thereof.
Maturity/Termination Date *DIP Credit Agreement, § 1.01*	"Maturity Date" means May 7, 2017. "Termination Date" means the earliest to occur of (i) May 7, 2017, (ii) the date on which the maturity of the DIP Obligations is accelerated (or deemed accelerated) and the Commitments are irrevocably terminated (or deemed terminated), (iii) the termination of the Commitments in accordance with the provisions of Section 2.06 the DIP Credit Agreement, (iv) the Consummation Date, or (v) the date on which (A) an Approved 363 Sale with respect to the assets of, or Equity Interests in, the Loan Parties is consummated, or (B) any other 363 Sale of all or substantially all of the assets of the Loan Parties is consummated.
Adequate Protection *Interim DIP Order ¶ 11*	Granting the Adequate Protection Liens and the Adequate Protection Priority Claims, effective and perfected upon the date of entry of the Interim Order, which shall secure the payment of an amount equal to the diminution in the value of the Prepetition Secured Parties' interests in the Prepetition Collateral from and after the Petition Date. As additional adequate protection, and subject to the Budget, the Debtors shall reimburse the Prepetition Agent on a monthly basis the reasonable and documented fees and out-of-pocket expenses for its services as administrative agent and collateral agent, and the fees and out-of-pocket expenses of one non-Delaware legal counsel and one Delaware legal counsel to the Prepetition Agent.

Required Disclosures	Summary of Material Terms
Section 506(c) Waiver *Interim Order ¶ 19*	The Debtors (on behalf of themselves and their estates) shall irrevocably waive, and shall be prohibited from asserting, any surcharge claim under section 506(c) of the Bankruptcy Code or otherwise for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Agent, the DIP Lenders and, upon entry of a Final Order, the portion of the Prepetition Collateral held for the benefit of the Prepetition Secured Lenders (the "Consenting Lender-Related Collateral" and the Prepetition Liens thereon (the "Consenting Lender-Related Liens") of such Prepetition Secured Lenders that have consented to imposition of the DIP Liens at the Final Hearing (the "Consenting Lenders").
Applicability of "equities of the case" exception to Section 552(b); No Marshaling *Interim Order ¶¶ 19, 33*	The Debtors (on behalf of themselves and their estates) shall irrevocably waive, and shall be prohibited from asserting, the "equities of the case" exception under section 552(b) of the Bankruptcy Code in connection with the DIP Credit Facility and with respect to the proceeds, product, offspring or profits of the Consenting Lender-Related Collateral or as against any of the Consenting Lenders. In no event shall the DIP Agent or the DIP Lenders be subject to the equitable doctrine of marshaling or any similar doctrine with respect to the DIP Collateral. Subject to the entry of a Final Order, none of the Prepetition Secured Parties shall be subject to the equitable doctrine of marshaling or any similar doctrine with respect to the Prepetition Collateral unless consented to by the Prepetition Agent.
Expenses *DIP Credit Agreement, § 10.04*	Subject to the entry and terms of the DIP Orders, the Debtors shall pay all Credit Party Expenses. In addition, the Debtors shall indemnify the DIP Agent and the DIP Lenders against any liability arising in connection with the DIP Credit Documents to the extent set forth in the DIP Credit Documents.
Miscellaneous *DIP Credit Agreement, §§ 6.2 & 6.21*	As noted above, it shall be an Event of Default if the Debtors fail to meet certain milestones (the "Milestones") set forth in the DIP Credit Agreement, which include without limitation: • within 7 days of the Petition Date, filing of a motion seeking entry of an order from the Bankruptcy Court approving bidding procedures and the selection of a Stalking Horse Bid relating to a 363 Sale for consideration in excess of the amount sufficient to repay the Obligations in full; • entry of the Final Order within 30 days of the Petition Date; • entry of the Bidding Procedures Order within 35 days of the Petition Date; • conducting an auction within 65 days of the Petition Date; • entry of the order approving a Sale within 70 days of the Petition Date; • closing of the Sale within 80 days of the Petition Date; and

Required Disclosures	Summary of Material Terms
	• filing of the motion seeking to extend the deadlines to assume or reject unexpired leases of non-residential real property within 14 days of the Petition Date.

REQUIREMENTS UNDER LOCAL RULE 4001-2

30. Local Rule 4001-2 requires that certain provisions contained in the DIP Credit Agreement be highlighted and that the Debtors provide justification for the inclusion of such highlighted provision(s).

31. Local Rule 4001-2(a)(i) provides:

> Provisions to be Highlighted. All Financing Motions must (a) recite whether the proposed form of order and/or underlying cash collateral stipulation or loan agreement contains any provision of the type indicated below, (b) identify the location of any such provision in the proposed form of order, cash collateral stipulation and/or loan agreement and (c) justify the inclusion of such provision:
>
> (A) Provisions that grant cross-collateralization protection (other than replacement liens or other adequate protection) to the prepetition secured creditors (i.e., clauses that secure prepetition debt by postpetition assets in which the secured creditor would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law);
>
> (B) Provisions or findings of fact that bind the estate or other parties in interest with respect to the validity, perfection or amount of the secured creditor's prepetition lien or the waiver of claims against the secured creditor without first giving parties in interest at least seventy-five (75) days from the entry of the order and the creditors' committee, if formed, at least sixty (60) days from the date of its formation to investigate such matters;
>
> (C) Provisions that seek to waive, without notice, whatever rights the estate may have under 11 U.S.C. §506(c);
>
> (D) Provisions that immediately grant to the prepetition secured creditor liens on the debtor's claims and causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548 and 549;
>
> (E) Provisions that deem prepetition secured debt to be postpetition debt or that use postpetition loans from a prepetition secured creditor to pay part or all of that secured creditor's prepetition debt, other than as provided in 11 U.S.C. § 552(b);

> (F) Provisions that provide disparate treatment for the professionals retained by a creditors' committee from those professionals retained by the debtor with respect to a professional fee carve out;
>
> (G) Provisions that prime any secured lien without the consent of that lienor; and
>
> (H) Provisions that seek to affect this Court's power to consider the equities of the case under 11 U.S.C. § 552(b)(1).

32. The Debtors identify and discuss the following provisions of the DIP Credit Agreement and Interim Order in accordance with Local Rule 4001-2 in the context and circumstances of these cases.

I. Local Rule 4001-2(a)(i)(A)

33. *Cross Collateralization.* Local Rule 4001-2(a)(i)(A) requires disclosure of provisions that grant cross-collateralization protection (other than replacement liens or other adequate protection) to the prepetition secured creditors (i.e., clauses that secure prepetition debt by postpetition assets in which the secured creditor would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law). The DIP Credit Agreement does not grant cross-collateralization protection.

II. Local Rule 4001-2(a)(i)(B)

34. *Stipulation and Challenge Provisions.* Local Rule 4001-2(a)(i)(B) requires disclosure of provisions that bind the estate or other parties in interest with respect to the validity, perfection or amount of the secured creditor's prepetition lien or the waiver of claims against the secured creditor without first giving parties in interest at least seventy-five (75) days from the entry of the order and the creditors' committee, if formed, at least sixty (60) days from the date of its formation to investigate such matters. Paragraph 30 of the Interim Order binds the estates and all other parties in interest with respect to the validity, perfection or amount of the Prepetition Credit Facility, but is subject to the rights of any party in interest with requisite

standing for a period of the earlier of (a) sixty (60) days after the appointment of any official committee of creditors (the "Committee") or (b) seventy-five (75) days after the Petition Date if no Committee is appointed to commence a Challenge (as defined in the Interim Order). Thus, the Debtors submit that parties in interest will have an adequate opportunity to investigate the Prepetition Credit Facility and associated liens.

III. Local Rule 4001-2(a)(i)(C)

35. *Section 506(c) Waiver.* Local Rule 4001-2(a)(i)(C) requires explicit disclosure of provisions that constitute a waiver, without notice, of the estates' rights under Bankruptcy Code section 506(c). Paragraph 19 of the Interim Order provides in part that upon the entry of the Interim Order, no person will be permitted to surcharge the DIP Collateral (as defined in the Interim Order) under section 506(c) of the Bankruptcy Code, nor shall any costs or expenses whatsoever be imposed against the DIP Collateral, except for the Carve-Out. The Debtors' waiver of the right to surcharge the DIP collateral is appropriate in these circumstances given the expedited timeline of these Cases and the objective to quickly consummate a Sale, and also in light of the DIP Lenders being third party lenders infusing new money into the Debtors' operations.

36. In addition, paragraph 30 of the Interim Order provides that upon the entry of a Final Order, the Debtors will waive and be prohibited from asserting a surcharge claim under section 506(c) of the Bankruptcy or otherwise for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by any of the Consenting Lenders upon the Consenting Lender-Related Collateral held for their respective benefit and the Consenting Lender-Related Liens thereon.

IV. Local Rule 4001-2(a)(i)(D)

37. *Liens on Avoidance Actions.* Local Rule 4001-2(a)(i)(D) requires disclosure of provisions under which the Debtors immediately grant the prepetition secured lenders liens on the Debtors' claims or causes of action under 11 U.S.C. sections 544, 545, 547, 548 and 549 (the "Avoidance Actions"). Paragraph 7 of the Interim Order provides the DIP Lenders with liens on (a) causes of action pursuant to section 549 of the Code subject to the entry of the Interim Order and (b) all amounts necessary to reimburse the DIP Secured Parties for the amount of the Carve-Out, if any, used to finance the pursuit of any recoveries of the Debtors, by settlement or otherwise, in respect of any Avoidance Actions (such assets, the "Avoidance-Related Assets"). The Interim Order proposes to grant the Prepetition Secured Lenders Adequate Protection Liens secured by the DIP Collateral. However, the Adequate Protection Liens will only encumber the portion of the DIP Collateral represented by the Avoidance-Related Assets upon the entry of a Final Order.

38. This provision does not seek a security interest and lien on avoidance actions under chapter 5 of the Bankruptcy Code (with the exception of avoidance actions pursuant to section 549 of the Code and amounts recovered using Carve-Out funds). The grant of a security interest and lien on actions under section 549 is reasonable because such actions would by definition accrue postpetition and likely involve the transfer of estate property on which the DIP Agent and Prepetition Secured Lenders have perfected liens and be otherwise prohibited under the DIP Credit Agreement. The grant of a security interest and lien on the amounts used to finance the pursuit of any Avoidance Actions is likewise reasonable because the DIP Secured Parties should not be expected to fund litigation potentially detrimental to their interests. Further, the grant of liens on the Avoidance-Related Assets in favor of the Prepetition Secured Lenders is subject to the approval of this Court at a Final Hearing. As such, the Debtors

respectfully submit that prepetition secured lenders are not being granted liens on the Avoidance Actions, and parties in interest will have an opportunity to be heard on the requested relief.

V. Local Rule 4001-2(a)(i)(E)

39. *Roll-Up.* Pursuant to Local Rule 4001-2(a)(i)(E), a movant must describe provisions of the proposed debtor-in-possession facility that deem prepetition secured debt to constitute postpetition debt. *See* Del. Bankr. L.R. 400l-2(a)(i)(E). The Debtors respectfully submit that the DIP Credit Facility does not contain a provision that deems prepetition secured debt to constitute postpetition secured debt.

VI. Local Rule 4001-2(a)(i)(F)

40. *Carve-Out.* Pursuant to Local Rule 4001-2(a)(i)(F), a movant must describe provisions of the proposed debtor-in-possession facility that provide disparate treatment for professionals retained by a creditors' committee with respect to a professional fee carve-out. Paragraph 14 of the Interim Order provides a professional fee carve-out for the Debtors' professionals and professionals hired by any official committee of unsecured creditors. The Debtors submit that the treatment of the Debtors' professionals and any Committee's professionals under the Carve-Out is substantially similar and therefore there is no disparate treatment of any Committee's professionals. Each professional employed by the Debtors and any Committee will be entitled to Carve Out protections that are commensurate with such professional's anticipated efforts in the Chapter 11 Cases, but, in recognition of the fact that the Debtors' professionals are expected to perform more work in connection with these Cases, the dollar amounts of the Carve Out protections for the Debtors' professionals after delivery of a Carve Out Case Trigger Notice are higher than the dollar amounts of the Carve Out protections afforded to the professionals retained by any Committee.

VII. Local Rule 4001-2(a)(i)(G)

41. *Priming Liens.* Pursuant to Local Rule 400l-2(a)(i)(G), a movant must describe provisions of the proposed debtor-in-possession facility that contemplates a priming of any secured lien without the consent of that lienor. *See* Del. Bankr. L.R. 4001-2(a)(i)(G).

42. The DIP Credit Facility is a "priming" facility inasmuch as the DIP Credit Facility will be secured by a first priority, senior, priming, perfected lien on and security interest in certain of the Debtors' rights, title and interest in, to and under the Prepetition Collateral (except the Excluded Interests) that is subject to or encumbered by a validly perfected, unavoidable security interest or lien on the Petition Date or subsequently perfected thereafter. The DIP Credit Facility will not prime the Excluded Interests. Importantly, the Prepetition Secured Lenders comprising Required Lenders have consented to the terms of the DIP Credit Agreement and the Interim and Final Orders, including the priming of certain of the liens granted pursuant to the Prepetition Credit Facility. Finally, by virtue of paragraph I of the Interim Order, the majority of the Prepetition Secured Lenders are prepared to consent to, among other things, the security interests and priming liens under the DIP Credit Agreement.

VIII. Local Rule 4001-(2)(a)(i)(H)

43. *Waiver of Section 552(b) "Equities of the Case" Exception.* Pursuant to Local Rule 4001-2(a)(i)(H), a movant must describe provisions of the proposed debtor-in-possession facility that seek to affect this Court's power to consider the equities of the case under section 552(b)(1) of the Bankruptcy Code. Paragraph 19 of the Interim Order provides that upon the entry of the Interim Order, the Debtors agree that the DIP Secured Parties shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and that the "equities of the case" exception under section 552(b) of the Bankruptcy Code will not apply to the DIP Secured Parties with respect to proceeds, product, offspring or profits of any of the DIP

Collateral, but such agreement is not binding on the Court. In addition, paragraph 19 of the Interim Order provides, upon entry of the Final Order, the equities of the case exception will not apply to proceeds, product, offspring or profits of any of the DIP Collateral or, as against any of the Consenting Lenders, the Consenting Lender-Related Collateral or the Consenting Lender-Related Liens.

44. Paragraph 33 of the Interim Order further provides (a) that in no event shall the DIP Agent or the DIP Lenders be subject to the equitable doctrine of marshaling or any similar doctrine with respect to the DIP Collateral and (b) subject to the entry of a Final Order, none of the Prepetition Secured Parties shall be subject to the equitable doctrine of marshaling or any similar doctrine with respect to the Prepetition Collateral unless consented to by the Prepetition Agent. The Debtors' waiver of the ability to assert the "equities of the case" exception is appropriate in these circumstances given the expedited timeline of these Cases and the objective to quickly consummate a Sale, and also in light of the DIP Lenders being third party lenders infusing new money into the Debtors' operations.

ADDITIONAL PROVISIONS

I. Milestones

45. In addition to the disclosures made pursuant to the Local Rules, the DIP Credit Agreement and the Interim Order contain certain other provisions that the Debtors believe this Court likely would want the Debtors to highlight, even though these provisions are noted in the Material Terms of the DIP Credit Facility chart set forth in this Motion. In particular, the DIP Credit Agreement contains various "milestones" that the Debtors must meet throughout the chapter 11 cases, and failure to meet such milestones constitutes an Event of Default under the DIP Credit Agreement. These milestones require

- entry of the Final Order within 30 days of the Petition Date;

- filing of the motion to approve the Bidding Procedures and a Sale within 7 days of the Petition Date;
- entry of the order approving the Bidding Procedures within 35 days of the Petition Date;
- conducting an auction within 65 days of the Petition Date;
- entry of the order approving a Sale within 70 days of the Petition Date;
- closing of the Sale within 80 days of the Petition Date; and
- filing of a motion seeking to extend the deadlines to assume or reject unexpired leases of non-residential real property within 14 days of the Petition Date.

Given the Debtors' desire to minimize the costs of administering these Cases and the substantial progress toward the Sale that already has been achieved to date — as set forth in the Burian Declaration — the Debtors believe these milestones are reasonable and capable of satisfaction.

II. Purchase Option

46. Section 10.06B of the DIP Credit Agreement offers the Prepetition Secured Parties, upon two business days notice, the option to purchase all (but not less than all) of the DIP Loans from the DIP Lenders. If such option is exercised by the Prepetition Secured Parties, all of the DIP Loans will be transferred by the DIP Lenders to the Prepetition Secured Parties and they will become the DIP Lenders and the DIP Agent will resign as the DIP Agent under the DIP Credit Documents in favor of the applicable successor agent.

REQUEST FOR THE APPROVAL OF THE DIP CREDIT AGREEMENT AND RELATED ACTIONS

I. Approval Under Section 364(c) of the Bankruptcy Code

47. As described above, it is essential that the Debtors obtain access to sufficient postpetition financing and use of Cash Collateral to avoid immediate and irreparable harm to their businesses pending the Sale. The preservation of estate assets, the Debtors' continuing

viability and their ability to maximize value for stakeholders depends heavily upon the expeditious approval of the relief requested herein.

48. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit out of the ordinary course of business and (c) obtaining credit with specialized priority or with security. *See* 11 U.S.C. § 364. If a debtor in possession cannot obtain postpetition credit on an unsecured basis, pursuant to section 364(b) of the Bankruptcy Code, a court may authorize a debtor to obtain credit or to incur debt, the repayment of which is entitled to superpriority administrative expense status, or is secured by a senior lien on unencumbered property, or a junior lien on encumbered property, or a combination of the foregoing. *See* 11 U.S.C. § 364(c).[7]

49. The statutory requirement for obtaining postpetition credit under section 364(c) of the Bankruptcy Code is a finding, made after notice and hearing, that the debtor in possession is "unable to obtain unsecured credit allowable under § 503(b)(1) of [the Bankruptcy Code] as an administrative expense." 11 U.S.C. § 364(c); *see In re Ames Dep't Stores*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("a debtor must show that it has made a reasonable effort to seek other sources of credit under sections 364(a) and (b)" of the Bankruptcy Code); *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987) (debtor seeking secured credit under

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[7] Section 364(c) of the Bankruptcy Code provides as follows:

> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

section 364(c) of the Bankruptcy Code must prove that it was unable to obtain unsecured credit pursuant to section 364(b) of the Bankruptcy Code), *modified on other grounds*, 75 B.R. 553 (Bankr. E.D. Pa. 1987).

50. Courts have articulated a three-part test to determine whether a debtor may obtain financing under section 364(c) of the Bankruptcy Code:

(a) the debtor is unable to obtain unsecured credit under section 364(b) (i.e., by granting a lender administrative expense priority);

(b) the credit transaction is necessary to preserve the assets of the estate; and

(c) the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender.

See, *e.g., In re Los Angeles Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (applying these factors); *In re Aqua Assocs*., 123 B.R. 192, 195 (Bankr. E.D. Pa. 1991) (same); *Ames Dep't Stores*, 115 B.R. at 39.

A. The Debtors Were Unable to Obtain Necessary Postpetition Financing on an Unsecured Basis

51. To show that the credit required is not obtainable on an unsecured basis, a debtor need only demonstrate "by a good faith effort that credit was not available without" the protections of sections 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." *Id.*; *see also In re Ames Dep't Stores*, 115 B.R. at 37 (holding that debtor made a reasonable effort to secure financing where it approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders). Moreover, where few lenders are likely to be able and willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the] Debtor to conduct such an

exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom. Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

52. As set forth above and in the Burian Declaration, the Debtors engaged in a robust prepetition process to secure debtor in possession financing. The Debtors' management, with the assistance of their advisors, explored various alternative sources of capital and financing as a part of this process, but determined that financing was unavailable on an unsecured basis. The Debtors' extensive efforts to seek the necessary postpetition financing from sources within the Debtors' existing capital structure and from third parties were reasonable and sufficient and satisfy the statutory requirements of section 364(c) of the Bankruptcy Code. *See*, *e.g., In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 630-31 (Bankr. S.D.N.Y. 1992) (a debtor seeking financing under section 364(c) of the Bankruptcy Code made an acceptable attempt to obtain less onerous financing by speaking to several lenders that denied the loan request); *Ames Dep't Stores*, 115 B.R. at 40 (same).

B. The DIP Credit Facility is Necessary to Preserve and Protect the Assets of the Debtors' Estates

53. It is essential that the Debtors immediately obtain the financing necessary to preserve and protect the value of their estates. The Debtors do not have sufficient working capital, financing or cash collateral to continue the operation of their businesses without near-term, additional financing. Without an infusion of cash, the Debtors will only be able to operate their businesses through next week, and will thereafter be unable to continue operating any of their businesses as required in connection with the Sale. In addition, the Debtors require such liquidity in order to meet accruing payroll obligations that will come due next week. The Debtors' inability to pay their employees would threaten the stability of the Debtors' workforce

and would result in significant disruptions to the operation of the Debtors' businesses, which, in turn, could have a negative impact on the Debtors' ability to monetize certain of their assets in a sales process. Accordingly, the DIP Credit Facility is necessary to ensure that the Debtors are able to maintain their businesses, and thus maximize the value of their estates. *See Burtch v. Ganz (In re Mushroom Transp. Co.)*, 382 F.3d 325, 339 (3d Cir. 2004) (debtors-in-possession have a duty to maximize their estates' assets).

C. The Terms of the DIP Credit Facility are Fair, Reasonable and Appropriate Under the Circumstances

54. In considering whether the terms of postpetition financing are fair and reasonable, courts consider the terms in light of the relative circumstances and disparate bargaining power of both the debtor and potential lender. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003); *see also Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.)*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986) (a debtor may have to enter into hard bargains to acquire funds).

55. The terms of the DIP Credit Agreement and the proposed Interim Order were negotiated in good faith and at arm's-length between the Debtors and the DIP Lenders, resulting in agreements designed to permit the Debtors to obtain the needed liquidity to maximize the value of their assets through the closing of the Sale.

D. The DIP Credit Facility is in the Best Interests of the Debtors' Estates and Creditors

56. The Debtors believe that the approval of the DIP Credit Facility is in the best interests of the Debtors' estates and their creditors. The Debtors, in the exercise of their sound business judgment, believe that they have negotiated for the best possible terms for the DIP Credit Facility, which would permit the Debtors to operate through the closing of the Sale.

57. The Debtors submit that the milestones under the DIP Credit Facility are appropriate in these circumstances and provide the Debtors and their advisors with sufficient runway to continue the postpetition marketing process, hold an auction and complete the sale process in the most value-maximizing manner for the benefit of all stakeholders. *See Farmland Indus.,* 294 B.R. at 884 (stating that it "was not unreasonable for the DIP [l]enders to insist on having a definite timetable," and that debtor in possession financing amendment "despite the tough new guidelines … is in the best interests of the estate … to avoid a termination of the [d]ebtors' DIP financing [which] would have been disastrous for the [d]ebtors … and, more than likely, have caused the [d]ebtors to cease their business operations, to the extreme detriment of their creditors.").

II. Approval of Postpetition Financing Under Section 364(d) of the Bankruptcy Code is Warranted

58. Section 364(d)(1) provides that a debtor may incur debt "secured by a senior or equal lien on property of the estate that is subject to a lien only if" this Court finds, after notice and hearing, that the debtors in possession are "unable to obtain such credit otherwise" and "there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted." *See Shaw Indus., Inc. v. First Nat'l Bank of PA (In re Shaw Indus., Inc.)*, 300 B.R. 861, 865 (Bankr. W.D. Pa. 2003) (where debtor made efforts by "contact[ing] numerous lenders" and was unable to obtain credit without a priming lien, it had met its burden under section 364(d)); *495 Cent. Park*, 136 B.R. at 630-31 (holding that debtor must make an effort to obtain credit without the requirement of a priming lien but is not required to seek credit from every possible lender); *In re Dunes Casino Hotel*, 69 B.R. 784, 791 (Bankr. D.N.J. 1986) (holding that the debtor had made required efforts under section 364(d)(1) of the Bankruptcy Code based on evidence that the debtor had attempted

unsuccessfully to borrow funds on an unsecured basis or secured by junior liens, but that at least three such lenders were willing to advance funds secured by a superpriority lien).

A. The Debtors Were Unable to Obtain Necessary Postpetition Financing Otherwise

59. As fully described above and in the Burian Declaration, the Debtors conducted a robust solicitation process and no other postpetition credit was available to the Debtors on terms better than the DIP Credit Facility. The DIP Credit Facility surpasses certain other proposals received by the Debtors for the principal reasons that (a) the fee, interest rate and other economics were superior to all other proposals; (b) it provides the Debtors with sufficient liquidity and, if needed, incremental liquidity to operate their businesses until the consummation of the Sale; (c) the DIP Lenders have previously conducted diligence on the Debtors and, compared to other proposed lenders, is the most familiar with the Debtors' business and capital structure and is prepared to move quickly toward a commitment; (d) the DIP Lenders were willing to provide the DIP Credit Facility on a partially non-priming basis and (e) the agreed upon milestones are reasonable.

B. The Prepetition Secured Lenders Have Consented to the Terms of the DIP Credit Agreement and the Interim and Final Orders

60. Under the Prepetition Credit Agreement, the requisite percentage of Prepetition Secured Lenders have consented to the priming of the liens held by the Prepetition Agent on the Prepetition Collateral. The Prepetition Primed Secured Lenders, which hold approximately 90% of the loans outstanding under the Prepetition Credit Agreement, constitute the Required Lenders so authorized to consent to the Debtors' entry into the DIP Credit Facility.

61. The Prepetition Credit Agreement contains a collective action clause at section 8.02 that vests in the Required Lenders the power to determine how and when the rights or remedies affecting all the Prepetition Secured Lenders should be exercised.

62. It is well-established that majority action under a collective action clause in a debt instrument — whereby the decision of lenders holding a majority of the debt is effective to bind all lenders — is sufficient to bind all lenders in connection with any actions authorized under the Bankruptcy Code affecting such lenders, such as incurrence of a priming postpetition financing facility. *See*, *e.g., In re Energy & Exploration Partners, Inc.*, No. 15-44931 (RFN) (Docket No. 305) (Bankr. N.D. Tex. Jan. 29, 2016) (approving postpetition financing facility, which included priming liens under section 364(d)(1) of the Bankruptcy Code, where 86% of the prepetition secured lenders consented to the imposition of the priming liens); *In re Green Field Energy Services, Inc.*, No. 13-12483 (KG) (Docket No. 191) (Bankr. D. Del. Nov. 26, 2013) (consent by secured noteholder group holding 80% of secured bonds effective for consent to priming DIP financing); *In re GSC, Inc.,* 453 B.R. 132, 183-84 (Bankr. S.D.N.Y. 2011) ("Consent under section 363(f)(2) [of the Bankruptcy Code] is also established where an agent for a group of lenders properly consents on behalf of all lenders."); *In re GWLS Holdings*, No. 08-12430 (PJW), 2009 Bankr. LEXIS 378, at *5 (Bankr. D. Del. Feb. 23, 2009) (holding that dissenting, minority lender delegated authority to credit bid to the administrative agent who had "all rights and remedies of a secured party under . . . applicable law" because "applicable law" included credit bidding under section 363(k) of the Bankruptcy Code); *In re Metaldyne Corp.*, 409 B.R. 671, 677-79 (Bankr. S.D.N.Y. 2009) (holding that agent's right to credit bid included entire amount of credit facility despite receiving direction from holders of only 97% of the loans because under the applicable loan documents, the agent was authorized to "exercise such powers as are delegated to [it] by the terms of the [Loan Documents] together with such actions and powers as are reasonably incidental thereto."); *see also Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 326-38 (2007) (holding that where required lenders holding more than 90% of the

outstanding debt directed administrative agent to enter into forbearance agreement, a minority, dissenting lender was barred from bringing a lawsuit to enforce a guarantee in violation of the forbearance agreement).[8]

63. The Prepetition Credit Agreement is consistent with this principle, providing that the Prepetition Agent "may, or at the request of the Required Lenders, shall . . . . (b) exercise on behalf of itself and the other Secured Parties ***all rights and remedies available to it and the other Secured Parties under the Loan Documents or any other remedies provided by applicable law***[.]" *Id.* § 8.02 (emphasis added).

64. Here, Prepetition Secured Lenders holding approximately 90% of the loans under the Prepetition Credit Facility have acted under the collective action clause and consented to the Debtors' incurrence of the DIP Credit Facility, including the priming of certain of the Prepetition Agent's liens on the Prepetition Collateral. Such consent is, therefore, binding and effective under the Prepetition Credit Agreement as to any other Prepetition Secured Lenders and sufficient to permit the Debtors to incur the DIP Credit Facility and grant the DIP Liens.

C. The Prepetition Primed Secured Creditors are Adequately Protected

65. As noted above, the Prepetition Primed Secured Lenders have consented to the priming of certain of the Prepetition Agent's liens on the Prepetition Collateral. In addition to having received their consent, the Prepetition Primed Secured Lenders' interests in the Prepetition Collateral are adequately protected.

66. Section 364(d)(1)(B) of the Bankruptcy Code requires a trustee or debtor in possession to establish that "there is ***adequate protection*** of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted."

[8] The Prepetition Credit Agreement is governed by New York law. See Prepetition Credit Agreement § 10.14.

11 U.S.C. § 364(d)(1)(B) (emphasis added). Whether the offered protection is "adequate" is determined on a case-by-case basis and "depends directly on how effectively it compensates the secured creditor for loss of value caused by the superpriority given to the post-petition loan." *Resolution Trust Corp. v. Swedeland Dev. Grp, Inc. (In re Swedeland Dev. Grp, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (internal citations and quotations omitted); *495 Cent. Park*, 136 B.R. at 631 (explaining that "the goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest") (citations omitted).

67. While section 361 of the Bankruptcy Code sets forth three non-exclusive forms of adequate protection (*i.e.*, periodic cash payments, granting replacement liens or for the creditor's realization of the indubitable equivalent of its claim), the concept of adequate protection is designed to give the "parties and the courts ***flexibility*** by allowing such other relief will result in the realization by the protected entity of the value of its interest in the property involved." *495 Cent Park*, 136 B.R. at 631 (emphasis added) (quoting H.Rep No. 95-595, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296 (1978)).

68. As explained above, the Prepetition Primed Secured Lenders have consented to the priming of certain of the Prepetition Agent's liens on the Prepetition Collateral. Nevertheless, the DIP Lenders and the Debtors propose to grant all Prepetition Secured Parties the following forms of adequate protection:

- Adequate Protection Liens: The Debtors will grant the Prepetition Agent, for the benefit of itself and the Prepetition Secured Lenders, a security interest in and lien and mortgage upon the DIP Collateral, which shall be junior only to the DIP Liens and the Carve-Out. The Adequate Protection Liens include liens on between approximately $30 million and $36.5 million of assets that will be created by the Debtors after the Petition Date, which the Prepetition Secured Lenders would otherwise not be entitled to receive as collateral. See Weinsten Decl. ¶ 14.

- Adequate Protection Claims: Subject to the Carve-Out and the claims of the DIP Lenders, as protection against any diminution in value of the interests of the Prepetition Secured Lenders in the Prepetition Collateral, the Prepetition Agent, on behalf of itself and the Prepetition Secured Lenders, will be granted an adequate protection superpriority claim against the Debtors as provided in sections 503(b) and 507(b) of the Bankruptcy Code with priority in payment over any and all administrative expenses and all other claims asserted against the Debtors.

- Adequate Protection Payments: The Debtors shall reimburse the Prepetition Agent on a monthly basis for its reasonable and documented fees and out-of-pocket expenses for its services as administrative agent and collateral agent and its reasonable and documented fees and out-of-pocket expenses for one Delaware legal counsel and one non-Delaware legal counsel.

- Proceeds Turnover Provision: Pursuant to paragraph 21 of the Interim Order, twenty percent (20%) of the net proceeds from a sale, transfer, assignment or other disposition of the Debtors' intellectual property shall be set aside for holders of the Exit Loans, including all of the SG Exit Loans (as defined therein) in a manner that leaves all of the SG Exit Loans unaffected by the priming nature of the DIP Liens, which will obtain a priority right to such net proceeds, notwithstanding the incurrence of the DIP Credit Facility.

69. By providing the above forms of adequate protection, the Debtors have satisfied their burden of demonstrating that the Prepetition Secured Lenders are adequately protected. In addition, the Prepetition Secured Lenders are adequately protected because the proceeds of the DIP Credit Facility will be used to fund these Cases and allow the Debtors to pursue their chapter 11 strategy of consummating the Sale. Moreover, numerous courts have held that a secured creditor is adequately protected where the debtor reasonably anticipates that its secured creditors will receive more on account of their collateral taking into account the imposition of the priming lien than if the debtor were unable to obtain the loan. *See*:

- *495 Cent. Park*, 136 B.R. at 631 ("[T]here is no question that the property would be improved by the proposed renovations and that an increase in value will result. In effect, a substitution occurs that the money spent for improvements will be transferred into value. This value will serve as adequate protection for the [prepetition secured lender].");

- *In re Aeropostale, Inc.*, No. 16-11275 (SHL) (Bankr. S.D.N.Y. May 6, 2016), Tr. of Hr'g at 18:5-12 (finding that secured lenders were adequately protected during pendency of the interim DIP order where the debtors demonstrated that liquidity was anticipated to slightly increase during the interim period and would allow the debtors to implement their chapter 11 strategy, including pursuing a sale of their assets, as opposed to forcing an immediate liquidation);

- *In re Hudson*, No. 208-09480, 2011 WL 1004630, at *9-10 (Bankr. M.D. Tex. Mar. 16, 2011) (approving debtor's financing to fund its construction of a shed that was required for it to continue operating under a valuable contract, which was projected to increase the value of the collateral far in excess of the amount of the postpetition loan);

- *In re Yellowstone Mountain Club, LLC*, No. 08-62570-11, 2008 WL 5875547, at *17 (Bankr. D. Mont. Dec. 17, 2008) (finding that "there will be a ***net economic benefit*** to all parties stemming from the DIP Loan" because "the DIP Loan ***will serve to preserve the value of [the] collateral and in fact enhance it in an amount that exceeds the amount of the DIP Loan by multiples***" where the DIP loan was used to finance operation of the debtor's ski club and resort rather than allowing it to "go dark" while it pursued a sale) (emphasis added);

- *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996) (holding that county's lien on debtor's property was adequately protected where a substantial portion of the DIP loan would be used to clean up environmental damage on the debtor's property, which was worthless absent such remediation, and to fund operations, thereby increasing the value of such property in an amount in excess of the DIP loan).

70. Here, the DIP Credit Facility will enable the Debtors to pursue the Sale rather than having to immediately liquidate in a chapter 7. Furthermore, the net proceeds of the Prepetition Collateral are anticipated to increase during the course of the anticipated term of the DIP Credit Facility as a result of the sale process funded by the DIP Credit Facility. See Weinsten Decl. ¶ 11 & Ex. A (estimating that the total net proceeds of the Prepetition Collateral will increase from approximately $82.788 million on the Petition Date to more than approximately $101.762 million through the anticipated closing date of a Sale after factoring in repayment in full of the DIP Credit Facility). Taken together, the Prepetition Secured Parties are

adequately protected because there is no diminution in the value of their interests in the Prepetition Collateral during the term of the DIP Credit Facility.

71. Thus, the requirements of section 364(d)(1)(B) of the Bankruptcy Code have been fulfilled, and the proposed DIP Credit Facility, including its priming provisions, should be approved.

III. Entry into the DIP Credit Facility Is an Exercise of the Debtors' Sound Business Judgment

72. As described above, after appropriate investigation and analysis, the Debtors' management has concluded that the DIP Credit Facility is the best option available under the circumstances of these cases. Bankruptcy courts routinely defer to a debtor's business judgment on certain business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re YL West 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) (stating that "[c]ourts have generally deferred to a debtor's business judgment in granting section 364 financing"); *Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.)*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the interim loan, receivables facility and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment on the part of TWA . . . [were] reasonable under the circumstances and in the best interests of TWA and its creditors"); *cf. In re Filene's Basement, LLC*, 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) (stating "[t]ransactions under § 363 must be based upon the sound business judgment of the debtor or trustee."). In fact, "[m]ore exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

73. The Debtors, with the assistance of their advisors, have exercised their sound business judgment in determining that a postpetition credit facility is appropriate and have satisfied the legal prerequisites to incur debt under the DIP Credit Facility. In light of this, and that the Debtors could not obtain postpetition financing from another lending source on terms superior to the DIP Credit Facility, the Debtors' decision to enter into the DIP Credit Facility is a sound exercise of the Debtors' business judgment, including, as discussed below, the following aspects of the DIP Credit Facility: (a) the Carve-Out; (b) the Budget; and (c) the payment of certain fees under the DIP Credit Agreement. Accordingly, this Court should grant the Debtors authority to enter into the DIP Credit Facility and obtain funds from the DIP Lenders on the secured, administrative superpriority basis described above, pursuant to sections 364(c) and 364(d) of the Bankruptcy Code.

A. The Scope of the Carve-Out is Appropriate

74. The proposed DIP Credit Facility subjects the security interests and administrative expense claims of the DIP Lenders, as well as the Adequate Protection Liens, to the Carve-Out. Similar carve-outs for professional fees have been found to be reasonable and necessary to ensure that a debtor's estate and any statutory committee can retain assistance from counsel. *See Ames*, 115 B.R. at 40. The DIP Credit Facility does not directly or indirectly deprive the Debtors' estates or other parties in interest of possible rights and powers by restricting the services for which professionals may be paid in these cases. *See id.* at 38 (observing that courts insist on carve-outs for professionals representing parties-in-interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced"). Additionally, the Carve-Out protects against administrative insolvency during the course of these chapter 11 cases by ensuring that assets remain for the payment of professional fees of the

Debtors and any official committees, notwithstanding the grant of superpriority and administrative liens and claims under the DIP Credit Facility.

75. The Carve-Out also seeks to pay all accrued and unpaid amounts under any key employee retention or incentive plans that have been (a) approved pursuant to an order of the Bankruptcy Court during the Cases, (b) are in accordance with the Budget and (c) are reasonably acceptable to a majority of the Prepetition Secured Lenders. The participants in these retention or incentive plans would be key employees who are critical to the Debtors' ongoing business operations pending a Sale and to the orderly wind down of the Debtors' remaining operations following the Sale. Without the key employees, the Debtors' operations would be adversely affected. This, in turn, could hinder the Debtors' ability to successfully execute the most value-maximizing strategy in these Cases. Moreover, in the event of an orderly liquidation either following a sale or otherwise, the key employees are critical to ensuring the Debtors' affairs are wound down in a timely and efficient manner that would maximize value for stakeholders.

76. Given the likelihood that the Debtors' professionals, as longstanding advisors with an extensive knowledge base regarding the Debtors, will be necessary to effect any wind down following an event that triggers a Carve-Out Notice, the Carve-Out provides that the Professional Expense Cap for any Professional Persons of the Debtors is $2,750,000 and for any Professional Persons of the Committee is $250,000. In addition, the Carve-Out also includes the fees to be paid to this Court and the U.S. Trustee, and the reasonable expenses any trustee appointed under section 726(b) of the Bankruptcy Code, and does not impair the ability of any party to object to such fees, expenses, reimbursement or compensation. Accordingly, the Debtors submit that the proposed Carve-Out is appropriate in these circumstances and comports with the standard set forth in this Court's Local Rules.

B. The Budget is Appropriate

77. As described above, the Debtors' access to Cash Collateral and DIP Loans under the DIP Credit Facility will be subject to the Budget, attached hereto as Exhibit 2. After diligent consideration of all known circumstances, and upon consultation with their advisors, the Debtors believe, in their reasonable business judgment, that the proposed Budget (including the variances permitted thereunder pursuant to the DIP Credit Agreement) is achievable and will allow the Debtors to operate in chapter 11 without the accrual of unpaid liabilities. Accordingly, the Debtors submit that the proposed Budget is appropriate.

C. The Payment of Fees under the DIP Credit Agreement is Appropriate

78. The fees and charges to be paid to the DIP Lenders and DIP Agent, as expressly provided in the DIP Credit Agreement, are reasonable and appropriate under the circumstances. Specifically, the DIP Credit Facility provides for a 2% closing fee and a 0.5% unused line fee. Courts routinely authorize debtor-in-possession lenders to impose fees beyond the explicit liens and rights specified in section 364 of the Bankruptcy Code. Moreover, such fees are often permitted where the associated financing is, in the debtor's business judgment, beneficial to the debtors' estates. *See*, *e.g.*, *In re TSAWD Holdings, Inc.,* No. 16-10527 (MFW) (Docket No. 1699) (Bankr. D. Del. May 3, 2016) (approving fees payable in connection with the DIP financing agreements, including a revolving fee of 1.25% of the amount of the aggregate revolving commitments and a closing fee of 1.25% of the amount of the aggregate credit facility, among others); *In re Quiksilver, Inc.*, No. 15-11880 (BLS) (Docket No. 382) (Bankr. D. Del. Oct. 28, 2015) (approving various facility fees, including a closing fee of 1.50% of the revolving commitment for the credit facility); *In re CWC Liquidation Inc.*, No. 14-10867 (BLS) (Docket No. 573) (Bankr. D. Del. June 12, 2014) (approving miscellaneous fees paid in connection with the credit facility, including a closing fee in the amount of $750,000 payable on the closing date,

letter of credit fees, and a commitment fee, among others); *In re Exide Technologies*, No. 13-11482 (KJC) (Docket No. 427) (Bankr. D. Del. July 25, 2013) (approving various fees to underwriters, arrangers and lenders, including an unused line fee in the amount of 0.50% times the undrawn amount of the credit facility).

REQUEST FOR USE OF CASH COLLATERAL

79. In connection with their need for debtor-in-possession financing, the Debtors also require the use of Cash Collateral. Bankruptcy Code section 363(c)(2) provides that the Debtors may not use, sell, or lease cash collateral unless "(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2). The majority of the Prepetition Secured Lenders are prepared to consent to the Debtors' use of Cash Collateral under the DIP Credit Agreement by virtue of paragraph I and the terms set forth in the Interim Order and the other provisions of the DIP Credit Agreement. Based on the foregoing, the Debtors respectfully request that this Court authorize the Debtors to use the Cash Collateral in accordance with the terms set forth in the Interim and Final Orders.

REQUEST FOR MODIFICATION OF THE AUTOMATIC STAY

80. Bankruptcy Code section 362 provides for an automatic stay upon the filing of a bankruptcy petition. The proposed Interim Order contemplates the modification of the automatic stay (to the extent applicable), to the extent necessary to permit the (a) Debtors and (b) DIP Agent to implement the terms of the Interim Order. Stay modification provisions of this type are standard features of postpetition debtor-in-possession financing facilities and, in the Debtors' business judgment, are reasonable under the present circumstances. Accordingly, the Debtors respectfully request that this Court authorize the modification of the automatic stay in accordance with the terms set forth in the Interim Order and DIP Credit Agreement.

GOOD FAITH

81. The terms and conditions of the DIP Credit Facility and the use of Cash Collateral are fair and reasonable and were negotiated by the parties in good faith and at arms' length. Therefore, the DIP Lenders should be accorded the benefits of section 364(e) of the Bankruptcy Code to the extent any or all of the provisions of the DIP Credit Facility, or any interim or final order of this Court pertaining thereto, are hereafter modified, vacated, stayed or terminated by subsequent order of this or any other court.

REQUEST FOR HEARING AND AUTHORITY TO MAKE INTERIM BORROWINGS UNDER THE DIP CREDIT FACILITY

82. Pursuant to Rule 4001(b) of the Bankruptcy Rules, the Debtors request that this Court conduct an interim hearing and authorize the Debtors' use of Cash Collateral in order to (a) maintain and finance the ongoing operations of the Debtors, and (b) avoid immediate and irreparable harm and prejudice to the Debtors' estates and all parties in interest.

83. Rule 4001(c) of the Bankruptcy Rules provides that a final hearing on a motion to obtain credit pursuant to section 364 of the Bankruptcy Code may not be commenced earlier than 14 days after the service of such motion. Fed. R. Bankr. P. 4001(c). Upon request, however, this Court is empowered to conduct a preliminary expedited hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to a debtor's estate. In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. *See, e.g., In re Simasko*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985); *see also In re Ames Dep't Stores*, 115 B.R. at 38. After the 14-day period, the request for financing is not limited to those amounts necessary to prevent disruption of the debtor's business, and the debtor is entitled to borrow those amounts that it believes

prudent in the operation of its business. *See, e.g., Simasko*, 47 B.R. at 449; *Ames Dep't Stores*, 115 B.R. at 36.

84. Pursuant to Rule 4001(c) of the Bankruptcy Rules, the Debtors respectfully request that this Court conduct a preliminary hearing on the Motion and authorize the Debtors from the entry of the Interim Order until the Final Hearing to obtain access to $10 million over such period under the terms contained in the DIP Credit Agreement and the Interim Order and to utilize Cash Collateral.

ESTABLISHING NOTICE PROCEDURES AND SCHEDULING FINAL HEARING

85. The Debtors respectfully request that this Court schedule the Final Hearing and authorize them to serve the Motion and the signed Interim Order, which fixes the time, date and manner for the filing of objections, on (a) the Office of the United States Trustee for the District of Delaware; (b) those creditors holding the 30 largest unsecured claims against the Debtors' estates; (c) Milbank, Tweed, Hadley & McCloy LLP and Fox Rothschild LLP, as counsel to the Committee of Lead Lenders; (d) Covington & Burling LLP, as counsel to Wilmington Trust, National Association, as administrative agent to the Debtors' prepetition secured lenders; (e) Riemer & Braunstein LLP and Ashby & Geddes, P.A., as counsel to the DIP Secured Parties; (f) Kilpatrick Townsend & Stockton LLP, as counsel to the Litigation Trustee; (g) Debevoise & Plimpton LLP, as counsel to Standard General, L.P.; (h) Sullivan & Cromwell LLP, as counsel to the Stalking Horse; (i) the Internal Revenue Service, the Securities and Exchange Commission and any other federal, state or local governmental agency to the extent required by the Bankruptcy Code, Bankruptcy Rules, the Local Rules or order of the Court; and (j) all persons and entities that have filed a request for service of filings in these Cases pursuant to Bankruptcy Rule 2002.

NOTICE

86. Notice of this Motion shall be given to (a) the Office of the United States Trustee for the District of Delaware; (b) those creditors holding the 30 largest unsecured claims against the Debtors' estates; (c) Milbank, Tweed, Hadley & McCloy LLP and Fox Rothschild LLP, as counsel to the Committee of Lead Lenders; (d) Covington & Burling LLP, as counsel to Wilmington Trust, National Association, as administrative agent to the Debtors' prepetition secured lenders; (e) Riemer & Braunstein LLP and Ashby & Geddes, P.A., as counsel to the DIP Lenders; (f) Kilpatrick Townsend & Stockton LLP, as counsel to the Litigation Trustee; (g) Debevoise & Plimpton LLP, as counsel to Standard General, L.P.; (h) Sullivan & Cromwell LLP, as counsel to the Stalking Horse; and (i) the Internal Revenue Service, the Securities and Exchange Commission and any other federal, state or local governmental agency to the extent required by the Bankruptcy Code, the Bankruptcy Rules, the Local Rules or order of the Court (the parties set forth in the preceding clauses (a) through (i), collectively, the "Notice Parties"). In light of the nature of the relief requested, the Debtors submit that not further notice is necessary.

NO PRIOR REQUEST

87. No prior request for the relief sought herein has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter the Interim Order substantially in the form attached hereto as Exhibit 1, granting: (a) the relief requested herein on an interim basis; (b) scheduling the Final Hearing; and (c) such other and further relief to the Debtors as this Court may deem proper.

Dated: November 14, 2016
Wilmington, Delaware

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